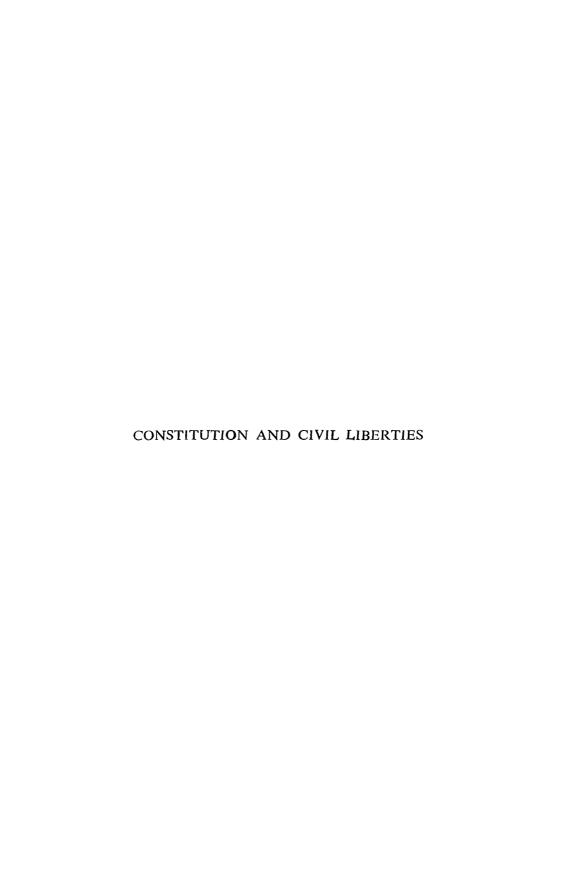
H. R. KHANNA

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R. AMBEDKAR MEMORIAL LECTURES



Dr. B. R. AMBEDKAR MEMORIAL LECTURES

CONSTITUTION AND CIVIL LIBERTIES

Mr. Justice H. R. Khanna

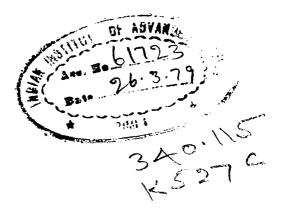
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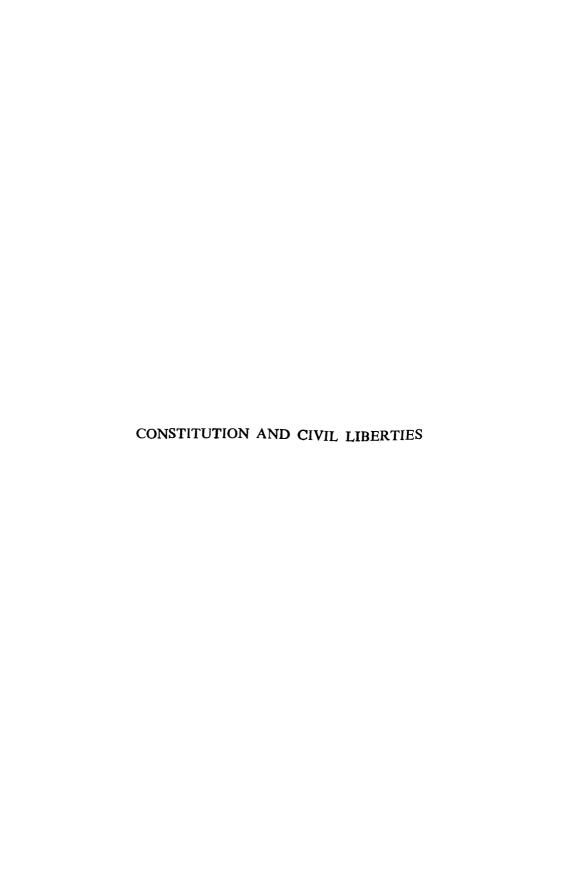
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EXORDIAL REMARKS

by

DR. L. M. SINGHVI

Executive Chairman

The Institute of Constitutional and Parliamentary Studies



Mr. Speaker, Mr. Law Minister, Mr. Justice Khanna, Ladies and Gentlemen:

It is a happy occasion for the Institute and a privilege for me to welcome our distinguished guests and, in particular, Mr. Justice H.R. Khanna who is to deliver the Dr. B.R. Ambedkar Memorial Lectures.

The Institute is proud of having instituted several Memorial Lectures to commemorate the contributions. of some of the most illustrious sons of India in the constitutional and parliamentary fields, and is equally proud of having succeeded in persuading some of the most eminent experts to deliver the Memorial Lectures sponsored by it. In a basic sense, these Memorial Lectures are meant to be a contribution to nation-building. Contributions of scholars and statesmen to these fields are not always remembered in the most appropriate and meaningful way. The idea of a series of Memorial Lectures was to provide an occasion for remembrance and commemoration of the contributions of those who have charted and blazed our nation's constitutional trails and parliamentary paths. We thought it appropriate that there should be an enduring homage of scholarship and thoughtful reflection on problems which every nation, in its on-going journey of fulfilling constitutional ideas and working parliamentary democratic institutions, must encounter. These twin objectives led to the establishment of these Memorial Lectures and I am glad to say that they have proved to be of immense value. Many of them have already been published in the form of books. Our distinguished President of the Institute, Mr. Speaker, Mr. Justice Hegde, as he then was, delivered one of the series of homage to Memorial Lectures on State Policy in the memory of Sir Benegal Narsing Rau. The names of Mr. Justice M. Hidavatullah, Shri G.S. Pathak, Mr. Justice K. Subba Rao, Lord Hailsham, Professor H.W.R. Wade, Professor J.A.G. Griffith, Dr. Kamal Hossain, Mr. Justice K. Mathew and Mr. Justice

M.H. Beg come to mind as I think of the distinguished galaxy of Memorial Lecturers who have stood at this podium in the past to deliver Memorial Lectures under the auspices of the Institute. Many of the published Memorial Lectures are acknowledged as excellent contributions to constitutional law, political science and lex parliamenti.

The name of Dr. B.R. Ambedkar vivifies the glorious seedtime of our republican constitution, in the making of which Dr. Ambedkar made an enormous contribution. As the Chairman of the Drafting Committee he was one of the architects, one of the master masons. who designed and built the remarkable edifice of our Constitution. Equally memorable was his contribution in piloting the passage of the Constitution Bill. Expounding authoritatively, explaining patiently, accommodating diverse points of view, debating with an open mind, considering and reconsidering ideas and proposals, reviewing and evaluating comparative experiences on the working of similar provisions and institutions in other countries, looking at the constitutional canvas in a futurist perspective, aware of India's political history, culture, socio-economic aspirations and judicial-legal culture, cognisant of India's mainsprings of strength and recesses of infirmity, Dr. Ambedkar not only presided over the deliberations of a remarkably wise, articulate and erudite pantheon of men of outstanding abilities and backgrounds, who constituted the Drafting Committee, but also helped to build a magnificent temple of liberty based on the message of unity in the mosaic of diversities and forward-looking national self-confidence. The Constitution of India represents the high watermark of consensus in India's political history. To look back upon the deliberations of the Constituent Assembly is to experience a sense of pride and nostalgia with regard to the capacity of the founding fathers of the Indian Constitution to fashion pragmatic solutions to vexed

problems, to build up and maintain mutual trust, to heal and bind psychological wounds, to translate their concern and quest for national unity and freein concrete constitutional terms, and synthesise long term and immediate perspectives. In a sense, the Constituent Assembly of India set an example of how to remain anchored steadfastly to principles, how not to allow the dreams and vision of the nation to be eclipsed by personal equations or lack of them, and how not to be oblivious of prevailing realities and intuitive apprehensions and premonitions. True, the Constitution was not a paragon of perfection nor an authentic embodiment of India's ancient genius for local self-government, but it was nevertheless a landmark achievement in the history of constitution-making, Mr. Shanti Bhushan, Minister of Law, Justice and Company Affairs, a lineal successor of Dr. Ambedkar in the office of Law Minister, would, I hope, agree with me that the edifying example of the Constituent Assembly and of the consensual processes of constitution-making should be a source of inspiration and instruction to the country and its Parliament today and for all times to come.

It is not necessary for me, Mr. President, to recount the details of the life and work of Dr. B.R. Ambedkar which I did on an earlier occasion when the first series of Dr. Ambedkar Lectures were delivered. All I would like to do today is to pay my humble homage to the memory of that illustrious son of India whose many-splendoured life and its message continue to illumine our paths.

Mr. President, we are privileged to have Mr. Justice H.R. Khanna to deliver the Dr. B.R. Ambedkar Memorial Lectures today and tomorrow. When Mr. Justice Khanna resigned his office as Judge of the Supreme Court on his 'supersession' in the matter of appointment to the office of Chief Justice of India, I told him then, and I may be permitted and excused for quoting

myself now, that it was better to be a living legend than to be the Chief Justice of India. If I may say so, Mr. Justice Khanna's dissenting judgement, in what has come to be known in popular parlance as the Habeas Corpus Case, will be remembered and quoted as a significant milestone, as a beacon of light in the midst of authoritarian executive denial of a modicum of protection to the besieged citizen and his cherished liberties, which had reached a vanishing point. Mr. Justice Khanna exemplified a profound sense of history and human values, a clarity of vision and robust common sense, the shrewd sagacity to see through the extravagant claims made on behalf of the State. It is my view that the source of the mischief which was poised to jeopardise our liberties lay in the interstices of the Constitution itself and not in the majority judgement of the Supreme Court, but it is also my view at the same time that the majority judgement allowed the last glimmer of hope to be extinguished, at least temporarily. Ladies and Gentlemen, you would recall the apt and evocative tribute The New York Times paid to Mr. Justice Khanna when it said something to the effect that every city in India should raise a monument to the great judge in grateful recognition of his contribution to the cause of freedom.

From Dr. B.R. Ambedkar to Mr. Shanti Bhushan, our constitutional journey has been full of a whole range of exciting and depressing moments, moments of hope and frustration. These experiences are rich with the flavour of life. In our on-going journey in the quest of our national goals enshrined in our Constitution, the life and work of Dr. B.R. Ambedkar will always remain a tower of strength. In paying our homage to his memory, we must particularly remind overselves that the struggle for a better quality of life for our people and for human dignity continues to be the clarion call and the rallying point of our constitutional crucible. The Constitution bears the cross

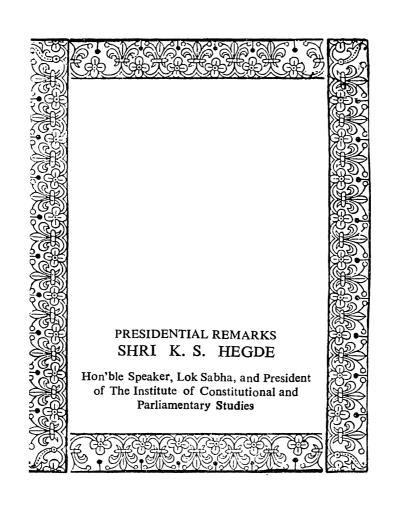
of suffering for the poor and the weak, for the exploited and the disadvantaged, and for the depressed and the disinherited.

