BOOK REVIEW: SARBANI SEN, POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS: THE CONSTITUTION OF INDIA

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I.

Despite all the hype about Indian constitutionalism, there is a dearth of books on the Constitution of India. As far as the process of constitution making is concerned, the repeated re-publication of the Constituent Assembly Debates have made them more and more accessible to those willing to read. The late Jagan Nath Khosla did a great service to scholarship in putting together a project on the documents of the Constituent Assembly which were then crafted into place by B. Shiva Rao under the title: *The Framing of India's Constitution (1968)*[1], which consists of a study volume and four volumes of documents to which some untidy additions have been made in the 2007 edition by Subhash Kashyap. Fortunately – or, unfortunately – Granville Austin's *The Indian Constitution: Cornerstone of a Nation*[2] was published in 1966. This had an important effect on scholars of constitution making. Austin had scoured through the records, which nobody had bothered to look at earlier. The politicians thought that they knew it all because many belonged to the era of the Constituent Assembly. Scholars thought that the Constituent Assembly Debates were enough to go on. But, those who read Austin's limited work were so impressed by his archival work that they gave the book a cult status – no less because of its optimism rather than because he had examined the process of making the Constitution as a whole. Shiva Rao was more comprehensive and more accurate. If in doubt, I have always turned to the Shiva Rao volumes rather than Austin's *Cornerstone*. This is equally true of other scholars and lawyers who cite accounts of the debates before the Supreme Court as aids to constitutional interpretation. But, Austin has held the field – grandly followed by his *Working a Democratic Constitution: The Indian Experience (1999)*[3] which addressed his main themes of the parliamentary system, human rights, judicial review, federalism and emergency powers. These are classical themes that emerge from viewing

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1. B. Shiva Rao, *The Framing of India's Constitution in five volumes: A Study volume with Vol I-IV containing Select Documents* (Bombay, N.M. Tripathi, 1968).
2. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford, Clarendon Press, 1966).
3. Granville Austin, *Working a Democratic Constitution: The Indian Experience* (New Delhi, Oxford University Press, 1999).

any Constitution from the standpoint of the separation of powers, human rights and federalism.

But a Constitution is more than what Montesquieu and the Americans think it is. Contemporary Constitutions view the allocation of distribution of powers and limitations very differently. The new Constitutions also aspire to different aims, ends and objectives. Scholarship has to go beyond Austin's friendly oversight to more rigorous and imaginative assessments. We need alternative interpretations of the work of the Constituent Assembly.[4] No doubt, even though valuable, the original intention of the makers of the Indian Constitution has to yield to contemporary intuitions. Courts may not accept the Constituent Assembly Debates as authoritative. Judges are notorious for a selective use of the debates to suit their own purposes. But, we do need to look at our Constitution as part of a historical continuum that has transformed, and will continue to transform over time.

II.

Sarbani Sen's book[5] seeks to examine the Constitution of India in terms of the concept of "popular sovereignty" which she believes reflects the aspirations of the freedom movement and underscores the "democratic transformations" inherent in, and brought about, by India's Constitution. This sounds more exciting than the book turns out to be. The book is a revised version of Sen's doctoral dissertation at Yale and gives us a library account of how a Connecticut Yankee might look at the process, evolution and transformation of constitutional governance in India. The list of her benefactors is impressive.[6] They have clearly influenced the book. Sen clearly fulfilled the expectations of her examiners to produce an interesting book which, like all good books, deserves to be read for both its naiveté and scholarship.

India's Constitution begins with a perambulatory statement that ascribes the source and authority of India's Constitution to "We the people of India" who have "adopt(ed), enact(ed)..... give(n) to....(themselves) this Constitution." This in itself is a half truth. As a matter of fact, it is not true to say that the Constitution was created by the express or implied authority of the Indian people. The Constituent Assembly was elected before Partition on a limited vote. The *crème de la crème* of Indian politicians were in the

4. See S.K. Chaube, *Constituent Assembly of India: Springboard of Revolution* (New Delhi, People's Publishing House, 1973); see also R. Dhavan, 'Tidy Intuitions, Untidy Discourse: Conversations and Exchanges on Human Rights Discourse in the Constituent Assembly', mimeo, Working Paper No. 20, (New Delhi, PILSARC, 1994).
5. Sarbani Sen, *Popular Sovereignty and Democratic Transformations: The Constitution of India* (New Delhi, Oxford University Press, 2007).
6. Id., Acknowledgements, at p. vii.

