N. R. Madhava Menon

Education and Public Health

Legislative Initiatives in Fifty Years of the Republic (1950-2000)

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NEW DELHI - INDIA

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Justice V R Krishna Iyer
Random Reflections, page 14

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2013 Edition

ISBN : 978-93-5035-377-6

The publication of the book has been financially supported by the Rajya Sabha Secretariat. The responsibility for the facts stated and opinions expressed is entirely of the author and not of the Rajya Sabha Secretariat.

Published by

Universal Law Publishing Co. Pvt. Ltd.
NEW DELHI - INDIA

A-58, G.T. Karnal Road Industrial Area,
(Near Azadpur Metro Station), Delhi-110033
Tel. : 011-47082254, 27458529, 27215334 Fax : 011-27458529
e-mail: unilaw@vsnl.com
• Showroom : C-27, Connaught Place, New Delhi-110001
e-mail: sales@unilawbooks.com
• Editorial : edit@unilawbooks.com
• Website : www.unilawbooks.com

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Recommended citation: N.R. Madhava Menon, *Education and Public Health–Legislative Initiatives in Fifty Years of the Republic (1950-2000)* (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2013).

Computer Typeset at Aesthetic and *Printed* at Glorious Printers, Delhi.

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FOREWORD

I feel honoured at being asked by Prof. Madhava Menon to contribute a Foreword to his latest treatise on "Education and Public Health – Legislative Initiatives in the First Fifty Years of the Republic". In his characteristic modesty, he calls it a monograph presumably because of its physical size.

I have known Prof. Menon for nearly half-a-century now. An eminent jurist and an accomplished law guru, he is widely respected for his pioneering work as an institution-builder in the field of legal studies and training.

Prof. Menon was the first incumbent of the Dr. S. Radhakrishnan Chair instituted in 2009. The present work is the result of his intensive research in the depths of the primary sources like the Constituent Assembly Debates, Proceedings of the two Houses of Parliament, Judicial pronouncements by Courts and much else from the vast field of secondary sources. Several reports of Committees of Experts and independent commentaries by distinguished scholars have been carefully perused and covered.

While handling the theme, Prof. Menon's attention revolves round Part IV of the Constitution containing the Directive Principles of State Policy. However, the agenda for the socio-economic transformation envisaged by the makers of the Constitution was heavily dependent on the extent to which Parliament and State Legislatures could provide legislative support. Prof. Menon decides to focus specially on the basic principles regarding education and health and the performance of Parliament in effectuating these through legislation for providing equal access to all citizens to enjoy health and education. The period covered by the enquiry is fifty years - 1950 to 2000.

Not only is the treatment of the subject of the study comprehensive, it actually extends much beyond and very competently deals with several fundamental issues of constitutionalism, unique nature of Indian Federalism with education and health being largely in the domain of State Legislatures, close relationship between the Preamble, Fundamental Rights, Directive Principles of State Policy and

Fundamental Duties of Citizens under the Constitution, international human rights, rule of law, the vision of founding fathers of the Constitution becoming an instrument of social revolution leading to the realisation of the supreme preambular values of Justice, social, economic and political, dignity of the individual and unity of the nation.

Prof. Menon brings in the links between the Supreme Court Doctrine of Basic Features and article 31C saving laws giving effect to directive principles. Here, it may be of some interest to revisit two articles of the Constitution *viz.* articles 37 and 14. The erudite author quotes article 37 which *inter alia* says that the directive principles were to be "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws". Article 14 of the fundamental rights guarantees that neither "equality before the LAW" nor "equal protection of the LAWS" shall be denied to any person. It is often not appreciated why the founding fathers used "law" in singular in the first part and "laws" in plural in the second part. The first refers to the concept of law as in Rule of Law with all the connotations of natural justice, equity, fairness etc., while the second specifically flags the responsibility of the States to provide equal protection to all in making statute laws. Thus, both the directive in article 37 and the fundamental right in article 14 underline the role of Legislatures. In fact, equitable legislation becomes a judicially enforceable fundamental right.

It is only during the last few decades that the idiom of "governance" has become part of the Political Science vocabulary and come into fashion in intellectual discourse in the academia and in civil society circles. But, the Constitution of India was almost a pioneer in using the word in the same sense in which it is being used today in contra distinction to the word "government". Incidentally, in the entire Constitution, the word "governance" has been used only once and that is in article 37 to declare the Directive Principles to be "fundamental" in the governance of the country and it being a "duty of the State to apply these principles in making laws". Prof. Menon aptly puts the focus on the close relationship between economic and political democracy and socio-economic justice propounded under the Directive Principles and good citizen-friendly governance norms based on the fundamental human rights principles of equality, non- discrimination and inclusiveness.

What accords great contemporary relevance to Prof. Menon's most comprehensive and short treatise is the state of our polity and Parliament today. There is a tremendous disconnect between the people and their elected representatives who constitute the Parliament and the

State Legislatures. We, the people of India are the unfortunate witnesses to constitutional and Parliamentary culture becoming captive to vested interests in misgovernance, corruption and vote bank politics. While the Constitution clearly aims at providing to all citizens Justice, social, economic and political, in the words of the author, the Constitution is viewed by the political class only as a "method of organising power and managing it".

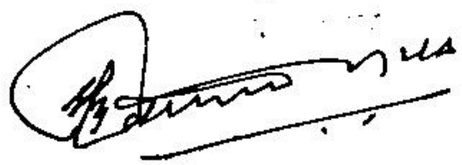
On the main theme of the study, Prof. Menon reaches the sad but inescapable conclusion that the performance of our Parliament in the field of providing good healthcare and education to all during the half century (1950-2000) has been on the whole dismal. During the first twenty years specially the record had been that of "little done, vast undone". It has always been a question of priorities. Unfortunately, health and education concerns could not become matters of high priority with the policy makers. It is interesting that in the early decades, the Judiciary also tilted towards the primacy of the fundamental rights of the individual including property rights as against the needs of socio-economic transformation and of justice envisaged by article 39 and other directives. For many years, there was a running battle between the Parliament and Judiciary on land reforms legislation. It gives a good feeling to be told that in recent decades, a little more attention has been paid to health and education concerns of the common people. The Courts tell us that Health and Education were integral to the right to life and liberty under article 21. However, these rights to be operational, need to be articulated by Legislative action followed by Executive and Administrative implementation. Inasmuch as in a Parliamentary system Executive is also part of the Legislature, the role of the Legislature is crucial. The National Commission to Review the Working of the Constitution (2000-2002) recommended in 2002 that universal education for children upto the age of 14 should be made a fundamental right under the Constitution. In 2003, by a Constitution Amendment Act, education for all between the age of 6 to 14 was declared to be a fundamental right and was to be brought into effect "in such manner as the State may, by law, determine". It was strange that for six years thereafter no law was passed and the right remained only on paper. Even after a law was passed in 2009, it was not brought into operation till April, 2010. Even now the ground realities are distressing. No wonder, after 66 years of Independence, India still has the largest population of the illiterates of the world.

It was very thoughtful of the author to include two brilliant addresses delivered by him at the gatherings of Hon'ble Members of

Parliament as part of his obligation as Dr. Rahakrishnan Chair. One can only hope there will be many more in this genre for the benefit of our representatives.

Prof. Menon's voice of sanity and reasoned warning needs to be heeded. He says that Education and Health are two basic rights the treatment of which by Parliament and State Legislatures in the coming years will determine the course of democracy, rule of law and governance in the country.

I am very confident that this work will be a trend-setter for more such enquiries into the performance of Parliament and State Legislatures in other fields *e.g.*, in providing protection to the interests of women and children. It will be widely welcomed and read with great interest by all those interested in constitutional law, human rights and Parliamentary political science. Above all, the larger fraternity of concerned citizens should find it a delightful and educative reading.



9 August, 2013

SUBHASH C. KASHYAP

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Chapter One
Introduction

Scope of the Study

This is a study on a small area of the functional domain of Indian Parliament which represents 1.2 billion people or one-sixth of world humanity. The area chosen for study is Part IV of the Indian Constitution which declares over a dozen Directive Principles of State Policy comprising the legislative agenda for the socio-economic transformation of the country beautifully captured in essence in the Preamble to the Constitution. The Indian brand of socialism or welfare state is written into these Policy Directives which are declared by article 37 as "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws". Supreme Court held that the Directives supplement the Fundamental Rights in achieving a welfare state. Parliament can even amend Fundamental Rights for implementing the Directives, so long as the amendment does not alter the basic features of the Constitution (article 31C). In fact, Supreme Court has gone to the extent of saying that constitutional provisions as to Fundamental Rights should be adjusted in their ambit so as to give effect to the Directive Principles. Even legislative entries may (within the limits of the total federal scheme) be given a wide interpretation for effectively implementing the Directive Principles. Such is the status and importance of the Directive Principles in law making in the country.

The present study focuses on two important sets of principles related to education and health which, from the citizen's perspective, are basic needs for life with dignity sanctified by article 21, a guaranteed right against the State. Given the Preambular promises and the mandate of the Directive Principles of State Policy one would expect the Parliament, the supreme authority to translate them into laws would have provided the legislative support to realize the constitutional goal of socio-economic transformation. The people are aware of the

efforts of the judiciary being on the vanguard in securing socio-economic rights of citizens through liberal interpretation of constitutional provisions and use of innovative remedies ever since judicial activism and Public Interest Litigation emerged in the 1980s. They are also somewhat familiar with the innumerable populist schemes ostensibly launched for social welfare by successive governments through Plan and non-Plan initiatives. However, what the Parliament did or did not do to advance the social justice agenda of the Directive Principles are not familiar to the public. This study is a modest attempt to explore the role of Parliament with reference to the implementation of the Directive Principles during the initial five decades since the adoption of the Constitution.

Dr. S. Radhakrishnan Chair on Parliamentary Studies

The Rajya Sabha Secretariat at the instance of Hon'ble Vice-President of India and Chairman, Rajya Sabha, Shri M. Hamid Ansari instituted Dr. S. Radhakrishnan Chair and Rajya Sabha Fellowships on Parliamentary Studies in 2009 for undertaking research on different issues relating to Parliamentary democracy in India and appointed me as the first incumbent to the Chair. I offered to look at critically the implementation by Parliament of two of the many socio-economic rights incorporated as Directive Principles of State Policy in Part IV of the Constitution, namely education and health. The procedure adopted was firstly to expound the constitutional goals of socio-economic transformation through democracy and rule of law as reflected in Constituent Assembly Debates and supporting documents. Thereafter a quick survey of Parliamentary debates between 1950-2000 was undertaken to identify the legislative initiatives taken by Parliament to give meaning and content to the Directives on education and health (articles 41, 42, 45, 46, 47). With the help of available data and other secondary materials an analysis on Parliamentary performance in this regard was undertaken in three phases 1950-'70, 1970-'90 and 1990-2000. To be able to understand how far the federal structure has inhibited Parliamentary activity in this regard, an attempt was made to look at the Canadian and South African experience on protection of socio-economic rights, again through secondary materials.

The study presents a point of view which is critical and not perhaps too complimentary of Parliament's performance in implementation of rights of education and health. Perhaps the record of the State Legislatures also need to be assessed to get a total picture of socio-economic transformation and relative role and responsibility of the two levels of government in legislating on Directive Principles. From the citizen's point of view, it has to be admitted that "the State" (which include Parliament and State Assemblies) has under-performed on the social welfare agenda despite certain Directives prescribing time-lines for achieving results!

I must record my sincere thanks the Search and Advisory Committee for giving me the honour to occupy the Dr. S. Radhakrishnan Chair for two years (2010-'12) and to look at an institution which is the hope of democratic India to bring about the social revolution that Dr. Ambedkar, the architect of the Constitution proudly talked about. As part of the assignment, I was also given an opportunity to address Members of Parliament on the topic of "Role of Legislation in the Promotion of Public Health which was presided over by the Hon'ble Vice-President of India and Chairman, Rajya Sabha himself and the Deputy Chairman (Rajya Sabha) was also present on the occasion".

Structure and Analysis

The study is presented here in five chapters excluding the introductory chapter.

Chapter two explores the constitutional mandate to the State towards achieving the socio-economic transformation envisaged by the Preamble and the Directive Principles of State Policy and the role assigned to Parliament in it. The Constitution is perceived as the manifesto of WE, THE PEOPLE OF INDIA, the real masters of the Republic. The implementation of the manifesto is the joint responsibility of all three wings of Government in which the legislative wing has the lead role. When it did not play that role decisively, the judiciary, when approached by People, took a pro-active role in prodding the legislature to act and to compel the executive to discharge its responsibilities under the law and the Constitution. In this process, there has been occasional shadow boxing and open fights between Parliament and judiciary which shaped Indian democracy and representative government on the constitutional path. The Constitution being a "living organism" with a body and a soul got its body parts amputated to cope with changes in society through a series of amendments and retained its soul which got permanency by way of the "basic structure doctrine" propounded by the Supreme Court. Besides expounding this fascinating story of *Parliament* v. *Judiciary in Indian Constitutional History*, this chapter takes the reader to the importance of Directive Principles in the scheme of governance and law making in the country.

The Welfare State ideal of the Constitution is entrenched in the Directive Principles of State Policy. Central to this ideal is the legislative mandate in respect of "Education". Understanding the nature and

scope of the legislative mandate requires one to re-visit the debates in the Constituent Assembly and how they were interpreted by judges, jurists and legislators. This is captured in brief in the second chapter.

Of course, right to health and right to education have also been addressed during the period by the United Nations at its various bodies which resulted in a number of treaties, declarations and conventions. India has been a party to these international agreements and has ratified them with or without reservations. A whole body of international human rights jurisprudence thus became part of domestic law which enlarged the scope of health and education as part of guaranteed individual rights of citizens. India's performance on health and education came to be assessed by official and non-official agencies which disclosed gaps and omissions between commitments and performance. This chapter examines some of these documents to look at how Parliament reacted to those facts and findings.

The reader will get from the analysis in chapter two an idea of the huge tasks that await Parliament's attention in respect of health and education at the turn of the century and the little that was done in the first five decades in this regard.

In the following two chapters (chapters 3 and 4) an attempt has been made to scan through available materials and make an assessment of Parliament's performance in implementing the Directive Principles on Health and Education during the period under review. Thanks to the pre-existing laws adopted during the colonial period, at least in parts of the country the basic infrastructure for healthcare and education was in place. Parliament was pre-occupied in the early period after Independence with land reform policies which got it into a running battle with judiciary at the end of which citizens lost the right to property as a fundamental right guaranteed under Part III of the Constitution! The few welfare legislations which got adopted during the period were mostly in respect of labour, equality through reservation in education and public employment and infrastructure development. Even the Directive to provide every child with free, compulsory primary education within ten years from the commencement of the Constitution did not receive the attention it deserved from Parliament.

The period during and after Emergency (1975-'77) turned out to be productive in advancing the socio-economic agenda both by Parliament and the Government. A number of Centrally-sponsored schemes and a variety of programmes under Five-Year Plans got introduced which included beneficial activities to improve access to health and education.

This was the period in which the Supreme Court through activist interpretation got the Directive Principles read into fundamental rights and asserted that health and education are indeed part of right to life and liberty guaranteed under article 21 of the Constitution. The responsibilities of Central and State Governments in implementing Directive Principles got articulated and citizens started demanding benefits through constitutional courts as part of basic human rights. This is the story briefly outlined in chapter four of the study.

Chapter five looks at the changing *paradigm* of State responsibility *vis-à-vis* social sectors in the context of economic liberalization and globalization. The turn of the century did bring about revolutionary changes not only on the economic front but also in social and cultural fronts creating new awareness of the importance of social capital in growth and development of a nation. Changes in the polity (panchayat raj as a third level of government) and the economy pushed the welfare agenda in the national mind and a number of significant measures on health and education emerged either as policies or programmes from the Central and State Governments.

The final chapter is devoted to take a prognosis on the status of education and health in the new millennium based on the trends in legislative and executive activity of national and state governments. In looking at the challenges in this regard, a brief analysis at how some other federal countries, developing and developed, handled health and education was undertaken to get insights on management of these complex items in terms of human rights as well as public policy choices. The way equality jurisprudence developed in different jurisdictions suggests models of constitutional governance of social sectors. It is argued that for problems of democracy, the answers lie in more democracy. Perhaps, so far as health and education are concerned, Parliament will be well-advised to follow the argument and increase public participation if inclusive development were to be pursued in coming decades.

The person occupying the Dr. S. Radhakrishnan Chair is supposed to make a couple of presentations in Parliament to an audience including Hon'ble Members of Parliament on topics related to the area of research undertaken by the scholar. It was indeed a great privilege and a rare honour to be a guest in Parliament for a scholar and I enjoyed that opportunity twice. On the first occasion on 5th September, 2011, I made an hour-long presentation on "Role of Legislation in the Promotion of Public Health". The Hon'ble Vice-President of India and Chairman, Rajya Sabha himself graced the occasion in which the

Deputy Chairman of Rajya Sabha presided and a number of members of both Houses were present. It was a satisfying experience for me responding to questions and comments from such eminent Parliamentarians like Mr. D. Raja of CPI, Member of Rajya Sabha and Mr. Javed Akhtar, nominated Member of Rajya Sabha.

On the second occasion on 17th May, 2012, I spoke at the same venue on a more general topic, "Law Making in Culturally Diverse, Federal Democracies: Building on Experience of Stability and Change" reflecting on various influences that impinge policy development leading to legislative proposals in a multi-cultural federation like India. The idea was to focus on the space being occupied by extra-Parliamentary initiatives in law making particularly in social sectors like education and health. A lively discussion followed the lecture.

The text of the above two presentations are kept as annexures to this booklet as they constitute part of the study undertaken by me in this assignment.

Chapter Two

Socio-Economic Transformation: The Parliamentary Agenda to Realize the Constitutional Dream

The Indian Parliament was born with a set agenda for priority consideration. It was the product of the massive struggle for independence from colonial rule which brought together the rich and the poor, the Hindu and the Muslim, the urban and the rural, sharing a common dream of a new India securing to all its citizens:

"JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation". (Preamble to the Constitution)

Thousands of books and commentaries have been written on Indian Constitution in general and on specific features which make it a unique document described as the "Cornerstone of a Nation" by Granville Austin[1]. Nothing short of a social revolution would satisfy the freedom fighters and Constitution-makers. However, the institutions and processes they designed to achieve the social revolution were democratic, Parliamentary and based on rule of law and rights of citizens. Democracy, unity and socio-economic transformation were the three "strands of a seamless web" to be pursued through successive governments for realizing the Constitutional Dream. Despite some hiccups, the country maintained its unity and federal structure.

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1. The Indian Constitution by Granville Austin, 1966.

Similarly democracy has taken deep roots and adapted itself to the needs of a diverse society in India. However, the social revolution promised remains an unfinished agenda for which, more than any other constitutional institution, Parliament has distinct role and responsibilities assigned by the Constitution itself. In this chapter we will try to understand the elements of the social revolution and its relation to the role of Parliament which the Constitution sought to articulate with a view to clarify the tasks and priorities set by WE, THE PEOPLE OF INDIA.

Constitution, the Constitutional Institutions and the Constitutional Process

There are many ways for appreciating a Constitution. For many people it is an instrument of government laying down the basic doctrines and principles as well as rights of the people binding those exercising public power. For the political class it is a method of organizing power and managing it under conditions set by the goals and values of a given society. For the majority of the people of India, who for long were exploited and denied freedom and dignity, the Indian Constitution is a People's Manifesto of socio-economic transformation to be achieved through rule of law and respecting human rights. More than anything else, the common man in India has this perspective of the Indian Constitution which makes him abide by its tenets and processes.

The People's Manifesto is essentially captured in the Preamble and the Directive Principles of State Policy. What is the status assigned to these parts in the overall scheme of the Constitution? Unless there is agreement on the status of these Directives *vis-à-vis* the Legislature and the Executive, people in power are likely to dismiss them as pious declarations to be ignored conveniently particularly when they are not judicially enforceable. It is important to remember in this connection what Dr. B.R. Ambedkar said sixty-three years ago in the Constituent Assembly. He spoke about the "life of contradictions" into which the Indian Republic would enter on January 26, 1950. He said that unless the contradictions in the social and economic sphere are eliminated at the earliest, political democracy will again be imperiled. It is to avoid such an eventuality that the Constitution-makers gave clear Directives to the State in the matter of making laws with a constitutionally binding statement in article 37 to the effect that "the principles therein (Part IV) are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws". This study attempting to look at how far Parliament in the first five decades succeeded in fulfilling the expectations of the Constitution in

implementing the Directive Principles in its law-making record. It tries to throw light on the gaps and deficits which future Parliaments may wish to address for avoiding the danger to political democracy that Ambedkar talked about in 1949.

Are the Directive Principles binding instructions for law-making? If ushering in of a welfare state is a constitutional goal, if fulfilling the basic needs of people are pre-requisites for democratic governance, and if socio-economic rights are indivisible from civil rights, it is natural to conclude that the Directive Principles do constitute a priority legislative agenda for Parliament whichever party is in government. In fact, the Supreme Court in successive judgments held that the Directives supplement fundamental rights in achieving a Welfare State. Legislation enacted to implement Directive Principles are consistently upheld by the court so that enough leeway is provided to give effect to the Directives[1]. Parliament also had a similar view regarding the status to be assigned to Directive Principles while making laws[2].

The avowed purpose of our Constitution as indicated in the Preamble to the Constitution is to secure to all Indian citizens Justice, social, economic and political; Equality of status and of opportunity and to promote among them all Fraternity assuring the dignity of the individual. It is to implement this object the directive principles of state policy set forth in Part IV of the Constitution have been enacted; and they impose a duty on the Legislature and the Executive in India to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which Justice social, economic and political shall inform all the institutions of national life. (article 38).

What are these Directives and why are they left judicially non-enforceable if they are so "fundamental in governance" and essential for avoiding the threat to hard won political democracy?

Judiciary's Approach in Interpreting Directives

The Supreme Court's approach in the implementation of Directive Principles by Parliament/Government was initially very ambivalent. It sustained the superiority of fundamental rights over Directive Principles merely because the latter was declared judicially non-enforceable. The effect of it was to give dominance for individual rights in preference to group rights, to deny social good whenever it conflicts with individual

1. *Chandra Bhawan Boarding and Lodging* v. *State of Mysore*, AIR 1970 SC 2042: (1970) 2 Lab LJ 403: (1970) 2 SCR 600; *State of Kerala* v. *N.M. Thomas*, AIR 1976 SC 490; *Laxmi Kant Pandey* v. *Union of India*, AIR 1987 SC 232: 1986 (4) Supreme 344: (1987) 1 SCC 66.
2. Article 31C inserted by Constitution (Twenty-fifth Amendment) Act, 1971.

interest. Obviously, the social revolution that the Constitution contemplated could not have been advanced effectively with such an approach. Parliament therefore had to amend the Constitution repeatedly and introduce articles 31A, 31B and 31C with the object of validating the acquisition of zamindaris protecting them from interference by courts[1]. Article 31A provided that no law, past or future, affecting the rights of any proprietor or intermediate holder in any estate shall be void on the ground that it is inconsistent with any of the fundamental rights guaranteed by articles 14, 19 and 31 as it then existed. Article 31B provided that none of the Acts and Regulations specified in the Ninth Schedule shall be deemed to be void or ever to have become void on the ground that such Act or Regulation is inconsistent with or takes away or abridges any of the rights conferred by any provisions of Part III and notwithstanding any judgment, decree or order of any court or tribunal to the contrary each of the said Acts and Regulations shall continue in force. Simultaneously the Ninth Schedule was introduced in the Constitution with 13 Acts which received the protection (from courts) under article 31B. All of them were laws relating to agrarian reforms. By Constitution 4th, 17th, 29th, 34th, 39th, 40th and 47th Amendment Acts, the Ninth Schedule list expanded to 203 Acts which were purportedly introduced to give effect to the provisions in clause (b) and (c) of article 39 of the Constitution whereby the State was directed to evolve its policies towards securing that the ownership and control of the material resource of the country are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Parliament did not rest with the above and showed its concern for effective implementation of the mandate of Part IV by further amending the Constitution in 1971 (25th Amendment Act) whereby article 31C was introduced giving protection to such laws against attack on the ground that they were opposed to fundamental rights. In the statement of objects and reasons, it was stated that the amendment was introduced with the object of getting over the obstacles placed in the way of giving effect to the Directive Principles of State Policy. Article 31C as originally enacted said:

> "Article 31C – Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19 or article 31 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy .....".

1. Constitution (First Amendment) Act, 1951; Constitution (Fourth Amendment) Act, 1955; Constitution (Seventeenth Amendment) Act, 1964; Constitution (Forty-second Amendment) Act, 1976; Constitution (Forty-fourth Amendment) Act, 1978.

The validity of the above article 39(c) was challenged in *Kesavananda Bharati* case[1]. The majority of the Judges in that case took the view that the words "no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" were unconstitutional since the introduction of these words would affect one of the basic features of the Constitution namely the power of judicial review by courts. The rest of article 31C as introduced by the 25th Amendment however remained intact. By the Constitution (42nd Amendment) Act, 1976, article 31C was again amended[2] by substituting the words, 'the principles specified in clause (b) or (c) of article 39 by the words "all or any of the principles laid down in Part IV"; the result was that if any law was made by the legislature in order to give effect to any of the provisions in Part IV of the Constitution, it could not be struck down on the ground that it was inconsistent with or takes away or abridges any of the rights conferred by article 14 or article 19 or article 31 of the Constitution. This amendment was made with the sole object of giving primacy to the Directive Principles of State Policy over article 14, article 19 and article 31 which are guaranteed fundamental rights. The amendment was questioned before the Supreme Court in *Minerva Mills* v. *Union of India*[3]. It was urged by the petitioner in that case that the amendment of article 31C made by the 42nd Amendment Act had expanded the scope of protection given by article 31C to the laws made by Indian Legislatures whereas under original article 31C as it existed before the amendment, protection had been given only in respect of laws giving effect to the policy of the State towards securing "the principles specified in clause (b) or (c) of article 39. After the amendment all laws giving effect to the policies of the State towards securing all or any of the principles laid down in Part IV were saved from a Constitutional Challenge under articles 14, 19 and 31.

The arguments urged on behalf of the petitioners ran thus: "The amendment introduced by section 4 of the 42nd Amendment Act destroys the harmony between Parts III and IV of the Constitution by

1. AIR 1973 SC 1461.
2. Constitution (Forty-second Amendment) Act, 1976.
3. AIR 1980 SC 1789.

making the fundamental rights conferred by Part III subservient to the Directive Principles of State Policy set out in Part IV of the Constitution. The Constitution-makers did not contemplate a disharmony or imbalance between the fundamental rights and the Directive Principles and indeed they were both meant to supplement each other. The basic structure of the Constitution rests on the foundation that while the Directive Principles are the mandatory ends of government, those ends can be achieved only through permissible means which are set out in Part III of the Constitution. In other words, the mandatory ends set out in Part IV can be achieved not through totalitarian methods but only through those which are consistent with the fundamental rights conferred by Part III. If article 31C as amended by the 42nd Amendment is allowed to stand, it will confer an unrestricted licence on the legislature and the executive, both at the Centre and in the State, to destroy democracy and establish an authoritarian regime. All legislative actions and every governmental action may be related, directly or indirectly, to some Directive Principle of State Policy and therefore can override the guarantees of Part III. The protection of the amended article will therefore be able to cover every legislative action under the sun. Article 31C abrogates the right to equality guaranteed by article 14, which is the very foundation of a republican form of government and is by itself a basic feature of the Constitution".

In reply to the above contention, the Learned Attorney-General raised a preliminary objection to the consideration of the question raised by the petitioners on the ground that the issue formulated for consideration of the court was academic for the purpose of deciding the said case and it was not necessary to decide above question as the case could be disposed of on a limited ground. The majority of Judges over-ruled above contention and set aside the amendment made by the 42nd Amendment to article 31C and restored article 31C to the pre-42nd Amendment position. That means, if any law is made by the State for giving effect to the Directive Principles contained in clause (b) or (c) of article 39 of the Constitution, it cannot be declared as void on the ground that it is inconsistent with or abridges any of the rights conferred by article 14 or article 19 of the Constitution. To repeat, the State may now make a law which would provide that the ownership and control of resources of the community are so distributed as best to subserve the common good and would ensure that the operation of the economic system does not result in the concentration of wealth and means of production to common detriment, without the fear of the law being declared invalid on the ground that it violates article 14 or article 19.

The importance of Directive Principles for sustaining democracy and the constitutional vision of a just society was highlighted by Dr. Ambedkar in his Constituent Assembly speech on 25 November, 1949 in the following words:

> "We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th January, 1950, we are going to enter into a life of contradictions. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one vote one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up".

It would appear from the above discussion that Parliament did take Directive Principles seriously in the beginning of our constitutional journey and was prepared even to amend the Constitution to advance the goals of the Directives. The provocation for this was, of course, the negative approach of the Supreme Court giving precedence to fundamental rights, particularly right to property, even in matters of agrarian reform which indeed constituted the organizing principle which mobilized all Indians during the Freedom Movement. This was the Parliament which consisted of members who fought for Freedom and who articulated the social justice revolution through the processes of parliamentary democracy and rule of law.

In the 1980s, however, the initiative was taken by the judiciary to give prominence to Directive Principles by invoking them in the interpretation of fundamental rights. The result has been the emergence of many more rights under articles 14 and 21 not explicitly spelt out in Part III and the burden of implementation becoming challenging to Parliament once again. How the Parliament reacted to the fresh challenge will be discussed later on in this study. Meanwhile, it is

necessary to recall the key principles contained in Part IV to be able to appreciate the legislative challenges posed by them particularly in the context of changes in the polity, the economy and the human rights mobilization of the people through civil society groups, media, technology and globalization.

