

M. N. Roy Memorial Lecture - 2000

**DOES OUR CONSTITUTION
REQUIRE TO BE REVIEWED?**

By

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INDIAN RENAISSANCE INSTITUTE

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FOREWORD

M.N. Roy, a revolutionary, an outstanding intellectual activist in the communist movement and a colleague of Lenin, Trotsky and Borodin, was truly a great world leader who inspired men and women alike. His idealism, vigor and vitality for socio-political reform and spread the ideology of New Humanism was incomparable. One seldom comes across such versatile thinker and activist these days.

The Indian Renaissance Institute (IRI) was founded by its architects M.N. & Ellen Roys with the help of a group of dedicated like-minded friends. Every year, to commemorate Roy's birth on 21st of March 1887, IRI organises a lecture by a distinguished person. This year the lecture was delivered by Shri Fali S. Nariman, a distinguished lawyer on the subject 'Does Our Constitution Require to be Reviewed?'.

In his crisp and thoughtful presentation Shri Nariman stresses that the Constitution of India is inherently sound in its goals and structure. The gaps that exist or have emerged with time, can be filled by constitutional amendments or by framing ordinary laws and evolving healthy conventions.

I take this opportunity to express our thanks to Mr. Fali S. Nariman for having responded to our invitation to deliver the M.N. Roy Memorial Lecture, and Justice P.B. Sawant to willingly agree to preside over the function held on 30th March this year.

Dr. Gauri Bazaz-Malik

Chairperson

30 March, 2000

Indian Renaissance Institute

DOES OUR CONSTITUTION REQUIRE TO BE REVIEWED?

N.N. ROY MEMORIAL LECTURE

By Fali S. Nariman

I. Introduction

I thank the Indian Renaissance Institute and the Indian Radical Humanist Association for inviting me to deliver the M. N. Roy Memorial Lecture: 2000 on the subject: Does our Constitution require to be reviewed? I should have thought the obvious answer would be: "why not ask Parliament? – the only body entrusted with the responsibility of amending the Constitution." But what is obvious to you and me is sometimes strange and tortuous to politicians, especially to those entrusted with the governance of this great country. But more of this later. First a few words about M. N. Roy and his mission in life.

II. Foreword

Mr. M. N. Roy was a revolutionary, a philosopher and a reformer. He was one of our truly great men – in the sense in which Edmund Burke defined great men: "as guide posts and landmarks in the State".

Throughout his eventful life Roy gathered round him men and women who were inspired by his idealism in propagating the new humanism: Alas, I never met Mr. M. N. Roy. But one of his distinguished followers whom I have known, respected and admired is V.M. Tarkunde who has lived the life of a true humanist. I agreed to deliver this Lecture at his request because in my opinion he too is a great man: there are now so few of them. The population of this country is accelerating but the numbers who fit the description are rapidly diminishing; to me this is the single most alarming aspect of our Indian polity: the marked decrease of men (and women) who can be reckoned as "guide posts and landmarks in the State".

Roy was a politician but different from all other politicians of his generation; because he never sought power. He denounced pragmatic politics. He sought neither popularity nor office since he believed that

those who cared for such things would have to adjust to others, to make compromises. For him politics was not the art of possible, but the play of reason in the conduct of public affairs.

The Radical Democratic Party, originally conceived and formed as a Political Party, had given itself the task of educating the people. But after the early tumultuous days of India's independence, Roy realized that a political party was not the appropriate instrument for that purpose. The Radical Democratic Party was disbanded and a new entity formed – a brotherhood, known as the Radical Humanist Movement. The philosophy of this movement was best expressed in M. N. Roy's final address to the fourth and last Conference of the Party in December, 1948, in which he said:

“The general belief is that a political party must come to power in order to implement its programme. Therefore power becomes the sole concern for political practice. Every means is adopted to capture power, the end justifying the means. That is why there is no morality in politics...Politics must have a *different purpose* if it ever is to be moral.”

The “different purpose” he envisioned was by pursuing a role no political party had so far pursued. Radical Humanists would refuse to become members of any political party, would refuse to solicit votes for themselves, but would support candidates of integrity – their task – would be to educate the people, telling them they were not obliged to vote for any party, they could select and nominate their own men, whom they would be able to influence better. The humanist political approach was to create small islands of democracy and freedom, the nucleus of a democratic humanist society: education would not only create a discriminating electorate, but also teach people to live a cooperative life.

As Roy pointed out, morality being the dictate of conscience could only be practiced by individuals. Without moral men there could be no moral society. Greatness of character was to him different from greatness of talents: and consistency of the moral dimension was the true measure of greatness of a human soul.

M. N. Roy, saw the dangers to the State in the malfunctioning of political parties. What took the rest of us half a century to realize, that visionary saw way back in the late forties.

Emerson used to say nothing great is ever achieved without enthusiasm: M. N. Roy was an enthusiast with a vision – a vision inspired

by idealism.

III. The lesson of the past fifty years is that it is far easier to draft or revise a Constitution : than to make it work

It was the same enthusiastic idealism that inspired the drafting of India's Constitution. The Constituent Assembly summoned to draft it in December 1946 completed its work on November 26, 1949, when the motion to adopt the draft Constitution was put to vote and adopted with unanimity. At the end of all its deliberations its President (Dr. Rajendra Prasad), later to become India's first Head of State, addressed the members of the Constituent Assembly and said:

"We have prepared a democratic Constitution. But successful working of democratic institutions requires in those who have to work them willingness to respect the viewpoints of others, capacity for compromise and accommodation. Many things, which cannot be written in a Constitution, are done by convention. The way in which we have been able to draw this Constitution without taking recourse to divisions in lobbies strengthens that hope."

