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## The Sophistry of Calls to Replace the Constitution

By: Rohin Bhatt

*India's Constitution is more robust than the politics of those who call for its replacement.*

On the eve of Independence Day this year, Bibek Debroy wrote an [article](#) for *LiveMint* calling for a new Constitution to bring forth *Amrit Kaal* (or is it *Kartavya Kaal* now)?

Usually, such a piece would not warrant a response, and one would let it live through the moment of its own obsolescence. However, this was coming from the chairman of the Economic Advisory Council (EAC) to the prime minister and cannot be dismissed as bluster. (On 17 August, the EAC put out a [tweet](#) that Debroy's views were his own and not endorsed by the government.)

But a few questions need to be raised at this juncture: Why did the *LiveMint* article not mention that Debroy was expressing his personal views, and not his views as the chairman of the EAC?

Why did the tweet come only after widespread outrage by the civil society and opposition parties?

The underlying argument of Debroy in the *LiveMint* piece seems to be that the Constitution of India is a colonial vestige, and we need a new constitution for *Kartavya Kaal*. Nothing could be further from the truth.

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The legal answer to this argument is twofold: first, that the Constitution of India was created by a Constituent Assembly of Indians and it did not seek the approval of the English Parliament.

Secondly, under [Article 395](#) of the Constitution of India, the Indian Independence Act, 1947 and the Government of India Act, 1935, together with related enactments, were repealed and ceased to have effect the moment the Constitution came into force.

Politically, the Constitution was more than a mere charter of rights. It was the legal equivalent of throwing off the colonial yoke. The Constituent Assembly was not representative of the populace, yet it was diverse.

It had members who were Christians, Muslims, Parsis, and Sikhs. Compare it to today, when there is no Muslim Bharatiya Janata Party (BJP) member of Parliament or Union cabinet minister. There is also no Muslim chief minister or member of the legislative assembly of the BJP in the states in which the party is in power.

Politically too, the Constituent Assembly was diverse. There were members such as K.T. Shah, who was a socialist, and there were members such as Syama Prasad Mookerjee, president of the Hindu Mahasabha. There were liberals too in the assembly, such as Minoo Masani. Can we expect this diversity under the current regime?

But more importantly, the Constitution of India was adopted in 1950, after 166 days of deliberations which were held over two years and eleven months.

The drafting of the Indian Constitution was discussed extensively in the sub-committees and the plenary sessions. If one looks at Parliament today, and the way it functions, can we expect the discussions to be deliberative? God forbid, if a new Constituent Assembly were to be constituted, will it be truly representative?

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Can we expect a legal colossus like Ambedkar to be put in charge of the drafting committee? Those in power today seem to be content with washing the feet of the downtrodden after they have been urinated on, instead of strengthening the [Prevention of Atrocities Act, 1989](#). How do we trust a government that does not hide its majoritarian politics to draft a constitution with grantees of equality,

liberty, fraternity and, more importantly, secularism.

After all, as Debroy put it in his article, the new regime and its *buddhajevis* think “[w]e should go back to the drawing board and start from first principles, asking what these words in the Preamble mean now: socialist, secular, democratic, justice, liberty and equality.”

The notion of “secular” has been under attack from the BJP ever since the party’s phenomenal rise in the 1990s, as it rejects the doctrine that democracies must protect minorities as “[pseudosecularism](#)” and “[appeasement](#)”.

Incidentally, a day after Debroy’s article appeared, Prime Minister Narendra Modi [identified](#) “appeasement” as one of the three big sins India needs to get rid of.

Similarly, the word “socialist” has also been under attack by the regime as anything from calls for labour reform, unionisation and protests by workers, and farmers asking due price for their produce are branded as “[terrorist](#)” and “[naxalite](#)” by the regime and academics and theorists who demonstrate the economic inequities in the country are branded as “[urban naxalites](#)”.

But now, Debroy’s article tells us that even words like democracy, justice, equality and liberty need to be given new meanings in the Kartavya Kaal.

