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Constitution Making in India: A Primer

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Though India became independent on August 15, 1947, through the Indian Independence Act, 1947 enacted by the British Parliament, it was only three years later that we took charge of our political destiny by becoming a Republic on January 26, 1950. In the intervening three years, a Constituent Assembly drafted the Constitution of India, 1950 through an intense process of arguing, bargaining and compromise. The distinction between Independence Day and Republic Day is already poorly understood, but to make matters worse the current Parliament adopted a resolution to celebrate November 26 as Constitution Day ostensibly to mark the commencement of the Constitution of India, 1950. As new political movements that had a marginal role in the constitution making period seek to stamp their authority on contemporary politics in India, it is likely that the debates on the drafting of the Indian Constitution and the nature of constitutional meaning will come to the political centre stage in the 21st century.

In this brief primer on constitution making in India, we present an analytical survey of the key constitution making institutions and processes that gave us our current Constitution. Though the bulk of the primer is analytical and descriptive, we conclude with a brief normative examination of constitution making in India through Jon Elster's framework of arguing and bargaining in constitution making. This framework allows us to bring a fresh perspective to thinking about the history and politics of constitution making in India.

A. Institutions

Unlike many other post-colonial nations that made a violent and revolutionary break with colonial rule, India managed a peaceful and orderly transfer of power. However, while several post-colonial countries were content to adopt a constitution framed by their colonial masters or appointed a body of experts to frame the constitution, India chose a democratically constituted body especially designed to frame its post-independence constitution. So the primary institution responsible for constitution making in India is the Constituent Assembly.

1. Constituent Assembly

The United Kingdom dispatched a Cabinet Mission to India in 1946 to discuss the transfer of power. This Mission formulated a Plan to set up a Constituent Assembly of India to draft a new constitution for a united India. The Mission rejected the proposal that this Assembly should be elected through universal adult franchise and instead suggested indirect elections by members of the recently elected Provincial Legislative Assemblies. In addition to the 292 members elected by the Provincial Legislative Assemblies, the Princely States and the Chief

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Commissioner's Provinces contributed 93 and 4 members to the Constituent Assembly respectively. The total membership of the Assembly was 389 but after partition, the total number of seats came down to 299 as some Provinces and Princely States became part of Pakistan.

On 6th December 1946, the Constituent Assembly sat for the first time. Rajendra Prasad was elected as the Chairman of the Constituent Assembly. In a span of 2 years and 11 months, it completed its task of framing the Indian Constitution. During this period the Constituent Assembly had 11 sessions and sat in plenary sessions for a total of 165 days. On 26th November the Constituent Assembly adopted the Constitution of India which came into force on 26th January 1950. Though several commentators suggested that this was an inordinately long time, in retrospect in comparison with other post-colonial experience, this was a well organized and timely process.

A major part of the deliberations of the Constituent Assembly were on the Draft Constitutions prepared by the Drafting Committee. During these deliberations members of the Constituent Assembly proposed amendments in advance to the Chairman, and these were debated at length in the Assembly. At the end of such a debate, the Constituent Assembly either adopted or rejected amendments through a majority vote. These deliberations were meticulously transcribed and edited into a 11 volume collection called the Constituent Assembly Debates which must be essential reading for any citizen of India.

2. Assembly Committees

Not all the work of the Constituent Assembly was conducted in plenary session. As several issues of substance and legal draftsmanship had to be worked out in considerable detail, the Assembly appointed several Committees either on specific subject matter or with specific roles to carry out. The Advisory Committee on Fundamental Rights and Minority Rights and Union Powers Committee are examples of subject matter committees. The Drafting Committee is an example of a powerful committee which enjoyed the power to bring together the work of all the other Committees.

These Committees conducted preliminary research and deliberations within smaller groups. Decision making in the committees was on the basis of a majority vote and members could record their dissents if they so wished. While some Committees minuted their proceedings in detail, others did not. These Committees submitted Reports which were then taken up in the wider Assembly. The Constitutional Adviser, B.N Rau compiled reports of various committees to prepare a Draft Constitution which he submitted to the Drafting Committee. The interaction between Committee deliberations and Assembly plenary deliberations make up the intricate exchanges that shape our constitution. Hence, we must pay careful attention to the work and outputs of the Assembly Committees.