I am glad that Mr. Speaker, Shri K.S. Hegde, who is the President of the Institute and on whom the Institute has a rightful claim, is with us to preside over these lectures. Mr. Justice Khanna succeeded Mr. Justice Hegde as Chief Justice of Delhi High Court. They are former colleagues as judges of our apex Court. Both of them have shared the distinction of being superseded in their time. I am glad these lectures bring them together on a theme of momentous significance to the nation

I am particularly thankful to Mr. Shanti Bhushan, Minister of Law, Justice and Company Affairs, who responded readily to my invitation to be with us today and to join us in paying homage to the memory of Dr. B.R. Ambedkar and his contribution to national life. Mr. Shanti Bhushan brings to his office and its great responsibilities his rich experience at the bar as well as his deep involvement in the political processes, particularly in recent years. If I may say so, Mr. Shanti Bhushan provides an illustration of the proposition that politics and law, at a certain level, are two sides of the same coin.

The theme of Mr. Justice Khanna's two lectures and the issues he has highlighted are of pressing and perennial interest to all those who are interested in a happy and harmonious reconciliation between liberty and restraint, between individual freedom and social defense, and between development and democracy. These seemingly opposing elements are not dichotomous; they are mutually complementary. The Constitution of India represents that happy balance and complementarity, a great synthesis, at once stable and dynamic. It was this conception of and striving for harmony and balance that had inspired Dr. Ambedkar. Mr.

Justice Khanna is a votary and an exponent of that balance and synthesis. And his message has a meaning for us here and now.



The distinguished speaker of tonight, Mr. Justice Khanna, Mr. Shanti Bhushan, Dr. Singhvi, Ladies and Gentlemen:

I was extremely happy when I was called upon to preside over this evening's meeting for two reasons. Firstly, this meeting is held in memory of a great son of India, whose contributions in various fields are remarkable and will be remembered for a very long time to come. Secondly, I was particularly pleased that I was to preside over a meeting to be addressed by my very dear friend, Justice Khanna. We have been colleagues for many years. We have been colleagues in the Delhi High Court, we have been colleagues in the Supreme Court. More than anything else, probably we lived more like brothers than as mere friends. So I thought it was a peculiar privilege that I would have to preside over this meeting.

I am glad that we have now arranged memorial lectures in honour of Dr. Ambedkar. Dr. Ambedkar's contributions are manifold. He was a great lawyer, he was a great jurist, but there are two distinct features which no one can forget, two areas where he made tremendous contributions: firstly, he was a great social reformer and secondly, he was practically the framer of our Constitution.

Among the two, I consider his first activity as far greater than even the second one. Due to age-old customs, a section of our own people have not been treated properly by society. Many reformers have tried to improve their social and economic conditions. There was a movement already in force, you know, to improve their conditions. But those movements have not been able to give self-confidence to the scheduled castes and scheduled tribes. What was needed was self-confidence to be created among the scheduled castes and scheduled tribes.

Gandhiji had done a great deal in rousing the conscience of the people towards the injustice done to

these weaker sections of the people. But it was Dr. Ambedkar who, for the first time, organised them into a driving force, gave them self-confidence and asked them to stand on their own feet. If they are today demanding certain things as their right, it is mainly because of the initiative given by Dr. Ambedkar. He had done a great social service. The movement which he started is gaining strength day by day, and I have no doubt that very soon these scheduled castes and scheduled tribes will attain a position equal to the other classes of citizens. It is necessary to remember the life and activities of such a great man.

The second foremost thing which Dr. Ambedkar contributed to society is in the drafting of the Constitution of India. Our Constitution is one of the best constitutions that the world probably has produced. Of course, every constitution has some defects but taking the Constitution as a whole, I am quite sure the two jurists, sitting on my right and my left will agree with me that ours is by far the best Constitution that the world has produced up till now. For this Constitution, Dr. Ambedkar was mainly responsible. He was the Law Minister at that time. He piloted the Bill. He took the consensus of the House. He was able to persuade people who had different ideas to agree to certain formulae.

As Chairman of the Drafting Committee, he did wonderful work. Those of you that have had occasion to go through the proceedings of the Constituent Assembly will agree that they are remarkable proceedings. Any council, any association would be proud of the debates that went on during the Constituent Assembly proceedings. Many eminent members have made great contributions to it. But those contributions were all gathered together and formulated into certain definite rules by Dr. Ambedkar. Of course, he was ably assisted by Sir B.N. Rau. We are grateful to Dr. Ambedkar for giving to the nation such a Constitution.

Of course, the Constitution has been damaged to some extent during the past few years. Mr. Shanti Bhushan is trying to repair the damage that has taken place. But anything that we may do now will be only repairing the damage and not introducing innovations, excepting minor measures.

On an occasion like this, at this moment in the history of the country, it is but necessary that we should remember the great contribution made by Dr. Ambedkar. We are glad that these lectures are going to be delivered in honour of a great jurist and a great social reformer.

I shall not stand between you and the learned lecturer, and I am sure we are all looking forward to a very useful contribution this evening and tomorrow evening.

Now, I will request our Law Minister, Shanti Bhushan, to pay his homage to Dr. Ambedkar.



A TRIBUTE TO DR. B.R. AMBEDKAR

bу

SHRI SHANTI BHUSHAN

Minister for Law, Justice and Company Affairs

Mr. Speaker, Justice Khanna, Dr. Singhvi and Friends:

It is indeed a great privilege for me to join the Speaker in paying my humble tribute to the memory of that great son of India, Dr. Ambedkar. As all of us know, Dr. Ambedkar was by birth an untouchable. Of course, for us who are living in the 20th century and who have come a long way from the period of that untouchability, that social evil, it is difficult to realise what conditions used to prevail in those days.

Dr. Ambedkar had been endowed with a very keen and sensitive mind. He got education and proved to be a very good student. He had a very scholarly mind. But even after he had completed his distinguished career in the University and had taken up a job, and when he was an administrator in Baroda, the position was that even peons, because they belonged to other castes and used to regard even an officer as an untouchable, instead of passing on or handing over the files to Dr. Ambedkar, threw the files from a distance into his hands, because they thought that if they were holding the file at a time when Dr. Ambedkar happened to touch them, they would get polluted and there would be no salvation for them. Some other colleagues were not even prepared to talk to him because the words uttered by him might enter the ears of a member belonging to a so-called higher caste, might conceivably pollute that higher caste person.

He had to face all these frustrations in his career before the State of Baroda sponsored his going as a student to Columbia, and it was there that a new life began for Dr. Ambedkar. When he saw what a free society could be, what freedom, what liberty, what equality could mean, then imbued with a new idealism, he returned to this country. Since then, of course, his legal work, his juristic work, his pioneering work in giving shape to the first Constitution of India in his

capacity as the Chairman of the Drafting Committee in the Constituent Assembly, and subsequently as the first distinguished Law Minister of free India — because he became Law Minister on 15th August 1947 when India regained its freedom — is well known to us.

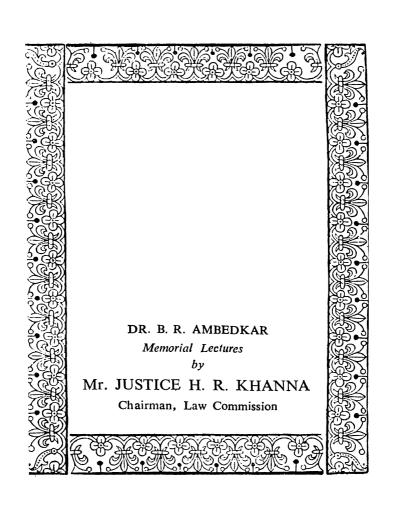
Perhaps what is not so well known to all of us is his great scholarship in the field of economics. He was a great economist and had done a lot of pioneering work in the field of economics. Many of his works in economics held the field as very remarkable and very scholarly works on the subject of public finance as well as on the monetary system. He had also written a book on the "Rupee" at that time.

He became a great champion for the down-trodden. There were sometimes differences between him and other great leaders of India, but every leader was agreed that his devotion to the cause of the down-trodden could not be excelled. Since then, India has come a long way and those down-trodden people, the people who were regarded as untouchables for several centuries in this country, are no longer regarded as untouchables — nobody can have the audacity to refer to that past of their untouchable period in a derogatory manner. Perhaps I would not be letting out a secret when I tell you that I was very happy to find recently that the Chief Justice of India had offered a judgeship of the Supreme Court to a member of one of those castes which used to be regarded as untouchables in the time of Dr. Ambedkar. It is a different matter that for some personal reasons that distinguished member of the judiciary, who was offered a judgeship of the Supreme Court, did not find it possible to accept it. But it shows what a long way India has already traversed and what is now the position of members of those castes which had been kept in shackles for such a long time. This is the result, to a considerable extent, of the unique effort made by Dr. Ambedkar in the amelioration of the condition of those communities.

This is indeed a unique occasion, when the Institute of Constitutional and Parliamentary Studies has organised this series of lectures as a tribute to the memory of Dr. Ambedkar. Dr. Ambedkar's main work, as is well known, was in the field of building up the parliamentary institutions of this country, and he can virtually be regarded as the author of the Indian Constitution.

It is therefore a very fitting that the Institute of Constitutional and Parliamentary Studies should sponsor this important series of lectures. It is again very appropriate that the person who should be called upon to deliver this series of lectures should be no less a person than Mr. Justice Khanna. Dr. Ambedkar had done a lot in creating, protecting and preserving fundamental rights of individual liberty, it is Mr. Justice Khanna who had rendered unique service to the country in upholding the cause of those individual liberties. His contribution to the cause of individual liberty, like the contribution of Dr. Ambedkar in shaping the Constitution of this country, will not be forgotten for many centuries.

With these words, I have great pleasure in paying my humble tribute, to the memory of that great son of India, Dr. B.R. Ambedkar.



CONSTITUTION AND CIVIL LIBERTIES

I consider it a great honour to deliver the Dr. B.R. Ambedkar Memorial Lecture on Constitution and Civil Liberties. Dr. Ambedkar was the supreme architect of the Constitution of India. During the years 1947 to 1950 we in India were fortunate in having a galaxy of brilliant men, and they all put their heads together in drafting the Constitution. Many of them were politicians, but that was the age when politics attracted the best amongst us—the very cream of society, persons who had made their mark in different spheres of life. And those entrusted with the task of drafting the Constitution did not hesitate to associate with others who had distinguished themselves in the field of law and learning, but who had somehow kept away from the dust and din of politics. And they were assisted in the task by a band of civil servants, devoted and dedicated, who strove for the very best.

A Constitution is the basic law relating to government of the country. It defines the various organs of the State, enumerates their function and demarcates their fields of operation. But a Constitution is more than that. It is the vehicle of a nation's prog-It has to reflect the best in the past traditions of the nation; it has also to provide a considered response to the needs of the present and to possess enough resilience to cope with the demands of the future. Constitution has to be at the same time a living thing, living not for one or two generations but for succeeding generations of men and women. It is for that reason that the provisions of the Constitution are couched in general terms, for the great generalities of the Constitution have a content and significance that vary from age to age and have, at the same time, transcendental continuity about them.

