CHAPTER 2

BASIC APPROACH AND PERSPECTIVE

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CHAPTER 2

BASIC APPROACH AND PERSPECTIVE

Approach to review

2.1.1 The terms of reference of the Commission have been so artistically drafted that they admit of no scope for misunderstanding. They aptly meet standards set by J. Stephen for a draftsman to attain a level of proficiency in drafting statutes whereby a reader or user of law drafted by him is not likely to go astray in construing the law even when he interprets it with a bad faith.

2.1.2 As the new millennium commences, we live in a world delicately poised between past fears and future hopes. Never in the past was the need to develop capabilities to manage forces of change so vital. Science and technology will change the world of tomorrow beyond recognition. Life-styles and mind sets will change; so would our world view. Newer concepts of wealth and newer dimensions of poverty will emerge; and so would newer patterns of geo-political equations. The world will increasingly be an inter-dependent world. What happens in far away countries is as consequential to our security and survival as what happen in our immediate neighbourhood. Research in genetically modified food, for instance, somewhere in another hemisphere, for instance, will profoundly affect our agricultural economy. Those who bear the responsibility of the government have a historic role and opportunity to re-build and prepare India for its rightful position in the comity of nations as front runner in humankind's struggle for a

greater future. This requires enlightened leadership having vision and deep sense of mission, and great amount of much work on their part. There is a gnawing doubt whether, sometime and somewhere down the line, we, as a nation, appear to have dropped some fundamental values of a free and self governing people and are finding it extremely difficult to retrieve and restore these values to their proper position in our national life. The words “changing needs of efficient, smooth and effective system of governance and socio-economic development” impart an important dimension to the task. “Today’s world”, wrote a scholar, "is divided not by ideology but by technology”1

1[1]. The following characterizes the nature of the contemporary Indian State:

- *The crucial failure is the innate resistance in governments and governmental processes to the fundamental article of democracy, viz. that all power and all authority flows from the people and that all public institutions are meant solely to serve the public interest. The assurance of the dignity of the individual enshrined in the preamble of the Constitution has remained unredeemed;*

- *From this fundamental breach of the constitutional faith flow almost all our present ills. The first and the foremost need is to place the citizens of this country at center-stage and demonstrate this prioritization in all manifestation of governance;*

- *Citizens see their government "beseiged by uncontrollable events and are losing faith with institutions. Society is unable to cope with current events.";*

- *Human dignity, human rights, literacy, health, social security and other public goods are not to be seen as ultimate rewards of development; but are quintessentially crucial to the developmental process itself;*

1[1] Jeffrey Sachs “NEW MAP OF THE WORLD” The Economist, June 2000

- *Vision of the future shape of the world lies in science, technology, economics, international trade and intellectual property regimes;*

- *Human rights and the role India should endeavour to perform are matters that must receive fuller, more organized, sensitive and incisive intellectual responses;*

- *The ability to respond to and manage the great forces of change ushered in by science and technology is of critical importance. The future of the world is knowledge based and knowledge driven. We simply cannot afford to ignore this truth. Our strategic economic responses need to be sharper;*

- *The Indian State has not shown commensurate and sensitive receptivity to the great transformation in international law and in the concept of national sovereignty. Domestic application of international treaty obligations has not adequately informed its institutions. Minimum economic standards are now a legitimate component of a justiciable Bill of Rights.*

2.1.3 Over the years under the sweep of the global winds of change transforming a welfare-economy into a market economy, the State has itself undergone a change in its character and in its mechanisms for the realization of its social and economic goals. The Overview of the World Development Report 2000 mentions that "The development landscape is being transformed, presenting policymakers with new challenges at the global and local levels". The Report recalls four critical lessons which 50 years of development-experience have yielded. "First, macro-economic stability is an essential prerequisite for achieving the growth needed for development. Second, growth does not trickle down; development must address human needs directly. Third, no one policy will trigger development, a comprehensive approach is needed. Fourth, institutions matter; sustained development should be rooted in processes that are socially inclusive and responsive to changing circumstances."

The 'Present' as History

2.2.1 "Monarchy", it is said, "lives by honour and the Republic by virtue". A period of little more than fifty years may, conceivably, be not deemed to constitute a period of history: being, perhaps too short a span in the life of a nation, or to pass judgement about a nation. But that time-span is enough to discern the virtues imbuing a nation's political institutions and the quality of its leadership. However, if the achievements of the present are so remarkable as to be historic, then, even a decade or two can be of historical import.

2.2.2 Surprises can be exciting and pleasant. Germany and Japan were amongst the many countries devastated at the end, and as a result, of the Second World War. The economic development of Germany, its re-unification and the broader agenda of the unification of Europe provided one of the most shining examples of enlightened political statesmanship. While a megalomaniacal Hitler tried to put a 'German roof' over Europe, Helmut Kohl was determined to put a 'European roof' over Germany. Quality of leadership has immense significance especially in periods of national crisis and reconstruction.

2.2.3 The surprises can, quite often, be unpleasant. The 20th century has, on its conscience, some 100 million human beings killed in armed conflicts and a further 120 million dead as a result of politically-related violence, in which race, ethnicity, religion or political opinion has been a factor.

Constitutional Reforms; Apprehensions

2.3.1 At bicentenary of the Constitution of the United States of America a group of about two hundred persons – professors, jurists, politicians, journalists, diplomats, administrators, senators – looked into the need for reforms in the American Government. The broad issue was identified thus:

"Government deficits, the spiraling imbalance of trade, inconsistencies in foreign policy, illegal immigration, unemployment, the decay of our cities, the abuse of the environment, the staggering cost of elections, and the piracy of special interest groups – these problems and a host of others have led thoughtful citizens to question whether our political system is capable of meeting the challenge of modern governance"

2[1].

As to the need for reassessment of institutions, it was said:

"We stand in awe of the wise men who framed the Constitution nearly two centuries ago, but as they themselves anticipated, changing circumstances demand a reassessment."3

1[1]

2.3.2 The Debate ranged from "Leave the Constitution Alone" to "Crisis and Its Cure". "The foremost requirement of a great power", it was noticed, "is strong executive leadership. The political demand for it, manifest world-wide, arises from the present condition of international relationships, given the state of the military arts; from the inexorable need to develop and use science to maintain national security; and from the nature of modern economic and social organization especially when coupled with emergent ecological considerations."

2[1] About the Book and the Editor : Reforming American Government

3[2] lbid

2.3.3 The opposition to the idea of any reform, more so of constitutional reform, is understandable. Opposition may arise from any or more of several conceivable apprehensions vis-a-vis the nature and composition of the reform body itself; from a propensity for conservatism; a form of inertia relative to change; or from apprehensions as to possible loss of available privileges. On the first, a study says:

> *"There is much to be said for the use of a constitutional revision commission when it is so composed as to be representative of the various major interests of the state; when it is dominated by one of those interests, little can be expected of it."*

On the second cause of opposition, it is said:

"The forces standing against revision have as a major ally the conservatism and apathy of the average citizen who is willing to suffer what he knows rather than risk the unknown quantity that constitutional revision may produce. The history of constitutional revision wherever successfully accomplished has been one of constant and unremitting efforts for citizen education over a period of years. Citizen demand, and only citizen demand, eventually overcomes the interests standing in opposition to change. Great economic, social, and political pressure is required to overcome entrenched interests and citizen inertia."4

1[1]

On the third factor, it is observed :

> *"There are always substantial and powerful forces that will oppose any extensive constitutional revision. There are always groups that stand to lose – or think they stand to lose – in power, prestige, economic position, or legal status if a constitution is substantially rewritten. Rewriting will bring up for reassessment and redetermination the constitutional provisions under which they hold power."5*

4[2] Major Problems in State Constitutional Revision – edited by W. Brooke Graves p.30

5[2] lbid p.28

1[1]

2.3.4 “A nation may make a Constitution, but a Constitution cannot make a nation”. No Constitution, written or unwritten, is ‘worth more than the political temper of the community allows it to be worth’. A Constitution, however lofty its exhortations and sentiments, is not a self-executing document. It requires human agency to implement it. The political traditions of the people and the spirit of constitutionalism are what make a Constitution work. Its essence is its practice.

2.3.5 An assessment of ‘half-a-century of the Constitution at work’ involves an appraisal of the performance of all the three organs of the State, viz. the Executive, the Legislature and the Judiciary. These organs are not merely the manifestations of the presence of the State. Their functions hold a cardinal position. The conditions of activity of these organs are elemental to the comprehension of the inextricable nature of the relationship of the various organs of the State and provides an understanding of the philosophy of the Constitution at work. Making of India’s Constitution has been a stupendous task. India has a diversity which few countries match. Its diversity needs a constitution which is not intended for a nation; but as a writer said its constitution is intended for a civilisation.

2.3.6 In the changing context of globalised economy, the Fundamental law should address itself in action to relocate the sources of the social obligations of the State. This is a complicated exercise. Central to the process of development is the realization of rights. It means that consideration of human rights, equity, equality, equal justice and the accommodation of diversity are central to the conceptualization, design, implementation, delivery, monitoring and evaluation of all developmental processes. The problems of social exclusion, more virulent in India on account of the hierarchical structure of its society, need systemic solutions.

2.3.7 The working of the Constitution over a period of about fifty years, on a balance of the good and bad, achievements and failures, promises and performances, is one of lost opportunities. The increasing impurity of the political climate and its deadening effect on the creativity of the people present a depressing picture. There are, it is true, some impressive achievements. Much has been done and achieved; but in the area of social justice performance falls greatly short of the potentials and of expectations.

Polity and Democracy

2.4.1 All political theories are united on the question of the principle; against arbitrary Government. When a democratic system is chosen, a nation cannot be impatient with democracy. Democracy has its own defects. It is not the best or the most beneficial form of political organization of human beings. But it is accepted as the least hostile amongst all other systems tried. The slackness in jettisoning the heavy baggage of inherited social evils in India has produced pervasive disenchantment with the institutions of democracy. 'Collective action that promises vast benefits is retarded by special interests that hold strategic controls'.

2.4.2 The political structure and system under the Indian Constitution envisage a federal democratic form of government based on the values of equality, social justice and republicanism. It provides a framework for the attainment of its social and economic goals. It envisages a State-centric welfare government. Fundamental Rights and the Directive Principles are the conscience of the Constitution. State has social obligations.

2.4.3 A glimpse of the 'Half-a-century of the Constitution at Work' render some undelectable conclusions inescapable:

(a) The full realization of the goals of social and economic justice as rewards of a peaceful social revolution promised by the Constitution has remained an unredeemed pledge.

(b) That the democratic processes have not promoted self-governance. People of India, under the dispensation, have no effective control over their social, political and economic destiny or emancipation. The system of administration designed and practiced by the political executive with the active support of the permanent civil services has reduced and limited the sovereignty of the people to a mere right to exercise their franchise at the elections; The remedy is to widen the base of democratic debate. As Jefferson observed, "I know of no safe depository of the ultimate powers of the society but the people themselves. And if we think them not enlightened enough to exercise their control with a wholesome discourse, the remedy is not to take it away from them but to inform their discretion".