Constituent Assembly. Many struck a chord with some of the people. But, whether the "people" participated in the process of constitution making is highly doubtful.

India's Constitution was made by the elite. Much of the discussion was between even smaller elite. The great big leaders of the day participated in the process of constitution making on an off and on basis. When the Constitution was circulated to the people in its draft form in February 1948, the responses of the people were few and far between – as is self evident from the Shiva Rao anthology.[7] Nor did the members think it necessary to refer back to their democratic constituencies in any measure. Since India was in the throes of Partition, religious leaders and members of the Scheduled Castes and Tribes (SC and ST) wanted to safeguard their interests. There may have been some rank and file interactions with some of the groups they represented. But the Constituent Assembly members seemed to honour the ideal expressed by Burke[8] in his famous address to the Bristol constituency over a century and half earlier. Parliamentarians were supposed to be representatives, not delegates. It was for them to represent their electors as they pleased. They were not delegates mandated by the views of the electorate. The truth may have been somewhere in between; but the style of parliamentary government followed by members of India's Constituent Assembly was more in the Burkian tradition. The members of the Constituent Assembly thought their responsibilities were *sui generis.* If anything, they were subject to a limited party discipline not as delegates of the constituencies that elected them. In those heady days, the Congress members looked upwards towards the Congress leaders for inspiration. The non-Congress members and independents represented alternative views and interests. All of them represented the people, but were not their delegates. The process of constitution making was a close knit affair. Nehru had little time for the Constituent Assembly, though he piloted the Objectives Resolution. The Advisory Committee, Fundamental Rights and Minorities Committees were thorough and painstaking. The debates in the Assembly were elegant, high powered and incisive. Indians can go back to these debates and discussions with pride. But the Constitution was created by a prominent elite-few of whom had no doubt that they were chosen as part of a historic destiny that brought them to the right place at right time. Even if the Constitution did

7. See generally B. Shiva Rao, *The Framing of India's Constitution – Select Documents*, supra n. 1, Vol. IV.
8. Burke in a letter to Sir Hercules Langrishe (January 3, 1792) said, "there is a communion of interests, and a sympathy in feelings and desires between those who act in the name of any description of people, and the people in whose name they act, though the trustees are not actually chosen by them. This is virtual representation. Such a representation I think to be, in many cases, even better than the actual." See Edmund Burke, Works (Bohn ed. London, G. Bell & Sons Ltd., 1891).

not spring from the Indian people in whose name it was made, it could not be said that the elite who drafted the Constitution did not owe part of their inspiration to the freedom movement in which the Indian people were massively involved.

The Preamble itself was traceable to Nehru's Objective Resolution in Karachi in 1931. So much of the fight over agrarian reform was for cultivators in favour of rich absentee landlords. The commitment to Schedules Castes and Schedules Tribes was shown through various provisions on affirmative action. Anti exploitation rights to prevent *begar* and forced labour and protect children from hazardous employments were added to the scheme of protected fundamental rights.[9] But beyond that, the specific concerns of the people were half heartedly articulated. T.T. Krishnamachari rightly called the Directive Principles of State Policy a "veritable dustbin of sentiment."[10] Most of the people's aspirations were thrown into this dustbin. These included striving for people's welfare and distributive justice,[11] securing people's livelihood through a nationalization of the material resources of the community for the common good, equal pay for equal work, good health and opportunities of development for children,[12] the organization of village panchayats,[13] the provision for work and education,[14] just and humane conditions of work and maternity benefit,[15] a living wage for workers,[16] a uniform civil code for all,[17] free and compulsory education for children,[18] the promotion of the SC, ST and other weaker sections,[19] raising the nutrition level, health and standard of living for all,[20] the organization of agriculture and animal husbandry,[21] the protection of India's heritage,[22] the separation of the executive from the judiciary[23] and the promotion of peace and security.[24] To these, the 42nd Amendment of 1976 added the promotion of equal justice and provision of legal aid,[25] participation of workers in

9. Constitution of India, Articles 23 & 24.
10. VII Constituent Assembly Debates 583; some two months later after giving this speech, Krishnamachari became a member of the Drafting Committee and his criticisms of the Draft provisions became mush less barbed.
11. Constitution of India, Article 38.
12. Id., Article 39.
13. Id., Article 40.
14. Id., Article 41.
15. Id., Article 42.
16. Id., Article 43.
17. Id., Article 44.
18. Id., Article 45.
19. Id., Article 46.
20. Id., Article 47.
21. Id., Article 48.
22. Id., Article 49.
23. Id., Article 50.
24. Id., Article 51.
25. Id., Article 39 A.

