Inaugural Address*

G.S. PATHAK
Vice-President of India

I thank the Chief Justice for his invitation to me to inaugurate this Seminar under the auspices of the Indian Law Institute. Appropriately after twenty-five years of independence our thoughts turn to 26th January, 1950, and it is felt that it is necessary to evaluate the working of our Constitution and to judge how far the hopes and aspirations of the nation have been fulfilled, and how far the machinery set up has been able to achieve the grand design underlying the Constitution. It is to be remembered that a constitution is not a mere mechanical apparatus. It is a living organism. It is dynamic and has an innate vitality. It grows and develops. Sometimes in the hands of a military dictator, the constitution has shrivelled and even been killed as happened in the case of the Weimar Constitution. Though a constitution is intended to be for all times, it responds to changed conditions. The concept of rights and institutions sometimes changes with changing times and the constitution absorbs the new concepts without alteration of language. It reflects the nation's character. With the currents and cross-currents in the stream of national life, the constitutional development would determine the ultimate direction in which a nation is moving in its onward march. In our country the constitutional development may be said to be the measure of our socio-economic progress.

Constitutional development results through a variety of processes. The most direct one is constitutional amendment made by Parliament. The constitution also develops through rules governing the practice and procedure of Parliament and conventions relating to its working as also those affecting its relationship with the executive and the judiciary. Indeed, conventions have also developed in relation to various organs of the government as well as the offices created by the Constitution. As an

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instance, I may quote the conventions which have developed in creating duties and functions attaching to the office of the Vice-President. The Constitution has merely described the Vice-President as a part of the executive. He is the Chairman of the Council of States but only *ex officio*. The Constitution has not laid down specifically any duties and functions pertaining to the office of the Vice-President. However, there are a considerable number of duties and functions which the holder of this office has to perform and discharge in addition to his obligations as Chairman of the Rajya Sabha.

The courts play a distinctive role in the development of the Constitution. The subtle and imperceptible, but generally unacknowledged method of legislating, the function of interpretation, and the rules and practice regarding the internal working and organisation of the judicial system itself vitally affect the development of the Constitution. It need hardly be said that the Constitution flourishes and develops even by its own vitality, if by its working it aids the progress of the nation and helps in the achievement of its ideals.

It is manifest that the concept of development of the Constitution covers a very wide range. If I may say so, the selection of the three subjects by the Institute for this Seminar is highly commendable. These three subjects have, for some time past, been a matter of deep concern to many in the country. A dispassionate consideration of these topics by a body of professional experts motivated purely by national interest and taking a long range view, would be of immense value. In a democratic system such as ours, conflicts between different interests and sometimes differences between organs of the government do arise. These conflicts and differences can, however, be reduced and even prevented if the spheres of the various organs and functionaries and their boundaries are well understood and recognised. The contribution made in this regard by professional experts can be very valuable in the moulding of public opinion on which the development of our Constitution so much depends.

One of the subjects for discussion before the Seminar is Parliamentary Government. Our Parliament consists of the President and the two Houses. Probably you will expect me to say a few words about the role of the Rajya Sabha which is one of the items on your agenda. In a federal constitution it is essential that there should be one chamber consisting of the representatives of the states. The Rajya Sabha, apart from the twelve nominated members, consists of such representatives. In our Constitution the Parliament is never dissolved. It is only the House of the People that is dissolved. The Rajya Sabha is a permanent body which maintains the permanent character of our Parliament.

The Rajya Sabha was intended to have a special responsibility to safeguard the states' rights. By reason of the fact that it represents the states, two special privileges or powers were exclusively conferred on it. By a special resolution it can confer jurisdiction on both the Houses to pass laws with respect to state subjects specified in the resolution (article 249). Similarly by a special resolution it can enable both the Houses to create an All-India service common to the Union and the states (article 312). The financial bills cannot be introduced, and voted on, in the Rajya Sabha though it can discuss both the financial bills and the annual financial statements. The Council of Ministers is responsible only to the Lok Sabha but the subjects of the portfolio of every ministry can be and are discussed by the Rajya Sabha. With the above exception, all Bills including Bills for amendment of the Constitution can be introduced and voted on in the Rajya Sabha and unless passed by both the Houses do not become law. It has been noted by an eminent writer on the Constitution that in the period 1952-56, 101 Bills were introduced in the Rajya Sabha including the Hindu Code legislation and other legislation of a controversial kind, and knocked into shape, resulting in considerable saving of time in the other House.

