

BOOK REVIEWS

THE CONSTITUTION OF INDIA: POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS. *By Sarbani Sen. Oxford University Press. New Delhi: 2007. Hard Cover. Pages vii - 214. Rs. 545.*

Constitutions are generally considered to be the fundamental law of the land across jurisdictions. Whether written or unwritten, they mirror an amount of certainty. Constitutions usually contain the philosophy of a nation, rights, duties and liabilities of the state as well as its citizens, and the structure of governance. Within the paradigm of certainty, these documents need to imbibe flexibility for the purpose of endurance. The demand for certainty and flexibility may sound contradictory but the working of different constitutions is a witness that most nations have struck a balance within these apparently contradictory claims. Factors that influence changes, the processes by which changes are effected and the ideal model of change in the constitutions have caught the imagination of many comparative constitutional law scholars. The book under review is one in that genre.

Like many other constitutions of the world, Constitution of India reflects the aspirations of the people of a period and is rooted in history. The crucial issue then is how far the past ought to bind the future. There have been doubts as to whether the post-formation generations feel included in “We, the people”. If inclusive, how far they can transform the constitution, and in doing so where do they locate the moorings of legitimacy. The answer seems to be simple if searched within the history of amendments in the Constitution of India. The democratic sovereignty has placed the ultimate power with the people. People through their elected representatives express their will and each amendment is an expression of popular sovereignty and a proof that “we” are very well part of the “We, the people”. Sarbani Sen, in her book holds out the fact that such a simple assessment is far from the answer.

I. THE PREMISE

The book is in three parts with an introductory chapter. The progression of ideas is from theoretical base to pragmatic and futuristic. The central theme of this work revolves around identification of the conceptual basis of ‘popular sovereignty’. It is calibrated with the Indian political and constitutional milieu so as to understand the transformations within Indian Constitution; past, present, and future. The dynamics of the ‘basic structure doctrine’ is used to bring forth the concerns of the author, which is sought to be addressed through this book.

Sen raises certain basic issues in the introductory chapter that sets the tone of the book. The enquiry points may seem to be a run of the mill approach, by raising oft repeated issues like; the custodian of constitution, the sanctity of the

original text and its underlying values. The twist of the book but is in the question raised as to the relevance and presence of the constitution in the changed circumstances that is no way similar to that of its period of founding. This search becomes all the more important in the backdrop of debates in the E.U and the U.S context about ‘new governance’, which calls for a severance from the traditional command and control approach to a ‘regulatory approach, which is less rigid, less prescriptive, less committed to uniform outcomes and less hierarchical in nature.’ This idea calls for the involvement of the affected actors and stakeholders rather than representative actors and prescribes a relegated role for the constitutions.

The book addresses the debate of the legitimacy of electoral victory being equated to the mandate of exercising sovereign power. This discussion garners relevancy when the winning party rarely or never obtain more than 50% of the vote share in India’s fragmented multi-party coalition alliances. This for the author, necessitate a ‘deeper examination of the nature of Indian founding, the exercise of popular sovereign authority by Indian people and the theories of constitutional preservation and transformation that the founders have visualised.’ The notion of popular sovereignty that occupied the minds of national leaders, like Gandhi and Nehru, are discussed to highlight the perennial unresolved question of placing popular sovereignty.

The engaging theoretical debate in the introductory chapter distinguishes the republican and liberal ideologies of people’s participation in governance and decision-making. Sen beneficially employs the theories of Habermas, Ackerman and Waldron to build her own structure of popular sovereignty, with an Indian understanding. She concludes that, theoretically, a break from the past constitutional regime should result from a process of deeper discourse between the branches of government, between the government and citizens which should generate a broad popular consent basis. While putting forth this proposition, Sen is not oblivious of the challenges involved within. The tight ropewalk between the points of ‘private’ citizens and ‘public’ citizens in finding the common good without moral overburdening is rightly identified as a daunting task. The solution for this problem is found in the amalgamation of ideas of Waldron, Ackerman and Habermas.

