

M.R.MASANI

THE CONSTITUTION

1855

twenty five years later



BANGALORE UNIVERSITY
Bangalore





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The Constitution : Twenty-five Years Later

M. R. MASANI

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Foreword

Janma Bhoomi Press Trust instituted an Endowment at the Bangalore University in 1974, to arrange a series of two lectures by prominent and distinguished persons on the subject 'Aspects of Democracy and Public Administration in India'. With this munificent donation by the Trust, particularly due to keen interest and active co-operation of Sri B. N. Gupta, it has been possible for us to arrange the endowment lectures this year. The University is fortunate that Sri M. R. Masani kindly agreed to deliver the first endowment lectures during April 3 and 4, 1975.

Sri Masani is one of our eminent leaders and intellectuals. His is a well-known name in the public life of India. As a founding father of the Indian Constitution, he is indeed well qualified to speak on the subject 'The Constitution : Twenty-five years later'. On the occasion of the year of Silver Jubilee of the Indian Constitution, the subject chosen for the endowment lectures by Sri Masani is both appropriate and significant.

The two lectures delivered by Sri Masani are educative in nature. I hope that these lectures will be read with interest and viewed in proper perspective. The University is much indebted to Sri Masani for permission to publish the lectures in the form of a book.

H. Narasimhaiah

Bangalore, April 23, 1975

The Constitution : Twenty-five Years Later

Lecture I

Introduction

The lapse of a quarter century is perhaps not a bad time for casting a glance back to the birth of our Constitution on January 26, 1950, and considering what has been happening to it since. This would be a legitimate exercise for any historian or indeed for any student of the subject. Perhaps the exercise may be even more interesting if undertaken by someone like myself who was privileged to be one of the Founding Fathers of the Republic and who played a part, albeit a modest one, in the framing of the Fundamental Law. That the picture we see today should not be an exact replica of the dreams we in the Constituent Assembly dreamt can hardly be a matter for surprise. For one thing, the period of a quarter century is long enough to bring out the strong and the weak points of a Constitution as also to confirm fears or doubts that may have been voiced at the time of its formulation. It may also provide some surprises.

The Constitution of a country, it has been said, "provides only the skeleton of the body politic. It is politics which provide the flesh and blood." The protection of a Constitution, as indeed the maintenance of freedom itself, calls for the exercise of eternal vigilance which has been well described as the price of liberty. Dr. B. R. Ambedkar, one of the architects of the Constitution, in one of his many speeches placed the onus of the successful working of the Constitution squarely on the shoulders of the people and in particular of the political leaders. "If things go wrong under the new Constitution", he said, "the

reason will not be that we had a bad Constitution. What we will have to say is that Man was vile”.

The President of the Constituent Assembly, Dr. Rajendra Prasad, also told the Assembly in 1949 : “Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it ... After all, a constitution, like a machine, is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them ... We can only hope that the country will throw up such men in abundance.”

There is a school of thought in this country which holds the view that, with the flux of time and the need for change, the provisions of our Constitution have become anachronistic. I am not one of those who hold this view. Indeed, I share with Rajaji the view that what India needs is to undo some of the numerous amendments that have been made to the Constitution and to get back to the original document in its purity. I therefore enjoyed reading the reply given to this criticism of the Constitution by Mr. N. A. Palkhivala in his book *Our Constitution-Defaced and Defiled* published earlier this year when he wrote : “In fact, it is good faith and the sense of decency and honour which have unfortunately become anachronistic in our public life today.”

As Professor S. P. Aiyar and Mr. S. V. Raju say in the Introduction to their very useful compilation on *Fundamental Rights and the Citizen* : “The Indian Constitution is the product of our struggle for independence and human dignity and it is rooted in a philosophy of freedom. It has stood the nation in good stead for two decades through exceptionally difficult years. It has the needed flexibility for growth, although minor changes may be necessary from time to time.”

Be that as it may, let us have a look at certain important aspects of the Constitution and the way in which they have

worked out. In the brief span of two talks, it would not be possible for me to deal with more than just a few of these and one must perforce therefore be selective.

In view of the widespread interest at the present time in the important subject of Electoral Reform, which in recent months has become a major topic of discussion in Parliament, the press and elsewhere, I have decided to deal with this topic in some detail. The other major topics in these talks will be : first, the Federal Structure and the exercise of States' Rights ; secondly, the position, role and authority of the President of the Union and the Governors of the States ; thirdly, the exercise of the power of dismissal of Governments and the dissolution of legislatures ; and last but not least, the issue of the Fundamental Rights of the citizen.

Federal Structure and States' Rights

The subject of the Federal Structure and States' Rights is one in which my interest dates back to my membership of the Constituent Assembly and its Committees. As it happens, I was a member of the Committee appointed on 24th January, 1947, on a motion by Rajaji to examine the scope and content of the subjects that should be allotted to the Centre, which came to be known as the Union Powers Committee. There were twelve members, with Jawaharlal Nehru as Chairman and Mr. Sarat Chandra Bose, Dr. Pattabhi Sitaramayya, Pandit Govind Ballabh Pant, Sir N. Gopalaswamy Ayyangar, and Dr. K. M. Munshi among my fellow members.

It was in this Committee that perhaps for the very first time an issue which was later to develop into one of the major dividing lines in Indian politics came up in a small way. I recall a significant passage at arms that took place between Pandit Nehru, our Chairman, and myself when Jawaharlal Nehru asked for the expression of members' views as to which

list planning should be placed in. I promptly answered that it should be in the States' List. Nehru glared at me and said he entirely disagreed and that it should be placed in the Union List. This was to be the first of many debates he and I were to have about the nature of Planning since he believed in Soviet style comprehensive planning and I stood for the Gandhian concept of a decentralised economy. Naturally, Jawaharlal won and the subject of "Economic and Social Planning" was placed in the Concurrent List covering matters in regard to which both the Union and the States could legislate. The Report of our Committee observed: "We have included planning in the above list for the reason that although authority may rest in respect of different subjects with the units, it is obviously in their interest to have a co-ordinating machinery to assist them".

The States' List includes three important entries, namely, Industry, Trade and Commerce, and the production, supply and distribution of goods. On the other hand, the Union List included "industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war" and "industries the control of which by the Union if declared by Parliament by law to be expedient in the public interest."

The way in which this allocation of subjects has worked has unfortunately upset the balance of the Federal Constitution. Not only did Parliament enact the Industries (Development and Regulation) Act in 1951 specifying the list of industries which should be controlled by the Centre but in the course of time more and more industries were added to the list and, for all practical purposes, the subject of Industries has been virtually shifted from the States List to the Union List. The Annual Survey of Industries shows that, in so far as undertakings with a fixed capital of Rs. 2.5 million and over are concerned, the Centre has now asserted its control over as many as ninety-three per cent of these industries as computed by the value of their output. It has been sarcastically pointed out that Parliament

has used its power to hold that the public interest demands that it should control the production of articles of such vital and strategic importance as razor blades, gum, shoes, cosmetics, soaps and other toilet requisites! Can there be any doubt that a fraud has been perpetrated on the Constitution?

The existence in Delhi of full-fledged Ministries for Education, Agriculture, Industry, Labour and Home Affairs despite these subjects being in the States List, has over the years contributed to the erosion of the autonomy of the States and made them little more than glorified Municipalities or Local District Boards.

Yet another example of this trend is the manner in which the Centre has monopolised the media of mass communication. All India Radio, which should really be a public service at the disposal of the Union Government, State Governments, voluntary associations and the public at large, is run departmentally by a Ministry of the Union Government. The only way in which the rights of the States could be asserted and these important means of communication freed from the dominance of the Centre would be to give effect to the recommendation of the Chanda Committee that the Radio and Television Services should be placed in charge of autonomous statutory Corporations like the B. B. C. and I. T. A. in the United Kingdom.

In so far as the Planning Commission is concerned, a Seminar which met in Agra from March 24 to 26, 1972, under the auspices of the Leslie Sawhney Programme of Training for Democracy, at which I happened to be present, had an interesting proposal to make: "In the course of discussion on the economic aspect of federalism, the role of the Planning Commission came up. It was agreed that the Planning Commission should be an expert independent statutory body, acting in an advisory capacity, and should consist of experienced men from public life, industry and trade unions and administration. Apart from preparing a national plan in certain specified areas, its role and scope should also include the indication of priorities and the co-ordination and integration of the State plans into a

national plan. Initiation and formulation of detailed planning should, however, be on a multi-tier system at the State, metropolitan and district levels. The discussion on the development of backward regions led to the conclusion that, where possible, there should be regional planning for backward regions in a State."

The Constitution when it was framed established what might be described as a tight Federation with less autonomy for the States than in most federal constitutions of the world such as those of the U.S.A., Australia and Switzerland.

If there is any one country that needs a federal structure, more than others, it is India with its size, population and wide diversities of race, religion, caste and ways of life. Even the maintenance of a free and plural society cannot be assured in such conditions except on the basis of genuine federalism. Already the concentration of power in a few hands in Delhi has contributed towards the erosion of our democracy and democratic institutions and threatens to end up, as in Bangla Desh, in a one-party authoritarian rule.

On the other hand, one has to take note of a growing sense of alienation from the Centre which is stronger in some States like Kashmir, Nagaland and Tamil Nad than in others. This alienation has historical and economic aspects. Regional aspirations as also linguistic and other tensions are real. They cannot be wished away. They need to be handled with sympathy, understanding and imagination.

I am convinced no amendment of the present Constitution is called for since it is not the Constitution that is defective. On this point I find myself in agreement with the Administrative Reforms Commission. All that is required is an acceptance of appropriate conventions and a respect for the spirit as the letter of the Constitution. There is ample scope within the Constitution for sound federalism provided there is a continuing process of consultation with States, the Centre scrupulously avoids any suspicion of partisanship and political motivation

in dealing with a particular State and a continuous search is made for procedures and modes of associating the States with the decision-making processes of the Union.

An important change that needs to be made is that the Governor should cease to be considered an agent of the President of the Union and should function independently as the Head of his own State. The Report of the Committee of Governors on this issue adumbrates propositions which are sound and should be accepted. According to the Committee, the Governor is the Head of the State and he should in no sense be considered an agent of the President.

In so far as the current economic imbalance is concerned, this can be put right by assuring the States of a steady pre-determined flow of resources on the basis of economic criteria leaving no room for arbitrary discretion on the part of the Union Government. The National Development Council has adopted quite sound principles of allocation of Central assistance for the Fourth Plan and these constitute a useful starting point. These criteria are that 60 per cent should be shared on the basis of population and the remaining 40 per cent on the basis of (1) per capita income below the national average; (2) tax effort in relation to the per capita income; (3) commitments in respect of major continuing irrigation and power projects; and (4) special problems such as floods, droughts and tribal areas of individual States. I would add that allocation in the light of these criteria can be undertaken by the Finance Commission which should have a permanent Secretariat ensuring continuity in its functions.