As I have said, Parliament is a permanent body because, unlike the Lok Sabha, the Rajya Sabha is never dissolved. The advantages of the Rajya Sabha, being a permanent House not subject to dissolution, are obvious both in normal times and in times of emergency. Text-book writers have discussed in detail the reasons for and against the creation or abolition of second chambers generally. The second chamber, however, in the case of a federal legislature where special responsibility to safeguard states' rights is required, is peculiarly important. Consequently, the Constitution has treated the Rajya Sabha and state legislative councils differently. In the case of the former the House is permanent and in the case of the latter the choice of the assemblies determines the creation or continuance of the state legislative councils, subject to legislation by Parliament (article 169).

I am sure all of you will agree that confrontations between the courts and the legislatures are undesirable and are to be avoided. Memory is still fresh of the head-on collision between the U.P. Legislature and the Allahabad High Court. The controversy ended with the Supreme Court's opinion on President's reference. The Supreme Court, in substance, took the view, *inter alia*, that it was competent for the High Court to entertain and deal with the petition under article 226 challenging the legality of the sentence of imprisonment imposed by the legislative assembly and to pass an order releasing the petitioner on bail. This opinion did not satisfy the Presiding Officers of the legislatures in India and also some

jurists. They preferred the minority judgment of Justice Sarkar and took the view that the fundamental rights could not have precedence over privileges of members of legislatures to commit a person for contempt without that committal being liable to be examined by a court of law. This opinion caused some concern in parliamentary circles, inasmuch as, in effect, the legislatures, were reduced to the status of inferior courts. The Presiding Officers in their conference recommended amendments to articles 105 and 194. Since then no serious conflict has arisen although some rumblings are heard now and again.

Having been intimately connected with Parliament for some years, I must own that I have been deeply impressed by the majesty of the concept of Parliament in our democracy. I must observe, however, that that has not diminished in any manner my conviction that the judiciary is an indispensable and highly important part of our democratic set-up. I confess that I find it difficult to believe that the Constitution-makers ever contemplated a writ being issued by the courts to Parliament or its Presiding Officers. Article 226 speaks of a writ "to issue to any person or authority, including in appropriate cases any Government". Could Parliament be described as "a person or authority"? Moreover, whenever Parliament or legislatures are mentioned in the Constitution, they are described as 'Parliament' or 'legislatures' and not as authorities. It is worth mentioning that in the United Kingdom the House has never directly admitted the claims of the courts of law to judge on matters of privilege. The courts in England have never proceeded to act in the case of general warrants. Undoubtedly, our Parliament has judicial power in the matter of breach of privilege. But surely while exercising such judicial power, it is not an inferior tribunal or authority. Moreover, there is constitutional immunity of proceedings in Parliament on the ground of any alleged irregularity of procedure. The Constitution has also provided that no presiding officer "shall be subject to the jurisdiction of any Court in respect of the exercise by him" of his powers. You may consider whether in view of the possibility of conflicts in future this subject is worthy of consideration by the Seminar.

As regards the necessity of legislation on the subject of powers, privileges and immunities of the Houses of Parliament and their members, I wish to say a few words. The present position is that barring the powers, privileges and immunities specifically mentioned they are frozen as it were as on the 26th January, 1950, and that too with reference to the law in a foreign country. There is no doubt that such a situation was intended to be temporary and the Constitution-makers contemplated the enactment of a law on the subject. For that purpose entry 74 in List I and entry 39 in List II were included in the Seventh Schedule. The practice of the

House of Commons as applicable to Indian legislatures is not examinable by courts, as such practice has been, by reference, incorporated in the Constitution. But it is said that it will be examinable if it becomes a part of a statute. The danger of examination by courts which stands in the way of the passing of such a statute can be obviated by amendment of articles 105 and 194. This is what has been suggested by the Speakers' Conference. It is worth considering whether it is possible to make a law on the subject without violating any fundamental right. The Seminar may also consider whether, in the national interest, it is expedient to allow the present position to continue. It is true that no difficulty has so far been experienced from the absence of a statute on the subject but a demand for enacting such a statute has been made by an important section of the society to ensure clarity and certainty in the existing law.

The constitutional relationship between the Centre and the states in our federal structure was provided in our Constitution in the historical background of the country. It must have been realised by the Constitution-makers that weak governments in the country were not able to withstand foreign invasions. Fissiparous tendencies arising from differences in language, religion, race, etc. had to be checked to preserve the unity of the nation. The experience of the past led to insistence on unity and a strong Centre. In order to preserve this unity and strength, the system known as cooperative federalism was adopted. As is well known the chief characteristics of this system are interdependence between the Union and its component parts and also the practice of administrative cooperation between the Union and state governments, and the partial financial dependence of the latter upon the former. It has been well recognised that cooperation on the part of the Union and the states may well achieve objects that neither alone could achieve. The development of India as one single economic and social structure was the desideratum and to regulate this development, planning of activities had inevitably to be coordinated and interrelated. Thus economic and social planning was shown in the Concurrent List. Differences between the states *inter se* and between the Union and the states are not uncommon in a federal set-up. They were anticipated and ample provisions were made in the Constitution for coordination between the states *inter se* and between the Union and the states, and for the resolution of the disputes arising between them.