industry,[26] the protection of environment, forests and wildlife[27] and a statement of people's duties.[28]

What the Constitution actually enabled was the creation of the concept of a command economy through nationalisation, which was also a constitutional objective.[29] Issues such as cow slaughter[30] found their place in the dustbin. Issues of international peace belonged there as well. Many of these "dustbin" issues were close to the Indian people. They were - as history would tell - postponed indefinitely. What was adopted was a bourgeois concept of human rights, equality and a diluted due process. These were borrowed as standard form clauses drawn from the French enlightenment and the American Revolution, amidst some significant changes in the due process clause[31] and in clauses dealing with agrarian reforms.[32] But, in fact, Indian governance was to follow the model of the British colonial administration and justice with which the Constitution makers were eminently familiar. This model had a characteristic emphasis on "law and order", and the invocation of emergency powers[33] with *ex post facto* affirmations by Parliament. It is well known that the framework of the Indian Constitution was taken from the Government of India Act, 1935. To this there were many changes, large and small. While the British legislation of 1935 supported a law and order economy, the Indian Constitution was designed to enable a centrist planned economy with a parliamentary democracy which would accommodate the aspirations of competing elites and work along British lines. Although ready to function immediately, some changes had to be made in the future. The federal structure was yet to be sorted out. Adjustments had to be made. But the Constitution was not a revolutionary Constitution of the people. It was not a "We the people" Constitution. It was a "We the rulers" Constitution. It was for the people to make their presence felt through the avenues through which the constitutional text allowed the people to make their footprints. Many of the controversies over the drafting of the Constitution are forgotten controversies which should not trouble us now. But we need to appreciate the challenge which India's Constitution has posed for the people.

Sarbani Sen's book is really less concerned with these issues than it might otherwise appear. For her, India is a case study of popular sovereignty

26. Id., Article 43 A.
27. Id., Article 48 A.
28. Id., Article 51 A.
29. Id., Article 38.
30. Id., Article 48.
31. Id., Article 21.
32. Id., Article 31.
33. Id., Articles 352-360.

as viewed through American lenses. Americans have long been troubled about issues of popular sovereignty. Notionally, they would like to believe in and strive towards a people's Constitution which depicts the true will of the people. But, they are also committed to the present constitutional structure which supports power structures which are alien to, and which dominate the people. America's question for Republicanism must be taken with a pinch of salt. According to Sen: "A historically, classical republicanism believed in direct exercise of sovereign authority by the people and viewed representation in the government as a necessary evil."[34] As she rightly puts it, true Republican political systems of governance were supposed to be small in their demographic and territorial size. Rousseau imagined small manageable democracies in and through which people could express their will. But he also believed in a mythical "general will" of the people, which would articulate the aspiration of the people, even if this "general will" was more than, and distinct from the sum of the will of the people. The "general will" was effectively what the rulers said it was. The road from Rousseau to Hegel to Fascism was clear.[35] The English were more prosaic and content with a doctrine of sovereignty through which the sovereign was entitled to declare the validity of his laws and obedience to his authority.[36]

III.

Did American Republicanism provide a better answer? The answer is probably not. They saw governance in terms of interests combined with the bluff and bluster of Uncle Sam draped in the American flag. Native Americans and Negroes were non-people to be slaughtered and exploited. Republican solutions were for white folk -mostly males. But Sarbani Sen is interested in the more sophisticated theories of republicanism as seen in the intellectual discourse of the writings of some American writers. Delhi was to be studied through the insights of Yale and Harvard. And why not? We are therefore made to traverse the road of republicanism as perceived by Frank Michelman[37] who is paraphrased as espousing a republicanism based on checks, balances and participation:

> "Modern republicans understand that the private spheres of both rights and institutional arrangements are the outcome of a

34. Sarbani Sen, supra n. 5, at p. 6.
35. For a piquant account of Rousseau see Paul Johnson, 'Jean Jacques Rousseau: An Interesting Madman', in Paul Johnson, *Intellectuals* (New York, Harper and Row Publishers, 1988); see further generally Karl R. Popper: *The Open Society and its Enemies* (London, Routledge and Kegan Paul, 1945).
36. This is in the tradition of John Austin; see John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, (H.L.A. Hart ed., Weidenfeld and Nicholson, 1954); see also Benthan, *Of Law in General*, (H.L.A. Hart ed., The Athlone Press, 1970).
37. See Frank Michelman, 'Foreword: Traces of Self-government', (1986) 100 Harv. L. Rev. 4.