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3. Drafting Committee

On 29th August 1947, the Constituent Assembly through a resolution appointed a Drafting Committee to

“..scrutinise the draft of the text of the Constitution of India prepared by Constitutional Adviser, giving effect to the decisions already taken in the Assembly and including all matters which are ancillary thereto or which have to be provided in such a Constitution, and to submit to the Assembly for consideration the text of the draft constitution as revised by the committee”

The Drafting Committee had seven members: Alladi Krishnaswami Ayyar, N. Gopalaswami; B.R. Ambedkar, K.M Munshi, Mohammad Saadulla, B.L. Mitter and D.P. Khaitan. At its first meeting on 30th August 1947, the Drafting Committee elected B.R Ambedkar as its Chairman. Towards the end of October 1947, the Drafting Committee began to scrutinise the Draft Constitution prepared by the B.N Rau, the Constitutional Advisor. It made various changes and submitted the Draft Constitution to the President of the Constituent Assembly on 21st of February 1948.

The Drafting Committee and its members were very influential in Indian constitution-making during the Committee stages as well as the deliberations of the Constituent Assembly. A brief review of the Constituent Assembly Debates confirms that a majority of the debates in the Constituent Assembly revolved around the Draft Constitution(s) prepared by the Drafting Committee. Out of 165 sittings of the Constituent Assembly, 114 were spent debating the Draft Constitution(s). Hence, this Committee above all others played a critical institutional role in shaping the constitution.

4. Congress Assembly Party

The Indian National Congress was the dominant political force in Indian constitution making. Of the 389 seats in the Constituent Assembly, the Indian National Congress had 208. While most members elected on a Congress ticket had been functionaries of the Congress Party there were non-party members too. Gandhi advised the leadership of the Congress Party to bring in eminent personalities from the fields of law and politics to aid constitution making by offering these individuals Congress Party tickets. This allowed the Congress Party to position itself as a diverse nonpartisan group in the Constituent Assembly.

The Congress Assembly Party met regularly on the sidelines of the Constituent Assembly. Though it had no legal status with respect to the Assembly it functioned as an unofficial forum where provisions of the Constitution and related issues were discussed and debated before they came up in the Constituent Assembly. All members elected on a Congress party ticket could attend and contribute to these meetings. Unfortunately there is no consolidated record of the proceedings in these meetings which makes it difficult to ascertain its impact on Indian constitution making. However, the proceedings of the Constituent Assembly confirm

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that the Congress Assembly Party did wield influence on the voting patterns in the Assembly through the Party whip.

B. Constitution Making Process

In the section above we reviewed the key institutions that were engaged in constitution making. We began with the most formal institution – the Assembly – and moved to the most informal institution – the Congress Assembly Party. In this section we provide a brief overview of the historical stages through which the Assembly crafted the Constitution of India 1950.

The Constituent Assembly had its first sitting on 9 December 1946. On 13 December 1946, Jawaharlal Nehru moved the Objectives Resolution to effectively begin the constitution making process. The resolution sought to “... proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution.” It set out broad principles to guide the Constituent Assembly’s work and was adopted on the 22nd of January, 1947.

In the second session of the Constituent Assembly, a number of Committees were constituted to look into and report on various aspects of the Constitution. These Committees submitted their reports during the period of April - August 1947. In parallel, as and when these Committees submitted their reports, the Constituent Assembly debated the broad principles that were set out in the recommendations of these committees. These debates came to a close on 30th August 1947.

In October 1947, B.N Rau, the Constitutional Advisor to the Constituent Assembly prepared a Draft Constitution on the basis of the reports of the various committees and discussions in the Constituent Assembly. The Draft Constitution was ready by October 1947 and submitted to the Drafting Committee.