The Foundation of Social and Economic Democracy

Part IV of the Constitution (articles 38 to 51) discusses fifteen sets of principles which together constitute the elements of the charter of socio-economic rights which may be called group rights in contra-distinction to individual rights. Democracy in its social and economic sense assumes significance when they are implemented as they secure to citizens an environment for access to basic needs to be able to live a life with dignity. Sixty-three years constitute a long enough period to secure conditions for meeting basic needs such as health, education, work and housing for everyone. And these are the essence of the Directive Principles which only State policies can accomplish through appropriate legislation.

While clause (1) of article 38 directs the State to secure a social order in which, justice, social, economic and political, shall inform all the institutions of national life, clause (2) gives specifically how the State should go about accomplishing that goal. It asks the State "to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations". Clause (2) was introduced in article 38 by the Constitution (44th Amendment) Act in 1978 which empowered Parliament to give meaning and content to the equality guarantee by taking positive legislative steps instead of depending only on reservation and non-discrimination under articles 15 and 16. These positive steps are aimed at equalization of status and opportunities for groups of people left out of the mainstream for no fault on their part. An equal opportunity drive would have enabled the backward classes to stand on their own feet and compete with the rest instead of depending all the time on government crutches.

Be that as it may. The Constitution has given six specific principles in article 39 which the State shall follow for securing the social order envisaged in article 38. These include:

(i) citizens, men and women equally, have the right to an adequate means to livelihood;

(ii) ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(iii) operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(iv) there is equal pay for equal work for both men and women;

(v) health and strength of workers 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;

(vi) 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 exploitation and against moral and material abandonment.

The six principles together constitute the idea of a Welfare State and the social and economic democracy Dr. Ambedkar talked about. They are elaborated in greater details in subsequent articles where they have been embodied in the form rights, benefits and entitlements. Several laws have been enacted to implement these principles though they have been far too inadequate to secure the inequalities and discrimination which prevail in society.

Even though legal aid to the poor has long been recognized in this country, the right was given a constitutional status through article 39A introduced by Constitution (42nd Amendment) Act, 1976. The article stipulates that the State shall ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The concern for equal opportunity in accessing justice is the essence of democracy and rule of law. Free legal aid to the poor therefore is a primary State responsibility. The Legal Services Authority Act, 1986 was accordingly enacted by Parliament.

Self-government is what democracy is about. Village panchayats with powers to enable them to function as units of self-government is another Directive Principle under article 40. The Constitution (73rd Amendment) Act, 1992 introduced Part IX and Part IXA into the Constitution whereby the panchayat system was brought into effect thereby bringing another democratic revolution for realizing the social revolution envisaged by the Constitution.

Right to work, right to education and right to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want are stipulated as State obligation in article 41. Using the language of rights, the Constitution wanted the State to secure social welfare and security to all its citizens, subject of course, to its economic capacity. This is where Parliament and State Legislatures have failed to make much progress in eradicating poverty, illness and

unemployment. It is only recently Parliament acted on right to education and the right to certain minimum days of guaranteed work to every unemployed person. A lot remains to be done in implementing the obligations under article 41.

Article 42 directs the State to make provision for just and humane conditions of work and for maternity relief. Many labour laws have been enacted, some of them prior to Independence, at the State and Central levels to put the mandate into operation. Article 43 and article 43A direct the State to make laws providing for payment of living wage to workers, to improve conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and to take steps to allow participation of workers in management of industries. There is also a mandate to strengthen the co-operative movement in rural areas. Thanks to the trade union movement, pressure from ILO and judicial interventions, the labour jurisprudence evolved by Parliament and the Court did promote the objects of the mandate under article 43 and article 43A.

The concept of equality before law and equal protection of law will not get fully recognized unless the system of personal laws based on religion is replaced by a common civil code. This is the mandate of article 44 which vote bank politics did not allow to materialize. There were attempts in Parliament through private members' bills which got aborted with the result the Directive under article 44 remains a dead letter till today.

The most fundamental of all the Directives is what is prescribed in the now amended article 45 which asked the State to provide within a period of ten years from the commencement of the Constitution free and compulsory education for all children until they complete the age of 14 years. No other article in the Constitution has prescribed a time-limit to accomplish the Directive. If Parliament had acted on it between 1950 and 1960, the country would not have been burdened with the largest illiterate population in the world as happens today. This is the biggest single failure of Parliament/Government in the history of independent India which has impeded the socio-economic transformation envisaged by the Constitution.

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections was mandated by article 46. The State is supposed to protect them from social injustice and all forms of exploitation for which many laws have been made from time to time. Article 15(4) and article 16(4) have enabled reservation in educational institutions and in Government services to advance the interests of these backward sections.

Improvement of public health and raising the level of nutrition and the standard of living of the people have been the Directives given to the State under article 47. This is another significant Directive which did not receive the attention it deserves from Parliament with the result malnutrition and infant mortality continues to be very high in the country. A recent report[1] released by the Prime Minister himself indicated that nearly forty per cent of children born in India are suffering malnutrition and are on the verge of either death or deformities which may last throughout their lives!

Article 48 directs the State to organize agriculture and animal husbandry on modern scientific lines.

Article 48A inserted by Constitution (42nd Amendment) Act, 1976 requires the State to protect and improve the environment and to safeguard the forest and wild-life of the country. A series of laws have been enacted by Parliament which did arrest to some extent, the deterioration of environment and exploitation of natural resources. Again, much remains to be done.

Article 49 requires the State to protect every monument or place or object of historic interest from disfigurement, destruction, removal etc.

Article 50 provides for separation of judiciary from executive in the public services of the State which got implemented throughout the country excepting in some pockets of the North-East States where tribal customs still prevail.

Article 51 is a call to the State to work for promotion of international peace and security. It demands of the State to foster respect for international law and treaty obligations and encourage settlement of international disputes by arbitration.

The above review of the Directive Principles declared fundamental in the governance of the country will enable us to take a balanced view of the performance of Parliament in making laws for their implementation. Of course, the responsibility is to be shared with State Legislatures as many items do fall in the State List under the Seventh Schedule. This study is, however, confined to the implementation through legislation of the relevant Directives related to education and health at the Central level.

Legislative Mandate on Education

Discussion on the Directive Principles was taken up by the Drafting Committee of the Constituent Assembly on 19th November, 1948 with comments on the scope of the expression "State". Dr. Ambedkar

1. Times of India, Delhi, 10th June, 2011.

emphatically said that 'State' in Part III includes, "the Government and the Parliament of India, the Government and the Legislature of each of the States and all local or other authorities within the territory of India ... So far as the Directive Principles are concerned, even a village panchayat or a local board would be a State also".

Prof. K.T. Shah wanted an amendment to the effect that the Directives "be treated as the obligations of the State towards the citizens and enforceable in such manner and by such authority as may be deemed appropriate under the respective law relating to each such obligation". He said otherwise it would be like a cheque on a bank payable only if the resources of the bank permit! He wanted every citizen being able to compel the State to enforce these obligations by whatever means found practicable and effective.

Prof. Shibban Lal Saksena felt the suggestion a "tall order" and argued that the very fact the Directives are in the Constitution ensures that it would not remain a pious wish and it would be open to every legislature to argue that a bill brought before it is not in tune with the Directives or conflicts with them. Acts which offend the Directives are *ultra vires* and although the citizen will not be able to go to a court seeking to nullify the law, the President of every legislature will be within his rights to rule out any Bill and say that it cannot be moved as it conflicts with Directives. He added, "... I, therefore, think that my amendment which was intended to put a sort of time-limit to make the State go on with their implementation at a rapid pace, so that all these Directive Principles may become incorporated in Acts of Parliament in ten years."[1]

Dr. Ambedkar in his reply to the amendments proposed on Directive Principles said that "these principles are not mere pious declarations but Instrument of Instructions. It is the intention of this Assembly that in the future both the legislature and the executive should not merely pay lip service to these principles, but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of governance of the country". Shri Ananthasayanam Ayyangar also argued that the incorporation of the Directives in the Constitution itself indicate the importance attached to them. "It is not a court but rather the strength of public opinion that can enforce these provisions of rights".

The sense of the House while adopting the Directive Principles was that it would be impractical to make these principles enforceable in court because of the huge financial burden it would impose on the

1. Constituent Assembly Debates, 19th November, 1948.

government. Therefore, a ten-year period was given after which these principles could be made enforceable. However, this was not done at the end. They were left to test the performance of the government and legislature rather than giving individuals enforceable rights over them. The Constituent Assembly believed that the Constitution was not intended to make policy decisions for all times but to act as a framework of guiding principles for the future governance.

Relationship of Fundamental Rights and Directive Principles

It is important to appreciate the relationship between the Directive Principles and fundamental rights as they overlap in content and concerns. This relationship got clarified through a series of challenges of laws made by Parliament in the Supreme Court. It all began in the very first year of the commencement of the Constitution in *State of Madras* v. *Champakam Dorairajan*[1] in which the Court took a negative approach and said: "the Directives cannot override the provisions of Part III. The chapter of fundamental rights is sacrosanct and not liable to be abridged by any Legislative or Executive Act or order, except to the extent provided in the appropriate article in Part III itself. The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of fundamental rights".

Prof. P.K. Tripathi criticized it as the lawyers' approach to Directive Principles which is "parochial, injurious and unconstitutional"[2]. He would like the rights interpreted in the light of Directives, and if at all, it is the fundamental rights that should be made to conform to the Directives, not the other way round. P.P. Rao felt the Champakam view did cause irreparable damage to the country and the Constitution by forcing a setback to the implementation of Directive Principles[3]. Speaking in Parliament during the discussions on the Constitution (First Amendment) Bill on May 18, 1951 Dr. B.R. Ambedkar reflected the mood of the House on the matter when he said[4]:

> "I find that these Directive Principles are made a matter of fun both by the judges and by lawyers appearing before them. Article 37 of the Directive Principles has been made a butt of ridicule. Article 37 says that these Directives are not justiciable, that no one would be entitled to file a suit against the Government for the purpose of what we call specific performance. But I respectfully submit that it is not the way of disposing of the Directive Principles."

1. AIR 1951 SC 226.
2. (1954) 17 SCJ 7 (36).
3. Comparative Constitutional Law (Ed) M.P. Singh (1989) p. 368.
4. Lok Sabha Debates, 18 May, 1951

Alan Gledhill in his book the Republic of India (pp. 161-162) wrote:

> "... Many of the fundamental rights are subject to reasonable restrictions in the interests of the general public. In interpreting those rights, the Courts will be obliged to lay down canons for determining what is reasonable; and it is improbable that a restriction should be deemed reasonable if it offends against these Directive Principles."

The relationship between the fundamental rights and Directive Principles is succinctly brought out in a publication of the Bar Council of India edited by Justice M. Hidayatullah[1]:

> "The first attempt to remove, *inter alia*, the obstacles in the way of the implementation of Directives of an economic import (affecting the fundamental right to property) was made by the First Constitution Amendment in 1951 itself, just one year after the enforcement of the Constitution. Article 19(6) was amended to protect any scheme of nationalization; article 31A and 31B and the Ninth Schedule were added to make Zamindari abolition laws unchallengeable in the courts; and article 15(4) was inserted providing for reverse discrimination in favour of Scheduled Castes, Scheduled Tribes and backward classes. These changes and additions can be correlated to the Directives in articles 39(b) and (c) and 46."

The Constitution (Fourth Amendment) Act, 1955, *inter alia*, further circumscribed the scope of the right to property. The scope of article 31A was extended, a new sub-clause 2A) was added to article 31 and article 305 (saving of existing laws and laws providing for State monopolies) was substituted by a new article. The object of all these amendments was immunizing laws providing for stricter State control in the economic field from challenge against the violation of fundamental rights.

The Constitution (Seventeenth Amendment) Act, 1964 again circumscribed the right to property by widening the definition of estate and by including more land reform laws in the Ninth Schedule. In *Golak Nath* v. *State of Punjab*[2], the Supreme Court declared the First, Fourth and Seventeenth Amendments valid though by using the doctrine of prospective overruling the Court held by 6:5 majority that fundamental rights were outside the amendatory process for the future. The judges felt that the Constitutional scheme permits the reasonable enforcement of Directive Principles without taking away or abridging the

1. Justice M. Hidayatullah (Ed.) Constitutional Law, Bar Council of India (1984), p. 676.
2. AIR 1967 SC 1643.

fundamental rights. The minority, however, held the view that for giving effect to the Directive Principles any part of the Constitution, including fundamental rights, should be amendable.

Through the Constitution (Twenty-fifth Amendment) Act, 1971 Parliament expressly gave primacy to certain Directive Principles over certain fundamental rights by introducing article 31(C) which reads:

> "Notwithstanding anything contained in article 31, no law giving effect to the policy of the State towards securing the Principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by articles 14, 19 or 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy ....."

In the celebrated case of *Kesavananda Bharati* v. *State of Kerala*[1] the vires of article 31C was challenged on the ground that it destroys fundamental rights and subordinates them to Directive Principles. Eight of the thirteen judges upheld the validity of the substantive part of article 31(C) on several grounds based on the scheme of the Constitution for achieving social justice but they held the conclusive declaration clause to be invalid as it restricts the courts' jurisdiction of judicial review, a basic feature of the Constitution.

The observations of Justice Khanna are revealing the true relationship of fundamental rights and Directive Principles. He said:

> "The objective of Directive Principle is to narrow the gap between the rich and the poor and that there ought to be no reluctance to abridge or regulate the fundamental rights to property if it was felt necessary to do so for changing the economic structure for attaining the objective. The right to property does not pertain to the basic structure or framework of the Constitution ..... The vesting of the power of exclusion of judicial review in a legislature, including State legislature, strikes at the basic structure of the Constitution. It goes beyond the permissible limit of what constitutes amendment under article 368. Hence the second part of article 31C is void."

The Constitution (Forty-second Amendment) Act, 1976 made several drastic changes in the Constitution some of which related to Directive Principles. Constitutional immunity was extended against articles 14, 19 and 31 for laws made under all Directive Principles with the objective to remove all hurdles in the way of enactment of socio-

1. AIR 1973 SC 1461.

economic legislations aimed to improve the conditions of the poor. Section 55 of the 42nd Amendment Act validated even the conclusive declaration clause of article 31C which was declared unconstitutional by the majority judgment in *Kesavananda* case. A number of new Directives were also introduced under articles 39(f) (protection of childhood and youth), 39A (equal justice and free legal aid), 43A (participation of workers in management of industries) and 48A (protection of environment, forests and wildlife) through the 42nd Amendment.

The Forty-fourth (Constitution Amendment) Act adopted under Janata Party Government in 1978 removed some of the controversial features of the 42nd Amendment. The major change made was the deletion of right to property (article 31) and the right "to acquire, hold and dispose of property" under article 19(1)(f). A newly introduced article 300A provided "No person shall be deprived of his property save by authority of law". Consequential changes in article 31C were also made. The Amendment sets at rest the prolonged controversy around right to property and eliminated all possible constitutional arguments to the removal of economic disparities under article 39(b) and (c). Two new clauses were also added to article 38 relating to the State's obligation to secure a social order for the promotion of welfare of the people.

In *Kesavananda* case, the judges were agreed that the only question open to judicial review under the unamended article 31C is the question of reasonable nexus between that law and article 39(b) and (c). Reasonableness is about nexus and not regarding the law. Palkhivala, on behalf of the petitioners, drew a distinction between the unamended article 31C under which only certain categories of laws were protected, and the position under the amended article 31C under which practically every law would be immune from challenge, and the result would be to make dead letter of the rights under articles 14 and 19 as well. Excepting Bhagawati J. all other judges in the Five-Judge Bench agreed with Palkhivala and held section 4 of the 42nd Amendment Act void. According to them it violates the basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with or takes away or abridges any of the rights guaranteed under article 14 or 19, if the law is for giving effect to any of the Directive in Part IV of the Constitution.

After the *Kesavananda and Minerva Mills* judgments, the approach of the Supreme Court has been to read Parts III and IV as complementary and supplementary to each other. The Court has been showing solicitude to Parliament initiatives for implementing Directive

Principles. In fact, the Court itself acknowledged that it also is bound to implement the Directives invoking the concept of reasonableness to give expression to the lofty ideal of social and economic justice. The Court also felt that the concept of public interest must as far as possible receive its orientation from the Directive Principles. The Court since then read the Directive Principle into one or other fundamental right giving harmonious construction to the rights under Parts III and IV.

The treatment of Directive Principles by the judiciary and Parliament is characterized by one lawyer as follows[1]:

> "In the early fifties when Parliament was keen to push through radical socio-economic reforms, the judiciary put speed-breakers in the way. In late seventies and early eighties when the court was in a mood to give a fillip to the Directive Principles, the Parliament and State Legislatures did not take advantage of the situation. The result is that the Directive Principles of State Policy remain a distant dream for We, the People of India."

Right to Education: Nature and Scope

Having examined the unique status of Directive Principles in the constitutional scheme, it is necessary to understand the scope of the right to education and the right to health to be able to appreciate the performance of Parliament in legislating on them.

Education is a pre-requisite for the enjoyment of all basic rights that give the individual to live a life with dignity. The enjoyment of civil and political rights, such as freedom of expression, assembly, association [article 19(1)], the right to vote and to participate in governance is dependent on at least having a minimum level of education. Access to higher education, the right to choose work and to enjoy the benefits of scientific and technological progress again depend on the ability which primary education imparts to an individual. Although the objectives of education may vary according to national, cultural and historical context, it is generally agreed that education shall be directed to the full development of the human personality and strengthening the sense of dignity of the individual.

Education is a process which involves a complex set of relationships among those who provide education (teacher, school management, parent), who receives education (the child, the student) and those legally responsible for organizing the education, the State. Two major concerns dominated public discourse on education, namely whether it imparts to the student the technical skills necessary to manage the tasks

1. P.P. Rao in M.P. Singh (Ed) Comparative Constitutional Law, p. 374.

of life and whether it imbibes on the student the socio-cultural values of the society. However, in course of time other concerns also got added making the role and responsibilities of the stakeholders diverse and complex. In early times, imparting education was the responsibility of parents and became a State responsibility only in the course of the eighteenth century. Eventually, education became a right of every child enforceable even against the parents. Today it is the legal duty of parents[1] to provide education to their children and it is the duty of the State to guarantee that every child receives quality education by means of schools at convenient distances, mandatory attendance procedures, legal regulation of school curricula, basic infrastructure for school instruction etc. Right to school education has become a human right enforceable against the State[2]. Together with the right to work and public assistance in cases of unemployment, old age, sickness and disablement, the right to education has become the most fundamental of all socio-economic rights under the Indian Constitution. Article 26 of the Universal Declaration of Human Rights (UDHR) proclaims the right of everyone to free and compulsory elementary education and to equal access to higher education. Article 26(2) of Universal Declaration of Human Rights further declared that: "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace".

Article 29(1) of the U.N. Convention on the Rights of the Child (CRC) obliges State Parties to direct education of the child to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms and for the principles enshrined in the Charter of the U.N.;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of

1. Article 51A(k) of the Indian Constitution.
2. Article 21A of the Constitution.

sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

Thus, internationally speaking, the aims and objectives of education can be broadly grouped under four heads:

(i) to enable a human being to freely develop his or her personality;

(ii) to enable a human being to actively participate in a free society in the spirit of mutual tolerance and respect for other civilizations, cultures and religions;

(iii) to develop respect for one's parents, the national values of one's country and for the natural environment; and

(iv) to develop respect for human rights, fundamental freedoms and the maintenance of peace.

The obligations of the States to promote equality of opportunity and treatment in the matter of education are laid down in the UNESCO Convention against Discrimination in Education (1960). One strategy to achieve equality of opportunity is to make education free and compulsory until a certain age, a strategy which the Indian Constitution adopted under article 45. Secondary education shall be accessible to all on the basis of merit/capacity and made progressively free depending on resources. The State should eliminate illiteracy and provide for special education to the handicapped. Thus conceived, State has many positive functions to perform to fulfil the obligations *vis-à-vis* the right to education.

To be able to find out whether the State has fulfilled its obligation, international practice has evolved some methods. Of course, a State with high illiteracy rate or a low primary enrolment ratio or which maintains a system of fees for primary education does not seem to comply with its obligation to fulfil the required minimum standard of the right to education. In the field of education, typical indicators to be applied in a cross-temporal perspective are, for example, literacy rates, primary, secondary and tertiary enrolment ratios, completion and drop out rates, primary pupil-teacher ratio or public expenditure on education as a percentage of GNP or of total public expenditure in comparison to other expenditures etc.[1]

There are many other aspects of the right to education which deserve attention of the government while evolving educational policies.

1. Manfred Nowak, The Right to Education in Economic, Social and Cultural Rights, Ed. Ashjorn Eide, Martims Nijhoff (1995) p. 200.

The issue of equal access and equal enjoyment of educational facilities warrant positive (affirmative action) and negative (non-discrimination) duties. Discrimination against girls or particular religious, ethnic groups is a serious violation of right to education under international law. Similarly, freedom to establish schools by private parties adopting their own curricula, admission procedure, fee structure and teaching methods is an issue which raises private-public responsibilities in promoting education as well as academic freedom. Protection of pupils against inhuman disciplinary measures raises issues of the child's human dignity and physical integrity.

In India, language rights in education raise a set of complex questions which continue to engage public debate at different levels and contexts. The existence of multiple languages spoken by different sections of Indian society has an important role to play in planning language as a medium of instruction. Replacement of multiple languages by a single dominant language is inimical to the right to education and is unacceptable in a multi-cultural society. It can also be violative of minority rights. The problem is the possible result of unequal opportunities arising as a consequence of a given language policy in primary, secondary and higher education.

The Supreme Court in a series of cases has elaborated the nature and scope of the right to education. *In Re, Kerala Education Bill*[1], the court said, " ... minorities will ordinarily desire that their children should be brought up properly and efficiently and eligible for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering the public services, educational institutions of their choice... . In other words, the article leaves it to their choice to establish such educational institutions as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving a thorough, good general education to their children". In *Unnikrishnan* v. *State of Andhra Pradesh*[3] it was observed that "education is a preparation for a living and for life, here and hereafter". Education leads to liberation, liberation from ignorance which shrouds the mind; liberation from superstition which paralyses effort; liberation from prejudices which blind the vision of truth".

Making generalizations on the status of right to education for the whole of India is difficult and risky in view of the vastness and diversity of the country and the varying standards of governance obtaining in

1. AIR 1955 SC 956.
2. AIR 1993 SC 2178.

different states and even in districts within the same state. The scope of the right is defined in the laws many of which are enacted by the state concerned. There are many reports, mostly put out by government agencies which give statement of policies pursued, money spent and results achieved. In 1998, some NGOs have done an empirical study of the ground situation on the status of elementary education in 200 randomly selected villages in Uttar Pradesh, Bihar, Madhya Pradesh, Rajasthan and Himachal Pradesh, states which account for nearly half of the country's population[1].

The report challenges, *inter alia*, the following "myths": (a) poor parents are not interested in sending their children to school; (b) most out of school children don't attend school because they have to work; and (c) elementary education is free. PROBE team reportedly found parents invariably wanting their children to get good education, though they attach greater importance to the education of sons rather than daughters. Most parents have no faith in the ability of the school to impart good education. The magnitude of child labour, according to them, is vastly exaggerated. In fact only a small percentage of children of school going age are full-time labourers. The report does not believe that there is a direct link between child labour and the phenomenon of drop outs. It suspects that most children take up employment after they drop out of schools for a variety of reasons, rather than the other way round – that children don't go to school because they have to work.

There is no such thing as an absolutely free schooling. It may be that government schools do not charge admission or tuition fees. But it does not mean that for educating children at the elementary level, parents have not to incur any expenditure. The report finds that the costs involved coupled with the quality of schooling the child obtains dissuades parents of poor families in sending their children to school. According to the report, parents spend more than Rs. 300 a year per child for maintaining her in primary schools. If there are several children of school going age it is indeed a serious problem for poor families. Still children do go to school "in scanty clothes and with depleted school bags". The report confirms some of the worst impression about school education in terms of quality, gender disparities, regional variations, poor pupil-teacher ratio, poor infrastructural facilities, unimaginative teaching material and lack of public and political commitment to universal elementary education.

Some of the other points raised in the report in the context of education being treated as a fundamental right are:

1. Public Report on Basic Education (PROBE), Oxford University Press (1998).

1. If the right to elementary education is to become a reality, a massive effort is required to bring the schooling system in line with this goal. And as things stand, there is little sign of such an effort being undertaken.
2. The successful universalization of elementary education depends on the positive involvement of teachers, parents and other members of the community. Whenever a teacher absconds from the classroom, or a parent withdraws a child from school or an employer exploits a child labourer, the fundamental right to education stands violated. Upholding the right is, ultimately, a social responsibility.
3. Learning to read and write can do a great deal to liberate children from the tremendous sense of powerlessness expressed by illiterate persons in modern society. Children often benefit from associating with other children in a learning environment, even when the content of teaching activities themselves is of limited interest. The socialization experience in school has much greater educational value than the formal curriculum.
4. Schooling is not the only means of acquiring education, but the two are closely linked. Right to education is usually understood in terms of a certain number of years of schooling (*e.g.* eight years according to the standard understanding of article 45). Education, however, is more than schooling and a lot of schooling activity has very little to do with education.
5. In most literature, 'education' is equated with 'literacy' though literacy is just one of the skills attained through education. Literacy rate is an indicator of the levels of educational achievement. Free, compulsory education cannot therefore be limited to 'total literacy'. Education for all was a much broader social goal.
6. Teachers are the key actors in the village school. Their skills are vastly under-utilised because of a demotivating work environment and lack of accountability.

Apart from the many 'myths' which surround the debate on elementary education in India, the Report identifies four facts which plague UEE:

Firstly, elementary education remains far from universal. Half of the country's population was unable to read and write. Less than 30 per cent of all adults had completed eight years of schooling. One-third of all children aged 6-14 years (about 23 million boys and 36 million girls) were out of school. Thus, only a small minority of the population has attained the constitutional goal of eight years of schooling.

Secondly, educational achievements are highly uneven. Literacy rates, for example, vary a great deal by region, class, caste and gender. Literacy rates tend to be higher in South and Western India than in North or Eastern India. Bihar, M.P., U.P., and Rajasthan are the worst performers where majority of children in the 10-14 age group are illiterate. Within a given region, literacy rates are usually lower among those who are economically under-privileged, SCs, STs and Muslims. Another crucial problem is that literacy rates are much lower for women than for men in most regions.

Thirdly, the poor state of elementary education is largely a reflection of State inertia in the form of under provision of education facilities, inadequate supervision of the schooling system, neglect of disadvantaged regions and communities. Most of the schemes like Total Literacy Mission, Operation Black Board, DPEP etc. are of *ad hoc* nature and at best of supplementary character.

Two significant reasons for lack of quality in elementary education brought out by PROBE team are lack of teacher accountability and gaps in educational management. The available mechanisms of accountability are weak in practice. For example, teacher promotions are based on seniority rather than performance. Transfer and punitive measures are resisted successfully by teachers' organizations. Inspection system has no follow-up action. Supervision by head teacher is ineffective as in some cases head teacher himself may be non-accountable. Concern for reputation seem not to bother many teachers any more. With a diluted work culture and subversive political connections, there is no effective system of peer group pressure. With little power left with parents or local communities, there is little that communities can do to make teachers accountable. An over-centralized administration makes the problem still more difficult. Teachers have lot of political clout because of the size and strength of their organizations and the statutory membership given to them in the upper houses of State legislatures and panchayat raj institutions. They had many strikes and agitations which had in the past substantially reduced the number of days available for teaching. The agitations were mainly on the issue of salaries and work conditions. The report of the National Commission on Teachers (1986) does not shy away from mentioning this problem (p. 71); "we must invite attention to the need to promote actively parents' organizations all over the country..... We feel that such organizations are desperately needed to promote and safeguard the educational interests of their wards and to counteract the negative and unhealthy political pre-occupations of some of the teachers and their organizations".

There has been legislative initiatives in different States to fulfil incrementally the obligation under article 45 in respect of free compulsory, elementary education. At the national level, the 83rd Constitution Amendment Bill introduced in 1997 was a modest attempt to make country-wide progress in this regard. Explaining the implications of the proposal to make elementary education a fundamental right, the Committee of State Education Ministers (Saikia Committee) in 1998 proposed that a State-wise approach in regard to free education should be adopted in keeping with the local requirements and constraints. However, in order to ensure uniformity, free elementary education should mean exemption from tuition fee, provision of free text books for all primary school children, provision of essential stationery to all children and mid-day meals programme. State Governments may provide other incentives such as free school uniforms, cash incentives, scholarships etc. in accordance with their economic capacity and priorities. (According to National Sample Survey Reports (52nd Report) only 77 per cent of the primary school children get free primary education – meaning no tuition fee is paid to the school by the students. Only 35 per cent of children in primary schools receive free/subsidized books, 5 per cent receive free/subsidized stationery and mid-day meal is available only to 25.9 per cent of the students. Only 3.9 per cent of the students get financial incentives/ scholarships). State should delegate authority and decentralize management of elementary education to local bodies in urban and rural areas in consonance with the spirit of the 73rd constitutional amendments.

The Saikia Committee recommended certain basic educational facilities, which if not provided may become justiciable on the right becoming a fundamental right. These include (a) at least two rooms when enrolment is less than 100 with verandah and separate toilet facilities for boys and girls; (b) at least two teachers for 100 students; and (c) essential teaching/learning material for Rs. 10,000 per school. For Upper Primary School, it was proposed that the guideline should be at least one room for each class, a headmaster-cum-office room, contingency grants of Rs. 1,000 per annum, library facilities and study equipment costing Rs. 40,000 per school.

The Committee was of the view that the primary responsibility to promote elementary education should remain with the State Governments which should authorize local bodies to raise revenue (educational cess) for improvement of facilities in schools. The Central and State Governments should allocate 50% of budgetary allocations for education to elementary education and ensure that the funds are not

diverted to any other sector. The requirement of additional finances are tentatively estimated to be Rs. 40,000 crore. The Committee did see the need for private participation in primary school education particularly in remote and inaccessible areas.