Nearly three years of debate, with acute differences in perspectives—but ultimately, all decisions by consensus; quite an achievement, one that could only have been accomplished by a keen sense of mission and purpose. Our Founding Fathers were truly inspired.

But perceptions differ. A year after the Constitution of India came into force, Sir Ivor Jennings (Constitutional historian of the Commonwealth) was asked to deliver a lecture in the University of Madras about its provisions. He was critical of the Indian Constitution. He said that the provisions regarding federalism were "extremely complicated", and that "the dominance of the Constituent Assembly by lawyers-politicians had added to the complexity of the Constitution".

He described India's Constitution as "a truly oriental display of occidental Constitutional devices!"¹ But it is easier to criticize a Constitution than to draft it. The same Sir Ivor Jennings was entrusted with the task of drawing up the second Constitution of Ceylon: a fine document it was, but that Constitution lasted only seven years! Which only goes to show that finely-worded instruments of governance are no

1. See Biography of Dr. Alladi Krishna Swami by Dr. Alladi Kuppaswami (1993) pages 156-157.

guarantee of successful fulfilment. It is only a *spirit of constitutionalism* that can help nurture and preserve a Constitution.

The life of a Constitution – like the life of the law – is not logic (or draftsmanship), but experience. And fifty years of experience on this subcontinent has shown us that it is easier to draft, a Constitution: than to work it – Pakistan and Bangladesh have drafted and crafted different written Constitutions at different times but they were interspersed with periods of martial law and military regimes.

During the past fifty years we have gained much. We have preserved our Constitution but we appear to have lost that spirit of constitutionalism – the spirit of consensus – that inspired its drafting. We need to revive that spirit before we make any attempt at a revision of our document of governance. To slightly misquote Shakespeare: “the fault, dear Brutus, is not in stars (*or in our Constitution*) but in ourselves that we are underlings”.

We must never forget that our Constitution was a compelling accident of history. In 1947, the British left us, somewhat in pique. Amidst the trauma of partition, the members of India’s Constituent Assembly, motivated by the urgent need to preserve the political and cultural unity of the rest of India rose to the occasion, and forged a document which became the Constitution of India 1950: we would not be able to piece together a workable Constitution in the present day and age even if we tried: innovative ideas however brilliant cannot give us a better Constitution: there are other forces – the spirit of persuasion, of accommodation and of tolerance being foremost amongst them – that bear their indelible imprint on all Constitution-making.

I am proud of our Constitution. The most eloquent words in it are: WE THE PEOPLE: they are also the opening words of the world’s oldest Constitution. But what about the overwhelming majority of India’s overpopulated millions – who were not born before 1950? They were not included in “We the People”. How do they come in? A shrewd politician in the United States gave an answer to this Conundrum some years ago. She said – yes, it was a woman – a Congresswoman – she said (referring to the US Constitution):

“*We the people*” a very eloquent beginning. But, when that document was completed on 17th September, 1787, I was not included in that “We the People”. I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake.

But I realize that it is through the process of interpretation and Court decision that I have been finally included in “*We the People*”.

Well that in a nutshell describes what has been the role of *our* Supreme Court – by interpretation and Court decision it has broadened the reach of the Constitution's provisions; it has included within the range of its beneficent provisions those who were not born when India got independence. I am proud of our Judges present and past who have interpreted and sustained this Constitution — which was framed for only 350 million people most of whom are not alive today. This is one of the ways in which a written Constitution is made to grow into a dynamic living document. Another way is through Conventions: an amendable Constitution like ours has to evolve with experience. Before we think of revisions and amendments we must first establish working norms or conventions. That is how all Constitutions are run. One of the more urgent and topical of these is the size of Ministries in the Centre and the States.

What criteria should be adopted? How best to adjust the mechanics of good government without straining (or draining) needlessly the public exchequer with excessive demands of jumbo-sized Councils of Ministers? And then how to better to manage precious and costly legislative time and how best to push along important legislative business in elected assemblies and ensure that time is not wasted in walk-outs or repeated adjournments in the House without transaction of business. All this and more, cannot even by the wisest and most learned be provided for or prescribed through Commissions or Committees for reviewing the Constitution – they have to be first experienced in what I would call the hard-school-of-legislative-knocks(!); and based on this experience, politicians who call themselves statesmen have to forge adequate norms and get them established by consensus.

Let us ask ourselves in all sincerity, why it is that we have not succeeded in working successfully a system which guarantees (as no other system does) a free and democratic way of life? It worked – and worked well for the first few years after independence. What happened after that? I think the answer lies in this – it ceased to work well (as Mr. M. N. Roy had clearly foreseen) the moment politics in this country became immoral and unprincipled. We have not been able to work the system – we cannot work any system – unless we reinject some degree of idealism and morality into politics. About a decade ago the prestigious international weekly “The Economist” expressed an opinion (which was both frank and brutal), but it is still topical. It said (I quote): “India will continue to be misgoverned until politics becomes more of a vehicle for policies instead of the other way round” – that is instead of policies being fashioned to suit the politics

of the day.