Here one comes up against the fear or prejudice that the assertion by the States of their autonomy would mean a weakening of the Centre and that what India needs is what is popularly called "a strong Centre". This is a fallacy which is not peculiar to this country. It led Mr. McGeorge Bundy, at one time Special Assistant for Security Affairs to President Kennedy and President Johnson and now President of the Ford

Foundation, to write his stimulating little book entitled *The Strength of Government*. The major thesis of that book is that strong Federal governments and strong States are not only not antithetical to each other but indeed that they strengthen each other. "Not only is there no contradiction", writes Mr. Bundy, "between strength in Washington and strength at the State house and in city hall - the three kinds of strength are in fact mutually indispensable. We must reorganise our thinking so as to understand this necessary partnership of effective power." Mr. Bundy goes on to point out that at the root of this confusion on which he was commenting was the myth that strong government means big government, a remark that applies strikingly to a great deal of the thinking in New Delhi. According to Mr. Bundy, it is important that a government should not "confuse strength with size, or effectiveness with a passion to do everything itself. The error of confusing strong government with big government is common today among both those who tend to praise government and those who abuse it."

Before I leave this topic, perhaps I should share my feeling that the biggest single factor that has made for the erosion of our Federal system and the upsetting of its balance has been the dominance of one political party over all others during the entire stretch of twenty-five years. Not only is such predominance bad for democracy, it is specifically bad for the maintenance of the Federal system.

There was indeed a break in this for a short time when, as a result of the general elections in 1967, the Congress Party lost its control over several States and remained in power at the Centre only by a wafer thin majority and with the support of the Communist Party of India. Unfortunately, thanks to the unprincipled and opportunist behaviour of the opposition political parties who joined in the S.V.D. governments which disgraced themselves all the way from Punjab to West Bengal, the first hope of a real federal policy in India came to an end and the electorate in its wisdom decided that one big party

out-voting all the others was perhaps a lesser evil than an unprincipled combination of the kind that had been witnessed throughout North India. Apart, therefore, from the establishment of sound conventions, what is required for the restoration of the Federal system is a better distribution of political power and the existence at any given time of several State governments of a different colour from that which may be in office in New Delhi.

The President and the Governors

On 21st July, 1947, Jawaharlal Nehru moved for the consideration of certain draft principles concerning the powers of the President in a speech which betrayed the beginnings of the confusion which was to prevail on this subject and which still continues. "We want to emphasise," he said, "the ministerial character of the Government, that power really resides in the Ministry and in the Legislature and not in the President as such. At the same time we did not want to make the President just a mere figure-head like the French President. We did not give him any real power but we have made his position one of great authority and dignity. You will notice that he is also the Commander-in-Chief of the Defence Forces just as the American President is."

It may be noticed that Nehru hardly knew his own mind. It is not therefore a matter for surprise that the rest of us have been at loggerheads on this subject ever since.

In any event, the Constitution, as enacted, provides by Article 74 (i) that "there shall be a Council of Ministers, with the Prime Minister at the head, to aid and advise the President in the exercise of his functions." Article 75 goes on to provide that "the Prime Minister would be appointed by the President and the Ministers would hold office during the pleasure of the President."

Article 78 provides that "it shall be the duty of the Prime Minister (a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation; (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and (c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

Similarly, Article 163 (1) provides, in respect of the Governor of a State, that there should be a Council of Ministers, with the Chief Minister at the head, to aid and advise the Governor in the exercise of his functions, "except in so far as he is by or under this Constitution required to exercise his functions or any of them at his discretion." Article 163 (2) lays it down that the decision of the Governor in his discretion in regard to whether or not he can act in his discretion in any particular matter should be final and cannot be called into question. Article 164 goes on to say that the Chief Minister would be appointed by the Governor and that the Ministers would hold office "at the pleasure of the Governor."

One would have thought that the language of the Constitution was perfectly clear. According to the Concise Oxford Dictionary, the word "to aid" means "to help" and the word "to advise" means "to offer counsel to". The essence of advice is that it leaves the person advised free to accept or reject it. It is perfectly obvious that the Council of Ministers are the advisers of the President and the Governor respectively, and that therefore the final decision on all matters would remain with the Head of the State. In a parliamentary form of government, it is well understood that the Head of the State would normally be guided by the advice of the Cabinet or the Council of Ministers, but that does not take

away from his legal and constitutional right to override the Cabinet whenever he feels called upon to do so and to face the consequences. Indeed, Dr. Rajendra Prasad, President of the Constituent Assembly, gave expression to this view when on May 23, 1949, he said that Article 74(1) [which was then draft Article 61(1)] "does not lay down that the President is bound to accept the advice."

There was a proposal at one stage that an Instrument of Instructions for the guidance of both the President and the Governor should be prepared. It was specifically laid down in the draft Instrument that, for the purpose of making certain appointments, the advice of the government of the day would not be taken but that the President would be advised by an Advisory Board of fifteen Members of Parliament in the matter of making certain appointments under the Constitution. It was suggested that the appointment of the Judges of the Supreme Court and the High Court, the Attorney-General of India, Ambassadors and members of the Public Service Commission and the Election Commission would require consultation with the Board. The object was clearly to prevent Ministers putting their own men into high office. However, no Instrument of Instructions was finally adopted as the Constituent Assembly was later told that the matter was dropped. If an Instrument of Instructions had been adopted, perhaps the unsavoury incident of the supersession of three ranking judges of the Supreme Court in 1973 would have been avoided and the independence of the Supreme Judiciary preserved.

It was not long after the Constitution was enacted that the issue came to a head. It appears that, on September 18, 1951, the first President of the Republic, Dr. Rajendra Prasad, sent Prime Minister Nehru a note in which he expressed a desire to act on his own judgement when giving assent to Bills, when sending messages to Parliament and when returning Bills to Parliament for reconsideration. This move was obviously inspired by the concern caused to Dr. Rajendra Prasad personally

by the Hindu Code Bill which had just been introduced in the Provisional Parliament. The Prime Minister referred the matter to the Attorney-General, Mr. M. C. Setalvad, for opinion and the latter on September 27, 1951, opined that under Article 74 (1) the President is required to act in all matters with the aid and advice of his Council of Ministers. It may be noted that the opinion is somewhat peculiarly worded. It does not say that the President was bound to abide by the advice of the Cabinet though that undoubtedly was what was suggested. As it happens, Dr. Rajendra Prasad did not persist in his view and, in 1955, the Supreme Court, in one of its judgements, took the same view as the Attorney-General.

Notwithstanding the fact that the President is designated by the Constitution as the Supreme Commander of the Defence Forces of the Union as in the U.S.A., Dr. Rajendra Prasad also allowed himself to be ignored when Prime Minister Nehru, in a dispute between the Defence Minister Krishna Menon and General K. Thimayya, Chief of the Army Staff, publicly insulted the Chief of the Army Staff in a speech in Parliament in the interest of Mr. Krishna Menon. I recall that when this happened, I was not in Delhi but I followed the developments through the press. I gathered that Prime Minister Nehru had secured the withdrawal of Gen. Thimayya's resignation which he had put in as a protest against the Defence Minister's behaviour, and then gone to Parliament and cut the General down to size. I felt that this was unfair to the General and bad for the morale of the Armed Forces.

I therefore asked for an interview with Dr. Rajendra Prasad whom I had known since as far back as 1934. During our talk, I told the President that I felt aggrieved at his not asserting his rights as the President and Supreme Commander of the Defence Forces. I was interested to find that the President appeared to be rather pleased at this grievance that I had made and was in agreement with it. He pleaded his helplessness, but thanked me for showing such concern about this matter.

Later, Dr. Rajendra Prasad was to raise the issue publicly. Addressing the Indian Law Institute on November 28, 1960, he said : "There is no provision in the Constitution which in so many words lays down that the President shall be bound to act in accordance with the advice of his ministers." He criticised attempts "to invoke and incorporate into our written Constitution by interpretation the conventions of the British Constitution, which is an unwritten Constitution."

My interest in this particular aspect of the Constitution revived during the Presidential elections of 1967 when the Congress Party put up Dr. Zakir Husain as their nominee, and I nominated former Chief Justice K. Subba Rao as the leader of the united Opposition which included not only my own party (the Swatantra Party), but all the other six opposition parties, namely, the Jana Sangh, the DMK, the two Socialist parties and the two Communist parties.

In the course of my correspondence with the Prime Minister over these rival nominations and the possibility of a compromise which was mooted, I had occasion in my letter to her of 26th April to write :

"In our view, the election of the President should be viewed against the background of the changed political situation resulting from the recent General Elections, with particular reference to the coming into existence of State Governments of political colours different from that of the Union Government. This, in our view, demands that the President of the Republic should act as a true interpreter and defender of the Constitution.

"Another relevant development is the composition of the new Lok Sabha where your Party enjoys only a slight edge and where situations similar to those which recently arose in certain States may well develop. A great deal will depend upon the judicious and democratic approach that the President brings to bear and the objective and

dispassionate manner in which he acts in such circumstances."

As Deputy Leader of the Swatantra Party in Parliament it fell to me a few days later to issue a public appeal on May 3, 1967, to voters in the Presidential Election. After referring to certain misconceptions that had crept into the discussion during the election which was proving to be educative, I wrote :

"There are two bogeys that have been raised and a red herring drawn across the trail to cloud the issue that needs to be dealt with so that the real issues in this election can be seen clearly.

"The first of the bogeys which has been raised is that, if Dr. Zakir Husain is defeated in the Presidential election, this in some mysterious way will involve the fall of the Congress Government in New Delhi. To any student of the Constitution this is a *non sequiter*.

"Our Constitution provides for a system of checks and balances between the Executive, the Legislature and the Judiciary. It is for the purpose of preserving such a balance that the Constitution provides that the President of the Republic shall not be elected by Parliament but by the entire people through an electoral college representing them. On the other hand, the Cabinet of the day is made responsible to the Lok Sabha. The result of the Presidential election cannot in any way therefore affect the survival of the present government so long as it continues to enjoy the confidence and support of the majority of the members of the Lok Sabha. If this were not so, the absurd situation would arise that the present Government would resign while still enjoying a Parliamentary majority, thus creating a vacuum that cannot be filled by anyone else ...