On 27 October 1947, the Drafting Committee began to scrutinize the Draft Constitution prepared by the Constitutional Advisor, along with other notes, reports and memoranda. After making changes it submitted its Draft Constitution to the President of the Assembly on the 21 February 1948.

This Draft Constitution was submitted to the President of the Constituent Assembly and was subsequently published and circulated among the public. Many comments, critiques and suggestions were received which were then scrutinized by a Special Committee of members of the Union Constitution Committee, Provincial Constitution Committee and the Union Powers Committee and the Drafting Committee. The Drafting Committee reviewed these inputs on the 23rd, 24th, 27th of March and then later on 18th October, 1948. On 26th October 1948, the Drafting Committee reprinted and resubmitted the Draft Constitution along with a set of amendments.

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On 4 November 1948 B.R. Ambedkar presented the Draft Constitution to the Constituent Assembly. The Constituent Assembly then debated, clause by clause, the Draft Constitution. Members of the Assembly often moved their own amendments to the Draft Constitution seeking to change or drop specific articles or clauses. The most crucial and voluminous debates took place at this stage till 17th October 1949.

Subsequently, the Drafting Committee revised the Draft Constitution in line with the decisions taken in the Constituent Assembly as well as general editorial revisions. The revised Draft Constitution was submitted to the President of the Constituent Assembly on 3rd Nov 1949, and then introduced in the Assembly on the 14th of November 1949.

The Constituent Assembly then undertook a second reading of the revised Draft Constitution. While many amendments were moved at this stage, most of them were negated. At the end of the third reading of the Draft Constitution, Dr Ambedkar moved a motion “that the Constitution as settled by the assembly be passed”. At this stage, there were few substantive debates. Most of the speeches involved general comments on the Constitution as a whole. While some members expressed their satisfaction, others expressed concerns.

On the 26th November, 1949, the third reading came to an end and the Constituent Assembly voted for the motion that Ambedkar had proposed to adopt this revised draft as the final Constitution. The Constitution was then finally signed by members of the Constituent Assembly on 24th January 1950 and came into effect as the Constitution of India on 26th January, 1950.

C. The Constituent Assembly in Action

The brief historical overview presents the constitution making process as a linear unbroken process. However, if we examine any particular aspect or provision of the constitution we learn that this is an incomplete picture of the process of constitution making. In this section we trace the debates around a right to education in the Indian Constitution to throw light on the ways in which the constitution making institutions and processes forge the final outcome – namely the Constitution of India 1950.

In the Constitution of India, 1950 finally adopted by the Assembly the provision that dealt with the education was Article 45 which declares that:

The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years

However, this final provision is far removed from the initial debates. In 1947, the Sub - Committee on Fundamental Rights (a sub-committee of the Advisory Committee on Fundamental Rights and Minority Rights) was given the mandate to draw up a list of

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Fundamental Rights that were to be included in the Constitution. The members of this sub-committee were clear that citizens of India must have a right to education which could be enforced in a court of law. In a report to its parent committee – the Advisory Committee - it placed the following provision in the list of Fundamental Rights:

“Every citizen is entitled as of right to free primary education and it shall be the duty of the State to provide within a period of ten years from the commencement of this Constitution for free and compulsory primary education for all children until they complete the age of fourteen years.”

The Advisory Committee scrutinised the report of Sub – Committee on Fundamental Rights and was of the opinion that an enforceable right to free and compulsory education would be impossible to honour taking into account the state’s limited financial resources. It then decided to remove the provision from the fundamental rights section and put it into the non-enforceable Chapter on the Directive Principles of State Policy. This decision was reflected in the Draft Constitution prepared by the Constitutional Adviser which was submitted to the Drafting Committee. No changes were made to the provision (draft Article 36) in the report that the Drafting Committee submitted to the Constituent Assembly

On November 1948, the Constituent Assembly began to take up – article by article – the provisions in the Draft Constitution for debate. On the 17th and 19th of November, the debates revealed a conflict between members about the Directive Principles of State Policy: some members felt that the Directive Principles were of no use if they were not justiciable and enforceable by the court. In this context – the right to education was discussed. Some members felt that right to education had to be part of the enforceable fundamental rights section and did not buy the argument that assuring all citizens of free compulsory education was impractical. There was no clear resolution of these differences that arose during this debate.

