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CONSTITUTIONAL LAW – II

(Subject Code - LC 0701)

STUDY MATERIAL
FOR
LL.B. – II (Sem. – III), B.A.LL.B. – IV (Sem. – VII) and
B. B.A.LL.B. – IV (Sem. – VII) Pattern – 2017

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Place: Ahmednagar

Date: 26th June 2020

Dr. More Atul Lalasaheb
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Preface

The course of ***Constitutional Law – II*** Paper (Subject Code - LC 0701) of LL.B. – II (Sem. – III), B.A.LL.B. – IV (Sem. – VII) and B. B.A.LL.B. – IV (Sem. – VII) Pattern – 2017 is designed on the basis of recommendations of Bar Council of India and UGC, New Delhi. I am glad to reveal that the syllabus of this paper which is framed by Committee of BoS (Faculty of Law), SPPU, Pune, I was a member of that Committee. The syllabus is framed with an objective to acquaint the students with the Federal Principles of Indian Constitution and the powers, functions and structures of various State organs established under it.

As it is said that the Constitution of India is living document hence, I am of the view that it will be advantageous to study the content of this paper in the *Social, Economic and Political* context in which the Constitution of India operates. I would like to particularly mention about various amendments done in the Constitution of India regarding Anti-Defection Law, Panchayat Raj, Applicability of provisions of RTI Act to the election of MPs and MLAs, Applicability of provisions of Lok Pal Act, 2016 to the post of Prime Minister, Extension of period of reservation of Seats to SCs/STs in Lok Sabha and State Legislative Assemblies, Provisions of Taxing (GST), Abolition of Article 370 and 35A etc. The Apex Court also has given positive response by laying down important rulings in this behalf. Hence, under this study material I have discussed most of the relevant and important components which are need to be studied in the respective Modules of the syllabus of this paper.

I would like to suggest to all law students, researcher and readers of this subject that in order to avoid lengthiness of study material I have mentioned only those relevant aspects which needs to be studied in each module, so you should read in detail those aspects from the reference material which I acknowledged at the end leaf of this study material. Really I appreciate the great work done by those authors in this subject.

I hope this study material will be useful to you, I will be happy to accept any relevant suggestions to improve the contents of this study material.

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SYLLABUS

CONSTITUTIONAL LAW - II
(Sub. Code - LC 0701)
(Pattern - 2017)
B.A. LL.B. – IV (Sem. – VII), B.B.A. LL.B. – IV (Sem. – VII) and LL.B. – II (Sem. – III)

Module – 01 Nature of Indian Federalism:
1. Forms of Governments
2. Concept of Federalism
3. Essential characteristics of American Federalism
4. Essential characteristics of Indian Federalism
5. Indian Federalism distinguishes from American Federalism

Module – 02 Structure Powers and Functions Union and State Executive:
1. Union Executive (Articles 52 to 78)
2. State Executive (Articles 152 to 167)

Module – 03 Structure, Powers and Functions of Union and State Legislature:
1. Union Legislature (Articles 79 to 123)
2. State Legislature (Articles 168 to 213)

Module – 04 Structure, Powers and Functions of Supreme Court, High Court and Tribunals:
1. Supreme Court (Articles 124 to 147)
2. High Court and Subordinate Courts (Articles 214 to 237)
3. Tribunals (Articles 323A and 323B)

Module – 05 Relations between Union and the States:
1. Legislative Relations between Union and the States (Articles 245 to 255)
2. Administrative Relations between Union and the States (Articles 256 to 263)
3. Financial Relations between Union and the States (Articles 264 to 290A), An Overview of the Constitution (One Hundred First Amendment) Act, 201

Module – 06 Constitutional Position of Jammu and Kashmir:
1. Historical background of Article 370
2. Provisions of Article 370 of the Constitution
3. The Constitutional (Application to Jammu and Kashmir) Order, 1954

Module – 07 Other Constitutional Institutions / Authorities:
1. Comptroller and Auditor-General of India (Articles 148 to 151)
2. Administration of Union territories (Articles 239 to 241)
3. Structure Powers and Functions of Panchayats (Articles 243 to 243O)
4. Structure Powers and Functions of Municipalities (Articles 243P to 243ZG)
5. Services and Public Service Commissions (Articles 308 to 323)
6. Elections and Election Commission (Articles 324 to 329)

Module – 08 Other Constitutional Provisions:
1. Borrowing (Articles 292 to 293)
2. Property, Contracts, Rights, Liabilities, Obligations and Suits (Articles 294 to 300)
3. Freedom of Trade, Commerce and Intercourse (Articles 301 to 307)
4. Official Language (Articles 343 to 351)

Module – 09 Emergency Provisions - Grounds, Approval for Continuation and Effects (Articles 352 to 360) :
1. National Emergency
2. State Emergency
3. Financial Emergency

Module – 10 Commissions and Committees on Union-State Relations - Objectives and Recommendations:
1. Administrative Reforms Commission (1966)
2. Rajmannar Committee (1969)
3. Sarkaria Commission (1983)
4. Punchhi Commission (2007)

MODULE - 01

NATURE OF INDIAN FEDERALISM

The Constitution of India is unique in many ways: It- has several special features that distinguish it from other Constitutions of the world.

Types of Constitution

Written or unwritten: Constitutions may be written like the U.S. Constitution or unwritten and based on conventions like the British. Our Constitution is written even though conventions also playa part insofar as they are in keeping with the provisions of the Constitution.

Rigid or Flexible: Constitutions may be called rigid or flexible on the ground of the amending procedure being difficult or easy. Federal Constitutions are usually classified as rigid because of their difficult amending processes. Our Constitution may be said to be a combination of rigid and flexible inasmuch as certain provisions of the Constitution e.g. Articles 2, 3 and 4, and 169-can be amended like ordinary legislation by simple majority in the Houses of Parliament, other provisions can be amended under Article 368 by the Houses of Parliament by a special majority of 2/3rd of the members present and voting and a majority of the total membership in each House. Only in the case of a few of the provisions, in addition to a special majority in the two Houses of Parliament, an amendment would require the ratification of not less than one half of the States. The fact that during 60 years, there were as many as 94 amendments disproves the charge of the rigidity of our Constitution.

Federal or Unitary: Constitutions are also divided between federal and unitary. The classic example of the first category again is the U.s. Constitution and of the second the U.K. Constitution. In a unitary constitution, all powers are vested in the Central Government to which the authorities in the units are subordinate and function as the agents of the Government at the Centre and exercise authority by delegation from the Centre. In a federal polity, usually, there must be a rigid, written constitution, it must be supreme and it must specifically divide powers between the federal government and the governments of the units-both exercising powers in their respective spheres in their own right and independently. In fact, in a classic federation, the federal government enjoys only those powers that are by agreement surrendered to it by the units. Also, there must be an independent supreme court as the arbiter of any disputes between the Union and the States.

India's Constitution has been variously described as quasi-federal, federal with a strong unitary or pro-centre bias, federal in structure but unitary in spirit, federal in normal times but

with possibilities of being converted into a purely unitary one during Emergency, etc. The fact is that it is difficult to put our Constitution in any strict mould of a federal or unitary type; it has features of both. It cannot be considered unitary because it provides, for example, for distribution of executive and legislative powers between the Union and the States and provisions affecting the powers of the States or Union-State relations cannot be amended without ratification by the States. It cannot be considered strictly federal either because the residuary powers vest in the Union. As Dr. Ambedkar said, rigidity and legalism were the two serious weaknesses of federalism. The Indian system was unique in that it created a dual polity with a single Indian citizenship. It could be both unitary and federal according to requirements of time and circumstances. Under Article 249, the Union Parliament can invade the State List. Under Articles 356 and 357, on the ground of failure of constitutional machinery in any State, all its executive and legislative powers may be taken over by the Union and under Articles 352 to 354, the Constitution can be converted into an entirely unitary one inasmuch as during Proclamation of Emergency, the executive and legislative powers of the Union extend to matters even in the State List. Finally, under Articles 2, 3 and 4, new States may be formed and areas, boundaries or names of existing-States altered by the Union Parliament by ordinary law passed by simple majority votes.

Reasons for this unique unitary-federal mix are to be found in the constitutional history of India, the sheer size of the country and in the nature of her complex diversities based on religion, language, region, culture etc. Moving the Draft Constitution for adoption by the Constituent Assembly, the Chairman of the Drafting Committee, Dr. B.R. Ambedkar tried to explain the significance of using the term "Union of States" instead of "Federation of States" in the following words:

"The Drafting Committee wanted to make it clear that though India was to be a federation, the federation was not the result of an agreement by the States to join in a federation and that the federation not being the result of an agreement, no state has the right to secede from it. The federation is a Union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source."

The text of the Constitution does not use the term 'federal' or 'federation'. The Supreme Court has spoken of the Indian Union as 'federal', 'quasi-federal' or 'amphibian' meaning sometimes 'federal' and sometimes 'unitary'.[1]

Parliamentary or Presidential System

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[1]. State of Rajasthan v. Union of India, AIR 1977 SC 1361. Also see under Chapter 6, 'The Union and its Territory'

India is a Republic and the head is the President in whom all the executive power vests and in whose name it is to be exercised. He is also the Supreme Commander of the armed forces. It has been held, however, that unlike the U.S. President, our President is only a nominal or constitutional head of the executive; he acts only with the aid and advice of the real political executive which is the Council of Ministers. The Ministers are collectively responsible to the popular House of Parliament i.e. the Lok Sabha. Thus, following the British pattern, the Constitution of India has basically adopted, both at the Union and State levels, the parliamentary system of government with ministerial responsibility to the popular House as against the US. system of Presidential Government with separation of powers and a nearly irremovable President as the Chief Executive for a fixed term. In the U.s. system, the President chooses his team of ministers from among the citizens at large and the ministers are not members of the legislature while in the Parliamentary System, the Ministers are from Parliament and remain part of it and responsible to its House of the People. The Parliamentary System may be said to be laying greater stress on the concept of the responsibility of the executive while the Presidential system obviously promotes more the stability of the executive.

It would, however, be wrong to assert that we have adopted the British parliamentary system in toto. There are several fundamental differences and departures. To name a few; the UK. Constitution is still largely unitary, while ours is largely federal. They are a monarchy with a hereditary King/ Queen while we are a republic with an elected President, unlike the British we have a written constitution and our Parliament, therefore, is not sovereign even in theory and legislation passed by it is subject to judicial review. Our Constitution includes a charter of justiciable fundamental rights which are enforceable by the Courts not only against the executive but also against the legislature unlike the position in UK. Of course, in UK. also such rights have now become enforceable after the Bill passed in 1998 came into operation in 2000.

There has been some debate in our country on the desirability or otherwise .of moving over) to the Presidential model. The founding fathers, however, preferred the parliamentary form because they had some experience of operating it and there were advantages in continuing established institutions. After a long struggle for responsible government and against arbitrary executive authority, they were naturally allergic to a fixed term irremovable executive. In a highly pluralistic society with India's size and diversity and with many pulls of various kinds, they believed that the parliamentary form was the most suited for accommodating a variety of interests and building a united India.

Discussing the problem of making a choice between the U.S. Presidential-model and the British parliamentary model, both of which were democratic, Dr. Ambedkar had said in the Constituent Assembly:

"A democratic executive must satisfy two conditions - 1) It must be a stable executive and 2) it must be a responsible executive. Unfortunately it has not been possible so far to devise a system which can ensure both in equal degree. You can have a system which can give you more stability but less responsibility or you can have a system which gives you more responsibility but less stability. The American and the Swiss systems give more stability but less responsibility. The British System on the other hand gives you more responsibility but less stability. The Draft Constitution in recommending the Parliamentary system of Executive has preferred more responsibility to more stability."

K.M. Munshi put the argument more candidly when he said:

"We must not forget a very important fact that during the last hundred years, Indian 'public life has largely drawn upon the traditions of British Constitutional Law. Most of us have looked up to the British model as the best. For the last thirty or forty years, some kind of responsibility has been introduced in the governance of this country. Our constitutional traditions have become parliamentary. After this experience, why should we go back upon the tradition that has been built for over a hundred years and buy a novel experience?"

PARLIAMENTARY SOVEREIGNTY VS. JUDICIAL SUPREMACY

In the British parliamentary system, Parliament was supposed to be supreme and sovereign. There were no limitations on its powers, at least in theory, inasmuch as there was no written constitution and the Judiciary had no powers of judicial review of legislation even if a law violated fundamental human rights.

In the U.S. system, the Supreme Court with its power of judicial review and of interpreting the Constitution has assumed supremacy.

In India, the Constitution has arrived at a middle course and a compromise between the British sovereignty of Parliament and American judicial supremacy. We are governed by the rule of law and judicial review of administrative action is an essential part of rule of law. Thus, courts can determine not only the constitutionality of the law but also the procedural part of administrative action (State of Bihar v. Subhash Singh, AIR 1997 SC 1390). But, since we have a written constitution and the powers and functions of every organ are defined and delimited by the Constitution, there is no question of any organ-not even Parliament-being sovereign. Both Parliament and the Supreme Court are supreme in their respective spheres. While the Supreme Court may declare a law passed by Parliament ultra vires as being

violative of the Constitution, Parliament may within certain restrictions amend most parts of the Constitution.

While many Constitutions of nations framed after the Second World War have floundered and gone into oblivion, our Constitution has successfully faced many crises and survived. This itself is evidence of its resilience, dynamism and growth potential.

Therefore in the context of above discuss the basis question raised - Is the Indian Constitution federal, unitary or quasi-federal? The members of the Drafting Committee of the Constituent Assembly of India called it federal. But there are jurists who dispute this title. It is, therefore, imperative to ascertain, what is a federal Constitution and what are its essential characteristics? However, the answer to this Question is compounded by the fact that there is no agreed definition of a federal State and it is customary with scholars on the subject to start with the model of the United States, the oldest (1787) of all federal Constitutions in the world, and to exclude any system that does not conform to that model from the nomenclature of federation. But it is generally agreed that whether a State is federal or unitary is one of degree and whether it is a federation or not depends upon the number of federal features it possesses.[2]

A FEDERAL STATE

A federation has well-established dual polity or dual government viz., the federal government and the state governments. The force of the government is divided between the federal and state governments which are not subordinate to one another but coordinate bodies that are independent within their respective allotted spheres. Therefore, the existence of co-ordinate authorities independent of each other is the foundation of the federal principle. A Constitution which embodies a federal system is said to possess the following five characteristics:

1. Distribution of Powers

An essential feature of a federal Constitution is the distribution of powers between the central government and the governments of the several units (provincial governments) forming the federation. Federation means the distribution of the power of the State among a number of co-ordinate bodies, each originating from and controlled by the Constitution.

2. Supremacy of the Constitution

This means that the Constitution should be binding on the federal and state governments. Neither of the two governments should be in a position to override the provisions of the Constitution relating to the powers and status which each is to enjoy. This requirement is satisfied if the 6upremcy or overriding authority is accorded only to the provisions relating to the division of powers. Other provisions of the Constitution, which do not relate to the

[2]. https://www.brainyias.com/federal-and-unitary-features-of-indian-state/ (Dated 25/05/2020)

relationship between the Centre and the units, need not be supreme.

3. Written Constitution

The Constitution must necessarily be a written document. It will be practically impossible to maintain the supremacy of the Constitution, unless the terms of the Constitution have been reduced into writing.

4. Rigidity

This feature is a corollary to the supremacy of the Constitution. Here rigidity does not mean that Constitution is unamendable or not subject to change. It simply means that the power of amending the provisions of the Constitution which regulates the status and powers of the federal and state government should not be confined exclusively either to the federal or state governments, but must be a joint act of both. As regards the provisions of the Constitution that are not concerned with the federal system there is no need to maintain the same rigidity.

5. Independent and impartial authority of Courts

The legal supremacy of the Constitution which is an essential feature of a federal State makes it necessary that there must be an authority above both, the federal government and the component state governments to decide whether they are operating under the frame of the Constitution in desired manner. This aspect of involves two connected matters. Firstly, there must be some authority, normally the courts of law to maintain the division of powers not only between the state governments, but also between the federal government on one hand and the state governments on the other. The courts of law are vested with power to declare laws made by the federal or state governments, ultra vires on the ground of excess of power. Secondly, to constitute a final Supreme Court which should not be dependent upon the federal or state governments and should be armed with the final authority to interpret the Constitution. A perusal of the provisions of the Constitution of India reveals that the political system introduced by it possesses all the aforesaid essentials of a federal polity.

The Indian Constitution establishes a dual polity. The dual polity consists of the Union at the Centre and the States at the periphery, each endowed with powers to be exercised in the field assigned to them respectively, by the Constitution. The powers of the Union and the States are clearly demarcated. The Constitution is written and supreme. Enactments in excess of the powers of the Union or the State Legislatures are invalid. Moreover, an amendment which makes any changes in the status or powers of the Centre or the State Legislatures is invalid. Further, any amendment which makes changes in the status or powers of the Centre or the units is possible only with the concurrence of the Union and of a majority of the States. Finally, the Constitution establishes a Supreme Court to decide disputes between the

Union and the States or between the States and to interpret finally the provisions of the Constitution.

UNITARY STATE

A State is unitary when it is governed constitutionally as one single unit, with one constitutionally created legislature. All power is top down. In federal system, power is divided between federal units. A unitary State is a sovereign State governed as one single unit in which the Central government is supreme and any administrative divisions (sub-national units) exercise only powers that the Central government chooses to delegate. Thus, while in a federal State, both the Central government and State governments derive their authority from the same Constitution, in a unitary State, the State governments derive their authority as delegated by the Central government.

UNITARY FEATURES OF INDIAN CONSTITUTION

1. Union of States

Article 1 of the Constitution describes India as a "Union of States", which implies two things: firstly, it is not the result of an agreement among the States, as it is there in federations and secondly, the States have no freedom to secede or separate from the Union. Besides, the Constitution of the Union and the States is a single framework from which neither can get out and within which they must function. The Indian federation is a union because it is indestructible and helps to maintain the unity of the country.

2. Power to form new States and to change existing boundaries

In the USA, it is not possible for the federal government to unilaterally change the territorial extent of a State but in India, the Parliament can do so even without the consent of the State concerned. Under Art 3, Centre can change the boundaries of existing States and can carve out new States. This should be seen in the perspective of the historical situation at the time of independence.

At that time there were no independent States. There were only Provinces that were formed by the British based on administrative convenience. At that time States were artificially created and a provision to alter the boundaries and to create new States was dept so that appropriate changes could be made as per requirement. It should be noted that British India did not have States similar to the States in the USA. Thus, the States in India do not enjoy the right to territorial integrity.

3. Unequal Representation in the Legislature

The equality of units in a federation is best guaranteed by their equal representation in the Upper House of the federal legislature (Parliament). However, this is not applicable in case of Indian States. They have unequal representation in the Rajya Sabha. In a true federation such as that of United States of America every State irrespective of their size in terms of area or population, sends two representatives to the Upper House i.e. Senate.

4. Single Constitution

There is a single Constitution for both Union and the States. There is no provision for separate Constitutions for the States, except for Jammu and Kashmir. In the USA and Australia, the States have their own Constitutions which are equally powerful as the federal Constitution. Nor the States of India can propose amendments to the federal Constitution. As such amendments can only be made by the Union Parliament.

5. Single citizenship

India follows the principle of uniform and single citizenship, but in the USA and Australia, double citizenship is followed. This means that people are citizens of both the federal State and their own State which has its own Constitution.

6. More powers to the Central government in the list of subjects

In India, the distribution of powers has made the Central government very strong. In the Schedule VII which contains the distribution of powers among units of federation, the Union list consists of 100 subjects whereas there are only 61 subjects in the State list. Again in the Concurrent list, there are 52 subjects. In case of an overlap or conflict, the Constitution secures the predominance of Union list over Concurrent and State lists as well as that of Concurrent list over State list. Even the Residuary powers (the power to make laws on those subjects which have not been mentioned in any of the lists) have been given to the Union government, which are otherwise given to federal units in conventional federations such as USA and Australia.

7. Power to make laws on the subjects in State list

The Parliament has the exclusive authority to make laws on the 100 subjects of the Union list, but the States do not have such exclusive rights over the State list. Under certain circumstances, the Parliament can legislate on subjects of State list. This power is exercised only on the matters of national importance and that too if the Rajya Sabha agrees with 2/3rdmajority. There are five such situations as mentioned below:

(1) Under Art. 249, if the Rajya Sabha passes a resolution with not less than 2/3rd majority, authorizing Parliament to make laws on any State subject, on the ground that it is expedient or necessary in the national interest, then Parliament can legislate over that subject. Such laws shall be in force for only 1 year and can be continuously extended any number of times but for not more than one year at a time.

(2) Under Art 250, if national emergency is declared under Art 352, the Parliament has the right to make laws with respect to all the 61 subjects in the State list automatically i.e. the State list is transformed into the Concurrent list.

(3) Under Art 252, if the Legislatures of two or more States request the Parliament to legislate on a particular State subject, the

Parliament can do so. However, such legislation can be amended or repealed only by the Parliament.

(4) Under Art 253, the Parliament can make laws even on subjects in the State list to comply with the international agreements to which India is a party. The States cannot oppose such a move. An example or this is the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which was enacted for giving effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region convened by the Economic and So-vial commission for Asia and Pacific held at Beijing in 1992.

(5) Under Art. 356, if President's rule is imposed in a State the power of the legislature of that State become exercisable by or under the authority of the Parliament. This gives the Parliament full powers to legislate on any matter included in the State list.

(6) In financial matters too, the States depend upon the Union to a great extent. The states do not possess adequate financial resources to meet their requirements. During emergency, the Centre exercises full control over the States' finances.

9. Emergency provisions

The President of India an declare three different types of emergency rules under Articles 352, 356 and 360 for an act of foreign aggression or internal armed rebellion, failure of constitutional machinery in a State and financial emergency respectively.. During the operation of an emergency, the powers of the State governments are greatly railed and the Union government acquires all the powers. If the President declares emergency for the whole or part of India under Article 352, the Parliament can make laws on subjects, which are otherwise, exclusively under the State list. The Parliament can give directions to the States on the manner in which to exercise their executive authority in matters within their charge. The financial provisions can also be suspended. Thus in one stroke, the Indian federation acquires a unitary character. However, such a situation is not possible in other federal Constitutions.

10. Appointment of Governor

Articles 155 and 156 provide that the Governor, who is the constitutional head of a State, is to be appointed by the President and stays only until the pleasure of the President. Thus, he is not responsible to the State legislature. The Centre may take over the administration of the State on the recommendations of the Governor or otherwise, to impose the President's rule. In other words, Governor is the agent of the Centre in the States. The working of Indian federal system clearly reveals that the Governor has acted more as a Central representative than as the head of the

State. This enables the Union government to exercise control over the State administration.

11. Administrative directions to the States

Under Article 256, the Centre can give administrative directions to the States, which are binding on the latter. Along with the directions, the Constitution also provides measures such as President's rule under Article 365, to be adopted by the Centre to ensure such compliance.

12. Unified Judiciary

The federal principle envisages a dual system of Courts. But, in India there is a single integrated judicial system for whole of the country. We have unified Judiciary with the Supreme Court at the apex. The High Courts work under its supervision. Similarly, the other courts in a State work under the respective State High Court.

13. Appointment on Key Positions

In addition to all this, all important appointments such as the Chief Election Commissioner, the Comptroller and Auditor General are made by the Union government, though their jurisdiction extends to both Union and the States.

14. All India Services

Under Article 312, the All India Services officials IAS, IPS and IFS (Forest) are appointed by the Centre, but are paid and controlled by the State. However, in case of any irregularities or misconduct committed by the officer, the States cannot initiate any disciplinary action except suspending him/her.

VIEWS OF DR. B. R. AMBEDKAR ON AMERICAN AND INDIAN CONSTITUTION[3]

In the Draft Constitution there is placed at the head of the Indian Union a functionary who is called the President of the Union. The title of this functionary reminds one of the President of the United States. But beyond identity of names there is nothing in common between the form of Government prevalent in America and the form of Government proposed under the Draft Constitution. The American form of Government is called the Presidential system of Government. What the Draft Constitution proposes is the Parliamentary system. The two are fundamentally different.

Under the Presidential system of America, the President is the Chief head of the Executive. The administration is vested in him. Under the Draft Constitution the President occupies the same position as the King under the English Constitution. He is the head of the State but not of the Executive. He represents the Nation but does not rule the Nation. He is the symbol of the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known. Under the American Constitution the President has under him Secretaries in charge of different Departments. In like manner the President of the Indian Union will have under him Ministers in charge of different Departments of administration. Here again there is a fundamental difference between the two. The President of the United States is not bound

[3]. Speech given by Dr. B. R. Ambedkar on the Motion re Draft Constitution, 4th Nov. 1948

to accept any advice tendered to him by any of his Secretaries. The President of the Indian Union will be generally bound by the advice of his Ministers. He can do-nothing contrary to their advice nor can he do anything without their advice. The President of the United States can dismiss any Secretary at any time. The President of the Indian Union has no power to do so long as his Ministers command a majority in Parliament.

The Presidential system of America is based upon the separation of the Executive and the Legislature. So that the President and his Secretaries cannot be members of the Congress. The Draft Constitution does not recognize this doctrine. The Ministers under the Indian Union are members of Parliament. Only members of Parliament can become Ministers. Ministers have the same rights as other members of Parliament, namely, that they can sit in Parliament, take part in debates and vote in its proceedings. Both systems of Government are of course democratic and the choice between the two is not very easy. A democratic executive must satisfy two conditions - (1) It must be a stable executive and (2) it must be a responsible executive. Unfortunately it has not been possible so far to devise a system which can ensure both in equal degree. You can have a system which can give you more stability but less responsibility or you can have a system which gives you more responsibility but less stability. The American and the Swiss systems give more stability but less responsibility. The British system on the other hand gives you more responsibility but less stability. The reason for this is obvious. The American Executive is anon-Parliamentary Executive which means that it is not dependent for its existence upon a majority in the Congress, while the British system is a Parliamentary Executive which means that it is not dependent for its existence upon a majority in the Congress, while the British system is parliamentary Executive which means that it is dependent upon a majority in Parliament. Being a non-Parliamentary Executive, the Congress of the United States cannot dismiss the Executive. A Parliamentary Government must resign the moment it loses the confidence of a majority of the members of Parliament. Looking at it from the point of view of responsibility, a non-Parliamentary Executive being independent of parliament tends to be less responsible to the Legislature, while a Parliamentary Executive being more dependent upon a majority in Parliament become more responsible. The Parliamentary system differs from a non-Parliamentary system in as much as the former is more responsible than the latter but they also differ as to the time and agency for assessment of their responsibility. Under the non-Parliamentary system, such as the one that exists in the U.S.A. the assessment of the responsibility of the Executive is periodic. It is done by the Electorate. In England, where the Parliamentary system prevails, the assessment of responsibility of the Executive is both daily and periodic. The daily assessment is done by members of Parliament, through questions, Resolutions, No-confidence motions, Adjournment motions and Debates on Addresses. Periodic assessment is done by the Electorate at the time of the election which may take place every five years or earlier. The Daily assessment of responsibility which is not available under the American system is it is felt

far more effective than the periodic assessment and far more necessary in a country like India. The Draft Constitution in recommending the Parliamentary system of Executive has preferred more responsibility to more stability.

So far I have explained the form of Government under the Draft Constitution. I will now turn to the other question, namely, the form of the Constitution.