"The second bogey is that the Swatantra Party wants the President of the Republic to over-rule the Cabinet

and Parliament and become a dictator. This of course is fantastic nonsense. We are firm believers in Parliamentary Democracy. That does not, however, mean that the President of the Republic should be a mere rubber stamp. The current political situation is marked by two new features. The first is that in more than half the States of the Union there are governments of political colours different from that of the Union. The second is that the Congress Party at the Centre has only a slight edge over the Opposition in the Lok Sabha. In these conditions, we believe that only an independent, non-party man can do justice to the functions of the President. We feel that there is need for a slight change here from the record of the last seventeen years. I shall give an example or two to illustrate my point.

“There was a Cabinet crisis in Rajasthan soon after the General Elections and a Presidential Proclamation was issued suspending constitutional government. We felt that it was a step that the President should not have taken on the advice of the Union Government. In our view, the President would have been entitled, in terms of his constitutional rights and functions, to ask the Governor of Rajasthan to call the Leader of the Opposition to form a government. It was only if the Opposition leader had declined to accept the invitation or had failed to form a government with the support of a majority in the State Assembly that the Presidential Proclamation would have been in order.

“Another case is that of the so called ‘Emergency’ declared in 1962 after the Chinese aggression that has lasted till this very day. There has been no excuse for this Emergency to continue for several years now. The personal liberties and rights of thousands of citizens down to the villagers have been truncated by the Defence of India Act and the Defence of India Rules. We felt that the President should have called on the Union

Government to abrogate the Presidential Proclamation of Emergency and restored full civil liberties a long time back. If the Union Government had refused to accept his advice, he should have offered to tender his resignation as President.

“These are examples to show what we have in mind when we talk of an independent man as the President who is not merely a rubber stamp. This is a far cry from the suggestion of suspending Parliamentary Democracy and the establishment of a dictatorship as has been perversely attributed to us, for example, in the editorial of an English language daily this morning.”

The considerations urged by me in my letter apply with particular force to such acts of the President as the declaration of an Emergency or the promulgation of an Ordinance. Article 352 lays it down that “if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.”

Similarly, Article 123 lays it down that “if at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.”

The question arises whether the satisfaction that has to be experienced by the President that certain circumstances exist which make it necessary for him to promulgate an Ordinance or proclaim an Emergency should be that of the President himself or that of his Council of Ministers. There can be no question that so far all the Presidents have behaved as if they had no personal responsibility for judging the merits of a situation and they have acted as a rubber stamp of the Prime Minister and the Cabinet in proclaiming Emergencies and promulgating Ordinances. I personally hold the view that

this is a mistaken view and that the satisfaction has to be that of the President himself who should rely on his own judgement as to whether or not the advice of the Cabinet is sustainable on the merits.

As it happened, an opportunity arose for me to do my bit to get this point tested in the Supreme Court when President Giri promulgated an Ordinance nationalising fourteen major banks on the afternoon of Saturday, 21st July, 1969, notwithstanding the fact that the Lok Sabha was to meet on the morning of Monday, 23rd July, 1969. I felt this was a fraud on the Constitution and a violation of the President's role and responsibilities. I consulted my good friend Mr. N. A. Palkhivala, who agreed with me. He therefore drafted and I filed a petition in the Supreme Court on 23rd July, 1969, to which my friend Mr. Balraj Madhok, then Deputy Leader of the Jan Sangh in Parliament, was a party. We challenged the validity of the Ordinance as Members of Parliament whose right to consider the issue of nationalisation of the Banks on merits and in debate had been filched by President Giri's action in facing us with a *fait accompli*. In our petition we said that the grounds that were necessary for the promulgation of the Ordinance did not in fact exist since Parliament was to meet within thirty-six hours of the promulgation of the Ordinance. Unfortunately our petition never came up for hearing on the merits. At the preliminary hearing of both our petition and that of Dr. R. C. Cooper, which he had filed as a shareholder of a Bank, the Supreme Court decided to proceed with the hearing of Dr. Cooper's petition on the merits and suggested that we should withdraw our petition. This we did. So the question that we had sought to raise still remains unanswered in so far as the Supreme Court is concerned.

Even more grave considerations apply in the case of the Proclamation of an Emergency. On more than one occasion, this power has been grossly abused by the President being asked wrongly by the Prime Minister and the Cabinet to continue an Emergency long after the occasion for it had disappeared. This

was so in the Emergency which was proclaimed during Communist China's invasion of India in 1962 and once again it is so today in the case of the current Emergency which was proclaimed in connection with the war with Pakistan and has been going on ever since for no reason that anyone can find except the convenience of those in power. It is clear that the provision that the Proclamation of Emergency should only last so long as the conditions prescribed in Article 352 of the Constitution has been violated and the former Attorney-General, Mr. C. K. Daphtary, was not wrong when he recently referred to the present State of Emergency as a 'phoney emergency'.

It has been pointed out that one of the sinister consequences of an undue prolongation of such a Proclamation is that, under the proviso to Article 83 of the Constitution, the life of the House of People could be extended by Parliament for a period not exceeding one year at a time and such extension may last for a period of six months after a Proclamation has ceased to operate. In the light of what has happened recently in Gujrat, Ceylon and Bangla Desh, the fear that has been expressed that some day the phoney emergency may be used to prolong the life of the Lok Sabha beyond its legal term cannot be dismissed altogether as far fetched. I believe that Mr. Jayaprakash Narayan is perfectly right in making this one of the issues of his campaign and one of the demands in the charter which he presented to the Speaker of the Lok Sabha and the Chairman of the Rajya Sabha on 6th March 1975.

Dismissal of the Cabinet and Dissolution of the Legislature

I have so far avoided dealing specifically with the power and authority of the President and the Governor to dismiss their respective Councils of Ministers and to dissolve the Lok Sabha on the one side and the State Legislative Assembly

on the other. This is an aspect which has led to quite sharp controversies from time to time. Mr. Jayaprakash Narayan, by his call for the dismissal of the Bihar Government and the dissolution of the Bihar State Assembly, has made this an issue of daily national discussion. It might, therefore, be worth while dealing in some detail with this particular matter.

The right of the Governor to dismiss his Council of Ministers and to dissolve the State Assembly first came to the fore in the years 1958 and 1959 during the term of office of the Communist Party's administration in Kerala State. I was then a Member of Parliament and, holding the views that I did, I did my bit to help in the removal of the Communist government from office in Kerala and supported the popular movement led by the veteran leader of the Nair Social Service Society, Mananath Padmanabhan, which was also backed by and large by the Christian community. Thus in November 1958, I presented a Resolution to the Lok Sabha which sought to impeach the Communist Chief Minister for breach of the privileges of the House.

The grim developments in Kerala, however, continued to drag on from month to month, while the rest of the country apparently watched helplessly. On June 19, 1959, I felt strongly enough on the subject to write a letter to the editors of newspapers which was published in the press drawing attention to a way out of the impasse which the Constitution had provided but to which, unfortunately, little attention seemed to have been given. I drew attention to the fact that both the Lok Sabha and the Legislative Assemblies in the States could be dissolved before the expiry of their normal term, as was the case with the British House of Commons. Article 174 (iii) gave the Governor the right "to dissolve the Legislative Assembly" and this power was given to enable the Governor to test the opinion of the electorate whenever there was reason to believe that there had been a change in the situation or in the mood of the electorate. "The essence of parliamentary democracy", I wrote, "is that

the identity or coincidence between the wishes of the legislature and the wishes of the electorate should at all times be maintained and that everything possible should be done to prevent a divergence of views materialising. Hence the power to dissolve the legislature given to the Head of the State." While normally the Head of the State would act on the advice of the Chief Minister in exercising this right, he could dismiss the Ministers and dissolve the Assembly when the Chief Minister refused to advise dissolution despite the Governor being satisfied that the majority in the legislature no longer reflected the wishes of the electorate.

In the case of Kerala, I went on to write :

"Two years of Communist rule have provided a new experience to the people of Kerala. In the result, not only is there widespread popular discontent with the government, but the other parties, such as the Congress, the Praja Socialist Party, the Revolutionary Socialist Party and the Muslim League, have now realised the danger to democracy in Kerala and come together in a United Front demanding a change of government. Since, between them, these parties had polled no less than sixty-five per cent of the vote, a fundamental change in the wishes of the electorate has now presumably taken place. In these circumstances, to suggest that the people of Kerala should suffer Communist misrule for another two and a half years is a counsel of defeat and despair and an incitement to extra-constitutional methods.

"If those who represent two-thirds of the Kerala electorate, *viz.*, the leaders of the Congress Party, the Praja Socialist Party, the Revolutionary Socialist Party and the Muslim League, were jointly to approach the Governor to ask for the dissolution of the Assembly and fresh elections and to signify their readiness to nominate a new Chief Minister and to go to the polls as a *bloc*, the Governor could hardly refuse to give an

opportunity to the electorate to choose a government in harmony with their wishes.

“If, however, the Governor were to refuse the plea, he and those who may advise him will be seen by the people of India to be responsible for flouting the spirit of the Constitution and for the continuing bloodshed and misery in Kerala.”

Fortunately the agony of the people of Kerala was brought to an end in August 1959, nine long months after the Motion of Privilege I had moved in the Lok Sabha. The President of the Republic issued a Proclamation removing the Communist Government and taking over the administration of the State in his own hands. On August 17, 1959, the matter came up for discussion in Parliament and I spoke in support of the motion to approve of the President's Proclamation.

The issue of the debate in my view was a simple one :

“Have the people of Kerala got the right to choose and change their government from time to time? By ‘time to time’ I do not mean five years. Our Constitution lays down that Parliament and the Assemblies can be dissolved earlier than the stated term. That is only the maximum. Articles 72, 174 (ii) and 164 make it perfectly clear that the existence of a State Government is at the pleasure of the Governor and that the life of the State Assembly is also at the discretion of the Governor who may dissolve it at any moment.

“The thesis behind this, which we have taken from the British Parliament, is that at no stage should a divergence of wishes be allowed to develop between the electorate on the one side and Parliament on the other, and when the Head of the State, be it the British Crown or our own President or the Governor of Kerala, becomes aware that a divergence has developed, it becomes his duty to dissolve Parliament and to have

fresh elections so that the identity of views may be restored.

“The Governor in his report makes it clear on pages 12, 13 and 15 that in his opinion the Kerala Communist Government had lost the confidence of the overwhelming majority of the people. He also makes it clear in his report that the Government was guilty of misrule and of subverting the Constitution.”