The labour and experience of many generations of men mould the work of those entrusted with the task of drafting the Constitution. The provisions of a Constitution, it has been rightly said, are not mathematical formulae having their essence in the form. They are an organic living institution. Their significance is vital, not formal. They are to be gathered not simply by taking the words of the dictionary, but by considering their origin and their growth. They call into life a being, a state of affairs, the development of which could have been at best felt vaguely but could not have been seen completely by the most gifted of its begetters. The drafting of a Constitution calls for the highest statecraft. Those entrusted with it have to realise the practical needs of the government and have, at the same time, to keep in view the ideals which have inspired the nation. Not anointed priests but men with proven grasp of affairs, who have developed resilience and spaciousness of mind through seasoned and diversified experience, through study of history, not only of their own country but also of other countries, through calm contemplation of the present, through deep thinking and sensitive awareness of the inarticulate feelings of their fellowmen, have to be the persons whom destinv and historical forces entrust with the task of drafting the Constitution. It is a rare and unique occasion in the history of a nation that a generation of men is called upon to frame the Constitution of a country. Such occasions do not recur and it becomes essential that those entrusted with the task should be conscious of their great role and the supreme importance of their assignment. On their wisdom and sagacity, their vision and foresight, their perspicacity and discernment depend the mode of life and happiness of succeeding generations of men, women and children.

Fortunately for us, those entrusted with the draft-

ing of the Indian Constitution were aware of their historic role and the supreme importance of the assignment. They chose Dr. Ambedkar as the person to pilot the draft clauses of the Constitution and the pilot was fully worthy of the confidence reposed in him.

Born in 1893 in a Harijan family Dr. Ambedkar smarted under the indignities to which the Harijans were then subjected. After he had graduated from Elphinstone College, Bombay, he was awarded scholarship by the Gaekwad of Baroda and he studied in various universities in the United States, Britain Returning to India he served for some and Germany. time as an official in Baroda and thereafter took to legal practice. He also served as a teacher in law Dr. Ambedkar started a crusade to and economics. highlight the discrimination and humiliation to which the Harijans were subjected at the hands of the caste Hindus, and carried on a relentless fight against that. Member for Labour in the Viceroy's Executive Council from 1942, he became Law Minister in 1947. It was in that capacity that he steered the draft Constitution through the Constituent Assembly. The Constitution bears the imprint of his personality, his indefatigable labour and versatile genius. The speeches he delivered during the deliberations, which preceded the finalisation of the various articles of the Constitution, show the depth of his learning, the great grasp he had of the subject, the wide vision and penetrating intellect which he brought to bear in the matter. Dr. Ambedkar became a Buddhist in October His life died two months after, in December 1956. provides ample testimony of the fact that it is not the accident of birth but proper education, dedication and perseverance that pave the way to success and greatness.

The concept of a written Constitution started with the American Constitution. This Constitution which came into force in 1789 is the oldest written Constitution now in use. It took shape as a result of the deliberations of the Constitutional Convention of 1787. The U.S. Constitution was hailed by Gladstone as "the most wonderful work ever struck off at a given time by the brain and purpose of man." Since then the concept of the written Constitution has gained wider acceptance and barring a few notable exceptions like the United Kingdom, countries all over the world have written constitutions. Even in the United Kingdom the demand for a written Constitution, especially after that country was admitted as a member of the European Economic Community, has become more articulate.

One of the major tasks which has faced the framers of constitutions in democratic countries is how to reconcile the needs of an effective government with the preservation of the rights of individuals. Generally speaking, the objective of a written Constitution in a democratic country are threefold:

- (i) to establish the framework or structure of the government;
- (ii) to delegate or assign the powers to the various organs of the government; and
- (iii) to restrain the exercise of those powers in order that individual rights are preserved.

A weak government, according to Burke, is the worst tyranny of all time. A government in order to be true to itself must govern effectively. Firmness in administration is one of the great imperatives of a good government. A Constitution must, therefore, arm the government with enough powers to exercise control over forces which threaten the even flow of life in the community and create problems of law and order. It is one of the functions of the government to enforce the laws and execute the State policies

¹Trisolini and Shapiro, American Constitutional Law, p. 5.

and to overcome the resistance, if any, which it meets in the process. A modern government has also to carry out various schemes of social and economic welfare. While carrying out those schemes, it must necessarily impinge upon the interests of individuals who are bound to put obstructions in the implementa-To get rid of such obstructions tion of those schemes. the government has to exercise its authority, and that it can do only if it is armed with enough powers. Laws are enacted to be obeyed. A law is a code of conduct prescribed in the form of a command of the legislature, speaking as the representative of the people. obedience of the law must entail penal consequences. In the absence of that, a law is a dead letter, no more than a pious precept without any sanction. is the existence of the sanction of penal consequences that distinguishes law from other rules of morality or ethics. It is the function of the government to ensure obedience of laws and use necessary force for the purpose. Power is also needed by the State to protect the weak against the strong, the oppressed against the oppressor, the victim against the wrong-doer. Man may be a little lower than the angels; he has not shed off the brute, and the brute within is apt to break loose on occasions. To curb that brute, we need the might of the State; otherwise we would be relapsing into a state of the jungle. The worst victims of the weakness, timidity and pusillanimity of the government would be the oppressed and the down-There can, therefore, be no doubt that for purposeful and effective administration, the government must be armed with sufficient powers.

Parallel to the awareness of the need for arming the government with great powers, there has also been growing awareness of the desirability of fostering and protecting individual rights. The American Constitution came into force on March 4, 1789. Six months later, in September 1789, the U.S. Congress proposed

the first ten amendments to the Constitution which have come to be known as the Bill of Rights. These amendments were ratified by the States and became effective in December 1791. The Bill of Rights set up a liberal tradition which since then has been imbibed by most of the democratic nations.

The stress on human rights has been gathering momentum since the time of the French Revolution. At first, international rules and procedure for the protection of human rights were developed in order to protect foreigners against abuse by local authorities. Many international tribunals and commissions during the nineteenth century established minimum standards for all nations to follow in the treatment of aliens. A series of treaties after the First World War imposed upon European countries special obligations for protection of racial, religious and national minorities and authorised the League of Nations to supervise the execution of those obligations.

The tyranny of the Nazi regime and the slaughter of the minorities and inhabitants of occupied territory during the Second World War created a new awareness of the necessity of human rights. amble to the Charter of the United Nations in 1945 reaffirmed faith in fundamental rights. of the Charter lists among the purposes of the United "to achieve international cooperation... **Nations** in promoting and encouraging respect for human rights and for the fundamental freedoms for all without distinction as to race, sex, language or religion..." The Universal Declaration of Human Rights adopted in December 1948 by unanimous vote. six members of the Soviet bloc, Saudi Arabia and South Africa abstained.

The U.N. Assembly proclaimed the declaration as "a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration cons-

tantly in mind, shall strive by teaching and education to promote respect for those rights and freedoms and by progressive measures, national and international, to secure the universal and effective recognition and observance". The Declaration incorporated a number of civil, political, economic, social and cultural Among the civil and political rights were right to life, liberty, security of person; freedom from arbitrary arrest, detention or exile; right to a fair and public hearing by an independent and impartial tribunal; freedom of thought, conscience and religion; and freedom of peaceful assembly and association. Amongst the economic, social and cultural rights were the right to social security, right to work, right to education, right to participate in the cultural life of the community, right to enjoy arts and to share in scientific advancement and benefits. There have been occasions when the United Nations has condemned violation of the provisions of the Declaration of Human Rights. One such occasion was in respect of a legislative act of the Union of South Africa.

Apart from the Universal Declaration of Human Rights, the nations of Western Europe under the auspices of the Council of Europe put into force the European Convention on Human Rights of 1950. The European Court of Human Rights was established in 1959 to enforce this Convention, and individuals were allowed to bring complaints in the form of petitions to the European Commission of Human Rights. Effective measures were thus provided for direct international protection of human rights.

In India the desire for civil rights took deep root in the nineteenth century. It was implict in the formation of the Indian National Congress. A Constitution of India Bill was introduced in 1895 wherein express demand was made for fundamental rights, including those of free speech and free state education. Resolutions passed in the sessions of the Indian National Congress in 1917 and 1919 reiterated the demand for civil rights and equality of status with Englishmen. Mrs. Besant's Commonwealth Bill of 1925, finalised by the National Convention, embodied specific declaration of rights for every person. In terms practically identical with the relevant provisions of the Irish Constitution the following rights were declared to be fundamental:

"(a) Liberty of person and security of his dwelling and property; (b) freedom of conscience and the free profession and practice of religion; (c) free expression of opinion and the right of assembly peaceably and without arms and of forming associations or unions; (d) free elementary education; (e) use of roads, public places, courts of justice and the like; (f) equality before the law, irrespective of considerations of nationality; and (g) equality of the sexes."

The Indian National Congress session of 1927 empowered the Working Committee "to draft a Swarajya Constitution of India on the basis of declaration of rights". A Committee was set up with Pt. Moti Lal Nehru as its Chairman by the All Parties Conference. The Committee's report, known as the Nehru Report, after referring to the provisions of the Irish Constitution enumerated a number of fundamental rights. They included:

"(i) Personal liberty and inviolability of dwelling place and property; (ii) freedom of conscience and of profession and practice of religion subject to public order or morality; (iii) right of free expression of opinion and to assemble peaceably and without arms, and to form associations or unions, subject to public order or morality; (iv) right to free elementary education without distinction of caste or creed in the matter of admission into any educational institutions, maintained or aided by the State: (v) equality for all citizens before the law and in civic rights; (vi) right of every citizen to writ of habeas corpus; (vii) protection in respect of punishment under ex post facto laws; (viii) non-discrimination against any person on grounds of religion, caste or creed in the matter of public employment, office or power or honour, and in the exercise of any trade or calling; (ix) equality of the right to all citizens in the matter of access to, and use of, public roads, public wells and all other places of public resort: (x) freedom of combination and association for the maintenance and improvement of labour and economic conditions; (xi) the right to keep and bear arms in accordance with regulations; and (xii) equality of rights to men and women as citi-**7ens** "

The Nehru Committee also laid great stress upon the fact that it should not be permissible to withdraw under any circumstances the guaranteed fundamental rights.

The Indian National Congress at its 1931 session at Karachi reiterated its resolve to have guaranteed fundamental rights as a part of the future Constitution of India. The next important document on rights was the Sapru Report at the end of 1945. The report contained a number of provisions to allay the apprehensions of minorities.

It was against the above historical background in India as well as developments on the international scene, especially after the formation of the United Nations, that the Constituent Assembly took upon itself the task of drafting the provisions relating to fundamental rights. The framers of the Constitution had also before them the precedents of constitutional guarantee of rights similar to our fundamental rights in some constitutions of the world. In taking the decision that the Constitution should enumerate fun-

damental rights and should guarantee their inviolability our Founding Fathers rejected the British view of rights enunciated by Dicey and subscribed to by others, including the British Government, that proclamation of rights in a Constitution "gives of itself but slight security that the right has more than a mere nominal existence". Earlier in 1934 the Joint Select Commission had referred to the following observations of the Statutory Commission:

"We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and means to make them effective."

After referring to the above observations, the Joint Select Committee observed:

"With these observations we entirely agree....But there are also strong practical arguments against the proposal, which may be put in the form of dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the courts because of being inconsistent with one or other of the rights so declared."