The transformative break from the past, for the author, could be located within the properties of ‘revolution’ (revolution with a designated meaning). This revolution is outlined as an “affirmation of the independent value of politics and citizen’s involvement in debating the validity of new political ideas.”

II. DISSECTION OF POPULAR SOVEREIGNTY FROM INDIAN PERSPECTIVE

The logic of the presence of abundant checks and balances in the Indian Constitution is explained by the author as having a basis in the Indian perception of popular sovereignty at the time of founding. A scheme where people remained outside the decision making process while virtual sovereignty continued with the people is what necessitated the checks and balances. The underlying notion, which needs evaluation for Sen, seems to be the constitutional premise of lack of legitimacy of electoral wins to change the resolutions made by the people at the founding. The ‘preservationist’ role of judiciary is justified in this model, as it can invalidate decisions and actions beyond the constitution.

The proposition that constitution alone can provide for its own transformation is challenged by the author by arguing that changes ought to happen by new forms of engagement even outside the formal amendment process. The justification is the experience of revolutionary forms of political participation of the colonial period. Translation of such an argument into practice sometimes may be too strenuous for the Constitution, accepting that revolutions are never meant to be cakewalk. Taking cue from the ‘new beginning’ argument by Sen, it could be equally argued that the ‘new deal’ shift in the U.S Constitution definitely sought a break from the established past, but was a short stint. The constitution and its philosophy endured as it was designed. The same argument in the contemporary Indian scenario would sure be handy for the advocates of new economic policy, the only notional impediment for which is the declared socialist philosophy, as judiciary has already given a pass by.

The popular basis of revolutionary interlude of breaking away from the colonial regime and giving a constitution unto themselves is not beyond challenges. People’s part in the working environment of Indian politics, it can be argued that, has reduced to electoral participation. The present working mode amply provides spaces for interest groups to further their agendas. The position of the author here is that a “deepening dialogue between leaders/citizenry” could generate popular consent for a break with the past and lead to significant political achievements and that the mass movements can create an environment which leadership cannot obscure. The real Indian politics in its complexity is a classic example of how this theoretical position loses its ground in practical. The Narmada or the SEZ issues could be examples of failure of the optimum discourse models. While arguing so, one should not be unmindful to the aspect to which Sen draws attention to. The break from the past, for her, would be legitimised only with a high level of institutional consensus reflecting public validation and she rejects the argument of ahistoric nature of the constitution.

Sen figures out the distinctiveness about Indian political experience by evaluating how the revolutionary experiences of Indian freedom struggle and

constitutional founding could “inspire people to invest their identities and energies for political redefinition”. The endeavour here is to create a framework to understand the relationship between popular sovereignty and constitutionalism. The suggested framework create three fragments; the direct exercise of people’s sovereignty – period of independence, self realization of the popular sovereignty of its potential to break from the past and create new – framing of Constitution, and the exercise of popular sovereignty in the institutionalised state setting.

III. POPULAR SOVEREIGNTY IN INDIAN CONSTITUTIONAL TRADITION

The first part of the book is a research into the development of popular sovereignty and its relation to constitutionalism through the prism of history. The slow process of the Indian freedom movement maturing into the claim for self-rule and the psyche of the moderate and extremist phase is detailed in this part. Sen in this part bring out the ideological difference and the element popular involvement in the actions of the moderates and extremists. The statement of Lala Lajpath Rai that “[t]hey want a constitution to be framed for them by the British Legislature; we desire freedom to do it ourselves ... We want to make a government of our own ... (which is) of the people ... , they are trying to get a government by the benevolence of the British”, not only speak about the difference of approaches but expose the popular engagement or lack of it also. Moderates were contended with dialogues between the leaders of congress and Britain but the extremist viewed their business as spawning mass base with nationalistic sentiments. The claim was for people’s rule with political authority, where laws and actions should be judged for its public good. The beginning of popular sovereignty in Sen’s analysis is the realisation that ‘people could create an alternative political structure rooted in the free will of the community’. This realization, for Sen, is capable of making changes in the post founding years too, which could justify transformations in the constitution.