(c) The society has not been able to use the great gifts of Human Rights, Human Security, Rule of Law, Secular Values to bring about a just, caring and inclusive society. Democratic sentiments and institutions need to be strengthened by civic- education, identifying and striving for common purpose and keeping the areas of private and public life separate. The sociology of pluralism is not inimical to strong democracy, but, on the contrary, is in itself a strong sustaining factor of democracy. It is essential to promote participatory institutions.

2.4.4 But the brighter side of the Half-a century of the Constitution at work is that basic spirit and creed of democracy has taken deep roots in the country, feudal character of society and polity notwithstanding. Democratic processes are, it is true, tainted by the impurity of the electoral processes and pervasive corruption in the working of the democratic institutions. They detract heavily from, and threaten, survival of democracy. Hopefully, they are the manifestations of a difficult but passing phase. With educational advancement and participatory institutions that situation hopefully would improve. The 73rd and the 74th Constitutional Amendments have provided a historic opportunity. The

broader base of democratic debate, free compulsory education and an independent press will strengthen democratic institutions and processes.

2.4.5 But, on an overall assessment, the political, social and economic gifts of democracy have endowed Indians with significant rewards, particularly in the matter of enjoyment of personal liberty and individual freedom. The Press has been free and fiercely independent.

Administrative inefficiency and indifference: The burgeoning of Extra-Legal Systems

2.5.1 It is a sad fact that needlessly harsh, lugubrious, unimaginative and indifferent administration has pushed the poor to the wall. Pervasive corruption, inefficiency and insensitivity – particularly in the distribution of public goods – has resulted in the burgeoning of 'extra-legal' systems. These "extra-legal systems", says an economist, "constitute the most important rebellion against the status-quo in the history of developing countries since their independence" :

- *"Unlike the situation in advanced countries where the 'under-class' represents a small minority living on the margin of society, in some countries extra-legality has always been the mainstream … Most Governments in most nations are in no condition to compete with the extra-legal power ….. throughout the Third World extra-legal activities burgeon wherever the legal systems imposes rules that thwart the expectations of those it excludes. People take refuge in it when the cost of obeying the law – outweighs the benefit."6*

1[1]

- *'Fraternity' the noble ideal of brotherhood of man enshrined in the Preamble of the Constitution has remained unrealized. The People*

6[2] Hernando de Soto "The Mystery of Capital" p.73, 74, 76, 77

of India are more divided amongst themselves than at the time of the country's independence.

- *National political parties are more divided on the definition of 'common national purpose' than ever before; the noble purposes of public life have degenerated than ever before into opportunistic and self-seeking politics of competitive personal gain.*

- *The world is changing at a bewildering pace. In 1800, the world's population is estimated to have been 1 billion. It took 130 years to climb to the mark of 2 billion; just 3 decades for the third billion; only one decade and a half for the fourth, a dozen years for the fifth and even less than that for the sixth billion.7*

1[1]

- *While it took 1000 years for English wheat production to quadruple from half a tonne to two tonnes per hectare, the world's cereals yields have doubled in the last 40 years.*

- *Crisis of leadership, corruption, insensitivity and inefficiency of administration have resulted in extra-legal systems and parallel economies and even parallel governments. Bureaucratic pettifoggeries which cause frustration in people in their daily life has a more serious fallout of pushing more and more people into extralegal systems.*

India: Burden of the Colonial Past

2.6.1 Today as we celebrate the 50 years of the Constitution we stand in awe of the great women and men who sculpted it. Political leaders of the day, who had come under the spell of

7[2] P.C. Alexander: India In the New Millennium p.17, 18

the Mahatma, were truly magnificent individuals. When we compare them with the founding fathers of the American Constitution, the great leaders of the Russian Revolution and the leaders of the movement for the advancement of the coloured people in America and Africa, our leaders, in addition to their great patriotism and wisdom, had another dimension to their great vision. They brought a spiritual dimension to a political task. In the entire debates in the Constituent Assembly, there is no touch of bitterness or rancour against the British or the grim events of the Partition; their anxiety was to save the Indian sub-continent from the scourge of the bigotries and intolerances that had made Partition inevitable. They reaffirmed their immense faith in the good sense of the common man and provided universal adult suffrage as one of the corner stones of the democratic edifice.

2.6.2 In 1750, India's share of the world's manufacturing output was 24.5% while that of the United Kingdom and the United States was 1.9% and 0.1% respectively. By 1900, India's share had come down to 1.7% while the United Kingdom and the United States of America8

1[1] had increased their shares to 62% and 23.6% respectively. Emerging from a long period of colonial rule, exploitation and divisive politics, independent India still bore visible, deep and unmistakable fault lines strewn across its national fabric. The dominant devisors included a whole range of ethnic, linguistic, religious, class and caste differences so pronounced that these appeared as serious impediments to formulating an agenda for materializing the vision of a democratic society with legal, political, social and economic benefits accruing to all citizens and with the ability to attain its rightful position in the comity of nations. Enveloping entire social spheres was a huge cultural haze manifested by superstition, social evils and malpractices, antediluvian dogmas, prejudices and contradictions across different sections of our society. It was an unequal society and all unequals were prone to live 'under a constant dread of an impending disaster.'

Spirit of the Independence Movement

2.7.1 The biggest divides – caused by communal and casteist attitudes – provided the sub-text for regional and other social divides. Increasingly, sentiments involving religion were manipulated by the colonial power to counter the movement towards the cherished goal of freedom and independence; and proved decisive in precipitating the Partition. The fight on this front was lost early. There were other divides fostered by colonial strategists and rulers who

8[2] Paul Kennedy – The Rise and Fall of the Great Powers – page 149

operated the policy of ‘Divide et impera' and consciously contrived to create and widen fissures in the polity. The other India overseen by the British, but ruled by the princes and their overlords, was perpetuated as an independent autonomous chunk of political India.

2.7.2 There were some social road blocks to progress fostered by moribund tendencies innate to the society itself. Under the caste regime, access to social facilities, social institutions and educational and economic opportunities were not available at all; but were severely restricted. The position of women presented a pitiable picture of injustice, cruelty, exploitation and indignity.

2.7.3 The stupendous task of the framers of the Indian Constitution needs to be seen in this context. A people suffering oppression under a feudal system were grimly struggling to be reborn into a life of dignity and hope. The past was heavy on their shoulders and the future uncertain. Over the centuries, despite India’s magnificent achievements in, and contributions to, art, literature, architecture, astronomy, sculpture, aesthetics, etc. and to the profound issues of man’s spiritual quest towards which the whole world looked with wide eyed wonder, it remained a fractured society deeply and painfully riven with rifts, animosities, hostilities and threats. The communal carnage of the Partition left India shocked and demoralized.

2.7.4 Within the independence movement strenuous efforts were made to address some of these issues by symbolism, action and dialogue. The struggle for freedom and independence was energized and driven by a powerful passion to free India from foreign rule and contained in it myriad hopes and aspirations for political, social and economic emancipation not of Indians alone, but of subjugated and exploited human beings the world over. Our great national leaders consistently articulated their vision of a higher human civilization based on humanism, pluralism, peace, brotherhood and oneness in which India would perform her rightful role in service of humankind.

2.7.5 Thus, inherent to the national movement was a social compromise that lasted through to the time when Independence was finally declared. The other lights kindled within the freedom movement on swadeshi, self-reliance, rural re-construction and basic education were available as pointers to address the issues in the future.

Making of the Constitution: Nature of the Polity : Federalism

2.8.1 Federalism as a form of governance becomes an attractive, and indeed, an obvious choice where wide political, cultural and linguistic diversity exists in a vast area of a country. Referring to the federal form being the obvious choice for India, Sawer observes: "The sub-continent of India was another area which by reason of size, population, regional (including linguistic) differences and communication problems presented an obvious federal situation, if not the possibility of several distinct Nations."9

1[1] "Not only did India become the first republican member of the Commonwealth", writes C.F. Strong10[2], "but it began the chapter of post-war constitutionalism."

> *"The rise of the constitutional state is essentially a historical process and the chief materials of history include the history of political ideas which have prompted their development." A Constitution is defined "as a frame of political society organized through and by law, in which law has established permanent institutions with recognized functions and definite rights", and a constitutional state "as one in which the powers of the government, the rights of the governed and the relations between the two are adjusted."*

2.8.2 Constitutions can be unitary or federal, unwritten or written, flexible or rigid, whether parliamentary or non-parliamentary. These are merely broad propositions and "the only manner in which states may be differentiated is according to the structural peculiarities of their governmental organization".

2.8.3 A unitary state is one organized under a single central government; a federal state is one in which a number of coordinate states unite for certain common purposes. But the distinction must be kept clearly distinguished between "local governments in a unitary state and state governments within a federal state."

9[2] Sawer, Modern Federalism (1969) p.284

10[2] C.F. Strong –Modern Political Constitutions – Sidgwick & Jackson, London

2.8.4 Federalism, as a political choice, was an inevitable necessity in view of the vast size of the country and its diverse regional, linguistic, ethnic, cultural patterns. But the federalism that the wise founders conceived was not the conventional or the ideal concept of federalism. India was to be a 'union' of States. The Union was an indissoluble union. The range of problems that confronted India at the time of the making of its Constitution has few parallel in the history of any country. The depth, range, diversity and complexity of its problems could baffle any pre-set political pattern or theoretical solutions or off-the-shelf-solutions as obvious political choices. The pattern was indeed sui-generis. This aspect was aptly summed up by a distinguished author when he said, "Characterizations such as 'quasi-federal' and 'statutory decentralization' are interesting, but not particularly illuminating. The members of the Assembly themselves refused to adhere to any theory or dogma about federalism. India had unique problems, they believed, problems that had not 'confronted other federations in history'. These could not be solved by recourse to theory because federalism was 'not a definite concept' and lacked a 'stable meaning'…… The Assembly, in fact, produced a new kind of federalism to meet India's peculiar needs."11

1[1]

2.8.5 The Objectives Resolution of the Constituent Assembly dated 22nd January, 1947 had arguably contemplated that, "the territories in India shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions are vested in, or assigned to, the Union or as are inherent or implied in the Union or resulting therefrom".12

1[1] But later, in the light of the experiences of the Partition, the Union Powers Committee (Second Report, 5th July, 1947) opted for a strong Centre taking the view, "that the soundest framework of our Constitution is a federation with a strong Centre. In the matter of distributing

11[3] The Indian Constitution Cornerstone of a Nation: Granville Austin p.186

12[3] Indian Federalism – A comparative Study: by Justice E.S. Venkataramiah and P.M. Bakshi p.75

powers between the Centre and the units, we think that the most satisfactory arrangement is to draw up three exhaustive lists on the lines followed in the Government of India Act, 1935, viz. the federal, the provincial and the concurrent. We think that the residuary power should remain with the Centre."