Discussion above indicates the vastness and dimensions of the right to education which the State was supposed to implement within 10 years of the commencement of the Constitution. The neglect of Parliament to legislate on the subject is perhaps the single most important failure in the initial decade which made the tasks still more difficult in subsequent decades.

Right to Health

In the scheme of the Indian Constitution, while civil and political rights are guaranteed as fundamental, enforceable rights, social and economic rights including right to health are kept as Directive Principles of State Policy to be realized progressively by actions of the Executive (Governments) and the Legislatures. Individuals cannot claim them as judicially enforceable rights unless State (Central, provincial or local) has made legislation therefor. Judiciary charged with protection of right to life and liberty (article 21) has by liberal interpretation of civil and political rights declared that the State has obligations to fulfil the survival needs of every individual without which no one can enjoy life with dignity. In other words, courts had no difficulty in holding that education and health are integral to the right to life and liberty guaranteed by article 21. However, these are inchoate rights till their scope and content are articulated by legislative action. The Constitution thus expects Parliament or State Legislatures to legislate and provide access to socio-economic rights keeping in mind that the State has special obligations to weaker sections, particularly women, children, sick and disabled persons. The executive government is obliged to allocate adequate resources and ensure through administrative processes that no one is denied the basic needs for survival.

It is important to know the scope of binding obligations of the State in this regard in order to find out whether the State has discharged them or not. When do we say that State has violated its core obligations *vis-à-vis* the health rights of citizens?

Increasingly, health is being perceived all over the world as a basic human right and public health law is being constructed on the basis of a jurisprudence informed by State's functions and obligations to keep people healthy. What is promised by international human rights instruments is "the highest attainable state of health", the content of

which is dependent on time, place, resources and state of development. This is the reason why the Indian Constitution has put right to health as part of Directive Principles of State Policy and mandated Parliament to implement them while making laws (article 37). Parliament can even amend fundamental rights for implementing the Directives, so long as the amendment does not alter the basic features of the Constitution (article 31C). All constitutional provisions, Supreme Court held, may be construed in the light of Directive Principles. Article 37 does declare Directive Principles as fundamental in the governance of the country even while, for obvious reasons, they are not made enforceable through courts. This has made the role of Parliament in the implementation of Directives so crucial for social welfare and good governance. The task of Parliament is to make laws incrementally to implement Directives even when the Government of the day neglects or postpones action on the Directives. Executive may have other priorities; but Parliament can never ignore the Directives which are addressed directly to the law makers in article 37. As such, if one were to assess the performance of legislatures in constitutional governance, an important parameter can well be the extent to which laws have been made in the implementation of Directive Principles.

Health in International Human Rights Discourse

What is the core content of right to health? The World Health Organization in 1978 in the *Alma Ata* Declaration (Health for All by the year 2000) identified six essential components of a programme to achieve "the highest attainable standard of health". These are—

(i) Preventive health services like immunization, family planning, sanitation etc.

(ii) Emphasis on maternal and child health care.

(iii) Education of people on health issues.

(iv) People's participation in planning and implementation of health care services.

(v) Priority in health care to vulnerable and high risk groups.

(vi) Provision for equal access to individuals to health care at affordable cost.

Alma Ata Declaration provides an agenda for Parliamentarians to pursue for promotion of public health. Constructing States' obligations in this regard, positive and negative, is a task which policy-makers who are aware of the inequalities and inequities of Indian society have to worry about. On the one hand, States' policies of development shall not deprive people of their livelihood or increase the health risks they are exposed to. These are negative obligations in the sense how law-making

should restrain itself in the interest of public health. On the other hand, State has obligations to create better conditions to promote public health (housing, nutrition, sanitation, water supply etc.) and to ensure that every section of people particularly the weaker sections have equal access to health services in treating diseases and alleviating suffering.

Ever since the adoption by the world community of the Universal Declaration of Human Rights (1948), public discourses relating to health have been conducted in the language of rights on the assumption that the State has definite obligations in the maintenance of public health, that is, conditions in which people can live healthy. In 1966, the international community articulated the right in article 12 of the Covenant on Cultural, Economic and Social Rights in the following terms:

(i) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(ii) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the still birth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

India is a signatory to the Covenant and is obliged to implement the obligations under it. India inherited a fragmented, inequitous and ineffective health system from the British which hardly could subserve even the minimum standard of health care to all its citizens. Health reforms were therefore an imperative necessity and the States were required to invest heavily to build the health infrastructure and services. The investment today in healthcare on the part of States and Centre is estimated to be less than 5% of the country's gross domestic product, far too little to assure "health for all".

Historically, health was dependent on income and employment, housing and environment, nutrition and food, water and sanitation,

rather than availability of health care systems and services. With the model of development now being pursued, health is now related to more areas like accident prevention and waste management, medical education and health insurance, town planning and family planning and many other disparate issues. Health policy therefore has become too complex and inter-related to a variety of other policies pursued in the name of welfare and development. Hence law makers need to appreciate the health dimension of every new development initiative they might undertake if public health is to be considered as a pre-condition for all development.

Since the recognition of health as a basic human right under the Covenant on Economic, Social and Cultural Rights, International Health Law has been developed by U.N. bodies like WHO, ILO etc. mainly on three fronts. *Firstly*, they aimed to give meaning and content to health rights in relation to disadvantaged sections of people. Thus, U.N. evolved the health rights of children in the Convention of Rights of the Child, health rights of the Disabled, the elderly, the mentally ill, women, indigenous persons, AIDS-affected persons etc. in separate Conventions. ILO has added several Conventions on occupational health and health rights of workers. *Secondly*, international health law provided for measures to control the international spread of diseases including quarantine and immunization regulations. *Thirdly*, international initiatives in the health sector related to setting standards on medical experimentation on human beings, clinical research, organ transplantation, access to healthcare services, reduction of health hazards, food and drug safety etc. Because of weak mechanisms in the enforcement of international law, the growing body of international health law requires municipal legislation to support effective implementation. Some aspects of it, however, get incorporated as part of ethical codes informing the conduct of health personnel to be implemented by peers of the respective professions.

In India, international law is a source for domestic law-making and Parliament is obliged to act in this regard under the Directives included in article 51 (foster respect for international law and treaty obligations) of the Constitution.

Health Under the Indian Constitution

The Indian Constitution deals with 'health' in multiple ways: as part of the right to life in article 21, as part of the Directive Principles for making laws in articles 42 and 47 and as part of the shared responsibility of the Union, State and Local Governments (Seventh, Eleventh and Twelfth Schedules).

It was left to the Supreme Court to clarify that right to life is indeed right to live with dignity and not a vegetable life. While the court conceded that the content of right to live with dignity would depend on the extent of development of the country, "in any view of the matter, it would include the bare necessities of life and also the right to carry on such activities as constitute the bare minimum expression of the human self"[1]. In a series of decisions thereafter, the court ruled that just and humane conditions of work and leisure to workmen are a part of the meaningful right to life of workers[2], that right of access to emergency medical treatment is part of right to life[3], that non-availability of services in government health centres amounted to a violation of article 21[4]. In this case the claimant was refused treatment at eight state-run medical institutions in succession because of non-availability of beds or insufficient technical capacity. The patient was forced to undergo lot of suffering and forced to get medical help in a private hospital at great cost. While awarding compensation to the person, the Court held that right to emergency medical care was a core component of right to health. Using the same logic, the Indian judiciary ruled on the duty of the State to maintain quality and safety of blood banks, establishment of primary health centres in every village, ban of hazardous drugs, control of inhuman conditions in State-run care homes and custodial institutions, prohibit smoking in public places, prevent discrimination in treatment of HIV patients etc. The significance of these judgments lies not in just empowering the people but more importantly in reminding the Executive and the Legislature of their constitutional obligations and prompting them to act in relation to improvement of public health. A rights-based approach around articles 21 and 14 did bring about some desirable changes in health status and administration at a time when the Governments were loath to invest in health reforms. The development of medical negligence law by courts is another significant contribution in improving the standards of care in medical services and hospital administration.

The role of legislation in public health development is emphasized, *inter alia*, in three specific Directives in Part IV of the Constitution. They are articles 39, 42 and 47 where the language of rights is employed to articulate the role of the State in public health while making laws.

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1. *Francis Coralie Mullin* v. *Administrator, Delhi*, (1981) 2 SCR 516.
2. *Consumer Education and Research Centre* v. *Union of India*, AIR 1995 SC 940.
3. *Katara* v. *Union of India*, AIR 1989 SC 2039.
4. *Paschim Bangal Khet Mazdoor Samiti* v. *State of West Bengal*, AIR 1996 SC 2426.

Article 39 : The State shall direct its policy towards securing—
(e) 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 vocations unsuited to their age or strength.

Article 42 : The State shall make provision for securing just and humane conditions of work and for maternity relief.

Article 47 : The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health.

Strong language is used by the Constitution-makers to emphasize that public health is among the primary duties of the State and Directive Principles are fundamental in governance, meaning thereby they are binding on all three wings of the Government. This message is further clear when one looks at the distribution of legislative powers in the Seventh Schedule where entries relating to public health fall in all the Three Lists – Union List [Treaties, Agreements and Conventions and their implementation (Entry 14); Quarantine and marine hospitals (Entry 28); Patents, inventions, trade marks (Entry 49); Labour safety in mines and oil fields (Entry 55); manufacture and distribution of salt and opium (Entries 58 and 59); professional and vocational training (Entry 65); inter-State migration and inter-State quarantine (Entry 81)] – Concurrent List [Lunacy and mental deficiency (Entry 16); Adulteration of food stuffs and other goods (Entry 18); Drugs and Poisons (Entry 19); Economic and social planning (Entry 20); Population control and family planning (Entry 20A); Social security (Entry 23); Welfare of Labour (Entry 24); Education including medical education (Entry 25); Medical profession and other professions (Entry 26); Prevention of infectious or contagious diseases (Entry 29); Price control (Entry 34); Factories and Boilers (Entries 36, 37)]. These are items in which the Union Parliament is entitled to legislate which have a direct bearing on health. Besides, residuary powers are always with the Union which enables Parliament to occupy health-related aspects not included in any of the three Lists.

Of course, the entries in the State List specifically empowers the State Legislatures to make laws on Public Health and Sanitation, Hospitals and Dispensaries (Entry 6); Manufacture and Sale of Intoxicating Liquors (Entry 8); Relief of the Disabled (Entry 9); Local Self-Government and Village Administration (Entry 5); Water Supplies

and Drainage (Entry 17); Industries (Entry 24) etc. Schedules Eleven and Twelve which relate to items on which Panchayats and Municipalities can exercise powers include entries like water management, food processing industries, drinking water, poverty alleviation programmes, education, Technical training, Health and Sanitation including hospitals, primary health centres and dispensaries, Family Welfare, women and children development social welfare including welfare of handicapped and mentally retarded, welfare of weaker sections etc.

Reading the constitutional provisions and scheme for promotion of public health, one gets the impression that the Constitution-makers have taken meticulous care in identifying what each level of government can and should do in relation to public health and its administration in the most efficient way. It is up to the elected representatives at each of the three levels of government to realize their responsibilities and act by making appropriate laws on different aspects of health in respect of the Entries in the three Lists as well as in the Eleventh and Twelfth Schedules.

Among the key challenges in the health sector is one that strikes at the root of our egalitarian social order. It is about the increasing inequality and inequity between men and women, between urban and rural people and between the rich and the poor in health conditions and in accessing health services. Whether it is in the matter of literacy, infant mortality, maternal mortality or life expectancy, the health divide is strikingly different between the poor, middle income and rich groups. "Inequalities in health describe the differences in health between groups independent of any assessment of their fairness. Inequities refer to a subset of inequalities that are deemed unfair. The unfairness qualification invokes assessments of whether the inequalities are avoidable as well as how it impacts on distributive justice as applied to health"[1]. Attaining optimal health ought not to be compromised by the social, political, ethnic, or occupational group into which one happens to fall. To the extent that disparities in health coincide with fault-lines between such groups, one may make the assessment that they are unfair and therefore constitute inequities.

Deep-seated imbalances generated by discrimination and power differences often underlie disparities in health. A fully articulated effort to redress inequities in health must inevitably work in tandem with wider efforts toward social justice – such as the provision of safety nets,

1. Timothy Evans (ed) Challenging Inequities in Health, OUP (2001).

protection against medical impoverishment, provision of education, jobs training and environmental risk reduction and a political voice for all[1]. Healthcare is just one determinant of health outcomes. Others include education, gender, employment or livelihoods, social status, poverty and marginalization and urban/rural divide.

As the study on Inequities in Health (Timothy Evans) suggests,—

"several global trends over recent decades have made the need to challenge health inequities as a matter of greater urgency. There has been a transition in the burden of disease and the poor carry a disproportionate burden. Globalization is rapidly emerging as an important stratifier of health outcomes. The challenge before us, therefore, is not merely the promotion of health, but a fair chance for all to achieve it".

A recent study on the health status of Indian people[2] after analyzing available data bring out the following trends:

"1. The so-called preventable diseases are still the major causes of death and disease in India.

2. The pattern of disease has not changed very much and infections and nutritional problems continue to head the list.

3. The preventable diseases have persisted in spite of an undeniable expansion in the health services structure".

The author further states that the health services system in place is characterized by inequality of resource distribution, inequality of access, inequality of participation and inequality of health status.

Parliament has to address these issues in the context of increasing privatization and globalization of the health sector. The obligations of private hospitals to poor patients need to be articulated through legislative provisions in the context of two Supreme Court judgments on the subject. The Court directed private hospitals to ensure free treatment up to 10 per cent of in-patients and 25 per cent out-patients on the ground that these hospitals received subsidized land on the promise of treating the economically weaker sections free of charges. A framework law on alcohol control similar to the one on tobacco control is necessary in the context of mounting health risks particularly among the poor, the children and women. It is indeed shameful to note that India still accounts for the largest number of maternal deaths in the world (over 70,000 deaths every year) or a quarter of all maternal deaths in the world. Despite the Janani Suraksha Yojana, a scheme to

1. Timothy Evans (ed) Challenging Inequities in Health, OUP (2001), p. 4.
2. Imrana Qadeer, Public Health in India (2011) Danish Books, p. 31.

boost institutional deliveries, just 47% of the deliveries are in hospitals or other health facilities. Every year, nearly eighteen lakh children under age of five die in India. Only 54% children are fully immunized. On the top of all these traditional problems, new non-communicable diseases like diabetes, hypertension, stroke, respiratory diseases etc. are taking a larger toll of human lives than all the communicable diseases combined. This is an additional disease burden where the health care costs are higher. The threat is loud and clear and is likely to affect not only the quality of life but also the productivity of what we claim to be our demographic dividend.

In short, legislation in key sectors affecting public health has assumed critical importance in socio-economic development. Economic liberalization and globalization have widened the health divide tending to aggravate health inequities. The challenges before Parliament on health front are many and complex closely related to security and development. It is too big a task to be left to States or to the market forces and is equally important as right to education.

Expert Committees on Health Care in India

The Health Survey and Development Committee was appointed by the Government of India in October, 1943 to make a broad survey of the public health conditions and health organizations in British India and provide recommendations for future development. It was headed by Sir Joseph Bhore and has nearly 25 experts and Government representatives involved in public health services. It provides a fairly comprehensive picture of the state of health on the eve of Independence. As such, excerpts from the report are reproduced here for a clear understanding of where we stood in respect of the state of public health and healthcare services.

The maintenance of public health requires the fulfilment of certain fundamental conditions, which include the provision of an environment conducive to healthful living, adequate nutrition, the 'availability of health protection, preventive and curative, to all members of the community irrespective of their ability to pay for it and the active cooperation of the people in the maintenance of their own health'. The factors responsible for the low level of health in India include the prevalence of malnutrition and under-nutrition among appreciable section of the people, the serious inadequacy of existing provision for affording health protection to the community and a group of social causes consisting of poverty and unemployment, illiteracy and ignorance of the hygienic mode of life and certain customs such as the purdah and early marriage. The cumulative effect of these factors is

seen in the incidence of a large amount of preventable morbidity and mortality in the community.

The conditions essential for healthful living are suitable housing, sanitary surroundings and a safe drinking water supply. The provision of effective means for the early detection and prevention of epidemic and communicable diseases must take a very high place in the organization of public health measures, while improvement in nutritional standards must form an objective as fundamental as any in our basic plan of health development. Regarding care of the individual, every child has the right to be ensured a fair chance of living a normal, healthy life and of contributing eventually, as an adult man or woman, its full share to the general advancement of the community. This will entail the proper care of expectant mothers and the provision of adequate ante-natal and post-natal attention.

The Committee[1] reported that there are serious impediments in the way of the early fruition of these hopes. The country's financial resources are limited. The trained personnel to provide a health service of the expansive character is unfortunately lacking at the moment, and this limitation is not one which can be removed today or tomorrow. Moreover social habits, customs, usages and existing standards of living may also call for modification. The ideal of community health cannot be attained until the individual has learnt to realize that his neighbours' health is a matter of as much concern to himself as his own, that it is his own efforts which must help decide the health pattern of the community circle in which he lives and that only a combined co-operative endeavor on part of all workers in the many fields of activity in that circle can yield results that are worth achieving.

Recommendations regarding provision of health services to the community which the Bhore Committee made included:

1. Public funds should, as far as they are available, be devoted to the development of the health service, which we have recommended, for the community in general and for certain particular sections of it *e.g.* women and children and should not be spent on the provision of special facilities for other sections of the population.
2. Money for such special facilities, if they are to be developed, should be provided by the communities or groups which will be benefited by these services and
3. The general health service should minister to the needs of the people without charge to the individual.

1. Bhore Committee, Government of India (1945).

A long-term programme was proposed in this Report. The objectives of a national health service are:

- The services should make adequate provision for the medical care of the individual in the curative and preventive fields and for the active promotion of positive health.
- The services should be placed as close to the people as possible in order to ensure their maximum use by the community which they are meant to serve.
- The health organization should provide for the widest possible basis of cooperation between the health personnel and the people.
- In order to promote the development of the health programme on sound lines the support of the medical and ancillary professions, such as those of dentists, pharmacists and nurses is essential; provision should, therefore, be made for enabling the representatives of these professions to influence the health policy of the country.
- In view of the complexity of modern medical practice, from the standpoint of diagnosis and treatment, consultant, laboratory and institutional facilities of a varied character, which together constitute 'group' practice should be made available.
- Special provision will be required for certain sections of the population *e.g.* mothers, children, the mentally deficient.
- No individual should fail to secure adequate medical care, curative and preventive, because of inability to pay for it, and
- The creation and maintenance of a healthy environment as is possible in the homes of the people as well as in all places where they congregate for work, amusement or recreation, are essential.

Recommendations of the long-term programme included:

1. It was recommended that preventive and curative health work must be dovetailed into each other at all administrative levels.
2. Three Million Plan: It was proposed that in a three million district, primary health units should be set up with 75 bedded hospitals for each 10,000 to 20,000 population and secondary units with 650 bedded hospital, again regionalized around district hospitals with 2,500 beds.
3. There should be an improvement in the health service both in quantitative and qualitative aspects and suitable training and administrative action should be provided to health workers so that they have a social outlook and a spirit of emulation.

Recommendations regarding legislation included the following:

1. Formation and execution of a National Health Policy and Co-ordination of Central and Provincial Health Activities: It was recommended that the Centre should promote the development and co-ordination of provincial health activities mainly by the provision of machinery for mutual consultation in the formulation of the national health policy, by a system of grants-in-aid from Central funds to the provinces and by the offer of technical advice to provincial health authorities. At the same time, it may become necessary for the Centre to intervene in the affairs of a province in the interests of the country as a whole and have therefore suggested that the Centre should be armed with the necessary legal powers.
2. Special legal provision for enabling Health Authorities to carry out their duties effectively: Legal powers are required to supplement the existing powers of health authorities in order to improve health administration in its different branches. The two issues specifically referred to are control of infectious diseases and control of the purity and quality of the community's food supply.
3. Consolidated Public Health Acts, Central and Provincial: The enactment of consolidated Public Health Acts by the Central and Provincial legislatures is considered necessary. Such Acts can serve at least three purposes, namely (1) to bring together existing legal provisions relating to health, which are scattered over various enactments, (2) to modify those sections of the law which require change in the interests of promoting efficient administration, and (3) to incorporate the new provisions which will be necessary for the development of the health programme we have recommended.

The articulation of the role of the State in organizing public health by the Bhore Committee (1946) was explicit and wanted the State to spend 15% of their revenues on health activities.

There were a number of other committees set up after the Constitution was adopted to examine different sectors of health services and administration. These committees helped to formulate investment under the Five-Year Plans and develop health infrastructure in urban and rural areas.

The Primary Health Care Declaration at *Alma Ata* in 1978 to which India was a signatory gave an impetus to health policy development towards achieving progressively the goals of the Declaration which conceived primary health care in following terms. Primary health care

should include "education concerning prevailing health problems and methods of identifying, preventing and controlling them; promotion of food supply and proper nutrition, and adequate supply of safe water and basic sanitation; maternal and child health care, including family planning; immunization against major infectious diseases; prevention and control of locally endemic diseases; appropriate treatment of common diseases and injuries; promotion of mental health and provision of essential drugs. It emphasized the need for strong first-level care with strong secondary and tertiary level care linked to it. It called for an integration of preventive, promotive, curative and rehabilitative health services that had to be made accessible and available to the people, and this was to be guided by the principles of universality, comprehensiveness and equity. In one sense, primary health care reasserted the role and responsibilities of the State, and recognized that health is influenced by a multitude of factors and not just the health services. It also recognized the need for a multi-sectoral approach to health and clearly stated that primary health care had to be linked to other sectors. At the same time, the Declaration emphasized on complete and organized community participation, and ultimate self-reliance with individuals, families and communities assuming more responsibility for their own health, facilitated by support from groups such as the local government, agencies, local leaders, voluntary groups, youth and women's groups, consumer groups, other non-governmental organizations, etc. The Declaration affirmed the need for a balanced distribution of available resources (WHO 1978)".

Following the *Alma Ata* Declaration, the Indian Council of Medical Research in 1980 attempted to articulate a national health policy through a committee constituted by it. The major recommendations of the report of the Committee are reproduced below:

1. The objective of the national health policy should be to provide health for all by 2000 A.D. This implies the provision of a good and adequate health care system for all citizens, and especially for women and children and poor and under-privileged groups. It also implies a drastic reduction in the total morbidity and mortality. In particular, it will mean a fall in infant mortality from 120 to 60 or less, and in the overall death rate from 15 to 9 (Para 2.18). These objectives and targets are realistic and feasible. But they cannot be achieved by a linear expansion of the existing system and even by tinkering with it through minor reforms. Nothing short of a radical change is

called for; and for this it is necessary to develop a comprehensive national policy on health (Para 1.20).

2. If this goal is to be realized, a major programme for the development of health care services is necessary but not sufficient. Health is a function, not only of medical care, but of the overall integrated development of society – cultural, economic, educational, social and political. Health also depends on a number of supportive services – nutrition, improvement in environment and health education. During the next two decades, therefore, the three programmes of (1) integrated overall development including family planning, (2) improvement in nutrition, environment and health education, and (3) the provision of adequate health care services for all and especially for the poor and underprivileged (through the creation of an alternative model proposed here) will have to be pursued side by side (Para 14.04).
3. There should be a National Population Commission set up by an Act of Parliament to formulate and implement an overall population policy. The objective should be to reduce the net reproduction rate from 1.67 to 1.00 and the birth rate from 33 to 21. This will imply effective protection of 60 per cent of eligible couples against 22 per cent at present. It will also imply a reduction in the average size of the family from 4.3 to 2.3 children, and the eventual stabilization of the total population at about 1200 million by 2050 A.D. The family planning programme must be fully rehabilitated at an early date and converted into a people's movement closely linked to development. The emphasis should be on education and motivation, especially through inter-personal communication and group action. Incentives, especially those of a compensatory character, should be widely used. While work with women will continue through MCH services, intensive efforts should be made to work with men also. While the health services have a role to play in motivation also, their main responsibility is to supply the needed services and follow-up care. The alternative model of health services has been designed to meet these challenges fully and squarely.
4. Nutrition will have to be improved through adequate production of food, reduction in post-harvest losses, proper organization of storage and distribution and increasing purchasing power of the poor through generation of employment and organization of food-for-work programmes

(Para 3.10). Great emphasis should be placed on improving the status of women and children (Paras 3.11-3.19) and special programmes should be developed for specific nutritional disorders like iron-deficiency anemia, or Vitamin-A and iodine deficiencies (Para 3.20). In addition, supplementary feeding programmes should be organized for carefully identified target groups at risk (Para 3.21).

5. Improvement of the environment will reduce infection, make programmes of nutrition more effective, and help materially in reducing morbidity and mortality. Safe drinking water supply will have to be provided to all urban and rural areas (Paras 4.02-4.04). Good sewage dispersal system should be established in all urban areas where simultaneously, a massive programme of proper collection and disposal of solid wastes and their conversion into compost will have to be developed (Paras 4.05-4.11). Similarly, an intensive programme of improving sanitation, with special emphasis on proper disposal of night soil, should be developed in rural areas (Paras 4.12-4.13). Greater attention will have to be paid to town and village planning (with special emphasis on removing the segregation of the Scheduled Castes), and large-scale programmes of housing for the rural poor and clearance of urban slums will have to be undertaken (Paras 4.14-4.16). Urgent steps have to be taken to prevent water and air pollution, to control the ill-effects of industrialization and to provide better work-place environment (Paras 4.17-4.22).
6. Health education should become an integral part of all general education and should receive adequate emphasis (Paras 5.03-5.09). Health education should also be an essential component of all health care; and the health care services should assume special responsibility for the health education of the poor and underprivileged groups who need it most (Paras 5.11-5.16).
7. Within the health sector, our most important recommendation is that the existing exotic, top-down, elite-oriented, urban-biased, centralized and bureaucratic system which over-emphasizes the curative aspects, large urban hospitals, doctors and drugs should be replaced by the alternative model of health care services described in detail in Chapter VII in a planned and phased manner by 2000 A.D. This alternative model is strongly rooted in the community, provides adequate, efficient and equitable referral services, integrates promotive,

preventive and curative aspects, and combines the valuable elements in our culture and tradition with the best elements of the Western system. It is also more economic and cost-effective (Chapter 6).

8. Maternal and Child Health (MCH) services should be expanded and improved. There should be attempt to cover all women and children with basic services with special attention to those 'at risk' through an essentially domiciliary programme (Para 8.09 and 8.11). The dais should be trained and fully utilized (Para 8.10). The MCH staff at each level should be adequate, have specific responsibilities (with an indication of priorities) and should receive job-specific training (Para 8.15). Health education of the mothers should be an important component of MCH services (Para 8.16).
9. Communicable diseases still form the largest cause of morbidity and mortality and the fight against them should be continued with still greater vigour in the years ahead (Para 9.25). A good surveillance system has to be set up and better coordinated efforts are needed (Para 9.26-9.27). By 2000 A.D., our object should be to eradicate or at least effectively control diarrhoeal diseases, tetanus, diphtheria, hydrophobia, poliomyelitis, tuberculosis, guinea-worm, malaria, filariasis and leprosy (Para 9.28).
10. Under the new alternative model, the Organization of the health services will be radically different from that in the existing system. A new category of personnel, the Community Health Volunteers will be introduced and it will be the main bridge between the community and the services (Para 10.06). The middle level personnel will increase very substantially (Para 10.08). Very important decisions will have to be taken about nurses, paramedicals, doctors, specialists and super specialists and these relate to their numbers, quality and duration of training, and value system (Para 10.08-10.14). There should be adequate arrangements for the continuous in-services education of all categories of health personnel (Para 10.15).

    The Government of India should establish, under an Act of Parliament, a Medical and Health Education Commission, with comprehensive terms of reference. A continuing study of manpower and training and taking effective action thereon should be a major responsibility of this Commission (Para 10.16).

11. There is need for a clear-cut drug policy and a National Drug Agency to implement it (Para 11.23). The pattern of drug production should be oriented to the disease pattern, with an emphasis on the production of basic and essential drugs (especially those needed by the poor and underprivileged groups) which should be produced in adequate quantities and sold at cheapest possible prices (Paras 11.05-11.13). The domination of the foreign section in drug production should be reduced further and price control made more effective by reducing overheads and packaging costs and adoption of generic names (Paras 11.14-11.19). There should be strict quality control, supply of adequate drugs to the rural sector, and a move in the direction to make the clients pay for the cost of drugs (Paras 11.20-11.22).
12. The priority areas obviously are primary health care, epidemiology, communicable diseases with a special emphasis on diarrhoea, environmental research, and research on drugs, problems of rural water supply and sanitation, indigenous medicine, health implications of industrial development, and family planning. It is also necessary to promote research on social aspects of medicine and especially on economics of health, jointly under the ICMR and ICSSR (Para 12.09). Considerable attention has to be given to the development of appropriate technology (Para 12.10). Side by side, there should be an emphasis on the development of clinical and basic research, particularly in the field of biology, and a determined bid to build up high-level indigenous research capability with a view to attaining self-reliance (Paras 12.11-12.12).
13. It is necessary to redefine the roles of the Central and State Governments in view of the large powers delegated to the local bodies at the district level and below (Paras 13.02-13.05). Voluntary agencies will have to function within the overall policy laid down by the State. But they should receive encouragement and aid, especially when fighting at the frontiers and doing pioneer work (Para 13.6). There will be considerable tensions within the new health care services and need for redefinition of roles and mutual adjustment. This is the responsibility of the administration to secure through good leadership and proper training (Paras 13.07-13.08). A new and efficient national information system should be created and adequate arrangements made for more effective coordination at all levels (Paras 13.10-13.11).