As against the above British view, our Founding Fathers decided to incorporate in the Constitution provisions enunciating fundamental rights dealing with civil liberties with a view to put them beyond the

¹Granville Austin, The Indian Constitution: Cornerstone of a Nation, p. 58.

reach of legislative majorities and executive fiats. In adopting this course, they acted not only as spokesmen of the enlightened conscience of the community: the foresight displayed in inserting such provisions in the bill of rights is amply justified by facts of history. There is a remarkable difference, in the words of Thomas Jefferson, between the character of the inconveniences which attend a Declaration of Rights and those which attend the want of it. The inconveniences of the Declaration are that it may cramp government in its useful exertion. But the evil of this is shortlived, moderate and repairable. The inconveniences of the want of Declaration are permanent, afflicting and irreparable.

I have already referred to the first ten amendments to the U.S. Constitution which constitute the Bill of Rights since December 1791. Most modern constitutions have a bill of rights incorporated in their provisions. Articles 1 to 19 of the 1949 Constitution of the German Federal Republic constitute a bill of rights under the heading Basic Rights. The preamble to the 1958 Constitution of France proclaims attachment to the Rights of Man of 1789 as complemented by the Constitution of 1946, and incorporates some of their provisions in articles 3, 4, 66 and 77. Articles 13 to 28 of the Italian Constitution of 1949 constitute a charter of rights and duties for private citizens. Articles 40 to 44 of the 1937 Irish Constitution provide for fundamental rights of citizens. The Parliament of Canada passed the Canadian Bill of Rights in August 1960. Articles 10 to 41 of the Japanese Constitution deal with rights and duties of the people. In Britain also the demand for a bill of rights has been gathering momentum in recent years. The demand has been reinforced by Lord Scarman in his Hamlyn lectures. also believes that the ratification by the British of the European Convention for the Protection of Human Rights and Fundamental Freedoms will work fundamental change in the whole concept of human rights under the British law.

We may now have a look at the provisions of our Constitution dealing with civil liberties. These provisions are enumerated in articles 12 to 35 in Part III. According to article 13, all laws in force before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III. to the extent of inconsistency, be void. The article further provides in clause (2) that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of that clause shall, to the extent of contravention, be void. The rights enumerated in Part III are grouped under seven broad heads: right to equality. right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights. right to property and right to constitutional remedies.

The first article dealing with civil liberties is article 14, according to which the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Equality is a word of passion. It rouses strong emotions and has a touch of nostalgia about it. It was one of the three words which constituted the rallying cry at the time of the French Revolution. It finds a prominent mention in the preamble to our Constitution. It is, therefore, no wonder that the first fundamental right in our Constitution relates to equality. One thing significant about the article is that its benefit is confined not merely to citizens: it applies to all persons, citizens and non-citizens.

Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Further, according to this article, no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops,

public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Article 16 provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the It further states that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State. At the same time, the article empowers the State to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Untouchability is abolished and its practice in any form is forbidden by article 17.

Article 19 gives protection to rights regarding a number of freedoms. According to this article, all citizens shall have the right to freedom of speech and expression; to assemble peaceably and without arms; to form unions; to move freely throughout associations or the territory of India; to reside and settle in any part of the territory of India; to acquire, hold and dispose of property; and to practise any profession, or to carry on any occupation, trade or business. Clauses (2) to (6) of article 19 state that the rights to the above mentioned freedoms shall be subject to reasonable restrictions which may be prescribed by any law by the State. For example, the right to freedom of speech and expression would not affect the operation of any existing law or prevent the State from making any law in so far as such laws impose reasonable restrictions on the exercise of the right to freedom of speech and expression in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. Article 19(1)(a) does not expressly mention the freedom of the Press. language employed in this respect is different from that employed in the U.S. Constitution wherein the relevant part of the First Amendment states "Congress shall make no law...abridging the freedom of speech or of the Press." The courts in India have, however, consistently taken the view that the freedom of speech and expression includes freedom of the Press and circulation. In the case of M.S.M. Sharma¹ the Supreme Court observed that being only a right flowing from the freedom of speech and expression, the liberty of the Press in India stands on no higher footing than the freedom of speech expression of a citizen and that no privilege attaches to the Press as such, as distinct from the freedom of the citizen. The difference in phraseology of the provisions of the U.S. Constitution the Indian Constitution in this respect was noted by Justice Douglas of the U.S. Supreme Court in the case of Kingsley Corporation v. Regents of the University of New York2 wherein he held that all pre-censorship of cinema films was constitutionally void. While repelling an argument of the need for censorship in the interest of morality, Justice Douglas observed that "if we had a provision in our Constitution for 'reasonable' regulation of the press as India has included in hers there would be room for argument that censorship in the interest of morality would be permissible."

Many other constitutions contain express provisions about the freedom of the Press and about censorship. For example, article 5 of the Federal German Constitution states that "everyone shall have the right freely to express and disseminate his opinions by speech,

¹(1959) Supp. 1 SCR 806 (838). ²360 U.S. 684 (698).

writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by radio and motion pictures are guaranteed. There shall be no censorship." tures are guaranteed. There shall be no censorship." According to clause (2) of that article, these rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour.

Restraint on the freedom of thought has generally been regarded as hindering and retarding "importation of our richest merchandise, Truth." This thought was expressed by Holmes in a classic passage which has echoed through the corridor of time. Said the great Judge:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment."

Article 20 grants protection in respect of conviction for offences. According to that article, no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The article further states that no person shall be prosecuted and punished for the same offence more than once. No person accused of any offence shall

¹Abrams v. United States, 250 US 616 (624).

be compelled, further according to this article, to be a witness against himself. Article 20 gives expression to the underlying objection to ex post facto laws. It prevents a person being punished for an act or omission which was not an offence at the time it was committed. The article also prohibits the infliction of a punishment greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In addition to that, the article enacts prohibition against double jeopardy. Clause (3) of article 20 contains protection against self-incrimination. Although the words used in clause (3) of article 20 are "to be a witness", the Supreme Court in one case held that a person could be a witness not merely by giving oral evidence but also by producing documents or by making intelligible gestures in the case of a dumb witness or the like. It is, however, settled that unless a statement was obtained under compulsion, clause (3) of article 20 does not come into play.

Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The question as to whether the said article is the sole repository of the right to life and personal liberty was the subject of heated controversy in the famous Habeas Corpus case decided in 1976 during the days of emergency. The Supreme Court in that case dealt with a Presidential Order issued under article 359 suspending the right of any person to move any court for the enforcement of the rights conferred by articles 14, 21 and 22 for the period during which the proclamation of emergency was in force. The majority seems to have proceeded upon the assumption that article 21 was the sole repository of the right of life and personal liberty. The

¹ Additional District Magistrate, Jabalpur v. Shivkant Shukla (1976) 2 SCC 521.

majority further held that in view of the Presidential Order, no person had locus standi to move any writ petition for habeas corpus to challenge the legality of an order of detention on the ground that the order was not under or in compliance with the Act or was illegal or was vitiated by mala fides, factual or legal, based on extraneous considerations. involved in that case was of tremendous question importance for the rule of law. The case raised, to reproduce the words from my dissent in that case, "questions of utmost importance and gravity, questions which impinge not only upon the scope of the different constitutional provisions, but have impact also upon the basic values affecting life, liberty and the rule of law. More is at stake in these cases than the liberty of a few individuals or the correct construction of the wording of an order. What is at stake is the rule of law. If it could be the boast of a great English judge that the air of England is too pure for a slave to breathe, cannot we also say, with justifiable pride, that this sacred land shall not suffer eclipse of the rule of law and that the Constitution and the laws of India do not permit life and liberty to be at the mercy of absolute power of the executive, a power against which there can be no redress in courts of law, even if it chooses to act contrary to law or in an arbitrary and capricious manner. The question is not whether there can be curtailment of personal liberty when there is threat to the security of the State. I have no doubt that there can be such curtailment, even on an extensive scale, in the face of such threat. The question is whether the laws speaking through the authority of the courts shall be absolutely silenced and rendered mute because of such threat."

According to article 22, no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be de-

fended by, a legal practitioner of his choice. The article also provides for the production before the nearest magistrate within 24 hours of the arrest of every person who is arrested or detained in custody. One other matter dealt with by article 22 is that of preventive detention. This is a subject which has aroused strong emotions and has been the subject of considerable controversy. To highlight the dilemma posed by this article, I feel tempted to reproduce the opening words of my dissent in the *Habeas Corpus* case:

"The law of preventive detention, of detention without trial, is anathema to all those who love personal liberty. Such a law makes deep inroads into basic human freedoms which we all cherish and which occupy prime position among the higher values of life. It is, therefore, not surprising that those who have an abiding faith in the rule of law and sanctity of personal liberty do not easily reconcile themselves with a law under which persons can be detained for long periods without trial. The proper forum for bringing to book those alleged to be guilty of infraction of the law and the commission of crime, according to them, is the court of law where the correctness of the allegations can be gone into in the light of the evidence adduced at the trial. The vesting of the power of detention without trial in the executive, they assert, has the effect of making the same authority both the prosecutor as well as the judge, and is bound to result in arbitrariness.

"Those who are entrusted with the task of administering the land have another viewpoint. According to them, although they are conscious of the value of human liberty, they cannot afford to be oblivious of the need of the security of the State or the maintenance of public order. Personal liberty has value if the security of the State is not jeopardised and the maintenance of public order is not threatened. There

can be, the administrators assert, no freedom to destroy freedom. Allegiance to ideals of freedom cannot operate in a vacuum. Danger lurks and serious consequences can follow when thoughts become encysted in fine phrases oblivious of political realities and the impact of *realpolitik*. No government can afford to take risks in matters relating to the security of the State. Liberty, they accordingly claim, has to be measured against the community's need for security against internal and external peril.

"It is with a view to balancing the conflicting view-points that the framers of the Constitution made express provision for preventive detention and, at the same time, inserted safeguards to prevent abuse of those powers and to mitigate the rigour and harshness of those provisions. The dilemma which faced the Constitution-makers in balancing the two conflicting viewpoints relating to liberty of the subject and the security of the State was not, however, laid to rest for good with the drafting of the Constitution. It has presented itself to the courts in one form or the other ever since the Constitution came into force."

Articles 23 and 24 deal with the right against exploitation. Exploitation connotes the utilisation of other persons for one's own ends. The preamble to our Constitution proclaims dignity of the individual as one of the objectives of the State. Article 23 accordingly provides that traffic in human beings and begar and other similar forms of forced labour are prohibited, and any contravention of this provision shall be an offence punishable in accordance with law. Article 24 prohibits employment of a child below the age of fourteen years in any factory or mine, or engaging him in any other hazardous employment. There is a close nexus between these articles and clauses

¹Additional District Magistrate, Jabalpur v. Shivkant Shukla (1976) 2 SCC 521.

(e) and (f) of article 39 of Directive Principles, according to which the State shall direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused, and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength, and that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, and that childhood and youth are protected against moral and material abandonment.