2.8.6 In a federal system, the Union and its Units touch each other at many points. That can be a source of friction; therefore, the need for accurate definition of their respective spheres and powers. This is possible only under a written Constitution. The achievement of the federal form of government is that it reconciles the conflicts between the Union and the States by an appeal to a fundamental law which all the parties recognize as binding and which erects a judicial forum for the authoritative determination of the limits of the respective powers.

2.8.7 The observations of Dr. Ambedkar on the special nature of India's federalism are worth recalling. He said, …. "there are some other special features of the proposed Indian Federation which mark it off not only from the American Federation but from all other Federations. All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances. In normal times, it is framed to work as a federal system. But in times of war it is so designed as to make it work as though it was a unitary system."

2.8.8 Dr. Ambedkar added that Indian federalism did not suffer from the faults of rigidity or legalism. The Indian federal polity was not the classical federalism of the American mould as is demonstrated by the many of its features which may be called 'unfederal'. There is no separate judicial systems to administer the State and federal laws separately. The judiciary is an integrated judiciary.

2.8.9 Article 263 had been most underutilized provisions of the Constitution. It can be imaginatively put into service by constituting subject or area specific Inter State Councils to deal with emerging new issues involving Union-State relations, more so in relation to areas touching upon international trade and participatory role therein of the States.

2.8.10 Dealing with the prominent unitary features of India's federal set-up, the Supreme Court observed, "that the inference is inevitable that the distribution of powers – both legislative and executive – does not support the theory of full sovereignty in the States".13

1[1] "In a sense, therefore, the Indian Union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated, and socially, intellectually, and spiritually uplifted." 14[3]

Basic Values of the Constitution: Democracy, Republicanism, Rule of Law, Constitutionalism and Respect for Minority Rights

2.9.1 The Preamble of the Constitution is the key to its social, political and economic philosophy. It enshrines sovereignty of the people; promises a socialist, secular, democratic republic based on justice, liberty, equality and fraternity. Democracy, rule of law, constitutionalism and respect for minority rights are essential, collective, inter-dependent, indivisible elements of a pluralist society. They together assure the dignity of the individual and unity and integrity of the nation. The Constitution promised a social revolution and the democratic means for its achievement. The reality of a constitution is not merely its adoption which, in and of itself, does not necessarily signal a state's commitment, even in theory, let alone

13[3] AIR 1963 Supreme Court 1241 (V 50 C 188) State of West Bengal vs. Union of India

14[3] Rajasthan vs. Union (1978) 1 S.C.R. at p.34

in practice, to constitutionalism. Constitutionalism is a broad amorphous concept. Louis Henkin15

1[1] presents some minimum ingredients of constitutionalism such as: government according to the constitution; separation of powers; popular sovereignty and democratic governance; constitutional review; an independent judiciary; controlling of police; civilian control of the military; individual rights; and provision for amendment.

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2.9.2 Elective despotism could be checked only by the doctrine of Government of enumerated powers under a written constitution. There are certain essential components of this concept of rule of law. The law is supreme over the acts of both Government and private persons. There is one law for all. Rule of law requires for its operation the making of just laws which embody and give expression to the more general and somewhat amorphous normative principles of rule of law and an independent judiciary, and a judiciary with the power to issue practical orders. "Rights and duties, after all, may exist on paper, but those who are unimpressed by pieces of paper may still have a healthy respect for threats of imprisonment. The exercise of all public power must find its ultimate source in some legal rule. This principle is the bond that unites the governors and the governed. If this obligation of the government is broken, then, it would be unrealistic to expect a voluntary, unilateral adherence to law by the citizenry".

Democracy And Republicanism

2.10.1 Strong democracy does not need homogenous interests but depends on civil education, capacity for mutual action and sociology of pluralism. Constituent Assembly debates refer to the times in the past "when India was studded with republics and even where there were monarchies, they were either elected or limited". Dr. Radhakrishnan echoed this:

> *"We cannot say that the republican tradition is foreign to the genius of this country. We have had it from the beginning of our history. When a few merchants from the north went down to the south, one of the Princes of Deccan asked the question, "Who is your King?" The answer was, "Some of us are governed by assemblies, some of us by kings".*

15[4] Henkin, 'Elements of Constitutionalism', Occasional Paper Series, August, 1994, Centre for the Study of Human Rights, Columbia University (Quoted in "Enforcement of Human Rights through Bill of Rights P.465)

2.10.2 Democracy has wider moral implications than mere majoritarianism. A mere majoritarian democracy is likely, sooner or later, to degenerate into elective despotism. Pluralism is the soul of democracy. "A true democracy", it is said, "is surely one in which the existence of the power of the many is conditional on respect for the rights of the few." There is no place for "a crude statistical view of democracy."

2.10.3 Democratic polity, to be conflict-free, has to be an inclusive democracy. Prof. De Smith expressed this:

"…we have seen it enacted so many times in so many countries. In a large majority of newly independent states, even the most modest expectations of liberal constitutionalists have gone unfulfilled…"

"…Nor was a federal constitutional structure, which presupposed a willingness to accept restraints on the exercise of power at both the central and regional levels, at all likely to flourish. When, moreover, the principal divisive factors in the state are communal-religious, racial, tribal or linguistic, the prospects for constitutionalism are never bright, even in a developed country, as the recent history of Northern Ireland has underlined."

2.10.4 It is erroneous to think that democracy succeeds where the composition of the society is homogeneous and that it is difficult in pluralist society. Benjamin Barber16

1[1] affirms that:

> *"Strong Democracy rests on the idea of a self-governing community of citizens who are united less by homogeneous interests than by civic education and who are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions rather than their altruism or their good nature. Strong democracy is consonant with – indeed it depends upon – the politics of conflict, the sociology of pluralism, and the separation of private and public realms of action".*

16[4] Benjamin Barber "Strong Democracy" p.117

2.10.5 On the positive side, the significant developments in the working of the democratic system are that the democratic base has been widened with the formation of elected panchyati raj institutions. Second is the impressive and progressive improvement in the educational qualifications of the elected members of the Parliament and State legislatures. The third significant feature is that the representation of the society in the legislatures has become more egalitarian. The composition of Parliament and the State legislatures, in terms of width of social representation, is moving in the right direction. Political debate is becoming increasingly broad based.

2.10.6 Equally impressive has been the way democracy has taken roots in the country. The 73rd and 74th amendments to the Constitution ensuring reservation of one-third of seats for women in elections to village *panchayats* and *nagar palikas* have provided a further impetus to democracy, decentralization and local governance providing a broader base for democratic debate.

2.10.7 The framers of the Constitution sought to unite the vast country with its great diversity and many languages and creeds within the common bond of constitutional justice on the great ideals of Justice, Liberty, Equality and Fraternity. The framers showed an uncompromising respect for human dignity, an unquestioning commitment to secularism, equality and non-discrimination and an abiding concern for the poor and the weak. They made a bold attempt to base the constitutional foundations on the firm faith that all classes of people, followers of all faiths and particularly the traditionally under-privileged should all join to work for their united constitutional salvation on the shared faith that the peoples as a whole must sink or swim together and that in the long run prosperity and salvation are in union and not in division. The words of Pandit Nehru during the constituent assembly debates are worth recalling:

> *"What we achieve in unanimity, what we achieve by cooperation is likely to survive. What we gain here and there by conflict and by overbearing manners and by threats will not survive long. It will only leave a trail of bad blood….. The great thing is to discover not what Governments prescribed", said Lord Acton, "but what they ought to prescribe; for no prescription is valid against the conscience of mankind."*

2.10.8 The Union of India was intended to be an indestructible union. The units had no power of secession. The cherished values of the Constitution were enshrined in the great words of its preamble. The Constitution promised Justice, social, economic and political; Liberty of thought, expression, belief, freedom of faith and worship; Equality of status and opportunity and to promote Fraternity, assuring the dignity of the individual and the unity and integrity of the Nation. The constitutional document thus is a formidable one. It has more than 395 articles and 12 schedules. It has an 'internal architecture' of its own called the 'basic features'. Any expounding of its provisions must have reference to the other provisions and the structure of the constitutional scheme, which underlies and infuses and breathes life into it.

Entrenched, Justiciable Constitutional Bill of Rights and Directive Principles

2.11.1 A Bill of Rights is the political technique of placing certain basic civilisational values as limitations on the majority. The entrenched and justiciable Fundamental Rights are the expedient adopted by self-governing peoples to recognize certain basic human-rights as inalienable and place them beyond the reach of an 'amoral majority.' Values of life, liberty and dignity are not subject to political vicissitudes. They depend on the outcome of no elections. They are sacrosanct in themselves and are inalienable.

2.11.2 Part III of the Indian Constitution enshrines these great rights. Part IV contains directives which enable the realization and effectuation of the aspiration of Part III and give full meaning to them. Part IV is theoretically non-justiciable. But it permeates the whole ethos of Part III. Despite Sir Ivor Jenning's sarcasm that "the ghost of Sidney and Beatrice Webb stalk through the pages of the text, Part IV of the Constitution expresses Fabian Socialism without the Socialism", the Constitution seeks humanism, endurance and higher values.

The Working of the Constitution: Economic and Social Change

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2.12.1 India has recorded significant achievements along many dimensions of human development since Independence. Important changes, for example, are visible in the social sphere too where affirmative action, political organization and collective mobilization are gradually transforming the status and position of many socially backward communities, particularly among those classified as belonging to the

Scheduled Castes and the Scheduled Tribes. Equally impressive has been the way democracy has taken roots in the country. The 73rd and 74th amendments to the Indian Constitution ensuring reservation of one-third of seats for women in elections to village level *panchayats* and *nagar palikas* have provided a further impetus to democracy, decentralization and local governance. Several positive changes are beginning to be felt at the grassroot level with women enjoying far greater freedoms than before, with the induction of more and more women into public decision making and with several thousands of self-help groups, voluntary organisations and civil society initiatives engaged in critical development action.

2.12.2 Market economy has its own negative impact on equality of distribution. It can produce unacceptable levels of economic inequality. The share of income and consumption of the poorest 20 per cent in India is 9.2% while that of the richest quintiles is 39.5%. This is perhaps the pattern in the modern market economics. In USA (1994) poorest 20% of the population had 1.5% share of income and consumption while the richest 20% had 45.2%. In China (1995), the poorest 20% had 5.5% share and the richest 20% had 47.5%. This reflects, in a non-trivial sense, the anomalies and inequities of the international economic order. Over the 30 years from 1960 to 1990, the affluent 20% of the world have enhanced their share of incomes and consumption to 86% while the poorest 20% have had their share reduced to 1%.