We Indians are brilliant – even though we have to say it ourselves. We have great talent – but we also have one enormous super-failing : which is that we do not have the openness of mind to recognize our failings. We must have a scapegoat for our failures: if we cannot run a system it must be because there is something wrong with the system, never anything wrong with ourselves. Unfortunately we have put out of our minds Dr. Ambedkar's warning to members of the Constituent Assembly in 1948, "its our responsibility now; we can't blame our troubles on any one else".

We are reduced to that tragic figure in Baudelaire's novel (La Fanfarlo): in which one of the characters says: "Life is a hospital – in which each patient thinks he will recover if he is moved to another bed". (Or is treated by another set of doctors!)

IV. The government's resolution of February 22, 2000 gives the wrong impression – that our Constitution is lagging behind the times and requires to respond to changing needs

On the occasion of the celebration of fifty years of our Constitution the President of India said (on January 27, 2000, in the Central Hall of Parliament) :

"Today when there is so much talk about revising the Constitution or even writing a new Constitution, we have to consider whether it is the Constitution that has failed us or whether it is we who have failed the Constitution²".

Simple words. Most effective. Most quoted. Yet they do not express any definitive point of view – they were words of caution expressed not by a lawyer or by a Judge but by a statesman with rich political experience. Surely they deserved consideration! But only a few weeks later, without even attempting to examine whether the Constitution had failed us or whether it was constitutional functionaries who had failed to work the Constitution in the manner in which it was conceived and written, the Government of the day resolved "to set up a National Commission to review the working of the Constitution": mark the words "National Commission". None of the political parties in opposition were consulted. Neither of the Houses of Parliament (whose members together have the

2. Essentially the same thought has been differently expressed by a contemporary American judge. Justice Kennedy of the U.S. Supreme Court has said that "framers of Constitutions do not *command* statesmanship. They simply provide structures from which it *might* emerge!"

sole power to amend the Constitution) were taken into confidence nor had its members expressed the need to “review” the Constitution. Both Houses had been summoned to meet on February, 23rd, 2000. But just a day before, a Government Resolution dated 22nd February 2000, announced the constitution of a Commission to examine (and I quote):

“how best the Constitution can respond to the *changing needs* of efficient, smooth and effective system of governance and socio-economic development of modern India within the framework of parliamentary democracy and to recommend changes if any that are required to the provisions of the constitution without interfering with its basic structure or features”.

Obviously the impression given was that our Constitution was lagging behind the times and had to respond to “changing needs”. No consideration was given to the fact that to meet “changing needs” the constituent body (consisting of members of both Houses of Parliament) had in fact amended the Constitution over the years on nearly eighty different occasions: all of which is so well-documented in a study on the nature and operation of the amending process published by the Lok Sabha Secretariat (titled “Constitution Amendment in India”). In the Preface to the Sixth Edition of this work the Editor (then Secretary-General of the Lok Sabha), had written (as of the year 1995): “The amending process of the Constitution has been working like a ‘safety-valve’ to reconcile the requisites for progress with the requisites for safety. It is ample testimony of the vibrance of our Constitution that in a span of 44 years of its adoption as many as 76 amendments have been carried out to bring it in tune with the *changing needs* and aspirations of society”. No one inside or outside the Government has ever contradicted the correctness of this factual assessment.

V. Our existing Constitution of India makes provision for unity amidst diversity – do not disturb it

We must first try to understand the background to our Constitution before we ask ourselves the question whether we need to review it.

We cannot comprehend or even attempt to comprehend this constitution of ours until we realize the vastness of India and its diversity. India’s diversity begins with its geography. The entire subcontinent – which today includes Pakistan, Bangladesh, Bhutan, Sri Lanka and of course, India – is a separate geographical entity bounded by high

mountains in the North, and great oceans to the West, South and East. Until about seventy years ago the subcontinent could be approached only by sea or through narrow-passes in the North-West. Protected by natural barriers, it formed historically a cul-de-sac; successive migratory waves of invaders were halted and intermingled with the indigenous residents to such an extent that radically distinct racial traits became hard to identify. Language and religion, rather than ethnic origin, became the primary distinguishing feature of the myriad peoples of India.

Writing in the quiet seclusion of a British prison in 1944 (during his night term of imprisonment for revolting against the British), Jawaharlal Nehru contemplated "the variety and unity" of India:

"The diversity of India is tremendous; it is obvious: it lies on the surface and anybody can see it. It concerns itself with physical appearances as well as with certain mental habits and traits. There is little in common, to outward seeming, between the Pathan of the Northwest and the Tamil in the far South. Their racial stocks are not the same, though there may be common strands running through them; they differ in face and figure, food and clothing, and, of course, language.... the Pathan and Tamil are two extreme examples; the others lie somewhere in between. All of them have still more the distinguishing mark of India. It is fascinating to find how the Bengalis, the Marathas, the Gujaratis, the Tamils, the Andhras, the Oriyas, the Assamese, the Canarese, the Malayalis, the Sindhis, the Punjabis, the Pathans, the Kashmiris, the Rajputs, and the great central block comprising the Hindustani-speaking people, have retained their peculiar characteristics for hundreds of years, have still more or less the same virtues and failings of which old tradition or record tells us, and yet have been throughout these ages *distinctively Indian*, with the same national heritage and the same set of moral and mental qualities. There was something living and dynamic about this heritage which showed itself in ways of living and a philosophical attitude to life and its problems. Ancient India, like ancient China, was a world in itself, a culture and a civilization, which gave shape to all things. Foreign influences poured in and often influenced that culture and were absorbed. Disruptive tendencies gave rise immediately to an attempt to find a synthesis. Some kind of a dream of unity has occupied the mind of India since the dawn of civilization. That unity was not conceived as something imposed from outside, a standardisation of externals or even of

beliefs. It was something deeper and, within its fold, *the widest tolerance of beliefs and customs was practiced and every variety acknowledged and even encouraged....*