Articles 25 to 28 deal with the right to freedom of religion. According to article 25, subject to public order. morality and health and to the other provisions of Part III, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. Article 26 states that subject to public order, morality and health, every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes and to manage its own affairs in matters of religion. Article 27 contains provisions against compulsion for payment of taxes for promotion of any particular religion or religious denomination. Article 28 prohibits the imparting of religious instruction in any educational institution wholly maintained out of State funds. According to article 29 any section of the citizens residing in the territory of India or any part thereof having a distinct language. script or culture of its own shall have the right to conserve the same. Article 30 provides that all minorities. whether based on religion or language, shall have the right to establish and administer institutions of their choice. The State, again according to article 30. shall not, in granting aid to educational institutions. discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. Articles

25 to 30 highlight the importance which the framers of the Constitution attached to the secular character of the State and their keen desire that secularism should permeate the different spheres of our national life. The articles also reflect the concern which the Founding Fathers had for protecting the interests of the minorities. To repeat what I said earlier: India is the second most populous country in the world. The people inhabiting this vast land profess different religions and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the nation the golden thread of a basic innate unity. It is a mosaic of different religions. languages and cultures. Each of them has made a mark on the Indian polity, and India today represents a synthesis of them all. The closing years of the British rule were marked by communal riots and dissensions. There was also a feeling of distrust and the demand was made by a section of the Muslims for a separate homeland. This ultimately resulted in the partition of the country. Those who led the fight for independence in India always laid great stress on communal amity and accord. They wanted the establishment of a secular State wherein people belonging different religions should all have a feeling of equality and non-discrimination. Demands had also been made before the partition by sections of people belonging to the minorities for reservation of seats and separate electorates. In order to bring about integration and fusion of the different sections of the population, the framers of the Constitution did away with separate electorates and introduced the system of joint electorates, so that every candidate in any election should have to look for support of all sections of the citizens. Special safeguards were guaranteed for the minorities and they were made a part of the

⁸The Ahmedabad St. Xavier's College Society v. The State of Gujarat & Others (1974) 1 SCC 717 (770)

fundamental rights with a view to instilling a sense of confidence and security in the minorities. These provisions were a kind of a charter of rights for the minorities so that none might have a feeling that any section of the population consisted of first-class citizens and the others of second-class citizens. The result was that minorities gave up their claims for reservation of seats. The object of articles 25 to 30 was to preserve the rights of religious and linguistic minorities, to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy. These provisions enshrined a befitting pledge to the minorities in the Constitution of the country whose greatest son had laid down his life for the protection of the minorities. As long as the Constitution stands as it is today, no tampering with those rights can be countenanced. Any attempt to do so would be not breach of faith, it would be constitutionally impermissible and liable to be struck down by the courts. Although the words 'secular State' are not expressly mentioned in the Constitution, there can be no doubt that our Constitution-makers wanted the establishment of such a State. The provisions of the Constitution were designed accordingly. There is no mysticism in the secular character of the State. Secularism is neither anti-God nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from matters of State and ensures that no one shall be discriminated against on the ground of religion. The Constitution, at the same time, expressly guarantees freedom of conscience and the right freely to profess, practise and propagate religion. The Constitutionmakers were conscious of the deep attachment the vast masses of our country had towards religion, the sway it had on their minds and the significant role it played in their lives. To allay all apprehensions of interference by the legislature and the executive in matters of religion, the rights mentioned in articles

25 to 30 were made a part of the fundamental rights and religious freedom contained in those articles was guaranteed by the Constitution.

Article 31 deals with compulsory acquisition of property and provides that no person shall be deprived of his property save by authority of law. Article 32 guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of fundamental rights. The Supreme Court has for this purpose been empowered to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari whichever may be appropriate. Dealing with draft article 25 corresponding to the present article 32, Dr. Ambedkar, speaking in the Constituent Assembly on December 9, 1948, observed:

"If I was asked to name any particular article in this Constitution as the most important—an article without which this Constitution would be a nullity—I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance."

CONSTITUTION AND CIVIL LIBERTIES

Having dealt with the various articles of the Constitution which bear on the question of civil liberties, we may now consider some of the issues which are linked with those liberties. The first question is: how far is a bill of rights consistent with effective. purposeful government? A government is a human institution and, like all other such institutions, it can be used by those in charge of it, not merely for legitimate purposes but also for ulterior purposes, for purposes not related to the interest of the State but for the self-aggrandisement of those in power. How to check such abuses while, at the same time, not clip the government of effective means of governance is a problem which has often baffled political philosophers and constitutional experts. If men, as observed by Madison. angels, no government would be necessary. angels were to govern. neither external nor internal control on government would be sary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, to control itself. A dependence on the people is, no doubt, the primary control on the government. But experience has taught mankind the necessity of auxiliary precautions. It is in the latter context that the political thinkers have evolved a system of checks and balances. The surrender of power by the people to the government in a republic is guarded by the division of the State machinery into different compartments. The method most often used is to have three distinct wings of the State: the Legislature, the Executive and the Judiciary.

Each operates within its demarcated field, but each, at the same time, acts as a check against the excesses and abuses of the others. Of the three, the Executive exercises the greatest power. Too much concentration of power, experience tells us, quite often leads to abuse of power, which soon degenerates tyranny. Both Legislature and Judiciary have, therefore, been assigned authority, though of different kinds, to check such abuse of power by the Executive. The great security against the gradual concentration of civil powers in the same department, it has been said, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a sad reflection on human nature that such devices should be necessary to control the abuses of government. But looking to the history of man, such safeguards are essential and cannot be dispensed with.

One other method of checking the excesses of the government is to have a charter or a bill of rights. This ensures that the government, while dealing with the citizens, adheres to certain norms. The charter spells out a code which is vital for the preservation of the basic dignity of the individual and the government agrees to abide by that code. According to the theory of social contract, some aspects of which have now been discredited, human beings surrender their freedom in return for the blessing of government. The blessing of government would lapse into the tyranny of government unless it were accompanied by a recognition that there are certain basic rights which are possessed by all citizens, not only good citizens but also bad citizens. These are the rights which are inalienable because the enlightened conscience of the community would not permit the surrender of those rights by any citizen even of his own volition. These are the rights which are inviolable because they are not only vital for the development and efflorescence of human personality and for ensuring its dignity, but also because without them men would be reduced to the level of animals. The charter ensures rules of self-restraint which have to be exercised by the government in dealing with the citizens in order to preserve a certain level of civilised existence for the community.

The question, then, is whether such a charter of rights cramps the powers of the government and thus creates difficulty in the functioning of an effective government.

This question, in a way, is linked with the other question as to why and for what purpose we need a government. Whatever might have been the notion in the primitive stage of mankind and during the subsequent periods of history, the modern view is that the end of good government is to bring about the security, welfare and happiness of the people. Of all the various forms of government, democratic government with a bill of rights comes nearest to the ideal form for the attainment of those objectives. Even the latter qualification about a bill of rights is superfluous, for all genuine democratic governments do have provisions in their constitutions or laws corresponding to a bill of rights. There can, indeed, be no genuine democracy where the citizens do not enjoy basic rights and civil liberties like freedom of expression, equality before law and a provision that no one shall be deprived of his life or liberty without the authority of law. Experience also tells us that in the absence of these attributes of a State, we can have no freedom from fear. It is also axiomatic that without freedom from fear there can be no happiness. Fear dries up all springs of idealism, and in the process, coarsens the conscience and degrades the spirit. The nobler impulses of mind and the higher values of life cannot co-exist with fear. Where fear is, happiness

cannot be; where fear is, justice cannot be; where fear is, freedom cannot be. Democracy entails the involvement of the people in the governance of the country by giving them a direct hand in the selection of rulers and by giving them periodic opportunities of getting rid of the rulers and replacing them by new rulers if they, the people, do not approve of the policies of the old rulers. Experience further tells us that those governments have proved to be most enduring, purposeful and effective that have been able to secure the maximum cooperation and willing involvement of the people.

Judged by all these tests, we can say that a bill of rights in a democratic set-up is not only consistent with effective purposeful government, but, taking a long-range view of the matter, it is an essential attribute and, perhaps, the best guarantee of an enduring, effective and purposeful government.

Linked with the above, and, perhaps, another facet of the same question, is the issue as to how far a bill of rights is consistent with the need for quick socioeconomic changes for bringing about rapid development in industrial and agricultural sectors. State intervention and regulation of economies is now an accepted principle of administration. A modern government has to look after not merely the maintenance of law and order or the defence of country's borders against foreign aggression, its activities in other fields have increased manifold and acquired numerous facets. It has to undertake a large number of welfare measures with a view to better the social and economic lot of the people. With this end in view, the State has armed itself with numerous powers, many of which impinge upon the rights of the individuals. A modern State has taken over the role of a protector, a dispenser of social services, an industrial manager, an economic controller and an arbitrator.

There has been a tendency in some countries to eli-

minate or water down human rights and civil liberties on the ground that a bill of rights creates restrictions on the power of government to regulate economy and bring about other reforms. That human rights and civil liberties are a luxury which the poor cannot afford is a pet theme of all authoritarian regimes. Liberal values and effective measures to improve the economic lot of the poor, according to them, cannot co-exist. They masquerade as the champions of the poor and down-trodden and under that garb set up totalitarian rule. Experience, however, tells us, as I said elsewhere, that the desire to do away with the bill of rights is actuated not so much by a desire to remove hurdles in the way of socio-economic reforms as with a view to arm the person or persons in authority with more powers. Experience further tells us that the elimination of the bill of rights and the curtailment of civil liberties have always paved the way to authoritarianism and dictatorship. It has also resulted in undermining the rule of law and thus created a climate of arbitrariness. The dictum that power corrupts and absolute power corrupts absolutely is amply affirmed by the facts of history. Generally speaking, only those economic and social developments have proved enduring and have made a deep impact on the life of a nation as have evoked willing cooperation and involvement of the people. Human beings do have physical needs but, in addition to that, they have also some other needs and it is in the latter respect that they differ from animals. There is always a craving in the human heart for satisfaction of the things of the spirit, the yearning for certain freedoms, for some basic values, without which life is not worth living. It is only when nations enjoy a synthesis of the satisfaction of physical needs and the demands of the spirit that there can be true efflorescence of the human personality and free exercise of individual faculties. It, therefore, becomes essential that the ever increasing powers of the modern government should be cushioned with adequate safeguards for the rights of individuals against any arbitrary and capricious use of those powers.

The question of majority rule and minority rights has always vexed constitutional pundits and political philosophers. On one side, we have the view of Jefferson, according to whom majority rule is neither anarchy nor absolutism but government with self-imposed restraints. Canvassing for the view that the will of the majority should prevail, Jefferson observed:

"I am persuaded myself that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves. The people are the only censors of their governors; and even their errors will tend to keep these to the true principles of their institution."

In reply to doubts expressed by another about the necessity of conferring absolute power on the people, Jefferson said: "We both love the people, but you love them as infants, whom you are afraid to trust without nurses; and I as adults whom I freely leave to selfgovernment."2 As against that, we have the warning of Adams that it is of great importance in a republic "not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure... In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature where the weaker

¹Bishop and Handels: Basic Issues of American Democracy, p. 62. ²lbid.

individual is not secured against the violence of the stronger."

A similar view was expressed by de Tocqueville, when he wrote:

"Unlimited power is in itself a bad and dangerous thing; human beings are not competent to exercise it with discretion, and God alone can be omnipotent, because his wisdom and his justice are always equal to his power. But no power upon earth is so worthy of honour for itself, or of reverential obedience to the rights which it represents that I would consent to admit its uncontrolled and all-predominant authority. When I see that the right and the means of absolute command are conferred on a people or upon a king, upon an aristocracy or a democracy, a monarchy or a republic, I recognize the germ of tyranny, and I journey onward to a land of more hopeful institutions."