> well-functioning deliberative process involving the exercise of popular sovereign authority, and they view this fact as a reason for preservation of constraints on government. Moreover, they are fearful of the exercise of political power by representative and agents and they impose numerous constraints on the operation of the public sphere. They believe that political institutions had to promote discussion and debate among the citizenry, and law-making could not involve 'deals' or bargains among self-interested private groups. Social disputes could be mediated through deliberative politics in ways that are generally acceptable. They favour judicial review designed to promote political deliberation and invalidate laws when deliberation has not occurred.....(T)he ideal of positive freedom, that is, of the people giving the law to themselves, could be exemplified through a jurisgenerative model of open, empathetic, undominated dialogue within legislatures and courts, with the formal participants conceiving themselves as parties to a broader dialogue representing the citizenry as a whole, both in their particularity as well as in generality. Legislatures and courts could then give laws that an empathetic public dialogue would produce – the law that each of us would give to ourselves. In his view, law needed to issue from a process having a 'jurisgenerative' quality – one that would confer upon its law – like issue the character of law binding upon all as self-given."[38]

The key words appear to be "open, emphatic, non-dominated dialogue among non-dominated citizens conceived of as equals.[39]

From Michelman, we are taken to Sunstien,[40] who is elaborated as saying:

> "...(I)t was improbable that the citizenry would remain consistently virtuous enough to achieve the common good through popular political action. The challenge was to economise on virtue by (i) structures designed so that 'ambition could counteract ambition', (ii) institutions such as the senate and the judiciary, in which enlightened officials would be relatively insulated from crass political pressures and, retaining their virtue, might reason towards the common good. The court should intervene to correct the democratic process when it

38. Sarbani Sen, supra n. 5, at pp. 7-8.
39. Id., at p. 7.
40. See Cass Sunstein, 'Interest Groups in American Public Law', (1985) 38 Stan. L. Rev. 29-87.

> believed that the legislature had departed from the rational deliberative ideal, or when the judges believed that they had some special capacity for deliberating rationally about a particular issue that major political institutions lacked."[41]

Curiously, in this conception of republicanism the courts can "correct democratic process when...the legislations...depar(t)...from the rational deliberatively ideal".[42] Thus, it would appear that in this view a Republicanism based on majoritarian democracy would yield to a rationality of aims. This drifts us across to Habermas'[43] fascinating ideas on the need for constant interactive discourse within and without government. Thus, both society and governance are on going processes where thinking and discourse should not be permitted to be trapped along dominant or authoritative lines, but should become part of a continuing critical discourse. Critical theory takes us in the direction of post-modernism with greater modesty than the latter. The same structure of governance may remain, but critical discourse can change its functioning under conditions where a deliberative democracy, will inform the working of the Rule of Law and the constitutional machinery, which are internally related.[44]

From Habermas we move to Bruce Ackerman's[45] framework.[46] This could hardly be avoided since Ackerman is Sen's guru, mentor and thesis advisor without whose "support and advice developing this framework for analysing the founding and transformation of the Indian Constitution would not have been possible".[47] In Ackerman's vision, popular sovereignty has always been dormant but can surface to assert itself. We are invited to a "dualist two track system of democratic law making" in the Constitution. We are advised:

> "Unlike the monists, the dualist will have no trouble supporting the idea that right can trump the conclusions of normal democratic politics. But while for the dualist, the constitutional protection of rights depend on their prior democratic affirmation on a higher law-making tack, the priority of the foundationalist is different. For them the Constitution is first and foremost, concerned with the protection of rights. It is only after these

41. Sarbani Sen, supra n. 5, at p. 8.
42. Id., at p. 8.
43. See Jurgen Habermas, *Between Facts and Norms- Contributions to a Discourse Theory of Law and Democracy* (William Rehg translator, Cambridge, MIT Press, 1996).
44. Sarbani Sen, supra n. 5, at p. 11.
45. See generally Bruce Ackerman, *We, The People*, Vol. 1, *Foundations* and Vol. 2, *Transformations* (Cambridge, The Belknap Press of Harvard University Press, 1991).
46. Sarbani Sen, supra n. 5, at p. 14.
47. Id., Acknowledgments, at p. vii.