Two principal forms of the Constitution are known to history - one is called Unitary and the other Federal. The two essential characteristics of A Unitary Constitution are : (1) the supremacy of the Central Polity and (2) the absence of subsidiary Sovereign polities. Contrariwise, a Federal Constitution is marked: (1) by the existence of a Central polity and subsidiary polities side by side, and (2) by each being sovereign in the field assigned to it. In other words. Federation means the establishment of a Dual Polity. The Draft Constitution is, Federal Constitution inasmuch as it establishes what may be called a Dual Polity. This Dual Polity under the proposed Constitution will consist of the Union at the Centre and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution. This dual polity resembles the American Constitution. The American polity is also a dual polity, one of it is known as the Federal Government and the other States which correspond respectively to the Union Government and the States Government of the Draft Constitution. Under the American Constitution the Federal Government is not a mere league of the States nor is the States administrative units or agencies of the Federal Government. In the same way the Indian Constitution proposed in the Draft Constitution is not a league of States nor are the States administrative units or agencies of the Union Government. Here, however, the similarities between the Indian and the American Constitution come to an end. The differences that distinguish them are more fundamental and glaring than the similarities between the two.

The points of difference between the American Federation and the Indian Federation are mainly two. In the U.S.A. this dual polity is followed by a dual citizenship. In the U.S.A. there is a citizenship of the U.S.A. But there is also a citizenship of the State. No doubt the rigours of this double citizenship are much assuaged by the fourteenth amendment to the Constitution of the United States which prohibits the States from taking away the rights, privilegesand immunities of the citizen of the United States. At the same time, as pointed out by Mr. William Anderson, in certain political matters, including the right to vote and to hold public office, States may and do discriminate infavour of their own citizens. This favoritism goes even farther in many cases. Thus to obtain employment in the service of a State or local Government one is in most places required to the be a local resident or citizen. Similarly in the licensing of persons for the practice of such public professions as law and medicine, residence or citizenship in the State is frequently required; and in business where public regulation must necessarily be strict, as in the sale of liquor, and of stocks and bonds, similar requirements have been upheld.

Each State has also certain rights in its own domain that it holds for the special

advantage of its own citizens. Thus wild game and fish in a sense belong to the State. It is customary for the States to charge higher hunting and fishing license fees to non-residents than to its own citizens. The States also charge non-residents higher tuition in State Colleges and Universities, and permit only residents to be admitted to their hospitals and asylums except in emergencies.

In short, there are a number of rights that a State can grant to its own citizens or residents that it may and does legally deny to non-residents, or grant to non-residents only on more difficult terms than those imposed nonresidents. These advantages, given to the citizen in his own State, constitute the special rights of State citizenship. Taken all together, they amount to a considerable difference in rights between citizens and non-citizens of the State. The transient and the temporary sojourner is everywhere under some special handicaps.

The proposed Indian Constitution is a dual polity withal single citizenship. There is only one citizenship for the whole of India. It is Indian citizenship. There is no State citizenship. Every Indian has the same rights of citizenship, no matter in what State he resides.

The dual polity of the proposed Indian Constitution differs

From the dual polity of the U.S.A. in another respect. In the U.S.A. the Constitutions of the Federal and the States Governments are loosely connected. In describing the relationship between the Federal and State Government in the U.S.A., Bryce has said: "The Central or national Government and the State Governments may be compared to a large building and a set of smaller buildings standing on the same ground, yet distinct from each other."

Distinct they are, but how distinct are the State Governments in the U.S.A. from the Federal Government? Some idea of this distinctness may be obtained from the following facts:

1. Subject to the maintenance of the republican form of Government, each State in America is free to make its own Constitution.
2. The people of a State retain forever in their hands, altogether independent of the National Government, the power of altering their Constitution.

To put it again in the words of Bryce: "A State (in America) exists as a commonwealth by virtue of its own Constitution, and all State Authorities, legislative, executive and judicial are the creatures of and subject to the Constitution."

This is not true of the proposed Indian Constitution. No States (at any rate those in Part I) have a right to frame its own Constitution. The Constitution of the Union and of the States is a single frame from which neither can get outland within which they must work.

So far I have drawn attention to the difference between the American Federation and the proposed Indian Federation. But there are some other special features of the proposed Indian Federation which mark it off not only from the American Federation but from all other Federations. All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand the Draft Constitution can be both unitary as well as

federal according to the requirements of time and circumstances. In normal times, it is framed to work as federal system. But in times of wait is so designed as to make it work as though it was unitary system. Once the President issues a Proclamation which he is authorized to do under the Provisions of Article275, the whole scene can become transformed and the State becomes a unitary state. The Union under the Proclamation can claim if it wants (1) the power to legislate upon any subject even though it may be in the State list, (2) the power to give directions to the States as to how they should exercise their executive authority in matters which are within their charge, (3) the power to vest authority for any purpose in any officer, and (4) the power to suspend the financial provisions of the Constitution. Such a power of converting itself into a unitary State no federation possesses. This is one point of difference between the Federation proposed in the Draft Constitution, and all other Federations we know of.

This is not the only difference between the proposed Indian Federation and other federations. Federalism is described as a weak if not an effete form of Government. There are two weaknesses from which Federation is alleged to suffer. One is rigidity and the other is legalism. That these faults are inherent in Federalism, there can be no dispute. A Federal Constitution cannot but be a written Constitution and a written Constitution must necessarily bee rigid Constitution. A Federal Constitution means division of Sovereignty by no less a sanction than that of the law of the Constitution between the Federal Government and the States, with two necessary consequences (1) that any invasion by the Federal Government in the field assigned to the States and vice versa is a breach of the Constitution and (2) such breach is a justiciable matter to be determinedly the Judiciary only. This being the nature of federalism, a federal Constitution have been found in a pronounced forming the Constitution of the United States of America.

Countries which have adopted Federalism at a later date have attempted to reduce the disadvantagesfollowing from the rigidity and legalism which are inherent therein. The example of Australia may well be referred to in this matter. The Australian Constitution has adopted the following means to make its federation less rigid:

(1) By conferring upon the Parliament of the Commonwealth large powers of concurrent Legislation and few powers of exclusive Legislation.

(2) By making some of the Articles of the Constitution of a temporary duration to remain in force only "until Parliament otherwise provides."

It is obvious that under the Australian Constitution, the Australian Parliament can do many things, which are not within the competence of the American Congress and for doing which the American Government will have to resort to the Supreme Court and depend upon its ability, ingenuity and willingness to invent a doctrine to justify it the exercise of authority.

In assuaging the rigor of rigidity and legalism the Draft Constitution follows the Australian plan on a far more extensive scale than has been done in Australia. Like the Australian Constitution, it has a long list of

subjects for concurrent powers of legislation. Under the Australian Constitution, concurrent subjects are 39. Under the Draft Constitution they are 37. Following the Australian Constitution there are as many as six Articles in the Draft Constitution, where the provisions are of a temporary duration and which could be replaced by Parliament at anytime by provisions suitable for the occasion. The biggest advance made by the Draft Constitution over the Australian Constitution is in the matter of exclusive powers of legislation vested in Parliament. While the exclusive authority of the Australian Parliament to legislate extends only to about 3 matters, the authority of the Indian Parliament as proposed in the Draft Constitution will extend to 91 matters. In this way the Draft Constitution has secured the greatest possible elasticity in its federalism which is supposed to be rigidly nature.

It is not enough to say that the Draft Constitution follows the Australian Constitution or follows it on a more extensive scale. What is to be noted is that it has added new ways of overcoming the rigidity and legalism inherent in federalism which are special to it and which are not to be found elsewhere.

First is the power given to Parliament to legislate on exclusively provincial subjects in normal times? I refer to Articles 226, 227 and 229. Under Article 226 Parliament can legislate when a subject becomes a matter of national concern as distinguished from purely Provincial concern, though the subject is in the State list, provided are solution is passed by the Upper Chamber by 2/3rd majority in favour of such exercise of the power by the Centre. Article 227 gives the similar power to Parliament in national emergency. Under Article 229 Parliament can exercise the same power if Provinces consent to such exercise. Though the last provision also exists in the Australian Constitution the first two are a special feature of the Draft Constitution.

The second means adopted to avoid rigidity and legalisms the provision for facility with which the Constitution could be amended. The provisions of the Constitution relating to the amendment of the Constitution divide the Articles of the Constitution into two groups. In the one group are placed Articles relating to (a) the distribution of legislative powers between the Centre and the States, (b) the representation of the States in Parliament, and (c) the powers of the Courts. All other Articles are placed in another group. Articles placed in the second group cover Avery large part of the Constitution and can be amended by Parliament by a double majority, namely, a majority of knotless than two thirds of the members of each House present and voting and by a majority of the total membership of each House. The amendment of these Articles does not require ratification by the States. It is only in those Articles which are placed in group one that an additional safeguard of ratification by the States is introduced.

One can therefore safely say that the Indian Federation will not suffer from the faults of rigidity or legalism. Its distinguishing feature is that it is a flexible federation.

There is another special feature of the proposed Indian Federation which distinguishes it from other federations. Federation being a dual polity based on divided authority with separate legislative, executive and judicial powers for each of the two polities is bound to produce diversity in laws, in administration and

in judicial protection. Upton ascertains point this diversity does not matter. It may be welcomed as being an attempt to accommodate the powers of Government to local needs and local circumstances. But thievery diversity when it goes beyond a certain point escapable of producing chaos and has produced chaos in many federal States. One has only to imagine twenty different laws-if we have twenty States in the Union-of marriage, of divorce, of inheritance of property, family relations, contracts, torts, crimes, weights and measures, of bills and cheques, banking and commerce, of procedures for obtaining justice and in the standards and methods of administration. Such a state of affairs not only weakens the State but becomes intolerant to the citizen who moves from State testate only to find that what is lawful in one State is not lawful in another. The Draft Constitution has sought to forge means and methods whereby India will have Federation and at the same time will have uniformity in all basic matters which are essential to maintain the unity of the country. The means adopted by the Draft Constitution are three

(1) A single judiciary,

(2) uniformity-in fundamental laws, civil and criminal, and

(3) A common All-India Civil Service to man important posts.

A dual judiciary, a duality of legal codes and duality of civil services, as I said, are the logical consequences of a dual polity which is inherent in federation. In the U. S. A. the Federal Judiciary and testate Judiciary are separate and independent of each other. The Indian Federation though a Dual Polity has no Dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional law, the civil law or the criminal law. Thesis done to eliminate all diversity in all remedial procedure. Canada is the only country which furnishes close parallel. The Australian system is only an approximation.

Care is taken to eliminate all diversity from laws which are at the basis of civic and corporate life. The great Codes of Civil & Criminal Laws, such as the Civil Procedure Code, Penal Code, the Criminal Procedure Code, the Evidence Act, Transfer of Property Act, Laws of Marriage Divorce, and Inheritance, are either placed in the Concurrent List so that the necessary uniformity can always be preserved without impairing the federal system.

The dual polity which is inherent in a federal systems I said is followed in all federations by a dual service. In all Federations there is a Federal Civil Service and astute Civil Service. The Indian Federation though a Dual Polity will have a Dual Service but with one exception. It is recognized that in every country there are certain posts in its administrative set up which might be called strategic from the point of view of maintaining the standard of administration. It may not be easy to spot such posts in large and complicated machinery of administration. But there can be no doubt that the standard of administration depends upon the caliber of the Civil Servants who are appointed to these strategic posts. Fortunately for us we have inherited from the past system of administration which is common to the whole of the country and we know what these strategic posts are. The Constitution provides that without

depriving the States of their right to form their own Civil Services there shall be an All India service recruited on anal India basis with common qualifications, with uniform scale of pay and the members of which alone could be appointed to these strategic posts throughout the Union.

Such are the special Features of the proposed Federation. I will now turn to what the critics have had today about it.

It is said that there is nothing new in the Draft Constitution, that about half of it has been copied from the Government of India Act of 1935 and that the rest of it has-been borrowed from the Constitutions of other countries. Very little of it can claim originality.

One likes to ask whether there can be anything new in constitution framed at this hour in the history of the world. More than hundred years have rolled over when the first written Constitution was drafted. It has been followed by many countries reducing their Constitutions to writing. What the scope of a Constitution should be has long been settled. Similarly what are the fundamentals of constitution are recognized all over the world. Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there can be any, in constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country. The charge of producing a blind copy of the Constitutions of other countries is based; I am sure, on an inadequate study of the Constitution. I have shown what is new in the Draft Constitution and I am sure that those who have studied other Constitutions and who are prepared to consider the matter dispassionately will agree that the Drafting Committee in performing its duty has not been guilty of such blind and slavish imitation as it is represented to be.

As to the accusation that the Draft Constitution has produced a good part of the provisions of the Government of India Act, 1935, I make no apologies. There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of constitution. What I am sorry about is that the provisions taken from the Government of India Act, 1935, relate mostly to the details of administration. I agree that administrative details should have no place in the Constitution. I wish very much that the Drafting Committee could see its way to avoid their inclusion in the Constitution. But this is to be said on the necessity which justifies their inclusion. Grote, the historian of Greece, has said that:

"The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendency for themselves."

By constitutional morality Grote meant "a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a

perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own." (Hear, hear.)

While everybody recognizes the necessity of the diffusion of Constitutional morality for the peaceful working of a democratic Constitution, there are two things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration has a close connection with the form of the Constitution. The form of the administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature

To prescribe them. The question is, can we presume such a diffusion of Constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.

In these circumstances it is wiser not to trust the Legislature to prescribe forms of administration. This is the justification for incorporating them in the Constitution.

Another criticism against the Draft Constitution is that no part of it represents the ancient polity of India. It is said that the new Constitution should have been drafted on the ancient Hindu model of a State and that instead of incorporating Western theories the new Constitution should have been raised and built upon village Panchayats and District Panchayats. There are others who have taken a more extreme view. They do not want any Central or Provincial Governments. They just want India to contain so many village Governments. The love of the intellectual Indians for the village community is of course infinite if not pathetic (laughter). It is largely due to the fulsome praise bestowed upon it by Metcalfe who described them as little republics having nearly everything that they want within themselves, and almost independent of any foreign relations. The existence of these village communities each one forming a separate little State in itself has according to Metcalfe contributed more than another cause to the preservation of the people of India ,through all the revolutions and changes which they have suffered, and is in a high degree conducive to their happiness and to the enjoyment of a great portion of the freedom and independence. No doubt the village communities have lasted where nothing else lasts. But those who take pride in the village communities do not care to consider what little part they have played in the affairs and the destiny of the country; and why? Their part in the destiny of the country has been well described by Metcalfe himself who says:

"Dynasty after dynasty tumbles down. Revolution succeeds to revolution. Hondo, Padhan, Mogul, Mahasabha, Sikh, English are

all masters in turn but the village communities remain the same. In times of trouble they Armand fortify themselves. A hostile army passes through the country. The village communities collect their little cattle within their walls, and let the enemy pass unprovoked."

Such is the part the village communities have played in the history of their country. Knowing this, what pride canone feel in them? That they have survived through all vicissitudes may be a fact. But mere survival has no value. The question is on what plane they have survived. Surely on a low, on a selfish level. I hold that these village republics have been the ruination of India. I am therefore surprised that those who condemn Provincialism and communalism should come forward as champions of the village. What is the village but a sink of localism, a den of ignorance, narrow-mindedness and communalism? I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit.

Thus, if we see, our Constitution establishes a federal State in terms of structure of governments, but it adorns a unitary character in terms of functions. This is particularly true in times of emergencies when all the powers are concentrated in the hands of Centre, as well as for the nature of legislative powers, administrative and financial control of Centre over the States. Thus, it is quite obvious that the Indian Constitution is more unitary than federal in nature.

It is for this reason that Dr. K. C. Wheare said: "The Indian Constitution establishes, indeed, a system of government which is at the most quasi-federal, almost devolutionary in character; a unitary State with subsidiary federal features rather than a federal State with unitary features." Hence, it is true to say that Indian Constitution establishes a system of government which is only 'federal in form but unitary in spirit'. Here, the Centre has been made strong at the cost of the States.

Having said this all, it must be noted that whatever the structure of the Constitution and resultant government is – federal, quasi-federal or unitary – it's real nature depends on the spirit of functionaries occupying the government. They can run it in the spirit of 'co-operative federalism' or 'unitary centralism'. The beauty of the Indian Constitution is that it has been made relatively flexible so as to showcase its federal or unitary face in accordance with the socio-political situations in the country. Dr Ambedkar, one of the architects of the Indian Constitution, rightly remarked, "Our Constitution would be both unitary as well as federal according to the requirements of time and circumstances."

The aforementioned provisions in the Constitution are aimed at establishing a working balance between the requirements of national unity and autonomy of the States. The federal Constitutions of the USA and Australia, which are placed in a tight mould of federalism, cannot change their form. They can never be unitary as per the provisions of their constitution. But, the

Indian Constitution is a flexible form of federation – a federation of its own kind. It is a federation sui generis.

The dominance of a single party both at the Centre and in the States till the 6th General elections had contributed further to the centralized structure of government in India. The Central government treated the State governments in those years as their subordinates. The financial strength of the Centre vis-à-vis states has kept it powerful all along. With every passing five year term the Planning Commission in India has also been emerging as stronger instrument for extending the sphere of influence of the Union government over the States. The situation has changed in the coalition era in the last twenty years or so and the regional parties are becoming strong. These regional parties are bargaining hard with the Centre in order to promote their local interests. With the rise of regional parties India now seems to be moving towards 'bargaining federalism'.

MODULE - 02

STRUCTURE POWERS AND FUNCTIONS UNION AND STATE EXECUTIVE

Our Constitution-makers chose for us the system of parliamentary democracy with ministerial responsibility to the representatives of the people in the Lok Sabha. Under the British system, the head of the State is the hereditary monarch. But, as the relationship between the King and the Parliament has evolved over the centuries, real political and executive power has come to be vested in the Cabinet while the King has become a constitutional, nominal or ceremonial head only. We, in India, do not have a monarchy. Also, we are not a small unitary State like the United Kingdom (U.K.). We are a large republic and a Union of States like the United States with an elected President at the head of the Republic. We are thus in the unique position of being at once a parliamentary polity and a Republic with a President.

Under Article 73 of the Constitution, the executive power of the Union extends to all matters with respect to which Parliament may make laws and to the exercise of all powers that accrue to the Government of India from any international treaty or agreement. It is important to remember that all executive power has t9 be exercised in accordance with the Constitution.

THE PRESIDENT

Position and Powers of the President

Article 52 of the Constitution says that there shall be a President of India. The position of the President in the scheme of our Constitution is one of the highest honour, dignity and prestige. He is the Head of the State and it would be very wrong to say that he is only a nominal or titular head. As Nehru said in the Constituent Assembly, it was not intended to make the President of India a mere figurehead. All executive power of the Union is vested in him and is to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution, 'Officers subordinate' are supposed to include Ministers.[4] All executive action of the Government of India is taken in his name. The Supreme Command of the Defence Forces is vested in him and is to be exercised in accordance with law (Articles 53 and 77).

The President appoints the Prime Minister and on his advice other Ministers. All the Ministers hold office during the pleasure of the President (Article 75).

Along with the two Houses of Parliament, the President is an integral part of Parliament. He summons the two Houses to meet, prorogues their sittings, and may dissolve the Lok Sabha (Article 85). He addresses the

[44] . Emperor V. Srinath, AIR 1945 PC 163

members of the two Houses assembled together at the beginning of the first session each year and after each General Election. The President may also, otherwise, send messages to Houses of Parliament or address either or both of them. All Bills after being passed by the two Houses of Parliament must receive the assent of the President in order to become laws. Bills belonging to certain categories (e.g. money bills) can be introduced and proceeded with only with the President's recommendation (Articles 79/ 85-87, 111 and 117). When during the Ninth Lok Sabha an amendment proposing pension to members of Parliament after only a year's service was allowed to be introduced and passed without President's recommendation, President Venkataraman did not give his assent to the Bill.

When both Houses of Parliament are not in session and the President is satisfied about the need for immediate action, he can promulgate ordinances which have the same force and effect as laws passed by Parliament (Article 123). These are in the nature of interim or temporary legislation. For, their continuance is subject to parliamentary approval and enactment of laws to replace the ordinances. The President's power to issue ordinances extends to only those matters in which Parliament can make laws. The Supreme Court has upheld the legitimacy and validity of the President's power to issue ordinances.[5]

There are certain other functions which the President is required to perform under the Constitution in relation to Parliament. He appoints the Speaker pro tern of Lok Sabha and an acting Chairman of Rajya Sabha as and when the need arises. He summons the joint sitting of both Houses in case of final disagreement between them on a Bill. The President causes to be laid, every year, before Parliament, the Budget of the government, referred to in the Constitution as the II annual financial statement" and certain other reports of constitutional functionaries like the Comptroller and Auditor-General of India, Finance Commission, Union Public Service Commission, National Commission for Scheduled Castes, National Commission for Scheduled Tribes and Backward Classes Commission. He may nominate not more than two members of the Anglo-Indian Community to Lok Sabha, if he is of the opinion that the community is not adequately represented in the House. The President also nominates 12 members to the Rajya Sabha from amongst persons having special knowledge or practical experience in respect of such matters as literature, science, art and social service. Besides, he is empowered to decide, after obtaining the opinion of the Election Commission, whether any member duly elected attracts the disqualifications laid down in Article 102 of the Constitution. His decision in the matter is final.

[5]. A.K. Roy v. Union of India, AIR 1982 SC 710; R.K. Garg v. Union of India, AIR 1981 SC 2139

All the high functionaries of the State including the judges of the Supreme Court and of the High Courts, the Attorney-General of India, the Comptroller and Auditor General of India, the Governors etc. are appointed by the President (Articles 76, 124, 148, 155 and 217).

Under Article 72, the President has the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person ill / all cases where the punishment has been awarded by a Court Martial, is for an offence against a Union law, or is a sentence of death. The power of the President under Article 72 is independent of the judiciary. He does not function as a court of appeal. The idea is to enable correction of any judicial error. Also, the President may decide to give relief from what may appear to him to be too harsh a punishment. Justifying the vesting of this power in the President, the Law Commission in its 1967 Report on capital punishment said:

There are many matters which may not have been considered by the courts. The hands of the court are tied down by the evidence placed before it. A sentence of death passed by a Court after consideration of all the materials placed before it may yet require reconsideration because of: (i) facts not placed before the court, (ii) facts placed before the court but not in the proper manner, (iii) acts discovered after the passing of the sentence, (iv) events which have developed after the passing of the sentence, and (v) other special features.

The President cannot be compelled to give a hearing to a petitioner. The courts cannot interfere with the decisions of the President on merits, but they can look into whether the President has considered all relevant materials.[6]

Since in the exercise of all his functions, the President has to act in accordance with the advice of the Council of Ministers (Article 74), in the exercise of function of granting pardons etc. also, the President is taken to be acting only on the advice of the Council of Ministers.

Under Article 352, the President may proclaim a state of emergency in the whole or part of India if he is satisfied that a grave situation exists whereby the security of India or part of its territory is threatened by war or external aggression of armed rebellion. Under Article 354, the President may restrict or prohibit the distribution of revenues. When a proclamation of emergency is in operation, the President may suspend the enforcement of fundamental rights (Article 359). Under Article 356, in case of failure of constitutional machinery in any State, the President may impose by proclamation President's rule in that State. Article 360 empowers the President to

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6. Hukam Singh v. State of Punjab, AIR 1975 P&H 902; Harbans v. State of U.P., AIR 1982 S.c. 849; Kuljit v. Lt. Governor, AIR 1982 S.c. 774; Maru v. Union of India, AIR 1980 S.c. 2147; Godse v. State of Maharastra, AIR 1961 SC 600; Nanavati v. State of Bombay, AIR 1961 S.c. 122; State of Punjab v. Joginder Singh, (1990) GLJ 1464 (SC)

declare financial emergency. Thus, the emergency powers of the President are drastic and far-reaching.

To sum up, the President has (1) executive powers to be exercised by him directly or through officers; (2) powers to appoint high functionaries of the State including judges of the Supreme Court and High Courts; (3) military powers as the Supreme Commander of the armed forces with the authority to declare war and peace; (4) power to grant pardon, reprieve etc.; (5) diplomatic powers including appointment of ambassadors and receiving the credentials of foreign diplomatic representatives; (6) legislative powers including powers to summon and prorogue Houses and dissolve Lok Sabha, assent to Bills etc. and issue ordinances having the force of law; (7) Emergency powers.

Despite all this array of impressive powers, our President's position is conceived as that of a constitutional head of State. It has to be remembered that Article 53 makes it clear that the executive power of the Union has to be exercised by the President "in accordance with the Constitution" and the exercise of the powers of the President a8 the Supreme Commander of the armed forces has to be "regulated by law".[7] Also, under Article 60, the President takes an oath "to preserve, protect and defend the Constitution and the law". Article 74(1) requires the President to act only with the aid and advice of the Council of Ministers in the discharge of all his functions. This follows also from our adoption of the parliamentary form of Government with ministerial responsibility. The Supreme Court through various decisions has upheld the position that the President is a constitutional head who must act on the advice of the Council of Ministers and that the real executive power in our system vests in the Council of Ministers.[8] Also, the Constitution does not make any distinction between normal times and Emergency in the matter of the exercise of President's powers. There is no special provision for any discretionary exercise of powers during the Emergency. Article 74 governs exercise of all powers by the President and as such the President is as much bound by the advice of Council of Ministers during Emergency as during normal times. By the 44th constitutional amendment, the position was finally put beyond all doubt and it was made clear that Emergency can be declared by the President only after receiving in writing a communication regarding the Union Cabinet deciding to advise him to do so.

Even though the Constitution makes it obligatory for the President to act on advice of the Council of Ministers, there are some grey

[7]. U.N. Rao v. Indira Gandhi, AIR 1971 SC 1002; Sanjeev v. State of Madras, AIR 1970 SC 1102.

[8]. Samsher Singh v. State of Punjab, AIR 1974 SC 2192; U.N. Rao v. Indira Gandhi, AIR 1971 SC 1002; Mis Bishamber Dayal Chandra Mohan v. Stqte of U.P. AIR 1982 SC 33; Ram Jawaya v. State of Punjab, AIR 1955 SC 544

areas where the President may still have to use his own judgment and wisdom. These are:

1. Appointment of the Prime Minister (Article 75(1)) n a situation where no single party or coalition commands the clear support of the majority of the Lok Sabha members. Obviously, the President cannot appoint the new Prime Minister on the advice of the outgoing Prime Minister who may have lost the election or the support of the House.
2. Appointment of a Prime Minister in case of sudden death (for example, by assassination as in the case of Indira Gandhi) of the incumbent, where the ruling legislature party is unable to meet immediately to elect a leader, there is no settled seniority among Cabinet ministers and a name from outside the Cabinet is suggested.
3. Dissolution of Lok Sabha (Article 85(2)(b))on the advice of a Council of Ministers that may have lost the majority support in Lok Sabha or against whom a vote of no confidence may have been passed.
4. Dismissal of Ministers (Article 75(2))in case the Council of Ministers loses the confidence of the House but refuses to resign.

In some such situations, the role of the President may become most crucial and decisive. This happened, for instance, when Charan Singh, Rajiv Gandhi and Chandra Sekhar came to be appointed to the office of Prime Minister.