Some time in the sixties, I took the same line to support the action of the Governor of West Bengal, Mr. Dharma Vira, in dismissing the Marxist Communist Party Government, dissolving the Assembly and calling for fresh elections. Thus, in both cases, I upheld the right of the Governor in his discretion to dismiss the Cabinet and dissolve the State Legislative Assembly. In the case of the present agitation in Bihar also, my position is the same, and I therefore find no difficulty in supporting Jayaprakash Narayan's call to that effect.

In glaring contrast is the position adopted by the Prime Minister and her supporters in regard to the situation in Bihar which is in direct contradiction to the position that was taken by them in the cases of Kerala and West Bengal.

The Kerala Legislative Assembly was dissolved by the Governor of Kerala over the head of Mr. Namboodiripad, his Chief Minister, who protested vigorously against this ‘undemocratic’ action *a la* Indira Gandhi, at the instance of Mrs. Indira Gandhi, the then Congress President, and the Union Government of Prime Minister Jawaharlal Nehru. The text of the Resolution adopted in January 1959 by the Central Parliamentary Board of the Congress Party protested the democratic character of this action :

“Taking note of the critical situation that had arisen in Kerala, the vast upsurge of public opinion against the State Government and frequent misuse by it of the coercive apparatus of the State, the Committee formally

resolved : 'In such circumstances, the democratic way of meeting the situation is to have general elections in the State for the Assembly. A Government which is so challenged and which has to face this widespread and intense opposition would be well advised to accept that challenge and agree to fresh elections. Such a course of action would divert popular energy into proper democratic channels ... Where there is a conflict of opinion, ways to resolve it should be found which are both peaceful and constitutional'.

Significantly, the Board's resolution made two other points. First, the Kerala situation was considered not only from the viewpoint of the Congress, but even more so of the larger interest of the country and the democratic structure to which India was committed. Secondly, it conceded that normally a government continues to function for the full period of five years as laid down in the Constitution, but it added that the Constitution itself had provided for a change to be made if "a State Government fails to carry a majority in the Assembly and no other Government can be found to be constituted ... It may however be that the Government has a majority in the State Assembly but nevertheless is unable to function satisfactorily because of widespread opposition from the public."

The view that I have held, which was shared in the fifties by Mrs. Indira Gandhi, was also endorsed by the Kerala Committee of the Indian Commission of Jurists which opined : "Where therefore the Governor is satisfied that Ministerial orders are in violation of the law, it is not only his right, but his duty as the guardian of the Constitution which he has sworn to preserve, protect and defend, to correct and rectify, and in the last resort, to dismiss the Ministry if recalcitrant. A Governor who fails in this duty must be deemed to be privy to this violation of the law ; and his position would become wholly untenable. It may be on the dismissal of the Ministry the Governor might be unable to find an alternative Ministry commanding a majority in the Legislature. But in that event,

he has the right to order a dissolution of the Legislative Assembly, and direct fresh elections”.

When the position is so clear, the question arises why many people find it difficult to think logically on this point. I would venture to suggest two reasons. The first is the fact that, unfortunately, all the Governors of the States in India have been nominees of the ruling party and most of them have failed to use the discretion given to them under the Constitution independently of the Union Government. If the Governors of the States in India had been distinguished public men acting independently of the Union Government, their right to use the discretion of the Head of the State would have been much more widely accepted than it is.

The other source of confusion is the ignorance of the parliamentary system of government that prevails in this country as a result of the purely adventitious fact that during the first two decades of the functioning of the Constitution the Lok Sabha and most of the State Assemblies were hardly ever dissolved before they had completed the full term prescribed by the Constitution. This, as is well known, resulted from the fact that one particular party both at the Centre and in most of the States so dominated the Legislatures that no occasion for dissolution arose. The result was that many people came to imagine that the maximum term laid down for the life of a legislature in the Constitution was also the normal term. Hence we find in our press a widespread use of that peculiarly Indian term, ‘mid-term poll’, which is not known elsewhere. The fact is that any election that takes place to a State Legislature or to Parliament is a General Election whenever it may take place and whether or not that legislature has served its full term. Dissolution is a very well known fact of life in Britain and other parliamentary democracies in Western Europe. Thus, Britain had recently two General Elections to Parliament, one in February 1974 and then yet another in October 1974, but we did not find a single British newspaper or Member of

Parliament using the term 'mid-term poll' or any description other than a General Election on both occasions.

Since the practice of dissolution has come to us from the practice of parliamentary democracy in Britain, it is worth while recalling what that great constitutional authority, Dicey, had to say in his classic work about the right of the Crown to dissolve Parliament :

"There are certainly combinations of circumstances under which the Crown has the right to dismiss a Ministry who command a parliamentary majority and to dissolve the Parliament by which the Ministry are supported ... The reason why the House can in accordance with the Constitution be deprived of power and of existence is that an occasion has arisen in which there is fair reason to suppose that the opinion of the House is not the opinion of the electors. A dissolution is in its essence an appeal from the legal to the political sovereign."

This prerogative has been the subject of prolonged discussion in England from which has emerged a consensus among the experts that the Crown has an unfettered discretion to accept or reject the Prime Minister's advice to dissolve Parliament but that this right would be exercised only in exceptional circumstances. Dr. Arthur Barriedale Kieth holds the view that the Crown is clearly not bound to grant dissolution when asked for. The same view is held by Sir Ivor Jennings, another authority on the subject, as also by that great Commoner, Winston Churchill.

The British precedents in regard to the dismissal of a Government are relevant. Three distinct grounds have been adduced for the dismissal of a cabinet. First, if in the Crown's judgement, the Ministry has lost the confidence of the people. Secondly, if the Crown is satisfied that the Ministry has forfeited the confidence of the House of Commons. Thirdly, if the Ministry is guilty of conduct that justly calls for dismissal.

Naturally, in all cases, the electorate must be asked to give its verdict and that verdict must be respected. This view extends as far back as the commentaries of Lord Halsbury who wrote : "In cases where the Ministry still retains the confidence of the House of Commons, but the Crown has reason to believe that the latter no longer represents the sense of the electorate, the dismissal of the Ministry or the dissolution of Parliament would be constitutional ; and cases of emergency might conceivably arise where, through the unfitness or incapacity of Ministry, the exercise of the power of dismissal would be constitutional, justifiable and proper, in order to prevent the adoption of some course ruinous to the nation."

Lecture II

The Electoral System and the Need for Reform

It cannot be denied that forms of government are closely influenced by methods of election. This makes it desirable that we should embark on a review of our electoral system and consider the need for electoral reform by recalling the objectives and purposes for which elections are devised.

We may start with a general philosophy of government that those in authority should rule not only according to the wishes of the people, but that they should be consciously chosen by the people. This means that those in authority should be, from time to time, elected by the people who should have the power to renew at suitable intervals the authority given to their representatives. Such a system is, of course, based on the willingness of those in office to hand over power to their successors. Those whose political philosophies dictate that they should behave like a cricket team which insists on batting all the time and not giving the other side its innings have obviously no place in a democratic set-up. Such, for instance, are totalitarians, whether Communist or Fascist.

The objectives of a sound electoral system can be spelt out somewhat as follows. First of all, since unanimity is not possible in human affairs, the majority should rule. That cannot mean only a majority in Parliament. It must mean a majority of the electorate as a whole. Thus, the first principle of a sound electoral system is that a majority of the electorate should have a majority in Parliament. Not only that, but the size of the majority and the composition of the groups in opposition should broadly reflect the division of opinion within the electorate.

If the different points of view within the electorate are to be fairly and justly represented in a Legislature, it follows that the system of election should give the vote of each voter roughly the same weightage. Any system that gives one man's vote greater representation or pull than that of another is obviously not a democratic system. Finally, fair representation also means that each man's vote should be effective. When a system of election involves a waste of a large number of votes due to their finding no representation at all, that system again cannot be called a democratic one.

Finally, while providing stable government, the electoral system should also create a reasonable balance between those in government and those in opposition. When this balance is destroyed, there is a lopsided result with a bloated and arbitrary government on the one side and an impotent and irresponsible opposition on the other.

Constituent Assembly's Choice

I remember the meeting, probably some time in July 1974, when the question of choosing an electoral system came up in the relevant Committee of the Constituent Assembly with Sardar Vallabhbhai Patel in the Chair. Dr. K. M. Munshi moved as a general principle that there should be reservation of seats for different recognised minorities in the various Legislatures. To this, I moved an amendment:

“That the representation of minorities, whether political or communal, be secured not by reservation of seats but by a system of proportional representation, preferably by cumulative voting in multi-member constituencies.”

I argued that if a system of Proportional Representation was adopted there would be no need whatsoever to reserve seats for the Harijans or any other minority. My argument was based on my general support for this modern, scientific method and my aversion to the archaic British system which had already led to distortions in British political life. I was also motivated by my strong opposition to breaking up the Indian nation into compartments, with seats reserved for each of them. I got heartwarming support from Dr. Ambedkar for the Harijans, Mr. Frank Anthony for the Anglo-Indians, Dr. Mukherjee, the spokesman of the Indian Christian community, and members of the Muslim League. They were all prepared to surrender their reservations if my proposal was adopted.

Unfortunately, Sardar Patel turned down my proposal by arguing that its acceptance would lead to shifting coalitions and instability as in France. What he wanted was a strong government backed by a decisive majority in Parliament and a two-party system as in England. He thought the British electoral system would give this result.

I on my part ventured to argue that the number of parties was not so much a result of the electoral system as of national temperament. Since we Indians were unlike the Anglo-Saxons, with their strong predilection for compromise, and more like the Latins, with their proclivity for splitting and splintering, the British system, if applied to our country, would not yield the same results as in Britain. On the contrary, I warned, the British electoral system, with a multi-party system which we were only too likely to have, would play havoc with our young democracy.

When the vote was taken, my amendment was lost, while Dr. Munshi's proposal was carried by the Congress steamroller

majority. So reservation of seats for the Harijans and Tribal minorities in the Legislature and provision for Anglo-Indian representation were provided in the draft Constitution.

Even so, I did not accept defeat. When the full Assembly considered this matter and Dr. Munshi moved that cumulative voting should not be accepted in elections to legislatures, thereby making single member constituencies compulsory, I moved an amendment :

“That no decision be recorded on this resolution and that the matter of cumulative or distributive voting be determined when the demarcation of constituencies and the electoral law are decided.”

Unfortunately, this too was defeated by a large majority.

Quarter Century's Experience

Looking back at this decision, one can only regret that wiser counsels did not prevail. As a result of reservation being accepted for the Harijans, India is still plagued with the phenomena which have resulted in the exploitation of the Harijans by unscrupulous and corrupt leaders who have used them to get into the Union and the State Governments. It is also a major cause of corruption in our national life which comes from the buying and selling of the votes of many Scheduled Class members in our legislatures.