The relationship between popular sovereignty and constitutionalism in India has a distinct nature as per Sen. Studying Gandhian notion of self-rule and his rejection of British representative parliamentary form, she concludes that the ‘Gandhian concept of swaraj was a departure from the British Constitution.’ The inadequacies of legislative representation made Gandhi search for alternatives such as decentralised polity. Gandhi has suggested a route map for resting popular sovereignty with the people.

The following Nehruvian era sought constitutionalism to be legitimated by popular sovereign engagement. The idea of strong centre and a national overarching political power was thought to be imperative by Nehru given the nature of India. Sen, taking help of arguments from others justifies this model, as not contradicting the fundamental political values of the movement, though the principles of centralised and representative institutions excluded people from direct participation. Limited government, checks and balances, institutional incentives for deliberation in government, guaranteed rights of political participation for

citizens, united electorate and adult suffrage are the points that justifies Nehru's location of sovereignty with the people, for Sen. The speech of Nehru, where he moots the idea that 'this house (Constituent Assembly), cannot bind down the next generation' is highlighted as Nehru's premise of popular sovereignty and its relation with constitutionalism.

The second stage in the constitutional development for Sen is the realization of constituent power by the popular sovereign. In this stage, it is argued that, the revolutionary experience of the first phase recognized its constitutive role and departed from the classical republican view – of continuing popular self-determination. The choice of Indian polity was to concretise political principles in the form of a constitutional order. This process is qualified as one that neither eclipses the exercise of sovereign power nor does get vanished in constitutional structures but is the retention of the power with the people to be exercised in the surrounds of institutionalised constitutional order.

The Constituent Assembly, in its formation and procedure, for Sen, reverberated the notion of people's engagement and was an embodiment of popular authority. True that the Assembly had asserted its sovereign nature and power by declaring that they are not bound by the limitations imposed by the colonial master, doubts remain as to its democratic nature considering the mode of selection of members. The strategy of consensus and accommodation could merge a range of kaleidoscopic interests in the Assembly. The debate gives one an idea about the involvement, the framers retained in most of the areas of debate. The vehemently argued varied view points about two controversial issues; minority reservation and state affirmative action is pointed out as examples of popular engagement in political discourse.

IV. POPULAR SOVEREIGNTY IN INDIAN CONSTITUTIONAL PRACTICE

It is one thing to say that popular sovereignty rest with the people and quiet another to locate it in actual practice. It is argued by Sen that the popular sovereign power in India is not designed to be continuously vested with the people for collective actions which would be a heavy call on 'citizen's public virtue', instead, the founders have devised a 'proceduralised method.' Such a structure, it is said that works in the Habermasian theory as the "popular opinion and will formation in informal and voluntary public spheres could influence the channels of legitimate law-making". Separation of powers, judicial review and right for equal political participation are the basic entrenchments devised by the constitution to protect popular sovereignty being steamrolled by electoral majority or interests groups.

The strategies adopted by the constitution as devised by the Constituent Assembly is discussed in detail in the sixth chapter of part one. Limited government, position of the President, the Upper House, federal character and its accompanying

limitations on the exercise of legislative and executive power, federal interventionism, supremacy of the text of the constitution and local self government are classified under the heads of checks and balances, preservationist approach and equal participation in the political process. The exposition of these positions though very familiar to every constitutional law practitioner and student gains a separate character in its rootedness with the Constituent Assembly Debates. The author's perseverance in sifting through the mammoth details to find the right arguments is creditable.