A question was raised whether a person who was not a member of either house of Parliament could be appointed Prime Minister. It was held that under Article 75(5), such a person could be a Minister for six months and since the Prime Minister was also a Minister he could be appointed from among non-members if he had the confidence of the House.[9]

Besides, Article 78(a) casts on the Prime Minister the responsibility to keep the President informed of all decisions relating to the administration of the affairs of the Union and proposals for legislation and to furnish the information asked for by the President in that regard. If a decision has been taken by a Minister, the President may require that it be referred to the Council of Ministers for consideration. Also, under the Proviso to Article 74 inserted in 1978 by the 44th Amendment, the President may require the Council of Ministers to reconsider their advice. He shall, of course, act on the reconsidered advice. But according to Article 74 (2), the question whether any, and if so what advice was tendered by the Ministers to the President is confidential between them and cannot be inquired into in any court of law. Of course, the Government itself is not barred from producing on its own any papers relating to the cabinet decisions and advice to the President and

[9]. S.P. Anand v. H.D. Deve Gowda, AIR 1997 SC 272

the Court can then look into them.[10] It is true that in Kartar Singh's case, the Supreme Court had held that the Court was within its rights to look into the basis of the advice tendered by the Council of Ministers to the President. But, in view of the very clear words of Article 74(2), the view in Kartar Singh v. State of Punjab[11] may not be fully correct and may need review.

When a Bill is presented to the President for his assent under Article 111, he may declare that he assents to the Bill or withholds assent. There is no time limit prescribed for the President giving his assent or declaring his decision to withhold it. But the President may, as soon as possible, also return the Bill, if it is not a money Bill, for reconsideration to the Houses of Parliament. When after reconsideration, the Bill is passed, with or without amendments, and is presented to the President again he shall not withhold his assent.

Inasmuch as giving assent to Bills is one of the functions of the President to be discharged on the advice of the Council of Ministers, it is open to him to seek clarificatory information from the Prime Minister under Article 78(b) or to send a Bill back to the Government for reconsideration under Proviso to Article 74(1). Presumably this is what was done by the President in the case of the controversial Postal Bill and the Bill seeking inter alia to provide to Members of Parliament pension after merely one year's service.

Twice during his tenure, President Narayanan was reported to have returned for reconsideration to his Council of Ministers its advice regarding imposition of President's rule in U.P. and Bihar. The 'satisfaction' stipulated under Article 356 is of one single authority, that of the President acting on the advice of the Council of Ministers or, in other words, that of the Union Government. It may be debatable whether in view of Article 74(2), what transpires between the President and his Ministers should become matters of public debate and controversy in the media.

Election of the President

When the question of the method of the election of the President came up for consideration before the Constituent Assembly, one of the suggestions made was that he should be elected directly by the people under universal adult franchise. On the other extreme was a suggestion that members of the two houses of Parliament alone may elect the President. The Constituent Assembly devised a unique mechanism which represented q middle course.

Since the membership in the two houses of Parliament was likely to be dominated by one party, election of the President merely by a majority of members of the Union Parliament could make him a nominee of the ruling party like the Prime Minister and such a President

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[10]. State of M.P. v. Nandlal, AIR 1987 SC 251; S.P. Gupta v. Union of India, AIR 1982 SC 149; State of Rajasthan v. Union of India, AIR 1977 SC 1361

[11]. JT (1994) 2 SC 423

could not represent the constituent States of the Union. On the other hand, if the President was elected directly by the people, he could become a rival centre of power to the Council of Ministers which would have been against the parliamentary system with ministerial responsibility. As Nehru said in the Constituent Assembly, we could not have a directly elected President and not give him "real powers".

Like the President of the United States, our President is also elected by an electoral college. But, here the Electoral College consists of the elected members of the two Houses of Parliament and Legislative Assemblies of the States (Article 54). The thinking in the Constituent Assembly was that such an electoral college would make the President the elected representative of the whole nation with a clear voice given to the States as well.

Article 58 of the Constitution lays down that no person shall be eligible for election as President unless he (a) is a citizen of India; (b) has completed the age of thirty five years; and (c) is qualified for election as a member of the House of the People. A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments. But a person shall not be deemed to hold any office of profit by reason only that he is President or Vice-President of the Union or the Governor of any State. Dr. S. Radhakrishnan and Dr. Zakir Husain contested the election to the office of the President of India in 1962 and 1967, respectively, without resigning from the office of Vice President of India. However, notwithstanding the constitutional provisions, Shri V.V. Giri, who was then the Vice President and Dr. N. Sanjiva Reddy, who was the Speaker of Lok Sabha, resigned their respective offices before filing their nomination papers for election to the office of President in 1969. Dr. N. Sanjiva Reddy again resigned from the office of Speaker in 1977 before a nomination proposing him as a candidate for the office of President was filed. Vice-President, Shri R. Venkataraman and Vice-President, Dr. S.D. Sharma, who contested and won the Presidential Election in 1987 and 1992 respectively did not resign from the office of Vice President till they assumed the office of President of India.

The Election Statute

The Presidential and Vice Presidential Elections Act, 1952 and the Rules framed there under regulate all matters relating to or connected with the election to the offices of the President and the Vice President of India. The Act of 1952 was amended in 1974 and 1997 to make certain changes therein in the light of the experience gained during the elections held earlier. Similarly, the Presidential and Vice-Presidential Election Rules 1952, were also revised. The main requirements of the Act are:

1. A nomination paper for election to the office of President of India should be completed in the prescribed form, subscribed by the candidate as assenting to the nomination and also by at least fifty electors as proposers and at least fifty electors as seconders. Before 1997, the number of proposers and seconders required was only ten each. The requirement was held to be in order because Article 58 provided only the qualifications for eligibility and not the requirements for a valid nomination[12];
2. Each nomination paper should be accompanied by a certified copy of the entry relating to the candidate in the electoral roll for the Parliamentary constituency in which the candidate is registered as an elector.

Article 55 provides that, as far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President; the election shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting shall be by secret ballot. The Article also provides that for the purpose of securing uniformity among the States inter se as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner:

a. Every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of elected members of the Assembly;
b. If, after taking the said multiples of one thousand, the remainder is not less than five hundred, then the vote of each member referred to in (a) above shall be further increased by one.

   Illustration

   Total population of a State 43,502,708

   Total No. of elected Members in the Assembly 294

   No. of votes for each [Value of each vote]

   = 43,502,708 / 1000 x 294

   = 147.96 or 148
c. Each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative, Assemblies of the States under (a) and (b) above by the total number of elected members of both Houses of Parliament, fractions exceeding one half being counted as one and other fractions being disregarded.

[12]. Charan Lal Sahu v. Neelam Sanjeeva Reddy, AIR 1978 SC 499

The total number of members in the Electoral College for a Presidential election, for example, was 4,848 as detailed below:

Rajya Sabha	233
Lok Sabha	543
State Assemblies	4072
Total	4848

The value of the vote of each Member of Parliament (both Rajya Sabha and Lok Sabha) is arrived at by dividing the total value of all the votes assigned to elected members of Legislative Assemblies (5,49,511) by the total number of the elected members of the two houses of Parliament (776). The value of the vote of each member of Parliament thus came to 708. The value of the vote of each member of the State Legislative Assembly differed from State to State depending on the strength of the Assembly and the population of the State as per the 1971 census. The lowest value for a State was 7 and the highest 208.

The method of providing parity between the States as a whole on the one hand and the Union on the other meant that the whole process was weighted in favour of the representatives of the States. They got double representation-first as members of the Council of States and secondly as members of the State Assemblies. This was done deliberately to make the office of President command unquestioning support from the entire country and the constituent States. The idea of providing uniformity in the scale of representation of different States inter se was broadly to provide representation on the basis of population and to respect the one man one vote principle and the concepts of one Indian Citizenship and equality among all citizens.

Explanation to Article 55 clarifies that the reference to population in that Article means the population ascertained at the last preceding census but that until the figures of a census after the year 2026 become available, the reference to last preceding census would mean the 1971 census. The 84th Constitution Amendment substituted the year 2026 for the year 2000 so that population continues to mean the population as in 1971.

The system of proportional representation by single transferable vote for the Presidential election was adopted presumably and simply because it was believed to give representation to minorities. There was hardly any discussion on the point in the Constituent Assembly. The proposal was just accepted. The system is hardly very relevant in a single member constituency situation. The system is useful only when there are more than one seat to be filled by the same electorate at the same poll. In fact to call the present system proportional representation by single transferable vote is a misnomer. It could better be called a system of alternate vote because it does in practice operate as such.

There have been 14 Presidential Elections so far. The only person to be elected without a contest was Dr. Sanjiva Reddy in

1977. The most hotly contested election was that of Shri V. V. Giri when second preference votes had to be counted. The only person to be elected to the office of President for two terms was Dr. Rajendra Prasad.

The election which was politically most interesting and caused the greatest anxiety in political circles was that of 1987 when besides Shri R. Venkataraman and Justice Krishna Iyer, there was a third valid candidate.

One of the most noteworthy things during Presidential Elections till recently was that most often many nominations were filed. Although most of these were non-serious candidates and their nominations on scrutiny were found to be invalid, this did make the point very loudly that in our democracy any citizen without any distinction could aspire to occupy the highest office. Before the 1997 Presidential election, an effort was made to curb the number of non serious candidates by increasing the required number of proposers and seconders from ten each to fifty each and the amount of security deposit from Rs.2500 to Rs.15000.

Election Disputes: Article 71 of the Constitution. lays down that all doubts and disputes relating to or connected with the Presidential and Vice-Presidential elections shall be enquired into and decided by the Supreme Court whose decision shall be final.

The election of the President or the Vice-President cannot be called in question simply on the ground of there being any vacancy among the members of the Electoral College.

A person who is neither a candidate nor an elector cannot file a suit challenging the validity of the election of the President.[13]

In the Presidential Election case, on a reference made by the President under Article 143(1) the Supreme Court held that election to the office of the President cannot be postponed or invalidated on the ground that the electoral college was incomplete or not fully constituted because of some State Assembly having been dissolved.[14] It must be held before the expiry of the term of the incumbent President.

Conditions of President's office

Article 59 of the Constitution lays down the conditions of the President's office. The President shall not be a member of any house of Union or State Legislature. He shall not hold any office of Profit. He shall be entitled to the free use of his official residences and such emoluments, allowances and privileges as may be determined by Parliament by law.

Ex-Presidents draw a pension, get a staff car, secretarial staff, free travel by highest class by air, free telephone, water and electricity, rent free furnished accommodation etc. provision has also been made for family pension, free residence and Medicare for the President's spouse.

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13. N.B. Khare v. Election Commissioner of India, AIR 1958 SC 139
14. (AIR 1974 SC 1682

President's Term of Office

Article 62(1) provides that an election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of that term.

Article 56(1) provides that the President shall hold office for a term of five years from the date on which he enters upon his office. He can resign his office by writing under his hand addressed to the Vice-President. The President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

Procedure for Impeachment

Article 61 lays down that the President may be removed from his office by impeachment on grounds of violation of the Constitution. The charge for impeachment may be preferred in either House of Parliament by a resolution signed by at least one-fourth of the total number of members of the House and passed by a majority of not less than two-thirds of the total membership of the House. When a charge is so preferred by one House, it shall be investigated or got investigated by the other House and if a resolution is passed by this other couse by a majority of 2/3rd of its total membership, the President shall stand removed from his office from the date of the passing of the resolution.

VICE-PRESIDENT

Next to the President of India, the highest position in the Official Warrant of Precedence is accorded to the Vice President. His office, therefore, is highly prestigious. Article 63 of the Constitution says that there shall be a Vice-President of India. The Vice-President shall be the ex-officio Chairman of Rajya Sabha (Article 64). This follows the U.S. practice. As the Chairman of Rajya Sabha, he presides over the proceedings of the House and functions with reference to all its matters as the counterpart of the Speaker in Lok Sabha. But, as the Vice-President as such, no functions have been assigned to him in the Constitution. By practice, he has come to have several ceremonial functions like meeting ambassadors, visiting foreign dignitaries etc. Article 65 lays down that he shall act as the President in the event of a vacancy in the office of President by reason of his death, resignation or removal or otherwise. In case the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President shall discharge his functions. While acting as President or discharging the functions of President, the Vice-President shall not perform the duties of the office of the Chairman of Rajya Sabha (Article 64).

It has been proved on many occasions, e.g. when two of our Presidents-Dr. Zakir Husain and Fakhruddin Ali Ahmed-died in office and Vice-Presidents V.V. Giri and B.D. Jatti acted as President that the contingency functions of the Vice-President are of crucial importance to the nation.

The Vice-President is elected by an electoral college consisting of the members of the two houses of Parliament in accordance with the system of proportional representation with single transferable vote (Article 66). This is intended to ensure that he enjoys the confidence of both the houses of Parliament.

The term of the office of the Vice-President is five years and election to the office has to be completed before the expiration of the term. All doubts and disputes regarding this election shall be enquired into and decided by the Supreme Court. The Vice-President may resign from his office by writing under his hand to the President. He may also be removed from his office by a resolution passed by a majority of all then members of Rajya Sabha and agreed to by Lok Sabha (vrticles 67, 68 and 71). The Vice-President shall not be a member of either house of Parliament or of a State Legislature (Article 66). ,

The eligibility conditions for election of a person as Vice President are the same as those for election as President except that for the former, the candidate must be qualified for election as a member of the Rajya Sabha (Article 66).

The Vice-President draws a salary as Chairman Rajya Sabha. In addition, he is entitled to a daily tax free allowance, free furnished residence, travel, water, electricity, telephone medical and other facilities. On retirement, the Vice-President gets facilities like free furnished residence, travel, water, electricity, telephone, secretarial and other facilities besides a monthly pension. Provision has also been made for family pension, free residence and Medicare for the spouse of the Vice-President.

The emoluments etc. are determined by Parliament by law from time to time vide Article 97 of the Constitution.[15]

COUNCIL OF MINISTERS

Article 74 of the Constitution lays down that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice. The President may, however, require the Cow1cil of Ministers to reconsider 3uch advice. The President shall act on the advice tendered after such reconsideration.

That there shall be a Council of Ministers has to be understood to mean that it shall always be there. The Constitution does not envisage a situation where there will be no Prime Minister or no Council of Ministers. There is no provision for failure of constitutional machinery (as under Article 356) and direct President's rule at the Union level.

Acceptance by the President of the advice tendered by the Council of Ministers has

[15]. See Vice-Presidential Pension Act, 1997 (as amended) and officers of Parliament (Salary and Allowances) Act, 1997 (as amended).

become obligatory particularly after the 42nd and 44th Constitutional Amendments. Before the amendments also the Supreme Court had taken the view that the advice was binding in all cases.[16]

Even after the dissolution of Lok Sabha, the President, in the exercise of his powers, was bound by the aid and advice of the Council of Ministers. It was held by the Supreme Court in U.N. Rao v. Indira Gandhi[17] that any exercise of powers by the President without the advice of the Council of Ministers shall be unconstitutional as being violative of Article 74(1).

However, the acceptance of the advice of the Council of Ministers by the President is not automatic or mechanical. The President is entitled to consider it by applying his mind. The 44th Amendment allows to the President an opportunity to advise and caution the Council of Ministers and seek reconsideration of any matter before the President puts his seal of approval and accepts the proposed course of action.

The decisions of the Cabinet are taken confidentially and the advice tendered to the President is also protected by confidentiality between the President and the Council of Ministers. As such, these cannot be questioned in a court of law. Of course, there is no bar to the court looking at them if these are produced by the Government.[18]

Under Article 75, the Prime Minister is appointed by the President and other Ministers are appointed by him on the advice of the Prime Minister. The Ministers hold office during the pleasure of the President but the Council of Ministers is collectively responsible to Lok Sabha.

While the President is to be fully guided in the discharge of all his functions by the advice of the Council of Ministers with the Prime Minister at its head, it is not clear as to on whose advice he performs the most crucial function of appointing the Prime Minister. So far as the letter of the Constitution goes, the President can appoint almost anyone as the Prime Minister but he has to remember that under the Constitution the Council of Ministers headed by the Prime Minister has the responsible to the House and would have to go if it loses the confidence of the Lok Sabha. The President, therefore would appoint only a person who, in his best judgment would be acceptable to the House. If a party or a pre-election alliance commands absolute majority support in the Lok Sabha, there is no difficulty. For, the President in such cases, following well established parliamentary practices and conventions, has to invite the

[16] . Samsher v. State of Punjab, AIR 1974 SC 2192

[17]. AIR 1971 SC 1002

[18]. S.P. Gupta v. Union of India, AIR 1982 SC 149; State of Rajasthan v. Union of India, AIR 1977 SC 1361; State of M.P. v. Nandla!, AIR 1987, SC 251; Chaudhary v. Government of Bihar, AIR 1980 SC 383

Leader of the majority party, front or alliance to take over as the Prime Minister and form a Government. But, where no single party or coalition is in a position to form a Government on its own, the role of the President in choosing the Prime Minister becomes most delicate and difficult. He may have to use all his abilities to decide on the leader most likely to command the confidence of Lok Sabha. The golden rule in such an eventuality is to call the leader of the single largest party or alliance first or seek to be satisfied in advance about a leader having the support of more than half of the members of the Lok Sabha. Since in any case, ultimately it is necessary for the Prime Minister to have the confidence of the Lok Sabha and it is his responsibility to find out who can command such confidence, the most logical and above board solution would be that instead of getting involved in political controversies, appointing someone and then asking him to seek a confidence vote in the House, the President can ask the House to elect its leader who can then be appointed by the President as the Prime Minister. This has been recommended by the Constitution Commission (2002) also.

While the Ministers are also appointed by the President and said to hold office during the pleasure of the President, in actual effect, it means they are selected by the Prime Minister-the President cannot appoint anyone not recommended by the Prime Minister-and hold office at his pleasure. If the Prime Minister is unhappy or dissatisfied with any Minister, he can advise him to resign, advise the President to dismiss him or tender the resignation of his Council of Ministers and then reconstitute it after deleting the name of the Minister in question.

In the U.K. the concept is that of individual and collective responsibility of Ministers. Our Constitution, however, provides only for collective responsibility which means that there can be no no-confidence in a single Minister. The entire Council of Ministers is jointly responsible to Lok Sabha for all acts of Government. Therefore, it stands or falls together. If it loses the confidence of the House, the entire Council of Ministers must resign. Also, collective responsibility would mean that the Ministers must not speak in public in different voices. If any Minister disagrees with a decision taken or a policy adopted by the Cabinet, he must either resign or own equal and joint responsibility.

Again, in the U.K., historically the concept of ministerial responsibility was a by-product or corollary of the doctrine that the King can do no wrong. Since the King could not be held responsible for any wrong acts of the State, ministers came handy as a peg to hang responsibility on. For every act of the State, there was a Minister responsible. Every order of the Crown for any public act had, therefore, to be countersigned by a Minister. In India, on the other hand, ministerial responsibility was

conceived and evolved on the basis of the highest principles of representative democracy, as the responsibility of the Government to the directly elected representatives of the people in the Lok Sabha. Actually, in India the Ministers have no legal accountability for acts of the State which are done in the name of the President and required to be countersigned by way of authentication not by a Minister but by a Secretary (or other authorized officer) to the Government in accordance with the n11es made by the President (Article 77).

The Constitution speaks only of Ministers. It does not indicate any classification or categories of Ministers into Cabinet Ministers, Ministers of State, Deputy Ministers etc. While Prime Minister is mentioned as one heading the Council of Ministers (Article 74), there is no reference made to any Deputy Prime Minister. In K.M. Sharma v. Devilal,[19] oath by Devi Lal as Deputy Prime Minister was questioned as being ultra vires the Constitution as the Constitution provided only for the 'Prime Minister' and 'Ministers'. The Court upheld the oath as valid but said that 'Deputy Prime Minister' was only a descriptive term and did not confer on him any powers of the Prime Minister. Also, the Constitution mentions only the Council of Ministers and makes no reference to the Cabinet except in Article 352 (as amended in 1979) where Cabinet is defined as the Council consisting of Ministers of Cabinet rank. For all practical purposes, it is the Cabinet which takes policy decisions and advises the President. The whole Council of Ministers including all categories of Ministers almost never meets to transact any business.

Coalition Government

For the major part of the last six decades single party governments have been in power at the Union level. Several of the States, however had coalition governments from as far back as 1967.

The Constitution has no provision in regard to single party or coalition governments. It only speaks of the Prime Minister/Chief Minister being appointed by the President/ Governor and the Council of Ministers being responsible to Lok Sabha/State Assembly.

Coalition is the ad hoc coming together or entering into an alliance of two or more separate parties, persons or interests, for a temporary period and with a specific objective of taking combined action like formation of government and carrying on the activities of the State. Coalition arrangements presume that the parties coming together retain their distinct identities but they usually agree on a common minimum programme or a national agenda to be followed by their government.

The National Democratic Alliance (NDA) government in power at the Union level during 1999-2004 was a coalition of several parties functioning on the basis of an agreed

[19]. AIR 1990 SC 528

national agenda of governance. The United Progressive Alliance (UPA) government in power since 2004 is also a coalition government.

Caretaker Government

At the level of States, if the government cannot be carried on in accordance with the Constitution, there is provision for President's rule. But, at the Union level, the Constitution envisages that there shall always be a Council of Ministers to aid and advise the President who shall act in accordance with the advice tendered. There is no provision in the Constitution for anything like a caretaker government. The term has come to be used in common parlance to describe the status of a Council of Ministers that has resigned on having lost the confidence of the Lok Sabha or otherwise but is asked by the President to continue till alternative arrangements are made. If an alternative government cannot be formed immediately and general 'elections have to be held, the outgoing Council of Ministers may have to hold charge till the conclusion of elections and formation of new government. In any case, the presumption is that such an arrangement is for as short a period as absolutely necessary, that elections, if necessary, are held at the earliest possible and that during the interregnum no new schemes are launched or major policy decisions taken by the Government unless dictated by demands of national security and the like.

Governmental Instability

In the words of the Constitution Commission (NCRWC) Report, the administrative and economic costs of political instability and short-lived governments were 'simply collossal'. During 1989-1999, there were five general elections for Lok Sabha-,3 in 4 years (1996-1999). In all these elections, no single party emerged with a majority of seats in the House. This aroused considerable concern about political stability, especially in the context of the needs of national development efforts and the far-reaching changes in international economic and security paradigms. During ten years, there were seven governments. In the situation of a hung house where no single party commanded majority support, India got either minority governments or governments formed by a workable multi-party alliance. On the question of stability versus accountability (in parliamentary polity, the Commission said:

Need for political stability has to be seen in two emerging contexts: that in administering any economy in the global context, a reasonable degree of stability of Government and strong governance is important. Secondly, the economic and administrative costs of political instability might reach unaffordable levels.

In a situation where no single political party or prepoll alliance of parties succeeds in securing a clear majority in the Lok Sabha after elections, instead of involving the highest office of the President in the controversies of finding out who could command the confidence of the

House, the Commission recommended it would be best to leave it to the House itself to determine majority support to a leader. It would remove uncertainty and also obviate the need for the President asking his appointee as Prime Minister to seek a vote of confidence within certain number of days.

The Rules of Procedure and Conduct of Business in Lok Sabha could provide for the election of the Leader of the House by the Lok Sabha along with the election of the Speaker and in like manner. The Leader could then be appointed as the Prime Minister. The same procedure could be followed for the office of the Chief Minister in the State concerned.

Anti-defection Law

The Commission further recommended an amendment in the Rules of Procedure of the Legislatures for adoption of a system of constructive vote of no-confidence. For a motion of no-confidence to be brought out against a government at least 20% of the total number of members of the House should give notice. Also, the motion should be accompanied by a proposal of alternative Leader to be voted simultaneously.

The Commission felt that instability of elected governments was in part attributable to unprincipled, opportunistic political realignments from time to time and defections and re-defections.

The Anti-Defection Law in the Tenth Schedule of the Constitution which was supposed to prevent defections, in effect, had become an enabling law for larger defections. The Commission recommended that all defectors-whether individual or in groups-must resign and contest fresh election. They should be debarred from holding any public office of a minister or any other remunerative political post without winning at a fresh election. Also, votes cast by them to topple a government should be treated as invalid.

The Commission further recommended that the practice of having oversized Councils of Ministers must be prohibited by law. A ceiling on the number of Ministers in any State or the Union government be fixed at the maximum of 10% of the total strength of the popular house of the legislature as provided in Article 239AA applicable to Delhi. The practice of creating a number of political offices with the position, perks and privileges of a minister should be discouraged and their number should be limited to 2 per cent of the total strength of the lower house.

The Commission added:

A law or parliamentary convention to limit the size of the Cabinet is all the more desirable at the present juncture in view of a manifest sense of abandonment with which large size of Cabinets are resorted to. There are also other political rewards for the party members and supporters in the form of chairmanship of statutory corporations, usually attached with status of a Minister of Cabinet rank. The magnitude of the harm caused to public-interest,

to the efficiency of administration and to the exchequer is, indeed, incalculable. This has increasingly become the pervasive political culture of the day.

The Constitution (Ninety-first Amendment) Act, 2003 partly accepting the recommendations of the Commission, amended the tenth Schedule of the Constitution to take away the protection from defectors on grounds of split in the party and added a new Article 361B to make them ineligible for Ministership or other remunerative public office till re-election. Also, by amending Articles 75 and 164 the size of Council of Ministers was limited to 15% of the number of Members in the lower House.

PRIME MINISTER

Duty has been specifically cast on the Prime Minister to keep the President informed of all decisions relating to administration and legislation, to furnish such information in these matters as the President may call for and to place before the Council of Ministers, if so desired by the President, any matter on which a decision might have been taken by a Minister (Article 78).

In a parliamentary system of Government, the Prime Minister occupies a unique position as the most powerful functionary who controls both the Parliament and the Executive. Increasingly parliamentary Government has come to be regarded as Prime ministerial Government. As the head of the Council of Ministers, the Prime Minister is the head of the Government. Also, he is the leader of his party or/and of a coalition of parties in Parliament and usually the Leader of the popular House. In the ultimate analysis, however, much depends on the personality of the Prime Minister and the level of acceptance and support he commands from the nation, his party or alliance and Parliament. The Prime Minister enjoys large powers of patronage. All the Ministers are appointed at his recommendation and stand dismissed at his demand. The Prime Minister allots work among the Ministers. Also, he can change their portfolios at will. The Prime Minister is the channel of communication between the Council of Ministers and the President.

Questions relating to the relationship between the Prime Minister and the President and between the Prime Minister and other Ministers have been subject matters of controversy right from the commencement of the Constitution. The perceptions of Sardar Patel as Home Minister and Nehru as the Prime Minister varied widely. Similarly, there were fundamental differences between the first President Dr. Rajendra Prasad and the first Prime Minister Jawaharlal Nehru. Later, despite all the amendments and judicial clarifications about the President being only a constitutional head, President Zail Singh had come very close to taking up cudgels against Prime Minister Rajiv Gandhi and as much as threatening to

dismiss him. More recently, relations between the holders of the two highest offices have been cordial.

ATTORNEY-GENERAL OF INDIA

Under the chapter on 'The Executive', the Constitution includes a provision (Article 76) for the President appointing a person qualified to be a Supreme Court judge as the Attorney-General of India to advise the Government on legal matters qrl9, perform other duties of a legal nature as may be assigned.

The Attorney-General holds office during the pleasure of the President. However, inasmuch as he is appointed on the advice of the Government, a convention has grown that with a change of Government, he submits his resignation.

The Attorney-General is the Chief Law Officer of the Government. He has the first right of audience in all courts in India. Also, he has the right to speak and take part in the proceedings of either House of Parliament without a right to vote. He is not' a full-time officer of the House nor is he a member of the Cabinet as in U.K. Also, he is not barred from private practice except that he cannot advise or hold briefs against the Government of India.

MODULE 03

STRUCTURE, POWERS AND FUNCTIONS OF UNION AND STATE LEGISLATURE

The supreme legislature of the Union of India is called the Parliament. As is natural in a system of parliamentary democracy, the Parliament of India occupies a place of primacy in the governance of the country.