Yes, the Constitution borrows from the Government of India Act, 1935, as Debroy points out. The same feelings were also echoed by some members of the Constituent Assembly. Hanumanthaiah remarked: “We wanted the music of a veena or sitar, but here we have the music of an English band.” (As an aside, sitar was developed by Muslims of Central Asian origin in India, so would it also be outlawed as a sign of a “[thousand-year slavery](#)”?)

Such a view, in my opinion, is wrong.

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The Constitution had uniquely Indian features: abolition of Untouchability, universal franchise, reservation, and executive accountability to Lok Sabha, which did not exist in the Government of India Act, 1935.

It is thus, a creation of an ‘Eastminister’ Parliament, to quote the constitutional historian Harshan Kumarasingham.

Now, to the arguments that Debroy makes. Notably, not one of them is an argument that is grounded in principles of constitutional law.

He does not make a legal case for why the Constitution is not working. His argument seems to be that the average lifespan of a written constitution is 17 years. Since we have long surpassed the 17 year mark, he argues that we must change the Constitution. Is that a sufficient cause? In my humble submission, it is not.

Tom Ginsburg, one of the directors of the Comparative Constitutions Project that Debroy cites, [wrote](#) in 2014, “The adoption of constitutional review is above all, a response to domestic political incentives, rather than ideas, the demands of federalism, or diffusion pressures.”

The tone and the tenor of Debroy’s article follows this pattern.

For long, the Modi-led government has chosen to tinker with the provisions of the Constitution through spurious means. Some changes, such as [reservations](#) for the economically weaker sections, which changed the pattern of reservation to just economic criteria and upended the purpose of reservations, have been upheld by the Supreme Court, while others changes such as central control of [Delhi public services](#) and [National Judicial Appointments Commission](#) have been struck down. Yet others, like [anti-conversion laws](#), [Article 370](#), and the [certification of a bill as a money bill](#) remain pending before the court.

The basic structure doctrine has been a major roadblock in allowing the government to do as it pleases with the Constitution. We have seen a former [chief justice of India](#) and the [vice president](#) attack the basic structure in order to delegitimise it. Debroy follows in their footsteps.

Judicial review is the strongest check against the executive. Our Supreme Court is called the most powerful constitutional court in the world. Its power of judicial review, which allows it to strike down constitutional amendments, should be cherished and treasured by all constitutionalists.

Fundamentally, we are safe until the correctness of [Kesavananda Bharati vs. State of Kerala](#) itself is questioned. I fear that we are moving towards it.

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One of the questions that the 13-judge bench was faced with in *Kesavananda Bharati* was whether the Constitution of India could be repealed. Of the 13 judges, Justices Mathew and Beg said ‘probably’. Justice Y.V. Chandrachud did not answer the question. All the other ten judges said ‘no’.

Has Debroy read the judgment in its entirety before going around making claims that are legally unsound? A senior lawyer once told me, “Unless you have read the case in its entirety, you must not speak about it.” At the cost of being impertinent, I tender the same argument.

Ours is not an ordinary Constitution. It codifies the feelings of the freedom movement, in which the BJP and the Rashtriya Swayamsevak Sangh (RSS) and their predecessors did not participate.

It is Babasaheb’s Constitution. It is a Constitution that we, the people, gave unto ourselves. It is a charter of aspirations of over a billion people who currently live in India and those that have died here.

The Preamble was read out at all the protests against the Citizenship (Amendment) Act, 2019 and National Register of Citizens in 2019, where people carried a copy of the Constitution as a totem of the protests.

This is a demonstration of the trust that people repose even today in the Constitution. The government, and the constitutional functionaries who swear an oath to the Constitution must not forget it.

There is a need for a popular resistance to this governmental provocation to delegitimise the Constitution because between the vicissitude of the politics, divisions of the society, and the marginalisation of fundamental rights, the Constitution remains the last bastion of hope for *We, the People*.

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*Rohin Bhatt is a queer lawyer and a queer rights activist from India.*