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A TRIBUTE TO THE ENDURING CONSTITUTION (BOOK REVIEW)

—M.P. Singh*

INDIA'S FOUNDING MOMENT: The Constitution of a Most Surprising Democracy, By Madhav Khosla, Harvard University Press, Cambridge, Massachusetts, London, England 2020.

Madhav Khosla has built an exceptional reputation as a constitutional law scholar at a relatively young age. He now seems to have moved to political theory in the book under review; a book which appears to have been based on his PhD dissertation in political science from Harvard University. He is currently an Associate Professor of Political Science at Ashoka University in Sonapat, Haryana. About the book, he writes:

This book is neither a book of historical reconstruction offering a sequential, causal account of actors and events, nor an exploration of power dynamics that shaped specific choices. It is instead a study of certain traditions of thought about democracy and constitutionalism at the moment of India's creation.¹

The “moment of India's creation” refers to the moment the Constitution² was conceived, discussed, framed and finally adopted. The predominance of certain ideas and objectives during that moment – led by Nehru and Ambedkar – gave birth to the Constitution which, contrary to all adverse predictions about its success, is still doing well as a democratic constitution.

Irrespective of what is or has been said about the merits and demerits of the Constitution of India and the body that shaped it, the Constitution has not *simply survived* during the past seventy-one years through the most unfavourable internal and external adversities, including wars with our neighbours in the North and the West. Even those who were and continue to be quite critical of a number of its provisions and features, do not, at least openly, speak of a lock, stock and barrel replacement of the Constitution by a different one. For ensuring undisturbed continuity of its basic framework and features, the Supreme

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¹ Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (HUP 2020) 24.

² The Constitution of India 1950.

Court has also propounded and applied the concept of a ‘basic structure’ of the Constitution.³ Therefore, its foundational principles and features – its *basic structure* – cannot be changed even by a super-majority in the Parliament and the State Legislatures together. Excepting a few examples of developed countries in the West, it is hard to find any examples of constitutions that have survived as long as the Constitution of India.⁴ During and after the making of the Constitution, several constitutional scholars had expressed their apprehensions about its survival and success. Perhaps Grenville Austin was the only exception among them, who expressed unflinching hope that the people of India would make the Constitution work.⁵ Even those among its makers, who were critical of several provisions at the time of its making and adoption, have worked with it without being able to damage its basic features or structure. How that has been possible is the main engagement of the author.

The book begins with Nehru’s regret that, “One of the unfortunate legacies of the past... has been that there is no imagination in the understanding of the Indian problem”,⁶ an issue which arose because India’s history had been written by Westerners who had never been to India and relied upon second hand information. Nehru’s *Discovery of India*⁷ played a pivotal role in removing the slavish mentality attributed to and ingrained among Indians and re-established their self-confidence. Therefore, by the time India’s independence from British rule became a certainty, Indian leaders such as Gandhi, Nehru, Patel, Ambedkar and several others had developed a design for a democratic India. Though the initial design had been prepared for an undivided India, its realisation became easier after the partition because the Constituent Assembly could act unconstrained from the conditions of the Cabinet Mission Plan of 1946.

Against this introductory background, the author picks up three broad issues for discussion as foundational for the successful operation of constitutional democracy in any country: the grammar of constitutionalism, the location of power, and identity and representation. Under the first head, he essentially discusses and justifies the size of the constitutional text which became necessary in view of the social and political changes in different parts of the world enhancing the responsibilities of the state towards its citizens. In the English-speaking world, this type of state was (and continues to be) referred to as a ‘social welfare state’. West European countries, going a step further, call it the ‘social state’. The ‘social state’ is an improvement to the concept of welfare state to the extent that it creates a right in the individual to claim

³ *His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala* (1973) 4 SCC 225 (Supreme Court of India).

⁴ Zachary Elkins and others, *The Endurance of National Constitutions* (CUP 2009) 65.

⁵ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1966) 328; *Working a Democratic Constitution* (OUP 1999) 633.

⁶ Khosla (n 1).

⁷ Jawaharlal Nehru, *The Discovery of India* (first published 1946, Penguin Books 2004).

from the state the means required to live a dignified life.⁸ While most of the Constitution makers of India were Fabian socialists and were committed to requiring the state to take care of vulnerable individuals and sections of the society, they could not go as far as the European countries had. Therefore, while they provided for some judicially unenforceable Directive Principles of State Policy,⁹ they also created some special justiciable provisions for certain sections of people, namely the Scheduled Castes and the Scheduled Tribes. Even among the Fundamental Rights,¹⁰ they specifically provided for rights and interests of vulnerable sections of the society, such as women, Scheduled Castes and Scheduled Tribes, bonded labourers and children.