If the record is to be judged by the extent to which the government of the country has reflected the views of the electorate, the conclusion cannot but be an equally a bleak one. For the entire period from 1950 to date, one particular political party has been in office in New Delhi, the Union capital. The same political party has, with some exceptions, been in office in most of the States of the Indian Union without a break. While this may not be a good thing from the point of view of a live democracy where parties alternating in office are a desirable feature making for clean and efficient government, nor in a Federal system which can only work where the colour of the

State Governments do not always have the same hues as that of the government at the Centre, from an electoral angle there is nothing wrong with a party which enjoys the continued support of the electorate remaining in power. There are democratic countries like the Scandinavian countries in Europe where a single party has remained in office with popular support for decades without the quality of their democracy suffering or being questioned. Such, however, is not the case with our own country.

What is shocking in our experience is that in no single General Election to Parliament has this party which has enjoyed a monopoly of power been able to secure even a bare majority of the votes cast and yet, throughout this period, with the exception of four years from 1967 to 1970, the party has enjoyed a majority of more than two-thirds of the seats in the Lok Sabha, which it has misused to amend the Constitution. Since this is a fact of which a large number of people are not yet aware, let us examine the detailed figures, general election by general election :

	<i>Congress Votes</i> (per cent)	<i>Congress Seats</i> (per cent)
1952 Parliamentary Elections	45	74.4
1957 Parliamentary Elections	47.4	75.1
1962 Parliamentary Elections	44.7	73
1967 Parliamentary Elections	40.9	54.4
1971 Parliamentary Elections	43.5	67.9

This distortion of the popular will is shocking enough but it becomes even more unacceptable when it is recalled that those who voted in these elections were just a fraction of the entire electorate. Thus, to take the last General Elections, namely, those of 1971, when the ruling party was reported in the press to have obtained "a massive mandate", the figures published by the Election Commission show that only around 54 per cent of the electorate cast their votes and that, of these,

43.5 per cent voted for the Congress Party. The net result of this turns out to be that the percentage of the electorate who voted for the ruling party did not exceed 24. To put it another way, only one out of four Indians of voting age cast his or her vote for the ruling party which, nonetheless, obtained 67.9 per cent of the seats in the Lok Sabha, thus being in a position, which it misused in due course, to enact amendments to the Constitution such as the 24th and 25th Amendments which undermined the Fundamental Rights of the citizen, the veto power of the President and the independence of the Judiciary.

The record of the Indian electoral system has so far violated every sound principle of elections. It is not a majority of the electorate but a minority which has monopolised political power. The votes of the electors have not enjoyed equal weightage since it has taken the Congress Party a much smaller quota of votes to get a member elected to Parliament than that required by various opposition parties to get a seat. Finally, the votes of literally millions of voters have been utterly ineffective and wasted and large numbers of voters have in effect been disfranchised. Surely it will not be argued that a single party government supported by only a minority of the electorate is preferable to a coalition government backed by a majority of the voters.

Views may differ as to whether this system has given India clean and efficient government. For whatever little it may be worth, my own view, based on experience as a Member of Parliament for most of the period, is that the system in Delhi and the State Capitals cannot be described as providing efficient administration. In so far as corruption is concerned, the massive support received by Jayaprakash Narayan for his campaign against corruption would indicate that a large majority of the Indian people do not believe that the system has provided clean and honest government.

Impact on Party System

There is another aspect where there can be no room for difference of opinion and that is as to whether, as Sardar

Vallabhbhai Patel had no doubt hoped, the adoption of the British system has resulted in approximation in India to the British two-party system. Here the record is clear and negative. The electoral system has in no way encouraged the emergence of two major parties nor reduced the number of parties which throughout the period, judging by the reports of the Election Commission of India, have always exceeded half-a-dozen on the national plane.

In case any one would like to hug the illusion that the system has not been tried out for a long enough time and may be expected to yield better results in the future, I may perhaps be permitted to quote from the Report published at the end of February 1975, by the Committee on Electoral Reform, of which I was a member, appointed by Jayaprakash Narayan on behalf of the Citizens for Democracy: "It is relevant to point out that there is so far no indication of any progressive decline in such distortion with the passage of time. The proportion of distortion ranges normally between twenty-four per cent and thirty per cent. The long-term operation of this electoral system does not, therefore, hold out any prospect of this distortion being mitigated."

The Committee noted that even in Britain, the home of the single member constituency and 'first past the post', where it had not been challenged for generations, the inequities of the system had now led to major controversy and a demand for electoral reform. Even some time earlier, Mr. James Middleton, Secretary of the British Labour Party, had conceded that 'there is no greater gamble on earth than the British General Election.'

In India, the objections to this system, according to the Committee, were no longer academic or abstract. It had led to concrete evils and had created a situation where there was a danger of people losing faith in democratic institutions and the electoral process. Such a situation was generating large-scale popular alienation and apathy.

Our Committee therefore came to the conclusion that the experience of the last quarter of a century in India makes it necessary to search for a fairer system of election.

The Alternatives

Our Committee went on to consider the various alternatives to the present system such as the system of the Single Transferable Vote, the Cumulative Vote, the List System and the Second Ballot.

Theoretically the best system of Proportional Representation is that of multi-member constituencies with, say, five seats, with a Single Transferable Vote. Unfortunately, this has to be ruled out in India for two reasons. The Single Transferable Vote, which requires the voter to indicate his preferences on the ballot paper, implies literacy. A predominantly illiterate electorate like ours cannot possibly exercise it.

The nearest alternative to the Single Transferable Vote feasible in a country like ours is the system of the Cumulative Vote, which worked very successfully in the elections to the Bombay Municipal Corporation for several decades. Here too, the constituency will have about five or more members each. Each voter will have as many votes and he can give one or more or all of them to any one candidate. When he gives all his votes to one candidate he casts a 'solid' vote. This means that no minority, political or otherwise, which covers twenty per cent or more of the electorate goes unrepresented, and, if it so desires, it can nominate at least one member. Here, literacy is not an objection because there would be a separate ballot box for each candidate, as was practised earlier, bearing the symbol of that particular candidate, and the voter can put in the whole voting paper or one or more coupons which form part of the card into the box, as he may desire.

Another alternative is called the List System. Here the country is divided into States or Regions and each party puts up its list of candidates for each region in order of preference. The

voter votes for the list of the Party that he favours in that particular State or Region. The seats allotted to that State or Region are then divided between the Parties proportionately to the number of votes received by each Party, the first so many candidates on each list being declared elected according to the number of seats to which it is entitled. This system prevails in Italy, Israel, Switzerland, the Scandinavian countries and the Benelux countries.

An advantage of the List System is not only that it is proportional, but that it reduces corruption as compared with the present system and all other alternatives. No candidate can hope to bribe the voter because there are millions scattered all over the State or Region. Nor can any party hope to do so because of the numbers involved. The only element of money power that can perhaps creep in is that a man who gives a fat donation to a particular political party might be rewarded by having his name put high up on the list of that party alongside of its leaders and functionaries. It will be agreed that this is not at all as objectionable as the bribing of individual voters by candidates.

The disadvantages of this system are: (a) it gives the party caucus or leadership a great deal of control, (b) there is no link between the Member of Parliament and a particular constituency, and (c) it leaves no room for independent candidates.

Yet another alternative to consider is the system of the Second Ballot prevalent in France. The Second Ballot calls for a run-off election between two leading candidates in each Single Member Constituency where the leading candidates do not get a clear majority of the votes polled on the first occasion. It involves eliminating the weaker candidates and gives an opportunity to each voter to exercise his second choice as between the two leading candidates. This has the advantage that, to some extent, it gives effect to the principle of the Single Transferable Vote but without requiring literacy on the part of the voter. It also has the advantage that each Member of

Parliament has the support of the majority in his own electoral constituency whereas in the present Lok Sabha a large majority of members only received the support of a minority of those who voted in their constituencies while the majority of votes were wasted owing to a large number of candidates splitting the vote. While this system would not produce a Parliament accurately reflecting the wishes of the electorate, it would certainly eliminate the grave distortions of the present system.

The Second Ballot is held a week or so after the first one. It may be argued that the system of the Second Ballot will increase the cost of elections. In so far as the governmental apparatus is concerned, that is so. But it need not involve higher costs to the candidates or parties if, in place of the present period stipulated between the date of nomination and the date of polling, a period which is one week shorter were to be prescribed by law.

A Mixed System

Our Committee found difficulties in the way of adopting any one of these systems although it conceded their advantages and it came to the unanimous conclusion that what would be desirable for adoption in this country is what may be described as a mixed system which combines the advantage of maintaining the nexus between the member of the legislature and his constituency and does not reduce the importance of independent candidates with the implementation of the important principle that a legislature should fairly reflect the various trends of public opinion and the will of the electorate.

Since the Committee went on to recommend a study and consideration of the West German system, it may be worth while setting out the main features of that system. The West German system was first evolved soon after World War II for the first post-Hitler elections. It consists of electing a certain fraction of members, roughly half, exactly as in an Indian General Election and then correcting any misrepresentation or

distortion of the popular vote by adding members from Party lists so as to make the total representation of each Party as near proportional as possible. The details of this system have varied from time to time but its main attraction to us would be that it would not disturb our constituencies or the method of the marking of our ballot papers and need not involve an increase in the size of the House of People. But it would mean doubling the size of each Parliamentary Constituency, which is already large. In order to meet this difficulty, it was suggested to the Electoral Reform Committee that two-thirds of the seats in a Legislature should be elected by single-member constituencies and one-third from the Lists, thereby making it necessary for the size of the present constituencies to be increased by not more than fifty per cent.

The results of the mixed system in Germany are incontestably good. Far from resulting in a proliferation of parties, the system has thrown up three strong, stable parties, namely the Christian Democratic Party, the Free Democratic Party (Liberals) and the Social Democratic Party. It has also had the advantage of providing a stable government. For nearly two decades there was only one government, namely, a coalition of the Christian Democratic Party, led by Dr. Adenauer, with the Free Democratic Party. Later there has been a new and equally stable coalition, that between the Social Democrats and the Free Democrats which has ruled now for several years. The administration provided by these two coalitions has not only given stable government but has given strong leadership which has successfully performed a drastic currency reform, created the German 'miracle', and pursued a consistent foreign policy.