> constraints have been satisfied that the people are authorised to exercise their power. For the dualist, there is no constitutional entrenchment of the rights clauses that prevents them from being changed through a genuine exercise of sovereign power by the people at moments of constitutional politics."[48]

Is this not the standard form distinction between 'law making' and 'Constitutional amendments'? By this time, if we feel – to borrow a phrase from Moliere – that we are being taught that prose is prose, we should not be too surprised. But how do we apply this to India which has amended its Constitution 93 times? Are these Constitutional amendments celebrations of democracy or its subversion? But before we have time to think of this, we are introduced to Waldron's[49] 'levelling premise' which:

> "(M)akes no such distinction between 'normal' and 'constitutional' politics. His is a 'levelling' premise – the people have the right to participate in all aspects of democratic governance of their community. This right to democratic participation is a right to participate on equal terms in decisions on issues of high principles, and not just interstitial matters of social/economic policy. Thus for Waldron, the people have a right to decide on both matters of political principle and procedure.
>
> Popular participation in politics meant that each individual claimed the right to play his part along with an equal part played by all other individual in the governance of the society. As a right bearer an individual can demand that his voice be heard and that it count in decision making."[50]

IV.

Apparently we are now equipped to take our journey into the foundations of popular sovereignty in modern India. But not quite. There are Indian authors to contend with. They run off the bat more easily and are slotted into their respective categories.[51] Sen criticizes Granville Austin's view of the Constitution as a "seamless web"[52] and responds that in her view

48. Id., at p. 17
49. See Jeremy Waldron, *Law and Disagreement* (Oxford, Clarendon Press, 1999)
50. Sarbani Sen, supra n. 5, at p. 19.
51. Id., at pp. 31-35; Sen talks of the following among others as the representatives of the elitist/ incrementalist model in Indian Constitutionalism: H.M. Seervai, 1 *Constitutional Law of India* (Bombay, N.M. Tripathi Ltd., 1983); M.C. Setalvad, *Indian Constitution 1950-1965* (Bombay, Bombay University Press, 1967); P.K. Tripathi, on the other hand, held the view that the Constitution was an ahistorical grundnorm. See generally P.K. Tripathi, 'Rule of Law and the Frontiers of Judicail Activism', (1975) 17 J.I.L.I. 17-36.
52. Sarbani Sen, supra n. 5, at p. 31.

the Indian Constitutional "tradition is better characterized as a service of transformations that have broken with past regimes." Would Granville disagree? I rather doubt it. Then, there are references to Kothari's unmasking of elitism[53] and the influence of an incremental British Constitutionalism. Sen's ideas are allegedly radically different:

> "Thus in my view, strategies of resistance and mass mobilization developed by the nationalist leaders could become a genuine popular movement by cultivating attitudes of inclusive participation and non-violence, rather than being 'controlled' by elite dominion to prevent their degeneration into violence. The political leadership challenged the colonial regime by theorizing on abstract principles of government, and initiated popular engagement in considering these issues."[54]

Sen believes:

> "My framework differs from the elitist/incrementalist model in that it recognizes the existence and value of revolutionary constitutional politics as a part of the Indian constitutional tradition, and as the primary mode of political change which led to the founding, and subsequent constitutional transformations."[55]

But, is the end result no more than a mere description of constitutional supremacy, separation of powers, the rule of law, bill of rights and judicial review?

> "The best fit among various interpretive theories is in my view the one which sees the major themes of the text-the supremacy of the constitutional text, judicial review, and special track for constitutional law-making, the system of separation of powers and federal division of powers, or the fundamental rights of citizens-as an expression by the framers of the primacy of the idea of popular sovereign power as a basis of new polity."[56]

No! There is more. The present is to be connected to the past to sustain the future. For, popular sovereignty can only be understood in the context of distinctiveness of the Indian political experience because:

> "The Indian leaders followed the American revolutionary prototype in affirming the independent value of politics, and

53. Id., at p. 33.
54. Id.
55. Id., at p. 32.
56. Id., at p. 36.

> valourizing the act of popular collective redefinition that involved a break from the colonial past and the creation of a new polity. The 'people' can be defined as those engaged in the act of creating a new political identity."[57]

Here, there is the link with America and Sen's gurus at Yale. We are, therefore, invited to travel a journey into the Indian revolution whose language of discourse was, according to Sen, developed indigenously. Sen reminds us that the Congress and Gandhi did not emulate British politics, but exposed how the colonial regime supported its own vested interests, stifled consensus and created divide and rule.[58] Perhaps, so far there is nothing ventured, nothing new. Her view of the Constituent Assembly is rosier than even Granville Austin's *The Indian Constitution: The Cornerstone of the Nation (1966).*[59] With this, we travel back into history to find roots for Sen's insights, approach or theory – whatever it may be.

V.