The device which has generally been adopted to meet the opposing viewpoints is that the minorities should not be allowed to deprive other members of the society of their rights, which flow from the operation of the principle of majority rule. At the same time, minorities should be assured as a result of the operation of the constitutional check on the power of majorities, that they would not be deprived of their basic rights. It is with that object that the various constitutions contain provisions of restraints in the form of checks and balances. So far as the Constitution of India is concerned, there are, as already mentioned, ample provisions for safeguarding the interests of the minorities. This fact is also borne out by a series of judgements rendered by the Supreme Court.

¹Democracy in America; reproduced in Basic Issues of American Democracy, p. 66.

A healthy society, in the words of Reinhold Niebuhr,1 must seek to achieve the greatest possible equilibrium of power, the greatest possible number of centres of power, the greatest possible social check upon the administration of power, and the greatest possible inner moral check on human ambition, as well as the most effective use of forms of power in which consent and coercion are compounded. At the same time, a free society requires some confidence in the ability of men to reach tentative and tolerable adjustments between competing interests and to arrive at some common notions of justice which transcend all partisan interests. The preservation of a democratic civilisation, it is stated, requires the wisdom of the serpent and the harmlessness of the dove. The children of light must be armed with the wisdom of the children of darkness but remain free from their malice. They must know the power of self-interest in human society without giving it moral justification. They must have this wisdom in order that they may beguile, deflect, harness and restrain self-interest, individual and collective, for the sake of the community.

One of the most cherished human rights is the freedom of expression, which includes the freedom to dissent. This right can be regarded as a true index of the prevalence of democratic values in a country. The enlightened sections of the community, as I said elsewhere, have to safeguard against any erosion or abridgement of the right to dissent—a right so essential for the moral health of the community. In respect of freedom of speech, Cardozo observed that it is the matrix, the indispensable condition, of nearly every other form of freedom. To repeat what I said some time back, if we look at the history of fifty years, we would find that some of the ideas which gained currency and spread like wild fire at one time had only an ephe-

¹Basic Issues of American Democracy, p. 53.

meral existence and thereafter nothing could revive them. Indeed, looking retrospectively and examining the matter with detachment and in an atmosphere free from the frenzy of the moment, we often wonder as to how certain ideas could have had such a sway over the minds of the people. This only shows that man is a gregarious animal. It is at moments like these that we need the sentinels to make us aware of the danger which underlies the disposition to take the immediate for the eternal, the transitory for the permanent and the ephemeral for the timeless. This necessarily calls for a determined resistance to the hypothecation of the thinking process. It also postulates a free trade in ideas

It is the freedom to express a view different from that of the ruling party or individual that distinguishes democracy from dictatorship. Regimentation of ideas goes ill with democracy. It is not for those in power to decide as to what views should be propagated amongst, or professed by, the people. Power always thinks that it has a great soul and vast views beyond the comprehension of the weak, and that it is doing God's service when it is violating all His laws. Those in power, however, forget that the people as a whole have basic common sense and it is not proper to deny them an opportunity of judging for themselves as to which view is better and more conducive to their welfare. Any attempt at preventing the people from knowing a view different from that of the persons in power betrays a distrust of the people and proceeds upon the assumption that the people are not sui juris and as such are not capable of deciding what is for their good. Such an approach strikes at the very basis of democracy. The suppression of the freedom of expression, it has been said, constitutes a disastrous threat to public safety. To be afraid of ideas is to profess failure or unfitness for self-government. The right to exert all governmental powers in aid of main-

taining our institutions and resisting their physical overthrow does not include intolerance of and persecution for ideas and opinions, even though they be opposed and alien to the dominant thinking of the person or persons in power. Freedom of expression, as was observed in the course of a judicial pronouncement, is the well-spring of our civilisation. For social development trial and error, the fullest possible opportunity for the free play of the human mind is an indispensable prerequisite. The history of civilisation is in considerable measure the displacement of error which once held sway as official truth, by beliefs which in turn have vielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge. Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavour or under dangers which are hazarded only by heroes. It is an essential function of speech to free men from the bondage of irrational fears. To put it in the words of Justice Brandeis,1 those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as vou will and to speak as you think are means indispensable to the discovery and spread of political truth: that without free speech and assembly discussion would be futile, that with them, discussion affords ordinarily adequate protection against the dissemination noxious doctrines, that the greatest menace is an inert people; that public discussion is a political duty. They recognised the risks to which all human insti-

¹Dennis et al v. United States, 341 US 494 (1951); Frankfurter J. Whitney v. California, 274 US 357.

tutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.

Freedom of expression also requires that the opposite views should be expressed in the language of those who propagate that view and not in a language which some others think expresses that view. According to John Stuart Mill¹, it is not enough that a person should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them: who defend them in their most plausible and persuasive form: he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.

Rule of law and independence of the courts are essential attributes of a civilised society. Without them, a bill of rights would be no more than a pious recital of platitudes, hollow and meaningless. Rule of law is the antithesis of arbitrariness. There was a time when philosophers assessed the respective merits of the rule of men and the rule of law. In the aggre-

¹On Liberty; quoted in Basic Issues of American Democracy, cover page.

gate, the decision has been in favour of the rule of law when the hard facts of human nature demonstrated the essential egotism of men and the truth of the dictum that power corrupts and absolute power corrupts absolutely. Rule of law has now come to be looked upon as the accepted norm of a civilised country and the hallmark of a free society. Even if there have been deviations from the rule of law, such deviations have been covert and disguised, for no government in a civilised country is prepared to accept the ignominy of governing without the rule of law. Although the contents of the rule of law may vary from country to country, everywhere it is identified with the liberty of the individual. It seeks to strike a balance between the opposing notions of individual liberty and public order. The problem of reconciling human rights with the requirements of public interest and of harmonising the two can be attained only by the existence of independent courts which may hold the balance between the citizen and the State and compel the government to conform to the law. Rule of law, it has been said, ultimately has three moral justifications:

- (1) It secures for men the maximum of individual liberty, freedom of speech and association, religion and privacy and equality before the law.
- (2) It secures the greatest opportunities for peaceful change not only today but also in the future.
- (3) The ultimate commitment of those devoted to the rule of law is the belief that the growth of each individual towards responsibility and the freedom to choose the best he can discern, is a purpose which must not be made subservient to other objectives.

History, it has accordingly been said, reveals no substitute for the rule of law in furthering the above pur-

pose. To achieve these goals, even the power of the government must be restrained and ways must be found by which men can live together not by power but by what reason tells is just to achieve. The substitute for power, in the words of Archibald Cox, is the rule of law. Our constitutionalism, according to him. is founded upon institutional inspiration that makes for a free and civilised society organised with the minimum of force and maximum of reason. A society can be said to be free in which law binds all men equally the governors as well as the governed, the judges as well as the litigants. The people—the ultimate rulers in a democracy—have voluntarily subjected themselves through a bill of rights to the restraints of law and have created courts to help them observe the law's prohibition.

In the working of a constitution, as I mentioned elsewhere, we sometimes come across encounters between one freedom and another. It was more than a century ago that de Tocqueville pointed out that one kind of liberty may cancel and destroy another, and that stronger even than the love of liberty is the passion for something different in name and yet at core the same, the passion for equality, Restrictions. vexatious if viewed alone, may be necessary in the long run, it has been said, to establish the equality of position in which true liberty can have its efflorescence. Many an appeal to freedom is the masquerade of privilege or inequality seeking to entrench itself behind the catchword of a principle. The underlying assumption of the grant of liberty always is that it shall not be allowed to degenerate into licence and those granted liberty would also be conscious of the responsibility which the conferment of liberty carries. Exercise of the right of liberty is always subject to reasonable restrictions. The liberty of one cannot be allowed to be asserted in such a manner as to destroy the liberty of others. To safeguard the liberty of the weak, it becomes essential to put restrictions on the liberties of the strong, including the manner of the exercise of those liberties, which itself is a form of liberty. Restrictions upon the exercise of the right of liberty thus become essential for the defence of liberty. Many political thinkers are of the view that equality affords an answer to the excesses of liberty. As was put by one of them, there is only one solution to the problem of liberty and it lies in equality. There must have been periods in social evolution when the refusal to permit the strong man to do what he liked with his own physical strength seemed, at least to the strong, an outrageous interference with his personal liberty. There is no more reason why a man should be allowed to use his wealth or his brain rather than his physical strength as he likes. Liberty of the weak depends upon the restraint of the strong, that of the poor upon the restraints of the rich and that of the simple-minded upon the restraint of the sharper. Every man should have his liberty and no more, to do unto others as he would that they should unto him; upon that common foundation rest liberty, equality and morality. Looked at superficially every curtailment of the right of an individual to do what he likes might be construed as an inroad into his liberty and thus smack of oppression. It is only when we construe liberty in that sense that we would come across areas of conflict between liberty and equality, for most measures undertaken by the State to bring about equality are bound to impinge upon the domain of liberty so conceived, and thus be looked upon as a challenge by its votaries. Deeper reflections would, however, show that there is no antithesis between equality and liberty if properly understood and that far from there being a conflict between the two, one can hardly exist without the other. Liberty and equality supplement each other in all welfare societies. It is only a proper synthesis of the two that can result in a true welfare society. Liberty, it has been rightly said, must be measured against the community's need for security against internal and external peril. Equality must be measured against the need for a hierarchy of social functions by which a community integrates its life and work.

In a nascent democracy like ours, freedom granted by the Constitution cannot be absolute; freedom has to be subjected to reasonable restrictions for its own survival. Liberty, if allowed to degenerate into licence, is suicidal, for it poses the greatest threat to liberty itself. Those who enjoy the blessings of liberty must not forget the heavy responsibility which the right to liberty carries with it. Those who love liberty, must also ensure the prevalence of conditions which are vital for the preservation of liberty. The worst enemies of liberty are those who abuse their liberty, for in the atmosphere of disorder and chaos created as a result of the abuse of liberty comes the man with the sword on horseback, be it a Mussolini or a Hitler.

A bill of rights necessarily postulates an awareness of corresponding duties. A society in which everyone is conscious only of his rights and not of his duties would soon find itself in a State of anarchy. Liberty is not, in the words of Learned Hand¹, the ruthless unbridled will; it is not freedom to do as one likes. That is the denial of liberty and leads straight to its overthrow. A society in which men recognise no check upon their freedom soon becomes a society where freedom is a possession of only a savage few, as we have learnt to our sorrow. A society in which each is willing to surrender only that for which he can see a personal equivalent is not a society at all; it is a group already in the process of dissolution and no one need concern himself with staying its inevitable end. It would be a hard choice between that and a totalitarian society.

¹Irving Dilliard: Spirit of Liberty, p. 150.

No utopia, nothing but bedlam, will automatically emerge from a regime of unbridled individualism. Freedom has its own limitations in its own interests and can properly be described as regulated freedom. According to Ernest Barker, (i) the truth that every man ought to be free has for its other side the complementary and consequential truth that no man can be absolutely free; (ii) the need of liberty for each is necessarily qualified and conditioned by the need of liberty for all; (iii) liberty in the State, or legal liberty, is never the absolute liberty of all; (iv) liberty within the State is thus a relative and regulated liberty; (v) a relative and regulated liberty, actually operative and enjoyed, is liberty greater in amount than absolute liberty could ever be—if, indeed, such liberty could ever exist.