2.12.3 Similarly, there has been only a marginal improvement in access to basic health care between 1992-93 and 1998-99.

- *Despite the positive growth record, there has not been a perceptible and significant improvement in the quality of people's lives. For instance, there has been a marked slowing down in the rate of reductions in infant mortality in recent years.*

- *Again, despite the better growth record in recent years, progress in bridging gender gaps has been slow. Between 1991 and 1997, literacy gaps between women and men has hardly been bridged.*

Economic performance

2.13.1 Most noticeable, however, is the expansion and diversification of production. New technologies, modern management and the advances in science, medicine, engineering and information technology have increased domestic production of a wide range of goods and services. Particularly significant has been the increase in agricultural production. Between 1950-2000, the index of agricultural production increased more than four fold. Between 1960-2000, wheat production went up from 11 million tonnes to 75.6 million tonnes and the production of rice increased from 35 million to 89.5 million tonnes. This is no mean achievement for a country that relied on food aid until the early 1960s. Similarly, there has been a rapid expansion in both the industrial and service sectors. The index of industrial production went up from 7.9 in 1950-51 to 154.7 in 1999-2000. Electricity generation went up from 5.1 billion KWH to 480.7 billion KWH.

2.13.2 This economic expansion has contributed to a steady and impressive growth in India's GNP. With the exception of 4 years, India has enjoyed a positive growth rate in its GNP every year since 1950. Particularly striking are the higher rates of growth after the mid-1980s, and even more so after the initiation of economic reforms in 1991. Prudent fiscal and economic management enabled India to avert the fiscal crisis that many east asian countries experienced in the mid-1990s. On the contrary, India's GDP grew annually by 6-8% per annum between 1994-2000 except in the year 1997-98 when it grew by 4.8%.

2.13.3 As a result, India's per capita Net National Product (NNP) in 1999-2000 was more than 2.75 times higher than what it was in 1951. Before 1980, the annual average rate of increase of per capita income was around 1.2%. Since then, there has been a significant change. In the first half of the 1980s, per capita NNP grew by 2.4%, and between 1985-90, by 3.2% on average every year. The financial crisis of the early 1990s saw a slowing down in the growth of per capita income, but there has been a quick recovery. Per capita NNP has grown on average by 4.8% every year between 1993-94 and 1998-99.

2.13.4 In India the industry generated 330 billion Rs. ($7.7 billion) in 1999, 15 times the level in 1990. One study estimates that by 2008, information technology shall account for 30% of India's exports and 7.5% of its GDP. Employment in the software industry is projected to rise from 180,000 in 1998 to 2.2 million in 2008, to account for 8% of India's formal employment.

2.13.5 Information and communication technology has created new out-sourcing opportunities by enabling services to be provided in one country and delivered in another. Delivered by telecommunication or data networks, the services include credit card administration, insurance claims, business payrolls and customer, financial and human resource management. The global out-sourcing market is worth more than $100 billion, with 185 Fortune 500 companies out-sourcing their software requirements in India alone. India has now 1,250 companies exporting software.

2.13.6 India's English-language technical colleges turn out more than 73,000 graduates a year. By investing in infrastructure (especially high-speed links and international gateways with sufficient bandwidth), the Government has helped develop India's place in the new economy. These efforts will deliver long-term benefits for human development and equitable growth.

2.13.7 There are economic predictions that by 2020 India would be one amongst top 10 countries in per capita income and the third in purchasing-power-parity. It is also predicted that by 2020 India would be the largest software developer and will be leading in space technology which will greatly enhance the potential for education, tele-medicine, disaster-management, meteorology, remote sensing, etc.

Disturbing Features: Increasing Disparities of Income

2.14.1 Global disparities of incomes and inequality are, indeed, high.

- *In 1993, the poorest 10% of the world's people had only 1.6% of the income of the richest 10%.*

- *The richest 1% of the world's people received as much income as the poorest 57%.*

- *The richest 10% of the US population (around 25 million people) had a combined income greater than that of the poorest 43% of the world's people (around 2 billion people).*

- *Around 25% of the world's people received 75% of the world's income (in PPP US$).*

- *In 1998, out of $70 billion spent on global health research, only $300 million went for research on HIV/AIDS and $100 million on malaria which are the problems of developing countries.*

- *This attitude is reflected on the fact that out of 1223 new drugs developed between 1975 and 1976 only 13 were relevant to tropical diseases.17*

1[1]

2.14.2 The Human Development Report (1999) noted of increasing inequalities between the countries. It says :

> "Inequality between countries has also increased. The income gap between the fifth of the world's people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, up from 60 to 1 in 1990 and 30 to 1 in 1960."

2.14.3 By the late 1990s, the fifth of the world's people living in the highest-income countries had:

17[4] UNDP Human Development Report, 2001

- 86% of world GDP – the bottom fifth just 1%
- 82% of world export markets – the bottom fifth just 1%
- 68% of foreign direct investment – the bottom fifth just 1%
- 74% of world telephone lines, today's basic means of communication – the bottom fifth just 1.5%.

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2.14.4 But despite the positive growth record, there has not been a perceptible and significant improvement in the quality of people's lives. For instance, there has been a marked slowing down in the rate of reductions in infant mortality in recent years. Again, despite the better growth record in recent years, progress in bridging gender gaps has been slow. Between 1991 and 1997, literacy gaps between women and men has hardly been bridged. India's low level of human development reflects the persistence of extensive human deprivations. Despite the growth record, India's backlog of human poverty is indeed enormous. At the end of 50 years, *human poverty* still persists in substantial number and the backlog of human deprivations are enormous.

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Public Finance and Public Spending

2.15.1 The state of public finance in India, despite the accelerating growth and low inflation and reasonable foreign exchange reserves situation, remains a source of concern. India's fiscal deficit is among the highest in the world - between 5-6% of GDP. The combined deficit of the Central and State Governments, after declining from 9.2% in 1990-91 to 6.8% in 1993-94, rose to 8.5% in 1998-99. Bulk of social sector spending comes from State Government revenues. However, the fiscal situation of most States is not good. Many face severe deficits. The pressure from the Central Government to reduce these deficits is even greater. This typically translates into State Governments cutting down their spending on social sectors - at a most inappropriate time. Indeed, it is only when the State invests in the social sectors - in health and education - that there is any possibility of sustaining a more equitable and higher economic growth rate in the years to come.

2.15.2 The combined fiscal deficit of the Central Government and the State Governments, as mentioned by the Finance Minister in his budget speech on 28th February, 2001, was in the order of 10 per cent of GDP. The amount left in the hands of the Central Government, after disbursement of States' share of the Central taxes and grants and meeting Central expenditures in the nature of expenses on interest payments, defence, major subsidies and pensions, was Rs. 12,000 crores necessitating borrowing in the order of 111,000 crores to make both ends meet. Again, the depressing picture portrayed by the Finance Minister was that 70% of these borrowings had to be for financing unproductive expenditures.

2.15.3 The preoccupation with managing the fiscal deficit as a goal in itself is resulting in many instances of lower allocations to the social sector. Unfortunately, the State Governments do not realize the impact of such cutbacks on human development. Many policy makers in fact see this as an opportunity for government to abdicate its responsibility towards assuring citizens of their basic human rights.

2.15.4 The poor and other socially disadvantaged groups are worst affected by such cuts. The combined deficit of the States has also gone up from 3.2% to 3.6% between 1991-99. In 1998-99, the States' budget deficit worsened below the level of 1990-91, and is likely to continue unless a serious effort is made to check it. Between 1993-94 and 1997-98, the fiscal deficit rose in Uttar Pradesh from 4.5% of State GDP to 8.6%; in Bihar from 4% to 6.2%; in Orissa from 5.7% to 6.3%.

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2.15.5 Public spending has played an important role in India's poverty reduction. The marked decline in income poverty from the mid 1970s to the end of the 1980s coincided with the sharp rise of public expenditures. Between 1976 and early eighties, real per capita development expenditure increased at an annual rate of 6%. It was also a period that coincided with the declaration of an increased political commitment to poverty eradication, and the introduction of several new anti-poverty programmes. Nationalized banks were required to assign 40% of their lending to priority sectors – small farmers, small businesses and artisans. New employment-creation and asset generation programmes were introduced. The period also witnessed a substantial increase in rural non-agricultural employment and real wages went up sharply.

2.15.6 Government expenditures on poverty alleviation appear to have strong "trickle down" characteristics, much more distinctly than income growth. Practically all States that have succeeded in reducing income poverty have made sizeable investments in poverty alleviation programmes. The size of government spending matters, and so does the efficiency of spending. It cannot be denied that leakage, wastage, corruption and inefficiency greatly reduce the impact on poverty reduction. The enormous scope that exists for improving the efficiency of public spending shows the potential that exists for rapidly reducing human poverty with significant improvements in the implementation and management of development programmes.

2.15.7 Some recent trends in public spending on poverty alleviation are however disturbing. Between 1990-91 and 1996-97, the Central Government expenditure as a percentage of GDP at current market prices went down from 18.1% to 14.3%. During this period, however, Central Government expenditure on social sectors (comprising education, health and family welfare, water supply, sanitation, housing, social welfare, nutrition, rural employment and minimum basic

services) as a ratio to total expenditure increased from 7.7% to 10.5%. Real development expenditure per capita by the States went up from Rs.207 in 1980-81 to Rs.367 in 1995-96. However, what is worrisome is that during this period, development expenditure as a multiple of non-development expenditures fell from 3.2 in 1980-81 to 2.1 in 1995-96.

2.15.8 Taking all 14 States together, there has been a decline in State plan expenditures. And this perhaps conceals an even greater decline in investment for new capacity as much of the increase is in the revenue component of the plan. With the exception of Rajasthan where there has been a marginal increase, there has been a decline in the levels of plan expenditure in every other State. The drop is the largest in Bihar.

Poverty in the Third World: Myth and Reality

2.16 The economic conditions in the Third World, no doubt, present a grim picture. Poverty in the developing countries is real and grinding. Enormous disparities of global wealth between the North and South, the West and the rest is a reality. An economist points out,

> *"Even in the poorest countries the poor save. The value of savings among the poor is, in fact, immense: forty times all the foreign aid received throughout the world since 1945."*

The chief obstacle, according to him, is that these enormous assets and resources of the poor are not documented and, therefore, not available to support credit. If U.S.A raises its budget for foreign aid to 0.7% of national income as recommended by U.N., it would take that richest country 150 years to transfer to the world's poor the wealth they already possess.