In ancient and medieval times, the idea of the modern nation was non-existent, and feudal, religious, racial, and cultural bonds had more importance. Yet I think that at almost any time in recorded history an Indian would have felt more or less at home in any part of India, and would have felt as a stranger and alien in any other country. He would certainly have felt less of a stranger in countries, which had partly adopted his culture or religion. Those, such as Christians, Jews, Parsees, or Moslems, who professed a religion of non-Indian origin on, coming to India, settled down there, became distinctively Indian in the course of a few generations. *Indian converts to some of these religions never ceased to be Indians on account of a change of their faith. They were looked upon in other countries as Indians and foreigners, even though there might have been a community of faith between them.*"

I like to believe that it is this eloquent passage (written in 1946) that inspired the drafting of India's Constitution.

The Constitution of India, 1950 as enacted, contained 395 Articles (with a Bill of Rights) and an Appendix of eight Schedules, occupying in the Official Edition, 251 pages. Its length was due, not merely to the size of the country, but to the problems of accommodating, in a Parliamentary-cum-Cabinet-style Constitution, divergent points of views of representatives of peoples speaking different languages and observing varied faiths, striving at the same time to transform a rigid hierarchical social order into an egalitarian society.

The Constitution enshrines a social covenant and is neutral to what economic model is chosen – except that it should approximate to a socialist ideal. The Chapter on the Directive Principles of State Policy makes this clear. The Constitution accommodates all religions but does not give recognition to any single one. Religion in India means not only the profession of faith; as you know it encompasses, places of worship; (temples, mosques, gurudwaras, churches, synagogues); it includes idols, deities and offerings to them, bathing places, graves, tombs, properties attached to and owned by religious institutions.

All this – faith, worship, ritual and the secular activities of religious groups – had to be and are provided for by the Constitution – in the

Chapter on Fundamental Rights. Their essentials are put beyond the reach of interference by the executive or by fleeting majorities in Parliament and in State Assemblies.

Pluralism, and an indigenous *federalism* thus became the delicate balance in the framework of India's Constitution. Pluralism has been India's great strength. It is also India's great weakness – and this incongruity is nowhere more apparent than in our Basic Law.

In a land of conflicting ideas and ideals, the basic document of governance has been forged in a spirit of tolerance accommodating diverse interests and values :

- With more than thirty principal indigenous languages and dialects from which to choose, the Constitution has recognized English as one of the two official languages of the Union – at the same time it has affirmed the fundamental right of sections of citizens having a distinct language and script, to conserve the same.
- In a professedly secular republic, the Chapter on Fundamental Rights has recognized and protected India's six main religions (and more than 200 "religious persuasions"³) ; and by a compact with India's minorities it has also insulated from legislative and executive incursions the cultural and educational rights of sections of citizens and minorities (whether based on religion or language).
- The Right to Equality is guaranteed, and the State is prohibited from discriminating against any citizen on grounds only of race, religion, caste, or place of birth, and yet discrimination in favour of socially and educationally backward classes is recognized and encouraged. The textual juxtaposition of guarantees of equality and the authorisation of compensatory discrimination reflects the deep conflict between divergent views on Equality, and varied notions as to the scope of protective discrimination.
- Whilst adopting adult suffrage as the basis for periodic elections to Parliament and to State Assemblies, and abolishing special electoral rolls based on race, religion, caste, or sex, the Constitution has

3. The six major religious listed in the latest census (1991) are Hindus, 82.00 percent of the population; Muslims, 12.2 percent; Christians, 2.34 percent; Sikhs, 1.94 percent; Buddhists, 0.76 percent; and Jains, 0.4 percent. Those having no religion – or no religion stated – constitute only 0.01 percent of the population. The census lists 183 "other religions and persuasions" (from Abutani, a small religious cult in the north-eastern state of Arunachal Pradesh, to one of the world's oldest religions, Zoroastrianism, whose adherents in India, the Parsis, number only 76,382).

provided for reservations of seats in the House of the People and in the Legislative Assembly of every State for the Scheduled Castes and Scheduled Tribes (for centuries, the outcastes of Hindu Society – reckoned as the world's largest minority⁴).

These seemingly disparate and contradictory provisions were necessitated not only by social, historical and political considerations, but to help preserve that "dream of unity" about which Panditji wrote (in his "Discovery of India") a dream that "has occupied the mind of India since the dawn of civilization". It is unity amidst diversity that is the touchstone of our Constitution's philosophy: the provision for a federal structure, with a strong centrist bias gives added emphasis to this philosophy.

VI. The entire history of the last fifty years shows that wherever the Constitution has not worked properly or has been inadequate to meet the challenge of a given moment it has been because constitutional functionaries have failed to perform the constitutional functions entrusted to them

But Constitutions do not work on their own. They are inert. They require human beings to work them. And the entire history of the last fifty years shows that whenever the Constitution has not worked properly or has been inadequate to meet the challenges of a given moment, it has been because constitutional functionaries have failed to perform the constitutional functions entrusted to them.