Liberty cannot rest upon anarchy: it is conditioned upon an ordered society. Some groups might bawl of liberty, but really they mean no more than the tyranny of their own domination over the mob and the freedom to use the mob for their partisan ends. Liberty postulates that all political parties should act with a sense of responsibility. There is a close nexus between liberty and the proper functioning of democratic institutions. Democracy embodies the principle of resistance to government within the principle of government itself. When differences of opinion within a State reach a point where individuals or groups refuse peaceably to lose and brush aside constitutional barriers, there arises real danger of the breakdown of constitutional system and collapse of civil liberties. Such individuals and groups would no doubt describe civil liberty to mean the removal of all restraints from the crowds and all local attempts to maintain order as impairment of the liberty of the citizen. "The choice in such a situation is," in the words of Jackson, "not between order and liberty. It is between liberty

¹Quoted in Additional District Magistrate, Jahalpur, v. Shivkant Shukla (supra), pp. 747-748.

with order and anarchy without either." It is in such moments that we have to ensure that a constitutional bill of rights is not converted into a suicide pact. Liberty is as much threatened by unruly elements and forces of indiscipline, by mass hysteria and mob action, by giving up methods of free discussion and taking matters to the streets, as it can be by forces of totalitarianism and dictatorship. The excesses of liberty are the worst enemies of liberty. Elimination of restraints can turn large groups of population into a rabble and a mob. Once roused it can easily become a Jacobin crowd. If it can guillotine a Louis XVI and Marie Antoinette: it can also mete out the same treatment to Danton and Robespierre. Mob passion, once roused, is like a Frankestein monster stalking the land and in the process making mince-meat of civil liberties and decent values. There can be nothing so dangerous as pandering to the emotions and passions of a mob. The furies of revolution, after devouring those against whom it is directed, quite often turn their wrath against the progenitors of the revolution. It is a common feature in such a situation for the heroes of today to become the victims of tomorrow.

The tender plant of liberty can have its efflorescence only in a climate where each one displays an attitude of tolerance and a spirit of moderation. The absence of these attributes poses a grave danger for society, of which warning was given by Learned Hand when he said:

"You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not

¹Terminiello v. Chicago (1948), 337 USI, pp. 36-37.

know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."

Entrustment of power to those in charge of the governance of the country calls for utmost vigilance lest the over-ambitious amongst them should make short shrift of our great heritage. Those in power can always, under the cover of a smoke-screen of slogans and incessant propaganda, create mass illusions and thus play with cherished values and basic liberties. Man, we should remember, is the kind of lion, who both kills the lamb and also dreams of the day when the lion and the lamb shall lie together. Experience should, therefore, teach us to be on guard against the insidious erosion of liberty. The people, it is said, never give up their liberty except under some illusion. Men born to freedom are naturally alert and would be immediately called to action to repel frontal assault on their liberty by evil-minded persons. The greatest danger is when liberty is nibbled away in bits and parts under cover of objects ostensibly beneficent and by men apparently well-intentioned.

One of the questions which has acquired importance during recent years relates to the right of privacy. Privacy has been defined as the claim of individuals, groups or institutions to determine for themselves, when, how and to what extent information about them is communicated to others. Some others have defined privacy as control over knowledge about oneself. Electronic surveillance as also search and seizure of homes and persons has led to unprecedented accumulation

¹Irving Dilliard: Spirit of Liberty, p. 164.

of data which quite often get computerised. Sophisticated electronic devices have enabled the government to pry into the private life of individuals. There is eavesdropping by mechanical process; there is also watching by an invisible eye. Both men and women are thus, in a way, laid bare and all their activities get exposed to inquisitive eyes.

This apart, persons holding high political office and their close relatives are shadowed by some overzealous pressmen to learn about their private affairs. Perhaps, the worst victims have been stars of the cinema and the theatre, and other glamorous personalities. And whatever they do, and sometimes even do not do, finds prominent mention in certain types of newspapers and magazines. The question is as to how far this invasion of privacy is consistent with basic human rights. Everyone, so long as he does not commit any breach of law or violation of the prescribed code of left to himself behaviour, has a right to be to enjoy his private life in comparative seclusion. Does his public image require that there should be a continuous and ceaseless surveillance of his private activities? Does the fact that one holds a political office or has a position in the world of cinema, theatre or some other sphere of social life disentitle him or her to enjoy a private life away from the public gaze and prying eyes?

A question connected with the liberty of the press relates to the danger of trial by the press. Certain aspects of a case pending before, or to be put up in the near future before a court of law or tribunal, are so much highlighted by the press that the publicity which, on occasions, is not free from mendacity, gives rise to strong public emotions. The inevitable effect of this is to prejudice the case of one party or the other for a fair trial. The question consequently arises as to what extent restraints are necessary and have to be exercised by the press with a view to ensure fairness of trial

and purity of judicial process. We must, however, also guard against another danger. A person cannot, as I said in the course of a judicial pronouncement in 1969, by starting some kind of judicial proceedings in respect of a matter of vital public importance, stifle all public discussion of that matter. A line to balance the whole thing has to be drawn at some point.

The demand for the security of the State and the country's relations with foreign powers might also raise questions of restraint on the freedom of the press. A leading pressman of the United States¹, writing under the caption 'In thy name, oh Liberty', stated that a French statesman who had served his country as Foreign Minister and Premier, had complained to him that it was impossible to talk confidentially with American leaders. The reason, he said, was that they immediately made memoranda of such conversations and distributed them in Washington and allied capitals. Often these subsequently leaked to the press. This made it difficult to discuss sensitive issues. In the above context, one may also refer to a recent remark of the US President that he was disconcerted by lack of confidentiality around Washington.

On one side we have the view of Woodrow Wilson that diplomacy shall proceed always frankly and in public. He accordingly called for open covenants of peace, openly arrived at. On the other, we have the words of a distinguished French Ambassador to Germany before First World War, "The day secrecy is abolished, negotiation of any kind is impossible." The functioning of democracy, it has been said, might well require some rough but rational balance between secrecy and disclosure, between official control of

¹C.L. Sulzberger; New York Times, January 12, 1972.

⁸Arthur Schlesinger Jr: The Secrecy Dilemma, New York Times, February 6, 1972.

information and public need for it. When somebody in the government upsets that balance by deceiving or misleading the public, resourceful newspapermen step in to come out with a scoop and then restore the balance. It has accordingly been observed that secrecy can be preserved only when credibility is truly maintained.

Another question which has attracted attention and has also been the subject of some difference in recent times is whether we should allow international agencies to interfere when there is flagrant violation of human rights in a country. In an address to the United Nations Assembly, President Carter stated that no member of the United Nations can claim that maltreatment of its citizens is solely its own business. Equally, according to him, no member can avoid its responsibility to review and to speak when torture or unwarranted deprivation of freedom occurs in any part of the world. As against that, the view has been expressed that how a State treats its own citizens is no concern of anyone else even if such treatment constitutes a breach of human rights. The governments of the countries in which the violation of human rights has occurred have invariably taken the stand that the treatment of its nationals is a matter within the domestic jurisdiction of each sovereign State and any international concern is a gratuitous interference in their internal affairs.

It may be mentioned that in February 1946, the Commission of Human Rights was set up with the duty of submitting to the UN Economic and Social Council proposals on topics concerning human rights, such as the International Bill of Human Rights, protection of minorities, prevention of discrimination on grounds of race, sex, language or religion; International Declarations or Conventions on Civil Liberty and Freedom of Information. Also an International Covenant on Civil and Political Rights, International Covenants

on Economic, Social and Cultural Rights were adopted by the UN General Assembly in 1966. The Covenants came into force in 1976 on ratification by the requisite number of States.

I must also refer to one other important matter. When people, denied freedom for long, suddenly acquire freedom, the risk of over-reaction cannot be ruled out. The danger in such situations is of the people going to the other extreme. The potentialities of mischief and public harm are immense when there is sudden loosening of the reins and abrupt laxity of administration. It is at moments like these that we need sentinels who should put us on guard against the excesses of reaction. Such moments can well prove to be the twilight of freedom, when only a firm administration can prevent the degeneration of liberty into licence. More than at any other time, it is at such moments that we should heed the admonition of Burke that nothing turns out to be so oppressive and unjust as a feeble government. The people have sometimes to pay a heavy price for the pusillanimity and lack of firmness of the administration at the initial stages. Such a state of affairs quite often leads to a situation wherein subsequently there is repeated resort to harsh and oppressive measures, and even they do not prove effective.

One other danger I also must allude to, because that is a danger of which the history of a number of countries teaches us to beware. When a country's moral climate gets polluted, when scruples and principles are sacrificed for the sake of expediency and personal ends, when democratic political parties become discredited by acts of corruption or otherwise, when industry, unions and pressure groups pursue their own interest with little care for the rest of society, when youth turns to vandalism and indiscipline, such moments prove to be crucial for civil liberties and basic freedoms. It is in such moments

that weak democratic governments seem increasingly unable to stop the onward march of organised, disciplined yet potentially undemocratic parties and groups.

Sometimes an attempt is made to clip the government of certain powers which, though seemingly harsh, are necessary for strong and effective government. The demand to denude the government of those powers stems from various sources. The demand is articulated by idealists who are genuinely devoted to civil liberties. The demand is also pressed by groups and sections who may possibly derive political or other benefit and premium from any aggravation of conditions of law and order by embarrassing the government on that account. Pressure is built up to force the government to part with those powers. When taking decisions on such issues, those in charge of the affairs of the country have to look essentially to the interest of the nation. Although it may be essential to provide safeguards to prevent abuse of such powers and mitigate their harshness, those at the helm cannot ignore the conditions prevalent in the country. It has to be borne in mind that conditions in all countries are not alike and what may be possible in some countries may not hold good in others. In no circumstances can a government, by becoming captive of some catchword or slogan, abdicate or suffer diminution of its primary responsibility of providing effective administration and maintaining proper law and order. As observed by Story¹ in the context of the admonition of Burke, government is a practical thing made for the happiness of mankind and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians. The business of those who are called to administer it is to rule and not to wrangle.

¹Story: Commentaries on the Constitution of United States, p. 436. Quoted in Judgement of Shri Khanna in the Kesayanand Bharti Case.

I may also observe that it would be a mistake to rely too much on the courts and the laws for the preservation of liberties. There is no modern instance, it is said, in which any judiciary has saved a whole people from the grave currents of intolerance, passion and tyranny, which have threatened liberty and free institutions. The attitude of a society and of its organised political forces rather than of its legal machinery, is the controlling force in the character of free institutions. The ramparts of defence against tyranny, to repeat what I said some time ago, are ultimately in the hearts of the people. The Constitution, the courts and the laws can act only as aids to strengthen those ramparts; they do not and cannot furnish substitutes for those ramparts. If the ramparts are secure, anyone who dares tamper with the liberties of the citizens would do so at his own peril. If, however, the ramparts fall down, no constitution, no law, court would be able to do much in the matter.

I can do no better than end this address by quoting a passage from the speech of Dr. Ambedkar, after whom these lectures are named, in his last address to the Constituent Assembly:

"The second thing we must do is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not 'to lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institutions'. There is nothing wrong in being grateful to great men who have rendered life-long services to the country. But there are limits to gratefulness. As has been said by the Irish patriot Daniel O'Connell, no man can be grateful at the cost of his honour, no woman can be grateful at the cost of her chastity and no nation can be grateful at the cost of its liberty. The caution is far more necessary in the case of

India than in the case of any other country. For in India, Bhakti or what may be called the path of devotion and hero worship plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country of the world. Bhakti in religion may be a road to salvation of the soul. But in politics, Bhakti or hero worship is a sure road to degradation and to eventual dictatorship."