He says,

> *"In the West, by contrast, every parcel of land, every building, every piece of equipment or store of inventories is represented in a property document that is visible sign of a vast hidden process that connects all these assets to the rest of the economy.*
>
> *Without an integrated formal property system, a modern market economy is inconceivable.*
>
> *By our calculations, the total value of the real estate held but not legally owned by the poor of the Third World and former communist nations is at least $9.3 trillion. This is a number worth pondering: $9.3 trillion is about twice as much as the total circulating US money supply. It is very nearly as much as the total value of all the companies listed on the main stock exchanges of the world's twenty most developed countries: New York, Tokyo, London, Frankfurt, Toronto, Paris, Milan, the NASDAQ and a dozen others. It is more than twenty times the total direct foreign investment into all Third World and former communist countries in the ten years after 1989, forty-six times as much as all the World Bank loans of the past three decades, and ninety-three times as much as all development assistance from all advanced countries to the Third World in the same period."*

Speaking of the poor, he writes,

> *"The words 'international poverty' too easily bring to mind images of destitute beggars sleeping on the kerbsides on Calcutta and hungry African children starving on the sand. These scenes are, of course, real, and millions of our fellow human beings demand and deserve our help. Nevertheless, the grimmest picture of the Third World is not the most accurate. Worse, it draws attention away from the arduous achievements of those small triumphed over every imaginable obstacle to create the greater part of the wealth of their society. A truer image would depict a man and woman who have painstakingly saved to construct a house for themselves and their children, and who are creating enterprises where nobody imagined they could be built. I resent the characterization of such heroic entrepreneurs as contributors to the problem of global poverty.*
>
> *They are not the problem. They are the solution."*

The author also recounts a story whose message, he said, had stirred millions of people:

> *"of an Indian merchant who had been promised by a prophet that he would surely become rich beyond all imaging if only he would seek his treasure. The merchant traveled the world only to return home old, sad and defeated. As he re-entered his abandoned house, he needed a drink of water. But the well on his property had silted up. Wearily, he took out his spade and dug a new one – and instantly struck the Golconda, the world's greatest diamond mine.'*

"Leaders of the Third World", he says, "need not wander the world's foreign ministries and international financial institutions seeking their fortune. In the midst of their own poorest neighbourhoods and shanty towns there are – if not acres of diamonds – trillions of dollars, all ready to be put to use if only we can unravel the mystery of how assets are transformed into live capital."18

1[1]

The Working of the Executive

2.17.1 A political executive is in the form of the Council of Ministers. In a parliamentary democracy, unlike in the presidential system, there is a degree of fusion of the two organs of the State, the Political Executive and the Legislature. The principle of responsible government has its institutional implications. The conventions of the cabinet system are : (1) that members of the cabinet are, as a rule, members of parliament; (2) that they are necessarily members of the majority, whether of one party or of a coalition; (3) that they hold office only while parliament and the country do not obviously withdraw their confidence from a minister or the entire cabinet; (4) that the cabinet acts as unit in face of other governmental bodies and this implies a certain predominance of the prime minister over his colleagues. The principle of collective responsibility means that the ministers answer as one for any action of the government. It does not necessarily mean collective decisions upon every matter. Normally, cabinet is a small body of persons drawn from the majority party (or the majority coalition) in the legislature. In India over the years the size of the Cabinets, both in the Union and the States, have tended to increase enormously adding to the cost and clumsiness of Government. A law or parliamentary convention to limit the size of the Cabinet is all the more desirable at the present juncture in view of a manifest sense of abandonment with which large size of Cabinets are resorted to. There are

18[4] Hernando de Soto – The Mystery of Capital p.30

also other political rewards for the party members and supporters in the form of chairmenship of statutory corporations, usually attached with status of a Minister of Cabinet rank. The magnitude of the harm caused to public-interest, to the efficiency of administration and to the exchequer is, indeed, incalculable. This has increasingly become the pervasive political culture of the day.

2.17.2 The permanent civil service is another gargantuan structure. The salaries, perquisites and the other benefits of office are so heavy that very little is left out of the revenues towards social infrastructure, social security, health, and education and other needs of the society. The financial allocations for health, education and social security in terms of percentage of the GDP is dismally low. The mobilization of resources in the States present a discouraging picture. There is heavy leakage of taxes. The executive has failed to afford reassurances to the citizenry of prompt reasonable efficient services particularly in public utilities. The citizenry has no assurances of living under the adequate system. Public-Greviance-Rederessal-Mechanisms are weak. Citizen Charters and Institutions of Charter Ombudsman have not taken off. Commission's Report addresses some of these problems bedeviling the polity.

Parliamentary System : Reforms

2.18.1 Debate on constitutional and parliamentary reforms has been raging for a long time. On occasions these have also become part of political campaigns. The ideas of a fixed term for Parliament, proportional system of representation, changes in the first-past-the post system, negative voting, state funding of elections, disqualification from electoral contest, anti-defection measures have all been debated endlessly.

2.18.2 Though the polity is federal, system of Government is the "parliamentary system" on the British pattern called the Westminster model. In a Parliamentary system there is no strict separation of powers between the Legislature and the Executive. Indeed, it involves a fusion of legislative and executive powers than a strict separation of those powers. The executive is drawn from the legislative- majority and can count on automatic endorsement of its programmes. The responsibility for success or failure of programme is clear and identifiable.

2.18.3 Indian Constitution has adopted this parliamentary system as distinct from the "presidential system" in which the executive is independent of, and not accountable to, the legislature. Position of the President of the Indian Republic under the Constitution is substantially different from that of the American President and is similar to that of the Queen in England. A learned judge adopting a picturesque riverine imagery said, "Not the Potomac, but the Thames, fertilizes the flow of the Yamuna,".19

1[1] The President of India "represents the nation but does not rule the nation. He is the symbol of the nation."

2.18.4 The Supreme Court of India dealing with the nature of the system of Cabinet Government observed,

> *"The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity…..*
>
> *Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State.*
>
> *…… In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers*

19[4] AIR 1974 Supreme Court Samsher Singh v. State of Punjab p.2212

consisting , as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part…..

The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions;"20

1[1]

Parliament and State Legislatures : Reforms

2.19.1 The Parliament and the State Legislatures, owing to the inherent weaknesses of the electoral system, have not acquired a true representative character. The 13th Lok Sabha represents only 27.9% of the total electorate and the recent past Legislature of Uttar Pradesh represents only 22.2% of the electorate. A fair and impartial electoral system is the key to the success of any democracy. Corruption in political life and elections is at the root of the pervasive corruption that is seen everywhere. Electoral reforms and reforming of the political parties and their internal democracy, both stupendous tasks, are an essential part of the remedies. The politician-bureaucrat nexus has eroded administrative credibility. Unprincipled, opportunistic political re-alignments from time to time and defections and re-defections erode the stability of governments. The administrative and economic costs of political instability and short-lived governments are enormous.

20[4] 1955 AIR Supreme Court (Vol.42) p.556

2.19.2 Maladministration has paralysed the creative energies of the people and has pushed people and their day to day living more and more into extra-legal systems. Owing to opportunistic and self-seeking politics and politicians and an increasing scenario of politician, criminal and bureaucratic nexus, the political climate of the country has been polluted bringing in its wake enormous corruption --- electoral, political and bureaucratic. There is pervasive de-generation of values. The foremost requirement is the restoration of confidence in the institutions of democracy. This needs strong and enlightened national leadership to be able to address itself to the emergent problems in international relationships; to issues of national integrity and security, to issues of development and economics. This Report addresses some of these issues particular in relation to the ticklish issues of dealing with the aspirations to enter Parliament and State Legislatures of those who have criminal records.

2.19.3 The first significant development in the composition of our Parliament and the State legislatures is the increasing higher level of education amongst them. The second significant and impressive feature is that the representation of the elite sections of society in the legislatures has given way to more and more common people who till recently were in the lower echelons. The composition of the legislatures is moving in the right direction. However, the negative factor that compels notice is the representative character of panchayat and legislatures. As noticed earlier, the 13th Lok Sabha represents only 27.9% of the total electorate in the country and amongst the State legislatures, for example, in Uttar Pradesh, the largest State population-wise and constituting of highest number of Members of Parliament for any State, the legislature represents only 22.2% of the total electorate. This low representative character of the panchayat and legislatures, even after more than 50 years of Independence, is a matter of concern. This position is indeed partly reflection of the number of voters who do not discharge this civic duty; but is more reflective of the inherent defect in the first-past-the-post system as it now obtains. In some cases those who would otherwise have forfeited their security deposit have been declared elected as they had obtained the highest number of votes amongst the candidates.

2.19.4 The Commission has examined these issues and other connected issues of the processes and products of the electoral system and has made certain recommendations. The alarming increase of violence and influence of money in the electoral processes is a matter of great concern. It threatens the very survival of the democratic system.

Accountability versus Stability

2.20.1 A Parliamentary system, unlike the Presidential system, lays emphasis on accountability. Any emphasis of the preponderance on stability, as against accountability, would negate certain basic assumptions - the political relationship between the Parliament and the Cabinet - and would 'presidentialise' the Prime Minister's office. Indeed, on the 'ever growing power' of the Prime Minister in Britain, some observers comment that "Britain, now has a quasi-presidential government." and that "the Prime Minister had become the focal point of public attention and governmental power"

21[4]. The debate, by implication, recognizes the trend in the Parliamentary system towards stability. In an article written for the American bicentennial review, Arther M. Schlesinger, Jr. said:

> *"The parliamentary system is to be defined by a fusion rather than by a separation of powers. The executive is drawn from the legislative majority and can count on automatic enactment of its program. No one doubts where responsibility lies for success or failure. But while the parliamentary system formally assumes legislative supremacy, in fact it assures the almost unassailable dominance of the executive over the legislature."22*

1[1]

2.20.2 In the Parliamentary system, if there is conflict between accountability on the one hand and stability on the other, the latter must necessarily yield. But accountability and stability need not necessarily and always be mutually conflicting. Instability introduced by personal ambitions

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21[4] Mackintosh: "The British Cabinet"

See also: Lalit Mohan Gautam's critiques of the Commission's Consultation papers: "Presidentialising the System".

22[5] Reforming American Government: Leave the Constitution Aone(1982) p.51

in opportunistic politics and unprincipled defections would need to be provided against. Need for political stability has to be seen in two emerging contexts: that in administering any economy in the global context, a reasonable degree of stability of Government and strong governance is important. Secondly, the economic and administrative costs of political instability might reach unaffordable levels. Writing on the economic costs of political instability a scholar says:

> *"The costs of the Indian economy of short-lived governments and their fall are very high. The uncertainty leads to postponement of investment decisions, both by domestic investors as well as foreign investors. Foreign direct investment gets postponed too. The paralysis of governmental decision-making also delays public investment. Naturally, one would expect economic growth to slow down. The economic impact can be quite sizeable as is reflected in our experience.*
>
> *Thus the fall in the annual GDP growth rate over the growth rate of the previous year was 10.7 percentage points during 1979-80 when Morarjee Desai and Charan Singh governments fell, 4.6% in 1991-92 when V.P. Singh and Chandra Sekhar governments fell, 2.8% in 1996-97 when Deve Gowda government fell.*
>
> *These numbers are large, but not surprising. A three-month postponement of half of total investment means 16 per cent fall in investment. This could easily result in lowering of growth rate by 1 percentage point. In today's terms, this is an income loss of roughly Rs. 15,000/- crores. If the political uncertainty lasts longer, the loss would be higher. This is the immediate loss. When its future effects are accounted for, the value of the loss would be many times more."*

2.20.3 There are also those who do not subscribe to this instability argument. They point out that only on 5 occasions out of 13, the Lok Sabha was dissolved before completing its full term and during the 53 years since Independence, just four Prime Ministers ruled for 40 years - two of them for 30 years between them. One political party alone, it is pointed out, was in power for 45 years out of 50 years.