Composition of Parliament

The Parliament consists of the President and the two Houses-the Rajya Sabha (Council of States) and the Lok Sabha (House of the People). Article 79 begins by saying that there shall be a Parliament for the Union which means that there must always be a Parliament for the Union. Of the three constituents of Parliament, only the Lok Sabha is subject to dissolution. The Rajya Sabha is a permanent or continuing House and there must always be a President or a person performing the functions of the President.

The President: Though the President of India is a constituent part of Parliament, he does not sit or participate in: the discussions in either of the two Houses. The two Houses are, however, summoned by the President to meet from time to time. He can prorogue the two Houses and dissolve the Lok Sabha. Prorogation terminates the session while dissolution puts an end to the life of the House. The I President's assent is essential for a Bill passed by both Houses to become law. Not only that, when both the Houses of Parliament are not in session and he is satisfied that circumstances exist which render it necessary for him to take immediate action, the President can promulgate Ordinances having the same force and effect as a law passed by Parliament (Arts. 85, 111 and 123).

At the commencement of the first session after each general election to Lok Sabha and at the commencement of the first session of each year, the President addresses both Houses of Parliament assembled together and informs Parliament of the causes of its summons. Besides, he may address either House of Parliament or both Houses assembled together and for that purpose require the attendance of· members. He is also empowered to send messages to either House whether with respect to a Bill then pending in Parliament or otherwise, and a House to which any message is so sent has to, with all convenient dispatch, consider any matter required to be considered by the message (Articles 86 and 87). Bills belonging to certain categories can be introduced and proceeded with only after the recommendation of the President has been obtained (Articles 117 and 274(1)).

RAJYA SABHA

The Rajya Sabha is, as its name indicates, the Council of States. It represents the people in an indirect way inasmuch as they are

grouped into several components of the Union-the States and the Union territories-and members of Rajya Sabha are elected by the elected members of the State Legislative Assemblies in accordance with the system of proportional representation by means of single transferable vote (Article 80(4)). The different States of the Union have not been given equal representation in the Rajya Sabha. The number of representatives from each State in India depends largely on its population. Thus, while Uttar Pradesh has 31 members in Rajya Sabha, smaller States like Manipur, Mizoram, Sikkim, Tripura, etc. have only one member each. The populations in some of the Union territories such as Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, and Lakshadweep are too small to have any representative in Rajya Sabha. Under the Constitution, Rajya Sabha consists of not more than 250 members. It includes twelve members nominated by the President and 238 members elected by the States and the Union territories (Art.80(1)).

The Rajya Sabha at present consists of 245 members as follows:

Andhra	-	18
Arunachal	-	01
Assann	-	07
Bihar	-	16
Goa	-	01
Gujarat	-	01
Chhattisgarh	-	05
Jharkhand	-	06
Haryana	-	05
Hinnachal	-	03
J & K	-	04
Karnataka	-	12
Kerala	-	09
M. P.	-	01
Maharashtra	-	19
Manipur	-	01
Meghalaya	–	01
Mizorann	-	01
Nagaland	-	01
Orissa	-	10
Punjab	-	07
Rajasthan	-	10
Sikkim	-	01
Tannil Nadu	-	18
Tripura	-	01
Uttar Pradesh	-	31
Uttarakhand	-	03
West Bengal	-	16
Delhi	-	03
Puducherry	-	01
Nonninated	-	12

Unlike the Lok Sabha, which has a fixed term but can be dissolved by the President at any time, the Rajya Sabha is a permanent body and is not subject to dissolution. While the term of an individual member of Rajya Sabha is six years, as nearly as possible, one-third of its members retire at the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law (Article 83(1))

The Vice-President, who is elected by the members of both Houses of Parliament, is the ex-officio Chairman of Rajya Sabha, whereas the Deputy Chairman is elected by the members of the Rajya Sabha from amongst themselves (Articles 64, 66 and 89).

LOK SABHA

The other House-the Lok Sabha-is the House of the People. It is directly elected by the people. Every citizen of India who is not less than 18 years of age is entitled to vote in elections to Lok Sabha unless he is otherwise disqualified under law (Article 326). The Constitution provides that the Lok Sabha shall consist of not more than 530 members chosen by direct election from territorial constituencies in the States, and not more than 20 members to represent the Union territories, chosen in such manner as Parliament by law provides (Article 81(1)). In addition, the President may· nominate not more than two members to represent the Anglo-Indian community (Article 331). The maximum strength of the House envisaged in the Constitution is thus 552. At present, the Lok Sabha consists of 545 members as follows:

Andhra Pradesh	-	42
Arunachal Pradesh	-	02
Assam	-	14
Uttarakhand	-	05
Bihar	-	40
Goa	-	02
Gujarat	-	26
Chhattisgarh	-	11
Jharkhand	-	14
Haryana	-	10
Himachal Pradesh	-	04
Jammu & Kashmir	-	06
Kama taka	-	28
Kerala	-	20
Madhya Pradesh	-	29
Maharashtra	-	48
Manipur	-	02
Meghalaya	-	02
Mizoram	-	01
Nagaland	-	01
Orissa	-	21
Punjab	-	13
Rajasthan	-	25
Sikkim	-	01
Tamil Nadu	-	39
Tripura	-	02
Uttar Pradesh	-	80
West Bengal	-	42
Andaman & Nicobar	-	01
Chandigarh	-	01
Dadra & Nagar Haveli	-	01
Daman & Diu	-	01
Delhi	-	07
Lakshdweep	-	01
Puducherry	-	01
Nominated		
(Anglo-Indian)	-	02

The total elective membership is distributed among the States in such a manner that the ratio between the number of seats allotted to each State and the population of the

State is, so far as possible, the same for all States (Article 81(2)(a)). Population for this purpose means the population as ascertained at the 1971 census. There was to be no change in the number of seats in Lok Sabha until the year 2000 (Article 81(3)) The position is now frozen for another 25 years by substituting the figure 2026 for the figure 2000 in Articles 55, 81, 82, 330 and 332 by the Constitution (Eighty-fourth Amendment) Act 2001 and the Constitution (Eighty-seventh Amendment) Act, 2003.

Reservation of seats for SC and ST in the house of the people

The Constitution of India treats the Scheduled Castes and Scheduled Tribes in India with special favour and affords them some safeguards. The Scheduled Castes are the depressed section of the Hindus who have suffered for long under social handicaps and thus need special protection and help for the amelioration of their social, economic and political condition. The constitution provides some reservation for the Scheduled Castes and Scheduled Tribes in the Legislature.

Article 330 of the Constitution lays down as follows:

1. Seats shall be reserved in the House of the People for

(a) the Scheduled Castes

(b) the Scheduled Tribes except the Scheduled Tribes in the tribal areas of Assam and the Scheduled Tribes in the autonomous districts of Assam.

2. The reservation for Lok Sabha seats for the Scheduled Castes and Scheduled Tribes has to be made in each state and Union territory on population basis. The number of Lok Sabha seats reserved in a state or Union territory on population basis. The number of Lok Sabha seats reserved in a state or Union territory for such castes and tribes is to be bear as nearly as possible the same proportion in the total number of seats alloted to that State or Union territory in the Lok Sabha as the population of the Scheduled Castes and the Scheduled Tribes in the State or Union territory bears to the total population of that State or Union territory.

In V.V. Giri, V.D.S. Dora the Supreme Court held that a Scheduled Tribe candidate can contest an election for both the seats reserved as well as open. At the same time it was also held that a non Scheduled Tribe candidate residing in a constituency for which there is a reserved seat will be unable to contest for election to that seat. It may however be noted that elections are to be held on the basis of a single electoral roll, and each voter in the reserved constituency is entitled to vote. There is no separate electorate, e.g. it is not for the Scheduled Castes and Scheduled Tribes only to elect their representatives. The system is that though a person belonging to such castes and tribes is to be elected to voters in the constituency. This has been done with a view to discourage the sharpening of differentiation between the Scheduled Castes and Scheduled Tribes from the

other people to lead to their gradual integration in the main stream of national life. In 1961, Parliament enacted legislation provided for the division of two members constituency and thus a non Scheduled Caste person will be debarred from contesting election to a reserved seat even though residing in that constituency. It frirther held that sec-54 of the Representation of people Act is not opposed to Article 330 of the Constitution when it is admitted that a Scheduled Tribe candidate could compete for a general seat. Also a member of the Scheduled Castes or Scheduled Tribes is not debarred from contesting any seat other than the reserved one.

Originally, the reservation was for ten years but it is being extended every time for the next ten years (Articles 330 and 334). Recently, by One Hundred and Twenty-Sixth Amendment, 2019 reservation of seats for Scheduled Castes (SCs) and Scheduled Tribes (STs) and Representation of the Anglo-Indian community by nomination, in Lok Sabha and Legislative Assemblies extended for another 10 years till January 25, 2030.

The population figure of Scheduled Castes in percentage terms with reference to the total population figure had increased from 14.6% in 1971 census to 16.2% in 2001 census. Similarly, the population figure of Scheduled Tribes had increased from 6.9% in 1971 census to 8.2% in 2001 census. The overall increase of population figure of SC and ST in 2001 census has led the Delimitation Commission to increase the seats for Scheduled Castes in Lok Sabha from 79 to 84 and for Scheduled Tribes from 41 to 47 out of 543 constituencies, as per Delimitation of Parliamentary and Assembly Constituencies Order, 2008.

There's no reservation for Rajya Sabha and State Legislative Council. However, 12 members are nominated to the Rajya Sabha by the President and the Governors of the states having Legislative Councils also nominated members to the respective Councils.

Allocation of seats for Scheduled Castes and Scheduled Tribes in the Lok Sabha are made on the basis of proportion of Scheduled Castes and Scheduled Tribes in the State concerned to that of the total population, provide provision contained in Article 330 of the Constitution of India read with Section 3 of the Representation of the People Act, 1951.

While between 1952 and 2020, two seats were reserved in the Lok Sabha, the lower house of the Parliament of India, for members of the Anglo-Indian community. These two members were nominated by the President of India on the advice of the Government of India. In January 2020, the Anglo-Indian reserved seats in the Parliament and State Legislatures of India were abolished by the 126th Constitutional Amendment Bill of 2019, when enacted as 104th Constitutional Amendment Act.

The Lok Sabha has been provided with a fixed term as in the case of the popularly elected House of Representatives in the United States of

America and the House of Commons in the United Kingdom. The raison d'etre of representative democracy is that the government should obtain the mandate of the people periodically in order to continue in office legitimately. The term of the House in India is five years from the date appointed for its first meeting. The expiration of the period of five years operates as its dissolution. The House may be dissolved before the expiration of its full term under certain circumstances. When a Proclamation of Emergency is in force, the term of Lok Sabha can be extended by Parliament for a period not exceeding one year at a time and not exceeding in any case a period of six months after the Proclamation has ceased to operate (Art.83). In fact, right from the First Lok Sabha, strictly viewed, every House has been dissolved before completing its full term. Once, when during the Emergency, its life was extended, the House was dissolved before the completion of the extended term.

MEMBERS OF PARLIAMENT

Qualification for Membership

Article 84 lays down the qualifications for membership of the two Houses of Parliament. In order to be eligible to be chosen as a member, a person must He a citizen of India and not less than 30 years of age in case of Rajya Sabha membership and not less than 25 years of age in case of Lok Sabha membership. Additional qualifications may be prescribed by law.

Disqualifications for Membership

Under Article 102, a person shall be disqualified for being chosen as and for being a member of either House (i) if he is not a citizen of India or otherwise owes allegiance to a foreign State, (ii) if he is an undischarged insolvent or one declared by a competent court to be of unsound mind, (iii) if he holds any office of profit under the Union or a State Government other than the office of Minister or any office exempted by Parliament by law, and (iv) if he is otherwise disqualified under any law made by Parliament.

Also, a person may be disqualified on grounds of defection under the Tenth Schedule which was added to the Constitution by the 52nd Amendment.

If any question arises whether a member of either House has become subject to any disqualification, it shall be decided by the President after obtaining the opinion of the Election Commission and in accordance with that opinion. In case of disqualification on grounds of defection, the matter will be decided by the Speaker Lok Sabha or Chairman Rajya Sabha as the case may be.

The job of Parliament and its Members is to represent the people, to lay down policies, to make laws and to exercise surveillance over executive action. With the exception of Members who become Ministers, other Members are not expected to exercise any executive powers by accepting any office of

profit under the Government. If those charged with the responsibility of overseeing the executive, themselves become part of the executive establishment or become beholden to the executive for an office of profit under the Government, obviously they cannot be expected to faithfully perform any worthwhile oversight functions. That is why, Article 102 of the Constitution provides that apart from certain other things, holding an office of profit under the Government would constitute a disqualification for membership of Parliament. Giving a somewhat arbitrary power to the Parliament/State Legislatures, it is provided that any offices can be exempted from disqualification.

A Member was divested of her Rajya Sabha Membership in March 2006 by the President on the advice of the Election Commission as per Article 103 of the Constitution. Several other cases were also reported to be pending when the two Houses of Parliament passed a Bill to retrospectively prevent the disqualification of a large number of Members who were alleged to be occupying high offices of profit under the Government. These included the Speaker Lok Sabha, Shri Som Nath Chatterjee and Leader of the United Progressive Alliance, Smt. Sonia Gandhi. The President, however returned the Bill to the Houses of Parliament for reconsideration. When the Bill, after reconsideration was again presented to the President under Article 111, he gave his assent after a few days and not before the Government announced the appointment of a Committee to consider the issues raised by the President.

Constitutional provisions for State Legislatures corresponding to Articles 102 and 103 are Articles 191 and 192.

Oath by Members

The first sitting of the first session of the Lok Sabha after a general election is devoted to members making and subscribing the prescribed oath or affirmation to "bear true faith and allegiance to the Constitution of India" and to "uphold the sovereignty and integrity of India" and to faithfully discharge the duty of a Member of Parliament. The oath/ affirmation is a prerequisite for every member taking his seat in either House (Article 99 and 3rd Schedule). Salary and Allowances: Members of both the Houses are entitled to salaries and allowances as may be determined by Parliament by law from time to time (Article 106). It would be seen that there is no separate mention of pensions in the provision. Parliament has, however sanctioned to Members a pension under the Members of Parliament (Salaries, Allowances and Pension) Act. A Bill passed by the two Houses during the ninth Lok Sabha period inter alia provided for a pension after only a year's service as a member. This, however, was not assented to by the President.

Officers of the Houses

The Constitution provides for a Speaker and a Deputy Speaker for the Lok Sabha and a Chairman and a Deputy Chairman for the Rajya Sabha. The Vice-President of India is the ex-officio Chairman of Rajya Sabha. A Deputy Chairman is chosen by the House from among its own members. The Speaker and the Deputy Speaker are chosen by the Lok Sabha . from among its members. In the absence of the Speaker in the House, the Deputy Speaker discharges the functions of the Speaker. Similarly, in the absence of the Chairman, the Deputy Chairman presides over the Rajya Sabha. While so presiding, the Deputy Presiding Officer in either case exercises all the powers of the Presiding Officer in the House. (Articles 64, 89, 91 and 93- 95).

Generally speaking, the position of the Speaker in India more or less corresponds to that of the Speaker of the House of Commons. His office is one of prestige, splendor and authority. He is the head of Lok Sabha. The smooth and orderly conduct of the business of the House is primarily his responsibility. Within the House and in all matters connected with the House, his word is final. His salary and allowances are charged on the Consolidated Fund of India that is, they do not have to be voted by Parliament. His conduct cannot be discussed except on a substantive motion. He does not vote in the House except when there is an equality of votes (Articles 94, 96, 100(1) and 112(3)(b)).

The Constitution gives the Speaker a special position in so far as relations between the two Houses in certain matters are concerned. He determines what matters are financial matters which fall within the exclusive jurisdiction of Lok Sabha. If he certifies a Bill to be a 'Money Bill', his decision is final (Article 110). Whenever, in the event of final disagreement between the Houses on a legislative measure a joint sitting is called, he presides over such a joint sitting and all the Rules of Procedure in such a sitting operate under his directions and orders (Articles 108 and 118(4)).

The Speaker or Deputy Speaker of Lok Sabha vacates his office if he ceases to be a member of the House, he can resign by writing to the Deputy Speaker/Speaker and he can be removed by a resolution of the House, with 14 days' notice, passed by a majority of all the then members of the House (Article 94). A similar provision exists for the Deputy .Chairman Rajya Sabha in Article 90. Irrespective of the dissolution of the House, the Speaker, however, continues in office until immediately before the first sitting of the new House (Article 94, proviso 2).

SESSIONS OF PARLIAMENT

It is for the President to summon each House of Parliament from time to time. But Article 85(1) provides that six months must not intervene between two sessions of the House. Normally there are three sessions of Parliament each year viz. the Budget Session (Feb. May),

the Monsoon Session Guly Sept.) and Winter Session (Nov. Dec.). In the case of the Rajya Sabha, however, the Budget Session is split up into two sessions with a three to four week break in between so that it has four sessions in a year. The schedule of sessions may vary during an election year or under other special circumstances.

Conduct of Business and Legislative Procedure

Each House is the master of its procedure and may make rules for regulating its procedure and conduct of business subject to the provisions of the Constitution (Article 118). The validity of any proceedings in Parliament cannot be questioned in a court of law on grounds of any alleged irregularity of procedure and no officer or member of Parliament is subject to jurisdiction of courts in respect of exercise of any powers in the matter of regulating procedure or conduct of business in Parliament (Article 122).

Some of the basic rules of procedure and conduct of business have been laid down in the Constitution itself. Thus, Article 100 provides (1) that except where otherwise provided in the Constitution (e.g. in the case of Constitutional Amendments, impeachment of the President, removal of the Presiding Officers, judges etc.), all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting other than the presiding officer who shall exercise a casting vote only in case of an equality of votes; (2) that all proceedings of either House shall be valid irrespective of any vacancies in membership or any unauthorized participation in debate or voting; and (3) that the quorum to constitute a meeting of either House shall be one-tenth of the total number of members.

Except Money Bills and other Financial Bills, a Bill may originate in either House. Such a Bill, before being presented to the President for his assent, must be passed by both the Houses either without any amendment or with such amendments as may be agreed to by both Houses. In case of final disagreement between the two Houses on any Bill other than a Money Bill, the President may summon a joint sitting of the two Houses to resolve the differences (Articles 107108). Financial Bills: The Constitution makes a distinction between Money Bills and Financial Bills. Generally speaking, a Financial Bill may be any Bill which relates to revenue or expenditure. Besides providing for any of the matters specified in the Constitution for a Money Bill, a Financial Bill may also provide for other matters. For the sake of convenience, the Financial Bills may be divided into two categories: Category A: those Bills which make provisions for any of the matters specified in Article 110 for the Money Bill but do not contain solely those matters, e.g. a Bill which contains a taxation clause, but does not deal solely with taxation. Category B: those

Bills containing provisions involving expenditure from the Consolidated Fund (Articles 110 and 117).

Special Procedure for Money Bills

Article 110 defines a Money Bill as a Bill which contains only provisions regarding taxes, borrowings, custody of the Consolidated and Contingency Funds, appropriations, declaring of any expenditure as charged on the Consolidated Fund, receipt and custody of money in the Consolidated Fund, audit of the accounts of the Union (or of a State) or any other incidental matters. A Bill shall not become a Money Bill simply because it provides for imposition of fines or other pecuniary penalties, or for payment of fees for licenses, or for fees for services rendered or by reason that it provides for imposition, regulation etc. of any tax by any local authority or body for local purposes. In case of any question arising whether a Bill is a Money Bill, the decision of the Speaker shall be final. While being presented to the President for his assent, every Money Bill has to be certified by the Speaker as such a Bill (Article 110). A Money Bill can be introduced only in the Lok Sabha and only on the recommendation of the President. After it is passed by the Lok Sabha and transmitted to Rajya Sabha, the latter may make its recommendations, if any, within a period of 14 days and the Lok Sabha may accept or reject all or any of the recommendations. The Bill is deemed to be passed by both the Houses with the amendments accepted by Lok Sabha. If no amendment recommended by Rajya Sabha is acceptable to Lok Sabha or if the Bill is not returned by Rajya Sabha within 14 days, it is deemed to have been passed by both the Houses' in the form in which it was passed by Lok Sabha (Article 109).

Assent to Bills

Article 111 says that when a Bill passed by the two Houses of Parliament is presented to the President, the President shall either assent to the Bill or withhold assent therefrom. He may return a Bill, if it is not a Money Bill, to the Houses for reconsideration. If the Bill is passed again with or without any amendments and presented to President for assent, he shall not withhold assent (Article 111). Another option available to the President is to seek some information or clarifications or to return the Bill to the Government i.e., the Council of Ministers, for reconsidering their advice for according assent to the Bill (Articles 74(1) and 78(b)). President Zail Singh did not give his assent to the Postal Bill and President Venkataraman returned to the Government the Bill seeking to give pension to Members of Parliament after just one year's service.

Procedure in Financial Matters

The Budget

The President is required to cause to be laid before both Houses of Parliament in respect of each financial year a statement of the estimated receipts and expenditure of the

Government. This is termed the annual financial statement or the budget.

The estimates of expenditure embodied in the annual financial statement shall show separately

(a) the sums required to meet expenditure described by the Constitution as expenditure charged upon the Consolidated Fund of India; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India and shall distinguish expenditure on revenue account from other expenditure.

The expenditure charged on the Consolidated Fund of India shall include:

(a) the emoluments and allowances of the President and other expenditure relating to his office;

(b) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People,

(c) debt charges for which the Government of India is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;

(d) (i) the salaries, allowances and pensions payable to or in respect of judges of the Supreme Court; (ii) the pensions payable to or in respect of judges of the Federal Court; (iii) the pensions payable to or in respect of judges of any High Court which exercises jurisdiction in relation to any area included in the territory of India or which at any time before the commencement of this Constitution exercised jurisdiction in relation to any area included in a Governor's Province of the Dominion of India;

(e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India;

(f) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(g) any other expenditure declared by the Constitution or by Parliament by law to be so charged (Article 112).

Estimates and Demands for Grants

Estimates relating to expenditure charged on the Consolidated Fund are not submitted to the vote of Parliament but discussion thereon is not barred. Other estimates are presented to Lok Sabha in the form of demands for grants and the Lok Sabha may either assent to or refuse any demand. It may also assent to a demand subject to a reduction in the amount asked for. Every demand for grant must receive the prior recommendation of the President (Article 113).

Appropriation Bills

After the Demands for grants are voted by the Lok Sabha, a Bill is introduced for appropriation out of the Consolidated Fund of

India, moneys required to meet the grants are voted by the House and the expenditure is charged on the Consolidated Fund. No amendment is permitted which seeks to vary the amount or alter the allocation of any grant head or vary the amount of any charged expenditure. Appropriation Bill is necessary because no money can be drawn from the Consolidated Fund without parliamentary sanction through an appropriation Act. Additional, supplementary or excess grants may be voted separately but the same procedure shall apply to them as well (Articles 114-115).

Article 116 provides for (i) a vote on account, i.e. grants being made in advance of the budget approval and completion of the whole procedure, (ii) an exceptional grant which does not form part of the current service of any financial year, and (iii) a grant to meet an unexpected demand of large magnitude or of an indefinite character (Article 116). Parliament may by law regulate the procedure for the purpose of timely completion of the financial business. (Article 119).

Language in Parliament

Hindi and English have been declared by the Constitution to be the languages for conducting business in Parliament. The Presiding Officers may, however, allow any member not proficient in either to address the House in his mother tongue (Article 120).

PARLIAMENTARY PRIVILEGES

Article 105 of the Constitution provides for the powers, privileges etc. of the Houses of Parliament and of the members and committees thereof.

'Privilege' means a special or exceptional right or freedom or an immunity enjoyed by a particular class of persons or some individuals. In its legal sense it means an exemption from some duty, burden, attendance or liability to which o~hers are subject. Privilege can also be defined as a right which others do not have. Parliamentary privileges are those special rights belonging to each House of Parliament, its members and committees, without which they cannot perform their functions in the manner they are expected to. The privileges are granted with a view to maintaining the independence of action and the dignity of the Houses of Parliament, their committees and members and to enable them to function without any let or hindrance. The privileges, in practice, give rise to certain powers, immunities and exemptions. It does not, however, imply that the privileges belonging to members place them on a footing different from that of an ordinary citizen in the eyes of law unless there are good reasons in the interest of Parliament itself to do so. The basic law is that all citizens including members of Parliament should be treated equally before the law. They have the same rights and liberties as ordinary citizens except when they perform their duties in Parliament. The privileges are available to the

members only when and to the extent that they are functioning as representatives of the people in Parliament and discharging their parliamentary responsibilities: The privileges do not, in any way, exempt the members from their normal obligations to society which apply to them as much and perhaps more closely in that capacity, as they apply to others.

1. The more important of the privileges, namely freedom of speech in Parliament and immunity of members from any proceedings in courts in respect of anything said or any vote given by them in Parliament, are specified in Article 105 of the Constitution.

   There shall be freedom of speech in Parliament but subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of Parliament.

2. Clauses(2) and (3) of the Article provide that no member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.[20]
3. In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until, so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-Fourth Amendment) Act, 1978.
4. The provisions of clauses (I), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

In other words, each House, its Committees and members in actual practice, shall enjoy the powers and privileges (other than those specified in the Constitution) that were available to the British House of Commons as on 26 January 1950.

The most important of parliamentary privileges is that of freedom of speech while performing parliamentary duties. Article 19 also gives a citizen the right of free speech but Articles 105 and 194 lay special emphasis on the right of free speech of members of the legislatures. Under Article 19, the right of free speech is subject to reasonable restrictions, for instance, the law of libel. An ordinary person who speaks something libelous is liable to be proceeded against but a member of Parliament speaking in the House or in one of its

[20]. Tej Kiran v. Sanjiva, AIR 1970 SC 1573; Gatish v. Harisadhan (1956) 60 CWN 971, A.I.R. 1961 SC 613

committees is immune from any attack on the ground that his speech was libelous or defamatory.

Members have to give expression to public grievances and raise various matters of public importance. In doing this, members should not suffer any inhibition and they should be able to speak out their mind and express their views freely. Inside the House or Committees of Parliament, a member is absolutely free to say whatever he likes subject only to the Constitution and internal discipline of the House or the Committee concerned; no outside authority has any right to interfere. Freedom of speech is absolutely necessary for a member to function freely without any fear or favour in the Committees and in the Houses of Parliament. Unless whatever a member says enjoys immunity from legal action, he cannot be expected to speak freely and frankly. The Constitution provides, therefore, that no action can be taken against a member of Parliament in any court or before any authority other than Parliament in respect of anything said or a vote given by him in Houses of Parliament or any Committee thereof. It has been held by the Supreme Court that provisions of the tenth schedule in regard to disqualification on ground of defection are not violative of Article 105(1)[21]

It is a breach of privilege to molest a member or to take any action against "him on account of anything said by him in Parliament or a Committee thereof. Likewise, it would be a breach of privilege to institute any legal proceedings against a member in respect of anything said by him in Parliament or in a Committee thereof. It has been held by the Supreme Court in the Searchlight case that the freedom of speech conferred on members under Article 105 is subject only to those provisions of the Constitution which regulate the procedure of Parliament and to the rules and standing orders of the House, but is free from any restrictions which may be imposed by any law made under Article 19(2) upon the freedom of speech of an ordinary citizen. Any investigation outside Parliament in respect of anything said or done by members in the discharge of their parliamentary duties would amount to a serious interference with the members' rights. Even though a speech delivered by a member in the House may amount to contempt of court, no action can be taken against him in any court. A court, being an outside authority, does not have the power to investigate the matter. Article 122 specifically forbids any inquiry by courts into proceedings of Parliament.

