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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 1947, 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 a 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 method and my aversion to the 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. Unlike the Anglo-Saxons, with the 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. When the vote was taken, my amendment was lost with only three members voting for it, while Dr. Munshi's proposal was carried by the Congress steamroller majority. So reservation of seats for the minorities in the Legislature and provision for Anglo-Indian representation was provided in the draft constitution.

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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 discussion 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 view 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 Scandanavian 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, that the party ^{had} 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:

	Congress Votes (percent)	Congress Seats (percent)
1952 Parliamentary Elections	45	74.4
1957 Parliamentary Elections	47.4	75.1

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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% of the electorate cast their votes and that, of these, 43.5 percent voted for the Congress Party. The nett 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 percent 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 to 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 anyone 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 for 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 percent and thirty percent. 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 possible 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 percent or less 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 along-side of its active political leaders and functionaries. It will be agreed that this is not at all as objectionable as the bribing of voters by individual 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. The Second Ballot calls for a run-off election between two leading candidates in each Single Member Constituency where the leading candidate does 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 the 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, on one hand, combines the advantage of maintaining the nexus between the member of the legislature and his constituency and does not reduce the importance and independence 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 would not involve an increase in the size of the House of *the People*. But it would mean doubling the size of each *freedom entary* 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 percent.

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 *has been* only one Government, namely a coalition of the Christian Democratic Party, led by Dr. Adenauer, with the Free Democratic Party. Later there was 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 benefitting 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, (VolXX, No.3) which discloses that twenty percent of all MPs and MLAs had never heard of Proportional Representation ! If that ^{is} was 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 believed that in recent years the Election Commission had 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 in ^{earlier} my first lecture, 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 both 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 increase, 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.V. 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 offense.
- (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 fulfill 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 you 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 contributions 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 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 ^{three} 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, consistent 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} our 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, ~~our Committee recommended that~~ 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 ^athe 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 'Janta 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 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 the 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 ~~box~~ papers ^{and} making detection more difficult is also relevant. The report of our Electoral Reform Committee on this subject was: "Mixing up of ballot papers of various polling booths has given rise to grave misgivings. For one thing, it might be difficult to identify offenses 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 over-powered through violence, correlation 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 AND THEIR AMENDMENT:

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} Committee on Fundamental Rights, whose other members included Acharya Kriplani, 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. Rao, 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. Rao'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/infringed, the citizen can and should have redress in /is 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 cognisable 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 where 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."

It is not without significance that, when the Constitution was still being framed, the Sub-committee on the Rights of Minorities took a decision not to submit its report till it had a good look at the Report of the Sub-committee on Fundamental Rights. This was a recognition of the fact that the rights of the minorities were dependant on the safeguards provided by the Fundamental Rights.

Among Those who gave expression to this philosophy was none other than Pandit Jawaharlal Nehru who on 30th April 1967 told the Constituent Body 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 Lokmanya 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. Perhaps in the whole world there is no country with representative institutions where there are no limitations which are binding on Parliament in such circumstances as special majorities or endorsement by a referendum.

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 and more. 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 by ~~5 to 4~~ that any amendment to the Constitution which took away or abridged the Fundamental Right of the citizen enumerated in Part III, would be void. In doing so, the Court over-ruled some of its earlier decisions. Chief Justice Subha 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 II rises 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.

I should be asked that the above case is the result of a deep fear of the Supreme Court

Billed 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 judgements 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 Golak Nath 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'.

Amendment
Secondly, the ~~Supreme Court~~ sought to undo the effect of the judgement in the Banks Nationalisation case by enacting that Article 19(1)(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 these 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 to be deprived of property not except by authority of law, and the right to any compensation worth the name. In sort, 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. H.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.

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 happened, 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 Kriplani, 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 held 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. Jairandas has since shrunk as a result of the passing away of Mr. 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.

ECONOMIC ADVANCE AND SOCIAL JUSTICE:

The real issue underlying the controversy about these constitutional amendments is not so much legal^a as philosophical^a 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 and 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, "Bread or Freedom" is false. It is only in and through freedom that people get bread.

But the best answer to those who attempt to lay the miseries of the people at the door of the Constitution was given by Lord Hailsham, the then British Lord Chancellor, at the Fourth Commonwealth Law Conference in January 1971, 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 manifestos. 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 ~~the~~ 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 someone 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 Kumarangalan, then a Member of the Cabinet whose earlier resignation from the Communist Party of India was known to be a purely tactical one. Mr. Kumarangalan's justification of a 'committed judiciary'

has drawn from Mr. N.A. Falkhivala 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 icecream. Either a man is committed or he is a judge in the true sense; he cannot be both."

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 worker and the businessman whose freedoms are also threatened.

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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 Electoral Reform have at heart.