For its makers, the Constitution as a whole was not merely a statement of minimum norms according to which the state would exercise powers either in respect of the relations between the Union and the States or of the rules by which they would exercise their respective powers. It was also conceived to be a document for the implementation and expansion of the democratic form of polity in a country which had thus far not had the opportunity to introduce this. It is for this reason that each and every chapter of the Constitution is so lengthy. For example, almost every fundamental right also includes the grounds on which it can be restricted or curtailed. The concept of ‘due process’ was not introduced for reasons of uncertainty that the courts could have created through it. The structure of the governments at the Union and the States was expressed in great detail for the clear guidance of those who aspire to take on the responsibility of running them. The administrative details, which sometimes are labelled a copy of the Government of India Act, 1935, were also satisfactorily explained with reference to the concept of *constitutional morality*.¹¹ Even in respect of distribution of powers between the Union and States, Ambedkar wanted them to be quite specific so as to avoid any overlap between them. “Codification”, it was believed, “would...make Indians democrats.”¹² Similarly, the introduction of the Directive Principles of State Policy was justified as an incentive to be democrats in the light of Lauterpacht’s support for the two parts of the International Bill of Rights. In view of the various perceptions of constitutional text, the Constitution makers had to make several adjustments acceptable to all. It is in this process that while the text of the Constitution became unusually long, it trained its makers in the democratic process and its operation through the courts. In light of these understandings of the Constitution makers, the Constitution has acquired

⁸ For the position under German Basic Law, see, Robert Alexy, *A Theory of Constitutional Rights* (first published 1985, OUP 2010) 288.

⁹ The Constitution of India 1950, arts 36-51.

¹⁰ The Constitution of India 1950, arts 12-35.

¹¹ For how I understand constitutional morality, see, Mahendra Pal Singh, ‘Observing Constitutional Morality’ (*India Seminar*, 2019) <www.india-seminar.com/2019/721/721_mahendra_pal_singh.htm#:~:text=By%20constitutional%20morality%20Grote%20meant,censure%20of%20those%20very%20authorities> accessed 2 March 2021.

¹² Khosla (n 1) 43.

long life among its contemporaries and those which came much later. This adequately justifies its length, which has further increased since its making.¹³

Drawing attention to the triumph of the nation-state in the twentieth century, the author takes up the issue of the administration of the vast and varying territory of the country left by the British, for which the constitution makers had to decide the kind of polity they should design. There was some support for village and community-based polity in Mahatma Gandhi's and a few sociologists and historians' village and communities-based model. However, soon after the Viceroy's announcement that the country would be divided into India and Pakistan, the Constituent Assembly took a decision to have a federation with strong Centre. Consequently, Nehru, Ambedkar and Patel started working on a constitution with a strong Centre, irrespective of theoretical justifications. After the adoption and implementation of the Constitution, scholars tried to classify it in accordance with their understanding of federal and unitary constitutions. But when the issue came before the Supreme Court for the first time, it held that the Constitution was not true to any federal design.¹⁴ Although much later the Court has held that federalism is one of the basic features of the Constitution,¹⁵ it cannot change the fact that the Constitution provides for a quasi-federal structure, one that is reflected in the history and wording of Article 1 which replaced "federal" with "Union" such that the Constitution speaks of Union and States and not a federation.¹⁶ This happened because of staunch support of Nehru and Ambedkar, joined by Patel and other members of the Assembly. Since the commencement of the Constitution, several commissions have been set up to examine the relationship between the Centre and the States, but besides making improvements and adjustments in the functioning of the existing arrangements between the Centre and the States, none of them has suggested any major amendment to the Constitution. It is this kind of arrangement in the Constitution which has brought expected changes in Indian society. Perhaps otherwise it would have continued to be what it was at the time of independence.

Finally, the author takes up the issue of identity and representation. Besides its ancient and highly stratified Hindu society, India has been a home for people of almost all religions, races and nationalities. Ensuring equal rights and treatment to all of them as well as their participation in nation-building has been a tremendously difficult issue. The Constituent Assembly solved this highly difficult issue by taking the bold decision of conferring universal suffrage on all adult citizens of the country, irrespective of religion, race, caste, sex or any of them, to ensure their engagement in nation-building. In continuation,

¹³ Elkins and others (n 4) 78.

¹⁴ *State of West Bengal v Union of India* (1963) 1 SCR 371 (Supreme Court of India).

¹⁵ *SR Bommai v. Union of India* (1994) 3 SCC 1 (Supreme Court of India).

¹⁶ PK Tripathi, 'Federalism: The Reality and the Myth' (1974) 3 Journal of Bar Council of India 251.

the author also examines the issues concerning the minorities and backward classes, especially the Scheduled Castes and Scheduled Tribes. While the issue of representation in Parliament and State Legislatures of Scheduled Castes and Scheduled Tribes as well as the miniscule minority of Anglo-Indians was specifically settled in the Constitution, the issues of backward classes were left to be decided by the concerned governments.¹⁷ Besides making provision for representation of Anglo-Indians in Parliament and the State Legislatures, no special provisions were made for any minority communities, except in specific matters like fundamental rights. Even the issue of citizenship was settled on the basis of birth or domicile and not on considerations of minority or majority or religion, race, caste, etc.¹⁸ Thus, controversial and divisive issues, such as of religion, were confined only to fundamental rights and not extended to other social and political aspects of the society.

On the basis of his analysis and settlement of these foundational issues in the Constitution, the author concludes:

For India's founders, the plasticity of one's political condition was a mark of possibility, just as it was a reminder of the fragility of any state of being. The endurance of the Indian project would, the founders felt, ultimately rest on whether reasons were present for individuals to remain committed to that project. Any kind of institutional change could not rely only on the idea of force.¹⁹

Let us hope the constitutional conception and design which the Constitution makers had incorporated into our founding document successfully passes the test which the current difficult times have thrust upon us. That would also be a fit tribute to the author and his product.

¹⁷ The Constitution of India 1950, arts 330-37.

¹⁸ The Constitution of India 1950, arts 29(1), 30.

¹⁹ Khosla (n 1) 160