The Institution of Prime Minister:

2.21.1 The importance and influence of the Prime Minister under the Cabinet-System is ever increasing. To those who speak of the 'Presidential System', the answer of the critics is the increasing 'presidentalising' of the Prime-Minister's office. Walter Bagehot said that the "hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part of the State is the Council of ministers,"23

1[1] But Crossman in his introduction to Bagehot's "English Constitution" referring to the increasing importance of the institution of the Prime-Minister said that the 'hyphen which joins, the buckle which fastens' is one single-man, viz. the Prime-Minister. "His right to select his own Cabinet and dismiss them at will; his power to decide the Cabinet's agenda and announce the decisions reached without taking a note; his control, through the Chief Whip, over patronage – all this had already before 1867 given him near-Presidential powers. Since then his powers have been steadily increased, first by the centralization of the party machine under his personal rule…"24[5]

2.21.2 Speaking of the British Cabinet and power to recommend dissolution of the House, C.F. Strong observes, "As Walter Bagehot acutely pointed out, the Cabinet is a creature, but, unlike all other creatures, it has the power of destroying its creator, i.e. the House of Commons. For if the Cabinet is defeated in the Commons it can, instead of resigning, advise the Queen to dissolve the assembly upon which it depends. Then the electorate decides whether the party from which the appealing Cabinet is drawn shall return with a majority or not."25

1[1] But the position is held to be different under the Indian Constitution.

The Judiciary

23[5] R.H.S. Crossman: Introduction to Walter Bagehot: "The English Constitution" p.20

24[5] lbid p.51

25[6] Modern Political Constitutions, C.F. Strong p.216

2.22.1 Though India has a federal polity, it has an integrated judiciary.There are no separate systems of Federal and State courts. One system of courts deal with enforcement of laws – both of Union and of the States. A written constitution defines the powers of the different organs of the State. Each organ, the Executive, the Legislature and the Judiciary has its own assigned role. It is supreme in its assigned field. However, under parliamentary system of government, there is a fusion between the two organs of the State, namely, the Executive and the Legislature. The Legislature oversees the working of the Executive and exercises legislative control over public expenditure. A government under a written constitution is one of enumerated powers. Under a federal disposition, quite often, issues of the demarcation of powers between the Union on the one hand and the States on the other hand need to be settled by an independent wing. So also, the issues as to the limits of the powers of the Legislature and the Executive. There must necessarily be some authority to adjudicate such issues and to interpret and define the scope and limitations of the powers of the Executive and the Legislature. Under the Constitution, that power is vested in the Judiciary to ensure the constitutional checks and balances and to adjudicate disputes touching the limits on the power of the respective branches of Government. This task is as vital as it is essential. If a justiciable entrenched constitutional Bill of Rights is appended, the role of the judiciary assumes a more significant dimension.

Democracy is said to be most perfect work of political wisdom but the pivot on which this grand machine turns is the principle of equality. Rule of law is the force which moves the democratic machine.

2.22.2 Another recurrent theme of debate relates to constitutional adjudications, judicial review and judicial activism. Even the incorporation of an entrenched justiciable Bill of Rights was attacked on democratic theory that the consequential shift of power to the judiciary, and away from the elected legislature, would place power in the hands of 'unelected, unaccountable and elite group of people, viz., the judges' who can over-turn the acts of Parliament. The power to identify and determine the inconsistency between an impugned law or an administrative policy on the one hand and the provisions of the Bill of Rights on the other hand, would itself, it is

said, violate three most fundamental elements of democracy viz.- participation, representativeness and accountability and that judges exercise such powers without being accountable to the community. It is argued that 'judicial activism' is a slippery word which could mean a thin justification to interfere in the governing process.

2.22.3 It was also argued that such a power in the judiciary would shift the power from the legislatures to the judges; a process bristling with the possibilities of politicization of the judiciary. Speaking of this process an American writer26

1[1] said,

"A popular style in complaining about the courts is to contrast modern judges with those of a golden or, at least, a less tarnished age. Many people have a fuzzy impression that the judges of old were different. They did things like "follow precedent" and "apply the law, not make it up." There is a good deal to be said for that view. The practice of judicial law making has certainly accelerated spectacularly in this century, particularly in the past four or five decades. Nevertheless, the whole truth is rather more complicated."

Of the need for judicial restraint the author says:27

1[1]

> "In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He must then choose between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time, solves an urgent human problem, and a faint crack appears in the American foundation. A judge has begun to rule where a legislature should."

26[6] Robert H. Bork – The Tempting of America – The Political Seduction of the Law p-15

27[6] Robert H. Bork – The Tempting of America – The Political Seduction of the Law p-1

2.22.4 But Bill of Rights and judicial activism are here to stay. Constitutional adjudications have an inevitable legislative element. But then, they need great wisdom and restraint on the part of the judges in wielding that high power lest they erect their own prejudices into principles. The "irreplaceable value of the power of judicial review lies in the protection which it has accorded to constitutional rights." A learned judge of the American Supreme Court said that "it is this role and not some amorphous general supervision of the government that has maintained public esteem for the federal courts and **has permitted the peaceful existence of counter-majoritarian implications of judicial review and the democratic principles on which our federal government rests." (emphasis supplied)**

2.22.5 About half a century of the Constitution at work has tossed up many issues of the working of the judiciary: from the difficult problems of appointments to the superior judiciary to the problems of court clogging and judicial delays. A wide variety of issues have arisen. Who should appoint the judges? Should they be "judges' judges" or "peoples' judges"? Should the composition of the judiciary reflect the pluralism of the society? Particularly disturbing has been the chronic and recurrent theme of the near collapse of the judicial trial-system, its delays and the mounting costs. The glorious uncertainties of the law have frustrated the aspirations for an equal, predictable and affordable justice.

2.22.6 In all countries with advanced systems of dispute resolution, the percentage of cases which will go through the entire litigative processes is comparatively small. Most of the litigations or potential litigations are settled at the pre-litigation stage or at the pre-trial stages. In India, however, the percentage of cases that go through whole processes in courts and their hierarchies is quite large. Imaginative use of Alternative Dispute Resolution mechanisms, such as, arbitration, mediation, conciliation etc. and auxiliary adjudicative services, neutral assessment and active case flow management need to be explored.

Electoral System

2.23.1 Regular, fair and free elections are fundamental to a constitutional democracy. They draw the nation to a debate on vital issues that touch the lives of the people. But there is increasing disillusionment about the purity of electoral process. Corruption and criminalisation has bedeviled its processes.

2.23.2 At the Golden jubilee of Independence, the Parliamentarians took a pledge -

> *"That meaningful electoral reforms be carried out so that our Parliament and other legislative bodies be balanced and effective instruments of democracy; and further that political life and processes be free of the adverse impact, on governance of undesirable extraneous factors including criminalisation;*
>
> *That continuous and proactive efforts be launched for ensuring greater transparency, probity and accountability in public life so that the freedom, authority and dignity of the Parliament and other legislative bodies are ensured and enhanced; that more especially, all political parties shall undertake all such steps as will attain the objective of ridding our polity of criminalisation or its influence;*

2.23.3 The proposals in the Consultation papers have evoked diverse views, including some sharp reactions. For instance, the proposal whether a political party securing less than, say, 5% or 10% of the votes polled should be entitled at all to representation, there was a pointed criticism. It has been eminently argued by a young scholar that, if the rule was operated, only two national parties, viz. the Congress and the B.J.P, which together, at present, account for about 300 seats in the Lok Sabha would qualify and the rest of the parties which account for 245 seats would be looked upon as "usurpers"!

28[1] Such a rule, it was urged, would ignore regional, social and other legitimate force, seeking space in the national democratic debate. It was mentioned that even in Britain, the two-party system is on the decline and the vote share of the top two political parties show a marked fall over the years.

2.23.4 Even in regard to requirement of 50%+1 vote considered necessary to improve the representative image of Parliament and the State Legislatures, there have been certain criticisms in the responses raised from the public.

2.23.5 In a different context, namely, the requirement of "secure majority" for the outcome of referenda, both as international practice and practice adopted by the United Nations, the responses have indicated the 50%+1 vote as desirable standard. In that context, a Canadian Minister said:

> *"In short, Canadian practice, international practice and the practice of the United Nations unanimously indicate that in the matter of referendums on accession to sovereignty, the absolute majority of votes, namely, 50%+1, expresses not only a clear majority but also a rule that must be recognized as being democratic, constant and universal."29*

1[1]

2.23.6 In regard to the relevance of the German Model to Indian conditions critics rely upon the following observations of David Willets:

"We have had a different history from the countries of the continent and that does give our Constitution a different shape from theirs. But that is not evidence that it is wrong. Different countries with their own traditions can quite reasonably have different

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28[6] Lalit Mohan Gautam "Presidentialising the System"

29[6] Joseph Facal, Minister Responsible for Canadian Intergovernmental Affairs on "Rules cannot be changed in the middle of the game".

constitutional arrangements. That the German Constitution works well for them is no reason for us to have it here."

Political Parties

2.24.1 Herman Finer sets out Burke's definition of a political party as "a body of men, united for the purpose of promoting by their joint endeavours the public interest, upon some principle on which they are all agreed."30

1[1] C.F. Strong refers to the following definition of political parties by Walter Dean Burnham, "…political parties, with all their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually – or organizationally – powerful."31[6] This desire for collective power and solidarity against perceived injustices seems to be the moving force behind the phenomenon of proliferation of smaller political parties.

2.24.2 Under the Constitutional document, there is no specific reference to the political parties excepting in the Twelfth Schedule which deals with defections. The right to form a political party is a right under the common law and is protected article 19(1)(c) of the Constitution.

2.24.3 Political parties play a great role in the working of the Constitution and its democratic institutions. Issues of the organization, functioning, inner-party-democracy, transparency of funding, ethical standards are all matters of vital public concern. There are 552 political parties in the country at the last count. But there is no comprehensive law regulating their functions and operations which are crucial to the welfare of the nation and, indeed, to the very survival of the democratic spirit and tradition. Samuel Lubbel, speaking on the crisis in politics, saw "no party

30[6] The Theory And Practice of Modern Government: Herman Finer p.240

31[6] Supreme Court Statecraft: The Rule of Law and Men: Wallace Mendelson p.226

coalition in command of sufficiently stable majority to be able to advance a unifying set of policy" and that "reasoned argument compromise and accommodation were increasingly shoved aside in favour of polarization, violence and struggle for raw power"32

1[1]. This, more or less, characterizes the situation in the country.

"Government is man's unending adventure." John Morley in his notes on "Politics and History" speaks of the great complexity of Governmental business: "Everybody who knows anything knows that it is a waste of our short lives to insist on ideal perfection. Popular government, or any other for that matter, is no chronometer, with delicate apparatus of springs, wheels, balances, and escapements. It is a rough heavy bulk of machinery, that we must get to work as best we can. It goes by rude force and weight of needs, greedy interests and stubborn prejudices."

2.24.4 Political parties that control and run democratic governments themselves need to be arranged on transparent systems as to their organization, funding, accounts and audit. There is increasing criminalisation of politics and of the electoral process. If remedies are not found and implemented speedily there might remain very little of value to salvage.

