

FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

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Session V Deferring Controversial Issues

Deferral of issues under the Indian Constitution

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What significant issues were deferred and why?

A number of issues were deferred at the time of the framing of the Indian Constitution. I will focus on three of these: cow slaughter, the uniform civil code, and labour rights. Each of these issues had a contentious history in the years leading up to the framing of the Constitution.

The prohibition of cow slaughter was an important plank of cultural Hindu nationalism, and prominent figures in the national movement (many of whom were members of the Indian National Congress) had often issued calls for the banning of cow slaughter. In the Constituent Assembly, a demand was raised that the prohibition of cow slaughter be written into the Constitution. This, however, was strongly opposed on the basis that religious sentiments should not be written into a secular Constitution in this manner. It was also opposed because it was perceived to be an instance of a religious majority (Hindus) imposing their will on a minority (Muslims).

Ever since the late-eighteenth century, the colonial regime had adopted a policy of non-interference with “personal laws” – that is, laws governing marriage, inheritance, succession, and so on. Personal laws were supposed to be the domain of separate communities, with the courts acting only as impartial enforcers. By the middle of the 20th century, primarily because of the adjudicative modes applied by the colonial courts, the diversity of these personal laws had been severely constrained, and communities rigidified into monolithic religious blocs such as “Hindus” and “Muslims”. This was accompanied by a push for a “uniform civil code”, which was justified on three main grounds: first, to achieve national unity and integration; secondly, to keep religion out of public life; and thirdly, to end a number of discriminatory practices that were primarily disadvantageous towards women. During the debates in the Constituent Assembly, it was strongly urged that the Constitution guarantee a uniform civil code as an enforceable right. However, this proposal was opposed on the basis that personal laws formed the cornerstone of community identity, and to force communities into a uniform, secular system would be to erode their internal autonomy as well as their identity.

Organised labour in India began to make its voice heard at around the turn of the 20th century. Parallel to the national movement, the 1920s and 1930s witnessed a series of labour strikes, and the formulation of the first set of labour codes, by the colonial government. The impact of the nascent labour movement on the nationalist struggle is evidenced by the fact that in 1931, the Indian National Congress passed a draft “Bill of Rights”, which was meant to be the basis of a future Constitution, which not only guaranteed classic civil and political rights such as the right to freedom of speech and expression, but also a set of labour rights including the right to work, equal pay for equal work, etc. In fact, B.R. Ambedkar, one of the principal drafters of the Constitution, was also a labour organizer, and founded the “Independent Labour Party” to fight elections under the colonial regime. The 1931 Bill of Rights was thus a clear precedent for incorporating labour rights into the Indian Constitution. However, labour rights were dropped from the draft of the Constitution’s bill of rights; although there was no extensive debate on the issue, some members of the Constituent Assembly did make the classic argument against the enforceability of socio-economic rights, stating that India did not yet have the financial capacity to adequately guarantee their existence and enforcement.

Consequently, because each of these issues – and especially the first two – split the Constituent Assembly deeply, it was decided not to incorporate them into the Constitution in the form of legally enforceable rights or prohibitions.

What drafting or other techniques were used to defer the issue?

The principal drafting technique was the introduction of a separate section of the Constitution, titled “Directive Principles of State Policy” (Part IV), which immediately followed the Fundamental Rights chapter (Part III). The concept of Directive Principles of State Policy was borrowed from the Irish Constitution’s “Directive Principles of Social Policy.” Unlike fundamental rights, which were enforceable in a court of law, and violations of which would result in the invalidation of statutes or other forms of State action, Directive Principles expressly could “not be enforceable by any court.” (Article 37, Constitution of India) The principal drafter of the Constitution, B.R. Ambedkar, was quite clear that the wording of Article 37 made it clear that the Directive Principles were statements of political principles, the breach of which could be remedied only at “the ballot box”, and not in court.

Labour rights (Articles 38 – 42), the uniform civil code (Article 44), and the prohibition of cow slaughter (Article 48) were all placed in the Directive Principles Chapter. In effect, therefore, these issues were deferred by refusing to frame them as constitutional principles and, instead, leave them up for political resolution in the years to come.

In addition, as far as cow slaughter went, a further gloss was added. Article 48 of the Constitution provides that “the State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.” In other words, the issue of prohibiting cow slaughter was framed not as a religious issue (because the Constitution was meant to be secular), but as an economic issue. During the Constituent Assembly Debates, the duplicitous character of this framing was pointed out both by proponents of the ban, as well as its opponents, who argued that if indeed a majority was in favour of prohibition, it should make it clear that the basis was religion.

How was the decision to defer made and by who?

The initial drafts of the Fundamental Rights Chapter and the Directive Principles Chapter were written by Constitutional Sub-Committees. These drafts were then debated by the Constituent Assembly, where any person could move an amendment. At the conclusion of the debate, each amendment, as well as the final draft, was put to a straight up-down vote. There were two complete rounds of debates before the wording of the Constitution was finalized.

Given the up-down nature of the final vote, perhaps it is most accurate to attribute deferral to the Constituent Assembly as a whole.

Did deferral assist the general Constitution building process? What were seen to be the benefits and risks of deferral?

The Constitution-making process had to face a number of problems. The most serious among these was the refusal of the Muslim League to engage with the process. The leader of the Muslim League, Jinnah, had raised a demand for a separate State. Midway through the tenure of the Constituent Assembly, India attained Independence (15th August 1947), and was split into two countries – India and Pakistan. With the non-engagement of the Muslim League, the Assembly faced an admitted crisis of legitimacy, especially on the issue of whether the interests of religious minorities would be adequately represented in the constitution-making process.