CONCLUDING REMARKS by

SHRI K. S. HEGDE

Hon'ble Speaker, Lok Sabha, and President of the Institute of Constitutional and Parliamentary Studies

Mr. Justice Khanna, Dr. Singhvi, Mr. Kamath, Ladies and Gentlemen:

Yesterday and today, we heard two illuminating lectures. They are quite thought-provoking. These lectures are not only important for what they say, but to my mind they are more important for what they implicitly contain. These addresses require to be read carefully and digested properly. These are not merely philosophical discourses. They deal with modern events, events that are taking place in the world and more particularly, events that are taking place in this country. Therefore I recommend you to go through these lectures very carefully and realise the implications contained in them.

I shall not deal with the entirety of the lectures, but convention requires that the person who presides must make certain comments at the end of these lectures. I shall take for my comments only two aspects.

Mr. Justice Khanna dealt with the importance of the Fundamental Rights and the necessity of having a very effective government. I am in entire agreement with him, as I have always been in most matters, that the Fundamental Rights embodied in our Constitution are the most important part of the Constitution. But I am not prepared to think that the Fundamental Rights should be examined in exclusion of the other parts of the Constitution. In my opinion, in order to understand the extent and the limits of the Fundamental Rights or to put it otherwise, the parameters of the Fundamental Rights, one has to read the Constitution as a whole. Unless we do that, we are likely to come to erroneous conclusions.

In the initial stage of interpreting the Constitution, the Supreme Court, impressed by the American decisions, took a narrow view of the subject. They separated the Fundamental Rights from the rest of the provisions of the Constitution. They thought that

the Fundamental Rights are something superior to the Directive Principles contained in Part IV of the Constitution. They arrived at this conclusion solely on the basis that the Fundamental Rights are enforceable, but the Directive Principles are not enforceable through a court of law. But in so doing they were doing injustice to the Constitution. Every Constitution is indivisible. So is our Constitution. Our Constitution has to be taken as a whole to understand its implications.

The learned lecturer has placed before you many problems and they are thought-provoking problems. In my opinion, for all these problems a solution has been made available in the Constitution itself. I do not think that we need go out of the Constitution in order to find solutions for the problems that are before us, and that were before us.

The first mistake that we are making is in thinking that the Fundamental Rights are the outcome of the emotions of the Founding Fathers, one of whom is present here before us, Mr. Kamath. It is not so at all. They are the products of history. They are the result of lessons learnt from the history of the world, from events that have taken place in this country as in the world at large. Therefore they are nothing new whatsoever. The rights embodied in Part III of the Constitution were the result of a great many deliberations that had taken place in this country. These deliberations had started as far back as 1895. Therefore it is not correct to think that these rights were conceived for the first time by the Founding Fathers.

The second mistake that we are making is to think that the Fundamental Rights are something different from the Directive Principles contained in the Constitution. Let me now illustrate by taking one or two aspects alone.

No fundamental right guaranteed under the Cons-

titution is an absolute right. Every right carries with itself certain limitations, limitations contained either in the article itself or in the other parts of the Constitution.

Take the Right to Equality, a very valuable right, a right which every one of us cherishes. This very right has its own limitations, when we go to articles 15. 16 and 17. That is not all. There can be no real equality or equality before law or equal opportunity before law, unless there is nearabout social equality and economic equality. Mere political equality does not carry with it the necessary concomitants for legal equality. There can be no equality between a poor person and a wealthy person, either before the court of law or otherwise. So, there are many handicaps for a poor man. That is why article 38 of the Constitution has provided that the government must see that there is no concentration of economic power. The economic power must be equitably distributed.

The Directive Principles have also provided that the social inequality existing in this country should be removed. Article 17 provided for the abolition of untouchability. There are various articles in the Constitution providing for protection of the scheduled castes and scheduled tribes and other weaker sections of society. Therefore, it is no use reading only article 14 by itself. You have to read article 14 which deals with equality with other provisions of the Constitution which command the government to see that social and economic equality is also provided within a very short period.

Let me come to Liberty. As Mr. Justice Khanna said, liberty is not some licence. My liberty ends where your liberty begins. Therefore for everybody, liberty is something which everyone must be in a position to share. Therefore in understanding liberty, we must take the assistance of the doctrine of equality.

What freedom of expression can an ignorant man have in this country? How can the ignorant man express himself, either orally or in writing? More than 70% of our people are illiterate even today. Can they really have freedom of expression? Can they really have even freedom of thought? Thought requires a certain knowledge, certain learning. It is for that reason that the Constitution provided in the Directive Principles that by 1960, within 10 years of the framing of the Constitution, the government must give free and compulsory education to every child between the ages of 6 and 14, so that you might have an enlightened society in the country. A democracy presupposes an enlightened society. It is only an enlightened society that can value liberty. It is only an enlightened society that can exercise the liberties contained in the various provisions of the Constitution.

So it is not the Constitution that has failed us. We have failed to rise to the expectations of the Constitution. We have to blame ourselves. If you so desire, you can blame the government. Therefore, when we think of the Fundamental Rights, we should think in terms of the various provisions of the Constitution and take them all together. For, liberty can become licence at certain stages in a country. It is for that reason that we require an effective government. A modern government is not merely a government which maintains law and order. A modern government is a government which must build up a welfare society. While providing for an egalitarian society it has a duty to build up a welfare State also. That is what the Constitution contemplates.

How can this be done? That is the main question that we have to pose now. In this context, we must remember, ours is a very big country, a country which is probably the sixth largest in the world, a country which has a population of over 620 million people, next only to China. Therefore, how can there

be an effective government, a government which can maintain not merely law and order, but which can build up a welfare society, if the power is concentrated only in a few centres? Will any power-centre, however efficient it might be, find it possible to deliver the goods? That is the question that we have to consider.

Our Constitution-makers undoubtedly have divided the powers between the States and the Centre. At the same time, the Constitution has provided, the Constition has given a mandate to the States to devolve more and more power on the local units. It is true today, probably it was true in the past also, that the condition of law and order is not satisfactory in this country. It is not only in this country but in most countries that the law and order situation is none too happy. It is no good thinking that in this country alone the law and order situation is bad. Such of you as had occasion to read what is happening in other countries, will know that the position in most countries is probably worse than it is in this country. Look at Japan, a highly prosperous country. Look at Germany, look at Italy, look at the United States, look at England-anywhere! The law and order position is no better than what is prevailing in this country. But that is no excuse. How shall we contain the disturbing forces in this country? That is the main question that we have to consider. In order to have an effective government which can not merely control law and order, but also give good government, it is an absolute necessity that governmental power must be widely distributed. More and more governmental powers must be given to the smaller units. That is what Gandhiji had said. Our Swaraj must have roots in the villages. It should not be a top-heavy government at all. Our Constitution in its Directive Principles provides that more and more power should be distributed to the

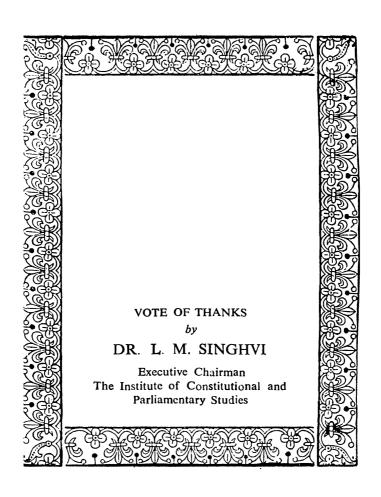
local centres; that the people who are governing should be in contact with the people of the locality.

Today, what are we doing? All the powers concentrated either in Delhi or at the State headquarters. There is practically no local self-government in this country. In most States, elections to local bodies have not been held for over 10 years, or probably 15 years. And even if elections are held, the local bodies have no power whatsoever. They are just instruments in the hands of the governments at the Centre or at the States. How can the people, who are governing the country either from Delhi or from Calcutta. or from Patna, know what is happening in a particular village or a particular area? In most of the democratic countries large powers are given to the local area councils, by whatever name they are called. The police powers are in the hands of the local units. The developmental powers are also in the hands of the local units. It is sometimes said: "Oh! In the local units there is a lot of corruption; they are inefficient." Which one of you can dare say that all State Ministers or Central Ministers are beyond corruption, or that all are embodiments of efficiency? There are difficulties everywhere. Therefore, why don't you trust human nature?

The only way to really build up a democratic society is to build up a grass-roots democracy. If only we do it that way, probably many of the local problems which give rise to law and order situations can be solved at the local level. The elected person in charge knows what problem is troubling them and how it could be met. Therefore, if you want to have an effective government, it is necessary that governmental power should be broad-based. Without broad-basing governmental power, we may not be able to effectively rule this country, a country of our size, a country with such a large population.

These are all things to which each one of you must give a great deal of thought. We are passing through difficult days. Of course, the world itself is passing through difficult days. Part of our trouble is that we are passing through a feudal era to become a modern State. Therefore there are a lot of conflicts. These are necessary conflicts. These conflicts have occurred in every country. There are people who are clamouring for rights. Therefore, necessarily, there is always a conflict between these groups. These conflicts must be settled as early as possible. We have not solved many problems during the last 30 years. Many problems, both social and economic, have to be solved as early as possible if you are to become a modern society, if you are really to become a democratic society.

I am sure these lectures have provoked you to think a great deal about this subject. If they have done that, Justice Khanna has served his purpose. Therefore it was probably his main duty to provoke you to think over the matter so that you, in your turn, may be catalytic agents to carry these ideas to others who are not present before us, and, thereby, let us all be partners in building up a really good society, a society which is really a welfare society and an egalitarian society.



It is for me now to propose a very hearty vote of thanks to Shri Hegde and Shri Khanna. It was well known that both of them shared many experiences. They were both Judges of the High Court of Delhi and both Judges of the Supreme Court. Mr. Justice Hegde has just now said that in most matters he found himself in agreement with Mr. Khanna and both have had the distinction of having been superseded.

The two Judges, both our distinguished President and the distinguished Lecturer, commanded the respect and affection of the Bar, and those who practised before them recall that they had an uncanny and intuitive way of getting to the heart of the problem.

Mr. Justice Khanna has shown that same intuitiveness in reaching out to the recesses of those problems which must command the attention of the nation today. It has been truly a convocation of wisdom. It has truly been an experience in which Mr. Justice Khanna has spoken both for our times and for times to come, and he has spoken evocatively. He has spoken with a sincerity and a candour all his own, and that is what makes these lectures a valuable contribution, not only to erudition, not only to scholarship, but also to that churning process of national self-introspection.

We are very grateful to him for having come to us and for having illumined the path of reason, and for having enriched the treasury of our experience on matters constitutional, political and public.

We are grateful to Mr. Hegde for having graced this occasion by his presence and for having found the time for two successive days, in spite of his very heavy and pressing parliamentary duties, to be in our midst.

Mr. Hegde has been good enough, at my request, not merely as a matter of convention, to give his candid views on many matters that were raised by the distinguished speaker. These will also naturally form a part of the book that will eventually

be published containing Mr. Justice Khanna's lectures.

I do wish to say how very grateful we are to our distinguished audience, for a more distinguished audience could not be found in the country. It makes it worthwhile to pay this humble tribute to that great son of India in a gathering like this and on an occasion like this and on lectures such as these.