Political System and Structure:

2.25.1 The political, social and economic philosophy of the Constitution is reflected in the Preamble of the Constitution which declares India a "sovereign, socialist, secular, democratic, republic". The Preamble read with the Directive Principles of State Policy presents the socio-economic goals of the Constitution. Fundamental Rights and Fundamental Duties are the means by which the socio-economic goals of the

32[7] Samuel Lubell: "The Hidden Crisis in American Politics:

Constitution are to be realized. "The judiciary", said Granville Austin, “was to be the arm of the social revolution.”33

1[1]

2.25.2 The framers of the Constitution sought to unite the vast country with its great diversity, many languages and creeds within a common-bond of constitutional justice on the great ideals of liberty, equality, fraternity and justice. Universal adult franchise was the foundation for the democratic polity. Framers showed an uncompromising respect for human dignity, an unquestioning commitment to equality and non-discrimination, and an abiding concern for the poor and the weak. They made a bold attempt to base the constitutional foundations on the firm faith that all classes of people, followers of all faiths, and particularly the traditionally under-privileged should all join to work for their united constitutional salvation on the shared faith that peoples of the several faiths must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.

2.25.3 The framers of the Constitution intended that it should not commit the country to any particular form of economic structure giving fullest freedom to the elected representatives to evolve any economic order or system to achieve the goals of economic democracy.

2.25.4 Indeed political reforms, in their very nature, follow and cannot force the pace of enlightened public opinion. Educating public opinion even on a vital and important issue may take years. The nuances of Parliamentary Democracy are political. As A.W. Bradley said:

33[7] The Indian Constitution – Cornerstone of a Nation – Granville Austin p.

"the responsibility of government to parliament is a political relationship. As such it is not a matter of precise definition and lawyers must resist the temptation to lay down rules for it".34

1[1]

The words of Sir Ivor Jennings are also worth recalling :

"In truth what the democratic system does is to harness a man's ambitions; if they lie in the right direction, to the National dog-cart: The horse will go of his own volition because he wants to get somewhere, and perforce the cart will follow; by choosing the right horses the nation will arrive at it's chosen destination. The horse chooses the destination, but the Nation chooses the horse; and – it is here a dictatorship differs; the horse can always be changed in mid-stream if necessary."35

1[1]

Fifty years of Working of the Constitution: Achievements & Failures : A Balance Sheet

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2.26.1 "The ideals on which this Draft Constitution is framed", lamented a member of the Constituent Assembly, "have no manifest relation to the fundamental spirit of India. I can assure you that this Constitution will not prove suitable and will break down soon after being brought into operation."36

1[1] But a learned author who surveyed its working spoke with feeling when he said, "The Constitution has been accepted as the charter of Indian unity. Within its limits are held the negotiations over the working of the federal system….. The Constitution has established the

34[7] ECS Wade and G. Philip "Constitutional & Administrative Law" by A.W. Bradley 5th Ed. P.97

35[7] Sir Ivor Jennings – Parliament Second Edition p.521 (See: Lalit Mohan Gautam's paper "Presidentialising the System"

36[7] The Indian Constitution – Cornerstone of a Nation – Granville Austin p.325

accepted norms of 'national' behavior…… The Constitution's greatest success, however, lies below the surface of government. It has provided a framework for social and political development, a rational, institutional basis for political behavior. It not only establishes the national ideals, more importantly it lays down the rational, institutional manner by which they are to be pursued – a gigantic step for a people previously committed largely to irrational means of achieving other-worldly goals."37[7] "By independence we have lost the excuse" said Ambedkar, "of blaming the British for anything going wrong. If hereafter things going wrong, we will have nobody to blame except ourselves."

2.26.2 What are our achievements and failures over the 50 years since Independence? How have each of the three organs of the State, the Legislature, the Executive and the Judiciary redeemed the constitutional pledge of ushering in a social revolution? Has the dream of the founding fathers for a life of dignity to the vast millions through the process of socio-economic transformation been realized? What then is the Balance Sheet?

2.26.3 Political Accomplishments:

- India's democratic base has stabilized as a working federal polity. With the Constitution, 73rd and 74th amendments, the base of democratic debate has widened. There is greater push towards non-centralisation. General Elections have been held with regularity; and transfers of power consequent upon the results of elections have been orderly, peaceful and democratic.

- The educational qualifications of the Members of Parliament and Legislatures have shown marked improvements. The Parliament and Legislatures are increasingly more representative of the composition of society. More and more members of the hitherto backward classes are moving up in the political ladder.

37[7] lbid p.309-310

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- The main cause and source of political-decay is the ineptness of the electoral process which has not been able to keep out criminal, anti-social and undesirable elements from participating in and even dominating the political scene and polluting the electoral and parliamentary processes.

- Though democratic traditions are stabilizing, however, democracy cannot be said to be an inclusive representative democracy. The pluralism and diversity of India is not reflected in and captured by its democratic institutions; likewise, participation of women in public affairs and decision-making processes is nowhere near proportionate to their numbers.

- The enormity of the costs of elections and electoral corruption in having have been a grievous deleterious effect on national progress and has led to the degradation of political processes to detriment of common good.

- Political parties, which have a fair share of the criminal elements, handle enormous funds collected ostensibly for meeting party and electoral expenditure. Money-power and criminal elements have contributed to pervasive degeneration of standards in public life and have criminalized politics. This is reflected in the quality of governments and of the governing processes.

- There are no legal instrumentalities or set of law regulating the conduct of the political parties, legitimacy of fund-raising, audit and account requirements and inner-party democracy.

- National political parties are more divided on the definition of ‘common national purpose’ than ever before; the noble purposes of

public life have degenerated than ever before into opportunistic and self-seeking politics of competitive personal gain.

- ‘Fraternity’, the noble ideal of brotherhood of man enshrined in the Preamble of the Constitution has remained unrealized. The people of India are more divided amongst themselves than at the time of the country’s independence.

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- There is increasing criminalisation and exploitation of the political climate and processes and an increasing criminals-politicians-bureaucratic nexus.

- There is crisis of confidence. There is crisis of leadership. Political leaders, owing to narrow partisan and sectarian interests and desire for short-time political gains, are unable even to agree upon broad common national purposes.

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2.26.4 Economic or Physical Infrastructure: Impressive Performance

- There has been marked expansion and diversification of production. New technologies and modern management techniques are increasingly employed. There are marked advances in Science, Technology, Medicine, Engineering and Information Technology.

- Between 1950-2000, the index of agricultural production increased from 46.2 to 176.8.

- Between 1960-2000, wheat production went up from 11 m. tones to 75.6 million tones.

- Between 1960-2000, rice production went up from 35 m. tones to 89.5 million tones.

- Impressive expansion of industrial and service sectors has taken place.

- Index of industrial production went up from 7.9 in 1950-51 to 154.7 in1999-2000.

- Electricity generation has increased from 5.1 billion KWH in 1950-51 to 480.7 billion KWH in 1999-2000.

- 6 to 8% annual growth of GNP between 1994-2000 (except in 1997-98) was achieved.

- Revenues from Information Technology industry have grown from $150 million in 1990 to $ 4 billion in 1999.

- India's per capita Net National Product (NNP) in 1999-2000 was more than 2.75 times than what it was in 1951.

2.26.5 Social Infrastructure:

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- Between 1950 to 1998 infant mortality rate have halved to 72 births per 1000 births down from146.

- India's maternal mortality rate in 1998 was 407 per 100,000 live births. These levels are more than 100 times the levels found in the West.

- Some 53% children (almost 60 million) under five remain malnourished – nearly twice the levels reported in many parts of sub-Saharan Africa.

- The proportion of low birth weight babies born in India is 33%. It is only 9% in China and South Korea, 6% in Thailand and 8% in Indonesia.

- India was a signatory to the Alma Ata Declaration in 1978 that assured 'health for all' by the year 2000. Only 42% of the children between 12-23 months are fully immunized – 37% in rural areas and 61% in urban areas. The coverage is shockingly low in Bihar – 11% and in Rajasthan – 17%.

- Life expectancy at birth has grown up from 32 years in 1950-51 to 63 years in 2000.

- A child born in Kerala today can expect to live longer than a child born in Washington.

- Life expectancy of women in Kerala is now 75 years.

- India has put in place an extensive system of Public Health Services and medical network. In 1951, the country had only 725 primary health centers. By 1995, this has increased to more than 1,50,000.

- The number of primary schools has increased significantly between 1951 and 1995 from 2,10,000 to 5,90,000.

- Close to 95% of the villages have a primary school within a walking distance of one kilometer.

- While per capita daily consumption of cereals has improved only marginally from 400 gms in 1950 to about 440 gms in 2000. The per capita pulses (protein intake) have over the 50 years decreased.

- The promise of social revolution has remained unredeemed. There are 270 million Scheduled Castes and Scheduled Tribes measures for whose welfare and uplift have not been implemented with sincerity.

- There are 380 million children below the age of 14. Almost 100 million of them are Dalit children. No effective steps are taken to bring them to the level of the “core-mainstream”.

- Population control measures in the northern States have not succeeded. Fertility rates in Uttar Pradesh indicate that State is almost a century behind Kerala.

2.26.6 Significant Failures: Economic Issues:

- The richest top quintile of population has 85% of the income. In India, the poorest quintile has only 1.5% of the country’s income. The second, the third and the fourth quintile from top have respectively 8%, 3.5% and 2% of the income.

- This disparity is an internal reflection of the international economic order. Internationally, inequalities amongst countries have been increasing. The income gap between the fifth of the world's people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, up from 60 to 1 in 1990 and 30 to 1 in 1960.

- 260 million people live below the poverty line.

2.26.7 Administration :

- Corruption, insensitivity and inefficiency of administration have resulted in extra-legal systems and parallel economies and even parallel governments. Bureaucratic corruption and pettifoggeries, which cause frustration in people in their daily lives has more serious fallout of pushing more and more people into extra-legal systems. The pervasive cynicism that mal-administration generates results in a lack of faith in and disenchantment with institutions of democracy.

- There is an increasing non-accountability. Corruption has been pervasive. Public interest has suffered.

- Constitutional protection for the Services under Article 311 has largely been exploited by dishonest officials to protect themselves from the consequences of their wrong-doings.

2.26.8 Gender Justice and Equality:

- The regional disparities in life expectancy is indicated by the fact that a woman born in Kerala can expect to live 18 years longer than one born in Madhya Pradesh.

- In most countries life expectancy among women exceeds that of men by about 5 years. In all but a few countries of the world, there are typically 1005 women for every 1000 men. Men outnumber women only in societies where women are specifically and systematically discriminated. In India, there are only 933 women for every 1000 men. This is the phenomenon about 'missing' women.

- Overall representation of women in public services is just 4.9%.

- Political participation of women indicates that in 1952 there were only 22 women in Lok Sabha against 499 seats (4.41%). In 1991 this increased to 49 seats as against 544 seats (9.02%).