14. The total investment in health services should be substantially raised and health expenditure should rise by 8 to 9 per cent per year at constant prices and reach about 6 per cent of GNP by 2000 A.D. The existing priorities should be radically altered and the bulk of the additional resources will have to go into promotive and preventive activities, in rural areas, in the development of supportive services like nutrition, sanitation, water supply and education, and for providing health care services to women and children and the poor and underprivileged groups. This will need taking of both positive and negative decisions. While the majority of expenditure on health in the proposed organization will be the responsibility of local bodies who will exercise financial control, basic responsibility of financing health will continue to rest with the Centre and States. An effort should also be made to tap local taxes and individual payments to cover drug costs (Paras 13.12-13.17).
15. The alternative model proposed here is a large step in the creation of a national health service, but it does not create it. In our opinion, the time is not ripe for the purpose and the issue may be examined in due course, say, ten years from now. There is, however, need to control private practice and it should not be allowed to employees in the public health care system (Paras 13.18-13.19).
16. The programme suggested here the Committee argued to realize the objective of health for all is as exciting and worthwhile as it is realistic and feasible (Paras 14.01-14.03). Its success will depend upon our capacity to create a mass movement and the ranks of millions of young men and women to work for it. It will be proportional to the extent to which it is possible (i) to reduce poverty and inequality and to spread education; (ii) to organize the poor and underprivileged groups so that they are able to assert themselves; and (iii) to move away from the counter-productive, consumerist Western model of health care and to replace it by the alternative model based in the community as is proposed in this Report.

High Level Expert Group on Universal Health Care (2011)

The latest study on health issues and policy came from a High Level Expert Group (HLEG) constituted by the Planning Commission under the chairmanship of Dr. K. Srinath Reddy (2011) who was asked, *inter alia*, to "rework the physical and financial norms needed to ensure quality, universal reach and access of health care services and to develop systems which will ensure access to essential drugs, vaccines and medical technology by enhancing their availability and reducing cost to the Indian consumer". The HLEG undertook a situational analysis of each of the key elements of the existing health system and has developed recommendations for reconfiguring and strengthening the health system to align it with the objectives of Universal Health Care. The HELG reportedly studied the experience of low and middle income countries while developing its recommendations for India. As such, it should be possible for Parliament to legislate on its recommendations in the course of the next few years as India's economy now permits a much higher spending on comprehensive health care of the people.

As the HLEG Report is the most authoritative statement on what needs to be done by Government and Parliament in respect of securing the right to health of citizens and highlights the gaps in health legislation, this study on Parliamentary performance has quoted extensively from the Report in the following pages.

According to the Committee, Universal Health Coverage (UHC) means:

> "**Ensuring equitable access for all Indian citizens,** resident in any part of the country, regardless of income level, social status, gender, caste or religion, **to affordable, accountable, appropriate health services of assured quality** (promotive, preventive, curative and rehabilitative) **as well as public health services addressing the wider determinants of health** delivered to individuals and populations, with **the government being the guarantor and enabler,** although not necessarily the only provider, of health and related services".

The foundation for UHC is a universal entitlement to comprehensive health security and an all-encompassing obligation on the part of the State to provide adequate food and nutrition, appropriate medical care, access to safe drinking water, proper sanitation, education, health-related information, and other contributors to good health. It is our belief that the State should be primarily and principally responsible for ensuring and guaranteeing UHC for its citizens. The State should not only provide health and related services, but should also address the wider determinants of health to effectively guarantee health security.

Ten principles have guided the formulation of our recommendations for introducing a system of UHC in India: (i) universality; (ii) equity; (iii) non-exclusion and non-discrimination; (iv) comprehensive care that is rational and of good quality; (v) financial protection; (vi) protection of

patients' rights that guarantee appropriateness of care, patient choice, portability and continuity of care; (vii) consolidated and strengthened public health provisioning; (viii) accountability and transparency; (ix) community participation; and (x) putting health in people's hands.

Intrinsic to the notion of universality, non-discrimination, non-exclusion and equity is a fundamental commitment to health as a human right. Universality implies that no one (especially marginalized, remote and migrant communities as well as communities that have been historically discriminated against) is excluded from a system of UHC. At the same time, while society should pay special attention to the concerns of disadvantaged populations and the poor, a universal system should provide health coverage and care for everyone. This will ensure the creation of a robust and sustainable system of UHC in whose success every section of society has vital interest. It will also protect both the poor and non-poor from the risk of impoverishment due to unaffordable healthcare expenditures. A system of UHC can succeed only if it is established on the strong foundations of common interest, social solidarity and cross-subsidization.

Instituting a system of UHC for India requires a flexible architecture to deal with inequalities in health outcomes, regional and socio-cultural diversity, and the differential healthcare needs of populations in different locations. It should also take into account the challenges of rapid urbanization, simultaneous demographic, epidemiological and nutritional transitions underway, as well as social and political changes occurring in the country.

Embedded in our understanding of UHC is recognition of two critical factors. First of all, it will be difficult, if not impossible, to achieve and sustain UHC without addressing the **social determinants of health.** Urgent and concrete actions addressing the social determinants of health are needed to move towards greater health equity, bridge gaps and reduce differentials in health by class, caste, gender and region across the country. In other words, UHC can be achieved only when sufficient and simultaneous attention is paid to at least the following health-related areas: nutrition and food security, water and sanitation, social inclusion to address concerns of gender, caste, religious and tribal minorities, decent housing, a clean environment, employment and work security, occupational safety and disaster management. Secondly, the very framework and principles of UHC for India will be severely undermined if gender insensitivity and gender discrimination remain unaddressed. An inclusive approach to health should attend to the needs and differentials between men, women and other genders, along with the interaction between social and biological markers of health. In

making UHC truly gender-sensitive, we specifically recommend critical actions to improve access for women and girls to health services (going beyond maternal and child health), to recognize and strengthen women's central role in healthcare provision in both the formal health system and in the home, to build up the capacity of the health system to recognize, measure, monitor and address gender concerns, and to support and empower girls and women.

Healthcare services to all citizens covered under UHC will be made available through the public sector and contracted-in private facilities (including NGOs and non-profits). The High Level Expert Group examined the range of services that could be offered by the institutions participating in the UHC program. Two different options emerged:

1. In the first option, private providers opting for inclusion in the UHC system would have to ensure that at least 75 per cent of out-patient care and 50 per cent of in-patient services are offered to citizens under the NHP. For these services, they would be reimbursed at standard rates as per levels of services offered, and their activities would be appropriately regulated and monitored to ensure that services guaranteed under the NHP are delivered cashless with equity and quality. For the remainder of the out-patient (up to 25%) and in-patient (up to 50%) coverage, service providers would be permitted to offer additional non-NHP services over and beyond the NHP package, for which they could accept additional payments from individuals or through privately purchased insurance policies.

UNIVERSAL HEALTH COVERAGE BY 2022: THE VISION

ENTITLEMENT	NATIONAL HEALTH PACKAGE	CHOICE OF FACILITIES
Universal health entitlement to every citizen.	Guaranteed access to an essential health package (including cashless in-patient and out-patient care provided free-of-cost) • Primary care • Secondary care • Tertiary care	People are free to choose between • Public sector facilities, and • Contracted-in private providers.

2. The second alternative entails that institutions participating in UHC would commit to provide only the cashless services related to the NHP and not provide any other services which would require private insurance coverage or out of pocket payment.

Central and State Governments may examine these options and choose, based on their assessment of how best the access and equity objectives of UHC can be served. If the former option is chosen, a strong regulatory and monitoring mechanism must be established to ensure appropriate care for UHC beneficiaries even in institutions that provide mixed services. State governments are free to supplement the UHC National Health Package (NHP) through additional funding from their own budgets for services beyond the NHP.

Even with the two options, there will be some or several private hospitals which may not get themselves accredited under the UHC system given the conditionalities. Citizens are free to supplement free-of-cost services (both in-patient and out-patient care) offered under the UHC system by paying out-of-pocket or directly purchasing additional private voluntary medical insurance from regulated insurance companies.

We recognize the need to distinguish between health-related clinical services and hospitality services especially in tertiary care institutions. Service providers registered with the UHC system will be allowed to charge additional amounts from those who seek additional hospitality services not covered under the NHP.

We envisage that over time, every citizen will be issued an IT-enabled National Health Entitlement Card (NHEC) that will ensure cashless transactions, allow for mobility across the country and contain personal health information. Such a card will also help the State to track patterns of disease burdens across the country and plan better for the public provision of healthcare.

It is possible for India, even within the financial resources available to it, to devise an effective architecture of health financing and financial protection that can offer UHC to every citizen. We have developed specific recommendations in six critical areas that are essential to augment the capacity of India's health system to fulfil the vision of UHC. These areas listed below are the focus of the recommendations in this Report:

3.1 Health Financing and Financial Protection

3.2 Health Service Norms

3.3 Human Resources for Health

3.4 Community Participation and Citizen Engagement

3.5 Access to Medicines, Vaccines and Technology

3.6 Management and Institutional Reforms

Financing the proposed UHC system will require public expenditures on health to be stepped-up from around 1.2% of GDP

today to at least 2.5% by 2017 and to 3% of GDP by 2022. The proposed increase is consistent with the estimates by government as well as our preliminary assessment of financial resources required to finance the NHP. Even if we assume that the combined public and private spending on health remains at the current level of around 4.5% of GDP, this will result in a five-fold increase in real per capita health expenditures by the government (from around Rs. 650-700 in 2011-12 to Rs. 3,400-3,500 by 2021-22). There will also be a corresponding decline in real private out-of-pocket expenditures from around Rs.1,800-1,850 in 2011-12 to Rs. 1,700-1,750 by 2021-22.

Low public spending on drugs and non-availability of free medicines in government healthcare facilities are major factors discouraging people from accessing public sector health facilities. Addressing this deficiency by ensuring adequate supplies of free essential drugs is vital to the success of the proposed UHC system. We estimate that an increase in the public procurement of medicines from around 0.1% to 0.5% of GDP would ensure universal access to essential drugs, greatly reduce the burden on private out-of-pocket expenditures and increase the financial protection for households. Increased spending on drugs needs to be combined with a pooled public procurement system to ensure adequate supplies and rational prescription of quality generic drugs by the public health system. Distribution and availability of quality medicines across the country could be ensured by contracting-in of private chemists.

We recommend general taxation as the most viable option for mobilizing resources to achieve the target of increasing public spending on health and creating mechanisms for financial protection. There are few other options given the difficulties of collecting regular premiums from India's large informal sector workforce.

User fees of all forms be dropped as a source of government revenue for health. User fees have not proven to be an effective source of resource mobilization. Global experience suggests that imposition of user fees in many low and middle income countries has increased inequalities in access to healthcare. Even modest levels of fees have led to sharply negative impacts on the usage of health services.

Ensuring basic healthcare services to the population, like poverty alleviation or universal elementary education, has nation-wide externalities and is also consistent with principles of equity. The fundamental rationales for the central transfers are to (i) ensure that all states devote sufficient resources to ensure the NHP for their entire population; and (ii) reduce inequalities in access and financial

protection arising from the fact that poorer states have lower levels of government health spending than do richer states. Therefore, a substantial proportion of financing of these services can and should come from the Central Government even though such health services have to be provided at sub-national (state) levels. The extent of Central and State contributions should depend on the perceived degree of nation-wide externality versus state-wide externality as well as the efforts to promote equity and fairness. An appropriate transfer scheme from the Central Government to states must be designed to reduce the disparity in the levels of public spending on health across states and to ensure that a basic package of healthcare services is available to every citizen in every state across the country. It is however important, while designing such a transfer scheme, to ensure that states do not substantively substitute Central transfers for their own contribution to health. States should not only continue to contribute as much as they do now on healthcare, but also proportionately increase their budget allocations for health over the years. In other words, the transfers received from the Central Government along with the matching contribution by the states should constitute additional public spending on health – and should not be used to substitute spending from own resources by the states. This is all the more important because, as noted earlier, the existing pattern of resource allocation by India's State and Central Governments, collectively result in one of the lowest priorities given to health of any country in the world.

The Central and State Governments (Departments of Health or specific-purpose *quasi*-governmental autonomous agencies with requisite professional competencies created by them) should become the sole purchasers of healthcare for UHC delivered in their respective jurisdictions. Provisioning of health services at primary, secondary and tertiary levels should be integrated to ensure equitable and efficient procurement and allocations. We believe that it is possible to substantially reform the manner in which Ministries and Departments operate so that they can become effective purchasers of healthcare services. District-specific assessment of healthcare needs and provider availability, communicated by the Director of District Health Services, should provide the basis for state-level purchase of services. The example of the Tamil Nadu Medical Services Corporation, which has functioned as an efficient agency of the State in Tamil Nadu, could serve as a possible model.

We recognize the limited capacity within government and envisage that, to begin with, purchases may need to be centralized at the state-level. However, over time, it is possible to foresee a system where the

district health system managers may eventually be able to purchase and enhance quality of care by using a variety of methods and also keep costs as well under control. State Governments should consider experimenting with arrangements where the state and district purchase care from an integrated network of combined primary, secondary and tertiary care providers. These provider networks should be regulated by the government so that they meet the rules and requirements for delivering cost effective, accountable and quality healthcare. Such an integrated provider entity should receive funds to achieve negotiated pre-determined health outcomes for the population being covered. This entity would bear financial risks and rewards and be required to deliver on healthcare and wellness objectives. Ideally, the strengthened District Hospital should be the leader of this provider network.

Smoothly transforming over time, the Rashtriya Swasthya Bima Yojana (RSBY) into a universal system of health entitlements and building on its existing capacity and architecture to issue citizens with a National Health Entitlement Card with a minimum amount of disruption, would in our view be the best way forward to satisfy the social objectives of both National Rural Health Mission (NRHM) and RSBY. A high level of capacity has been developed within the Ministry of Labour for the management of the RSBY. This capacity should be utilized for the roll out of the UHC system even if the functions performed by the insurance companies will now be performed by the Ministries and Departments of Health.

In addition, the proposed UHC system is a modified version of the traditional health insurance model with a few critical differences in terms of provider network and design which, in our view, are essential for realizing better healthcare access and cost outcomes. It has all the characteristics of traditional health insurance in terms of risk pooling and financial protection. The proposed UHC system focuses on reduction of the disease burden facing communities along with early disease detection and prevention. The emphasis is on investing in primary care networks and holding providers responsible for wellness outcomes at the population-level. It places emphasis on an extensive and high quality primary care network, which in turn is likely to reduce the need for secondary and tertiary facilities.

The Committee further made the following norms for the physical provision of services at different levels:

(i) Develop a National Health Package that offers, as part of the entitlement of every citizen, essential health services at different levels of the healthcare delivery system.

(ii) A strong primary healthcare approach, backed by the reallocation of sufficient resources, should guide healthcare service delivery.

(iii) The District Hospital has a critical role to play in healthcare delivery which should be well attuned to the needs of the particular district. An adequately equipped and suitably staffed district hospital, backed by contracting-in of regulated private hospitals, should aim to meet the healthcare needs of at least 95% of the population within the district, so that only a small number would need referral to higher level tertiary care centres. This will require the upgrading of district hospitals as a high priority over the next five years.

(iv) Adherence to Indian Public Health Standards by all public and contracted-in private health facilities responsible for delivering the NHP as the starting point of the commitment to quality assurance in healthcare service delivery. Such a move should include licensing, accreditation and public disclosure of the accreditation status of all public and private health facilities.

On human resources for improved healthcare delivery system, the committee recommended appropriately trained and adequately supported practitioners and providers with relevant expertise to be located close to people, particularly in marginalized communities. A professional public health managerial cadre should replace the system of the healthcare personnel doing the managerial functions as well.

Two Community Health Workers per 1000 population should provide preventive and basic curative care, serve on health and sanitation committees and enable people to claim their health entitlements. Nearly 1.9 million CHWs will be needed who should be paid a fixed compensation supplemented by performance-based incentives. Further, a 3-year Bachelor of Rural Health Care (BHRC) degree programme should produce a cadre of rural healthcare practitioners. Doctor-population ratio need to be increased from the present 0.5 per 1000 population to one per 1000 people by the year 2027.

The Group recommended the setting-up of the National Council for Human Resources in Health (NCHRH) to prescribe, monitor and promote standards of health professional education.

On community participation in healthcare, the Group has made several recommendations. Communities are not just recipients of care. They have the capacities to create and promote health, by means of social and familial support networks, and the application of local health

knowledge. Increased community participation in healthcare – its delivery, governance and accountability – represents the deepening of democracy. It can empower people, particularly women, the poor and other marginalized segments of society, and ensure that the delivery of healthcare services remains appropriate and accountable to them.

Our recommendations seek to strengthen institutional mechanisms for community participation and citizen engagement in order to make health planning, review and implementation more responsive to the voices and needs of communities. They are also intended to promote the involvement of communities and other stakeholders (including health providers and people's representatives) in decision-making on health, and to improve the processes of policy formulation and public decision-making. We believe that planning, review and oversight mechanisms should be decentralized and made participatory in order to ensure effective implementation as well as a high level of transparency and local accountability. Recommendations in this regard include:

(i) Transform existing Village Health Committees (or Health & Sanitation Committees) into participatory Health Councils.

(ii) The Health Councils should organize Annual Health Assemblies at different levels (district, state and nation) to enable community review of health plans and their performance as well as record ground level experiences that call for corrective responses at the systemic level. By organizing such Health Assemblies, the Health Councils will serve as a bridge between the executive agencies responsible for design and delivery of health services and the wider community, which is the intended beneficiary of such services. Recording the needs and priorities identified by the communities as well as taking note of grievances relating to sub-optimal or inequitable performance of health system services would enable the Councils to provide constructive feedback to policy-makers and health system managers. This will also provide an opportunity to health system managers to explain to the community and find solutions to the constraints that prevented a prompt response to the expressed needs or complaints. Data from the annual report, finance report, action plan and community monitoring should be presented to the Assemblies for review and feedback.

(iii) Involvement of local elected representatives and Panchayats in health governance can significantly increase the motivation, performance and accountability of community health workers.

It can also contribute to much-needed convergence of social services at the community level. For this to happen, local health functions and finances should be devolved to PRIs and local bodies with clear directives and guidelines. The participation of PRIs and other elected representatives in health governance and community oversight through the (Village and Block) Health and Sanitation Committees has been generally inadequate due to operational deficits including low capacities and role ambiguity. These gaps should be addressed through better training, role definition, financial devolution, capacity strengthening, and the establishment of mechanisms through Health Assemblies for greater community oversight. NGOs should additionally be engaged to train PRI representatives in health administration.

(iv) Introduction of a systematic and responsive grievance redressal and information mechanism for citizens to access knowledge of and claim their health entitlements. Such a mechanism is urgently required at the block headquarters to deal with confidential complaints and grievances about public and private health services in a particular block. Procedures for corrective measures should be clearly enunciated at each level, with defined parameters for grievance investigation, feedback loop, corrective process, no-fault compensation and grievance escalation. Responsibilities of health department officials should be defined in relation to Grievance Redressal Officers and *vice versa*, supported by sufficient and clear directives and guidelines or orders, as applicable. This should be linked, at the district level, with an Ombudsperson who functions under the aegis of a National Health Regulatory and Development Authority. Serious grievances and unresolved cases should be referred to the Ombudsperson. We recommend the setting-up of Jan Sahayata Kendras (People's Facilitation Centres) that should be co-located with the office for grievance redressal in order to locally provide people with information services.

On access to medicines, vaccines and technology, the Expert Group stated as follows:

Ensuring effective and affordable access to medicines, vaccines and appropriate technologies is critical for promoting health security. In making our recommendations, we note that:

- Almost 74% of private out-of-pocket expenditures today are on drugs;

- Millions of Indian households have no access to medicines because they cannot afford them and do not receive them free-of-cost at government health facilities;
- Drug prices have risen sharply in recent decades;
- India's dynamic domestic generic industry is at risk of takeover by multinational companies; and
- The market is flooded by irrational, non-essential, and even hazardous drugs that waste resources and compromise health.

The Group made the following recommendations in this regard:

(i) Enforce price controls and price regulation especially on essential drugs.

(ii) Revise and expand the Essential Drugs List.

(iii) Strengthen the public sector capacity of domestic drug and vaccines industry to meet national needs.

(iv) Adopt centralized national and state procurement systems in order to realize economies of scale bringing down the prices. For this Drug Supply Logistics Corporation be set up.

(v) Safeguards in Patent Act and TRIPS Agreement be fully exploited to strengthen the country's ability to produce essential drugs. Compulsory licences should be issued as and when necessary to make available at affordable prices all essential drugs relevant to India's disease profile. Data exclusivity clause must be removed from any Free Trade Agreement that India enters into since that extends patent life through evergreening and adversely affects drug access and affordability.

Finally, on management and institutional reforms, the Group had the following recommendations:

(i) Introduce All India and State-level Public Health Service Cadres and a specialized State-level Health Systems Management Cadre in order to give greater attention to public health and also strengthen the management of the UHC system.

(ii) Establish National Health Regulatory and Development Authority to regulate and monitor public and private healthcare providers with powers of enforcement and redressal. This regulator will oversee contracts, accredit healthcare providers, develop ethical standards for care delivery, enforce patient's charter of rights and take measures to provide UHC system support by formulation of legal and

regulatory norms and standard treatment guidelines and management protocols for the National Health Package so as to control entry, quality, quantity and price. The National Authority will be linked to similar State-level institutions and to the Ombudsman at the district level especially to handle grievance redressal.

(iii) To regulate pharmaceuticals and medical devices and provide patients access to safe and cost-effective products, a National Drug Regulatory and Development Authority be established.

(iv) A National Health Promotion and Protection Trust also be set-up with chapters in the States to promote public awareness about key health issues, track progress and impact on the social determinants of health and to provide technical expert advice to the Ministry of Health.

Conclusions

This Chapter undertook our extensive survey of expert committee reports, judicial pronouncements and independent commentaries on the concepts, policies and practices in relation to Health and Education mainly to appraise the reader of the nature and scope of the two basic rights and the tasks before Parliament to articulate the rights and duties and provide the delivery mechanisms for implementing those rights. The socio-economic transformation envisaged by the Constitution is heavily dependent on the extent to which Parliament could provide equal access to all citizens to enjoy health and primary education. To the extent Parliament could not legislate on these items in the initial decades of the Republic not only reflects on the misplaced priorities of the governments of the day but also explains why India continues to face huge problems of equity and inclusiveness despite the impressive advances made on economic growth.

Chapter Three

Education and Health in the Initial Two Decades of the Republic: Little Done Vast Undone

In the previous chapter, we have examined in some detail the legislative agenda in respect of socio-economic transformation which the Constitution-makers have laid out particularly in respect of health and education. Securing civil and political rights through judicially enforceable mechanisms and leaving socio-economic rights for progressive development through legislative and executive action was perhaps the only strategy the country could afford in the circumstances prevailing at the time of partition and ending of long colonial rule. Nonetheless everybody realized that political democracy can hardly survive without the basic necessities of life of majority of citizens not being fulfilled in reasonable time. Hence there was an urgency for livelihood concerns and social justice for weaker sections of society. India's Constitution reflects the concerns of socio-economic transformation in full measure and provides strategies for achieving the objective through democratic procedures under rule of law. Parliament being the supreme body for converting the strategies into rights and duties through legislative action have not been able to do what was expected in the first two decades. The reasons are many and varied. In this chapter, we propose to take a critical look on what was done in this regard in Parliament between 1950 and 1970 to present a report card on its performance in respect of health and education rights.

Under article 372(1) of the Constitution, "all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or

amended by a competent legislature or other competent authority". Naturally many laws relating to health and education enacted during the British colonial rule continued to be the only socio-economic rights available to citizens in post-colonial India. Because health and education were not included as part of guaranteed fundamental rights, citizens were to look forward to legislative action around Directive Principles of State Policy where these rights were stipulated for adoption progressively. In other words, sans Parliamentary enactment, citizens could not claim as rights the basic necessities of education and health from the State. And without them, freedom and democracy make little meaning to the lives of the vast majority of impoverished people who struggled for 'Swaraj' unitedly with the rest of their countrymen. It is in this context, the assessment of Parliamentary performance assumes significance though there can be many justifications why Parliament could not do more than it did in the initial two decades.

Undoubtedly the people expected a great deal in terms of social justice from Congressmen who fought for freedom and who dominated the Parliament in the initial two decades with very little opposition from other political parties. The Objectives Resolution drafted by Nehru himself and adopted by the Constituent Assembly in 1946 loudly proclaimed "Justice, social, economic and political; equality of status, of opportunity, and before the law; and safeguards for minorities, depressed and backward classes and tribal areas" as part of the primary tasks for Parliament to address. Together with it Parliament and the Government were to strive for protecting national unity and integrity as well as the cultivation of democratic institutions and processes. Despite some hiccups and set backs, Parliament could succeed in strengthening democracy and national unity. However, the social revolution promised under Parts III and IV of the Constitution did not receive the attention it deserved from the Parliament and the Government. Without a just social and economic order it is difficult to argue that democracy flourished in India though the leadership was committed to democratic principles and processes. Was the attention of Parliament diverted by the approach of the Supreme Court in the manner of bringing about the Social Revolution and the interpretation of constitutional provisions in that regard? The recurrent battle between the Supreme Court and Parliament during the first two decades particularly in respect of the scope of the equality guarantee and property rights *vis-à-vis* the social revolution did gag the legislature from pursuing the social justice agenda of Part IV vigorously. The issue arose obliquely around the scope of Parliament's power of amendment

of the constitutional provisions. Two major constitutional institutions – Parliament and Judiciary – took divergent positions on amendatory provisions with the result the social revolution through law took a back seat.

Social Justice and Property Right Litigation

Land, the basic means of production in an agricultural economy was largely in the hands of few zamindars at the time of Independence and it was necessary to reform the system of land holding to bring about equality and equal opportunity, a major goal of social and economic justice. Naturally it was one of the first steps taken by Parliament, of course, through the processes of law. The Bihar Land Reforms Act of 1950 which provided for differential rates of compensation to land owners on acquisition of their property came to be challenged in Courts under the equality right. In *Kameshwar Singh's* case[1] the Court accepted the plea and struck down the Bihar Act as unconstitutional. Parliament rose in utter disbelief and lost no time to amend the property right guarantee by introducing article 31A and 31B and the Ninth Schedule protection[2] to safeguard land reform legislations from judicial scrutiny. In order to counter the judicial approach against the quantum of compensation payable on acquisition of property being determined on the basis of market value[3], Parliament had to amend the Constitution again[4] making the issue non-justiceable. This was followed by the Constitution (Seventeenth) Amendment Act, 1964 to include *ryotwari* holding also within the definition of the term 'estate' in article 31A. Parliament's role in balancing individual rights against larger social good was being questioned in court and the court tilted in favour of individual rights making it difficult for Parliament to pursue the goal of economic justice through the instrumentality of law making. In *Cooper's* case[5] the battle was taken to breaking point when the Supreme Court took the view that excluding justiceability of compensation was equivalent to fraudulent expropriation. Parliament by yet another amendment[6] substituted the word "compensation" itself with the word "amount". Again in *Kesavananda Bharati* case[7] the Court insisted that the amount cannot be

1. *Kameshwar Singh* v. *State of Bihar*, AIR 1951 Pat 91.
2. Constitution (First Amendment) Act, 1951.
3. *State of West Bengal* v. *Bella Bannerjee*, AIR 1954 SC 170.
4. Constitution (Fourth) Amendment Act, 1955.
5. *Rustom Cavasjee Cooper* v. *Union of India*, AIR 1970 SC 564.
6. Constitution (Twenty-fifth) Amendment Act, 1971.
7. *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

arbitrary. This resulted in the introduction of article 31C whereby legislations implementing the objectives of article 39(b) and (c) were made immune against challenges under articles 14, 19 and 31. Ultimately, Parliament resorted to the extreme step of deleting the right to property as a fundamental right by repealing articles 19(1)(f) and 31 from Part III through the Constitution (Forty-fourth) Amendment Act, 1978.

In the 25 years during which Parliament battled with the Supreme Court on the question of bringing about economic justice consistent with individual rights one can see the balancing of democracy and the working of rule of law in achieving social justice. Ultimately Parliament's approach seem to have succeeded in policy development with the Supreme Court softening the process of assuring equal protection and equality before law. It may have delayed economic justice; but it provided guidelines on how social revolution can be brought about in a rule of law society respecting individual rights with reasonable restrictions. Of course, it is not to be advanced as a justification for non-implementation of Directive Principles of State Policy. It possibly explains the delay in legislative action in the realization of the constitutional dream of economic justice.

Equality Debate and Socio-Economic Transformation

As the architect of the Objectives Resolution adopted by the Constituent Assembly and incorporated in the Directive Principles, Pandit Nehru could not have been indifferent to the promise of social revolution. However, he seems to have adopted the path of selected welfare schemes organized through Planning Commission and the Central Government instead of the legislative route to realize the policy of a just social order. The Parliamentary route through legislation would have created judicially enforceable rights and entitlements putting the government accountable to the people's representatives. In the alternate scheme of socio-economic transformation, the Planning Commission became more powerful in deployment of resources and distribution of revenue than representative institutions accountable to Parliament. In later years, centrally-sponsored schemes supported by Plan funds became the bone of contention between Centre and States as they were skewed in favour of ruling party at the Centre resulting, to some extent, in erosion of State's powers.

Be that as it may. As observed by Granville Austin[1], "The Constituent Assembly laboured arduously for the social revolution when drafting the fundamental rights, Directive Principles of State

1. Granville Austin, Working A Democratic Constitution, OUP 1999 pp. 73-74.

Policy and the provisions for the uplift of disadvantaged citizens. The Rights expressed not only prohibitions – what governments must not do – but also conditions, such as equality before the law, that government should strive to bring about".