The courts of law in India have thus recognised that a House of Parliament or a State Legislature is the sole authority to judge as to whether or not there has been a breach of privilege in a particular case. It has also been held that the power of the House to commit for contempt is identical with that of the House of

[21]. Kihoto v. Zachillhu, AIR 1993 SC 412 (CB)

Commons and that a court of law would be incompetent to scrutinize the exercise of that power.

The immunity from external influence or interference, however, does not mean an unrestricted licence of speech within the walls of Parliament. It is important to remember that the privileges of the Houses and members and committees thereof are subject to other provisions of the Constitution being construed harmoniously. Thus, for example, the privilege of freedom of speech in Parliament will be subject to rules of procedure framed by Houses of Parliament under Article 118 and Article 121 forbids discussion in Parliament on the conduct of judges except on a motion for their removal.[22] In 1965, the Supreme Court in its advisory opinion in Special Reference Case of 1964,[23] observed as follows:

It would not be correct to read the majority decision in the Searchlight case as laying down a general proposition that whenever there is a conflict between the provisions of the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by Part III, the latter must yield to the former. The majority decision, therefore, must be taken to have settled that Article 19(1)(a) would not apply, and Article 21 would.

In dealing with the effect of the provisions contained in clause (3) of Article 194, whenever it appears that there is a conflict between the said provisions and the provisions pertaining to fundamental rights, an attempt will have to be made to resolve the said conflict by the adoption of the rule of harmonious construction.

The Allahabad High Court, in their judgment in Keshav Singh's case dated 10 March 1965 (i.e. delivered after the advisory opinion of the Supreme Court), observed as follows:

(i) In our opinion, both upon authority and upon a consideration of the relevant provisions of the Constitution, it must be held that the Legislative Assembly has, by virtue of Article 194(3), the same power to commit for its contempt as the House of Commons has.

(ii) In our opinion, the provisions of Article 22(2) of the Constitution cannot apply to a detention in pursuance of a conviction and imposition of a sentence of imprisonment by competent authority.

(iii) Since we have already held that the Legislative Assembly has the power to commit the petitioner for its contempt and since the Legislative Assembly has framed rules for the procedure and conduct of its business under Article 208(1), the commitment and deprivation of the personal liberty of the petitioner cannot but be held to

[22] . M.S. Sharma v. Sri Krishna Sinha, AIR 1959 SC 395

[23]. Keshav Singh's case)

be according to the procedure laid down by law within the meaning of Article 21 of the Constitution.

(iv) Once we come to the conclusion that the Legislative Assembly has the power and jurisdiction to commit for its contempt and to impose the sentence passed on the petitioner, we cannot go into the_ question of the correctness, propriety or legality of the commitment. This Court cannot, in a petition under Article 226 of the Constitution, sit in appeal over the decision of the Legislative Assembly committing the petitioner for its contempt. The Legislative Assembly is the master of its own procedure and is the sole judge of the question whether its contempt has been committed or not.

The Government, therefore, decided that an amendment of the Constitution was not necessary. It was of the opinion that the Legislatures and the Judiciary would develop their own conventions in the light of the opinion given by the Supreme Court and the judgment pronounced by the Allahabad High Court.

More recently, when 11 Members were expelled from their respective Houses-l0 from Lok Sabha and 1 from Rajya Sabha-and the matter reached the Supreme Court, upholding the power of the Houses of legislatures to expel their members, the Court held: Parliament would always be presumed to perform its functions and to exercise its powers in a reasonable manner subject to exception of there being no scope for a general rule that the exercise of powers by the legislature is not amenable to judicial review. Scope for judicial review in matters concerning Parliamentary proceedings despite being limited and restricted is subject to scrutiny on breach of other constitutional provisions. Sheer irregularity of the procedure is no ground of challenge to the proceedings in Parliament or effect thereof but in case of gross illegality or violation of constitutional provisions the Court has the jurisdiction to examine the procedure adopted. Power to punish for contempt is a broad power encompassing a variety of other powers. Only limitation the Court recognizes in the power of the legislatures to punish for contempt is that such powers cannot be used to divest the ordinary Courts of their jurisdiction. Duty of Supreme Court is to ensure that there is no abuse or misuse of power by the Legislature. Court, therefore, should exercise its power of judicial review with utmost care, caution and circumspection.[24]

Thus, the latest position is that exercise of power under the privilege law has also been brought under judicial review.

Codification of Privileges: Article 105(3) of the Constitution stipulates that, apart from the privileges mentioned in the Constitution itself, Parliament may, from time to time, define its privileges by law. No law, however, has so far been enacted by Parliament in pursuance of this

[24]. Raja Ram Pal v. Speaker Lok Sabha, (2007) 3 SCC 184

provision to define the powers, privileges and immunities of each House and its members and the Committees thereof.

As far as the constitutional stipulation "until defined by Parliament by law" and the question of defining or codifying the parliamentary privileges are concerned, opinions are divided.

Legislative Powers of the President

Article 123 empowers the President to promulgate ordinances when both Houses of Parliament are not in session and he is satisfied that a situation has arisen that requires immediate action. Ordinances issued by the President have the same force and effect as laws made by Parliament except that all such ordinances become inoperative on the expiry of six weeks from the reassembly of Parliament or earlier if disapproved by the two Houses.

It has been held that the satisfaction of the President is beyond judicial review but it means satisfaction on the aid and advice of the Council of Ministers.[25]

Repromulgation of an ordinance without any attempt to get the corresponding Bill passed by the legislature and the practice of proroguing the House merely to promulgate an ordinance has been held to be a fraud on the Constitution in case of the Governor of Bihar[26] but the same should apply equally to Presidential Ordinances.

The President's ordinance making power has been challenged in courts in a number of cases. It is clear that while the constitutional validity of the ordinances has been upheld, the ordinance making power of the President is subject to the same limitations as the legislative power of Parliament e.g. in the matter of being subject to judicial review, fundamental rights, and distribution of legislative powers under the Seventh Schedule.[27]

RELATIVE ROLE OF THE TWO HOUSES

The two Houses of Parliament enjoy co-equal power and status in all spheres except in financial matters and in regard to the responsibility of the Council of Ministers, which are exclusively in the domain of Lok Sabha. Accordingly, the following limitations have been placed on the powers of Rajya Sabha:

(i) A Money Bill cannot be introduced in Rajya Sabha.

(ii) Rajya Sabha has no power either to reject or amend a Money Bill. It can only make recommendations on the Money Bill. If such a Bill is not returned to Lok Sabha within a period of 14 days, the Bill is deemed to have

[25]. AK. Roy v. Union of India, AIR 1982 SC 710; Cooper v. Union of India, AIR 1970 SC 564; Satpal v. Lt. Governor, AIR 1979 SC 1550; Venkata v. State of AP., AIR 1985 SC 725; Nagaraj v. State of AP., AIR 1985 SC 55; State of Rajasthan v. Union of India, AIR 1977 SC 136.

[26]. D.C. Wadhwa v. State of Bihar, AIR 1987 SC 579

[27]. State of Punjab v. Mohar Singh, AIR 1955 SC 84; State of Orissa v. Bhupendra, AIR 1962 SC 945; Nagaraj v. State of AP., AIR 1985 SC 551; Vcnkata v. State of AP., 1985 SC 724; R.K. Garg v. Union of India, 1 SIR I SC 2139; A.K. Roy v. Union of India, AIR 1982 SC 710

been passed by both the Houses at the expiration of the said period in the form in which it was passed by Lok Sabha (Article 109).

(iii) Whether a particular Bill is a Money Bill or not is to be decided by the Speaker of Lok Sabha (Article 110(3)).

(iv) Rajya Sabha may discuss the Annual Financial Statement (Article 113). It has no power to vote on the Demands for Grants.

(v) Rajya Sabha has no power to pass a vote of no confidence in the Council of Ministers (Article 75(3)).

Every non-financial measure must be passed by both the Houses individually before it can become an Act. Rajya Sabha has equal powers with Lok Sabha in important matters like the impeachment of the President, removal of the Vice President, constitutional amendments, and removal of the Judges of the Supreme Court and the High Courts (Articles 56, 61, 67, 124(1) and 217(1)(b». Every Presidential Ordinance, Proclamation of Emergency and Proclamation of the failure of constitutional machinery in a State must be placed before both Houses of Parliament (Articles 123,352(4) and 356(4)). Disagreement between the two Houses on a Bill, other than a Money Bill and a Constitution Amendment Bill, is resolved by both the Houses in a joint sitting where matters are decided by majority vote. Such joint sitting of the two Houses is presided over by the Speaker of Lok Sabha (Articles 108 and 118(4)).

The Constitution has assigned some special powers to the Rajya Sabha. It alone has the power to declare that it would be in national interest for the Parliament to legislate in respect of a matter in the State List. If by a two-thirds majority, Rajya Sabha passes a resolution to this effect, the Union Parliament can make laws for the whole or any part of the country even with respect to a matter enumerated in the State List (Article 249). Also, Parliament is empowered to make laws providing for the creation of one or more All India Services common to the Union and the States, if the Rajya Sabha declares by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest to do so (Article 312).

Parliament and the Executive

After a new Lok Sabha is duly elected and constituted, the President invites the leader of the party or parties commanding the support of more than half of the members of the Lok Sabha, to form the government.

While the Prime Minister usually is a member of the Lok Sabha, the Ministers are drawn from both Houses of Parliament. A person other than a Member of Parliament may also be appointed as Minister, but he has to vacate the office after six months unless, in the meanwhile, he manages to get himself elected to either of the two Houses. Since the Council of Ministers is collectively responsible to Lok

Sabha (Article 75), Ministers are under a constitutional obligation to resign collectively as soon as they lose the confidence of Lok Sabha.

The scheme of the Constitution represents a real fusion of the highest executive and legislative authorities. The relationship between the Executive and Legislature there under is one that is most intimate and ideally does not admit of any antagonism or dichotomy. The two are not visualized as competing centres of power but as inseparable partners or co-partners in the business of government. Strictly speaking, Parliamentary system of government should mean Government by Parliament. But, the Parliament is a large body. It does not and cannot itself govern. The Council of Ministers may in a sense be described as the grand executive committee of Parliament charged with the responsibility of governance on behalf of the parent body. In other words, the Executive is not a separate or outside body. Inasmuch as the Council of Ministers is drawn from and remains part of Parliament and responsible to Lok Sabha, the relationship may be said to be that of a part to the whole and one of interdependence. There is, however, a clear distinction between the functions of the Executive and the functions of Parliament (Article 75). The Parliament is to deliberate, discuss, legislate, advise, criticize and ventilate public grievances. Also, it has a legitimatizational role. The Executive is to govern, albeit on behalf of Parliament and the People.

While the Executive has almost unlimited right to initiate and formulate legislative and financial proposals before Parliament and to give effect to approved policies unfettered and unhindered by Parliament, the latter has the unlimited power to call for information, to discuss, to scrutinize and to put the seal of popular approval on proposals made by the Executive. The Executive remains responsible and the administration accountable to Parliament. The function of Parliament is to exercise political and financial control over the Executive and to ensure parliamentary surveillance of administration. This control is exercised through various procedural devices like Question Hour, Motions, Resolutions, various kinds of discussions and scrutiny by parliamentary committees.

PARLIAMENT AND THE JUDICIARY

Parliament has the power to make laws regulating the constitution, organisation, jurisdiction and powers of the Courts. It was laid down in the Constitution that the number of Judges other than the Chief Justice would not be more than seven. The number now (2009) vide Supreme Court (Number of Judges) Amendment Act, 2008 is thirty. The Parliament was, however, empowered to prescribe a larger number of Judges by law (Article 124). Under our Constitution, the Parliament may by law:

1. extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union territory;

2. establish a common High Court for two or more States or for two or more States and a Union territory; and
3. constitute a High Court for a Union territory or declare any Court in any such territory to be a High Court for all or any of the purposes of the Constitution (Art.241).

A judge of the Supreme Court or any High Court may by writing under his hand, addressed to the President, resign his office. He can be removed from his Office by the President, only if a joint address passed by both Houses of Parliament with a special majority (i.e., by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of each House present and voting) is presented to him (Article 124(4) and 218). Parliament is not empowered to discuss the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except in the case of a motion for presenting an address to the President praying for the removal of a Judge (Article 121).

Parliament may by law provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States. The law made under the provision may specify the jurisdiction and powers of the tribunals. Such law may exclude the jurisdiction of all Courts, except the jurisdiction of the Supreme Court under Article 136, with respect to certain specified matters (Articles 323A and 323B). Further, the Constitution empowers Parliament to create an all India judicial service which shall not include any post inferior to that of a district judge (Articles 312(1) and (3)).

The validity of any proceedings in either House of Parliament cannot be questioned before a court of law on the ground of any alleged irregularity of procedure (Articles 122(1) and 212(1))[28]. The presiding officer of each House or any other officer or Member of Parliament who is for the time being vested with the powers to regulate procedure, or to enforce or carry out the decision of either House of Parliament, is not subject to the jurisdiction of the courts in exercise of those powers (Articles 122(2) and 105(3)).

The constitutional validity of a law can be challenged in India on the ground that the subject matter of the legislation:

1. is not within the competence of the Legislature which has passed it;
2. is repugnant to the provisions of the Constitution; or iii. it infringes one of the Fundamental Rights.

There is no appeal against the judgment of the Supreme Court. It remains the law of the land unless its interpretation is reviewed or reversed by the Supreme Court itself or the law or the Constitution is suitably amended by Parliament. If an Act of Parliament is set aside by the judiciary, Parliament can re-enact it after

[28]. Kihoto v. Zachilhu, AIR 1993 SC 412

removing the defects for which it was set aside. Also, Parliament may, within the limits of its constituent powers, amend the Constitution in such a manner that the law no longer remains unconstitutional.

Thus the Parliament in India is not as supreme as the British Parliament where traditionally no judicial review of legislation is permitted. At the same time the judiciary in India is not as supreme as in the United States of America which recognizes virtually no limit on the scope of judicial review.

On the issue of the sovereignty of Parliament, different views have been expressed even by the Supreme Court.[29] It has, however, been held in the Gopalan case that within the specified limits of its powers, the Parliament is supreme.

FUNCTIONS OF PARLIAMENT

1) Legislation

Traditionally the main function of a legislature is to legislate. Under Articles 245-246 Parliament can make laws for the whole or any part of India within its area of competence as defined and delimited under the distribution of legislative powers between the Union and the States vide the Seventh Schedule. In regard to the Union List, the Parliament's jurisdiction is exclusive. Both the Union and the States have concurrent power to legislate in respect of entries in the Concurrent List. In case of conflict between the Union and the State laws, the former prevails (Article 254). Also, the residuary powers vest in the Union Parliament (Article 248 and entry 97 of the Union List). A large number of Articles empower the Parliament to make laws in various matters by saying things like 'save as otherwise provided by Parliament by law', 'Parliament may by law ..... ' or 'until Parliament by law prescribes' etc. Parliament may by law change the name, the boundaries, area etc. of the States or establish new States (Articles 2, 3 and 4), increase the number of judges of the Supreme Court or establish additional courts (Articles 124,247). Under Article 249, Parliament may legislate even on matters in the State List. Under Article 253, it may legislate for implementing a treaty or agreement with a foreign country even though the matter falls in the State List. Also, in circumstances of President's rule (Article 356) or proclamation of Emergency (Article 352), Parliament can legislate in the State field.

2) Constituent Powers

Under Article 368, Parliament exercises constituent powers in accordance with the procedure laid down for different categories of amendments. While a large number of Articles can be amended by Parliament itself by a special majority, in certain cases concurrence of the States is required (See under' Amendment of the Constitution'). Parliamentary control over

[29]. See A.K. Gopalan v. State of Madras, (1950) SCR 88; In re Delhi Laws case (1951) SCR 747; Shankari Prasad v. Union of India, AIR 1951 SC 458

Government: In a parliamentary system of Government and under the scheme of our Constitution, Parliament has to ensure Executive or Ministerial responsibility, financial control and administrative accountability. Executive or Ministerial responsibility to Parliament or what is often termed parliamentary control over the Executive or the Government is based on: (i) the constitutional provision of collective responsibility of the Council of Ministers to the popular House of Parliament; and (ii) the Parliament's control over the Budget (Articles 75, 114-116 and 265).

4) **Parliamentary control over the Executive**

This is political in nature. The answerability of the Executive is direct, continuous, concurrent and day-to-day. When Parliament is sitting, the continuance of the Government in office depends from moment to moment on its not losing the confidence of the House of the People. The House may at any time decide to throw out the Government by a majority vote, i.e. if the ruling party loses the confidence of the majority of the members of the House, its Government goes. No grounds, arguments, proofs or justification are necessary. When the House clearly and conclusively pronounces that the Government of the day has lost its confidence, the Government must resign. Want of parliamentary confidence in the Government may be expressed by the House of the People by: (a) passing a substantive motion of no-confidence in the Council of Ministers, (b) defeating the Government on a major issue of policy; (c) passing an adjournment motion; or (d) refusing to vote supplies or defeating the Government on a financial measure.

5) Parliamentary control over public finance

The power to levy or modify taxes and the voting of supplies and grants is one of the most important checks against the Executive assuming arbitrary powers. No taxes can be legally levied and no expenditure incurred from the public exchequer without specific parliamentary authorization by law (Articles 114 116 and 265).

In fact, except in the theoretical sense of the budgetary control or the ultimate sanction of a vote of no-confidence, parliamentary control over the Government is no more valid even in the 'Mother of Parliaments', In actual practice, it is the Government which controls Parliament through its majority in the House of the People and through its power to have the House dissolved and fresh elections ordered by the President.

Administrative accountability is ensured through legislation, through parliamentary devices like questions, discussions on various motions, committee scrutiny, and through the Minister who actually represents Parliament and controls his department on behalf of Parliament.

Other Functions: Besides, Parliament exercises multifarious functions, for example, in matters like the impeachment of the President, removal of Supreme Court and High Court judges,

Comptroller and Auditor-General, Chief Election Commissioner, Presiding Officers of the two Houses etc. (Articles 61, 124,217, 148,324,90 and 94).

ANTI- DEFECTION LAW

The Constitution (Fifty-second Amendment) Act, 1985 amended Articles 101, 102, 190 and 191 of the Constitution regarding vacation of seats and disqualification from membership of Parliament and the State Legislatures and added a new schedule (Tenth Schedule) to the Constitution setting out certain provisions as to disqualification on grounds of defection. Originally, the Tenth Schedule inter alia provided that:

(1) an elected member of Parliament or a State Legislature, who has been elected as a candidate set up by a political party, and a nominated member of Parliament or a State Legislature who is a member of a political party at the time he takes his seat would be disqualified on the ground of defection if he voluntarily relinquishes his membership of such political party or votes or abstains from voting in the House contrary to any direction of such party;

(2) an independent member of Parliament or a State Legislature will be disqualified if he joins any political party after his election;

(3) a nominated member of Parliament or a State Legislature who is not a member of a political party at the time of his nomination and who has not become a member of any political party before the expiry of six months from the date on which he takes his seat shall be disqualified if he joins any political party after the expiry of the said period of six months;

(4) no disqualification would be incurred where a member claims that he belongs to a group representing a faction arising from a split in a party or merger of a party in another provided that in the event of a split the group consists of not less than one-third of the members of the legislature party and in case of a merger of not less than two-thirds of the members of the legislature party concerned;

(5) no disqualification is incurred by a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or of the Legislative Assembly of a State or to the office of the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State, if he severs his connection with his political party;

(6) the question as to whether a member of a House of Parliament or State Legislature has become subject to disqualification will be determined by the Chairman or the Speaker of the respective House; where the question is with reference to the Chairman or the Speaker himself it will be decided by a member of the concerned House elected by it in that behalf;

(7) the Chairman or the Speaker of a House has been empowered to make rules for giving effect to the provisions of the Schedule. The rules are required to be laid before the House and are subject to modifications/ disapproval by the House;

(8) all proceedings in relation to any question as to disqualification of a member of a House under the Schedule will be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212; and

(9) notwithstanding anything in the Constitution, no court will have any jurisdiction in respect of any matter connected with the disqualification of a member of a House.

The Constitution (Fifty-second Amendment) Act, 1985, which has since popularly come to be known as the Anti - Defection Law, has been the subject matter of a controversy from the very beginning. It has been questioned on several grounds viz., that it is violative of the basic structure of the Constitution, that it is beyond the competence of Parliament, and that it gives preference to expediency over principles.

Paragraph 7 of the Tenth Schedule which barred the jurisdiction of the courts was struck down as being ultra vires of the Constitution by the High Court of Punjab and Haryana and an appeal against this order was preferred by the Government in the Supreme Court. Several writ petitions challenging the validity and constitutionality of the 1985 enactment were also filed in the Supreme Court and various High Courts. The Supreme Court, on the request of the Government, withdrew and transferred to itself all the writ petitions pending before various High Courts. The Supreme Court[30] found that there were legal infirmities in the passage of the Anti-Defection Law inasmuch as the Constitution Amendment Bill had not been ratified by the requisite number of State Assemblies before being presented for the President's assent. Also, the Speaker's functions under the 10th Schedule called for a judicial determination of issues under the law. The process of determining the question of disqualification could not be considered part of the proceedings of the House and as such was not amenable to judicial review. The Supreme Court struck down Para 7 of the Schedule barring the jurisdiction of Courts and declared that while operating under the Anti-Defection Law, the Speaker was in the position of a tribunal and therefore his decisions like those of all tribunals were subject to judicial review.

Some of the situations that arose do not seem to have seen foreseen by those who drafted the 52nd Amendment for outlawing defections. Also, the fact that certain provisions of the Tenth Schedule were found to be amenable to entirely

[30]. Kihata Hallahan v. Zachillhu & Others, AIR 1993 SC 412

different interpretations by different presiding officers created terrible uncertainty and fluidity in the application of the law and brought to limelight a number of defects.

At the Union level, two Governments-those of Shri VP. Singh and Shri Chandra Shekhar-fell in quick succession. Even though Shri Chandra Shekhar formed the Janata Dal(S) Government and won the confidence of the House on a substantive motion, all the members of the ruling Janata Dal(S) were either those who had been expelled by Shri Vr. Singh and declared "unattached" by Speaker Rabi Ray or those against whom show cause notices for disqualification under the Anti-Defection Law had been issued by Speaker Ray in the exercise of his powers under the Anti-Defection Law. The Speaker's action covered all the members of the Council of Ministers headed by Shri Chandra Shekhar. This dragged on until finally on 11 January, 1991 Ray decided to give benefit of doubt to the ruling party and recognised the split as a one time process which began and closed on 5 November. Janata Dal(S) was recognised as a political party with 54 members. The seven members who joined after the date of split were disqualified.

In another case of Janata split, on 7 August, 1992, 20 of the 59 members of the Janata Dal appeared before Speaker Patil physically in one group, at the same time and claimed that they belonged to a group and should be seated separately from the Janata Dal members led by Shri Vr. Singh. Even though eight of these members had been expelled earlier by the Janata Dal leadership in two separate spells, the Speaker allotted them separate seats in the House. They continued to be shown as among the 59 Janata Oal members in all official Lok Sabha records. In his final decision on 1 June 1993. Speaker Patil held that (i) the political parties had no right under the Constitution to expel members from the legislature party so as to take away their constitutional status as members elected on a particular party ticket (Tenth Schedule, Explanation (a) to para 2(1)), and (ii) that the 20 members did not suffer from any disability as on 7 August 1992 and since they had the requisite strength of one-third on that day, they constituted a valid faction of the Janata Dal Parliamentary Party. The Speaker disqualified four of the 20 members on the ground of voluntarily disobeying their party whip. However, the disqualification was to have only prospective effect from the date of the order. Most significantly, the Speaker agreed that the Anti-Defection Law was defective and needed review and reform. He suggested that the task of determining disqualification of members under the Tenth Schedule could better be entrusted to the judges.

It was agreed on all sides that the Tenth Schedule of the Constitution which embodied the Anti-Defection Law had several serious lacunae which had caused tremendous damage

to our body politic and that amendments were called for urgently. For instance, several terms like 'political parties', 'split', 'merger' etc. had not been defined. The Tenth Schedule defined a 'Legislature Party' and an 'original political party' in either case with reference to a 'political party' but unfortunately a 'political party' had not been defined. It would be necessary to define a political party and to lay down conditions for its recognition for purposes of the Anti Defection Law. It was particularly imperative in view of the constitutional provision of Para 3 of the Tenth Schedule to the effect that the breakaway faction following a split would be deemed to be a 'political party' for purposes of Para 2(1).

The Constitution Commission (NCRWC) recommended that all defectors-whether individual or in groups of one-third etc.-should be disqualified for continuing as members. They must resign and seek fresh election and until re-election, they should stand debarred from holding any public office of a minister or any other remunerative political post. Following the NCRWC recommendation, the Constitution (9pt Amendment) Act 2003 amended the Tenth Schedule of the Constitution and inserted a new Article 361B to take away the protection from defectors on grounds of split in the party. It disqualified all defectors from membership and made them ineligible for ministership or other remunerative public office till reelection. Also, the number of ministerial posts was limited to 15% of the membership of the Lok Sabha / Vidhan Sabha. However, the protection under the merger provision still remains.

Parliamentary Reforms

The Constitution Commission (NCRWC) reviewed the working of Parliament for half a century (1950-2000) and inter alia recommended:

(1) periodic review of the work of Standing Committees of Parliament,
(2) setting up of a model standing committee on National economy,
(3) setting up of a Standing Constitution Committee for a priori scrutiny of Constitution amendment proposals.
(4) discussing major reports of Parliamentary Committees on the floors of the two houses;
(5) parliamentarians throwing themselves open to public scrutiny through a parliamentary 'ombudsman'.
(6) restoration of domiciliary requirement for Rajya Sabha membership
(7) codification of parliamentary privileges inter alia clarifying that they do not cover corrupt acts like accepting bribe
(8) more systematic approach to planning legislation, appointment of a Legislation Committee and referring all bills to a departmental standing committee
(9) the MP LAD Scheme may be discontinued immediately for being inconsistent with the spirit of the Constitution.

STATE LEGISLATURES

Article 168 of the Indian constitution provides that every state shall have a legislature. It consists of the governor and one house or the governor and two houses. The two houses are known as the 'Legislative Assembly' and the 'Legislative Council'. If there be only one house, it is known as the 'Legislative Assembly'. It is not always necessary that every state legislature must be bicameral. A state's legislature may be unicameral. In fact, barring very few states, many states in the union do not have legislative councils. The constitution provides for the abolition of legislative councils where they exist and also for their creation where they are non-existent. As per Art.169, for creation or abolition, the legislative assembly of the state must pass a resolution to that effect by a majority of the total membership of the assembly and by a majority of not less than two-thirds of the members of the assembly present and voting.

Composition of Legislative Assemblies

As per Art.170 of the Indian constitution, the legislative assembly of a state shall consist of not more than five hundred and not less than sixty members chosen by direct election from the territorial constituencies in the state. If the governor of a state is of the opinion that the Anglo-Indian community needs representation in the assembly and is not adequately represented therein, he may nominate one member of that community as provided under Art 333 of the constitution of India.

Composition of the Legislative Council

As per Art.171 of the Indian constitution, the total number of members in the legislative council of a state having such a council shall not exceed one-third of the total number of members in the legislative assembly of the state, however, in no case, the strength of the legislative council shall be less than forty.