On 23rd November 1948 however, it seemed like the Constituent Assembly had more or less decided that the Right to Education would be part of the Directive Principles and not Fundamental Rights. The intervention by Lakshmi Maitra appears to have settled the matter. She pointed out that all the Articles in the Directive Principles of State Policy which began with ‘The State shall endeavour..’, but the education article began with ‘ Every citizen is entitled to...’. This phrasing seemed to suggest that the article was a Fundamental Right rather than a Directive Principle. Hence, she proposed an amendment to draft article 36:

Mr. Vice-President, Sir, I beg to move: "That in article 36, the words `Every citizen is entitled to free primary education and' be deleted." If this amendment is accepted by the House, as I hope it will be, then the article will read as follows: -"The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

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At the end of the debate, her amendment was adopted by the Constituent Assembly and a year later in the second version of the Draft Constitution prepared by the Drafting Committee, the education article was amended by the Drafting Committee as below. “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years”. This is the final form of the article of the Constitution of India, 1950 adopted by the Constituent Assembly.

This brief account of the drafting history of the education provisions illuminates the several institutions, actors and processes through which the constitutional provisions are settled. However, even this account does not examine the politics and philosophy underlying these debates and a rich understanding of the constitution making process calls for such an analysis. Several provisions of the constitution go through a similar evolution through the constitution making process and deserve the closest scrutiny.

D. Conclusion

So far we’ve presented a descriptive and analytical account of constitution making in India. In this final section, we borrow from Jon Elster’s path breaking work on constitution making to propose an analytical framework that may be applied to the analysis of any provision in the Constitution. Constitutions that is the outcome of a democratic and deliberative process involves the aggregation of several individual constitutional preferences. In the sections above we showed that the manner in which Constituent Assembly members were elected and the mode of decision making within the Constituent Assembly indicate that the Indian constitution making process was both democratic and deliberative in this sense.

Any analysis of the drafting history of a constitutional provision should pay attention to how individual preferences were aggregated through deliberation. Elster suggests that members will engage in forms of arguing and bargaining to weld their individual preferences. Members ‘argue’ when they adopt a constitutional preference because they genuinely believe in it, are advancing their interests, or are persuaded by arguments that they come across. Members ‘bargain’ when they adopt a constitutional preference on the basis of threats or promises. These two forms of group deliberations shape constitutional outcomes and there is no normative preference for one or the other form of deliberation.

Granville Austin, an eminent political historian of the Indian Constitution, seems to suggest that the process of constitution making in India was primarily one of ‘bargaining’. Congress Assembly Party members, who met outside the Constituent Assembly, were urged to adopt the constitutional preferences by the Congress leadership. The members then, during deliberations in the Constituent Assembly, under the watch of the party whip, articulated these constitutional preferences as their own. And since the Congress Party was numerically

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dominant in the Constituent Assembly, Granville Austin claims that the final outcome of the constitution making process in India was forged by the Party leadership.

As mentioned in Section A, we do not have a historical record of the the deliberations in the Congress Assembly Party to verify Austin's claim. Moreover, the proceedings in the Constituent Assembly and its various Committees suggests that while the Congress Party did exert influence it was not decisive or overbearing in every case. Arguably, the extent of 'arguing' and 'bargaining' in Indian constitution-making is an empirical question that turns on the particular constitutional provision we are concerned about.

In this essay, we've suggested that to understand constitution making in India we must begin with an overview of the institutions and processes through which the constitution was framed. Further, to appreciate the political and social process of constitution making we must assess the nature of deliberation, particularly the extent of arguing and bargaining, that explains why particular provision found its way into or out of the Constitution of India 1950. Unless we carefully appreciate the constitutional choices that the Constituent Assembly made we cannot call out and resist ideologically motivated histories of constitution making in India. As contemporary political, social and legal controversies – like cow slaughter – are recast as questions of constitutional history we must become equipped to enquire into these controversies with rigour and clarity.

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