Equality in an unequal society raised difficult issues for law and governance. The matter came up in the very first year of the Constitution when the reservation policy in favour of certain deprived groups came to be tested in the courts for its constitutionality. The Madras High Court held invalid a local regulation which reserved medical seats for certain socially disadvantaged Backward Castes. The view was upheld by the Supreme Court[1] striking a deadly blow to the constitutional strategy of equalization. As in property rights case, the response of Parliament was to introduce clause (4) to article 15 by the Constitution (First) Amendment Act, 1955 which enabled the State to make provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

Champakam case in a sense created constitutional history in the matter of Parliament's authority in implementation of Directive Principles. The Court was of the view that Directive Principles have to conform to and run as subsidiary to fundamental rights. The judges felt that the constitutional scheme permits the reasonable enforcement of Directives without taking away or abridging the fundamental rights. A minority of judges however held the view that for giving effect to the Directives, any part of the Constitution including fundamental rights should be amendable[2]. Anyway the Parliamentarians were not to accept defeat and kept on amending various provisions of the Constitution empowering themselves to legislate as they consider appropriate to bring about social equality.

While the Constitution (Twenty-fifth) Amendment Act, 1971 and Constitution (Forty-second) Amendment Act, 1976 expressly gave primacy to Directive Principles over certain fundamental rights (articles 14, 19, 31), it also made a provision that a mere declaration in the law that it is to give effect to Directives shall be binding on courts which were not allowed to probe the correctness of such declaration (article 31C). In the celebrated *Kesavananda Bharati* case[3] eight of the thirteen judges upheld the validity of the substantive part of article 31C on several grounds based on the scheme of the Constitution for achieving

1. *State of Madras* v. *Champakom Dorairajan*, AIR 1951 SC 226.
2. *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643.
3. *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

social justice; but they held the conclusive declaration to be invalid as it restricts the Court's jurisdiction of judicial review, a basic feature of the Constitution.

After the *Kesavananda*[1] and *Minerva Mills*[2] judgments, the Supreme Court started reading Parts III and IV (Fundamental Rights and Directive Principles) as complementary and integral to each other. The Court showed solicitude to Parliament initiatives for freely implementing Directive Principles. In fact, the Court itself acknowledged that it is also bound to implement the Directives as they are fundamental in governance. In determining the reasonableness of restrictions on fundamental rights the Court would accommodate the concept of social justice and public welfare to justify legislations. As one constitutional lawyer remarked[3], "In the early fifties when Parliament was keen to push through radical socio-economic reforms, the judiciary put speed-breakers in the way. In late seventies and early eighties when the court was in a mood to give a fillip to the Directive Principles, Parliament and State legislatures did not take advantage of the situation. The result is that the Directive Principles of State Policy remained a distant dream for We, the People of India".

The constitutional amendment route was again employed by Parliament to moderate the effect of the judgment in post-Mandal Report case of *Indra Sawhney* v. *Union of India*[4]. In order to extend reservation to the level of promotional posts in public employment, Parliament brought in the Constitution (Seventy-seventh) Amendment Act, 1995. The Ninth Schedule which was originally devised to protect land reform laws from judicial challenge was invoked to safeguard the Tamil Nadu law on reservation exceeding the court-mandated 50 per cent limit[5]. Few years later Parliament amended the Constitution again to fill-up backlog vacancies disregarding the 50 per cent rule[6]. The fact that as many as five constitutional amendments were made within a short period to advance reservation for depressed sections overlooking the standards set by the Supreme Court speaks volumes about the readiness of political parties to take the easy route to equality instead of the Parliamentary route of legislating socio-economic rights recommended by the Directive Principles.

1. *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.
2. (1980) 3 SCC 625.
3. P.P. Rao in Comparative Constitutional Law (Ed) M.P. Singh, Eastern Book Co., p. 374.
4. AIR 1993 SC 477.
5. Constitution (Seventy-sixth) Amendment Act, 1994.
6. Constitution (Eighty-first) Amendment Act, 2000.

Slow Movement in Welfare Legislation

In the incessant battle between Parliament and Supreme Court on supremacy over constitutional amendments, precious time was lost in advancing the social revolution through welfare legislations on education, health, housing and equal opportunities for all sections in the enjoyment of fruits of development. Of course, reservations in education, in legislatures and in government employment have brought into universities and institutions of governance many individuals who otherwise would have entered neither. But the government development programmes did not reach large sections of the poorest of the poor because of bureaucratic and political corruption and indifference of ruling parties. As observed by a foreign scholar,[1] "The executive and legislative branches in New Delhi and the States, in reality as distinct from on paper, have neglected the social revolution as expressed in the Directive Principles, the Preamble and in the fundamental rights provisions establishing equality before the law ..... Parliament in the 1950s amended the constitution to get around judicial rulings, acting on the premise that the constitution has bestowed upon it constituent as well as legislative power. Though the Supreme Court in *Shankari Prasad* case[2] upheld this view, later in the *Keshvananda Bharati* case, it ruled that Parliament's constituent power had limits. Fear had caused the change. Fear that Indira Gandhi intended to end the co-equality of the branches by eliminating judicial review of amendments on the way to sacrificing democracy and its fundamental rights to authoritarian socialism. With the basic structure doctrine, a balance, if an uneasy one, had been reached between the responsibilities of Parliament and the Supreme Court for protecting the integrity of the seamless web".

The two options available to Parliament to overcome the difficulties arising out of Supreme Court interventions were amendment of the Constitution (which it exercised liberally particularly for limiting property rights and excesses in reservation policy) and revision of laws to eliminate the portions the Court had found objectionable. The apparent collision between guaranteed individual rights and the welfare goals of the promised social revolution left a void in the progressive implementation of Directive Principles on health and education. The clear object of the Constitution (Twenty-fifth) Amendment Act was to subordinate the rights of individuals to the urgent needs of society. When a balance was struck after a series of

1. Granville Austin, Working a Democratic Constitution, OUP (1999), pp. 649, 652.
2. *Shankari Prasad* v. *Union of India*, AIR 1951 SC 458.

confrontations between the Court and Parliament, the executive branch gained so much power that even Parliament was subdued during the Prime Ministership of Mrs. Indira Gandhi. Parliament under Nehru allowed the judiciary to be powerful and independent even while questioning it on reviewing the constituent power.

The legislative and executive branches have undergone fundamental changes when elections put an end to one party governments both at the Centre and in the States. The induction of persons into political leadership who were not active participants in the independence struggle and were beginners in democratic governance brought in its own problems in the advancement of social revolution. Nonetheless, Parliament and State Legislatures were active in pursuing the social revolution agenda and a number of significant legislations on industrial relations, food and drugs were adopted in the initial decades. Though it is outside the scope of this study, a quick survey of the legislative record of the first few Lok Sabhas will give a perspective of the issues Parliament was concerned with during the period besides confronting the judiciary through a series of constitutional amendments.

Regulation of relationship between employers and employees and resolution of labour disputes engaged the attention of the first Parliament and it discussed and enacted the Trade Unions' Bill, Industrial Disputes (Appellate Tribunal) Bill, Fair Wages Bill, Employers Liability (Amendment) Bill, Industrial (Development and Control) Bill, Plantations Labour Bill, Employees' Provident Fund Bill, Working Journalists' Bill, Equal Remuneration Bill and Industrial Disputes (Miscellaneous Provisions) Bill. Among other significant areas of law-making attempted by the first Lok Sabha included the Drugs Control Bill, Food Adulteration Bill, Hindu Marriage Bill, Hindu Succession Bill, Hindu Minority and Guardianship Bill, Hindu Adoption and Maintenance Bill and the University Grants Commission Bill.

Excepting the UGC Bill, the first Parliament did not care to look at education for priority attention in law making. The two health related legislations enacted during the period were regarding food and drugs control rather than health care delivery or access to health services.

The second Lok Sabha did focus on health of weaker sections when it enacted the Dowry Prohibition Bill, the Maternity Benefit Bill, the Children's Bill, the Medical Termination of Pregnancy Bill, Bonded Labour System (Abolition) Bill and Equal Remuneration Bill. Education too received attention when it adopted the Delhi Primary Education Bill and the Institutes of Technology Bill. Other significant legislations which came out of second Lok Sabha included the Public Provident

Fund Bill, the Monopolies and Restrictive Trade Practices Bill and the Equal Remuneration Bill.

A significant portion of time of the third and fourth Lok Sabhas was devoted to the enactment of a series of environment laws and a number of laws on a variety of subjects other than education and health. Education and health again did not find a dominant place in the legislative agenda. It is inexplicable how Parliament could ignore the ten-year time limit for implementing free compulsory primary education to all children mandated by the Directive Principle. Equally disturbing has been the inaction of Parliament on Directives related to nutrition and public health. There can be many explanations for the neglect of education and health in Parliamentary business. It was possibly left to the States to legislate upon them because these subjects are in the State List in the distribution of subjects. *Secondly*, the Planning Commission was addressing these issues in the allocation of resources and executive schemes and programmes were launched from time to time, of course, without statutory backing. *Finally*, the political developments after the Emergency period created a lot of uncertainties in policy development and imbalances in Parliamentary functioning. Whatever the explanations for inaction, the fact remains that in the initial two or three decades of Parliaments' functioning what could have been achieved on the education and health fronts was not to be. The nation is now paying a very heavy price on account of illiteracy and ill-health of a large majority of people. This is not to belittle the work done by Parliament on other fronts. Democracy was sustained and strengthened, unity and integrity was maintained; security defended even when the country was invaded by two of its neighbours; and the process of planned economic development continued uninterrupted. The opposition in Parliament was not strong enough to demand greater accountability in the matter of implementing Directives. States were weak in resources and bargaining power *vis-à-vis* the Central Government to be able to influence decision-making at the Centre. A powerful bureaucracy at the Centre decided the priorities and influenced the policy-making process to the disadvantage of the marginalized and unorganized sections of the public. The social revolution was delayed and distorted and it was the turn of the judiciary in the next three decades to lead a Rights revolution through judicial activism and Public Interest Litigation.

Chapter Four

Grappling with Socio-Economic Issues and the Emergence of the Rights Jurisprudence (1970-1990)

Judicial Activism and Social Justice Litigation

Public policy on livelihood and social security issues used to form the focus of political manifestoes when parties seek votes before elections. On these matters there exists little consultation outside party circles with the result the people as well as their leaders easily forget the promises made in manifestoes and in election speeches. Even the rights and entitlements already available in statutes often do not get implemented either because they were part of the opposition parties' reform when they were in power or because resources need to be diverted for doing something on behalf of the victorious party. The politics of development and the dynamics of electoral politics have denied people of their rights already adopted under laws and schemes. The situation resulted in the affected people or others on their behalf preferring Public Interest Litigation (PIL) to get the obligations of governments fulfilled through orders of courts. With the increased awareness of human rights among the people and the media and civil society playing pro-active roles in social justice issues, Governments were put on the defensive on non-performance of statutory obligations at the State, Central and local levels. The Supreme Court and the High Courts in their post-Emergency activist stance not only entertained PILs liberally but devised new techniques and tools to make judicial processes people-friendly. *Mandamus,* continuing *mandamus* and contempt powers were employed to compel executive compliance to legal obligations under welfare laws irrespective of budgetary constraints and administrative expediency. Courts also invented new

judicial remedies other than monetary remedies by way of medical relief, re-habilitative relief etc. through non-adversarial processes and negotiated settlements. Even Governments were directed by courts to frame policies conducive to social justice on the lines of the Directive Principles. In extreme cases, Courts have gone to the extent of framing policies temporarily, calling them guidelines pending legislation, invoking international treaties on human rights to which India was a signatory[1].

No doubt frequent orders from courts to different ministries and departments of Central and State Governments did raise questions on co-equality of the three branches and on the limits of judicial activism. Government in early 1990s even prepared a Bill to restrict the scope of judicial powers in respect of PIL which was later withdrawn seeing the level of opposition to it in civil society. People acclaimed the activism on the part of higher courts to create a "rights jurisprudence" against recalcitrant executive authorities through interpretative logic using the provisions on fundamental rights and Directive Principles. The Executive in turn came up with a variety of populist schemes like Twenty-Point Programme, Garibi Hatao Plan Policies and a series of Yojanas surrounding basic needs of people. The 1980s thus generated a Rights Revolution spearheaded by the judiciary creating a new jurisprudence supportive of socio-economic rights enshrined in the Directive Principles. A large number of Centrally-sponsored schemes directed at empowering people with socio-economic benefits were launched by the Central Government. Parliament remained a poor third during the period in the matter of promotion of socio-economic rights partly because of the changing political climate, dynamics of coalition regimes and quick succession of governments ruled by different political parties.

The rise of the regional parties with increasing clout at the level of central government unsettled pre-existing patterns of governance, created instabilities and uncertainties in politics, down turn in economy and increased incidence of communal and terrorist events. Though social and economic rights assumed centre stage in planned development, there was very little improvement in the quality of life of the common man.

Centre-State Responsibilities in Implementation of Directive Principles

According to article 12, "State" includes the Government and Parliament of India and the Government and the Legislature of each of

1. *Vishakha* v. *State of Rajasthan*, AIR 1997 SC 3011.

the States and all local or other authorities within the territory of India. For discharging the obligations under Directive Principles of State Policy also, "State" includes as per article 36, the Government and Parliament at the Centre, the Government and Legislature of each of the States as well as local or other authorities. In short, the Directives are addressed to all three levels of government and they equally apply in the making of laws as well. It is in this context the issue of Centre-State responsibilities *vis-à-vis* the implementation of Directives have to be considered and not necessarily under the scheme of distribution of legislative powers. While, in a general sense, a constitutional duty may arise under each of the Directives on the part of both the Centre as also the States, this is surely distinct from saying that both the Centre and the States are required to act in identical manner in the fulfilment of such duty.

In appreciating the relative responsibilities one has to consider the relative capacities of the Centre and the States. Union Government naturally is placed in a more robust financial position than the States. *Secondly*, the legislative and administrative powers of the Centre under the Constitution are of much wider scope than States. In such a situation, citizens rights get implemented only when the Centre and the States act in tandem under a policy of co-operative federalism. Since large part of the revenue is with the Centre, States cannot fufil their obligation in respect of health and education unless funds are provided by the Centre. At the same time, States cannot disown responsibilities on basic needs on the plea that Centre has not provided funds. Thus perceived, access to health and education for the citizens depend on the model of federal governance adopted between the Centre and States on the one hand and the States and local governments on the other. In other words, the constitutional responsibility of all three levels of government in implementing the Directives on Health and Education is joint and several.

There has been no objective assessment of the manner and extent of implementation of Directive Principles by the Central and State Governments excepting occasional surveys by the Planning Commission, some NGO studies and the Human Development Reports of some States. The annual reports of the Ministries of Human Resources Development and Health give scanty and fragmented data on investments and outcomes with no clear indication in terms of fulfilment of rights and obligations. As India is required to report performance on basic rights to the Human Rights Committee of the United Nations there ought to have been periodical reporting on nature and extent of rights availed or fulfilled to Parliament and State

Legislatures so that there could be public scrutiny of not only Government's performance but also that of Parliament's and Legislatures' as well.

Directive Principles Need Updating for Inclusive Development

In fact, one would have thought that Parliament should have updated and enriched Directive Principles consistent with changes in society, economy and technology. This precisely was what the Supreme Court had done while interpreting the right to life under article 21 in the light of Directive Principles. The Court said that right to life is not to be taken as vegetable life or life at subsistence level. It is meant to be a life with dignity which involves right to education, right to health, right to work, right to leisure, right to clean environment, right to housing and right to medical care. Such an expansive interpretation of right to life made the right relevant, meaningful and enriching to individuals. In that perspective it is time to re-write or re-interpret some of the Directive Principles in order to make them relevant to the times and to relate them to the legislative plans of democratic governments. Had Parliament legislated free, compulsory education fifty years ago, it would have now been pursuing similar goals in respect of secondary and tertiary education. Had Parliament legislated on primary health care in the previous century, the Directive Principles on health in this century would have been on tertiary health care and specialized services. In short, the Directive Principles of State Policy, like the way right to life was interpreted by courts, should have been given an expansive meaning if only they were made binding on Parliament under certain circumstances. For example, good governance with all its essential elements should have been part of the Directives.

Right to Education and State Accountability

Article 45 as it then stood made it obligatory on the State to provide within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years. In the case of *Mohini Jain* v. *State of Karnataka*[1] the Supreme Court ruled that the right is not just a Directive but a part of right to life and therefore an enforceable Fundamental Right. In *Unnikrishnan* v. *State of Andhra Pradesh*[2] the Court noted that article 45 is the only provision in the entire Constitution which puts a time limit for Parliamentary and governmental action. It is also important, the Court noticed that unlike article 41, in article 45 the right is not subjected to the "economic

1. (1992) 3 SCC 666.
2. (1993) 1 SCC 645.

capacity and development" of the State. The Court added, " .... We cannot believe that any State would say that it need not provide education to its people even within the limits of its economic capacity and development ..... We must hasten to add that just because we have relied upon some of the Directive Principles to locate the parameters of the right to education implicit in article 21, it does not follow automatically that each and every obligation referred to in Part IV gets automatically included within the purview of article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental importance".

It took Parliament another decade to act on the judicial declaration and insert, through the Constitution Amendment Act of 2002, article 21A which guaranteed the right to education for children between the ages of six and fourteen. It took another eight years for Parliament to formulate and enact the Right of Children to Free and Compulsory Education Act and to spell out Government responsibilities in that regard. It will be interesting to note the joint and several responsibilities of the Central, State and local governments in the matter of right to education. The Act states that the Central Government and the State Government shall have concurrent responsibility for providing funds for carrying out the provisions of the Act. The Central Government shall prepare estimates of expenditures and provide the State Government with a percentage of these costs, in consultation with the State Government.

In terms of duties and functions, the Central Government would create a national curriculum framework with assistance from the academic community. It would further develop and enforce teacher training standards and provide State Governments with technical assistance for innovation, research and capacity building.

The State Government shall provide free and compulsory elementary education for children aged 6-14 years and ensure compulsory admission, attendance and completion of elementary education upto 14 years. It is also the State Governments' obligation to make available neighbourhood schools, prevent discrimination of children from disadvantaged groups, provide infrastructure including staff, equipment, teacher training facilities, special students training facilities and proper school building. Finally it is the State Governments' duty to maintain quality as per standards and norms specified by timely prescription of curriculum and courses and appointing necessary academic authorities.

The Act stipulates the duties of panchayats, municipalities and other local bodies as well. It is for the local authority to ensure a

neighbourhood school to every child for free compulsory education, free from discrimination against weaker sections. Local Government is to ensure maintenance of records of all children up to 14 years, ensure admission, attendance, infrastructure, teaching facilities and special needs of students with disabilities. It has to monitor schools, decide the academic year and ensure timely adoption of curriculum and courses.

Once the rules are framed and responsibilities assigned it becomes a right that is accessible, verifiable and enforceable. This is the advantage of legislative action, that is, ability to fix responsibility and demand performance. People may not know that a parallel scheme named "Sarva Shiksha Abhiyan" (SSA) was sponsored several years ago by the Central Government to universalize elementary education and several thousand crores of Plan funds were spent on it. As with other schemes of Government, not even one-fourth of the amount reaches the beneficiaries and no responsibility for outcome beyond targets can be expected. In fact, in the Comptroller and Auditor-General report in 2006, five years after the introduction of the SSA, the CAG found the scheme not performing, *inter alia*, in following respects:

(i) 40 per cent of the children in the age group of 6-14 years remained out of school four years after implementation of the scheme and after the Government had incurred an expenditure of twelve thousand crore rupees.

(ii) Funds were irregularly diverted to activities which were beyond the scope of SSA.

(iii) Supervision and monitoring of the scheme was ineffective both at the national and State levels.

(iv) Infrastructural facilities were dismal, scheme guidelines relating to the disabled were not implemented, text books were not made available and expenses were shown for building non-existent schools.

The comments on Sarva Shiksha Abhiyan were quoted only to show how executive schemes compared to statutory schemes are extremely poor in terms of delivery of services, protection of rights and accountability for obligatory outcomes. One can only guess the damage done, the time lost and the cost escalation happened because of the neglect of Parliamentary responsibility under article 45 for such a long period in the matter of primary education. The country today has the dubious distinction of having the single largest group of illiterate population in the world which influence the pace of economic development and quality of life. Nobody knows when the country will be rid of this malady even after the legislation is put in place because

of the problem of numbers, the level of corruption in the administration and the politics of vote banks and coalitions. Coalition politics need not be inherently problematic as long as the parties follow the rules of the game and respect the authority of the law and the Constitution. It may slow down the pace of development occasionally; but the practice of evolving the 'Dharma' of common minimum programme did help to overcome some of the difficulties at least in the matter of welfare programmes.

Parliament's Engagement on Health and Education in the 1970s and 80s

The three significant pieces of legislation that Parliament enacted during the period are the All India Council for Technical Education Act, 1987 (AICTE), the Indira Gandhi National Open University Act, 1985 (IGNOU) and the National Council for Teacher Education Act, (NCTE), 1993. The National Policy on Education was announced in 1986 which gave a direction for education reform including legislative reform.

The AICTE Act was intended to making proper planning and co-ordinated development of the technical education system throughout the country, the promotion of qualitative improvements of such education in relation to planned quantitative growth, regulation and proper maintenance of norms and standards in the technical education system. "Technical education" is defined as programmes of education, research and training in engineering, technology, architecture, town planning, management, pharmacy and applied arts and crafts and such other programmes or areas as the Central Government may notify in the Official Gazette. "Technical institution" is defined as an institution, not being a university which offers courses or programmes of technical education.

The main objective of NCTE Act is to achieve planned, co-ordinated development of the teacher-education system throughout the country and the regulation and proper maintenance of norms and standards in teacher-education. The mandate given to the NCTE is very broad and covers the whole gamut of teacher education programmes including research and training of persons for equipping them to teach at pre-primary, primary, secondary and senior secondary stages in schools and non-formal education, part-time education, adult education and distance education courses.

IGNOU Act is significant because it provided for the establishment of a Distance Education Council within IGNOU to promote, co-ordinate and regulate standards of education offered through open and distance learning system in the country.

While Parliament seemed to have ignored the Directive under article 45 during this period, it did respond to its mandate to co-ordinate and determine standards in institutions for higher education or research and scientific and technical institutions under Entry 66 of List-I of the Seventh Schedule. No doubt, Parliament's legislative response in this sphere did help the country in a big way when Information-Communication Technology made it possible in the 1990s for the country to export IT services in a big way significantly contributing to economic growth and improvement of quality of life.

Turning to the sphere of health, the record of Parliament during the period was somewhat better as several pieces of legislation found its way into the Statute Book. Among them are the Mental Health Act, 1987; Air (Prevention and Control of Pollution) Act, 1981; Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975; Consumer Protection Act, 1986; The Environment (Protection) Act, 1986; Water (Prevention and Control of Pollution) Act, 1974 etc. Government during the period introduced a variety of health-related centrally-sponsored schemes including the cooked mid-day meal scheme, the integrated child development services, strengthening of the public distribution system for all households at risk of hunger etc. Besides a National Health Policy was announced by the Government in 1982.

Again, the main thrust during the period was more on centrally-sponsored schemes and programmes rather than on empowerment through legislation imposing governmental obligations under Statute. No doubt, governmental spending on health-related projects has increased, though it is difficult to say that access to health care services and right to health have significantly enhanced in content and reach during an era supposed to have acquired prominence due to Supreme Court inspired Rights Revolution. In fact, the law-making by the Executive has acquired prominence as the Centrally-sponsored schemes invariably contained conditions for central assistance under the schemes which the Centre could enforce against States under its financial clout and power to give administrative directions.

The bulk of entries relating to health are in List-II, the State List. These include Public Health and Sanitation, Hospitals and Dispensaries, Manufacture and Sale of Intoxicating Liquors, Relief of the Disabled, Water Supplies and Drainage etc. In the Union List (List-I) are kept only Quarantine, Patents, Labour Safety in Mines and Oil Fields, Manufacture and Distribution of Salt and Opium and Professional/ Vocational training. In the Concurrent List (List-III) are included

Lunacy, Adulteration of Food Stuffs, Drugs and Poisons, Population Control and Family Planning, Medical Education and Medical Profession, Prevention of Infectious Diseases and Price Control. Residuary powers are with the Union which entitles Parliament to make laws on matters not mentioned in the three Lists.

Schedules Eleven and Twelve which relate to items on which Panchayats and Municipalities can exercise powers include entries like water management, food processing industries, drinking water, poverty alleviation programmes, education, technical training, health and sanitation including hospitals, primary health centres and dispensaries, family welfare, women and children development, social welfare including welfare of handicapped and mentally retarded etc.

Reading the constitutional provisions and scheme for promotion of public health, one gets the impression that the Constitution-makers have taken meticulous care in identifying what each level of government can and should do in relation to public health and its administration in the most efficient way. It is up to the elected representatives at each of the three levels of government to realize their responsibilities and act by making appropriate laws on different aspects of health in respect of the entries in the three Lists as well as in the Eleventh and Twelfth Schedules.

The Bhopal Gas Leak Disaster (1984) marked a turning point in health-related law making at Central level because it brought out the legislative deficit in respect of ecology, environment, industrial safety, mass disaster response, restitutive justice, corporate responsibility for mass torts, role of insurance laws in risk distribution etc. Consequently, post-1985 period showed a spurt of legislative activity which is discussed in the next Chapter.

Chapter Five

The New Economic Policy, Third Tier of Government and the Unfinished Agenda of Social Revolution

Decentralized Governance and Social Justice Delivery

Two significant developments in democratic governance marked the beginning of the last decade of the twentieth century and both have influenced legislative activity in respect of the unfinished agenda of social revolution promised by the fundamental rights and Directive Principles in the Constitution. The Indian Constitution in Directive Principles of State Policy had asked the State to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government (article 40). Yet, it took the State over 40 years to act on this democratic decentralization. The turning point came in 1993 when the Constitution (Seventy-third) and Constitution (Seventy-fourth) Amendment Acts, 1992 gave Panchayat Raj system, the constitutional status. Though the full potential of these Amendments in democratic governance is yet to be realized, no one can belittle the importance of the step in enabling people in the far flung villages of the country to enjoy the fruits of Freedom. From representative democracy the nation moved one step closer to direct democracy. The relationship of local bodies (Panchayats and Municipalities) with the other two tiers of Government and division of powers and responsibilities among them are governed by constitutional provisions, statutes and administrative orders.

By giving a constitutional status to the age-old Panchayat structure, local bodies are taken away from the legislative discretion of the States and given a distinct life and composition. The idea was self-government

in full measure. A Gram Sabha in a village or group of villages became the unit of self-government. Direct elections, reservation of seats for S.C./S.T. and women, a fixed tenure of five years and elections within six months in case of supersessions, devolution of powers by State legislature, sound finance including grants-in-aid and powers of taxation, duties, tolls and fees, setting-up of Finance Commissions every five years to review the financial position and auditing of accounts make the self-government apparatus complete excepting full-fledged law making on policies.

Another significant aspect in which local bodies differ is on the constitutional mandate regarding the structure and process of district and metropolitan level planning. Though the Planning Commission at the Centre is outside the Constitution, the District Planning Committees have constitutional status as it is part of self-government. There is now evidence that funds allotted for planned development and poverty reduction are actually reaching the beneficiaries because resource allocations are being made locally and not by a bureaucracy-driven delivery system. A cadre of local leadership has emerged and basic infrastructure for life with dignity has started coming up in rural India. Indeed this has been a remarkable development in democratic governance in which education and health of ordinary villagers are bound to receive greater attention of Governments at all levels.

Liberalization and Laws on Health and Education

Another event of equal importance which happened in early 1990s is the introduction of a new economic policy under which private enterprise was given greater freedom to participate in the economic activities of the nation earlier reserved for the State. Though the change was compelled by circumstances which left little option to Government, it did bring about policy changes in different sectors including the sectors of education and health. There was a spate of private colleges and vocational institutes set up particularly in professional education which not only enlarged access to higher education but released funds available to State to be utilized elsewhere for the welfare of weaker sections. In the sphere of healthcare services also there was discernible expansion with tertiary care reaching out to small towns in rural areas.

It is important to point out that under the constitutional scheme, "Education, including primary and secondary schools", "Technical Training and Vocational Education", "Adult and Non-formal Education", "Cultural Activities", "Health and Sanitation, including Hospitals, Primary Health Centres and Sanitation, "Family Welfare", "Women and Child Development", "Social Welfare, including Welfare

of the Handicapped and Mentally Retarded", "Welfare of the Weaker Sections" etc. are assigned to the Panchayats (Eleventh Schedule).

It will be interesting to see how Parliament's legislative performance developed after the above developments in the 1990s. The idea of making right to education a fundamental right by amending the Constitution and following it up by a detailed legislation on Right to Education delineating the functions and responsibilities of the three tiers of Government emerged after the above events. On similar lines, a National Health Bill is now being discussed at the national level. A State Government, (Assam) in fact, have adopted the Draft Bill and enacted a legislation giving the right to comprehensive healthcare services to the people of Assam while imposing obligations on the State. The New Millenium does promise great advances in education and health hopefully making the relevant Directive Principles a reality in the near future.

Article 41 is a Directive Principle which talks about right to work, right to education and right to public assistance in cases of unemployment, old age, sickness, disablement and in other cases of undeserved want. According to a rough count nearly a hundred pieces of legislations have been enacted to implement the Directive of which half related to improvement of working conditions and rights of industrial and plantation labour. Among the significant laws enacted on education, health and related issues particularly in the post-liberalization and post-Panchayat raj era are:

- Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.
- Building and Other Construction Workers Welfare Cess Act, 1996.
- Central Educational Institutions (Reservation in Admission) Act, 2006.
- Child Labour (Prohibition and Regulation) Act, 1986.
- Legal Services Authorities Act, 1987.
- Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.
- Food Safety and Standards Act, 2006.
- Maintenance and Welfare of Parents and Senior Citizens Act, 2007.
- Mental Health Act, 1987.
- National Commission for Minority Educational Institutions Act, 2004.