For those starved of a potted history of the Indian freedom movement, constitutional politics during the Raj,[60] the work of the Constitution Assembly as a continuation of the revolutionary exercise of popular sovereign power[61] and the three themes of the "need for limited government,"[62] the supremacy of the Constitutional text,[63] and the "securing (of) rights of equal participation in the political process,"[64] Sen's narrative jump starts the discussions from many angles to support her view that, amidst dissent, the theme of popular sovereignty does not desert Indian transformations into constitutional change.

According to this potted history, the Moderates of the late 19th and early 20th century were clear that the source of sovereign power was the British Crown in Parliament. But, British sovereignty was a legal fact and therefore, alien. Sen confuses the method of transition with the aims of the Moderates. In 1867, Canada became an independent dominion. This was also true for Australia in 1900. The question was: would the jewel in the Crown follow suit to self-governance? If the Extremists were willing to further their agitation outside the scope of British 'law and order' and 'breach of peace'[65] political economy, the Moderates sought to change the system incrementally from within. The end of self-governance was common to both.

57. Id., at p. 38.
58. Id., at p. 34.
59. Granville Austin, supra n. 2.
60. Sarbani Sen, supra n. 5, at pp. 43-83.
61. Id., at pp. 90-110.
62. Id., at p. 115.
63. Id., at pp. 138-180.
64. Id., at pp. 150-160.
65. Id., at p. 50.

No doubt, for the Moderates, the form of self government was dominion status within the Empire, which is what India became between 1947 and 1950. Dominion status was only a form through which claims of "independence" and "self-governance" were expressed. There were shifts in the methods of achieving independence through both "constitutional" and "unconstitutional" methods– with "violent" methods gathering some ascendancy. To my mind, the "Gandhian revolution" is one which we will not fully understand for years to come. The masses were drawn into *satyagraha* though dramatic events as if they owned the freedom movement. To that extent it could be said that the "...Gandhian concept of Swaraj was a distinct departure from the assumptions of the British Constitution (and)...built on a revolutionary insight into the inadequacies of legislative representation."[66] But what happened to this insight? Influenced though he was by Gandhi, did Nehru really accept this insight?[67] As a strategy, Nehru "knew that the British regime could not be wrecked by action inside the Legislature's only... (but by) mass action outside."[68] But as a future pattern of governance, Nehru followed Anglo-American patterns of Constitutionalism – with a Soviet perspective thrown in for good measure. This was Nehru's triumph and Gandhi's remorse.

We can pick up stray sentences from here and there to explain anything. I will assume that Gandhi said, as quoted by Sen, "I regard the Constituent Assembly as the substitute as satyagraha. It is constructive satyagraha."[69] But, in fact, he turned his back to the Constituent Assembly. He did not participate in its proceedings and showed active disinterest in it. His own Constitution, if there was one, was structurally different. It was rejected. Popular sovereignty and people's rule was sacrificed to 'modern' concepts of periodic elections with both vertical and horizontal checks and balances.

VI.

What India's Constituent Assembly did was a 'miracle'. They brought together a consensus through compromise in ways that were principled and effective. India's Constitution is one of few constitutions of the developing world that has survived, while so many others have fallen by the wayside. But, to say that the case for popular sovereignty ran through the discussions of the Constituent Assembly is not really correct. The last debates in the Constituent Assembly show the dissatisfaction. The 'Drafting' Committee

66. Id., at p. 70.
67. Though Gandhi did not have a blue print for the Constitution, a framework may be found in S. Agarwal, *Gandhian Constitution for Free India* (Allahabad, Kitabistan, 1946).
68. Sarbani Sen, supra n. 5, at p. 75.
69. Id., at p. 69.

was referred to as the 'drifting' Committee.[70] The lack of dedication to Hindu deities was regretted as also the absence of Soviet influences. I have described the remonstrations in the Constituent Assembly about the Constitution as follows:

> "A nice innovation allowed further amendments to the Constitution between the second and third reading. If amendments can express remorse, frustration, concern, and anger, this was the last chance to do so. Since the Preamble was the home of declaratory statements, some interventions took place at the end of the second reading with members moving amendments for India to be recognised as a 'federal' or 'independent' republic or 'Union of Indian Socialists Republic called UISR on the lines of USSR'. Another member wanted an invocation to God to be asked amidst laughter: 'Why not Goddess'. Actually voted upon with a counted division, it was followed by other amendments 'in the name of almighty God' or 'by the grace of Parmeshwar' and 'Gandhi'. The Socialists decided to ask for a declaration promising to secure livelihood, compulsory education, free medical aid and compulsory military training to be asked contemptuously by a senior member: 'What about a camel and motor cycle'. This amendment did not succeed, nor the one seeking the dropping of the word 'sovereign' and claim the sovereignty of the people.
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> This interlude is important only to demonstrate that we might in retrospect consider trivia as crucial as articulate concern to various members and lobbies. The penultimate stage also revealed amendments in the detention and martial law provisions insofar as they affected the Fundamental Rights and Directive Principles chapters. The third reading began on 17 November 1949 with little time to spare, since almost 71 members wanted to speak. At least one member was content to accept the Constitution with great reservations, while another subjected it to drafting scrutiny to conclude that 'the drafting is very bad'. It was not 'entirely satisfactory...too bulky, [with] too many articles and also many details that could have been left out. It 'deviated from the ideals [the Assembly] had' and 'does not reflect a true picture of India', with no 'reference to the position of our ancient culture'. What people 'wanted was the music of

70. See B.R. Ambedkar's speech referring to N. Ahmed's calling the 'Drafting Committee' a 'drifting committee'; XI Constituent Assembly Debates, 973.

> the veena or sitar', what they got was 'the music of English music band'. It was a 'fantastic mixture', 'a scissor and paste' job 'that does not' 'come up to our standards', embodying selections 'with all the defects of a compromise'. To others, this was not the case, it was 'a happy compromise', which accorded with both the socialist and Hindu Mahasabha drafts, the product of the most unique incidents in the history of the world – a democratic non-violent revolution, and, indeed, 'the child of the revolution' – amidst protests that it was 'not a revolutionary document'. To a prominent member, the Constitution succeeded because it 'enables the people of India to do anything they like'. At any rate, this was 'not the stage, nor the time' to deny various provisions of the Constitution. The discussion was a ritual in which many wanted to participate to respect he historicity of the situation. But for the unbeliever, it was another kind of ritual that was captured by the Persian saying Marg-e-ambush Jasnane dard, which means even death en masse is a festivity in itself. Therefore, the assembly members had joined a 'death squad'."[71]

We learn much from the Constituent Assembly Debates and will always do so. But, we know that the Constituent Assembly reverted back to the British model of Constitutionalism with the Bill of Rights and other changes thrown in. The framework of the Indian Constitution is identical to that of the Government of India Act, 1935, which in turn was modelled on the Canadian Act of 1867 and the Australian Act of 1900. Popular sovereignty was to be expressed through elections, a weakened Bill of Rights, and a not-too-difficult process to amend the Constitution. The people had no role in the future amendment process. A state could be wiped out and bifurcated through a simple Parliamentary majority. This has happened and continues to happen. There was no scope for referenda. The provision of local government was a wish not a reality. It was made more real by the 73rd and 74th Amendments in 1992. The judiciary was not to be trusted too much. That is why the Constituent Assembly ensured that an "any process" clause replaced the "due process" clause. Concessions of various kinds were made – even to a point of allowing Sikhs to wear a kirpan as a protected fundamental right.[72] Special tribal areas were protected as they were in the Act of 1935. Communal electorates were abolished, but special representation given to the Scheduled Castes and Scheduled Tribes (SC and ST) and Anglo Indians. The Constitution was imbued with a sense of purpose for the future.

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71. R. Dhavan, supra n. 4.
72. Constitution of India, Article 25.

Nehru's plans for the future were to ensure periodic elections. He humbled the judiciary through constitutional amendments, but he did not humiliate them – as Mrs. Indira Gandhi did during the Emergency. He was an elected dictator – but could not be termed one precisely because he encouraged discourse in the press, in Parliament and through other democratic means. He punished the Kerala government in 1959 for standing up to his daughter Indira, who was then the President of the Congress. But he steered India towards the idea of a discourse based democracy. He lost the India-China war and was dispirited. His daughter's ascension was through the elimination of rivals by a Congress split in 1969. This had a medieval air to it. Her Bangladesh victory with the majorities that followed made her forget the electoral signs of the '60s when non-Congress coalitions emerged in many states. She stamped them out by an injudicious use of President's rule to impose central Emergency rule on State after State after State – until she declared a total dictatorship from 1975-1977. This proved to be her undoing at the hustings.[73] Curiously, Sen has little to say of this Emergency or these tactics which were wholly subversive of democracy.