The 'Emergency' of 26th June 1975 – believed by most people to be a phoney one – showed up the feet of clay of our "great" men and women. The highest constitutional functionary the President – following the advice of two lawyer-politicians whom Mrs. Gandhi sent to him on the night of 25th June, signed the Proclamation of Emergency presented to him although the Council of Ministers had not till then approved of it – the necessary consequence of this was that all his erstwhile political colleagues were dragged out of their homes soon after, in the dead of night, and marched off to jail under preventive detention orders (our Prime Minister and our Home Minister were two of the prominent leaders so picked up and detained).

Early next morning when the Cabinet met to approve the

4. It still is: although in our Constitution we have abolished untouchability, the experience of fifty years of its working will show that we have not abolished it from our hearts.

Proclamation; one of the Cabinet Ministers reportedly told Mrs. Gandhi "what have we to approve, the deed is already done".⁵

The Head of State could have refused to sign the Proclamation of Emergency, and quit in protest. He did not. He could have delayed signing the Proclamation by a few days, which would have possibly defused the situation. He did not. The Cabinet Ministers, who were not consulted before the Proclamation of Emergency was signed (which was itself an infraction of the Constitution) – could have protested at that fateful Cabinet meeting on the early morning of the 26th June – they could have protested, and quit. They did not – they acquiesced instead.

The presiding officers of legislative bodies could have called upon the authorities for an explanation as to why some of its members were not to be seen in the House – but they did not. And the Members of the Legislative Assemblies, including the members of Parliament who were not locked up, could have protested against authoritarian rule. Alas, with a few (very few) heroic exceptions, they did not. And the Judiciary – the highest Judiciary in the land – said in a judgment as infamous as that nineteenth century judgement of the US Supreme Court in the *Dred Scott* case⁶ that the personal liberty guaranteed by Article 21 of the Constitution was a "gift of the law" and could upon a suspension of that Article by the Executive be taken away. And the country's Attorney-General informed the Supreme Court that with the suspension of the fundamental rights to life and liberty (Article 21) any person could be picked up and shot and there would be no redress even if he was wrongly identified: i.e. if the wrong man was shot.

Constitutional functionaries completely failed us – during that June '75 Emergency: in retrospect, we could perhaps say, in extenuation that this was because "times were bad". But constitutional functionaries have failed us in other times as well – in the good times. For instance when the Janata Government came to power in March 1977 on a tidal wave of protest against the phoney Emergency (of June 1975). The Janata Party

5. Another version of this is described in the recent book by Prof. Granville Austin "Working a Democratic Constitution" published by Oxford University Press, page 307 (2000). In it he says:

"Mrs. Gandhi called a Cabinet meeting at 6.00 a.m. on 26th June, 1975, announce to her own ministers the actions that she, without consulting them, and thus probably unconstitutionally, had had the President take. During the meeting, Sardar Swaran Singh, Minister of Defence, is said to have wondered whether it was necessary to proclaim an emergency; others remained silent. Swaran Singh did not pursue this, and Mrs. Gandhi did not reply. The Cabinet approved the Prime Minister's advice to the President."

6. *Dred Scott v. Sandford*: (1856) 60 US 393: a case that rationalised the constitutionality of slavery.

had always castigated the Congress Party and the Centre on the misuse of Article 356 of the Constitution (imposition of President's rule). But gaining power at the Centre for the first time they manipulated that Article to suit their political purpose. In May 1977 a circular was issued by the Home Minister Mr. Charan Singh, a constitutional functionary in Mr. Morarji Desai's Council of Ministers. Under its terms, Chief Ministers of nine State Assemblies were asked to recommend dissolution of their respective State Legislatures even though in respect of some of them (the State Assemblies of Rajasthan, Orissa and Punjab) the constitutional term of five years had not then expired. The Union Law Minister endorsed the circular of the Home Minister saying that a clear case had been made out for the dissolution of assemblies of nine Congress ruled States and there was *need* for holding fresh elections – All this was a pressure tactic – not envisaged by the text or the spirit of Constitution. But it worked. When the circular was challenged by the concerned State Governments, our Supreme Court endorsed approval (in May 1977) of the Home Minister's circular – in the case of *State of Rajasthan vs. Union of India* (by a majority 5:2) paving the way for the imposition of President's Rule under Article 356 in all the nine States, and rudely shaking the balance of the federal structure under our Constitution. The judgment also exhibited the truth of Justice Benjamin Cardozo's oft-quoted remark that "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by"! In March 1994 the Supreme Court of India did say in a larger Bench decision of nine Judges (in *Bommai's case*) that the view taken in the *State of Rajasthan's case* was erroneous; that the mere defeat of the ruling party at the Centre could not by itself without anything more entitle the newly elected party which assumed power at the Centre to advise the President to dissolve the assemblies of those states where the party in power was other than the one in power at the Centre. But all this was said when it was too late to have any practical effect.

Because when the Janata wave had petered out, and Mrs. Gandhi's Congress Party came back to power in 1980, it was the Supreme Court judgment of May 1977 that was used to invoke Article 356 and to dissolve all the nine State Assemblies composed at this time of a majority of Janata Party members! President N. Sanjiva Reddy signed the Proclamation – with some hesitation. He is reported to have said: "Given the precedent, how could I say No". Prof. Granville Austin records in his book published earlier this year ("Working a Democratic Constitution") that Mr. Sanjiva Reddy also said:

"I told Indira that Morarji had been wrong in principle and to dissolve again was still wrong".