- National Commission for Safai Karmacharis Act, 1993.
- National Commission for Teacher Education Act, 1993.
- National Commission for Women Act, 1990.
- National Rural Employment Guarantee Act, 2005.
- National Institute of Pharmaceutical Education and Research Act, 1998.
- National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.
- Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.
- Protection of Plant Varieties and Farmers' Rights Act, 2001.
- Transplantation of Human Organs Act, 1994.
- Constitution (Eighty-sixth Amendment) Act, 2002 making Right to Education a Fundamental Right under article 21A and Duty to provide it a Fundamental Duty of Parents under article 51A(k)
- Scheduled Tribes and other Traditional Forest-Dwellers (Recognition of Forest Rights) Act, 2007.
- Tobacco Control Act, 2003.
- Environment Protection Act, 1986.
- Biological Diversity Act, 2002.
- The Right of Children to Free and Compulsory Education Act, 2009.

A significant aspect to be noted in the legislative activity of Parliament during the period is the concern for setting-up institutions outside the Government empowered to monitor the securing of rights to weaker sections of people. Recognition of rights under statutes is no doubt the first step towards empowerment of the poor. But laws are not self-executing. They need institutions to work out and expert personnel to direct. Institutions within the bureaucracy have their limitations in moulding the reliefs and remedies whose rights are not honoured. What the Constitution expects in such cases is to let the aggrieved individuals go to courts to assert their rights and seek judicial remedies. Unfortunately access to justice through courts is time-consuming, expensive and uncertain because of the nature of judicial proceeding. Though Parliament passed the Legal Services Authorities Act, 1987 the benefits available are too inadequate to deliver equal justice under law. Hence the need for Ombudsman type institutions to make administrative remedies available to weaker sections. The various Commissions, some with constitutional status, set up by Parliament

during 1980s and 90s are intended to intervene on behalf of identified beneficiaries – women, children, scheduled castes, scheduled tribes, backward classes, safai karmacharis, minorities, disabled persons etc. – in the concerned Ministries and Departments of the Government to correct policies and to facilitate delivery of benefits according to the provisions of the Constitution and the law. Their reports are submitted to Parliament where discussion take place and the Executive directed to be more accountable in their delivery systems.

Participatory Mechanisms in Law-Making and Implementation

A new trend in the drafting of social sector legislations employed by Parliament in recent times is worthy of notice if only for its democratic orientation and pragmatic appeal. The idea is to work out the federal principle in letter and spirit and to make the operations transparent and accountable. A brief examination of the structure of two important legislations enacted in 2009 will be illustrative of this new trend.

The Right of Children to Free and Compulsory Education Act, 2009 aims to provide the constitutional mandate of article 45 giving children between 6-14 years of age free and compulsory education. The Act lays out in great detail the roles and responsibilities of the Union, State and local Governments, of Parents, of Schools and Teachers. It is the concurrent responsibility of the Centre, States and local bodies to ensure that children are educated for which they have obligations to set-up schools and appoint teachers. Regarding the finances required, the Central Government is to draw up the capital and recurrent expenditure in consultation with State Governments and share the burden between them. The Central Government has the responsibility of co-ordinating the standards of education and providing technical support. The local bodies (Panchayats and Municipalities) are fully involved in implementation. So also parents, teaches and school managements. Rarely in the past one has come across with such comprehensive, inclusive system of law making intended to serve the beneficiaries to the maximum extent possible overcoming bureaucratic hurdles and financial conundrums. As if this is not enough, the National and State Child Rights Commissions are co-opted to monitor child's right to education, review the safeguards, inquire into complaints and take necessary steps to get the right fully honoured to every child.

The National Rural Employment Guarantee Act, 2009 is a more inclusive legislation in which all the stake-holders including all three levels of government are roped in with roles and responsibilities designed to ensure that benefits reach the beneficiaries with least

leakage of funds. It is an Act to guarantee employment for unemployed in rural areas for one hundred days in a year through works such as building roads, improving water supply schemes and infrastructure development in rural areas. The Act is unique in the sense that it lays emphasis on issues of equality of wages for men and women, elimination of work contracting middlemen, payment of wages only through bank and post office accounts, creating transparency in workers muster rolls etc. If work is not provided within a fifteen-day time frame, then the applicant is eligible for unemployment allowance. If the work site is not within five kilometres from the applicant's residence, then the applicant is eligible for an additional 10 per cent of the wage.

The National Rural Employment Act provides for two Councils – the Central Employment Guarantee Council and the State Employment Guarantee Council – to advise the Government on all matters concerning implementation of the Act, to prepare reports to be laid before Parliament and to evaluate various schemes under the Act. The Funds at Central and State-level are also constituted with contribution from Centre and States. Panchayats have been given important role of planning, monitoring and actual implementation. Unlike the usual practice of leaving it to States to devolve powers to local bodies, the Act stipulates the role and functions of Panchayats in the implementation of the Act.

These two legislations are cited here only to show how Parliament has devised new strategies and techniques to ensure compliance of obligations in the delivery of services and created spaces for all tiers of government as well as civil society and NGOs in implementing Directive Principles on social welfare. It is a new trend in participatory and transparent governance which deserves to be watched for better implementation of the unfinished Social Revolution.

Chapter Six

Education and Health in the New Millenium: A Prognosis

Social sector management in federal democracies under Parliamentary system always evolved in response to needs and demands of the population. Unfortunately, the beneficiary groups in India happened to be so illiterate and unorganized that they could not articulate their demands in constitutional language to influence decision-making authorities. They were dependent so much on Governments and political parties to know their needs and do the needful. However, political system work under pressure based on priorities canvassed by interest groups. In this final chapter, the effort is to look at the experiences of some other federal systems like USA, Canada and South Africa to know how health and education rights get implemented. In doing so, it is proposed to reflect on India's own experience evolved through successful experiments at the Central and State levels. Though the focus is on legislative performance of Parliament, it is necessary to bring in how it has been influenced by actions of the judiciary, the media and the civil society. The multiple factors which influence policy development and law making in a pluralist democracy cannot always be envisaged and planned accordingly. The presence of increasing number of political parties with regional and sectarian agendas exercising disproportionate influence in shaping public opinion and in decision making puts the exercise frustrating and unpredictable. Therefore, generalizations are risky and often unreliable. However, the present study looks only at policies relating to health and education in which there are less controversies and differences of opinion among parties and governments.

In writing this part of the report the author has borrowed liberally from the report of the Second Commission on Centre-State Relations (2006-2009) of which he was a Member and as Chairman of the Expert Group on Equal Opportunity Commission (2007-2008). As the issues

are the same (Social Justice, Good Governance and Socio-Economic Development) and the reference points are the same (fundamental rights, Directive Principles of State Policy and Constitutional Democracy) it is desirable not to ignore earlier recommendations of expert committees, Government or private. In this respect some of the reports of the Second Administrative Reforms Commission (2005-2008) are also relevant as they try to locate the strengths and weaknesses in the system for policy development and implementation.

Flexibility in Constitutional Institutions and Democratic Politics

There are certain unique aspects on how politics is played out in Indian democracy which make comparisons with other countries difficult and misleading. These aspects are related to India's own history, culture and socio-economic factors impinging upon aspects of democracy, market and civil society. The Constitution is a wonderful and progressive document which incorporates the best of liberal democracies around the world, organizes public power among institutional structures based on the doctrine of separation of powers, rule of law, checks and balances, and trusts the wisdom of the people and their leadership to work out the best form of government suited to Indian conditions. In this regard the Constitution makers have borrowed the framework of the Government of India Act, 1935 for organizing its administrative structures and relations, gathered the most liberal set of human rights from Western democracies to write its own charter of rights and gave the political mechanism of Parliamentary government under the Westminster model combined with a Presidential system to meet administrative and political exigencies. So long as the people who structured the system and who shared the ideals of the Freedom Movement were in command, the system functioned relatively smoothly despite the initial *hiccups* relating to power of constitutional amendments and on the ways of bringing about the socio-economic transformation. As the situation changed and the power equations between political parties and between the Centre and States became more contentious, cracks appeared in the system to manage which the available mechanisms were found inadequate. The use of emergency powers to settle political scores and the use of communal passions to win elections proved costly for constitutional governance and social solidarity essential for progress. It is a matter of surprise for many outside observers how India remained democratic and united despite such divisions and achieved eight per cent economic growth for over a decade. This is a story on which many treatises have been written and many theories advanced which defy conventional notions of politics and governance.

Be that as it may. For our purpose of examining the performance of the three branches of State in implementing Directive Principles declared by the Constitution to be fundamental in governance particularly in making of laws, what is important is to delineate the attention devoted by successive Parliaments and the Governments of the time in developing and implementing policies in respect of health and education, key elements of the Social Revolution. The strategy employed by the Constitution in achieving the Social Revolution is two-fold: *firstly*, prohibiting discriminatory laws, practices, customs etc. and *secondly*, directing the State to create a level playing field by doing certain things spelt out in the Directives. What we are concerned here is the record of the State in creating those conditions of equal opportunity for everyone rich and poor, young and old, man and woman, urban and rural. The essence of the Social Revolution therefore lies in the concept of Equality as spelt out by the Constitution and the policies evolved to promote an egalitarian social order by the Governments at the Centre and States. Since this transformation is dependent on the laws made or amended or repealed during the period, the focus is on Parliament and State Legislatures. To the extent they understood the constitutional goal of Equality and Equal Opportunity as key for governance, the progress on the road to social revolution is achieved.

Equal Opportunity and Inclusive Development; Case for an EOC[1]

Are the protection of individual rights enough to secure the rights of groups of persons discriminated and long suppressed with the sanction of customs and State authority? Are anti-discrimination provisions in the Constitution enough to achieve equality of status and of opportunity to all citizens? The Constitution-makers felt otherwise and have provided for a series of other "affirmative action" measures to achieve the social justice objective. Reservation in public employment and in education is just one such measure. More importantly, the Constitution, anticipating the changes in society and the limited scope of reservation, in securing equal opportunities for all deprived groups has adopted a long-term strategy of enabling the State to bring in special provisions in terms of the Directive Principles for the advancement of deprived sections [articles 15(3), (4), (5); article 16(3), (4), (4A), (4B)]. This is followed up by special mention of a number of areas like education, employment, nutrition and health (articles 41, 46, 47) where the State, through legislation or schemes or otherwise is

1. *See* Preface to the Equal Opportunity Commission Report (2008) pp. XV-XVII, Ministry of Minority Affairs, Government of India.

obliged to bring in conditions where deprived sections of people are enabled to avail of equality of status and of opportunity. It is this long-term strategy of progressive realization of conditions of equality that the State has been attempting to introduce through a series of social justice-oriented legislation during the last six decades. The process of planning and development was intended to supplement it with resources and executive action.

The question arises on how adequate are these two strategies of (a) anti-discrimination as part of right to equality, and (b) of Directives of State Policy for creation of level playing field in securing equal opportunities to the disadvantaged sections of people? The data available through national surveys by official agencies and expert committee reports suggest that while considerable progress has been achieved in some sectors, a large number of groups are still disadvantaged in terms of even accessing the basic necessities of life for survival with dignity. They are either discriminated or disproportionately denied of opportunities because of a variety of circumstances which are neither of their creation nor within their control to overcome. The lapse may be of the institutional arrangements in place or the weakness of policies involved. The differential impact of some developmental policies are either not noticed or acted upon. It is this data and institutional deficit that an Equal Opportunity Commission (EOC) is expected to address. The object is removal of unfair discrimination and pro-active creation of conditions in order to enable such neglected groups to avail of the constitutionally guaranteed right to equality. The new mechanism therefore should be such that, based on well-researched qualitative and quantitative data around the status of deprived groups, it should be able to influence policy (legislature), intervene in the implementation of laws and schemes (executive) and enable the accessing of equal justice under law (judicial processes).

Inclusive growth is what is sustainable in the long-run. This is the socialist/egalitarian model, the Indian Constitution has envisaged for the Republic. Given the vast numbers who are in the disadvantaged category and the complex nature of disabilities they have been suffering from, it is not easy to bring about equality of status and of opportunity for all through legislative processes alone. Entrenched attitudes and conventional mindsets constitute a major limitation in bringing about social change. History is replete with instances of how well-intentioned initiatives have brought more misery than good when authoritarian methods were employed and balance of interests not maintained. In other words, social engineering through legal and democratic

institutions and processes has to necessarily acknowledge group identities and opt for incremental and consensual change. The consensus model depends a great deal on evidence-based advocacy and a balance between liberty and freedom. With the market forces not being favourably disposed to ideals of equity and equality, it becomes the duty of the State to be pro-active in the matter of equalization of opportunities for disadvantaged people. The human rights jurisprudence as it developed globally during the last few decades has decidedly supported State intervention against discriminatory practices even against private enterprise. Indian Constitutional Law as interpreted and developed by the Supreme Court has also shown a remarkable trend to invoke the human rights discipline in constructing the egalitarian social order through qualitative and quantitative criteria. Courts sought measurable indices evaluated statistically to determine beneficiaries of affirmative action. The Equal Opportunity Commission can profitably build on this trend with its evidence-based advocacy to promote equality of opportunity to deprived sections.

The equality jurisprudence contained in the Constitution, interpreted and developed by Parliament and Judiciary in India is rich and dynamic to serve the social justice vision of the Republic. The challenge is to translate it into appropriate policies and programmes without disturbing the democratic commitment to rule of law and harmonious relations among the different communities and groups. Multi-cultural societies all over the world have been experimenting with diverse institutional mechanisms to achieve the desired results with varying degrees of success. India too set up almost a dozen commissions at the national level to look after the special interests of disadvantaged sections of society. They are doing their best to focus the attention of the authorities on the problems of communities entrusted to their care. However, the issue of equal opportunity in different walks of life to disadvantaged groups has not received the attention it deserved for want of detailed quantitative and qualitative data, adequate legislative support and vigorous public advocacy.

The unorganized sector and the vast mass of self-employed persons do need the support of the State to be able to share the opportunities provided by economic development. The identity of the deprived sections is not so much based on caste and religion but on their common plight of deprivation and consequent inability to access opportunities as equals. They are people with per capita consumption of less than Rs.15 per day whose numbers, we understand, exceed 500 million people. They do not belong to any one caste or religion. They largely come from among the Scheduled Castes, Scheduled Tribes, disabled persons,

minorities and even from some section of the majority communities. Thanks to the Constitution-makers, these persons are not helpless before law and the Constitution. They are endowed with rights and entitlements in respect of education, employment, health and dignity. The problem is with respect to their inability to assert the rights and fight discrimination. Our legal system can help only those who can reach the court and prove the discrimination based on facts and figures. The proposed Equal Opportunity Commission is expected to assume the role of a public advocate for the deprived groups. The evidence it collects and the arguments it constructs on the basis of factual data and reasoned arguments can deliver reliefs and remedies administratively, and wherever required, through the courts and tribunals.

No community or group should feel discriminated against. Nor should any group suffer denial of equal opportunity for want of capacity to marshal facts and advance arguments based on them. If there are gaps and inadequacies in policies or programmes, the proposed watchdog body (EOC) should be able to intervene effectively and restore equality of opportunity in each and every sector of public life. A culture of equality and fraternity should thus be cultivated so as to permeate every section of society if the Preambular promise of Justice, Social, Economic and Political, has to be redeemed. This is a task in which the Equal Opportunity Commission can take a lead role with a missionary zeal. The various other commissions now functioning can be partners in this mission.

Perhaps the equal opportunity situation would have been different had the Government set up the Equal Opportunity Commission immediately after the enactment of the Constitution. Now it is up to Government not to delay the establishment of the Commission. There are expectations generated among deprived groups including minorities that the proposed Commission would not just be a recommendatory body but one which can remedy the discrimination and denial of equal opportunity of deprived groups through appropriate, expeditious action. The country cannot afford to disappoint them and still hope to be a nation committed to equality, fairness and dignity. With the economy looking up and all the political parties subscribing to the ideal of inclusive development, the time is opportune for a breakthrough in the conventional style of administration of the social justice agenda. Let the Equal Opportunity Commission herald a new era of hope and empowerment to the many "deprived groups" to enjoy the fruits of freedom and development and to live a life of dignity equal to their fellow countrymen in this great land of Bharat.

I have quoted extensively from my preface to the Report on Equal Opportunity Commission submitted to the Ministry of Minority Affairs, Government of India only four years ago, because I believe after this study on Parliamentary Performance *vis-à-vis* Directive Principles that the problem with Indian democratic governance is one of unacceptable levels of inequality and denial of equal opportunities. This is acknowledged by the Indian Constitution and some drastic remedies have been suggested also. The political leadership seem to be enthused by the strategy of "reservation" as the *panacea* for the problem of deprivation and is clinging on to it even though the Constitution makers thought of it for a short period alone. The other remedies included positive action (affirmative action) by way of developing a level playing field which required policies directed towards creating equal opportunities for the deprived section: more schools for them, more hospitals for them, more infrastructure and communication facilities for them, in short, acting on the entire package of Directive Principles. Nobody brought hard evidence on deprivation and discrimination as a result of lopsided Government policies to the attention of Parliament. When it was so brought by the Sachar Committee[1] on the plight of Muslims, Parliament acted swiftly and vigorously through a series of policy initiatives. Taking a cue from it, what is proposed is a legislation to set up an Equal Opportunity Commission constantly monitoring the denial of equal opportunity in accessing basic needs (education, health, housing, work) by groups of people of different identities and act on behalf of them with the Government and Parliament. In fact, this ought to have been the major function of the National and State Human Rights Commissions; but they do not have the capacity to generate such hard data across the country on which alone Governments (and even Courts) can be moved to grant reliefs. Hence the need for an Equal Opportunity Commission possibly combining it with the existing Human Rights Commissions.

Policy-Making on Social Issues to be more Inclusive and Consultative

Democracy is about consultation and consensus building. The more opportunities are provided for consultative development of policies the more effective is their implementation and outcomes. When there are multiple layers of Government with concurrent powers and shared responsibilities, there is no alternative to consensus building not only on policies but also on institutional mechanisms proposed for implementation. In the Indian context it is important that Central

1. Committee set up under Justice Rajender Sachar by Government of India to look into the status of Muslims and their under-development.

policies on matters in the Concurrent List and State List are initiated only after full consultation on objects, powers, functions, responsibilities of the legislation proposed. The Constitution in its functioning over the years has titled more and more powers to the Centre far beyond the expectation of the Constitution-makers. At least, this is the general perception which erupted in open disputes between Centre and States in recent times resulting in stalling legislations in Parliament. The action of the Centre in transferring State subjects to Concurrent List (education for example) and legislating on state subjects ostensibly to implement international agreements and treaties entered into by the Union executive are often cited to show Central intransigence to abide by the federal principle.

Unfortunately the Inter-State Council provided under article 263 is seldom utilized to thrash out policies. The National Development Council does not get time needed to go into details of policy with the result vital policies concerning States are dealt with administratively by the bureaucrats. Parliament prescribed mandatory public hearings in matters affecting ecology and environment. The practice needs to be replicated in specific sectors of governance where policies are evolved which affect the basic needs and livelihood of the people. This is now administratively possible with the Panchayats and Municipalities with the District Planning Committees in place throughout the length and breadth of the country.

The Parliamentary Committees on legislation do hold public consultation before submitting their reports to Parliament. But the response is largely from urban elite groups and activists working in specific areas. The idea of bottom-up planning processes envisaged by the Panchayat Raj system are supposed to strengthen and streamline policy development in this regard. Given the diversities of Indian polity it is important that policies are sufficiently flexible to accommodate regional needs and demands. Furthermore, spaces have to be created for civil society to participate in policy-making outside the formal official structures.

Article 350 of the Constitution speaks about representation by citizens to redress grievances. Every person is entitled to submit a representation for the redress of any grievance to any office or authority of the Union or a State in any of the languages used in the Union or the State as the case may be. This will become effective when citizens are told of their rights and entitlements which different offices are supposed to service on behalf of the Government. Citizens Charter is now becoming popular and when the Lokpal Bill is enacted hopefully it would become a statutory requirement from every department.

Federal Management of Right to Education in USA

The Right to Education Act is now part of the legal system. Every child is guaranteed elementary education upto 14 years as a fundamental right. The Centre, State and local Governments have shared and concurrent responsibilities. Finances are to be provided by Centre on a mutually agreed formula. The mechanism for redressal of grievances is the Commission for Protection of Child Rights which is yet not in place in many States. There are many issues relating to quality assurance and accreditation still to be resolved.

In this context it will be interesting to see how the right to education is organized in some other federal democratic countries. In USA, States including local authorities are primarily responsible to evolve education policies in respect of elementary and secondary schools. The role of the federal government is marginal. In 1965, President Lyndon Johnson signed the Elementary and Secondary Education Act as a part of his War on Poverty initiative that provided for approximately $2 billion in federal funding to improve educational opportunities for the disadvantaged. Over the next four decades, the ESEA was reauthorized eight times, and the federal government's involvement in education grew. By 2002, the law had ballooned into the 1,100 page No Child Left Behind Act of 2001, funded at $22 billion. Meanwhile it was found that the academic achievement has not improved which created concern on policy planners. The Bush Administration seeking to enhance local control and reduce federal involvement in education brought in the No Child Left Behind Act, 2001 with five distinct objectives: increase accountability for student performance, focus on what works, reduce bureaucracy and increase flexibility for States and school districts, and empower parents with school choice. It is said the objectives are only partly achieved and distortions crept in. Doubts arose on the wisdom of decoupling education policy authority and funding responsibility. Greater federal involvement with school education has not helped to improve student achievement. To the contrary, they have created a convoluted reporting system that has encouraged the proliferation of State bureaucracy and a compliance mentality among State and local officials.

The American Congress then created a Charter Option under which a State could opt for a contractual relationship that would allow State and local authorities to make decisions based on how best to help students with available resources. The contract would free State and local school authorities from federal regulations and red tape. Under the contract, State elected officials would have the discretion to

consolidate and re-focus funding on State-directed initiatives in exchange for monitoring and reporting academic results.

The Charter Option would allow different States to pursue differing methods to enhance student learning. Federalism would give each State the freedom to implement its reform strategies while learning from the successes and failures of other States' reforms. In summary, the contract would consist of a designation of federal programmes to be included in the flexibility agreement and a description of the States' academic testing, monitoring and public reporting system. It acknowledges States and local bodies as the appropriate formulators of policy on school education, the federal government would simply provide aid for education while verifying that States are accountable to the citizens for the expenditure of those funds and the results they yield.

The Second Commission on Centre-State Relations appointed by the Government of India recommended that the Government consider the U.S. approach in the matter of education policy implementation under the Right to Education Act.

Alternate Models in Delivery of Public Services

India has to evolve an appropriate model of federal governance to be able to provide the best of public services to the people at reasonable cost and efficiency. Otherwise, as a former Prime Minister discovered, the administration would eat up the bulk of money spent leaving the beneficiaries getting not even one-fourth of their entitlements. Such a situation will bring discredit to democracy itself. It is therefore necessary to look at alternate models of federal governance in other democracies to select best practices suitable to the Indian situation. Three models are often cited by writers and commentators of federal administration.

In the model described as unilateral federalism, there is not only inter-dependence but the relationship is hierarchical in which the federal government by and large directs provincial policy, usually through conditional funding. "An instance of this model is the Canada Health Act, 1984 that included a penalty regime, under which the federal government would hold back funding to those provinces that failed to meet any of the Act's criteria. Immediately following the Act's introduction in 1984, the federal government announced it would be applying penalties to those provinces that permitted user fees and extra-billing (the federal government later released the money it had held back, but only when the provinces had eliminated these practices). In the 1990s, the federal government applied the penalties on several occasions, mostly when provinces permitted the application of user fees in private medical clinics.

From the perspective of the federal government, the introduction of the Canada Health Act was an important instrument to maintaining certain national standards in public health care. The experience of this model in Canada has been that from the perspective of the provinces, the federal action was viewed as an encroachment on provincial authority and jurisdiction. This concern was magnified, moreover, by the fact that the federal government had significantly, and unilaterally, reduced its financial commitment to provincial public health care plans."[1] The model is considered the most effective for national programmes due to minimum overlap between policies and advantages of economies of scale. On the other hand, its weakness is that infringes upon jurisdictional autonomy of provinces.

In scenarios in which there is inter-dependence and the relationship is non-hierarchical, the model is described as collaborative federalism. Here, the federal and provincial governments work collaboratively to attain policy goals, and there is no coercion on part of the federal government. "An example is the Canadian Social Union Framework Agreement. The main features were the commitment to obtain provincial agreement before introducing new programs and the agreement on a collaborative mechanism for settling disputes. The provinces and territories agreed to eliminate residency-based policies that constrained access to social transfer; not introducing new social programs funded through inter-governmental transfers without the agreement of a majority of provincial government; and providing prior notification before introducing new Canada-wide social programs funded through direct transfers."[2] This arrangement respects jurisdictional autonomy of provinces while implementing national policies. However, critics point out that this model requires an effective dispute resolution mechanism and blurs accountability.

In Germany exists a third model which is described as Co-operative federalism. Wherever there is need for co-operation between levels of government to get things done, this model emerges even if there is necessarily no co-operation. "In Germany, what you find is a real division of labour between the Federal Government and the Lander. The Federal Government does not deliver health services but does provide the regulatory framework and policy settings within which the Lander and the private sector provide health care. This includes issues

1. Jay Makarenko, Canadian Federalism and Public Health Care: The Evolution of Federal-Provincial Relations, January 30, 2008, available at http://www.mapleleafweb.com/features/canadian-federalism-and-public-health-care-evolution federal-provincial-relations.
2. *Ibid.*

such as insurance, quality control, funding and national priorities in terms of health. Responsibility really is split but it tends to be a division of labour between the setting of regulatory and policy frameworks (Federal) and the delivery of services and provision of infrastructure (Lander/Gemeinde)."[1] In the German model the Lander is responsible for the delivery of services and the federal government is responsible for setting out the policy and regulatory frameworks. In co-operative federalism the role and responsibilities of different tiers of government are defined. Obviously, the institutional design here is critical for effectiveness of policy and delivery of services. Otherwise delays and distortions are inevitable which may defeat the objects.

It appears from the above description of federal governance, the system adopted under the Right to Education Act, in India is closer to the co-operative model of Germany rather than the "co-ordinate" system of Canada. It remains to be seen how it protects the jurisdictional autonomy of States, impacts the delivery of services by the Panchayats and upholds the national objects and policies. If it works in all respects, it might turn out to be the appropriate model for implementation of Directive Principles under the federal arrangement.

Public-Private Partnership for Effective Delivery of Public Services

PPP is an idea widely discussed in different sectors of governance though has not yet become popular with consumers of public services. There is fear that it is a measure of the State disowning responsibility and enabling private sector to capture the so-called regulatory agencies. PPPs are different from privatization. While PPPs involve private management of public service through a long-term contract between an operator and a public authority, privatization involves outright sale of a public service or facility to the private sector.

The Eleventh Five-Year Plan welcomed private participation saying, involvement of private sector in public services may help in introducing innovative ideas, generating financial resources and injecting corporate management practices resulting in improvement of service efficiency and accountability to users. Anyway private enterprise will get in wherever there are gaps in delivery of services. As such it is prudent for governments to find out mechanisms for legitimizing the activities of the private sector by actively participating them in the formulation of policies and implementation of programmes. To make such partnerships sustainable, Government should formulate policies which

1. Roger Wilkins, Federalism – Australia and New Zealand School of Government – 11 September, 2008, available at, http://www.ag.gov.au/www/agd/agd/agd.nsf/Page/About the Department_Speeches_2008_Federalism-Australia and New Zealand SchoolofGovernment-11 September 2008.

are people friendly and cost-effective. Often PPPs run into trouble because of non-transparent and preferential selection processes and lack of accountability systems. Mandatory social audit can enhance accountability. An independent regulator can also extract accountability from private players through supervision and monitoring.

Social Audit as an Accountability Mechanism

Social audit has emerged as one of the most powerful accountability mechanism if scientifically organized to test the efficiency of welfare programmes for weaker sections. A report on the Andhra Pradesh experience in using social audit to monitor the NREGA programme demonstrate its potential.

Andhra Pradesh utilized the accountability and transparency measures enshrined in NREGA legislation for all NREGA works across the State. The Government reportedly took pro-active steps to open itself up to scrutiny by citizen groups. The first step in this direction was to computerize the entire implementation process of NREGA. All the data is public and available for scrutiny. The social audit process is facilitated by the Rural Development Department through the Strategy and Performance Innovation Unit (SPIU) that provides the organizational backbone to the process. The SPIU is headed by a director, who is drawn from the state civil service cadre. The presence of civil society ensures that there is a high degree of autonomy and objectivity to the exercise. It is one of the most important checks and balances mechanism that have been built in to the process. The director SPIU together with the social development specialist is responsible for taking all policy and management decisions related to the conduct of Social Audits on NREGA. The State Resource Persons (SRPs) are responsible for managing the day to day aspects of conducting the social audit. This includes drawing up the social audit schedule, training district level resource persons, liaisoning with district level officials and ensuring follow-up to social audit findings. The District Resource Persons (DRPs) are responsible for managing the actual conduct of the social audit. This includes identifying the village social auditors, training the village social auditors along with state resource persons, filing RTI applications for accessing government documents and interacting with the mandal level officials to organize logistics and the public hearings. The social audit itself is conducted by volunteers from the villages.[1]

1. *See* Yamini Aiyar and Salimah Samji, 'Transparency and Accountability in NREGA: A case study of Andhra Pradesh', available at http://www.accountabilityindia.org/admin/uploads/publicationfiles/311244199489.pdf.