What has eventually humbled politicians are two simultaneous developments – one which is traceable to democracy, and the other which is anti-democratic. The democratic restraint arose with the rise of coalition governments in the Centre from 1989 and in the States from 1967. The anti-democratic restraint came from an unelected judiciary, which declared for itself the custodianship of the Rule of Law (including fundamental rights) to assume phenomenal powers. This combination of "democracy" and "the Rule of Law" is the foundation of Constitutional governance in India. The Parliament has become the custodian of "democracy" and the judiciary has successfully claimed the custodianship of "the Rule of Law" in its expanded sense. It is these experiments that are taking Indian governance, which is riddled with corruption, state violence, money and muscle, into the 21st century. True, there have been changes in local government. No Indian government will suspend periodic elections. But "popular sovereignty" as an expression of the people is sinking into new expressions of fundamentalism. The rise of Shiv Sena and the Sangh Parivar and the destruction of mosques, books and paintings, and social censorship claim to be by and for the people. Ordinary people rule at the hustings. That generates its own politics even to the point of reorienting the affirmative action programme. The world's largest and most diverse democracy is on the move – but slowly and shufflingly displacing the many faces of power, not all of whom are a testimony to democracy. The fact

73. Inder Malhotra, *Indira Gandhi: A Personal and Political Biography* (Philadelphia, Coronet Books, 1991).

that the Constitution had been amended 93 times is not a tribute to the people exercising their reserve power to change their constitutional destiny. Most changes – other than those that were routine – have been forced by elite politics without public support or participation.

India will overcome; but to argue that a spirit of popular sovereignty runs through its democratic working must be treated as declaring half a gesture and stating half the challenge. What India has is a strong activist movement which is forever looking for niches to assert itself and devise instruments of empowerment to strengthen their endeavours.

VII.

All knowledge is good. Perhaps Yankee knowledge is better. But Sen's book creates illusions. Books are often written to cement bonds. Churchill's "History of English Speaking Peoples"[74] which won him the Nobel Prize for literature was to celebrate his bond with America, which was an ally during the Second World War. Sen's book celebrates the link between American and Indian constitutional democracies to force comparisons. Comparative work is often imbued with emotional undertones. In the fifties and sixties, there was a lot of comparative work on India which sought to look at India through American eyes.[75] This included excellent American studies such as those of Chris Merrillat on the land reforms[76] and Marc Galanter's work on reservations[77]. Many have called these studies "legal imperialism"[78] by "scholars in self estrangement"[79]. Sen's work takes us back a decade or two. It is packaged more neatly. It is a tribute to Indo-US friendship.

India does not have a peoples' based Constitution. It never really devised one. But the Constitution has excited all kinds of responsible and irresponsible social politics. I have argued that the Constitution is a site of

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74. W. Churchill, *History of the English Speaking Peoples'*(New York, Dodd Mead, 1956).
75. See R. Dhavan, 'Borrowed Ideas: On the Impact of American Scholarship on Indian Law', (1985) 33 Am. J. Comp. L. 505-526.
76. See H.C.L. Merillat, *Land and the Constitution* (Bombay, N.M. Tripathi, 1970).
77. See Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (California, University of California Press, 1984).
78. See J.A. Gardiner, *Legal Imperialism: American Lawyer and Foreign Aid in Latin America* (Madison, University of Wisconsin Press, June 1981).
79. D. Trubeck & M. Galanter, 'Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States' (1974) Wis. L. Rev. 1062-1102. Note reply by R. Seidman, 'The Lessons of Self-Estrangement: On the Methodology of Law and Development', (1978) 1 Research in Law and Sociology 1; and the further reply by D. Trubeck and M. Galanter, 'Scholars in the Fund House; A Reply to Professor Seidman', (1978) 1 Research in Law and Sociology 31. See also R. Dhavan, 'Law as Concern: Reflecting on Law and Development' in Y. Vyas, K. Kibwana, O. Owiti, S. Wanjala (ed.) *Law and Development in the Third World* (Nairobi, University of Nairobi, 1994).

struggle.[80] There is a difference between viewing the Constitution through the lenses of popular sovereignty and treating it as a site of struggle. The concept of popular sovereignty is a myth. The view that law and the Constitution are possible sites of struggle is more realistic. The people have to learn to use the various sites of struggle to achieve their diverse end through a never ending discourse consolidated by action. That is why the promise of the Constitution is so precarious. That is also the reason why the magic of constitutional change can be so exciting.

80. See R. Dhavan, 'The Constitution as the Situs of Struggle: India's Constitution Forty Years On' in L.W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (Seattle, University of Washington Press, 1992); see also R. Dhavan: 'Law as Struggle: Public Interest Law in India', (1994) 36 J.I.L.I. 302-338.