But with this mental reservation, the Proclamation was signed by the President.

These are but a few of the glaring instances when political expediency of the moment was made to prevail over adherence to constitutionalism and constitutional norms : instances of a lack of the spirit of constitutionalism.

VII. We have now foisted on us a committee euphemistically described as a national commission to review the working of the Constitution and to recommend changes – as if our Constitution had remained static since 1950; and all this by a government resolution, by-passing Parliament

When members of India's Constituent Assembly first took a pledge to dedicate themselves in all humility to the service of the country and her people, Dr. S. Radhakrishnan, whilst seconding the resolution, warned that when power outstrips ability, we will fall on evil days. Power has overtaken ability. We *have* fallen on evil days. There is a crisis of competence in almost all fields of activity – but more markedly in the political.

The public is now fed up with politicians – a phenomenon noticed in many parts of the world. (Lest you think I am partial in my criticism, let me add that the public is equally fed up with lawyers!) In that delightful book 'Yes Minister', there is this even more delightful passage :

"If civil servants could remove politicians on grounds of ineffectiveness it would empty the House of Commons, remove the Cabinet, and this would be the end of democracy – *and the beginning of responsible Government*"!

It is these politicians who have now foisted on us a Committee euphemistically described as a "National Commission" to review the working of the Constitution and to recommend changes as if our Constitution had remained just as it was drafted and enacted in 1950. But as the Government and everyone else knows, the Constitution has not remained unaltered or static. It has been adapted to changing times by a large number of amendments – discussed, debated upon, and passed from time to time by a two-thirds majority in Parliament. Amendments which

did not find acceptance have been rejected, after debate. Since 1950, as many as ten Constitution Amendment Bills could not and did not pass muster in Parliament. The Constitution therefore remains a vibrant institution of governance: it does not require the political distraction of a Government-appointed Committee or Commission. But alas, to fulfil party agendas, politicians *will* go to any lengths – by even doing what they think is the right thing – *in the wrong way*. Why the wrong way? Simply because it is Parliament that is the guardian and custodian of our Constitution – not the Government. It is for Parliament (or for one of its Houses) to say whether there is a felt need to revise the Constitution, and if so to authorise the appointment of a National Commission for the purpose: it is then and then only that a “*National*” Commission can acquire legitimacy in the eyes of right-thinking people.

VIII. Minority rights (Articles 25 to 30) are in grave jeopardy

By-passing Parliament makes the Government Resolution both suspect and partisan. I should have thought the respect for the institution of “*Parliamentary* democracy” (which the Government resolution expressly forbids the Commission to alter) was of itself sufficient compelling reason for Government to have introduced its proposal in the Lok Sabha where the NDA has a majority. The proposal could then have been discussed and debated. During such debate it could have been ascertained whether (or not) the “commitment” of the major political partner in the coalition-government (the BJP) expressed in its own political document of 1998 (for the elections held in that year) to the concept of “One Nation, One People and *One Culture*” was the real motivating factor for setting up a commission to review the Constitution; if it was, then (more importantly) whether cultural and educational rights of sections of citizens and of minorities (guaranteed by Articles 29 and 30) were proposed to be altered or done away with; all this and more would have cleared the air, making a Commission for reviewing the Constitution (if decided to be constituted) more universally acceptable.

ONE CULTURE – I submit is antithetical to the text and philosophy of our Constitution. One Culture? Read Article 29: it explicitly negates the “One-Culture” theory. That Article provides that all sections of citizens have the fundamental right to conserve *their own language, script and culture*. All the minority rights from Article 25 to Article 30 are in jeopardy under a régime, in which the principal partner of the ruling coalition has publicly stated in election manifestos in 1996 and again in 1998 that it is

"committed" (mark the word "committed") to the concept of *One Culture*. "Cultural Nationalism of India" (which is the core of Hindutva) is inimical to "the Right to Freedom of Religion" (Articles 25 to 28) and to "Cultural and Educational Rights" (Articles 29 and 30): all are fundamental rights guaranteed in Part-III (the Fundamental Rights Chapter of our Constitution). The Terms of Reference of the Commission do not preclude a change in *these* Articles: even though they are contained in the Fundamental Rights Chapter. Because in the famous Fundamental Rights Case (*Keshvananda*) a Bench of thirteen Judges (by majority) has held (in April 1973) that although the power of amendment under Article 368 does not include the power to alter the basic structure or framework of the Constitution, the amending power is plenary and includes within itself the power to amend various articles of the Constitution *including those relating to fundamental rights*.

IX . The Commission's public statements have done nothing to allay the apprehensions of the minorities

The Commission comprises learned, sagacious and honourable men with good intentions but the public statement it issued last week after holding its first meeting has done nothing to allay the apprehensions of the minorities. According to the Press Statement issued on March 23, 2000, the Commission, after identifying certain aspects that needed change in our Constitution "said that it had decided to invite public suggestions regarding the areas that it should review".

This fills me with deep foreboding.