The composition of legislative council is partly through indirect election (one-third of the total numbers of the council being elected by members of the legislative assembly), partly through special constituencies (e.g., graduates' constituency, teachers', constituency) and partly by nomination. The governor nominates persons having special knowledge on experience in the fields of literature, science, Art, co-operative movement and social service.

Reservation of seats for SC / ST in the Legislative assembly

Article 332 of the Constitution deals with the reservation of seats for the Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the state. This Article lays down as follows:

(1) Seats shall be reserved for the Scheduled Castes and Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam in the Legislative Assembly of every state.

(2) Seats shall be reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of Assam.

(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly under clause (1) shall bear as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the total number of seats in the Assembly as the population to the Scheduled Castes in the state or of the Scheduled Tribes in the state or part of the state, as the case may be, in respect of which seats are so reserved, bears to the total population of the state.

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the state of Assam shall bear to the total number of seats in Assembly in proportion not less than the population of the district bears to the total population of the state.

(5) The Constitution for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district.

(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the state of Assam shall be eligible for election to the Legislative Assembly of the state from any Constituency of that district.

The total number of seats in Legislative Assemblies in state and the Union Territories in the year 2019-20 was 4,120 out of which 577 seats were reserved for SC's and 288 for ST's.

Duration of State Legislatures and Qualification for membership

As per Arts.172 and 83, the provisions for the duration of the legislatures and as per Art.84 the provisions of qualification are mutatis mutandis the same as those for the duration and qualification of members the houses of parliament.

Dissolution

As like president is of parliament, governor is an integral part of the state legislature. Likewise the president at the centre, the governor of a state can summon, address, prorogue the state legislature, can dissolve the state assembly, The legislative council is not subject to dissolution as mentioned under Art.174,175,176 of the Indian constitution respectively.

The speaker, deputy speaker of the legislative assembly; vacation, resignation, removal, other ancillary provision are mutatis mutandis the same as those for the speaker and deputy speaker of Lok Sabha as per Art.178,179,180,181of the constitution of India.

The chairman & deputy chairman of the Legislative Council

Legislative Council has to choose both the chairman and the deputy chairman as soon as it can.

Vacation, Resignation, Removal & other Ancillary provisions

The vice-president is the ex officio chairman of the council of states. The provisions

for vacating his office or for his removal have been dealt with earlier.

The other provisions relating to the chairman, deputy chairman of the legislative council are mutatis mutandis the same as those relating to the speaker, deputy speaker of the Lok Sabha and the legislative assembly as provided underArt.89 to 92 & 182 to 185 of the constitution of India. Provisions for conducting business like oaths, votes, quorum as provided under Arts. 99 & 188; 100 &189 of the Indian Constitution are same for both the parliament and state legislatures. Further, the provisions for vacation of seats provided under Art. 101 & 190; Disqualification mentioned under Arts.102 ,191; provision of 'No Dual Membership' mentioned under Arts.102 (1) and 190 (3); disputes as to disqualification of members to be decided by the governor acting according to the opinion of the election commission as per Art.192 of the Indian constitution.

The provisions mentioned under Art.194 deal with the powers, privileges and immunities of the members of legislatures. It compares materials on Art.105.The procedures of the state legislature in respect of money bills and financial and other matters are mutatis mutandis the same except for the following;

1) No provision for joint session of legislative assembly & legislative council even if a state legislature has two houses.
2) Items charged on the consolidation fund are to some extent different.
3) Although Art.200, exclusive of the proviso, corresponds to Art.111. The proviso requires that the governor to reserve for the consideration of the president any Bill which in his opinion, if it became law, would so derogate from the powers of the High court as to endanger the position which the High Court is designed to fill under the constitution.
4) When a bill is reserved by the governor for the assent of the president, the president may either give his assent or declare that he withholds his assent. Where the bill is not a money bill, the president may direct the governor to return the bill together with the message as per proviso to Art.200 of the constitution of India, requesting the legislature to reconsider two bill or parts of it in the light of the message, the house or houses must then consider the bill within six months & if it is passed without amendment, it must be submitted to the president for his consideration.

Powers and functions of state legislatures

The powers and functions of the state legislature may be mentioned as follows:-

(a) Legislative powers

The legislature of each state has got power to frame laws on all matters included in the state list (list II) and the concurrent list(list III) of the VII th schedule of the constitution of India. But laws made by the state legislature on the subject in the concurrent list will be null and

void, if in case they conflict with the laws of the union on the same subject provided the relevant laws of the state legislature have not obtained the assent of the president. Thus, the constitution has imposed certain restrictions on the powers of the state legislature. Another limitation on the power of the legislature is that during an emergency, the parliament of India may make laws on the state list.

As provided under Article 249 of the constitution of India, even in normal times, if the council of states passes a resolution by two-thirds majority that in the national interest the union parliament should make law on any matters in the state list, the parliament of India is competent to make laws.

Further, the governor of the state, at his discretion may reserve certain bills like acquisition of private property, bills seeking to impose restrictions on freedom of trade and commerce, bills affecting powers of High Courts, etc. for presidential assent. Under such circumstances, the president of India may give assent to such bills or send them back for the reconsideration of the state legislature. If such bills are again passed by the state legislature, the president is not bound to give his assent. Thus the president can veto the bills in entirety, if he so desires. Thus the legislative power of the state legislative assembly is limited.

(b) Financial powers:

The legislature of a state controls the finances of a state. Without the legislative sanction, a single rupee cannot be spent. The budget is introduced every year in the state legislature. The state legislature may pass, reduce, or reject the demands for grants made in the budget. It is its duty to find ways and means to meet the budget expenditure. Proposal for increase or decrease of taxes are to be approved in the assembly.

In a bi-cameral legislature, the position of the legislative assembly superior to that of the legislative council in respect of financial matters. Excepting the expenditure charged on the consolidated fund of the state (which is non-votable) all other items of expenditure must be submitted to the legislative assembly in form of demands for grants. In financial matters, the legislative assembly is supreme in the state.

(c) Control over executive

As we have parliamentary form of government in the centre as well as in the states. Consequently, the council of ministers is collectively made responsible to the state legislature. Thus, the legislature exercises supervision and control over the ministers. The common method used to make the ministers responsible to the legislature is through question, censure motion, amendment to government's policy, vote of no confidence, etc.

There are also committees, which exercise control over the government on behalf of the state legislature. In controlling the executive, the legislative assembly is more powerful than the legislative council. A vote of

no confidence in the legislative council may not lead to the resignation of the council of ministers. However, such a vote of no confidence if passed in the legislative assembly compels the ministry to tender its resignation.

(d) Electoral functions

The elected members of the legislative assembly constitute a part of the electoral college provided for the election of the president of India. The legislative assembly also elects the representatives of the state to the Rajya Sabha and 1/3rd of the members of the legislative council of the state concerned. Further, it elects it's speaker and deputy speaker. Legislative council also elects a chairman and vice-chairman from among its members to preside over the meeting of the council.

(e) Constituent functions

The state legislatures in India have no power to propose any amendment of the constitution. All initiatives for the amendment of the constitution are vested in the union parliament.

In America, both the union and the states have equal power with regard to the amendment of the constitution. However, there are certain categories of amendments of the Indian constitution (such as the election of the Indian president, High Courts, the representation of states in the parliament, Article 368 of the constitution etc.) which are to be ratified by one half of the legislatures. In these respects, the state legislatures also take part in the amendment of the constitution. Thus unlike U.S.A., the state legislatures in India has limited voice in the amendment of the constitution

Ordinance making powers of governor-

Just as the President of India is constitutionally mandated to issue ordinances under Article 123, the governor of a state can also issue ordinances under Article 213, when the state legislative assembly (or either of the two Houses in states with bicameral legislatures) is not in session. The powers of the president and the governor are broadly comparable with respect to ordinance making. However, the governor cannot issue an ordinance without instructions from the president in three cases where the assent of the president would have been required to pass a similar bill.

Restrictions on the powers of state legislature

1) Some bills can be introduced in a state legislature only with the prior consent of the president.
2) Some bills even though it is passed by the state legislature, can be reserved by the governor for the consent of the president. Such bills become laws only after the assent of the president.
3) The union parliament has got the power to pass laws on the state list, (for one year) if the Rajya Sabha adopts a resolution (supported by 2/3rd majority of the members present and voting) and declares a state subject mentioned in the resolution as a subject of national importance.

4) During the period of a national emergency (Under Art. 352), the parliament is empowered to pass a law on any subject of the state list. Such law operates during the period of emergency and for six months after the end of the emergency.
5) During the operation of constitutional emergency in a state under Art 356, the union parliament gets the authority of making laws for that state. The state legislature stands either dissolved or suspended.
6) Discretionary powers of the governor of a state also constitute a limitation on the state legislature. Whenever he acts in his discretion, he is beyond the jurisdiction of the state legislature. Acting in his discretion, the governor can even dissolve the state legislative assembly.
7) The state legislature and the union parliament, both have the concurrent power to make laws on the subjects of the concurrent list. If both the union parliament and a state legislature pass a law on the same subject of the concurrent list and there is inconsistency between the two, the law passed by the union parliament gets precedence over the corresponding state law.

State legislature privileges

The state legislature privileges are mutatis mutandis the same as those relating to privileges of members of parliament.-

GOVERNOR AND THE LEGISLATURE

(A) Nomination of members to the Legislature

Like the President of India, the Governor of the State in the Indian Union is also an integral part of the State Legislature. It consists of the Governor and the Legislative Assembly and wherever there is a bi-cameral Legislature it consists of the Governor, the Legislative Assembly and the Legislative Council as provided under Article 168 of the Constitution.

Article 333 says: "Notwithstanding anything in Article 170, the Governor of a State may, if he is of the opinion that the Anglo Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein, nominate one member of the community to the Assembly.

According to Article 171(3)(e) of the Constitution the State Governor is to nominate one-sixth of the members of the Legislative Council. Article 171, clause (5) stipulates "The members to be nominated under sub-clause (e) of clause (3) shall consists of persons having special knowledge or practical experience In respect of such matters as the following; Literature, Science, Art, Co-operative Movement and Social service."

If we examine the qualifications mentioned in Article 171, then we will find that they are quite vague and when the Governor is to nominate more than one person it is not

necessary that he should nominate persons of different categories mentioned in the Article. In fact, he can nominate more than one person belonging to the same category.[31] Besides this, the question whether the persons nominated have the required qualifications or not, cannot be decided by 'the Court because whether one possesses the required qualifications or not is a question of fact and the High Court cannot[32]decide it under Article 226.

The pertinent question arises, whether the Governor is to act upon the advice of the Council of Ministers while exercising his powers of nominating the members or whether he is to exercise his discretion in this respect. In Biman Chandra Bose vs. H.C. Mukherjee[33], the Calcutta High Court declared : "Unless a particular Article expressly so provides an obligation to act in his discretion, cannot be imposed upon the Governor by implication. Article 163 makes it quite clear that except in the cases required to act in his discretion, he is to act on the advice and so it must be presumed that in making the nomination he must have acted on the advice of his Council of Ministers." In this case it was alleged that out of nine persons nominated by the Governor, none fulfils the requirements of Article 171 (5). But the Court held that "the Governor alone is made the sole Judge on this point. The Court cannot substitute its opinion or decision in place of the decision of the Governor."

On this point there are two conflicting opinions. According to Mr. C.K. Daphtary (former Attorney General) "the nomination is not made by the Governor in his discretion, but is made by the Governor in the exercise of his executive power of the State vested in him on the aid and advice of the Council of Ministers.[34] But according to other school of thought "the power exercised by the Governor under Article 171(3)(e) is not an exercise of the executive power of the State but that in acting under this provision of the Constitution, the Governor exercises his special constitutional function, mentioned therein, and this function has to be performed by the Governor himself in his discretion."

If we examine this question carefully, then it will be found that it is difficult to agree with the proposition made by the former Attorney General. "Just as the power of issuing ordinance is a constitutional power and not a power of the Government, and hence, it is incapable of being delegated or entrusted to any other body or authority, similarly, the power of nomination is also a constitutional power given to the Governor by Chapter III of Part VI which gives other constitutional powers to him such as the power of summoning, proroguing and

[31]. Vidya Sagar v. Krishna Ballabha Sahay, A.I.R. 1965,Patna, 321.
[32]. Ibid.
[33]. AIR 1952, Cal. 801
[34]. Vidya Sagar Vs. Krishna Ballabha Sahay, A.I.R. 1965 Patna, 321.

dissolution.* The contention that the Governor does not exercise this power in the exercise of his executive power of the State is also supported by the fact, that the executive power of the State extends only to those matters with respect to which the Legislature of the State has power to make laws, [35] and since the State Legislature has no power to make laws in this respect, therefore, it is not an exercise of the executive power of the State. "Hence it is a discretionary power, but if the Governor instead of exercising his discretion, acts upon the advice of the Council of Ministers, then it will not be unconstitutional."[36] Here it is also pertinent to note that, "the Court cannot enquire into advice, if any, given by the Council of Ministers."[37] The Governor not being liable to justify the nominations is not bound to disclose any facts relating to such nominations. [38] Being so, the power of nomination been misused by the Governors in various States. For instance, "after the General Election in 1952, the Governor of Madras nominated Mr. C. Rajagopalachari to the Council simply to appoint him the Chief Minister. In this case Sri Prakasa himself said that he did not consult the Cabinet when he nominated Mr. C. Rajagopalachari to the Council. [39] Sri Prakasa while defending his action said that the "convention requires that the Governor should make such nomination on the advice of the Chief Ministers. As the then Chief Minister was not prepared to give any advice on anything, I had to act on my own. [40] Subsequently these nominations were challenged in the Madras High Court by Raraamoorthi on the ground that it was "virtually in exercise of fraud of the powers conferred by the Constitution on the Governor because the nomination was made with the ulterior object of assisting the Congress Legislature Party." The validity of nomination was also challenged on the ground that "the Governor cannot exercise the power of making the nominations under Article 171(3) (e), (5) of the Constitution except on the advice of the Council of Ministers." But the High Court refused to accept this contention.[41]

There are other examples also where the Governors have exercised this power without the advice of the council of Ministers. For instance after the general election in 1957 the Kerala Governor nominated an Anglo Indian to the State Assembly. The nomination was even before the new Government was formed and

[35]. Article 162.
[36]. J.R. Siwach, Office of the Governor (1971), p. 125.
[37]. Vidya Sagar Vs. Krishna Ballabha Sahay, A.I.R. 1965, Patna 321.
[38]. Biman Chandra Vs. H. C. Mukherjee, Governor, West Bengal, A.I.R, 1952, Cal, 6o3.
[39]. K.V. Rao, "The Deputy Ministers - Their constitutional positions." The modern Review, Vol. LXXXIV, No. 2, August 1953, pi 118.
[40]. Sri Prakasa, state Governors in India, (1966), p. 42.
[41]. In re Ramamoorthi, A.I.R, 1953, Madras, p. 95.

therefore without its advice.[42] Similarly the Governor of UP Mr. B. Gopal Reddy nominated four Congress backed persons to the Legislative Council during the President's Rule.[43] Mr. Pitamber Das a member of the Rajya Sabha criticized these nominations and said that none of those members was qualified to be appointed under Article 171 (5) of the Constitution.[44] So far as the qualifications mentioned in Art. 171 (5) are concerned the Governor can exploit the situation easily because these are quite vague and purposeless. The Allahabad High Court has decided that "even practical experience in spheres enumerated makes a person eligible for nomination to the Council even though he has no special knowledge in them – person who has taken active part in politics and the governance of the State for several years – presumption is that he has practical experience in matters of social service and is therefore qualified to be nominated as member of the Council.[45]

Besides in 1962 Mr. S. Nijalingapa after having been defeated at the poll was brought to the Council through the instrumentality of nomination. As a matter of fact such a step of the Governor, in view of the decision of the Allahabad High Court, seems to be unconstitutional. In Har Sharan Varma Vs. Chandra Bhan Gupta,[46] it decided that "clause 3(e) and (5) of Article 171 make an inroad into principle of election which is the foundation of the system of Parliamentary Government established by Constitution. Clause (5) was not purported to enable a Minister who had been defeated in election to enter Legislature through back door to enable the party in office to increase its numerical strength in the Upper Chamber. Clause (5) was intended to make membership available in public interest to persons having special knowledge or invaluable political experience in the spheres mentioned so that they might not context election."

Article 171 should be used according to a set of conventions. The real talented persons should be searched from different fields as prescribed by Article 171(5) while making nomination. Past records of the persons to be nominated should be verified. The politicians defeated in the polls should not be nominated to the Legislative Council.

However, the constitutional practice warrants that the Governor should always consult the Council of Ministers before any name for nomination is declared.

(B) Summoning of the Legislature

Article 174(1) says "The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six

42. Tribune, Ambala Cantt March 10 1967
43. Rajya Sabha Debates Vol. 65 No.18 Aug. 19, 1968
44. Ibid
45. Harsharan Varma v. Chandra Bhan Gupta AIR 1962 All 301
46. AIR 1962, Allahabad 305

months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session."

The term 'session' cannotes a number of sittings of the Legislative body for transaction of business. A session begins with summons and ends with prorogation. According to the Parliamentary norms it is expected that the Governor would exercise this power according to the advice of the Chief Minister of a State. It is the Council of Ministers which provides business for a session of the Legislature. The Governor has nothing to do with the business except to act in accordance with the advice of the Council of Ministers. In the Constituent Assembly when Prof. K.T. Shah[47] wanted to empower the Presiding Officers of both the Houses of Parliament "provided that if at any time the President does not summon as provided for in the Constitution." Dr. B. R. Ambedkar maintained first that the President may be impeached since a refusal on the part of President to perform obligations which have been imposed upon him would be undoubtedly violation of the Constitution and second that neither the speaker nor the Chairman of either House would be entitled to summon the meeting of the Legislature since the business' had to be provided by the executive; that is to say the Prime Minister who would advise the President to summon the Legislature.[48]

In Britain it is a well-formed convention that the Sovereign always exercises his prerogatives of summoning and proroguing and dissolving Parliament on the advice of the Prime Minister.[49] The British Parliament is summoned by Queen / King by a royal proclamation and it is prorogued and dissolved by the Queen / King. The modern practice is that the new Parliament is summoned to meet not less than twenty clear days after the date of the proclamation.[50]

The Union Government's spokesman also conceded that "it is for the Ministry functioning for the time being to reach the decisions as to whether the State Legislature is to be summoned to meet, and if so, at what time and place. The Chief Minister will have to persuade the Governor about it and the latter may express a different view-point, but the final say will be that of the Chief Minister.[51] The Emergency conference of the Presiding Officers of the Legislatures in India also held that the Governor should summon or prorogue the Legislature on the advice of the Chief Minister.[52] Hence, the Governor should act on the advice of

47. C.A.D. Vol. VIII, p. 99

48. Ibid, p. 106.
49. S.3. Chrimes, English Constitutional History (London, Oxford University Press, 1947), p. 14.
50. E.C.E. Wade, 6. Godfrey Phillips, Constitutional Law (London: Longmans Green and Co; 5th Edn. 1955) p. 90.
51. Quoted from A.c. Noorani, India's constitution, p. 29.
52. Aslan Recorder, Vol. XIV, No. 17, April 22-28, 1968 pp. 8284-85.

the Chief Minister alone. It is the choice of the Chief Minister alone when and where he wants to transact the business of the Assembly.

This is the role of the Governor in the normal days of the functioning of the constitutional machinery in the State. But what should be the role of the Governor when there are constant defections or there is a split in the ruling party which has reduced ruling Government into a minority and the Chi6f Minister is not prepared to face the Assembly? The Constitution as such does not provide any solution to meet this contingency.

Constitutional practice has countenanced the authority of a Governor in insisting upon a Chief Minister to convene the Assembly to clear the clouds upon his continuing majority when the loss of support is manefestly obvious. It has been contended in some quarters that such a procedure is opposed to the terms of Article 174(1) which does not compel a Chief Minister to convene a session of the Assembly during the interval of six months. The Advocate General of West Bengal is stated to have expressed the view that "no Assembly can be summoned to test the majority of the Chief Minister.

MODULE - 04

STRUCTURE, POWERS AND FUNCTIONS OF SUPREME COURT, HIGH COURT AND TRIBUNALS

Provisions in regard to the judiciary in India are contained in Part V on The Union under Chapter IV titled The Union Judiciary and Part VI on The States under Chapters V and VI titled The High Courts in the States and Subordinate Courts respectively. It is, however important to emphasize that unlike other federal systems, for example, that of the United States, we do not have separate hierarchies of federal and State Courts.

For the entire republic of India, there is one unified judicial system-one hierarchy of courts-with the Supreme Court as the highest or the apex court and as the only arbiter in matters of relations between the Union and the States and the States inter se.

THE SUPREME COURT

Composition of the Court and conditions of Judge's office:

Article 124 provided for the establishment of the Supreme Court with a Chief Justice and seven other judges. It, however authorized Parliament to increase the number of judges by law. The number as fixed by law [Supreme Court (No. of Judges) Act 1956 as amended in 1986) was 25 in addition to the Chief Justice. It has since been increased to 30 by the 2008 Amending Act. Under Article 124(2), Supreme Court Judges are to be appointed by the President after consultation with such of the judges of the Supreme Court and of the High Courts as the President may deem necessary.

The proviso to the Article says that "in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted". The only obligation for the Government was to consult the Chief Justice and other judges. Significantly, the appointment was not required to be made 'in consultation' but only 'after consultation'. In actual practice, after receiving the opinion of the Chief Justice, the Cabinet deliberated on the matter and advised the President in regard to persons to be appointed. The President acted on the advice. In case of the Chief Justice, the senior most judge was usually appointed. The convention, however, was ignored when in the 70s, a couple of Chief Justices were appointed superseding their more senior colleagues.

It was held in S.P. Gupta v. Union of India (AIR 1982 SC 149) that consultation must be effective and must imply exchange of views after examining merits, but that it did not mean concurrence. However this case was overruled in 1993 in the Supreme Court Advocates-on

Record Association v. Union of India (AIR 1994 SC 268). In this case, the Supreme Court practically took over the power of selecting the judges for appointment in its own hands. As a safeguard, it mandated the Chief Justice associating two of his senior most colleagues in the selection process. The procedure for appointment was revised in the light of this judgment in 1994 to the effect that the decisive view in the matter of the appointment of judges shall be that of the Chief Justice of India and in case of a vacancy in the office of the Chief Justice of India, the senior most judge shall be appointed unless the retiring Chief Justice reported that he was unfit. However, following the government's reservations in regard to certain recommendations made by the Chief Justice in the matter of appointment of judges to the Supreme Court, the matter again became highly controversial and the President made a reference to seek the advisory opinion of the Supreme Court under Article 143 of the Constitution. The Court pronouncing its advisory opinion [53] basically confirmed the position in the 1993 judgment but it provided some more safeguards. The Chief Justice had to consult four senior most judges of the Supreme Court and if two of the four disagreed on some name, it could not be recommended. In effect, decisions were to be taken by consensus where the Chief and at least three of the four had to agree.

The Constitution Commission (NCRWC) recommended appointment of a National Judicial Commission as 'a machinery for appointment of judges 'and suggested that retirement age of High Court judges may be increased to 65 years and of the Supreme Court judges to 68 years.

Every judge of the Supreme Court holds office until the age of 65 years. A judge may be removed from his office only by an order of the President passed after an address by each House of Parliament for his removal" on the ground of misbehaviour or incapacity" supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members present and voting is presented to him in the same session. The procedure may be regulated by Parliament by law (Article 124). In the case of Justice Ramaswamy, motion for presenting an address to the President for his removal failed to get the required majority in Lok Sabha.

Contrary to the common belief, there is no provision in our Constitution for the impeachment of a judge. The impeachment is provided for the President and none else. Also, there is a fundamental difference between removal procedure and impeachment procedure and between the impact of the adoption of a motion for impeachment and the passing of a motion for presenting an address to the President

[53]. Spi. Ref No.1 of 1998 on 28 October 1998 [(1998) 7n see 739J

seeking orders for the removal of a judge. The grounds for the impeachment of the President have to concern 'violation of the Constitution' while an address for removal of a judge has to be on the ground of "misbehavior or incapacity". In case of impeachment, the moment the motion is passed by the two Houses, the President forthwith ceases to be the President. But in case of the motion for removal, it is for the President to consider issuing necessary orders.

Every person appointed as a judge of the Supreme Court, before he enters upon his office, takes an oath before the President -or some person appointed in that behalf by him in the form prescribed in the Constitution. The Constitution prohibits a person who has held office as a judge of the Supreme Court from practicing law before any court in the territory of India (Article 124(6) and (7)).

Judges of the Supreme Court are to be paid such salaries as may be determined by Parliament by law (Article 125). This is done by the High Court and Supreme Court Judges (Conditions of Service) Act as amended from time to time. In addition, to salary, the judges are allowed sumptuory allowances, rent free furnished residences, telephone, water, electricity, medical and other facilities exclusive of allowances and privileges like travelling expenses within the country, pension etc.

When the office of the Chief Justice of India is vacant or when the Chief Justice is unable to perform the duties of his office due to absence, the President shall appoint an Acting Chief Justice from among the judges of the Court to perform the duties of the Chief Justice (Article 126).

If at any time there is no quorum of judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India is empowered to appoint ad hoc judges in the Supreme Court from among judges of the High Courts, having qualifications to be appointed judges of the Supreme Court, for such period as he deems necessary. He can do so only with previous consent of the President and after consultation with the Chief Justice of the High Court concerned. The judge so appointed is duty bound to give priority to the Supreme Court duties. The Chief Justice of India may also invite a retired judge of the Supreme Court or a retired judge of the High Court having the qualification to be a judge of the Supreme Court, to sit and act as a judge of the Supreme Court for such period as he deems necessary. This too can be done with the previous consent of the President and also of the person to be so appointed (Articles 127 and 128).

POWER AND JURISDICTION OF THE COURT:

Article 129 provides that the Supreme Court shall be a court of record and shall have all the powers of such a court. Being the highest court of the land, its proceedings, acts and decisions are kept in record for perpetual memory and for presentation as evidence, when

need be, in support of what the law is. Being a court of record implies that its records can be used as evidence and cannot be questioned for their authenticity in any court.[54]

Court of record also means that it can punish for its own contempt. But this is a summary power, used sparingly and under pressing circumstances. It does not inhibit genuine and well intentioned criticism of court and its functioning. Fair and reasonable criticism of a judicial act in the interest of public good does not constitute contempt.

The Supreme Court has original, appellate and advisory jurisdiction. Original jurisdiction means the power to hear and determine a dispute in the first instance. The Supreme Court has been given exclusive original jurisdiction which extends to disputes (a) between the Government of India and one or more States e.g. State of West Bengal v. Union of India,[55] (b) between the Government of India and one or more States on one side and one or more States on the other, (c) between two or more States. However, this jurisdiction shall not extend to a dispute arising out of a treaty, agreement etc. which is in operation and excludes such jurisdiction (Article 131). The jurisdiction of the Supreme Court may also be excluded in certain other matters, e.g. inter State water disputes (Article 262), matters referred to the Finance Commission (Article 280) and adjustment of certain expenses and pensions between the Union and the States (Article 290). Recovery of damages against the Government of India cannot be claimed by a State before the Supreme Court under Article 131. The Article does not cover such ordinary commercial matters between the Union and the States.[56] Also, a dispute to be so brought before the Supreme Court must involve a question, whether of law or fact, on which the existence or extent of a legal right depends.

Under the new Article 139A inserted by the 44th Amendment in 1978, the Supreme Court may transfer to itself cases from one or more High Courts if these involve questions of law or of great importance. Also, the Supreme Court may transfer cases from one High Court to another in the interests of justice.