- In the Central Council of Ministers there are only 3 Cabinet Ministers out of 30.

- In India between 1995-2000, out of 503 judges of the High Court only 15 were women.

2.26.9 Administration of Justice:

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- Judicial system has not been able to meet even the modest expectations of the society. Its delays and costs are frustrating, its processes slow and uncertain. People are pushed to seek recourse to extra-legal methods for relief. Trial system both on the civil and criminal side has utterly broken down.

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2.26.10 On an overall assessment there are more failures than success stories, making the inference inescapable that the fifty years of the working of the Constitution is substantially a saga of missed opportunities.

Areas of Concern: Commission's perception

2.27 The following are the important areas of concern according to the perception of the Commission:

(a) There is a fundamental breach of the constitutional faith on the part of Governments and their method of governance lies in the neglect of the people who are the ultimate source of all political authority. Public servants and institutions are not alive to the basic imperative that they are servants of the people meant to serve them. The dignity of the individual enshrined in the Constitution has remained an unredeemed pledge. There is, thus, a loss of faith in the Governments and governance. Citizens see their Governments besieged by uncontrollable events and are losing faith in institutions. Society is unable to cope up with current events.

(b) The foremost area of concern is the present nature of the Indian State and its inability to anticipate and provide for the great global forces of change ushered in by the pace of scientific and technological developments.

(c) The next and equally important dimension is the increasing cost of government and financial defects which are alarming. In 1947, there was a deficit of Rs.2 crores in the revenue budget; in 1997-98 it became Rs.88,937 crores; in 2001-02, it is about Rs.1,16,000/- crores(4.8% of GDP). India is on its way to a debt-trap.

(d) There is pervasive impurity of the political climate and of political activity. Criminalisation of politics; political-corruption and the politician-criminal-bureaucratic nexus have reached unprecedented levels needing strong systemic changes.

(e) Issues of national integrity and security have not received adequate and thoughtful attention. Mechanisms for the assessment of early warning symptoms of social unrest are absent. Mechanisms for adequate and immediate state responses to emergencies and disaster management are wholly inadequate. Administration, as a system for anticipating coming events and planning responses in advance, has failed. It has become un-coordinated and directionless amalgam of different departments often with over-lapping and even mutually conflicting jurisdictions, powers and responsibilities which merely acts as a reaction to problems. There are no clear-cut standards or basis for fixing responsibilities.

(f) Though India's overall record and experience as a working democracy (despite many centrifugal forces) are worthy to mention and though the bases of democratic debate have widened with the

73rd and 74th Constitutional amendments, the working of the institutions of parliamentary democracy, however, have thrown-up serious fault-lines, which might, if unattended, prove destructive of the basic democratic values.

(g) There is pervasive misuse of the electoral process and the electoral system is unable to prevent the entry of persons with criminal record into the portal of law-making institutions.

(h) The Parliament and the State Legislatures, owing to the inherent weakness of the electoral system, have failed to acquire adequate representative character. The 13th Lok Sabha represents only 27.9% of the total electorate and the Legislature of U.P. represents only 22.2% of electorate respectively.

(i) The increasing instability of the elected governments is attributable to opportunistic politics and unprincipled defections. The economic and administrative costs of political instability are unaffordably high and their impact on the polity is not clearly comprehended and realized. Though just four Prime Ministers ruled the country for 40 years out of the 54 years of independence and one political party alone was in power for 45 years, however, 1989 onwards the country saw five General Elections to the Lok Sabha. Costs of this political instability are simply colossal.

(j) The state of the Indian economy is disturbing. The economy is gradually sinking into a debt-trap. Economic, fiscal and monetary

policies, coupled with administrative inefficiency, corruption and wasteful expenditure are increasingly pushing the society into extra-legal systems, crime-syndicates, mob-rule and hoodlum out-fits. Black-money, parallel economy and even parallel governments are the overarching economic and social realities. Legitimate governments will, in due course, find it increasingly difficult to confront them. In course of time these illegal criminal out-fits will dictate terms to the legitimate governments.

(k) Rural de-population, urbanization and urban-congestion and social unrest need immediate attention and solutions. Increasing unemployment will prove a serious threat to orderly government.

(l) Future of society is increasingly knowledge-based and knowledge-driven. The quality of education and the efficiency of the administration and higher research are in educational agenda and need of immediate and urgent repair. The country is engaged in a unilateral and unthinking educational disarmament.

(m) System of administration of justice in the country is another area of concern.

(n) Criminal justice system is on the verge of collapse. The quality of investigations and of prosecutions requires a strong second look. Law's delay and costs of litigation have become proverbial. Victimology, victim-protection, protection of witnesses in sensitive criminal-trials need institutional arrangements. Recruitment,

training, refresher and continuing legal education for lawyers, judges and judicial administrators need immediate attention. The increasing utilization of alternative dispute resolution mechanisms, such as mediation, conciliation and arbitration and mechanisms of auxiliary adjudicative services need to be stressed. Training programmes for conciliators, mediators etc. need to be institutionalized. Legal profession needs to be transformed to meet the increasing public-expectations. Modernizing the system and making it user-friendly is one of the urgent tasks.

(o) Communal and other inter-group riots in a country like India with its religious, social and cultural diversity cannot be treated as merely law and order problem. They are manifestations of collective behavioural disorders. Legal and administrative measures are required to be taken to remove the insecurity felt by the minorities and for bringing them into the mainstream of the national fabric. The Commission dealt with various safeguards required in the matter. The Commission considered the aspects of positive discrimination for bringing equality of opportunity under articles 15 and 16 of the Constitution to the socially and educationally backward classes of citizens, granting of recognition to languages spoken by a section of population in a State under article 347, inadequate political representation of minorities, religious freedom under article 25(2) and necessity of establishment of an Inter-Faith Commission in the context of the present scenario.

(p) The state of social infrastructure is disturbing. There are 380 million children below the age of 14. The arrangements for their education, health and well-being are wholly inadequate both

qualitatively and quantitatively. 96.4% of the primary education budget goes for salaries alone.

(q) Rates of infant mortality, blindness, maternal mortality, maternal-anemia, child malnutrition and child-immunization, despite significant progress achieved, yet remain at high and disconcerting levels.

(r) Public health and hygiene have not received adequate attention. There is alarming increase of infectious diseases such as Tuberculosis, Malaria, Hepatitis, HIV etc.

Pandora's Boxes!

2.28.1 The Commission has examined various areas of the working of the Constitution with the help and assistance of experts and formulated its views. Change must come from the spirit of constitutionalism and by determined and dedicated leaders and statesmen when societies do not have predictable futures.

2.28.2 A learned university scholar likened the proposals in the Consultation papers of the Commission as Pandora's boxes. Michael Foley referred to a similar criticism of William Ress-Mogg of the 11 proposals, of the Labour Party under John Smith and lamented that the 'party under John Smith fell into hands of lawyers… (who) love proposals for constitutional reform.'

2.28.3 There is pervasive disenchament with the working of the institutions of democracy. People themselves seem almost to have resigned to what they consider their inevitable fate. Their patience and emotional resources appear to be wearing thin, yielding place to a sense of revulsion against the State and a deep distrust against the machinery of the government, particularly - the police and the bureaucracy. There is pervasive and cynical disbelief that anything will change at all. Seventy eight years ago Chakaravarti Rajagopalachari wrote some prophetic words from his prison cell in Vellore: "We all ought to know that Swaraj will, not at once or, I think, even for a time to come, bring better government or greater happiness for the people. Elections and their corruptions, injustice, and the power and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us."

2.28.4 Government, it is said, is a potent teacher which teaches people by its own example. In the Indian context the lessons have not been happy. Quite often they were bitter, leaving the populace confused. The Parliamentary reforms need a high level of public awareness and political commitment. Simplistic analogies do not help. Not unoften, the proposed solutions may themselves turn-out to be the source of other problems. There is always the law of unintended results. Particularly, in regard to the institutions of parliamentary democracy, the utility of changes imposed by law is greatly debateable.

Arthur M. Schlesinger, Jr. said38

1[1]:

> *"My concern is that this agitation about constitutional reform is a form of escapism. Constitution-tinkering is a flight from the hard question, which is the search for remedy. Structure is an alibi for analytical failure. As Bryce wisely reminds us,*

38[8] 'Leave the Constitution Alone (1982): Reforming American Governmentp.54

"The student of institutions, as well as the lawyer, is apt to overrate the effect of mechanical contrivances in politics.

Fascinating as constitutional-tinkering may be, like the Rubik cube, let it not divert us from the real task of statecraft. Let us never forget that politics is the high and serious art of solving substantive problems".

John Major said39

1[1]:

"The British Constitution is vibrant and robust. But it is not indestructible. People must realize that our Constitution is not a piece of architecture that one can re-engineer by knocking down a wall here or adding an extension there. It is a living, breathing constitution. It's roots are ancient but it has evolved. It embodies a set of values, a legacy of understanding that have developed year by year over the centuries. No one should lightly contemplate tampering with an institution that is so ancient and yet so alive."

Remedies, it is said, will come by reversing the decay not by sweeping reform measures. An American writer said,"

"The remedies will come – if they come at all – not through any sudden and sweeping reform measures but through the gradual development and adoption of new doctrine by the elite cadre of political activist and, through them, by the public at large, which will lead to incremental changes in institutions and behaviour."40

1[1]

Madhu Limaye observed:

39[8] John Major, Speech on the Constitution given to the Centre for Policy Studies: 26th June, 1996.

40[8] 'Reversing the Decay of Party (1982), James L. Sundquist : Reforming American Government

"The process of cleansing public life and strengthening democracy is a difficult and painful process. ..... It has to be accompanied by democratization of parties. There is no easy way out, no instant solution awaiting implementation through a suitable statute."41

1[1]

2.28.5 In the last analysis, citizen education is essential for any remedial action. If the democratic polity has failed to fulfill even the minimal expectations of the people, in a large measure, people have none else to blame except themselves. Indeed 200 years ago, in one of the most moving and poignant events in human history, Pontius Pilate offered to the hysteric crowd before him a choice as to whom he should pardon – Jesus or Ba-rab'bas. The crowd wanted pardon for Ba-rab'bas, the robber. Jesus was crucified. Professor Rene Cassin, the illustrious French jurist and principal architect of the Universal Declaration of Human Rights on the occasion of the award of the Nobel Prize for Peace on him, was asked why he thought the Universal Declaration of Human Rights was necessary. He is reported to have answered "because, Men are not always good." The haunting words "Not Always Good", reverberates through history as man's inhumanity.

2.28.6 Good systems can and do change men. Good governments can earn their confidence. It is only when we fulfill the basic duty of politics and restoring the power of the Constitution and its institutions back to their legitimate owners – the people – that things will begin to change. It is only then that "We can move beyond the limits of physical world and use our minds to sore into the future". Dag Hammarskjold said: "In our era, the path to holiness must lead through the world of action."

41[8] 'Contemporary Indian Politics' Madhu Limaye

2.28.7 It is with this hope that the Commission dedicates this Report to the people.