V. THE RENEWED PERCEPTION OF POPULAR SOVEREIGNTY

Popular sovereignty manifested in the popular base of independence movement and reflected in the constitution making process reaches its third stage when it actually interacts with the structures of Indian governance. Sen views the presence of popular sovereignty as the manifestation of will in transforming constitution through amendments. Though it is claimed by Sen that there are institutional forms that could generate discourse between citizens and political leaders on contentious issues, to me, the real popular engagement and collective decision making in the post- founding transformations remains grey and could do with further authentication.

The idea mooted is that the past generation should not bind the constitutional aspirations of the future. The theoretical position espoused by Waldron is focussed by Sen to justify legislative intervention. The Indian tradition with added precaution of treating constitutional transformation as higher law-making is pointed out as a safety check. The 'interstitial legislations' that directly or indirectly affect constitutional content is also recognised by the author. Sen claims that the later changes in the constitution have succeeded in bringing "popular will more directly into play." This position is sought to be justified by an analysis that in the post-founding transformations, one could locate an inter-branch dialogue and people's role in testing and ratifying new proposals. The argument taken is that the popular sovereignty retained by the people could be proved by the "transformative process that redefined the constitutional right to property and Parliament's power of constitutional amendment."

The property issue, due to the then political position of the congress, have in fact eschewed any institutional debate between the union and federal governments. Courts were the only institution that partook in the discourse, and to Sen, the judiciary was performing its preservationist role. This impasse for the government was addressed through constitutional amendments. The other group that came into picture in this debate was the propertied class, who challenged the various Land Reforms Acts. The constitutional amendments were brought forth with a prelude that constitution has to take note of the clarion call for social revolution which was warranted by the then society. Nehru's position was that, change is necessary and if the courts find the change as violative of the

constitution, it is for the Parliament to remove the incongruity. Sen justifies the popular basis of these actions of the government on the basis of electoral support for Nehru's government.

The next phase of transformation witness a judiciary that challenges the power of the Parliament to amend all parts of the constitution. With a wielding executive, supported by a clear majority in the Parliament, it turned out to be a dialogue between two institutions. The whole process resulted in the dissolution of Lok Sabha to get fresh mandate for the amending process. This is the point Sen stress as interpolation of institutional debate into a public debate.

Emboldened by a clear victory in 1972 election, the congress government went ahead with further amendments to the constitution which attracted dissenting voices. The whole process culminated in the enunciation of basic structure doctrine by a bench of formidable strength. The aftermath of the decision and the predatory stand of the government, which ultimately lead to declaration of emergency, is history. The will of the people had to wait till 21 March 1977, when Mrs. Gandhi resigned and the victory of Janata party.

Sen views the long process of property debate as a 'prolonged engagement and renewal of popular sovereignty of the post -founding period.' The inter- institutional conflicts, dialogues with the public in various forums, mobilization of public opinion on electoral arena were the avenues of political engagement of popular sovereignty for the author. The claim in the book is that it is the popular electoral mandate that determined the constitutional outcome. A counter issue may be raised here as to the non-notification of certain parts of the 44th amendment till today, despite the amendment being claimed to be the wish of the popular sovereign.

The role of the Supreme Court in the whole process, which Sen qualifies as 'inter-generational synthesis', is crucial. The book concludes with accolades to the Supreme Court in its preservationist role as

"[T]he constitution has been transformed through the lived experience of post-founding generation, it is the court which has, through its backward-looking synthetic exercise, identified those breaks with the founding vision caused by subsequent exercise of popular sovereignty."

The lingering question then is the magnitude of popular sovereignty. Sen tries to establish that popular sovereignty is to be conditioned by the higher values of constitutionalism channelised by institutional interferences. The experience so far make Sen think that the Supreme Court is that institution which has played the vital role of fusion. With its undemocratic base, one may mischievously add.

The relevance of the book besides its historical analysis of a political and legal problem lies in the theoretical exposition of certain fundamental issues

relating to democracy. The theories discussed do not remain a separate segment isolated from the practical. Sen, deftly weaves the theoretical discussion into the pragmatic. This book is also an answer to many who ask, why would one read theory.

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