With flagship programmes like Sarva Shiksha Abhiyan, National Rural Health Mission and NREGA in operation nation-wide, it is important that delay and corruption are not allowed to subvert the objects of reaching basic needs to the needy and the poor. The delivery process needs to be monitored and evaluated periodically not only to keep corruption at bay but also to enrich the scheme with best practices gathered in administration of similar programmes elsewhere. This calls for social audit which is important in democratic governance as it brings in transparency and participation besides accountability. The NREGA Guidelines occupy an entire chapter of the Act. As the Act says "one simple form of social audit is a public assembly where all the details of a project are scrutinised; however, Social Audit can also be understood in a broader sense, as a continuous process of public vigilance". In effect, Social Audit is a unique approach through which the people work along side their government in the designing of policies, schemes and legislations. It is a continuous process through which the stakeholders and the intended beneficiaries of the project are involved at every stage from planning and implementation to monitoring and evaluation. The superiority of Social Audit lies in the fact that when contrasted to institutional or government audits, Social Audit actually guarantees that the decision-making process is informed by the views of the stakeholders and beneficiaries and thus takes into account the local conditions appropriate for designing and implementation of the policies, thereby most effectively serving the public interest. In the Social Audit Forums information will be read out publicly and people will be given an opportunity to question officials, seek and obtain information, verify financial expenditure, examine the provision of entitlements, discuss the priorities reflected in choices made, and critically evaluate the quality of work as well as the services of the programme itself[1]. Section 4 of the Right to Information Act which mandates the proactive disclosure of the important documentation of NREGA to the people even without a demand being made to that effect by the person concerned goes further to strengthen the process of Social Audit. So also the Citizens' Charter provided for in the Guidelines which lays down the minimum service levels mandated by the provision of the law on the Panchayats and the officers concerned helps the process of Social Audit.

Given the prospects of what Social Audit can do for Good Governance in delivery of socio-economic rights, it is worthwhile for Parliament to think of a Central legislation on the subject providing minimum standards for conduct of Social Audit. The entire focus is not

1. NREGA Guidelines.

just in uncovering irregularities but on participation and performance promotion. The process has the potential to change the very dynamics of the power equation between the decision-maker and the beneficiary. Social Audit thus brings rights to the people without intervention of courts or officials. It cultivates the habit to be vigilant on duties on the part of people in order to claim rights. Government in the process becomes just a facilitator at the delivery level. In this sense the NREGA is the first legislation in the history of independent India to have given the kind of space and role to people in participatory governance of welfare schemes.

Inclusiveness Involves Participation in Decision-making

For almost thirty years after the Constitution, it was possible for the Centre to manage with what may be called Unilateral Federalism (described elsewhere in this report) under which the Centre could initiate measures with some success in various spheres such as public policy, social equity and governance to bring about some uniform standards. Slowly it was found that without flexibilities to accommodate local diversities, administration would not succeed. This led to revision of "one policy fit all" approach, top-down planning and bureaucracy controlled administration. This led to a movement towards more collaboration and responsiveness resulting in what may be called Collaborative Federalism. Such collaboration meant higher levels of partnerships in policy making and public administration, greater dependence on third party dispute resolution and increased involvement of various non-governmental players including private enterprise and civil society groups. It was soon realized that if the ultimate objective is inclusive growth, citizen participation would have to be at the core of the identification and choice of policy as well as the implementation arrangement. This resulted in a shift to what may be called Co-operative Federalism in which the State, the stakeholders and the beneficiaries co-operate with shared and joint responsibilities, functions and powers.

Local self-government institutions helped to give meaning and content to inclusive governance. Panchayat Raj therefore must become the principal governance structure if economic development should result in inclusive growth. The concept of power-sharing in decision making is inherent in federal democratic administration and India provides a good example of its imperative need. The dispersion of authority both vertically (across levels/tiers of government) and horizontally (over multiple institutions and agencies or decision makers) will enable more careful decision-making, control of abuses of power, and institutionalization of policy-making cross-checks.

Assuming the above considerations are fairly well incorporated in the constitutional framework, the question to be examined is why it did not result in inclusive growth as expected. Will the scheme proposed under the Right to Education Act, 2009 or the proposed National Health Bill be more promotive of inclusive development? Based on the experience of Canada in organizing health care services referred earlier, one would argue that there should be clarity on the extent of independence or inter-dependence a policy or programme envisage in decision-making, funding or implementation. How much the action of one level of government may impact the other and influence its choices decisively? Where that impact requires the second order of government to make only modest adjustments to its programme, the relationship is more independent than inter-dependent. Where the impact effectively forces important changes in the priorities or structures of the second level of government, the relationship is more inter-dependent.

Education and Health are two basic rights the treatment of which by Parliament and State Legislatures in the coming years will determine the course of democracy, rule of law and governance in the country. These two rights are essential for enjoyment of all other rights and people are increasingly aware of their importance to live a life with dignity. Equality jurisprudence will provide the launching pad for people's struggle and a testing ground for good governance. The challenge for the leadership is to find new strategies for expeditiously and effectively implementing the obligations set by the Directive Principles of State Policy particularly in respect of education and health.

ANNEXURES

1. **ROLE OF LEGISLATION IN THE PROMOTION OF PUBLIC HEALTH.**
2. **LAW MAKING IN CULTURALLY DIVERSE, FEDERAL DEMOCRACIES: BUILDING ON EXPERIENCE OF STABILITY AND CHANGE.**

ROLE OF LEGISLATION IN THE PROMOTION OF PUBLIC HEALTH

A PRESENTATION FOR PARLIAMENTARIANS

UNDER THE AUSPICES OF

DR. S. RADHAKRISHNAN CHAIR ON PARLIAMENTARY STUDIES
(RAJYA SABHA)

ON 5TH SEPTEMBER, 2011

AT PARLIAMENT ANNEX, NEW DELHI

PROF. (DR.) N.R. MADHAVA MENON

Appendix I

Role of Legislation in the Promotion of Public Health

Public Health, a Basic Priority in Law Making

Public health relates to conditions in which people are enabled to be healthy and to the powers/functions of the State/society to limit individual rights for the preservation of conditions for people to be healthy. Naturally it is not a subject which can be appropriated or comprehended by any one branch of knowledge. Medicine, Law, Public Administration, Politics, Economics, Social Work and Management have legitimate claims of ownership of public health spaces.

Increasingly, health is being perceived all over the world as a basic human right and public health law is being constructed on the basis of a jurisprudence informed by State's powers and obligations to keep the people healthy. What is promised by international human rights instruments is "the highest attainable state of health", the content of which is dependent on time, place, resources and state of development. This is the reason why the Indian Constitution has put right to health as part of Directive Principles of State Policy and mandated Parliament to implement them while making laws (article 37). Parliament can even amend fundamental rights for implementing the Directives, so long as the amendment does not alter the basic features of the Constitution (article 31C). All constitutional provisions, Supreme Court held, may be construed in the light of Directive Principles. Article 37 does declare Directive Principles as fundamental in the governance of the country even while, for obvious reasons, they are not made enforceable through courts. This has made the role of Parliament in the implementation of Directives so crucial for social welfare and good governance. The task of Parliament is to make laws incrementally to implement Directives even when the Government of the day neglects or postpones action on the Directives. Executive may have other priorities; but Parliament can

never ignore the Directives which are addressed directly to the law makers in article 37. As such, if one were to assess the performance of legislatures in constitutional governance, an important parameter can well be the extent to which laws have been made in the implementation of Directive Principles.

Core Content of Right to Health

What is the core content of right to health? The World Health Organization in 1978 in the *Alma Ata* Declaration (Health for All by the year 2000) identified six essential components of a programme to achieve "the highest attainable standard of health". These are—

(i) Preventive health services like immunization, family planning, sanitation etc.

(ii) Emphasis on maternal and child health care.

(iii) Education of people on health issues.

(iv) People's participation in planning and implementation of health care services.

(v) Priority in health care to vulnerable and high risk groups.

(vi) Provision for equal access to individuals to health care at affordable cost.

Alma Ata Declaration provides an agenda for Parliamentarians to pursue for promotion of public health. Constructing States' obligations in this regard, positive and negative, is a task which policy makers who are aware of the inequalities and inequities of Indian society have to worry about. On the one hand, States' policies of development shall not deprive people of their livelihood or increase the health risks they are exposed to. These are negative obligations in the sense how law making should restrain itself in the interest of public health. On the other hand, State has obligations to create better conditions to promote public health (housing, nutrition, sanitation, water supply etc.) and to ensure that every section of people particularly the weaker sections have equal access to health services in treating diseases and alleviating suffering.

Health and International Human Rights Discourse

Ever since the adoption by the world community of the Universal Declaration of Human Rights (1948), public discourses relating to health have been conducted in the language of rights on the assumption that the State has definite obligations in the maintenance of public health, that is, conditions in which people can live healthy. In 1966, the international community articulated the right in article 12 of the Covenant on Cultural, Economic and Social Rights in the following terms:

" (i) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(ii) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the still birth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

India is a signatory to the Covenant and is obliged to implement the obligations under it. India inherited a fragmented, inequitous and ineffective health systems from the British which hardly could subserve even the minimum standard of health care to all its citizens. Health reforms were therefore an imperative necessity and the States were required to invest heavily to build the health infrastructure and services. The investment today in healthcare on the part of States and Centre is estimated to be less than 5% of the country's gross domestic product, far too little to assure "health for all".

Historically, health was dependent on income and employment, housing and environment, nutrition and food, water and sanitation, rather than availability of health care systems and services. With the model of development now being pursued, health is now related to more areas like accident prevention and waste management, medical education and health insurance, town planning and family planning and many other disparate issues. Health policy therefore has become too complex and inter-related to a variety of other policies pursued in the name of welfare and development. Hence law makers need to appreciate the health dimension of every new development initiative they might undertake if public health is to be considered as a pre-condition for all development.

Since the recognition of health as a basic human right under the Covenant on Economic, Social and Cultural Rights, International Health Law has been developed by U.N. bodies like WHO, ILO etc. mainly on three fronts. *Firstly*, they aimed to give meaning and content

to health rights in relation to disadvantaged sections of people. Thus, U.N. evolved the health rights of children in the Convention of Rights of the Child, health rights of the Disabled, the elderly, the mentally ill, women, indigenous persons, AIDS-affected persons etc. in separate Conventions. ILO has added several Conventions on occupational health and health rights of workers. *Secondly*, international health law provided for measures to control the international spread of diseases including quarantine and immunization regulations. *Thirdly*, international initiatives in the health sector related to setting standards on medical experimentation on human beings, clinical research, organ transplantation, access to healthcare services, reduction of health hazards, food and drug safety etc. Because of weak mechanisms in the enforcement of international law, the growing body of international health law requires municipal legislation to support effective implementation. Some aspects of it, however, get incorporated as part of ethical codes informing the conduct of health personnel to be implemented by peers of the respective professions. In any case, international law is a source for domestic law making and Parliament is obliged to act in this regard under the Directives included in article 51 (foster respect for international law and treaty obligations) of the Constitution.

Health and the Indian Constitution

The Indian Constitution deals with 'health' in multiple ways: as part of the right to life in article 21, as part of the Directive Principles for making laws in articles 42 and 47 and as part of the shared responsibility of the Union, State and Local Governments (Seventh, Eleventh and Twelfth Schedules).

It was left to the Supreme Court to clarify that right to life is indeed right to live with dignity and not a vegetable life. While the court conceded that the content of right to live with dignity would depend on the extent of development of the country, "in any view of the matter, it would include the bare necessities of life and also the right to carry on such activities as constitute the bare minimum expression of the human-self" [*Francis Coralie Mullin* v. *The Administrator, Delhi*, (1981) 2 SCR 516]. In a series of decisions thereafter, the court ruled that just and humane conditions of work and leisure to workmen are a part of the meaningful right to life of workers (*Consumer Education and Research Centre* v. *Union of India*, AIR 1995 SC 940), that right of access to emergency medical treatment is part of right to life (*Katara* v. *Union of India*, AIR 1989 SC 2039), that non-availability of services in government health centres amounted to a violation of article 21. (*Paschim Banga Khet Mazdoor Samiti* v. *State of West Bengal*, AIR 1996

SC 2426). In this case the claimant was refused treatment at eight state-run medical institutions in succession because of non-availability of beds or insufficient technical capacity. The patient was forced to undergo lot of suffering and get medical help in a private hospital at great cost. While awarding compensation to the person, the Court held that right to emergency medical care was a core component of right to health. Using the same logic, the Indian judiciary ruled on the duty of the State to maintain quality and safety of blood banks, establishment of primary health centres in every village, ban of hazardous drugs, control of inhuman conditions in State-run care homes and custodial institutions, prohibit smoking in public places, prevent discrimination in treatment of HIV patients etc. The significance of these judgments lies not in just empowering the people but more importantly in reminding the Executive and the Legislature of their constitutional obligations and prompting them to act in relation to improvement of public health. A rights-based approach around articles 21 and 14 did bring about some desirable changes in health status and administration at a time when the Governments were loath to invest in health reforms. The development of medical negligence law by courts is another significant contribution in improving the standards of care in medical services and hospital administration.

The role of legislation in public health development is emphasized, *inter alia*, in three specific Directives in Part IV of the Constitution. They are articles 39, 42 and 47 where the language of rights and duties is employed to articulate the role of the State in public health while making laws.

Article 39 : The State shall direct its policy towards securing—
(e) 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 vocations unsuited to their age or strength.

Article 42 : The State shall make provision for securing just and humane conditions of work and for maternity relief.

Article 47 : The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health.

Strong language is used by the Constitution-makers to emphasize that public health is among the primary duties of the State and

Directive Principles are fundamental in governance, meaning thereby they are binding on all three wings of the Government. This message is further clear when one looks at the distribution of legislative powers in the Seventh Schedule where entries relating to public health fall in all the Three Lists – Union List [Treaties, Agreements and Conventions and their implementation (Entry 14); Quarantine and marine hospitals (Entry 28); Patents, inventions, trade marks (Entry 49); Labour safety in mines and oil fields (Entry 55); manufacture and distribution of salt and opium (Entries 58 and 59); professional and vocational training (Entry 65); inter-State migration and inter-State quarantine (Entry 81)] – Concurrent List [Lunacy and mental deficiency (Entry 16); Adulteration of food stuffs and other goods (Entry 18); Drugs and Poisons (Entry 19); Economic and social planning (Entry 20); Population control and family planning (Entry 20A); Social security (Entry 23); Welfare of Labour (Entry 24); Education including medical education (Entry 25); Medical profession and other professions (Entry 26); Prevention of infectious or contagious diseases (Entry 29); Price control (Entry 34); Factories and Boilers (Entries 36, 37)]. These are items in which the Union Parliament is entitled to legislate which have a direct bearing on health. Besides, residuary powers are always with the Union which enables Parliament to occupy health-related aspects not included in any of the three Lists.

Of course, the entries in the State List specifically empowers the State Legislatures to make laws on Public Health and Sanitation, Hospitals and Dispensaries (Entry 6); Manufacture and Sale of Intoxicating Liquors (Entry 8); Relief of the Disabled (Entry 9); Local Self-Government and Village Administration (Entry 5); Water Supplies and Drainage (Entry 17); Industries (Entry 24) etc. Schedules Eleven and Twelve which relate to items on which Panchayats and Municipalities can exercise powers include entries like water management, food processing industries, drinking water, poverty alleviation programmes, education, Technical training, Health and Sanitation including hospitals, primary health centres and dispensaries, Family Welfare, women and children development social welfare including welfare of handicapped and mentally retarded, welfare of weaker sections etc.

Reading the constitutional provisions and scheme for promotion of public health, one gets the impression that the Constitution-makers have taken meticulous care in identifying what each level of government can and should do in relation to public health and its administration in the most efficient way. It is up to the elected representatives at each of the three levels of government to realize their responsibilities and act by making appropriate laws on different aspects

of health in respect of the Entries in the three Lists as well as in the Eleventh and Twelfth Schedules.

Health-related laws basically perform half a dozen distinct functions in terms of policy and administration. *Firstly*, it confers rights on individuals and institutions in the matter of health claims and services. *Secondly*, it prohibits conduct which has unacceptable levels of risks and regulate products and processes injurious to health. *Thirdly*, health laws authorize and regulate programmes and services promotive of health. Financing health research and health care services is another function of health laws. Exercising quality control on health care services is yet another important function of health legislation. In all these functions there are certain constitutional values which determine policy structure and scope. Thus, equality and non-discrimination are key standards which legislations have to incorporate. Equally important in the Indian conditions are the values of equity and social justice which in the health sector will call for many affirmative action strategies in delivery of services. Of late, efficiency and inter-sectoral co-operation in management of health policies have become critical factors in health legislation. Public participation is also actively canvassed on statutory basis to enhance efficiency and accountability of health care services. The opening of health sector to the market forces has introduced a new dimension for greater legislative activity in coming years. In short, health laws, most of which are of pre-Independence vintage, do call for a comprehensive look on the part of law makers to make them subserve the constitutional goals and standards.

To be able to appreciate the tasks ahead, one may look at the legislative record under articles 42 and 47 in the last six decades and the schemes being implemented at the instance of the Health Ministry in the context of the political economy now in place and the constitutional mandate in respect of public health.

A quick look at health laws in the Indian Statute Book reveals certain interesting facts on the performance of Legislatures and Executive Governments of the past in the country. There are over hundred legislations at the Union level and an equal number at the State level. Over hundred and fifty Centrally-sponsored schemes and programmes based on administrative rule-making involving huge financial investments are in place or have been there for different periods. A number of health-related policies and declarations including mission level programmes govern the field emphasizing shifting priorities on the part of the Union Government in the health sector. At least two major Commissions and several expert committees have given reports on how the state of health of the people can be improved and

policies and investments corrected to improve public health. Disasters and calamities, natural and man-made, have also contributed to the spurt of legislative and executive action outside the regular policy framework. A general survey of the existing health law scenario is what is attempted here with a view to understand the legislative mind and pre-occupation in respect of public health.

Pre-Constitution Laws on Public Health

Nearly one-third of the existing health legislations are enacted during the British period mostly intended to protect imperial interests in the colony and the health of the British employees in India. They are mainly directed at controlling communicable diseases, preventing occupational risks of workers in plantations and mines and providing medical services to British subjects and employees. A sample of laws enacted during the period will illustrate the point:

1. The Epidemic Diseases Act, 1897
2. The Lepers Act, 1898
3. The Explosives Act, 1884
4. The Explosive Substances Act, 1908
5. The Destructive Insects and Pests Act, 1914
6. The Indian Medical Degrees Act, 1916
7. The Poisons Act, 1919
8. The Indian Red Cross Society Act, 1920
9. The Workmens' Compensation Act, 1923
10. The Drugs and Cosmetics Act, 1940
11. The Indian Nursing Council Act, 1947
12. The Dentists Act, 1948
13. The Employees' State Insurance Act, 1948
14. The Pharmacy Act, 1948
15. The Factories Act, 1948
16. The Industrial Disputes Act, 1947
17. The Industrial Employment (Standing Orders) Act, 1946
18. The Minimum Wages Act, 1948
19. Payment of Wages Act, 1936
20. Plantations Labour Act, 1951
21. The Provident Fund Act, 1925
22. Dock Workers (Regulations of Employment) Act, 1948

Health Laws During 1950-1985

Soon after the adoption of the Constitution, during the life of the initial six Lok Sabhas, a whole set of welfare laws intended, among other things, to improve public health have been enacted by Parliament, supplemented by a series of health legislations at State level. They are mostly based on specific objectives identified by the Five-Year Plans which the country adopted from the beginning. Some tentative inferences can be drawn on the health priorities of Parliament during the period from an examination of the list of statutes enacted between 1950 and 1985. This period is suggested because the Bhopal Disaster of 1984 was a critical event in Indian public health history which made a decisive impact on the attention of Parliament to the large legislative deficit on ecology, environment, industrial safety, mass disaster response, restitutive justice, corporate responsibility for mass torts, role of insurance and related issues. A spurt of legislative activity took place in the post-1984 period partly in response to the post-disaster experience.

The major legislative enactments of the period 1950 to 1985 are listed below:

1. The Mines Act, 1952
2. The Prevention of Food Adulteration Act, 1954
3. The Indian Medical Council Act, 1956
4. The All India Institute of Medical Sciences Act, 1956
5. The Maternity Benefit Act, 1961
6. The Atomic Energy Act, 1962
7. The Food Corporation Act, 1964
8. The Beedi and Cigar Workers' (Conditions of Employment) Act, 1966
9. The Registration of Births and Deaths Act, 1969
10. The Contract Labour (Regulation and Abolition) Act, 1970
11. The Indian Medical Council Act, 1970
12. The Medical Termination of Pregnancy Act, 1971
13. The Homeopathy Central Council Act, 1973
14. The Water (Prevention and Control of Pollution) Act, 1974
15. The Bonded Labour System Abolition Act, 1976
16. Inter-State Migrant Workers' (Regulation of Employment and Conditions of Service) Act, 1979
17. The Maintenance of Essential Commodities Act, 1980
18. The Cine Workers' (Regulation of Employment) Act, 1981
19. The Air (Prevention and Control of Pollution) Act, 1981
20. The Dangerous Machines (Regulation) Act, 1983
21. The Indian Veterinary Council Act, 1984

22. The Narcotic Drugs and Psychotropic Substance Act, 1985
23. The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985
24. The Environment Protection Act, 1986.

The list does not include the various amendments and the delegated legislations (Rules and Regulations) made under the above Acts. Nonetheless one finds that Parliament's concern during the period was to extend regulatory regimes in the interest of workers particularly in hazardous industries. Parliament showed concern with the quality of food and drugs as well as their availability in the market. Another area of concern was with the control of medical education and research and systems of indigenous medicine and their development. Finally, environment protection and pollution control became focal point of legislation for a long period in the post-Bhopal Disaster period.

Post-1985 Parliamentary Record on Public Health

In post-Bhopal Disaster years, the health agenda received relatively greater attention of Parliament and the country received a wide range of legislations including amendments to pre-existing legislations warranting increased investment both at Central and State levels. A number of factors contributed to this development. The lead role India took in the Stockholm Conference on environment and sustainable development provided a new framework in environment-related law making. The Supreme Court also acted *in tandem* to provide a progressive environment jurisprudence which created a new awareness and guidelines for action. The shock and sense of helplessness on the part of the people and governments caused by the Union Carbide's *efforts to escape liability led to legislative initiatives on several fronts* including amendment to constitutional provisions. The stunning discoveries of medical sciences and its potential to undermine human rights standards also prompted legislative responses. The list of laws made after 1985 given below is illustrative of the realization that health is too complex a field to be given only *ad hoc* responses based on problems as they arise. An attempt to look at public health comprehensively in its inter-relatedness to other sectors of governance is now being made to understand the gaps and inadequacies in existing legal arrangements with a view to give the subject a long-term agenda for legislative action to ensure minimum standards and maximum health security to people.

A select list of health laws put in the Statute Book during the post-1985 *period is given below:*

1. The Consumer Protection Act, 1986
2. The Mental Health Act, 1987

3. The National Dairy Development Board Act, 1987
4. The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988
5. The Public Liability Insurance Act, 1991
6. The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992
7. The Protection of Human Rights Act, 1993
8. The National Commission for Safai Karmacharis Act, 1993
9. The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993
10. The Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994
11. The Transplantation of Human Organs Act, 1994
12. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995
13. The National Institute of Pharmaceutical Education and Research Act, 1998
14. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999
15. The Chemical Weapons Convention Act, 2000
16. The Biological Diversity Act, 2002
17. The Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce) Act, 2003
18. The Protection of Women from Domestic Violence Act, 2005
19. The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005
20. The Food Safety and Standards Act, 2006.

The enumeration of leading health legislations enacted by Parliament during the past sixty years divided by the worst ever industrial tragedy in Bhopal is intended to give an overview of the pre-occupation of the legislature in respect of the health agenda. Some of these legislations are part-implemented either because the rules have not been framed or the institutions not set-up or the personnel not appointed – the same story with all welfare legislations. The inaction of State governments and Panchayat Raj institutions also contributed to the beneficiaries not receiving the services under these legislations. Of late, Parliament has sought to involve civil society organizations and social audit mechanisms to ensure better implementation of welfare legislations. Yet, the entry of market-oriented private sector institutions

in the health and education sectors with poor regulatory mechanisms in place have tended to weaken the delivery of healthcare services in the public sector warranting amendments in the law and rules made thereunder.

Yojanas, Schemes and Missions in Abundance

Meanwhile, the Union Executive has been bypassing Parliament with a variety of new policies, programmes, schemes, missions and Yojanas involving substantial investments outside the legislative framework, of course within its constitutional and administrative powers. These populist schemes are of *ad hoc* nature, not subject to usual standards of Parliamentary accountability and often resented by the States who have the responsibility to implement them. These Centrally-sponsored Schemes include a wide spectrum of activities some of them significantly related to the legislations in place. The problem is not with the Yojanas themselves; the beneficiaries have little information of their entitlements, reach and scope, the States are often forced to adopt their implementation in a uniform pattern which sometimes distorts the very purpose of the scheme, and at the end of the day there is much less accountability for the money spent.

The National Rural Health Mission

The National Rural Health Mission (2005-2012) which is supposed to end next year provides an example of centrally-sponsored schemes in the health sector creating high expectations but ending with great disappointments. The Mission was launched in 2005 to provide accessible, affordable and accountable quality health services even to the poorest households in the remotest rural regions of the country. The thrust of the Mission was on establishing a fully functional, community owned, decentralized health delivery system with inter-sectoral convergence at all levels, to ensure simultaneous action on a wide range of determinants of health like water, sanitation, education, nutrition, social and gender equality. From narrowly defined schemes, the NRHM was taking the efforts to a broad-based functional health system from the village to the district. What better articulation of health goals can be there than what is represented by NRHM? This is nothing but an official recognition of the fact that health and quality of life of people is the single-most important determinant of economic and social development.

The state of public health remains totally unsatisfactory especially in rural areas even after five years of NRHM. The capacities of health infrastructure are deplorably poor. Village Health and Sanitation Committees have been formed reportedly over 70 per cent of villages

and they have been given grant of Rs.10,000 each. District Programme Managers, District Accounts Managers, District Data Managers and several such officials have been employed under the programme management plans of NRHM. We are told that several hundred Rogi Kalyan Samitis have been formed and funded to improve quality of health services. An evaluation of the scheme reports that "the experience gives us the confidence that we are on the right track and that we need to deepen institutional reforms and effective decentralization through a concerted effort at capacity building and accountability systems". Such a finding on the performance of a major Executive public health exercise provides an ideal situation for legislative intervention, it is submitted.

The Draft National Health Bill, 2009

The highly fragmented, executive-driven and accountability deficit public health sector in India is expected to receive a legislative face lift with the adoption of the much-awaited National Health Bill which has been in the pipeline for too long. There is no lobby or pressure group to bring it before Parliament as the Lok Pal Bill received from people like Anna Hazaare. Anyone looking at contemporary health statistics will be convinced that the time for a comprehensive legislation on health services has come and it will tell upon the whole process of social and economic development if we do not act now. If fact, alarmed at the delay in moving the National Health Bill in Parliament, the Assam Government has got the Assam Public Health Act, 2010 enacted by the State Legislature. While the States' contribution to public health expenditure is over 80 per cent, that of the Centre is less than 20 per cent and that speaks a whole story about Union involvement in health sector. There are striking regional inequalities in availability of healthcare services. Less than 10 per cent of Indians have some form of health insurance. On an average, nearly 60 per cent of total family income is spent on health-related expenditure. With private hospitals and nursing homes taking the space, health expenditure of Indians is bound to increase pushing more people below the poverty line. The health inequities may retard economic development and may raise social conflicts in coming years if the issues are not addressed.

It is in the above context the provisions of the National Health Bill is to be analyzed and the Bill itself prioritized in the Parliamentary agenda. The Bill does take account of the inter-relationship between health outcomes and related issues like water, nutrition and sanitation. The Bill adopts a rights-based, inclusive approach and emphasizes the need for a comprehensive, broad-based legal framework to bring the public, private and voluntary sector together.

For a rights-based scheme, it is important to set the obligations upfront. The Bill in the second chapter lists the obligation of governments in relation to health and categorises them into general obligations, core obligations and specific public health obligations. It spells out the obligations of State Governments separately. There are negative obligations too, in the sense that the State and its agencies refrain from actions extinguishing or interfering with employment of existing rights to health in the name of development etc.

The Bill articulates right to health as a bundle of separate rights under individual and collective categories. It includes right to receive quality health care, rights against discrimination, right to dignity and information, right to confidentiality and the right to consent and refuse treatment. Of course, those providing health care services also have rights which the users are supposed to respect.

The infrastructure proposed by the Bill includes National and State Public Health Boards, Health Information Systems and a monitoring mechanism involving Government and community-based mechanisms. With citizen participation, the Bill envisages a disputes resolution mechanism (*Jan Sunwais*), in-house complaints redressal forums in public health establishments, health courts in every district, Health Reparation Funds in States etc.

Legislative Challenges and Constitutional Obligation

What then is the legislative agenda on public health which the Constitution commands? What are the sources from where the legislative items and concerns have to be gathered and prioritized? Is the initiative to be left to the Executive alone? Parliament has several distinct sources from which it can invoke inspiration to promote public health through law making in the country.

Firstly, the commitments under treaties and agreements. International Health Law is scattered in several treaties, conventions and agreements. The Indian Government negotiates them, undertakes obligations and agrees to implement them when they are ratified by Government of India. Implementation involves making appropriate laws for which Parliament is given complete powers even overriding the scheme of distribution of legislative powers under the three Lists. (article 253). There are instances where the Supreme Court has invoked treaty provisions to construct orders in the absence of laws which ought to have been there under the treaty obligations undertook by the Government of India.

Of course, the main source from which the legislative agenda is drawn is the Constitution itself. The entries in the Seventh Schedule as

discussed above provide a wide range of subjects on which health-related legislation are expected from Parliament. The Directive Principles particularly in articles 39, 42 and 47 focus on role of Parliament in health-related law-making.

The third source providing the key areas where legislation is called for is the series of decisions given by the Supreme Court while interpreting health rights. There are instances where the Court has pointed out gaps in the Statute Book and asked Parliament to address them. In some cases the decisions gave guidelines for the Executive to follow pending legislation on the subject.