In recent years such differences arose and centre-state relations assumed considerable importance and attracted wide public attention. They became the subject-matter of lectures, articles and seminars. I had the honour of inaugurating some of these seminars. The Indian Law Institute itself, to the best of my recollection, in conjunction with other organisations also, held one. There was a seminar at Hyderabad also. The conclusions

reached at these seminars might be of some assistance to you. Earlier, the Administrative Reforms Commission had to consider the question of centre-state relations at some length. In its report to the Union Government the commission observed: "but these controversies pertain mostly to matters administrative and financial and not to constitutional issues". Its conclusion was:

> It is not in the amendment of the Constitution that the solution of the problems of the Centre-State relationship is to be sought, but in the working of the provisions of the Constitution by all concerned in the balanced spirit in which the founding-fathers intended them to be worked.

Later came the report of the Rajamannar Committee appointed by the Tamil Nadu Government. It made some recommendations of a drastic character. The latest expression of views on the subject, I believe, will be found in M.C. Setalvad's Tagore Law Lectures recently delivered in Calcutta. I am sure you will agree that the central idea behind the constitutional provisions relating to centre-state relations, namely, that of the preservation of the unity, stability and strength of the nation will always have to be borne in mind while considering this very crucial subject. Recent events, I believe, have underscored the importance of these factors in our national life. Care has to be taken to see that the balance between the Centre and the states is not disturbed and the rationale of the basis on which the system was established is maintained.

To illustrate the principle of such cooperation, I may refer to the constitutional requirement (article 256) that the executive power of every state shall be so exercised as to ensure compliance with the laws made by Parliament and the executive power of the Union shall extend to the giving of such directions to a state as may appear to the Government of India to be necessary for that purpose. Negatively, there is the requirement that the executive power of every state shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union and in this case also the executive power of the Union extends to the giving of all necessary directions. Article 258 is also an important measure of cooperation. It empowers the President with the consent of the government of a state to entrust to that government functions in relation to any matter to which the executive power of the Union extends. Conversely, the Governor of a state is empowered by article 258A, with the consent of the Government of India, to entrust to the state government functions in relation to any matter to which the executive power of that state extends. The consent of the state government does not appear to be necessary where a law made by Parliament confers powers and

imposes duties upon the state and its officers. Article 365 provides the answer to the question : What would happen in case the state government refuses cooperation to the Centre and disregards the directions given in any matter authorised by the Constitution ? In such a situation it shall be lawful for the President to hold that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the Constitution. To ensure that the government of every state is carried on in accordance with the provisions of the Constitution, a duty is imposed on the Union by article 355. This is in addition to its duty to protect every state against external aggression and internal disturbance. The ultimate sanction is incorporated in article 356. It need hardly be said that for the proper exercise of its powers, the Central Government is responsible to Parliament and such exercise has to be justified before the representatives of the people and the representatives of the states. In the matter of financial and administrative relations, cooperation and understanding are of the utmost importance.

The office of the Governor has also been the subject of discussion in recent years. Various suggestions have been made in relation to this office. I have even heard the extreme view that the Governor's office should be abolished. This obviously is an untenable view as that would break the very link between the Union and its component parts. The Governor constitutes such a link and fills a dual role. Firstly, he is the constitutional authority charged with the duty of seeing that the government of the state is carried on in accordance with the provisions of the Constitution. This obligation is imposed on him by his oath whereby he is required to preserve, protect and defend the Constitution and also by the fact that he owes a duty to report to the President under article 356 if the government of the state cannot be carried on in accordance with the provisions of the Constitution. His second role is that of the head of the State. A view was recently expressed that guidelines should be given to the Governors for the efficient discharge of their duties and for bringing uniformity of action in like situations. It may be remembered that in the Constituent Assembly Dr. Ambedkar had first moved that provision should be made in the Constitution for giving instructions both to the President and to the Governors. Later, on further consideration he strongly took the view that a provision for the issue of instructions to both the President and the Governors should be omitted from the Constitution. While withdrawing the proposal to incorporate the instrument of instructions for the Governor, Ambedkar said in the Constituent Assembly that the instrument was useless because there was no functionary who could see that the instrument of instructions was followed by the Governor. He appears to have admitted that the provisions of