*Soliciting public suggestions – as to what parts of the Constitution should be reviewed without even defining those parts – is an invitation to anarchy. We will only succeed (like Omar Khayyam)⁸ "shattering to bits" what the Founding Fathers had so painstakingly fashioned, in the years 1948 and 1949, and what succeeding generations over the past fifty years have carefully added to or altered by way of Constitutional Amendments. We cannot bring back the spirit of forty-eight and forty-nine – the spirit

7. The Statesman, Friday 24th March, 2000.

8. The Rubaiyat of Omar Khayyam by Edward Fitzgerald-I, LXXIII:

"Ah could thou and I with Fate conspire,
To grasp this sorry scheme of things entire,
Would we not shatter it to bits – and then,
Remould it nearer to the Heart's Desire".

of tolerance, accommodation and compromise – and hence practical wisdom lies in leaving well alone.

The Commission's invitation to the public also opens the floodgates to public responses to special rights for minorities: proponents of Hindutva will object to them as they have done in the past. And irrespective of what the Commission ultimately recommends (even if it ultimately recommends no change in minority rights) the vitriolic polemics of the ensuing debate will tear apart the already strained fabric of pluralist Indian society.

The tremors are already being felt. In the past few weeks there have been reported (rather alarming) utterances of the new head of the avowedly cultural organization (RSS) with which many members of the principal partner of the NDA have close connections – they are to the effect that “the present Constitution should be scrapped and replaced with a new one”! This foreshadows the type of representations likely to be received by the Commission in response to its invitation to the public as to what areas of the Constitution should be reviewed!

In a Press Statement issued yesterday (March 29th) one of the members of the Commission has now suggested that the Commission may even embark on an “enlargement” of minority rights! This is not only wishful thinking, but dangerous – wishful thinking – because none of the minorities (even if they desired it) could possibly secure in the intolerant climate of our times an “enlargement” of minority rights! Dangerous – because if you ask the public to make suggestions on minority rights, even with a view to enlarge them, you cannot prevent solicitations for their deletion or restriction. The minorities only desire that the Commission leave out of its purview minority rights which are already constitutionally established and guaranteed, as frequently acknowledged by the decisions of our highest Court. With all humility I would say to the Commission – do not touch something you can never ever hope to enlarge or expand. Harken instead to the words of judicial wisdom by India's Chief Justice S.R. Das who, speaking on this point for a Bench of seven Judges said (in 1958 in Kerala Education Bill case):

“We the people of India have given to ourselves the Constitution which is not for any particular community or section *but for all*. Its provisions are intended to protect all, minority as well as majority communities. There can be no manner of doubt that our Constitution has guaranteed certain cherished rights of the minorities concerning their language, culture and religion. These concessions must have

been made to them for good and valid reasons.

“So long as the Constitution stands as it is *and is not altered* it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our *sacred obligation to the minority communities who are of our own.*”

A successor Chief Justice (Chief Justice Gajendragadkar) after he retired said (in November 1972) that it would be appropriate and advisable to move the Supreme Court to reconsider the above decision. But in April 1974 in the *St. Xavier's College Society case* a Bench of nine Judges gave its response to the suggestion that minority rights may be abrogated in the name of national integration and uniformity. It is our truly great Judge Justice H.R. Khanna (“great” in Burke’s definition of the term) who scoffed at this suggestion when delivering the leading judgment for the Court. In it he said (and mark carefully the words):

“Special safeguards were guaranteed for the minorities and they were made a part of the fundamental rights with a view to instill a sense of confidence and security in the minorities. Those provisions were a kind of a Charter of Rights for the minorities so that none might have the feeling that any section of the population consisted of first-class citizens and the others of second-class citizens. The result was that minorities gave up their claims for reservation of seats.....

“The object of Articles 25 to 30 was to preserve the rights of religious and linguistic minorities, to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy. These provisions enshrined a befitting pledge to the minorities in the Constitution of the country whose greatest son had laid down his life for the protection of the minorities. As long as the Constitution stands as it is today, no tampering with those rights can be countenanced. Any attempt to do so would be not only an act of breach of faith, it would be constitutionally impermissible and liable to be struck down by the Courts.”

If the Commission as a body subscribes to these views – as who cannot since it is the law declared by the Supreme Court and binding on all (including the Commission) – then the Commission should not have given the impression that suggestions invited from the public “regarding the areas it should review” might even include minority rights already

guaranteed and "enshrined" in the Constitution of India 1950: "No tampering with the rights under Articles 25 to 30 can at all be countenanced as it would be tantamount to an act of breach of faith." How could these clear and categorical words be ignored or by-passed by the Commission?

X. Minority rights apart there is a more fundamental objection to a reviewing commission

I must make clear that the difficulty about a reviewing commission is not only about minority rights. There is a more deep-rooted and fundamental objection. It is this – that our Constitution is simply not ready for "modern surgery". Modern surgery as you know is as much about putting in as taking out. Our body politic is today riddled with the disease of factionalism, hate and intolerance – certainly not the right atmosphere for "efficient, smooth and effective system of governance" (which the Government resolution says it has in mind). The cure for this is in the hands of "physicians" (not "surgeons"): in other words, in the hands of enlightened statesmen who must rise above petty politics, in the hands of liberal educationists who have a vision for Young India in the new millennium, and in the hands of those who practice (and not merely preach) philanthropic and human values. Until we succeed in curing the disease, with some such expedient as M.N. Roy's "humanist political approach" – creating small islands of influence, which would form the nucleus of a democratic and tolerant society – or the like, the setting up of a Commission for reviewing and recommending changes in various parts of our Constitution will be an exercise in futility: fostering more disharmony than accord.