It is obvious that in order to give effect to a basic reform of the electoral system of this nature, moving over from the present system of 'first past the post' to a mixed system of proportional representation as in West Germany, we shall need a great deal of popular education before any government in

office benefiting from the present inequities can be persuaded to accept the change. The need for a campaign of public education is reinforced by the monthly *Survey of Public Opinion* published last month by the Indian Institute of Public Opinion (Vol XX, No. 3) which discloses that twenty per cent of all MPs and MLAs had never heard of Proportional Representation! If that is the case with our elected legislators, one can imagine the extent of the ignorance on this issue that must prevail among the wider public.

Other Reforms

A change in the electoral system is urgently called for. Unless this is undertaken, not all the other changes put together can ensure a fair and democratic government for our people. There are, however, certain other changes in the electoral law about which there has been recently a certain amount of public discussion. Among these are the composition of the Election Commission, the misuse of governmental authority, the question of election expenses, and the methods for the polling and counting of votes. We may now proceed to consider some of these aspects.

The Election Commission

It is obvious that the efficient functioning of the Election Commission set up under our Constitution is a basic need in a system of fair and free elections. Not only should the Election Commission, like the court of law, be independent, but it must also manifestly appear to be independent, in the exercise of its powers of organising and conducting elections. Evidence led before the Electoral Reform Committee left on us the impression that people believe that in recent years the Election Commission has become less independent of the Executive than in the early years after Independence. One of the ways in which this widespread lack of confidence is expressed is the readiness with which complaints made during recent elections about irregularities and the rigging of elections have received acceptance.

The Electoral Reform Committee has therefore made a proposal that, as provided by the Constitution, the Commission should no longer consist of only one person but should consist of three persons who would share the responsibilities at present falling on the Chief Election Commissioner.

The method of selection of these persons is also relevant. The Constitution provides that these appointments should be made by the President and, as I mentioned earlier, it has been assumed that the President would in this respect, as in all others, act on the advice of his Council of Ministers. Here, however, is one function of the President which cannot and should not be so exercised. The Electoral Reform Committee has therefore suggested that members of the Election Commission should be appointed by the President on the advice of a team consisting of the Prime Minister, the Chief Justice and the Leader of the Opposition in the Lok Sabha or, in the absence of such a functionary, a Member of Parliament selected by the Opposition. The Committee has also suggested the appointment of Regional or State Commissioners.

Misuse of Administrative Machinery

Another important issue is that of eliminating opportunities for the misuse of governmental power and machinery by the party in office. Rajaji had once suggested, in the light of his experience of the working of this system as the first Indian Governor-General, as Governor of a State, as Union Home Minister and as Chief Minister of Madras, that the Cabinet should resign six months before the General Elections and allow the administration to be carried on by the permanent civil servants, so that the politicians in office would be unable to misuse their position and patronage. Our Committee found this suggestion too far-reaching and suggested instead that there should be legal sanction to the effect that the Government of the day should function as a caretaker government from the time of the announcement of the dissolution of Parliament or a Legislative Assembly, as the case may be, until polling day.

During this period, the caretaker government should not (a) initiate and announce new policies, (b) promise or start new projects, (c) grant allowances or loans or salary increases, or (d) hold official functions attended by Ministers, Deputy Ministers and Parliamentary Secretaries. The Committee also recommended that between the date of dissolution and polling day, there should be several other limitations and checks such as that Ministers should not travel except at their own expense and should not use government aircraft or vehicles; that they should not be given time either on radio or television beyond the time allotted to their parties for election propaganda; that no advertisements of Government's achievements should be published; that no police officer above a certain level should be transferred from his post; and that public vehicles except public transport should be used only to the extent and the manner permitted by the Returning Officer.

There has been a great deal of discussion in this country about the manner in which the audio-visual media of Broadcasting and Television should be regulated. It is my view that no exhortations nor even legal provisions will suffice so long as these national services are run departmentally by those in office. The only real safeguard against their misuse for election purposes is the bringing into existence of statutory autonomous bodies such as the *British Broadcasting Corporation* and *Independent T.A.* which have proved how well such institutions function. As it happens, a Committee appointed by Government called the Chanda Committee had pointed this way out several years ago, but unfortunately their Report has not been implemented and, until that is done, I fear that these extremely vital channels of communication, among a people many of whom are still illiterate, will continue to be misused by those in authority.

Money Power

There has been a great deal of discussion in the Press and otherwise about the role played by money power in politics

and in elections. With a view to limiting the impact of money power in elections, the Electoral Reform Committee made the following recommendations :

- (1) All recognised political parties should be required by law to keep full and accurate accounts, including their sources of income and details of expenditure. The accounts should be audited by Chartered Accountants nominated by the Election Commission and should be open to public inspection on moderate charges. Keeping of false accounts should make the office-bearers of a Party punishable of a cognizable offence.
- (2) In every constituency, all the amounts spent for the furtherance, directly or indirectly, of the prospects of a candidate in an election shall be disbursed through his election agent. These should include amounts spent by the candidate's political party or any organisation or persons supporting him. The present altogether unrealistically low ceilings on expenditure should be raised. All contracts whereby election expenses are incurred shall, in every case, be entered into by the candidate himself or by his election agent, and by nobody else. The provisions of Sections 60-63 of the (British) Representations of the Peoples Act, 1949, should be referred to in this connection.

I may be permitted to state my personal conviction that no legal measures of this nature, however desirable they may be, can be counted upon to fulfil the objectives in mind. While not opposed to regulation or legislation for effecting social reform and the improvement of the human condition, it is my conviction as a Liberal that we cannot make men good by enacting laws. In the long run, it is the character of people resulting from the influence of the parent and the teacher and the disciplines to which young people are subjected that will produce results. In the U. S. A., financial contribu-

tions to parties have been subjected to strict legislation. In Britain there has been no such legislation. Yet, can there be any doubt that elections in Britain are cheaper and cleaner, while elections in America and India are relatively corrupt and extremely expensive ?

So long as there is economic inequality there cannot be equality between individuals and parties in an electoral contest. Just as tax laws are evaded, just as the controls prevalent in India have given birth to the hoarder, the blackmarketeer and the smuggler, so will electoral controls be broken. The way in which the present so-called ceilings on expenditure have been almost universally ignored by the candidates of all political parties without let or hindrance for the past two decades proves the point.

The Communist Parties have therefore logically suggested that private property be abolished in order to deal with this evil. Some of us may be forgiven for considering this remedy to be many times worse than the disease. Wherever private property is abolished, free elections are also abolished along with opposition candidates, and all that happens is that the man with police power replaces the man with money power but with this difference that, while money power is, in all free countries, fairly reasonably distributed between political parties and groups, in the police state where there is no private property there is a complete monopoly of power in the hands of those who control the secret police.

There are two other specific issues which come up at this stage. The first is as to whether or not Joint Stock Companies should be permitted to contribute to political parties and their election funds. During the fifties and early sixties there was no bar to such contributions but in the mid-sixties I remember raising this matter as a member of a Select Committee dealing with Company Law, by moving that contributions of this nature should be banned by law. At that time, Mr. Lal Bahadur Shastri, the Minister piloting the

Bill, though he expressed his sympathy with my point of view, found it difficult to accept my proposal which was defeated by the vote of Mr. Nehru's "Socialist" Congress Party, though all other parties supported my proposal.

Some years later, the same Congress Party brought forward a proposal to ban Company contributions. Though their motives were not clear, some of us, consistently with our record, supported the proposal in Parliament. It is alleged that the result has not been desirable, since in a controlled economy it is not possible for business houses to resist the pressure of those in office for contributions. But now it appears from press reports that the same people want to remove the ban and go back to the earlier position. Once again it would serve no purpose to discuss their motives, but I am glad that the Electoral Reform Committee has expressed the view that "in principle a Joint Stock Company which is formed by a large number of shareholders holding different political views for the purpose of commercial and industrial activities should not be allowed to contribute collectively to a political party. Even if a majority of the shareholders may be inclined to do so, it would be doing violence to the feelings of those shareholders who hold different views. We are not satisfied that legalising company donations will necessarily prevent clandestine payments being extorted from companies. We, therefore, recommend that the present ban on corporate donations should continue. Indeed we believe that the way in which the ban at present is being evaded by large payments being made for so-called advertisements in the so-called souvenirs of political parties should be prevented by law."

A suggestion we in the Electoral Reform Committee accepted was that, in order to encourage the resort to small contributions from a large number of persons rather than large contributions, any donation to a political party or for a political purpose up to Rs. 1000 per year per assessee should be eligible for exemption from Income Tax.

Another suggestion is that a way to equalise the burden of election expenses which have skyrocketed in recent years, well beyond the impact of inflation, would be for the State to provide funds to parties or candidates. Since the only way in which this can be done is, as in certain other countries, to make the contribution roughly proportionate to the number of votes secured by each party during the last General Elections, it is clear that the result of such a provision would be to make the taxpayer pay to perpetuate the rule of the party in office and also to perpetuate the existence of the other parties. It would also penalise any new development such as the 'Janata candidates' who have recently found favour with the electorate in more than one by-election. I may be forgiven for observing that I can think of no worse reform than this which would artificially bolster the survival of political parties whose record since Independence has not, by and large, been a notably good one and also to freeze the political structure of India into this undesirable pattern. The only result would be that, when a change became necessary, it could only come by revolutionary methods and by the smashing of the Constitution—a development I for one would deplore,

All the same, it is possible to hold the view that certain facilities should be provided by the State, not by paying out cash, which would be disastrous, since such cash is often diverted to purposes other than those for which it is intended, but by providing free services or facilities of a minimal kind. The Electoral Reform Committee has suggested that :

- (1) Printed cards giving the registered number of a voter and the polling booth where he may cast his or her vote, along with the names and symbols of candidates in the order in which they would appear in the ballot papers, should be made available to all voters. These printed cards should be sent by postal delivery to the satisfaction of the candidates or their election agents ;

- (2) each candidate should be entitled to send to each voter, free of postage, one communication containing matter relating to the election and not exceeding two ounces in weight; and
- (3) twelve copies of the relevant electoral roll should be supplied to each candidate free of charge.

Changes in Electoral Law and Procedure

Various changes in the electoral law were mooted before the Electoral Reform Committee and one which we accepted was that since the age of majority in India is eighteen years, there was no reason why in order to get on the electoral roll a man or a woman should wait till the age of twenty-one. The Committee therefore recommended that the franchise should be extended to all persons on their attaining the age of eighteen.

There is a certain amount of feeling that the procedure followed during the polling of votes and the counting of votes needs to be carefully examined. Thus, the numbering of polling boxes and precautions taken while the polling boxes are being transported from the polling booth to the counting centre should leave no room for mischief.