the instrument of instructions were, strictly speaking, not enforceable or justiciable. The proposal to issue the instrument of instructions and to incorporate it in the Constitution was exhaustively considered by the Constituent Assembly and was rejected by it. Thus, for giving authoritative guidelines to the Governors, a power in the Constitution will have to be discovered and there is no such power. Moreover, no instrument of instructions can be exhaustive, as events quite often assume new postures and circumstances not anticipated and not provided for in the instrument of instructions may arise. In this situation perhaps conventions could be allowed to grow. The President appointed a five-member committee of Governors to study the constitutional provisions regarding the appointment of the Council of Ministers, summoning, prorogation and dissolution of a legislative assembly and failure of constitutional machinery in a state. The report of this committee was discussed in the Conference of Governors. The conference did not favour laying down guidelines for Governors, presumably because there was no power vested in any authority in the Constitution in this respect. It is a matter of common occurrence that when the proclamation for emergency comes up for discussion before Parliament, the Governor's action is also discussed.

The Seminar will, I understand, examine the scope and reach of different fundamental rights, questions arising out of the decision in the *Golaknath* case and will also undertake the study of the extent to which the directive principles have been implemented and are in the process of implementation. It cannot be denied that social change affects the concept of fundamental rights. For example, the concept of the right to property has undergone a substantial change since Blackstone's time. The function of property is different today from what it was in a feudal state. According to Friedmann, ownership and control have become increasingly divorced in a Welfare State. Property becomes conditioned by social duty towards the community, and the individual's rights are modified by such duty. That is why reasonable restrictions in the interests of the general public on the exercise of the right to property are justified. As Laski put it, property is a social fact like any other and it is the character of social fact to alter. It is in the light of this modern concept that the word 'compensation' in article 31 had to be interpreted, and the Fourth Amendment of the Constitution was in consonance with this modern concept of property.

No litigant has acquired greater fame in legal history than Golaknath. His case has been discussed almost threadbare in numerous lectures, articles and seminars and in the courts and Parliament. Even foreign jurists have expressed opinion on the correctness or otherwise of

this decision. I am not sure whether the Seminar will express its views on matters which are going to be decided by the Full Bench of the Supreme Court. Nor am I sure whether it will be possible to advance fresh arguments pro and contra.

I would like to make a few observations about fundamental rights and directive principles of state policy. Fundamental rights were guaranteed to promote the development of the individual's personality by securing the enjoyment of those rights to individuals or groups of individuals. Part IV was designed to promote the social and economic growth of the collective community as such. Both Parts III and IV were declared fundamental in their respective spheres. Both created obligations on the State. The essential difference between the two lies in their inherent nature and character. While the rights are enforceable in a court of law, the principles of policy are not capable of enforcement. The striving for the promotion of the welfare of the people, the directing of policy towards securing certain aims, the endeavouring to secure certain objectives, etc. can hardly be the subject of a writ jurisdiction as known to law. There is no opposition between Parts III and IV and by a harmonious construction there could be reconciliation between the two in case of an apparent conflict. Thus, in the normal working out of the directive principles, the fundamental rights would not be infringed. To illustrate, take cases where article 19(1) (*f*) and (*g*) or article 31 are attracted. It would be said that whatever is done in pursuance of the constitutional mandate provided by article 39 must be in the interests of the general public, and the restriction imposed by obedience to that mandate could be described as a reasonable restriction on the exercise of the fundamental right. Even where there is a prohibition and not a mere restriction, the principle may be attracted that in a particular setting of time and circumstance, a prohibition can amount to a reasonable restriction. But where a prohibition of an act or activity is prescribed by the Constitution itself (as distinguished from a statute), it attains a higher sanctity. In a case which attracts article 31(2) the current concept of property and its consequences could be judicially taken into consideration with the result that 'compensation' did not mean an equivalent sum and the Fourth Amendment could be given effect to in its true meaning. All this I have said without applying the Twenty-Fifth Amendment. In this process of reasoning a sociological and not a mere positivist-analytical method of interpretation will have to be adopted.

We are living in fast moving times and there are great challenges confronting the nation. The subjects which the Seminar has undertaken to examine and discuss are of the greatest national importance. I trust

the deliberations at the Seminar will yield fruitful results. I wish all success in the endeavours of the Indian Law Institute and I offer my good wishes to the participants in the Seminar for success in their deliberations. I have now great pleasure in inaugurating this Seminar.