Finally, one may even suggest the innumerable Centrally-sponsored schemes in the health sector many of which are better implemented under a statutory framework. Thousands of crores of rupees are spent under health schemes with uncertain results which have little accountability to Parliament. Many of them are not short-duration programmes and are implemented through States and Panchayats with very little control on roles and responsibilities. If they are based on legislation, the beneficiaries will get better results and public money better spent.

Health Inequalities and Inequities

Among the key challenges in the health sector is one that strikes at the root of our egalitarian social order. It is about the increasing inequality and inequity between men and women, between urban and rural people and between the rich and the poor in health conditions and in accessing health services. Whether it is in the matter of literacy, infant mortality, maternal mortality or life expectancy, the health divide is strikingly different between the poor, middle income and rich groups. "Inequalities in health describe the differences in health between groups independent of any assessment of their fairness. Inequities refer to a subset of inequalities that are deemed unfair. The unfairness qualification invokes assessments of whether the inequalities are avoidable as well as how it impacts on distributive justice as applied to health" (Challenging Inequities in Health, edited by Timothy Evans, OUP, 2001). Attaining optimal health ought not to be compromised by the social, political, ethnic, or occupational group into which one happens to fall. To the extent that disparities in health coincide with faultlines between such groups, one may make the assessment that they are unfair and therefore constitute inequities.

Deep-seated imbalances generated by discrimination and power differences often underlie disparities in health. A fully articulated effort to redress inequities in health must inevitably work in tandem with

wider efforts toward social justice – such as the provision of safety nets, protection against medical impoverishment, provision of education, jobs training and environmental risk reduction and a political voice for all (*Ibid*, p. 4). Healthcare is just one determinant of health outcomes. Others include education, gender, employment or livelihoods, social status, poverty and marginalization and urban/rural divide.

As the study on Inequities in Health (Timothy Evans) suggests, "several global trends over recent decades have made the need to challenge health inequities as a matter of greater urgency. There has been a transition in the burden of disease and the poor carry a disproportionate burden. Globalization is rapidly emerging as an important stratifier of health outcomes. The challenge before us, therefore, is not merely the promotion of health, but a fair chance for all to achieve it".

A recent study on the health status of Indian people (Public Health in India by Dr. Imrana Qadeer, Daanish Books, 2011) after analyzing available data bring out the following trends:

" 1. The so-called preventable diseases are still the major causes of death and disease in India.
2. The pattern of disease has not changed very much and infections and nutritional problems continue to head the list.
3. The preventable diseases have persisted in spite of an undeniable expansion in the health services structure". (p.31).

The author further states that the health services system in place is characterized by inequality of resource distribution, inequality of access, inequality of participation and inequality of health status.

Parliament has to address these issues in the context of increasing privatization and globalization of the health sector. The obligations of private hospitals to poor patients need to be articulated through legislative provisions in the context of two Supreme Court judgments on the subject. The Court directed private hospitals to ensure free treatment to 10 per cent of in-patients and 25 per cent out-patients on the ground that these hospitals received subsidized land on the promise of treating the economically weaker sections free of charges. A framework law on alcohol control similar to the one on tobacco control is necessary in the context of mounting health risks particularly among the poor, the children and women. It is indeed shameful to note that India still accounts for the largest number of maternal deaths in the world (over 70,000 deaths every year) or a quarter of all maternal deaths in the world. Despite the Janani Suraksha Yojana, a scheme to boost institutional deliveries, just 47% of the deliveries are in hospitals

or other health facilities. Every year, nearly eighteen lakh children under age five die in India. Only 54% children are fully immunized. On the top of all these traditional problems, new non-communicable diseases like diabetes, hypertension, stroke, respiratory diseases etc. are taking a larger toll of human lives than all the communicable diseases combined. This is an additional disease burden where the health care costs are higher. The threat is loud and clear and is likely to affect not only the quality of life but also the productivity of what we claim to be our demographic dividend.

In short, legislation in key sectors affecting public health has assumed critical importance in socio-economic development. Economic liberalization and globalization have widened the health divide tending to aggravate health inequities. The challenges before Parliament on health front are many and complex closely related to security and development. It is too big a task to be left to States or to the market forces and is equally important as right to education.

LAW MAKING IN CULTURALLY DIVERSE, FEDERAL DEMOCRACIES: BUILDING ON EXPERIENCE OF STABILITY AND CHANGE

A PRESENTATION BEFORE MEMBERS OF INDIAN PARLIAMENT

UNDER THE AUSPICES OF

DR. S. RADHAKRISHNAN CHAIR ON PARLIAMENTARY STUDIES (RAJYA SABHA)

ON 17TH MAY, 2012 AT 5:30 PM

AT PARLIAMENT HOUSE ANNEX, NEW DELHI

PROF. (DR.) N.R. MADHAVA MENON

Appendix II

Law-Making in Culturally Diverse, Federal Democracies: Building on Experience of Stability and Change

Democracy and Development: Twin Goals of Governance

In his monumental study on "Working a Democratic Constitution: A History of the Indian Experience", Granville Austin, a constitutional historian of international repute, wrote in 1999:

"During the brief fifty years that Indians have held the reins they have governed themselves successfully against awesome odds. The seamless web woven by the Constituent Assembly into the Constitution for the nation establishing the institutions and spirit of democracy, pursuing a social revolution to better the lot of the mass of Indians, and preserving and enhancing the country's unity and integrity – is intact, having recovered from the terrible distortion of the Emergency. The inter-dependence of its strands is well understood; none can continue to exist or prosper without the others. Neither democracy nor social revolution should be sought at the expense of the other. The Constitution, above all, has been the source of the country's political stability and its open society".[1]

There was a view that feelings of regionalism, cultural identities and widespread inequalities in Indian Society would make it difficult for the new republic to sustain itself as a constitutional democracy committed to a constitutional revolution of enormous proportions. However, contrary to the prophets of doom, caste and cultural allegiances, while continuing their negative impacts on democracy and social revolution have contributed to democracy and development by becoming the focus

1. Granville Austin, Working a Democratic Constitution, OUP, Third Impression (2006) p. 633.

for political mobilization at all levels of society. The establishment of local self-government institutions under the Seventy-third Amendment of the Constitution in 1992 gave a remarkable boost to representation of women, Scheduled Castes, Scheduled Tribes and backward classes in the governance systems and institutions. The approach appears to have been that the solution to the problems of democracy is more democracy and more open and direct transaction of public affairs. Economic development in recent times acted as another powerful force against the negative influences of culture and tradition by pushing the social revolution to the centre-stage of the national agenda. In short, democracy and social revolution helped each other to take the nation in the path of progress providing a rare model of stability and growth with social justice. It is a matter of pride for every Indian to have maintained rule of law and constitutional democracy despite formidable challenges from within and outside.

The issue before the Nation today is how soon the social revolution promised by the Constitution can be brought about through constitutional processes while strengthening democracy and rule of law. Herein lies the role of law-making institutions for the future. Cultural diversity to some extent puts limitations on law making for accelerated development. Federal structure demands consensus building and accommodation of regional sentiments and needs. Democracy warrants more and more people's participation and mobilization of public opinion to support policy-making. In short, law-making for social revolution in a country of India's size, diversity and complexity is not a simple task as in countries more modern and homogenous. A critical look at Indian experience in this regard is the purpose of this presentation. The context is the recent development of people's campaign for an alternate Lokpal Bill compelling Parliament to consider it in preference to the Government-sponsored Bill. The context again is a series of non-official initiatives like Right to Information Act, Food Security Bill, Forest Rights Act, National Rural Employment Guarantee Act, the National Health Bill, Right to Education Act etc. which attracted Parliamentary attention, sometimes successfully culminating in legislation putting the Government bureaucracy in the defensive on social sector policy making. Social revolution through legislation is the constitutional mandate contained in the Directive Principles of State Policy, long neglected by the bureaucracy and the political leadership. A new era of law making for social revolution with people's participation is now under way which has very few parallels in the history of constitutional democracies, ancient and modern. One has to understand the limits and limitations of the processes involved if

one were to seek its institutionalization within the constitutional framework of a plural, federal governance structure seeking change with stability.

Law-Making in India: A Constitutional Perspective

Law-making is the prerogative of the State. Individuals need the State to protect their rights, although the State can itself be a threat to the realization of those rights. The challenge to constitutional governance is therefore, how to regulate the arbitrary exercise of power by the State and its organs. The idea of separation of powers and the creation of autonomous centres of power within the State is a device to control abuse of power. The Indian Constitution adopted this technique and based on functions of government created the legislative, the executive and the judicial branches. The idea is not only efficiency in government but more importantly, securing the liberty of the individual.

The Indian Constitution accordingly provides for the creation of the executive, legislative and judicial wings of government at the Union and State levels, specifies their composition, powers and functions and lists the items on which they can exercise exclusive and concurrent jurisdiction. The formula employed is to create three Lists under the Seventh Schedule stipulating the matters on which Parliament and Legislatures of States may make laws (article 246). The Union Parliament and every State Legislature have power to make laws with respect to any of the matters which fall within their field of legislation under article 246 read with Seventh Schedule of the Constitution.

Of course, extreme separation of powers/functions is impractical and unworkable in any modern State as government is complex business and overlapping of functions is inevitable particularly in constitutions based on the "Westminster model" of Britain. In such cases, an independent judiciary is supposed to determine the constitutionality of legislation by employing various principles of interpretation such as presumption of constitutionality, liberal interpretation including incidental and ancillary matters, application of the doctrine of *pith* and *substance* or true nature and character of the law, the doctrine of colourable legislation etc. However, the Constitution specifically provides for Parliamentary supremacy in the event of a conflict between a Union and State law in matters falling under List I or III (article 254). Article 248 confers residuary powers of legislation exclusively on the Union Parliament.

Tilting the federal arrangement in favour of the Union, the Indian Constitution contains several provisions in which Parliament's power to legislate with respect to matters contained in the State List is expressly

provided for. This is a unique way of managing distribution of powers. These include (a) power of Parliament to legislate in the national interest if two-third members of Rajya Sabha present and voting declares so by a resolution (article 249); (b) power of Parliament to legislate on matters in State List during Emergency (article 250); (c) power of Parliament to legislate with the consent of two or more States (article 252); (d) power of Parliament to make law for giving effect to international agreements notwithstanding article 246(3) (article 253); and (e) Parliament's power to legislate under article 356 when the President declared that there is constitutional break down in a State.

There are additional provisions for the Union's control over State legislation. Thus article 200 empowers the Governor of the State to reserve any Bill passed by the State Legislature for the consideration of the President which would become law only if assented to by the President (article 201). There are certain Bills, such as Financial Bills which can be introduced in the Legislature only with the prior recommendation or sanction of the President or the Governor (article 255).

As observed by Granville Austin, "The demands of national development led logically to an interventionist Central Government. This did assist the social revolution, but the excessive centralization became counter-productive. It stifled State Government initiatives dedicated to the common purpose, denied State leaders and citizens, participation in policy decisions affecting them, and encouraged doubts about New Delhi's faith in democracy. Over-centralization unbalanced many of the Constitution's provisions for Centre-State relations and set back the cause of unity. The Central Government's belief in its own infallibility and its jaundiced view of the abilities of State Governments was partly derived from the cultural elements of hierarchy, authority and suspicion of alternative centres of power"[1]. It is interesting how cultural factors influenced governance structures and patterns in ways not anticipated by the constitutional provisions.

Any way Parliament's role in law-making for constitutional governance is comprehensive and overriding despite the federal division of powers and the autonomy of States *vis-à-vis* the Union. However, given the cultural diversity, regional aspirations and fragmented polity, it is futile to think of Parliament as supreme in law-making for the country. Even in its constituent power, there are limitations intended to ensure authority of the ultimate holders of power, WE, THE PEOPLE

1. Granville Austin, Working a Democratic Constitution, OUP, Third Impression (2006) p. 657.

OF INDIA. In this sense, Constitution is supreme and constitutional institutions including Parliament are made subservient to the Will of the people of India not necessarily represented by their elected representatives alone. It will be interesting to examine this theory of constitutional democracy in terms of past experience in constitutional interpretation and practice.

Limitations on Law-making Power: Fundamental Rights and "Basic Features"

Constitutionalism and Rule of Law are the two organizing principles of Indian democracy and governance. Limited government and absence of arbitrariness in exercise of public power are the attributes of constitutionalism, while supremacy of law and equal protection of law are the foundations of rule of law. Applied to law-making, these principles imply certain norms and standards which are often taken for granted by those in government.

Human rights guaranteed as fundamental rights in Part-III of the Constitution set limits to the law-making power of the State. Article 13(2) expressly prohibits the State making any law which takes away or abridges the fundamental rights. Any law, which includes ordinance, order, rule, regulation, notification, custom or usage having the force of law in contravention of the mandate of article 13(2) is declared void. The judiciary has the power to review legislation and decide on its constitutionality with a view to protect the rights of citizens against the government including Parliament. Therefore, merely having legislative power does not make Parliament supreme in legislative matters.

To give another illustration of this inherent limitation in law making is the Equality guarantee in article 14 which militates against patently, arbitrary or discriminatory laws. A statute giving unregulated discretion to the Executive may itself fall foul of article 14.

The limitations on the legislative power even extends to situations when the Legislature exercises its constituent power to amend the Constitution itself. This is what the celebrated *Kesavananda Bharati* case[1] decided by thirteen judges of the Supreme Court declared by the doctrine of "basic features" of the Constitution. Till that time it was believed that Parliament had unfettered power to amend any part of the Constitution. This position had judicial sanction also. The events leading to its reversal is the story of conflicting interpretation of the provisions of the Constitution relating to the social revolution through

1. *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

rule of law by Parliament on the one hand and the judiciary on the other. Though ultimately Parliament had its way in pursuing the implementation of Directive Principles established through a series of constitutional amendments, the "basic structure" doctrine remained as a solid shield against claim of Parliamentary supremacy in the matter of constitutional amendments even in the face of the explicit language of article 368.

Despite the expansive ambit of judicial power, it is wrong to say that the Court is acting as a Super Legislature while sitting on judgment on laws adopted by the Parliament. Court cannot make policies or sit on judgment on them. At the same time, to advance the intention of the Constitution-makers, there are occasions in which Courts assume a *quasi*-legislature role where gaps and ambiguities exist in the law or where the full protection of fundamental rights warranted enunciation of an existing policy in conformity with the constitutional scheme and international obligations undertaken by the State. The *Visakha* judgment in the matter of sexual harassment at work places[1] and the *Lakshmi Nath Pandey* judgment[2] on international adoption guidelines are examples of judicial activism in the legislative sphere. In many instances they have been welcomed by Parliament which acted upon the guidelines enunciated by the Court.

Another questionable exercise by the judiciary interfering with legislative powers arose as a result of the importation of the "due process clause" in article 21 and the expansive interpretation of right to life under that article. From the perspective of the judiciary it was only attempting to achieve the constitutional purpose in the best way it felt appropriate in the situation. From the perspective of the Legislature, it was usurpation of its powers and functions. The judiciary defended itself by saying that court acted only in areas where there was legislative vacuum in the field of basic rights of the people and its action only strengthened democracy and the common man's faith in the rule of law[3].

It is difficult to say that the judiciary is entirely right or the Parliament is entirely right as their functions do overlap in rare situations where the rule of law has to be necessarily right. Judicial review is a necessary safeguard against majoritarian politics and authoritarian governments and is necessary for freedom and liberty. At

1. (1997) 6 SCC 241.
2. (1984) 2 SCC 244.
3. Justice A.S. Anand, Millenium Lecture reproduced in Law & Justice, ed. by Soli Sorabji, Universal Publishers, 2004.

the same time, judiciary is neither competent nor justified in appropriating legislative function beyond giving constructive and purposive interpretation of legislation. There may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the Legislature to take remedial measures. Meanwhile, one has to acknowledge the long-term impact of judge-made law on Parliamentary legislation especially in the area of socio-economic rights, environmental protection, rights of women, children and the disabled. This generally happens through the process of the Law Commission or other expert bodies making policy recommendations on the basis of judicial opinions in decided cases which the Government formulates into Bills for consideration of Parliament.

Law-making, Political Economy and the Implementation of Directive Principles

Social transformation securing justice, equality, liberty and dignity to every individual is the constitutional goal expressed in the Preamble, in fundamental rights and in Directive Principles of State Policy. The strategy for that transformation is democratic politics and law-making to implement Directive Principles. In Parliamentary system of government, the political leadership is to attempt radical institutional change if social transformation is to be brought about. But electoral politics and the interests of the ruling class usually prevail upon the leadership to go slow in the matter of changing laws and the institutional arrangements which might inconvenience the powerful sections of society. This is what happened in India as well. Instead of the colonial laws and power systems being replaced on adoption of the Constitution, they were allowed to continue (article 372) letting a dysfunctionality between the constitutional goals and the legal system. The poor and the powerless are bound to lose the race when the political class is in alliance with those controlling the legal and economic institutions.

Use of State power to bring in the social revolution is dependent upon the activism of the law-making system in a constitutional democracy governed by rule of law. In the Indian scenario the prevailing colonial legal order became part of the problem of under development and destitution rather than part of its solution. The power structure which supported that legal order was supposed to change under pressure of democratic politics and enlightened political leadership. Organized polity can readily manipulate the law and maintain patterns of behaviour that determine who gets what and how

much. New laws failed to induce appropriate behaviours leading to desirable change.

Analyzing the reasons why development-oriented laws failed to induce the prescribed behaviour, Robert B. Seidman, Professor of Law and Political Science of Boston University argued that either the law makers did not take into account the milieu within which the actors chose to obey or disobey the new law, or the laws assumed that the implementing agencies would behave in ways they did not[1]. "A law-maker's task consists in enacting not merely laws with high flown objectives, but laws that work – that is, laws that in practice induce behaviours that tend to solve the social problems that excited the laws. That so many laws never induced the behaviours prescribed, or induced inappropriate behaviours, exhibited a failure of law-making[2].

There are many participants in the official law-making process. Decisions are often made by the Executive though it is the Legislature which gives the stamp of approval. The need for the law is sometimes raised by civil servants who identified a problem, assessed the viability of a law to solve it, got comments from expert committees and stakeholders and prepared a draft for consideration by the Cabinet. It is then sent for vetting to the Parliamentary draftsmen/legislative department after which the Bill is again sent for Cabinet approval for introduction into Parliament. In Parliament, the Bill is referred to a Select Committee which seeks public opinion and gives its report including amendment. Thereafter the two Houses of Parliament pass it with or without amendments and submits for approval of President. The critical question in the process is how much the legislators contribute to decide the character, content and viability of the law in relation to the social revolution proposed. No law compels Parliamentarians to do anything which the Directive Principles enjoin them to do (article 37). They have the legislative power but no legislative obligation to act against poverty or in favour of health, education and employment of the marginalized sections of people. In fact, even on occasions when important Bills are discussed, the House is half empty. Legislations are passed in hurry within minutes of introduction.

Given the fact that the draftsmen merely write into legalise policies laid down by their political masters who often are under the influence of lobbyists and interest groups, law-making is often an amateur

1. Robert B. Seidman, The Fatal Race: Law-Making and the Implementation of Development Goals, Third World Legal Studies (1992), The Valparasio University School of Law, p.83.
2. *Ibid.*, p. 84.

exercise divorced from social reality and the interest of the common man. Lack of deeper understanding of behavioural sciences and the inclination to please the political masters tend to persuade the civil servants to push legislative proposals forgetting the need for consultation even with the States. When a civil servant consulted interested parties to a proposed Bill, he generally consulted organized groups closer to government circles rather than the vast mass of under-privileged and unorganized sections who may have no channels to reach out to the influential sections in the bureaucracy. Government secrecy also prevented the common man even from knowing what is being considered in government circles. The party discipline does not allow individual legislators to vent their views unless the party authorizes it. Parties decide to vote for the Bill or not on the basis of advancement of their own political interests which may not necessarily be the interest of the ordinary people. These patterns of behaviour of law makers are shaped by a variety of factors which have little bearing on what the people expect from the legislators. Wide disparities emerge between law in the books and law in action.

According to a study on why law-makers and law-making systems failed to create a legal order contributing to social revolution envisaged by the Constitutions of newly independent countries, the reason lies in the system's overall structure[1]. "The law-making system maximized inputs from those on the top of the heap, not the poor and powerless whom development aims to help. Outputs responded to those influences of the elite groups. These patterns of behaviour of the law-making systems bore a systematic relationship to the legal order. In principle, by changing the law the political leadership could have changed those institutions. They did not because they too quickly became a bureaucratic bourgeoisie ..... In a sense, the legal order created the ruling class. Class power rests on economic and political institutions – property, corporations, banks, land tenures, elections and law-making and law-implementing institutions generally. A systematic relationship exist between institutions and the law. Class power, institutions and the legal order constitute a trinity; changing any of them changes the others. Not only can we explain the existence of law by class power, but also *vice versa*[2].

Finding devices to permit mass participation in the making of law-making processes is a step to contain the fatal hold of the "bureaucratic

1. R.B. Seidman, "On Restructuring the Colonial State: How a Bill became a Law in Zimbabwe" (1982) Africa 116.
2. Supra Note 4 at p. 90.

bourgeoisie" in the systems that sustain the legal order inimical to social justice. These include openness in government sought to some extent by the RTI Act, structured points of access to the law-making process like public hearings, wide public circulation of Bill and supporting arguments before it goes for Cabinet approval, involving organizations of the civil society in drafting Bills, conduct of social audit of legislation, strengthening the planning process from below, invoking the petition procedure to challenge policies permissible under article 350 are some windows available in this regard for the masses.

In short, in order to explain the failure of laws or legal systems to implement social justice goals, there is need for critical study of law-makers and law-making systems. Law constitutes government's principal device to affect behaviour and therefore institutions. By stimulating mechanisms for mass participation in the making of laws critical for the social revolution, it would be possible to influence the law-making processes to take cognizance of the behavioural patterns the given law might generate. Alternatively, the process can stipulate like the environment impact assessment of a new project, a law impact assessment to be made mandatory at least in respect of social sector legislations affecting the common man.

Influence of International Law in Law-Making

There are at least two articles in the Constitution which directly put obligations on the State to honour international law in its law-making functions. They are articles 51 and 253. Article 51 which is part of the Directive Principles of State Policy is declared fundamental in the governance of the country and directs the State to apply it in making laws (article 37). The said article stipulates that the State while making laws shall promote international peace and security, maintain just and honourable relations between nations, foster respect for international law and treaty obligations in the dealings of organized peoples with one another, and encourage settlement of international disputes by arbitration.

Article 253 gives Parliament complete power irrespective of the scheme of distribution of legislative powers to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. However, the laws enacted for the implementation of international agreements will be subject to other constitutional limitations.

The Supreme Court has gone a step further to declare that if there is a vacuum in domestic legislation on a subject in which India has

entered into an international agreement, the provisions of that agreement can be invoked to interpret applicable domestic law. In other words national courts generally interpret statutes so as to maintain harmony with rules of international law.

With the adoption of the GATT Agreement and the emergence of WTO, the law and law-making systems of member countries are increasingly tied up with the rules evolved by the bodies created under it. For example, the Trade-Related International Property Rights Agreement has in a sense compelled the Parliament to amend the Indian Patent Act in 2005 to accommodate the obligations under the Agreement despite a section of legislative opinion to the contrary. The process of globalization is bound to influence increasingly the law making system and the legal order in India which Parliament has to take cognizance of. To pursue the constitutional goals of social revolution, human rights and unity of the country, the law-makers have to be extra-vigilant lest the system should perpetuate the colonial order under the guise of modernization and change.

Law, Public Opinion and the New Legal Order

The design of the new legal order consisting of law (Substantive and Procedural), legal institutions and systems are envisaged by the Constitution in its Preamble, the fundamental rights and the Directive Principles of State Policy. It would have been relatively easy for the political leadership soon after Independence and the adoption of the Constitution to change over to a new legal order by breaking out of the colonial order because of the advantage of homogeneity of public opinion born out of the idealism of the Freedom Movement. However, when the old legal order was allowed to continue for whatever reasons, challenges to law-making grew in intensity and diversity and the politics of power and expediency dictated the directions of legal change. The legal order envisaged by Parts III and IV of the Constitution did not receive the attention it deserved with the result the social justice agenda is inadequately legislated and the Governments have been doing fire-fighting operations through the planning apparatus and centrally-sponsored schemes. The much-delayed adoption of the Right to Education Act, sixty years after the Parliament first met, is an example of how the rights-based legal order comes only after sustained struggle even in a constitutional democracy.

The message is that law-making cannot be entirely left to the Legislators alone because in a Parliamentary system, politics and expediency play a critical role in shaping the legislative agenda rather than the Constitutional Directives and the legitimate aspirations of the

impoverished masses. In fact, the establishment of the National Advisory Council outside the Government involving non-political activists and social reformers and from which many major policy initiatives concerning the common people emerged in recent times is an indication of this acknowledgment of the need for organized public participation in law-making.

To some extent, the function of the Law Commissions is also to elicit public opinion and distil the same towards possible legislative opinion for advancing the constitutional goals. However, the way Law Commissions were constituted, the manner they organized their work and recommendations as well as the attitude successive governments adopted in the matter, did not inspire public confidence on the Commission's role in bringing about the social revolution through law reform. More importantly, despite institutional inadequacies, the Committees of Parliament on legislation attempted to bridge the gulf between public opinion and policy development through legislation. Given the illiteracy of the masses and their inability to articulate their interests to influence legislative opinion, the window offered by the committee system of Parliament is more often used by powerful lobbies working for vested interests in association with political parties. Unfortunately, the powerful print and electronic media controlled by industrial and other influential groups also failed to canvass the case of the marginalized sections with the result what got accepted as public opinion was what the media preferred to project on any given issue. In fact, the current debate about the need for regulating the media on its content and priorities is at least partly generated by a public perception of the problem that public opinion in a democracy and its mobilization and articulation is a sacred duty of those who operate in the public domain. Legislative opinion in liberal democracies is invariably influenced by public opinion usually articulated by political parties through their manifestoes during election time. But what gets finally legislated is vastly different from the party manifestoes. As such, there is need for mass campaigning to remind political parties of their election promises and to compel them to act at least on those items which impartial people perceive to be of vital importance to people's interests and for constitutional governance. It is this corrective intervention of public spirited people which leads to campaigns for law-making, sometimes against the collective wisdom of Parliament itself. Accommodating such extra-constitutional interventions in the law-making process to counteract the bureaucratic articulation of public interest will do some good in the long-term to democratic stability and rule of law.

Another message that recent events convey for law-making in the country is that the discipline of co-operative federalism which a "Union of States" warrant cannot be explained in terms of legislative competence or constitutional power alone. It is essentially a matter of consensus-building at the political and executive levels before it is put for Parliamentary debate. A typical example of this formula is what was attempted by the strategy of entrusting the task to an empowered committee of State Finance Ministers to thrash out the GST and other tax law reforms affecting the Union and States. Why this could not be attempted in the matter of Central Government's role on legislation for internal security is not clear. At least the mechanism of Inter-State Council envisaged by the Constitution could have been tried to formulate legislative opinion in this regard. It is one thing for the Centre to formulate the policy and then try to persuade the States to accept it and quite another for the Centre to use available forums to build a consensus giving due respect to States' autonomy and to the idea that what is good for the States can be equally good for the Centre as well. Law-making at the federal level particularly in the era of coalition governments has to necessarily adopt a different approach than what prevailed in the early years of single party governments and unquestioned authority of central leadership.

Equally challenging is law-making for multi-cultural societies which guarantee religious freedom and minority rights. Everyone who subscribed to equality and rule of law will concede that a Uniform Civil Code is essential for cultivating human dignity and national unity. Gender discrimination in greater or lesser degree prevails in all religions. This is violative of the Equality guarantee. The Constitution mandates a Uniform Civil Code for all Indians. The Supreme Court repeatedly asked Parliament to enact it. On few occasions Parliament was presented with Draft Bills on the subject by private members. Yet no party in power has shown the inclination to legislate on this important matter ostensibly respecting the views of minorities. Others see it as vote bank politics. Parliament owes an explanation to the Nation on why even after sixty years it did not find it necessary to consider the matter or even ask the Government to do the needful for preparing the ground for such a legislation. It is not anybody's case that Uniform Civil Code is violative of religious freedom and minority rights. The Constitution-makers did not think so; nor did the Supreme Court. In fact the Court believes it to be essential to have an UCC for freedom and equality.

This takes us to the oblique issue of the role of judiciary in law-making and the way Private Bills are processed in Parliament. It is

reported that in the fourteen Lok Sabhas we have had since 1952, more than 3,748 private members bills were introduced of which Parliament considered only fourteen! It is not clear how the issue is determined in Parliamentary procedures. In any case there is need to strengthen it if public participation is to be encouraged in law making. Equally important is for Parliament to give continuing attention to judicial law-making which is usually called "Guidelines pending legislation" as they are based on fact situations brought before court by aggrieved sections for which legislative solutions alone were found appropriate.

Conclusion

This analysis began with the proposition that a new era of law-making for the promised social revolution has emerged and participation of people beyond through their elected representatives is found a desirable development to accelerate the social revolution agenda. Wisdom lies not in questioning this development but understanding its causes and assimilating its processes in a manner that will strengthen democracy and rule of law. It will be promotive of federalism, pluralism and national unity if ways and means are evolved to institutionalize it within acceptable limits and making it part of law-making in the world's largest and most diverse democracy. In any case the social justice agenda incorporated in the Directive Principles of State Policy cannot be inordinately delayed if the country were to remain united and democracy strengthened.

THE CONSTITUTION OF INDIA

PREAMBLE

WE, THE PEOPLE of India, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

₹ 325

Universal
Law Publishing Co.
NEW DELHI - INDIA

UNIVERSAL
LEGAL
MASTERPIECE

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ISBN 978-93-5035-377-6

9 789350 353776

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