The long interval that takes place between the polling and counting of votes is undoubtedly undesirable as it gives rise to a great deal of suspicion. In most democratic countries the votes are counted immediately after they are polled and there is no reason why in India this should not take place. This would no doubt necessitate the holding of elections on the same day all over the State or the country, as the case may be, as it is desirable that the result of elections in one area should not influence the vote in others. It is desirable that administrative arrangements be made for simultaneous voting and counting of votes.

A change that was made on the eve of the General Elections of March 1971 to the effect that the counting of votes which

used to take place polling booth-wise was now to take place constituency-wise by the ballot papers from various polling booths being put in a drum and mixed up and then counted has been attacked by almost all political parties except the one in office and it appears that it was made without any consultation with the political parties.

While there may be something in the argument that the current system of mixing votes prevents intimidation and harassment by making it impossible to identify the way in which a particular village has voted, the suspicion that the new system facilitates tampering with the ballot papers by making detection more difficult is also relevant. The report of our Electoral Reform Committee on this subject says: "Mixing up of ballot papers of various polling booths has given rise to grave misgivings. For one thing, it might be difficult to identify offences at a particular booth. For instance, there might be some ballot papers found in bunches or without the signature of the officer concerned. If ballot papers are mixed up, a correlation between them may otherwise not be established. Similarly, any complaint at a particular booth may lose its validity if the counting is not done separately. If, on the other hand, counting is done separately and a polling booth overpowered through violence co-relation may be established between the polling of the votes and the offence committed. Similarly, counting agents can know by counting at every booth."

When all is said and done, however, it is the character of the voters and the candidates and the vigilance exercised by the electorate which can ensure free and fair elections. Eternal vigilance, it has been said, is the price of liberty. It is also the price of free and fair elections. Voters' Councils at the grass roots level, preferably consisting of those who do not owe allegiance to any political party, may be one form such popular initiative may take.

Fundamental Rights

On February 27, 1947, the Constituent Assembly of India set up various committees, and I was fortunate enough to be elected to two important committees, the Advisory Committee and the Sub-Committee on Fundamental Rights, whose other members included Acharya Kripalani, Professor K. T. Shah, Rajkumari Amrit Kaur, Mrs. Hansa Mehta, Sir Alladi Krishnaswami Ayyar, Dr. K. M. Munshi, Sardar Harnam Singh, the Honourable Maulana Abdul Kalam Azad, Dr. B. R. Ambedkar and Mr. Jairamdas Daulatram.

At the very first meeting the minutes report that I expressed the view that the *rights which could not be enforced by law* should not be included among the Fundamental Rights. I suggested the setting up of an independent supreme judicial authority for pronouncing judgement on the validity of laws which might infringe the Fundamental Rights of the citizen. I also spoke for the assertion of the Fundamental Rights of groups of citizens like minorities in addition to the rights of individual citizens.

In the light of later controversies and attempts to amend the Constitution by the 24th and 25th Amendments, it is interesting to recall that Sir B. N. Rau, who played a big part in the framing of the draft Constitution of India had, in his Report to the Constituent Assembly, suggested the insertion of a clause which would have done exactly what the 25th Amendment now seeks to do. His draft clause (10) 2 ran as follows :

“ No law which may be made by the State in the discharge of its duty under the first paragraph of this section and no law which may have been made by the State in pursuance of the principles of policy now set forth in Chapter III of this Part should be void merely on the ground that it contravenes the provisions of Section 9 or is inconsistent with the provisions of Chapter II of this Part.”

(Section 9 partly corresponded to the present Article 13 and Chapters II and III to Parts III and IV of the present Constitution.)

Happily, Sir B. N. Rau's suggestion was not accepted and we thought we had placed the Fundamental Rights of the citizen beyond the scope of any mischief. Alas, we were to be proved wrong.

The Fundamental Rights Committee prepared its report which was presented to the Assembly on April 3, 1947. In a covering letter addressed to the Chairman of the Advisory Committee, the Committee explained what they had done on the subject of Fundamental Rights :

“ We have attempted to divide Fundamental Rights into two classes :

- (1) Justiciable rights, that is to say, rights which can be normally enforced by legal action, and
- (2) Non-justiciable rights, that is to say, those which are not normally either capable of, or suitable for, enforcement by legal action.

“ Typical of the former is the right which requires that the State shall not deprive a citizen of his liberty without due process of law. It is obvious that if this right is infringed, the citizen can and should have redress in a court of law, for it is possible for the court to find in a given case whether the right has been infringed or not. Typical of the latter is the right which requires the State to endeavour to secure a decent standard of life for all workers. Obviously, it is as impossible for a worker to prove, as for a court to find, that a general right of this kind has been infringed in a given case. We have accordingly put justiciable rights and non-justiciable rights into separate chapters and have made it clear that the latter are intended to be directions for the general guidance of the State and are not cognizable by any court.”

"When the Committee began its work, it was resolved that a difference should be drawn into the list of fundamental rights between rights which are enforceable by appropriate legal process and provisions which are in the nature of fundamental principles of the social policy that is to regulate the governments concerned. In this respect, the Committee has followed the Irish model and adopted a middle course between the one adopted by the framers of the American Constitution and the one pursued in recent European constitutions which have mixed up the two sets of rights."

Why Fundamental Rights ?

The considerations that moved my colleagues and myself in including in the Constitution a Chapter on Fundamental Rights and making the Supreme Court the guardian of these rights vis-a-vis the Executive and Parliament were many and varied. There was first the recognition of the fact that, while the majority may not always be wrong, as the cynic has suggested, there was no assurance that it would always be right. Some of the worse tyrannies in history were to be found and are even today to be found in countries where the legislature consists of the elected representatives of the people. The fact that an action is taken with the support of a temporary majority provides no guarantee that it is either fair or just or wise. Thus, Thomas Jefferson had opined that "the tyranny of the legislators is the most formidable dread at present and will be for many years." There are certain rights that the citizen possesses that cannot be subjected to the whims and fancies of the majority of the day and these are the rights that we listed and described as Fundamental Rights.

These general considerations appeared to us to possess particular validity in the case of a country like India with its wide variety of linguistic, cultural, economic and religious backgrounds and the absence of what may be described as the "non-conformist conscience."

Among those who gave expression to this philosophy was none other than Pandit Jawaharlal Nehru who on 30th April 1967 told the Constituent Assembly that "a Fundamental Right should be looked upon, not from the point of view of any particular difficulty of the moment, but as something that you want to make permanent in the Constitution."

This was not at all a matter for surprise considering that the demand for certain basic rights was reiterated throughout the struggle for national independence and dates back to the Swaraj Bill of 1895 inspired by Lokamanya Tilak, which sought to guarantee "freedom of expression, inviolability of one's house, right to property and equality before the law."

Britain an Exception

It will be seen that we made a striking departure from the British system. Since the detractors of Fundamental Rights have, in Parliament and outside, often sought to draw analogies based on the position in Britain, it needs to be said very clearly that in this respect Britain can give us no guidance. In Britain there is no written Constitution or Fundamental Law. Parliament is sovereign, unlike our Parliament which is a subordinate limb of the Constitution. The right of Parliament to deal with the Fundamental Rights of the citizen enjoyed by the British Parliament we rejected when we decided on a written Constitution by which the Fundamental Rights and other principles of the Constitution could be protected from laws enacted by Parliament. In this particular respect, the British Constitution is well nigh unique.

Yet another reason why Parliament in India cannot be sovereign, as in Britain, is that ours is a Federal Constitution, in which legislative powers are divided and the Union Parliament cannot, save in exceptional circumstances, legislate on items in the State List.

History

From time to time attempts were made through the years to whittle down the Fundamental Rights of the citizen by enacting

various constitutional amendments which sought to truncate one or the other Fundamental Right. The first Amendment was passed in June 1951, only a year after the coming into operation of the new Constitution. The 17th Amendment came into force on 20th June 1964. In between, amendments were made to the Constitution at an average speed of an amendment per year. Despite all these attacks on the various rights of the citizen and in particular the right of the agriculturist to his land, by and large the edifice created by the Constitution survived.

Golaknath Case Judgement

It was reinforced by the historic judgement of the Supreme Court in what is known as the Golaknath case in the beginning of 1967. The majority of the Supreme Court decided that any amendment to the Constitution which took away or abridged the Fundamental Rights of the citizen enumerated in Part III would be void. In doing so, the Court over-ruled some of its earlier decisions. Chief Justice Subba Rao delivering the majority decision said: "In giving themselves the Constitution, the people have reserved the fundamental freedoms to themselves. It is not what the Parliament regards at a given moment as conducive to the public benefit but what Part III declares protected which determines the ambit of the freedom. The incapacity of the Parliament, therefore, in exercise of its amending power to modify, restrict or impair fundamental freedoms in Part III arises from the scheme of the Constitution and the nature of the freedoms." The Court arrived at its decision by taking the view that Article 13 (2) of the Constitution which says categorically that "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void," covers amendments to the Constitution under Article 368 as well as ordinary legislative bills.

Riled by this judgement as also later ones arising out of the nationalisation of banks and the abolition of the privileges

of the princes which followed the same line of thought, those who sought to undermine the Fundamental Rights decided to make a frontal attack on the Constitution and the judgments of the Supreme Court.

24th and 25th Amendments

This major attack was embodied in the 24th and 25th Amendments to the Constitution. On July 28, 1971, the 24th Amendment Bill was introduced in the Lok Sabha and was in due course passed by a big majority. It came into force on 5th September 1971. The 25th Amendment came into force on 20th April 1972.

The 24th Amendment seeks to undo the judgement in the Golaknath case by providing that Article 13(2) does not apply to Constitutional amendments but only to ordinary legislative bills. It is thus aimed at empowering Parliament to abrogate all or any of the Fundamental Rights of the citizen.

The 25th Amendment, which is even more far-reaching, took the matter several steps further down the slope. First, it amended Article 31(2) and destroyed the right to fair compensation and legalised expropriation by substituting the word 'amount' in place of the word 'compensation'.

Secondly, the amendment sought to undo the effect of the judgement in the Banks Nationalisation case by enacting that Article 19 (i) (f) would not be applicable to laws for acquiring or requisitioning property, notwithstanding that it may violate even the rules of natural justice.

Thirdly, and worst of all, Article 31C was sought to be inserted in the Constitution providing that "no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31 ; and that no law containing a declaration that it is for giving effect to such policy shall

be called in question in any court on the ground that it does not give effect to such policy."