XI. Conclusion

Ultimate sovereignty rests with the people. Devolved sovereignty in a Parliamentary system vests in Parliament. And after each election, political power remains in the hands of a few – and it is the men and women who occupy positions of power who must be watched – watched, not worshiped – watched continually in order to ensure that they function responsibly and democratically. This can be ensured – both in their interests and our own – by not making too much of them. Not making too much of anyone however high the office he or she fills – *that* is the essence of a democratic way of life.

In his book "In Search of History", Theodore White speaks of American politics and the American Presidency, which he describes as

an office of trust. This is what he says:

"The margin is thin but the responsibility is clear. The echo has returned to me on every election night in America, however, thin or large the margin. Politics in the United States begets power; and when the votes are counted, however thin the margin, the man who has that margin cannot escape the *responsibility of power*".

In India too, politics begets power and the men and women in power cannot escape its responsibility. Persons in high office should be held responsible and accountable for the power they wield. This is constitutionalism in practice.

We must be wary of *elected governments* whatever be their composition. And we must strive in ways that are legitimate, and with the assistance of independent and fearless judges, to keep elected government accountable. We must help to revive that spirit of consensus and idealism that inspired the drafting of India's Constitution. And we must help cultivate a spirit of Constitutionalism amongst the people of India. As I see it, *these* will be, the more important concerns of responsible citizens of this vast and diverse country in the next decade.

There is a story (probably apochryphal) told of the time when the United States of America (like India) was a young, struggling Republic rid with dissension (as India is today), ultimately leading to the conflict of North and South America which nearly destroyed that nation. It was during this period that the American Ambassador to the Court of St. James in London was asked (somewhat patronizingly) by the French Ambassador:

"Tell me, Mr. Ambassador, tell me,
How long will your United States last?"

The answer was as courageous and courteous, as it was prophetic:
"*Sir so long as our leaders live up to and cherish the ideals of its Founding Fathers.*"

This I believe to be the need of the hour.

I would humbly say to our leaders in governance – Put aside your election manifesto. Cherish the ideals of those who framed our Constitution. Do not, I beseech you, tamper with our Constitution by undertaking an over all review – such a venture can only lead to rising expectations, then dissatisfaction and disillusionment, followed by

frustration, and perhaps even (God forbid) ultimate disintegration. When occasion arises, add to and alter – as has been done in the past fifty years – using the amending power and procedure provided for in the Constitution itself, always taking care to safeguard the cultural diversity and political unity of this great country. Only then will you be truly worthy of the Founding Fathers.

Announcement

Paperback editions of *Selected Works of M.N. Roy* edited by Sibnarayan Ray have been published by Oxford University Press.

Volume I	(1917-22)	600 pp.	Rs. 275;
Volume II	(1923-27)	740 pp.	Rs. 295;
Volume III	(1927-32)	696 pp.	Rs. 250;
Volume IV	(1932-36)	674 pp.	Rs. 250;

BRIEF INTRODUCTIONS

The Speaker :

Mr. Fali Sam Nariman, a legal luminary and President of the Bar Association of India, was born in Rangoon, Burma, in 1929. He was enrolled as an advocate, High Court, Bombay in 1950. He has been practising at the Supreme Court of India for three decades. He is the President of International Council of Commercial Arbitration (ICCR) and member of LCIA.

Mr. Nariman was the Additional Solicitor General of India from May 1972 to June 25, 1975. He resigned from this post a day after emergency was declared in the country on 26 June 1975. He was awarded Padma Bhushan by the President of India in 1991. President of India in 1999 nominated him to Rajya Sabha as a member, for six years term, in recognition of his distinguished services to Jurisprudence.

The Chairperson :

Mr. Justice P.B. Sawant, a distinguished former judge of the Supreme Court of India, presently Chairman of the Press Council of India, was born on 30th June, 1930. After obtaining B.A. (special) Hons. in economics and LLB of Bombay University, Justice Sawant practised as a advocate in Bombay High Court on Original and Appellant sides. On shifting to the Supreme Court he practised in all branches of law. As a lecturer in New Law College, Bombay, he has taught Constitutional and International law and been the legal adviser of several trade unions, Social and Educational Institutions.

As a Judge of the Bombay High Court, Justice Sawant conducted the inquiry in an Air crash, in Bombay. He was elevated to the bench of the Supreme Court of India on 6th October 1989. Presently he is the President of the Press Council of India and the President of the World Association of Press Council since August 1997.

Search for Our Abiding Heritage*

Those who have conceived the idea of a Renaissance as a historical necessity, know fully well that the great thinkers of ancient India made valuable contribution to the common human heritage. There are two aspects of human thought. One is temporary. That aspect of thought is valid for one particular period of history, but loses its force in another period of changed social environments. But there is an abiding under-current throughout the history of human thought. In the absence of that, culture, progress, civilisation would be impossible. Whenever mankind comes to a dead end, to what appears to be a dead end, it naturally looks back, trying to draw courage and inspiration from the abiding features in past traditions. It is necessary to discover the abiding features of the culture and thought-currents of ancient India. If they can help us to visualise what is in store for us in the future, it will surely be worthwhile to dig in the past. We must dig deep in the mountainous heap of rubbish which has been built up as the bulwark of age-long stagnation, and which is mistakenly cherished even today as our heritage.

* From the writings of M.N. Roy in *Philosopher-Revolutionary*.
Edi. Sibnarayan Ray, p. 250, Ajanta Pub, 1995, New Delhi.

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