The original jurisdiction of the Supreme Court also extends to cases of violation of the fundamental rights of individuals and the Court can issue several writs for the enforcement of these rights (Article 32). It is a unique feature of our Constitution that in principle, any individual can straightaway approach the highest court in case of violation of his fundamental rights.

The appellate jurisdiction of the Supreme Court extends to civil, criminal and constitutional matters. In a civil matter, an appeal lies to the Supreme Court from any

[54]. Daphtary v. Gupta, AIR 1971 SC 1132; Namboodripad v. Nambiar, AIR 1970 SC 2015

[55]. AIR 1963 SC 1241

[56]. Union of India v. State of Rajasthan (1984) 4 SCC 238

judgment, decree or final order of a High Court if the High Court certifies under Article 134A that a substantial question of law of general importance as to the interpretation of the Constitution is involved and the matter needs to be decided by the Supreme Court (Articles 132-134).

Considering an appeal under Article 133, the Supreme Court held in P.K. Dave v. People's Union of Civil Liberties[57] that the High Court should refrain from using intemperate language as part of judicial discipline while commenting upon the conduct of another individual particularly when that individual is not before the court.

In criminal cases, an appeal to the Supreme Court shall lie if the High Court (a) has reversed an order of acquittal of an accused person and sentenced him to death, or (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death (Article 134).[58]

Under Article 134(1)(c) an appeal against a decision of a High Court can be filed before the Supreme Court if the High Court certifies under Article 134A that the case is a fit one for appeal to the Supreme Court. But the proviso to sub-clause (c) lays down that such appeals shall be subject to rules made by the Supreme Court and to such other conditions as the High Court may decide. The grant of the certificate by the High Court for appeals in criminal cases to the Supreme Court depends on an evaluation whether the case involves a substantial question of law and its interpretation on which the Supreme Court is urgently required to pronounce its opinion and whether it would result in grave injustice to the accused if he is denied the opportunity of an appeal to the Supreme Court.

Under Article 136, the Supreme Court, at its discretion, may grant special leave to appeal from any judgment, decree, determination, sentence or order, in any cause or matter passed or made by any court or tribunal in the territory of India. These powers of the Supreme Court to grant special leave to appeal are far wider than the High Courts' power to grant certificates to appeal to the Supreme Court under Article 134. The Supreme Court can grant special leave against judgments of any court or tribunal in the territory, except the military courts, and in any type of cases, civil, criminal or revenue. But, the Supreme Court has itself said that it will grant special leave to appeal only in cases where there has been gross miscarriage of justice or where the High Court or Tribunal is found to have been wrong in law. If the judgment of the court below shakes the

[57]. AIR 1996 SC 2166

[58]. Ram Kumar v. State of M.P., AIR 1975 SC 1026; Padda Narayana v. State of U.P., AIR 1975 SC 1252

conscience and shocks the sense of justice, Supreme Court shall interfere.[59]

Article 137 provides for the Supreme Court having the power to review its own judgments and orders.

Article 143 of the Constitution confers upon the Supreme Court advisory jurisdiction. The President may seek the opinion of the Supreme Court on any question of law or fact of public importance on which has thinks it expedient to obtain such an opinion. On such reference from the President, the Supreme Court, after giving it such hearing as it deems fit, may report to the President its opinion thereon. The opinion is only advisory, which the President is free to follow or not to follow. The first such reference was made in the Delhi Laws case[60]. A recent instance was of President Abdul Kalam seeking (in August 2002) advice of the Supreme Court under Article 143 in connection with the controversy between the Election Commission and the Government on elections in Gujarat. The issues related to the limits on the powers of the Election Commission under Article 324, the impact of Article 174 on the jurisdiction and powers of the Commission and whether the Commission' could recommend promulgation of President's rule in a State.

The President may also seek the opinion of the Supreme Court, through a similar reference on any treaty, agreement, covenant, engagement, sanad or other similar instrument which had been entered into or executed before the commencement of this Constitution, and has continued in operation thereafter.

Under Article 138, the Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer. It shall have such jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if the Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court. This enlarges the jurisdiction of the Supreme Court and provides it with very special jurisdiction to hear cases of most urgent nature directly and in its original jurisdiction for speedy disposal.

Article 139 lays down that Parliament may by law confer on the Supreme Court power to issue directions, orders or writs in matters not already covered under Article 32. Under Article 140, Parliament may by law supplement the powers of the Supreme Court. Law declared by the Supreme Court is binding on all courts in India vide Article 141.[61] But no law can be taken

[59]. Haripada Dey v. State of West Bengal, AIR 1965 SC 757; Matru v. State of U.P., AIR 1971 SC 1050; Ram Saran v. CT.O., AIR 1962 SC 1326; Muniswamy v. Ranganathan, (1991) 2SCC 139; Mahesh v. State of Delhi, (1991) Cr LJ 1703 (FB)

[60]. (1951) SCR 7

[61]. Vineet Narain v. Union of India, AIR 1998 SC 889; Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd., AIR 1997 SC 2477

to have been declared where no reasons are given. Also, what is binding is the principle or the ratio of the decision and not findings on facts, opinions or arguments.[62] Decrees and orders of the Supreme Court shall be enforceable throughout India and civil and judicial authorities shall act in aid of the Supreme Court (Articles 142 & 144).

For purposes of giving effect to the directions and decisions of the Supreme Court, all authorities, civil and judicial, in the territory of India, have been made subordinate to the authority of the Supreme Court inasmuch as all these are required to "act in aid of the Supreme Court" (Article 144). The Supreme Court may from time to time, and with the approval of the President, make rules for regulating generally the practice and procedure of the Court. The officers and staff of the Supreme Court are appointed by the Chief Justice of India or such other judge or officer of the court as he may direct (Articles 145 146). Article 147 clarifies that references to interpretation of the Constitution shall cover interpretation of the Government of India Act 1935, Indian Independence Act 1947 etc.

Judicial Review

Judicial review as it has evolved in the United States 1j11eans the power of the highest court of the land to finally pronounce upon the legality or otherwise of a legislative act in so far as it conforms, or does not conform, to the provisions of the fundamental law, i.e. the Constitution of the land. Our Constitution very largely but not entirely follows the U.s. practice in this regard. The Constitution being the fundamental law of the land, every legislative enactment, whether of the Union or that of States must conform to this fundamental law except that in India, after a law is declared unconstitutional, in most cases, the Constitution can be amended to take care of the judicial interpretation and make the law permissible.

Cases are often filed before the Supreme Court by a State Government, or by an affected private individual or a party, claiming that in enacting a particular law, the concerned government exceeded its jurisdictional limit with regard to the division of powers under the Seventh Schedule. While reviewing such enactment the Supreme Court will examine whether jurisdictional limits have been transgressed. Incorporation of a Chapter on Fundamental Rights in the Constitution makes judicial review specially relevant. Article 12 guarantees fundamental rights against all State action. And 'State' under this Article has been defined to include the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government.

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62. Supreme Court Employees v. Union of India, AIR 1991 SC 334; Ramesh v. Union of India, AIR 1990 SC 560; C.R. T. v. S.E. W., AIR 1993 SC 43; Krishan v. Union of India, (1990) 4 SCC 207 (FB)

Article 13 declares all laws inconsistent with or in derogation of the fundamental rights to be void to the extent of inconsistency. Up to 1967, the Supreme Court accepted the view that an Act amending the Constitution was not 'Law' in the definition of Article 13(2). But, in the Golaknath case, the Supreme Court ruled by a majority judgment that an Act amending the Constitution was also 'law' under this definition and therefore subject to judicial review. The Constitution (Twenty-fourth Amendment) Act, 1971 inserted clause 13(4) in the Constitution, laying down that an Amendment to the Constitution is not 'law' under the definition of Article 13(2). In the Keshvanand Bharti case, the Supreme Court upheld this position.

Article 32 in the Chapter on Fundamental Rights specifically confers the power of judicial review on the Supreme Court. Under this Article every citizen has a right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred in Chapter III. The Supreme Court can hear the petition in its original jurisdiction. The Supreme Court has been given the power to issue directions, orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred.

Under Article 226, State High Courts have been given similar power, i.e., the power to issue to any person or authority, within its territorial jurisdiction, directions, orders, or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them for the enforcement of any of these rights.

DUE PROCESS OF LAW VS. ACCORDING TO THE PROCEDURE ESTABLISHED BY LAW

The US Constitution (Constitutional Amendments) provides that a man may not be deprived of his right to liberty and property except according to due process o£1aw. The Indian Constitution, however, lays down that a man may not be deprived of his rights to liberty except according to the procedure established by law. The due process of law gives wide scope to the Supreme Court to grant protection to the rights of its citizens. It can declare laws violative of these rights void not only on substantive grounds of being unlawful, but also on procedural grounds of being unreasonable. Our Supreme Court, while determining the constitutionality of a law, however was expected to examine only the substantive question, i.e., whether the law is within the powers of the authority concerned or not. It was not expected to go into the question of its reasonableness, suitability or policy implications.

The Supreme Court pronounces -its judgment on a specific case through a specific petition. It does not give its opinion or advice on a general reference. Generally, there should be an aggrieved person who petitions the Court to

challenge the constitutionality of the statute which has adversely affected his rights. He has to show that he has sustained or is in immediate danger of sustaining some direct injury as a result of the enforcement of the statute, and that the injury complained of is justiciable.

PUBLIC INTEREST LITIGATION

In the historic judgment in the Judges' Transfer case, the seven judge Constitution Bench of the Supreme Court held that any member of the public even if not directly involved but having "sufficient interest" can approach the High Court under Article 226, or in case of breach of fundamental rights the Supreme Court, for redressal of the grievances of the persons who cannot move the Court because of "poverty, helplessness or disability or socially or economically disadvantaged position". The Court can be approached even through a letter in such a case.[63] After this judgment, it has been open to public minded individual citizens or social organizations to seek judicial relief in the interest of the general public.

In Bandhua Mukti Morcha v. Union of India[64], an organisation dedicated to the cause of release of bonded labourers informed the Supreme Court through a letter that they conducted a survey of the stone quarries situated in Faridabad District of Haryana and found that there were a large number of labourers working in such quarries under "inhuman and intolerable conditions" and many of them were bonded labourers. The petitioners entreated that a writ be issued for proper implementation of the various provisions of the Constitution and Statutes with a view to ending the misery, suffering and helplessness of those labourers. The court treated the letter as a writ petition and appointed a Commission consisting of two advocates to visit these stone quarries, make an enquiry and report to the court on the matter.

In Lakshmi Kant Pandey v. Union of India,[65] a writ petition was filed on the basis of a letter complaining malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children to foreign parents. It was alleged that in the guise of adoption, children of tender age were not only being exposed to a long dreadful journey to distant countries at great risk to their lives but also to uncertainty as to their shelter and future. Chief Justice EN. Bhagwati laid down certain principles and norms to ensure the welfare of the children and directed the Government and various agencies dealing with the matter to follow them.

In recent years, under what has come to be called judicial activism, the Supreme Court has issued directions to control pollution, to check the evil of child prostitution, to revive a

63. S.P. Gupta v. President of India, AIR 1982 SC 149
64. AIR 1984 SC 803
65. ((1987) 1 SCC 667

sick company to protect the livelihood of 10,000 employe1s, to look into the danger to safety in building a dam, to segregate the children of prostitutes from their mothers, to! provide insurance to workers in match factories, to protect the Taj Mahal from environmental pollution etc.[66] However, it has been held that non-justiciable political matters cannot be brought before the court under the guise of public interest litigation.[67] Locus stundi to file a petition depends on the facts as they exist. Even a journalist may file a writ petition if the case falls in the category of public interest litigation. On the other hand, if personal interest litigation is sought to be fought as public interest litigation, person instituting such litigation may be made to pay the costs. The Court should not allow an unscrupulous person to vindicate his personal grudge in the garb of public interest.[68]

Presumption in favour of Constitutionality

The presumption is always in favour of constitutionality of an enactment. The burden of providing all the facts and proof against the constitutionality of the statute lies with the petitioners.

Doctrine of Severability

While interpreting the statute, the court has to decide whether the law as a whole or only some parts thereof attract unconstitutionality. The court can declare a law voids in part as well, if the facts so warrant.

Doctrine of Progressive interpretation

The Supreme Court, in interpreting the Constitution, has been guided by the doctrine of progressive interpretation i.e., it has taken the ever changing socio legal context in view while interpreting the Constitution.

Effect of a law declared unconstitutional

Under Article 141, a law declared by the Supreme Court shall be binding on all courts within the territory of India. Thus, if the Supreme Court declares a law unconstitutional, whether on grounds of legislative competence, or of being violative of fundamental rights, the order shall be binding on law courts in the territory of India. Such law shall be totally ignored and shall not be implemented in subsequent proceedings.[69] Independence of the Judiciary: In a representative democracy, administration of justice assumes special significance in view of the rights of individuals which need protection against executive or

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66. Subhash v. State of Bihar, AIR 1991 SC 420; Vishal v. Union of India, (1990) 3 SCC 318; Workers of Rohtas Industries Ltd. v. Rohtas Industries Ltd., AIR 1990 SC 491; Tehri Baandh v. State of U.P, (1991) 1 SCC 121; Gaurav Jain v. Union of India, AIR 1990 SC 292; Mehta v. State of TN., AIR 1991 SC 417; M.e. Mehta v. Union of India, AIR 1997 SC 734.

67. Maharshi v. the State, AIR 1990 All. 52.

68. Rugmani v. Achutha, AIR 1991 SC 983; Bholanath v. State of U.P (1990) Supp SCC 151; $ubhash v. State of Bihar, AIR 1991 SC 420; ehhetriya Pradushan v. State of T.N., AIR 1991 SC 417; Chetriya Samiti v. State of U.P (1991) I SCJ 130.

69. Star Co. v. Union of India, AIR 1987 SC 179; Assistant Collector v. Dunlop (1985) 1 SC 260; Gourya v. Thakur, AIR 1986 SC 1440

legislative interference. This protection is given by making the judiciary independent of the other two organs of the government and supreme in its own sphere. An independent and supreme judiciary is also an essential requisite of a federal polity, wherein there is a constitutional division of powers between the federal government and governments of the constituent units and a functional division of powers between the executive, legislature and judiciary. Also, an independent and impartial judiciary is an essential requisite for ensuring human rights and protecting democracy. Only an independent judiciary can act effectively as the guardian of the rights of the individual and that of the Constitution. There are many devices in the Indian Constitution which ensure the independence of the Courts, for example, the constitutional provisions in regard to the appointment and removal of judges, security of tenure, salaries and service conditions, salaries and allowances of judges being a charge on the Consolidated Fund, recruitment and appointment of their own staff by the Supreme Court, debarring the judges of the Supreme Court from practicing before any Court in India after retirement, the power to punish for contempt etc.

THE HIGH COURTS

The Constitution provides for a High Court for each State. Parliament may, however establish by law a common High Court for two or more States or for two or more States and a Union territory (Articles 214 and 231).

Like the Supreme Court, each High Court is also to be a Court of record and of original and appellate jurisdiction with all the powers of such a court including the power to punish for its contempt (Article 215).

Judges of the High Court were appointed by the President after consultation with the Chief Justice of India, the Governor of the State and in case of appointment of all judges other than the Chief Justice, the Chief Justice of the High Court. It was held in S.P Gupta v. Union of India (AIR 1982 SC 149) that all the three functionaries were to be given equal importance in the process of consultation. Thereafter, we had the Supreme Court verdict in the Advocates-On-Record case and the advisory opinion.

To be appointed a High Court judge, a person must be a citizen of India with ten years' service in a judicial office or ten years' experience as a High Court advocate. On appointment, every High Court judge must take an oath of office. Every High Court judge shall hold office until he attains the age of 62. He cannot be removed from his office except in the manner provided for removal of a judge of the Supreme Court. Further, to ensure the independence of the office of a High Court judge, it is laid down that after being a permanent judge of a High Court, a person shall not plead in any court in India except the

Supreme Court or other High Courts. Every High Court judge is entitled to a salary and allowances as may be settled by Parliament by law.

Judges may be transferred from one High Court to another by the President after consulting the Chief Justice of India (Article 222). However, the Supreme Court has held that judicial review is necessary to check arbitrariness and that a High Court judge can be transferred only on public interest and that only the judge affected can question it.[70] In the Advocates case, the Supreme Court decided that in the matter of transfer of judges as well, the views of the Chief Justice of India will be given primacy and respect, (AIR 1994 SC 266). The President may appoint an acting Chief Justice for a High Court. Also, in case of need, the President may appoint additional and acting judges of the High Court for a period not exceeding two years. The Chief Justice of a High Court may, with the consent of the President, appoint a retired judge to sit and act as a judge (Articles 215, 217 224A).

Every High Court shall consist of a Chief Justice and such other judges as the President may deem necessary to appoint from time to time (Article 216). Each High Court has powers of superintendence over all the courts and tribunals-other than those set up under any law relating to armed forces-in the area of its jurisdiction (Article 227).

Where any High Court is satisfied that a case pending in the lower courts involves a substantial question of law as to the interpretation of the Constitution, it may withdraw the case and either itself decide it or determine the said question of law and return the case to the Court for determination (Article 228).

High Court has full control over its staff. The salaries and allowances of the judges and of the High Court staff are all charged on the Consolidated Fund of the State. Appointments of officers and staff of a High Court are made by the Chief Justice of the Court or by such other judge or officer of the Court as he may decide. The terms and conditions of service of the staff and officers of the Court should appropriately be settled by rules made by the Chief Justice and approved by the President (Article 229). The jurisdiction of a High Court may be extended to or excluded from a Union Territory (Article 230).

Article 226 lays down that every High Court shall have power throughout the territory under its jurisdiction to issue to any person or authority directions, orders or writs including writs of habeas corpus, prohibition, mandamus, quo warranto and certiorari or any of them for the enforcement of the fundamental rights or for any other purpose. Thus, while the Supreme Court's writ jurisdiction extends only to cases of

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[70]. Union of India u. Sankal Chand, AIR 1977 SC 2328; K. Ashok Reddy v. Gout of India, JT (1994) I S C 40

violation of fundamental rights, the High Courts under Article 226 enjoy much wider powers and can issue writs in all cases of breach of any right. This becomes obvious from the use of the term /I for any other purpose". The High Court may set aside an illegal order, may declare the law or the right, may order relief by way of, for example, refund of illegal tax etc. Just as the law declared by the Supreme Court is binding on all courts in India, that declared by the High Court is binding on all subordinate courts within the State or within the territory covered by the jurisdiction of the High Court.[71]

In appeals by special leave against the Patna High Court orders in writ petitions alleging large-scale misappropriation of public funds to the extent of several hundred crores of rupees in the Animal Husbandry Department (Fodder Scam), the Supreme Court directed the High Court to ensure that a fair, honest and complete investigation was completed by the CBI and all persons against whom a prima facie case for trial is made out were identified and put on trial in accordance with law. The High Court's jurisdiction extended to examining the manner of investigations and considering the question of extension of time.[72]

It needs to be remembered that the remedy through a writ in cases other than those of violation of fundamental· rights is not a normal one and is not expected to be granted as a matter of routine. It is an extraordinary remedy which can be expected in special circumstances and only under the discretion of the Court. Judiciary is not supposed to lay down policy and no court or tribunal can compel the governments to change its policy involving expenditure.[73]

The power to issue writs has been vested in the Supreme Court and the High Courts with a view to ensure quicker justice and early relief to persons whose rights are violated with impunity and who would suffer irreparably if a: ready and speedy remedy is not made available without going into avoidable technicalities. There are five well-known writs.

Habeas Corpus literally means a demand to produce the body. It applies in a case where a person is alleged to have been illegally detained. The issuance of the writ means an order to the detaining authority or person to physically present before the Court the detained person and show the cause of detention so that the Court can determine its legality or otherwise. If the detention is found to be illegal, the detained person is set free forthwith. Since now, after the

[71]. State of Orissa v. Madan Gopal (1952) SCR 28; Rambhadraiah v. Secretary, AIR 1981 SC 1653; Desai v. Roshan, AIR 1976 SC 578; State of M.P. v. Bhailal, AIR 1964 SC 1006

[72]. Union of India v. Sushil Kumar Modi, AIR 1997 SC 314.

[73]. Himmat Lal Shah v. State of U.P., AIR 1954 SC 403; Abraham v. ITO, AIR 1961 SC 609; Bhopal Sugar Industry v. ITO, AIR 1967 SC 549; State of Rajasthan v. Karam Chand, AIR 1965 SC 913; Union of India v. Tejram, (1991) 3 SCC 11; Kartar Singh v. State of Punjab (1994) 2 SC 423

44th Amendment, Article 21 cannot be suspended even during the proclamation of Emergency, this becomes a very valuable writ for safeguarding the personal liberty of the individual.

While the Supreme Court can issue the writ of habeas corpus only against the State in cases of violation of fundamental rights, the High Court can issue it also against private individuals illegally or arbitrarily detaining any other person.

Mandamus is a command to act lawfully and to desist from perpetrating an unlawful act. Where A has a legal right which casts certain legal obligations on B, A can seek a writ of mandamus directing B to perform its legal duty. Mandamus may lie against any authority, officers, government or even judicial bodies that fail to or refuse to perform a public duty and discharge a legal obligation. The Supreme Court may issue a mandamus to enforce the fundamental right of a person when its violation by some governmental order or act is alleged. The High Courts may issue this writ to direct an officer to exercise his constitutional and legal powers, to compel any person to discharge duties cast on him by the Constitution or the statute, to compel a judicial authority to exercise its jurisdiction and to order the Government not to enforce any unconstitutional law.

Prohibition is issued by a higher Court to a lower Court or tribunal and is intended to prohibit it from exceeding its jurisdiction. Writ of prohibition is not issued against administrative agencies. It is available only against judicial and quasi judicial bodies.

Certiorari lies against judicial and quasi judicial authorities-courts and tribunals-and means 'to be informed'. When, for example, a tribunal acts without jurisdiction or in excess of it and issues an illegal order, that order can be quashed by a writ of certiorari. Such a writ may lie even against an administrative body affecting individual rights.[74]

Quo Warranto is a question asking 'with what authority or warrant'. The writ may be sought to clarify in public interest the legal position in regard to claim of a person to hold a public office. An application seeking such a writ may be made by any person provided the office in question is a substantive public office of a permanent nature created by the Constitution or law and a person has been appointed to it without a legal title and in contravention of the Constitution or the laws.

Besides writs, the High Courts under Article 226 may also issue other directions and orders in the interests of justice to the people.[75]

THE SUBORDINATE COURTS

The Governor in consultation with the High Court appoints the district judges. A person who is not already in Government Service should have at least seven years'

[74]. Union of India v. Nambudri (1991) 2 VJSC 302.
[75]. T.C. Basappa v. Nagappa, AIR 1954 SC 440

experience at the bar to become eligible for the position of a district judge (Article 233).

Article 233A inserted by the twentieth Amendment Act validated the appointments of and judgments etc. delivered by certain district judges (233A).

Appointment of persons other than district judges to the judicial service of a State shall be made by the Governor in accordance with rules made in that regard. Besides the State Public Service Commission, the High Court has to be consulted in the matter of such appointments (Article 234).

The administrative control of the High Court over the district courts and other lower courts is full inasmuch as postings, promotions and grant of leave etc. to any person belonging to the judicial service of a State and holding any post inferior to the post of a judge is vested in the High Court (Article 235).[76]

Article 236 is the interpretation clause and explains terms like district judge, judicial service etc. while Article 237 empowers the Governor to apply the provisions regarding subordinate courts to any class or classes of magistrates in the State.

Judicial Reforms

Apart from suggesting a National Judicial Commission for the appointment of judges, and increasing the retirement age of judges, the Constitution Commission (NCRWC) inter alia recommended:

(i) Adequate training to presiding officers of courts and a systematic assessment of the training needs of judicial personnel at different levels

(ii) Delivery of judgments after the conclusion of the case ordinarily within 90 days

(iii) Award of exemplary costs in appropriate cases of abuse of law

(iv) Preparation of a strategic plan by each High Court for time bound clearance of arrears in courts within its jurisdiction. No case to remain pending for more than a year

(v) Union and State laws to be made for an effective scheme of compensation to victims of crime.

[76]. Tej Pal v. State of U.P. (1985) 3 SCC 604; State of Assam v. Ranga Mohammed, AIR 1967 SC 903.

MODULE - 05

RELATIONS BETWEEN UNION AND THE STATES

Article 1 of our Constitution describes India as a "Union of States". When the British power was established in India it was highly centralized and unitary. To hold India under its imperial authority, the British had to control it from the Centre and ensure that power remained centralized in their hands, A strong central authority was for the British both an imperial and an administrative necessity. The Charter Act of 1833 carried the process of centralization in India to an extreme degree by depriving the Governments of Madras and Bombay of all legislative powers and concentrating them in the Governor-General-in-Council at Calcutta. This act also expressly vested in the Governor-General-in-Council the superintendence, direction and control of the whole civil and military Government of India.

The Government of India Act, 1919, provided for a considerable measure of devolution of authority to the provinces. The Joint Committee on Constitutional Reforms in 1934 observed: Notwithstanding the measure of devolution on the provincial authorities which was the outcome of the Act of 1919, the Government of India is and remains in essence a unitary and centralized Government, with the Governor General-in-Council as the keystone of the whole constitutional edifice.

When the Commonwealth of India Bill came up for discussion in the British House of Commons, the Government spokesman Malcolm Hailey, among other things, significantly said that some kind of federation was inevitable as the ultimate objective to be kept in view. The problems of princely states and of British commercial interests were also raised as grounds for the continuation of a strong central authority under the direct control of the British masters. Both the Simon Commission (1927-29) and the Butler Committee (1927-30) visualized, even though as a distant ideal, a federal Union for the whole of India.

The Government of India Act of 1935 proposed to set up a federal polity in India, with a central government and the Provinces deriving their jurisdiction and powers by direct devolution from the Crown. The Federation envisaged by the 1935 Act never came into being. The Provincial autonomy part of the 1935 Act was put into operation. Since a limited responsible Government was established only at the provincial level, the nationalists naturally asked for more powers for provincial legislatures. The experiment was, however short-lived.

In any case, the country as a whole continued to be ruled under the 1919 Act by a

central authority until 1947. And, since under the 1919 Act, there was a central government, a central legislature, a system of central laws etc., even after the new Constitution, the bureaucracy perhaps could not discard the colonial hangover and the use of these terms continued.

When the Constituent Assembly first met in 1946 and early 1947, the idea was to have a federation with a Centre having limited powers. Before the Union Constitution Committee could transact any worthwhile business, the Mountbatten Plan of 3 June 1947 was announced. All hopes of preserving the unity of India vanished and the partition of the country on communal lines became a firm decision. As was expected, a decisive swing followed in favour of a strong Centre. The Union Constitution Committee and the Provincial Constitution Committee decided, at a joint meeting on 5 June, that in view of the 3 June announcement, the limitations imposed by the Cabinet Mission's plan on the form of the constitution no longer existed. Once partition had become a reality, there was no need to appease the Muslim League and restrict the powers of the Union Government. The Union Constitution Committee meeting of 6 June 1947 tentatively decided that the Constitution should be a federal structure with a strong Centre, and that there should be three exhaustive lists with residuary powers vesting in the Centre.