In addition, the Indian National Congress – the dominant political party and the spearhead of the nationalist movement for political freedom – had always advertised itself as a “broad tent”, speaking for the nation as a whole, and with room for many strands of thought. This meant that within the Congress (and this translated to the Constituent Assembly as well), there were conflicting views on a number of issues. One of the sharpest cleavages was between cultural nationalists and secularists, and this took the form of disagreements over the reform of personal laws as well as issues such as cow slaughter.

For this reason, it came to be believed by many of the prominent constitutional framers that there existed irresolvable differences within the Constituent Assembly, which simply could not be dealt with within that forum. Although there were debates on personal laws and cow slaughter (and on a number of other issues as well, such as language), these debates were themselves inconclusive, and it was clear that an up-down vote on issues as divisive and contentious as these would have threatened the harmonious working of the Constitution.

However, it is difficult to accurately answer the question: “what were seen to be the benefits and risks of deferral”, because the Constitutional framers never admitted that they were deferring anything. The Directive Principles of State Policy were publicly proclaimed to be every bit as important as Fundamental Rights, with the only difference being that they could not be enforced in a Court. The text of Article 37 itself says that the Directive Principles are “fundamental in the governance of the country”, and in the Constituent Assembly, Ambedkar stated that no government could afford to ignore them while making laws, because it would have to answer to the people.

What ultimately happened in relation to the issue/s deferred?

Each of the deferred issues remains contentious. Soon after the Constitution came into force, many states (provinces) in northern India passed laws banning cattle slaughter. The constitutionality of these laws was challenged on multiple grounds, but the main ground of attack was that they violated butchers' fundamentally guaranteed right to trade, and destroyed their livelihood. However, the bans were upheld almost in totality by the Supreme Court (with the exception that "useless" cattle – i.e., cattle that were suitable neither for milch purposes, nor for draught). The Court went into detailed analysis about how cattle were useful for the economy, and that therefore, bans were "reasonable restrictions" upon the freedom of trade, and in the public interest. In 2005, the Court went even further, and upheld a complete ban on cow slaughter on the basis that even "useless" cattle produced cow dung and cow urine, which was economically important. There is something particularly surreal about reading Supreme Court judgments discussing the economic value of cow dung and cow urine; and this stems from the simple fact that because of the constitutional text, the real reason for cattle slaughter bans – i.e., religious sentiments – cannot be invoked in defence of such laws, which, in turn, cannot be assessed by the Courts on their own terms. This lends a curious sense of duplicity to both the arguments and the judgments, which replicates the duplicity of the Constituent Assembly.¹

The issue of personal laws and a Uniform Civil Code has been even more fraught. In the decade after the Constitution came into force – the 1950s – the ruling Congress Party codified Hindu Law and brought about far-reaching reforms. There have been incremental reforms – in the direction of gender justice – in the succeeding decades. However, for a number of complex reasons, there has been no similar reform in Muslim Personal Law, and this has become a politically divisive issue. The Court's own rulings have exacerbated the problem: in 1952, the High Court of Bombay held that uncodified personal laws were exempt from constitutional scrutiny, a position that the Supreme Court subsequently affirmed. Most recently, the Supreme Court struck down instantaneous "triple talaq" as a mode of divorce under Muslim personal law; however, not only did it do so by a wafer-thin majority (3:2), but the bench was itself split three ways, with two judges out of five holding that not only could the Court not assess the constitutionality of personal laws, but also that personal laws themselves had the status of a "fundamental right", being protected under the Constitution's religious freedom clause.

Labour rights faced a slightly different problem. After they were placed in the Directive Principles Chapter, the Indian parliament passed a series of statutory enactments, creating an extensive, patchwork labour code. In the years after Independence, the Supreme Court has been called upon to interpret the provisions of these statutes, and has, by and large – to simplify the matter – interpreted them in the context of the dominant economic philosophy at the time (from Fabian socialism in the 1960s, to neoliberal economics in the 1990s). In other words, despite the fact that the Directive Principles were meant to be "fundamental to governance", the Court has not anchored its interpretation of labour rights within the framework principles set out in Articles 38 – 42.

¹ Disclosure: I am presently involved in a case challenging a cattle slaughter ban before the Supreme Court.

What insights can be gained from India's experience with deferral, in relation to the kinds of issues that can effectively be deferred and the conditions in which deferral occurs?

It is probably yet too early to come to firm conclusions on this point. Perhaps what we can say is this: if it was the framers' belief that certain issues needed to be deferred because they were too divisive to decide one way or the other at that moment, and could be resolved at a future date when the divisions were themselves less intense, then that belief has not been borne out in practice. There seem to be two reasons for this: first, that the framers were mistaken in their assumption that the conflicts would soften in future years; but more relevant for our purposes, the framers' mode of deferral itself was to attempt an untidy compromise: the creation of the Directive Principles of State Policy was a *modus vivendi*, a midway point between including a principle as a fundamental right, and excluding it from the Constitution altogether. This, therefore, ended up being not so much a deferral as a method that kept the conflict festering; and therefore, perhaps expectedly, through various interpretive formulas adopted by the Courts, the issues have travelled back from the political domain into the constitutional domain.

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