There are several vital features of the Constitution that this Article seeks to destroy. First of all, this article damages the supremacy of the Constitution and gives a blank cheque to Parliament and State Legislatures to violate the provisions regarding human rights. Secondly, the Article subordinates the Fundamental Rights to the Directive Principles of State policy, thus making those platonic principles which were deemed to be harmless when they were enacted, subvert vital Fundamental Rights of the citizen. Thirdly, by removing the barrier to arbitrary amendment to the Constitution, Fundamental Rights are virtually abolished even though they still remain ostensibly on the Statute Book.

Then again, the Article destroys completely the right to acquire or hold property, the right not to be deprived of property except by authority of law, and the right to any compensation worth the name. In short, Article 31C authorises outright confiscation of any property, large or small, belonging to any one, rich or poor.

It is not only property rights that are destroyed. This Article also snuffs out other important rights distinct from the right to property such as the right to equality before the law, freedom of speech and expression, freedom to assemble peacefully without arms, freedom to form associations or unions, freedom to move freely, reside or settle in any part of the country. All these can be jettisoned under the plea of furthering social justice.

Further the citizen is not permitted to raise the question whether the proposed law would result in securing the Directive Principles laid down in Article 39(b) or (c). Thus a fraud on the Constitution is specifically protected. The right to move the Supreme Court for the enforcement of the other Fundamental Rights is destroyed by providing that the Fundamental Rights are unenforceable against a law purporting

to give effect to the Directive Principles while precluding the Court from considering whether the law is such that it actually serves any directive principle.

Finally, in the guise of giving effect to the Directive Principles the position of regional, linguistic and cultural minorities is gravely undermined.

In his book, Mr. N. A. Palkhivala comes to the conclusion that "In the entire history of liberty never were so many hundreds of millions deprived of so many fundamental rights at one fell swoop as by the insertion of Article 31C. De Tocqueville remarked that nothing is more arduous than the apprenticeship of liberty. It is a measure of our immaturity as a democracy and the utter apathy of our people that the betrayal of our basic freedoms excited hardly any public debate."

What did Constituent Assembly intend ?

The question has been raised as to what was the intention of the Constituent Assembly in this connection. Did we intend Article 13(2) to apply to amendments to the Constitution or did we intend that Article 368 regarding the procedure for amendments to the Constitution should be independent of Article 13(2)? Considering the large number of Members of the Constituent Assembly, I do not think any one person can be expected to answer for all of them. I can only state my own understanding and, as it happens, I am not the only Founding Father alive to hold that view. My own understanding of the position has been correctly cited in the Minute of Dissent to the Report of the Joint Committee of Parliament on Nath Pai's Bill penned by Mr. Jairamdas Daulatram, a veteran Gandhian Congressman with a very fine record of public service behind him, when he says: "I may mention in conclusion that the Advisory Committee of the Constituent Assembly appointed a special sub-committee to deal with the question of fundamental rights. We were clear in view of the discussion and the spirit

which prevailed in the Advisory Committee at the end of the struggle for National Freedom that we were framing a set of basic rights which would constitute a kind of pact incorporating the understanding we arrived at between representatives of all sections of our people as to mutual rights and obligations and conceived as essential for holding the whole composite nation together. The inviolability of this pact conceived as a vow is patent to our mind. We knew it was our objective and the need of the composite nation. Of the twelve members of the composite committee, six are now alive: Mr. Acharya Kripalani, Dr. K. M. Munshi, Mr. M. R. Masani, Smt. Hansa Mehta, Sardar H. Singh and myself...

"It is not a mere coincidence that all the six of us still hold that the rights contained in Part Three were not to be abridged or abrogatable by Parliament except to the extent and for the purposes specified and provided in Part Three itself. And the only place or part to abridge or abrogate it is in that Part itself."

The number mentioned by Mr. Jairamdas has since shrunk as a result of the passing away of Dr. K. M. Munshi and perhaps some others. Soon there may be none of us left, so it is just as well that I should testify on this occasion to what we thought we were doing when we drafted the Constitution.

At this stage I must confess that the confusion to be found in the conflicting judgement of the Supreme Court probably arose from the fact that there was a certain amount of carelessness in drafting which was at the root of all this trouble. While Article 13 made it very clear that Parliament could not touch any of the Fundamental Rights embodied in the Constitution, we in the Constituent Assembly unfortunately forgot to repeat this provision categorically in Article 368. This error has been the cause of a great deal of confusion and is now threatening to open the door to a situation where our entire free way of life is placed in jeopardy.

Which Way of Life ?

The real issue underlying the controversy about these constitutional amendments is not so much a legal as a philosophic one. In what kind of way of life does one believe? Here there is a distinct clash between two ways of life — the liberal democratic way that is embodied in our Constitution and the totalitarian one followed by the Fascists and Communists. The Marxists have invented a thesis that what our Constitution has described as Fundamental Rights are merely 'formal' freedoms such as the freedom of speech, the freedom of the press, *habeas corpus*, the right to travel and move, the right to choose and change your job, and the rule of law. According to them there are freedoms which are superior to these which they consider to be 'real' freedoms, which are bread, equality, the right to work and social justice. When these two kinds of freedoms clash, they claim that the 'formal' freedoms must be subordinated and give way to the 'real' freedoms. The Soviet dictatorship established by Lenin and Trotsky was built on this logic. The failure of the Soviet experiment to create a free and equal society by destroying the 'formal' freedoms, should, however, give the Marxists reason to pause.

A moment's reflection would indeed show that there is no reason whatsoever why slaves should be given bread. From the time of the ancient Egyptian Pyramids to Stalin's canals built by slave labour the man who has lost his freedom is always starved. Why, when he is so helpless, should he be given bread? So the Marxist dichotomy of "Bread or Freedom" is false. It is only in and through freedom that people get bread.

The best answer to those who attempt to lay the miseries of the people at the door of the Constitution was given by Lord Halisham, the then British Lord Chancellor, at the Fourth Commonwealth Law Conference in January 1971 in Delhi when he said :

"It is only in conditions produced by law that freedom can grow. It is only in conditions where freedom can grow that human dignity can be achieved. It is only free human beings who have attained human dignity who will be ultimately secure in the possession of food, homes and jobs and the security that goes to make the good life. This is the basic philosophy on which I build what I have to say about law and the common man ...

"Constitutional liberties—freedom of the person and of association, equality before the law and liberty of expression—precede and are the conditions of economic advance and social security, both of which are largely the result of constitutional freedoms and cannot be obtained without them. This is why those who throw away constitutional safeguards—elected governments, freedom to oppose, independent courts—in the name of economic advance, are ultimately betraying the common man, and depriving him of the chance of social progress and the very things they promise him in their party manifestoes. *They are the real class traitors because, in the end, they impose themselves as masters on those before whom they parade themselves as liberators.*"

Some of us have for many years urged that a comprehensive and centralised system of planning is not compatible with the rule of law. It has now been established by those who call themselves socialists and who supported the 24th and 25th Amendments that our warning was not misplaced.

It is sometimes argued that all that is sought to be attacked is the right to property and that no harm is intended by the 24th and 25th Amendments to the other Fundamental Freedoms. That, however, is not what the 25th Amendment says. Just as there is a very direct link between the right to property and the other Fundamental Rights, these amendments have covered in their attacks all the Fundamental Rights along with the right to property. Without the right to property, all other rights

tend to weaken. Thus the right to freedom of the press is meaningless without the right to own a printing press and a man is only free to the extent that he controls his physical environment to a reasonable extent.

When Mr. Kumaramangalam, a member of the Union Government and a life-long Communist, in spite of his earlier tactical resignation from the Communist Party, spoke in Parliament on August 4, 1971, on the subject, he appealed to his fellow Communists across the floor to withdraw their amendments seeking to protect the rights of freedom of speech, expression and movement. According to him: "If Parliament's power is curbed in this way, actual experience will show that the forces of the *status quo* would seek refuge under those Articles to frustrate socio-economic measures which you value." In other words, he appealed to them, as one comrade to another, to remember that all these "formal" freedoms which they were trying to protect must be sacrificed. The Communist parties, recognising the voice of their master, withdrew their amendments. Mr. Kumaramangalam, though not right, was certainly logical. Freedom, like peace, is indivisible.

Role of Supreme Court : It is an inviolable principle of constitutional law that the Constitution is what the Supreme Court says it is, and tribute should be paid to the Supreme Court and the High Courts in India for fearlessly carrying out their constitutional mandate, but for which the only restraint on oppressive government would be what Dicey had called the external check of revolution.

In the last week of April 1973, a cruel blow was sought to be struck at the independence of our Supreme Judiciary. The Prime Minister reconstructed the Supreme Court by superseding three senior judges who were in line for the succession to the post of Chief Justice and nominating some one who was said to be receptive to the philosophies of her own Government. This action rightly outraged public opinion in the country. The reaction of the Bar, which was manifested for the first

time in Indian history by members of the profession going on strike, was heartening while the three judges themselves asserted their self-respect and dignity by immediately resigning from the Bench.

The blow that was thus struck at the integrity of the Supreme Judiciary was part of a general pattern to subvert the democratic Constitution and accept the Soviet concept of justice. The method of the *coup d'etat* and conspiracy was evident in the hole and corner manner in which the announcement of the nomination of the new Chief Justice was made after the Supreme Court had closed for the day on 25th April 1973. Perhaps it is not an accident that the authoritative defence of this act was entrusted to a Communist, Mr. Mohan Kumaramangalam, then a Member of the Cabinet. Mr. Kumaramangalam's justification of a "committed judiciary" has drawn from Mr. N.A. Palkhivala in his book the comment that "a committed judge is a contradiction in terms. You cannot have a committed judge any more than you can have boiling ice-cream. Either a man is committed or he is a judge in the true sense; he cannot be both."

Conclusion

Since freedom, like peace, is indivisible, it is necessary to sound a note of caution that the independence of the Judiciary will stand or fall with the maintenance of the Fundamental Rights of the citizen, which involve the freedom of the universities, the press, the farmer, the trader, the workers and the businessman whose freedoms are also threatened,

"Educate our masters" was the call of a British politician long ago. There can be no better exhortation than this to serve as the Order of the Day in furtherance of the purposes which the supporters of the Constitution have at heart.

The two lectures delivered by Sri Masani are educative in nature. I hope that these lectures will be read with interest and viewed in proper perspective.

Sri Masani is one of our eminent leaders and intellectuals. His is a well-known name in the public life of India. As a founding father of the Indian Constitution, he is indeed well qualified to speak on the subject 'The Constitution Twenty-five years later'. On the occasion of the year of Silver Jubilee of the Indian Constitution, the subject chosen for the endowment lectures by Sri Masani is both appropriate and significant.