

THE CONSTITUTION - TWENTY-FIVE YEARS LATER
A FOUNDING FATHER'S REVIEW

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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. H.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 the 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 and 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 in 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 and their Amendment.

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 in 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, Mr. Biswanath Das, Sir N. Gopalaswamy Ayyangar, Dr. D. P. Khaitan and Dr. K.M. Munshi as 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 ~~the~~ 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 that it ~~should be placed in the Union List~~ /and 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 ~~indicative planning~~ and 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.

At the same time, the States' List including 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 is 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 State 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 percent 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 ?

This is only one of the ways in which the adoption of Socialist policies which may be better described as 'Statist' and ^{the} series of Five Year Plans 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 communications. 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 an autonomous statutory Corporation 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, however, there is any one country that needs a federal structure, more than others, it is a country like India with ^{its} size, population and wide diversities of race, religion, caste and ways of life. Even the maintenance of a free and pluralistic 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 well 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 the 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 his functions are laid down in the Constitution 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 percent should be shared on the basis of population and the remaining 40 percent 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 devolution 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 a 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 polity 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 ~~the~~ 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 also be noticed that Nehru hardly knew his own mind. It is not therefore a matter for surprise that the rest of India has been at loggerheads on this subject ever since.

In any event, the Constitution, as enacted, provides by Article 74 (1) that "there ^{shall} ~~should~~ be a Council of Ministers, with the Prime Minister at the ~~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 "aid" means "help" and the word "advise" means "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 advisors 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 Hussain 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 Hussain 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."

urgency of the situation
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 have 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 authority and responsibilities. I consulted my good friend Mr. H.A. Palkhivala, who agreed with me. He therefore drafted and I

a petition in the Supreme Court on 23rd July, 1969, to which my friend Jalraj Madhok, then Deputy Leader of the Jan Sangh in Parliament, was a party. We challenged the validity of the Ordinance as Member of Parliament whose rights 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 twenty-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 shareholder of the 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 permitted 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 respect of 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 have been violated, the former Attorney-General, and Mr. C.K. Daphtary, was not wrong when he recently referred to the present State of Emergency as a 'phony 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 extensions may last for a period of six months after a Proclamation has ceased to operate. In the light of what has happened recently in Ceylon and Bangladesh, the fear that has been expressed that someday 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 Vice 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 worthwhile 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 view 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 veteran leader of the Nair Social Service Society, Ramnath Padmanathan, 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 Governors 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 percent 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 black 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. Article 72, 174 (11) 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."

Sometime in the sixties, I took the same line to support the action of the Governor of West Bengal, Mr. Dharna 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 ~~the~~ 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 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, almost all the Governors of the States in India have been nominees of the ruling party and ^{most of them} have, with rare exception, failed to use the discretion given to them under the Constitution independantly of the Union Government. If the Governors of the States in India had been distinguished public men, acting independantly 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 would 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."

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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. ~~Sir~~ Arthur Barriedale^{Leith} 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, Sir Winston Churchill.

The British precedents in regard to the dismissal of a Government are also 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 the 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."