On 5 July 1947, the Union Powers Committee presented a second report to the President of the Constituent Assembly emphasizing that the "soundest framework for the Constitution was a federation with a strong Centre". The report said that the severe limitation on the scope of central authority in the Cabinet Mission's Plan was a compromise accepted by the Assembly much against its judgment of the administrative needs of the country in order to accommodate the Muslim League. The Union Powers Committee was unanimous in its view that it would be injurious to the interests of the country to provide for a weak central authority which would be incapable of ensuring peace, of coordinating vital matters of common concern, and of speaking effectively for the whole country in the international sphere. Meanwhile, 600 and odd princely states were integrated with the emerging Indian Union. As a result, the number of State units in the Indian Union was brought down to manageable proportions.

In the context of these developments, the Drafting Committee decided in favour of describing India as a Union, although its Constitution might be federal in structure. The emphasis on India being a Union was to convey the fact that it was not the result of a compact or agreement between the constituent units but a declaration by the Constituent Assembly deriving its authority from the one people of India. Further, the conceptualization was clearly intended to convey the federal nature of the polity but with a subordinate position to the

States and structural functional balance in favour of the supremacy of the Union. The point was upheld by the Supreme Court in West Bengal v. Union of India[77].

The predominant concern of the founding fathers as also of the various Commissions and Committees appointed since Independence to consider reorganization of States or Union-State relations-the JVP Committee, the Dar Commission, the States Reorganization Commission, the Rajamannar Committee, the Sarkaria Commission, etc.-has been that of the unity and integrity of India. The SRC report concluded:

It is the Union of India which is the basis of our nationality. States are but limbs of the Union, and while we recognize that the limbs must be healthy and strong it is the strength and stability of the Union and its capacity to develop and evolve that should be the governing consideration of all changes in the country.

Legislative Relations

Article 245 to 255 contain a charter of the distribution of legislative powers between the Union and the States. Parliament may make laws for the whole or any part of India. The Legislature of a State may make laws for the whole or any part of the State. Any State law would be void if it has extra territorial operation unless sufficient nexus can be shown to exist between the object and the State.[78] Laws made by Parliament, however, cannot be questioned on grounds of extra territorial operation (Article 245). The Seventh Schedule to the Constitution embodies three lists; viz. the Union List, the State List and the Concurrent List consisting of 97, 66 and 47 items respectively. Even after the changes in the Schedule brought about by Constitution Amendment Acts, the numbers of entries in the three lists have remained the same. Where some entry in full or in part is omitted (e.g. entry 33 in the Union List), the omission has been indicated by putting stars (***) and indicating in the footnote the name and number of the relevant Amendment Act. Similarly, where a new entry is added, it is given a supplementary number by alphabets A, B, C, etc. e.g. entry 2A in the Union List. Amendments in the three lists have been effected by the third, sixth,-seventh, fifteenth, thirty-second, forty-second and forty-sixth amendments. But, the most far reaching changes were made by the seventh and the forty-second amendments.

Article 246 lays down that the Union Parliament would have exclusive jurisdiction to make laws in regard to items in the Union List, the State Legislature would have exclusive power to make laws in respect of items in the State List and both the Union and State

[77]. AIR 1963 SC 1241

[78]. State of Bombay v. RMDC, AIR 1957 SC 699; Tata Iron & Steel Co. v. State of Bihar, AIR 1958 SC 452.

Legislatures could legislate in the area of items included in the Concurrent List. In case of any inconsistency between laws made by Parliament and those made by the Legislature of a State in respect of items in the Concurrent List, the Union law shall prevail and the State law shall be void to the extent of inconsistency except where a State law is reserved for the consideration of the President and receives his assent (Article 254). In the three fold distribution of legislative powers, residuary powers of legislation have been left with the Union (Article 248). Also, Parliament has been given the power to make any law for the whole or any part of the country to give effect to any international treaty, agreement, convention or decision (Article 253).

The Union List consists of subjects which are of common interest to the Union and with respect to which uniformity of legislation throughout the Union is essential. Subjects which allow for diversity of interest and treatment are included in the State List and matters in which uniformity of legislation throughout the Union is desirable but not essential are included in the Concurrent List. Although the States are given exclusive powers over the subjects in the State List, there are two exceptions to this general rule. Under Article 249, if the Rajya Sabha declares by a Resolution supported by two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List, Parliament is competent to make laws on that matter for the whole or any part of India. Such a resolution remains valid for a year; it can be extended by another year by a subsequent resolution. Any law passed under this provision would cease to be in force within six months after the end of the year.

Again under Article 250, Parliament is empowered to make laws on any item included in the State List for the whole or any part of India while a Proclamation of Emergency is in operation. The maximum duration of validity of such laws will be six months after the expiry of the Emergency.

In case of inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by State Legislatures, the law made by Parliament shall prevail and the State law shall be inoperative to the extent of repugnancy while the law made by Parliament remains in effect (Article 251). Under the Doctrine of Pith and Substance, any jurisdictional conflict between the "Qnion and the State/ s in regard to their legislative competence can be settled by the court ascertaining the substance of the matter relating to an item in one list or the other.

According to Article 252, two or more State Legislatures by passing a resolution may ask Parliament to make laws on any matter in the State List. Such laws can be extended to

other States provided the concerned State Legislatures pass resolutions to that effect.

ADMINISTRATIVE RELATIONS

Articles 256 to 263 seek to regulate administrative relations between the Union and the States. It is common in federal systems that the administrative relations between the Union and the States are fraught with difficulties. The Constitution of India seeks to achieve a smooth working relationship between the two levels. It provides that the executive powers of the State Government are to be exercised in such a way as to ensure compliance with the laws made by Parliament. The Union Executive is also empowered to give such directions to a State, as may appear to the Government of India, to be necessary for the purpose.

Article 257 similarly provides that the executive power of every State shall be so exercised as not to impede the exercise of the executive power of the Union and the Union may issue necessary directions in that regard and for protection of railways and maintenance of means of communication of national or military importance. Any extra expenditure incurred by the State for the purpose of fulfilling Central directives is to be reimbursed by the Centre to the State. The provision in Article 261, directing that full faith and credit shall be given to public acts, records and judicial proceedings of the Union and the States in all parts of the Indian territory, adds a lot to the smooth working of Union State relations. Parliamentary control over Inter-State rivers and provisions for adjudication of any Inter-State water disputes were designed to take away a whole host of possibilities of friction between Union and States and between States themselves (Article 262). In fact the Constitution-makers did not want anything to be left to chance; hence the arrangement for Inter-State Councils. Article 263 empowers the President to establish an Inter-State Council to enquire into and advise upon Inter-State disputes and matters of common interest between States or between the Union and the States and make recommendations for better coordination of policy and action.

Under Article 258, the President may with the consent of a State Government entrust to that Government or its officers functions in relation to any matter to which the executive power of the Union extends. Similarly, under Article 258A the Governor of a State may with the consent of the Union Government entrust to that Government or to its officers functions in relation to any matter to which the executive power of the State extends.

FINANCIAL RELATIONS

In regard to the financial relations between the Union and the States too, one can find the general tendency of Indian federalism for centralization. The Union may be said to be financially more powerful but given the nature of the country's needs for growth through planned economy this may be not only very

desirable but entirely necessary. The States, however, have their own resources; the Union provides substantial amounts to the States by way of grantsin-aid, share proceeds of certain taxes, etc. The provision for the appointment of a Finance Commission every five years to examine the distribution of tax proceeds between the Union and States and to determine the principles which should govern the grants-in-aid is patterned on the Commonwealth Grants Commission in Australia and has contributed to the generally smooth financial relationship between the Union and the States.

UNION VS. CENTRE

In the field of Union-State relations, it needs to be specially stressed that a great deal of damage and misinterpretation has been caused as a result of the wrong use of the term 'Centre State' instead of 'Union State'. The Constitution does not use the term 'Centre'; actually 'Central government', 'Central legislature', 'Central laws' etc. are an unfortunate hang-over from the days of the centralized government during the colonial rule. 'Centre' and 'Union' create very different images and connote concepts very different. 'Centre' is a point in the middle of the circle while 'Union' is the whole circle. The relationship between the Union and the States is that between the whole and the parts and not between the centre of authority and its peripheries.

The Constitution Commission (NCRWC) has recommended:

- River water disputes being important disputes between two or more States and/ or the Union, they should be heard and disposed by a bench of not less than three Judges and if necessary, a bench of five Judges of the Supreme Court for the final disposal of the suit.
- Appropriate Parliamentary legislation should be made for repealing the River Boards Act, 1956 and replacing it by another comprehensive enactment under Entry 56 of List 1. The new enactment should clearly define the constitution of the River Boards and their jurisdiction so as to regulate, develop all control all inter-State rivers keeping intact the adjudicated and the recognized rights of the States through which the inter-State river passes and their inhabitants. While enacting the legislation, national interest should be the paramount consideration as inter-State rivers are 'material resources' of the community and are national assets.
- In resolving problems and coordinating policy and action, the Union as well as the States should more effectively utilize the forum of inter-State Council.

FINANCE, PROPERTY, CONTRACTS AND SUITS

Article 265 upholds the salutary democratic principle of 'No taxation without representation' and categorically declares that no taxes can be imposed without the authority of law. Also, it adds, no taxes can be 'collected' except as under the authority of law.

Consolidated Fund: Subject to provision of a Contingency Fund and allocations to the States, all revenues received or loans etc. raised by the Government of India shall constitute a Consolidated Fund of India. Similarly, there will be a Consolidated Fund for each of the States. All other money received by the Union or State Governments shall be credited to the public accounts of the Union or the State concerned. No amount can be withdrawn from the Consolidated Fund without the authority of law. This restriction does not apply to public accounts (Article 266).

Contingency Fund: To meet contingent situations where under some expenditure may be required to be incurred emergently, Article 267 authorises Parliament and State Legislatures to form their contingency funds. The Contingency Fund is placed at the disposal of Union or State Government (President or Governor) to enable it to make advances for meeting unforeseen expenses pending authorization by the legislature.

Distribution of Revenues between the Union and the States

A scheme for the distribution of revenues between the Union and the States is laid down in Articles 268-273. The proceeds of all the taxes levied by the State are fully retained by the concerned State's themselves while taxes in the Union List may be in part allotted to the States.

Thus, taxes that belong exclusively to the Union include Customs, Corporation Tax, taxes on capital value of assets, surcharge on income tax, etc. and taxes in respect of matters in the Union List.

Taxes belonging exclusively to the States include land revenue, Stamp Duty on items included in the State List, taxes on passengers and goods carried on inland waterways, lands and buildings, mineral rights, animals and boats, road vehicles, advertisements, consumption of electricity, luxuries, amusements etc., taxes on entry of goods into a local area, State tax tolls, fees in respect of matters in the State List and taxes on professions, trades, etc. not exceeding Rupees 2500 per annum (Article 276 and List 2, Seventh Schedule). Stamp duties on Bills of exchange etc. and duties of excise on medicinal and toilet preparations mentioned in the Union List shall be levied by the Union but collected and appropriated by the States and form part of their revenues except in the case of Union Territories (Article 268).

Taxes on sale or purchase of goods other than newspapers and taxes on consignment of

goods shall all be levied and collected by the Government of India but shall be assigned to the States concerned and distributed among the States as may be decided by Parliament by law. The proceeds attributable to Union Territories, however, shall form part of the Consolidated Fund of India (Article 269 as amended by the 80th Amendment during 2000).

There are some taxes and duties in the Union List which are levied and collected by the Union but their proceeds are distributed between the Union and the States. After a Finance Commission has been constituted, Presidential Order in regard to distribution of proceeds from income tax etc. shall issue after considering the Commission's recommendations (Articles 270-271).[79]

New Article 268A added by the 88th Constitution Amendment provides for levy of taxes on services to be collected and appropriated by the Government of India and the States. New entry 92C inserted in the Union List under the Seventh Schedule reads "Taxes on Services".

Articles 273, 275 and 282 provide for three kinds of grants-in-aid and the circumstances in which these may be extended to the States by the Union. Thus, grants may be given by the Union to the States of Assam, Bihar, Orris a and West Bengal in lieu of export duty on jute and jute products (Article 273). Grants may be given to any State in need as may be deemed essential (Article 275). Under Article 282, the Union or a State may make a grant for any public purpose irrespective of that purpose being outside the legislative jurisdiction of the Union or State concerned.

Article 274 requires that in case of Bills affecting taxation in which States are interested, in effect, prior recommendation of the President would be necessary.

The State Legislatures may by law levy taxes on professions, trades, callings or employment. The total amount of these taxes payable by an individual shall not exceed Rs. 2500 per annum. The provision would not affect the power of Parliament to make laws in respect of income from professions etc. (Article 276)

Finance Commission: Article 280 provides for the appointment by the President of a Finance Commission consisting of a Chairman and four members every five years. The Commission shall make recommendations to the President in regard to the distribution of proceeds between the Union and the States and to suggest principles which should govern the grants-in-aid to the States from the Consolidated Fund of India. The President shall cause the recommendations of the Commission and action taken thereon to be laid before each House of Parliament (Articles 280-281).

[79]. Article 272 providing for Union excise duties that "may be" distributed between the Union and the States, was omitted w.e.f. 9 June 2000 by the 80th Amendment.

Miscellaneous Financial Provisions: Custody etc. of Consolidated Funds, Contingency Funds and moneys credited to public accounts are to be regulated by Parliament and each State Legislature concerned (Article 283).

Suitors' deposits and other moneys received by public servants and courts shall be paid into the public accounts of the Union or the State concerned as the case may be (Article 284).

Property of the Union shall be exempt from taxation by the States and the property of the States shall be similarly exempt from taxation by the Union (Articles 285 and 289).

Articles 286-288 place restrictions as to imposition of tax by the States on consumption or sale of electricity or water and on the sale or purchase of goods outside the State or in case of export or import.

Article 290 provides for adjustments to be made between the Union and State Governments in respect of payment of certain expenses of any Court or Commission and pensions of persons in service before the Constitution. Article 290A provides for certain sums to be paid annually to Devaswom Funds of Travancore and Tamil Nadu from the Consolidated Funds of these States.

GOODS AND SERVICES TAX (GST)

The Goods and Services Tax (GST) is a comprehensive indirect tax on manufacture, sale, and consumption of goods and services throughout India. GST would replace respective taxes levied by the central and state governments.

Timeline of GST

- **1986:** Vishwanath Pratap Singh, Finance Minister in Rajiv Gandhi's government, proposed in the Budget a major overhaul of the excise taxation structure. This was similar to GST in a theoretical sense.
- **2000**: Initiating discussions on GST, Vajpayee government appoints an Empowered Committee headed by the then finance minister of West Bengal Asim Gupta.
- **2004**: Vijay Kelkar, then advisor to the Finance Ministry, recommends GST to replace the existing tax regime.
- **Feb 28, 2006**: GST appears in the Budget speech for the first time**.** Finance Minister Chidambaram sets an ambitious task of implementing GST by April 1, 2010.
- **Feb 28, 2007**: Chidambaram said in his Budget speech that the Empowered Committee of finance ministers will prepare a road map for GST.
- **April 30, 2008**: The Empowered Committee submits a report titled 'A Model and Roadmap Goods and Services Tax (GST) in India' to the government.
- **Nov 10, 2009**: Empowered Committee submits a discussion paper in the public domain on GST welcoming debate.

- **Feb 2010**: Government launches project for computerisation of commercial taxes. Finance Minister Pranab Mukherjee defers GST to April 1, 2011.
- **March 22, 2011**: Constitution Amendment Bill (115th) to GST introduced in the LokSabha
- **March 29, 2011**: Bill referred to Standing Committee on Finance.
- **Nov 2012**: Finance minister and state ministers decide to resolve all issues by Dec 31, 2012.
- **Feb 2013**: Declaring government's resolve to introduce GST, the finance minister makes provisions for compensation to states in the Budget.
- **Aug 2013**: The standing committee submits a report to Parliament suggesting improvements. But the bill lapsed as the 15th LokSabha was dissolved.
- **Dec 18, 2014:** Cabinet approval for the Constitution Amendment Bill (122nd) to GST.
- **Dec 19, 2014**: The Amendment Bill (122nd) in the LokSabha
- **May 6, 2015:** The Amendment Bill (122nd) passed by the LokSabha.
- **May 12, 2015**: The Amendment Bill presented in the RajyaSabha
- **May 14, 2015**: The Bill forwarded to joint committee of RajyaSabha and LokSabha
- **Aug 2015**: Government fails to win the support of Opposition to pass the bill in the RajyaSabha where it lacks sufficient number.
- **Aug 3, 2016:** RajyaSabha passes the Constitution Amendment Bill by a two-thirds majority. Note: GST constitutional amendment bill needs to passed by at least 50% of state legislatures to be implemented. Assam is 1st State to pass GST bill.
- **1 July 2017**: GST to be applicable across India.

What is GST?

- It is a destination-based taxation system.
- It has been established by the 101st Constitutional Amendment Act.
- It is an indirect tax for the whole country on the lines of "**One Nation One Tax**" to make India a unified market.
- It is a single tax on supply of Goods and Services in its entire product cycle or life cycle i.e. from manufacturer to the consumer.
- It is calculated only in the "Value addition" at any stage of a goods or services.
- The final consumer will pay only his part of the tax and not the entire supply chain which was the case earlier.
- There is a provision of GST Council to decide upon any matter related to GST whose chairman in the finance minister of India.

Taxes subsume in GST

GST would replace the following taxes currently levied and collected by the Centre:

1. Central Excise duty
2. Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act 1955,
3. Additional Excise Duties (Goods of Special Importance)
4. Additional Excise Duties (Textiles and Textile Products)
5. Additional Customs Duty (commonly known as Countervailing duties or CVD)
6. Special Additional Duty of Customs (SAD)
7. Service Tax
8. Cesses and surcharges in so far as they relate to the supply of goods and services
9. Taxes on the sale or purchase of newspapers and on advertisements published therein.

State taxes that would be subsumed within the GST are:

1. State VAT/ Sales Tax
2. Central Sales Tax (levied by the Center and collected by the States)
3. Luxury Tax
4. Octroi
5. Entry Tax i.e, taxes on the entry of goods into a local area for consumption, use or sale therein. (other than those in lieu of octroi)
6. Purchase Tax
7. Entertainment Tax which are not levied by the local bodies; i.e. panchayats, municipalities and District councils of autonomous districts can impose taxes on entertainment and amusements
8. Taxes on general advertisements
9. Taxes on lotteries, betting and gambling
10. State cesses and surcharges insofar as they relate to supply of goods or services

GST does not subsume stamp duties and custom duties.

What taxes at center and state level are incorporated into the GST?

At the State Level

- State Value Added Tax/Sales Tax
- Entertainment Tax (Other than the tax levied by the local bodies)
- Octroi and Entry Tax
- Purchase Tax
- Luxury Tax
- Taxes on lottery, betting, and gambling

At the Central level

- Central Excise Duty
- Additional Excise Duty
- Service Tax
- Additional Customs Duty (Countervailing Duty)
- Special Additional Duty of Customs

AN OVERVIEW OF THE CONSTITUTION (ONE HUNDRED FIRST AMENDMENT) ACT, 2016

The One Hundred and First Amendment of the Constitution of India, officially known as The Constitution (One Hundred and First Amendment) Act, 2016, introduced a national Goods and Service Tax (GST) in India from 1st April 2017. The GST is a Value Added Tax (VAT) and is proposed to be a comprehensive indirect tax levied on manufacture, sale and consumption of goods as well as services at the national level which will replace all indirect taxes levied on goods and services by a single tax on the supply, right from the manufacturer to the consumer.[80]

This Amendment Act, introduced as the one Hundred and Twenty-Second Amendment Bill, to the Constitution of India. There are three ways of amending the Constitution:

- Bills passed by a simple majority
- Bills passed by a special majority of $^{2}/_{3}^{rd}$ of the members present and voting.
- Bills passed by a special majority along with ratification of legislatures of ½ of the states.

Since the present amendment to the Constitution also included amendments to Chapter I of Part XI and the Lists in the Seventh Schedule, under Article 368 (2) the latter mode of the amendment was followed.

Amendments:

The 101st Amendment Act inserts repeals and amends certain parts of the Constitution.

The following Articles have been inserted-

Article 246A:

(1) Notwithstanding anything contained in Articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have the power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both take place in the course of inter-State trade or commerce.

Explanation—The provisions of this Article, shall, in respect of goods and services tax referred to in clause (5) of Article 279A, take effect from the date recommended by the Goods and Services Tax Council.[81]

By this Article, the State Legislatures now have the power to make individual laws with respect to GST imposed by the Centre and to make necessary arrangements for

[80]. F. Lourdunathan& P. Xavier, A study on the implementation of goods and services tax (GST) in India: Prospectus and challenges, 3(1) INTERNATIONAL JOURNAL OF APPLIED RESEARCH 626, 626-627 (2016)

[81]. Ministry of Law and Justice (Legislative Deptt.), The Constitution (One Hundred and First Amendment) Act, 2016, II THE GAZETTE OF INDIA, Sep 8, 2016, at pp. 1-2.

implementation of the same in inter-state trade, while the Centre has exclusive power to make GST laws in case of inter-state trade. Both the Union and States in India now have concurrent powers to make law with respect to goods & services.

Article 269A:

(1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation—For the purposes of this clause, the supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be the supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as a tax levied under clause (1) has been used for payment of the tax levied by a State under Article 246A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as the tax levied by a State under Article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both take place in the course of inter-State trade or commerce.[82]

In case of inter-state trade, the amount collected by the Centre is to be apportioned between the Centre and the States as per recommendations of the GST Council. That is under GST, where the center collects the tax, it assigns the state's share to state, while where the state collects the tax, it assigns center's share to center. Such proceeds shall not form a part of the Consolidated Fund of India.

Article 279A:

(1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and First Amendment) Act, 2016, by order, constitute a Council to be called the Goods and Services Tax Council.

(2) The Goods and Services Tax Council shall consist of the following members, namely:

(a) the Union Finance Minister:- Chairperson;
(b) the Union Minister of State in charge of Revenue or Finance:- Member;
(c) the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government:- Members.

[82]. Supra p. 2

(3) The Members of the Goods and Services Tax Council referred to in sub-clause (c) of clause (2) shall, as soon as may be, choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.

(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on—

(d) the taxes, ceases, and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

(e) the goods and services that may be subjected to, or exempted from the goods and services tax;

(f) model Goods and Services Tax Laws, principles of the levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under Article 269A and the principles that govern the place of supply;

(g) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;

(h) the rates including floor rates with bands of goods and services tax;

(i) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

(j) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh, and Uttarakhand; and

(k) any other matter relating to the goods and services tax, as the Council may decide.

(5) The Goods and Services Tax Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high-speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

(6) While discharging the functions conferred by this Article, the Goods and Services Tax Council shall be guided by the need for a harmonized structure of goods and services tax and for the development of a harmonized national market for goods and services.

(7) One-half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings.

(8) The Goods and Services Tax Council shall determine the procedure in the performance of its functions.

(9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:

(l) the vote of the Central Government shall have a weight of one-third of the total votes cast, and

(m) the votes of all the State Governments taken together shall have a weight of two-

thirds of the total votes cast, in that meeting.

(10) No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of—

(n) any vacancy in, or any defect in, the Constitution of the Council; or

(o) any defect in the appointment of a person as a Member of the Council; or

(p) any procedural irregularity of the Council not affecting the merits of the case.

(11)The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute —

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other side; or

(c) between two or more States, arising out of the recommendations of the Council or implementation thereof.[83]

This Article provides for the constitution of a GST Council along with its powers and positions. The process of decision-making also has to be done through voting.

Repealed Articles:–

Article 268A

This sec., as inserted by Section 2 of the Constitution (Eighty-eighth Amendment) Act, 2003 relating to Service tax levied by Union and collected and appropriated by the Union and the States.

Amended Articles:-

1. The residuary power of legislation of Parliament under Article 248 is now subject to Article 246A.

2. Article 249 has been changed so that if $^{2}/_{3}^{rd}$ majority resolution is passed by Rajya Sabha, the Parliament will have powers to make necessary laws with respect to GST also in the national interest.

3. Article 250 has been amended so that the Parliament will have powers to make laws related to GST during the emergency period.

4. Article 268 has been amended so that excise duty on medicinal and toilet preparation will be omitted from the state list and will be subsumed in GST.

5. Article 269 would empower the Parliament to make GST related laws for inter-state trade/commerce.

6. Article 270 now provides for collection and distribution of tax to be done according to Article 246A.

7. Currently, under Article 271, GST has been exempted from being part of the Consolidated Fund of India.

8. Article 286 has been amended to include the supply of goods and/or services under its ambit than just sale or purchase of goods.

9. Article 366 now includes the definitions of Goods and Service Tax, Services and State.

[83]. Supra p. 3-4

10. Article 279A has also been brought under the ambit of Article 368.[84]

Amended schedule-

The **Sixth Schedule** has been amended to give power to the District Councils to levy and collect taxes on entertainment and amusements. (para 8, sub-para3)

The Seventh Schedule has been amended thus-

1. In the **Union List**, petroleum crude, high-speed diesel, motor spirit (petrol), natural gas, and aviation turbine fuel, tobacco and tobacco products have been removed from the ambit of GST and have been subjected to Union jurisdiction. Newspapers, advertisements, and Service Tax have been brought under GST. (entries 84, 92, 92C)
2. In the **State List**, petroleum crude, high-speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption have been included, except where the sale is in course of inter-State or International trade and commerce. Entry tax and Advertisement taxes have been removed. Taxes on entertainment only to be included to the extent of that imposed by local bodies. (entries 52, 54, 55, 62)

Compensation and Transition

Upon recommendation by GST Council, the Parliament will provide compensation to the States in case of any loss due to the implementation of GST to five years. However, no redressal against the advice or decisions of the GST council has been provided to the States. Special powers have been given to the president to make such necessary adaptations and modifications by order within a period of three years for removing any difficulty that may arise. Finally, for the transitional period, it has been provided that laws inconsistent with the above provisions shall continue to be in force until repealed by the legislature, or until a year has elapsed, whichever is earlier.

BENEFITS OF GST

For Central and State Governments

- **Simple and Easy to administer:** Because multiple indirect taxes at the central and state levels are being replaced by a single tax "GST". Moreover, backed with a robust end to end IT system, it would be easier to administer.
- **Better control on leakage:** Because of better tax compliance, reduction of rent seeking, transparency in taxation due to IT use, an inbuilt mechanism in the design of GST that would incentivize tax compliance by traders.
- **Higher revenue efficiency:** Since the cost of collection will decrease along with an increase in the ease of compliance, it will lead to higher tax revenue.

[84]. Supra p. 5

For the Consumer

- The single and transparent tax will provide a lowering of inflation.
- Relief in overall tax burden.
- Tax democracy that is luxury items will be taxed more and basic goods will be tax-free.

For the Business Class

- Ease of doing business will increase due to easy tax compliance.
- Uniformity of tax rate and structure, therefore, better future business decision making and investments by the corporates.
- Removal of cascading effects of taxes.
- Reduction in transactional cost will lead to improved competitiveness.
- Gain to the manufacturer and exporters.
- It is expected to raise the country GDP by 2% points.

PRINCIPLE OF GST?

- The Centre will levy and collect the Central GST.
- States will levy and collect the State GST on the supply of goods and services within a state.
- The Centre will levy the Integrated GST (IGST) on the interstate supply of goods and services, and apportion the state's share of tax to the state where the good or service is consumed.
- The 2016 Act requires Parliament to compensate states for any revenue loss owing to the implementation of GST.

GSTN?

- GSTN is registered as a **not-for-profit company** under the companies Act.
- It has been formed to set up and operate the information technology backbone of the GST.
- While the Central (24.5%) and the state (24.5%) governments hold a combined stake of 49%, the remaining 51% stake is divided among five financial institutions—LIC Housing Finance with 11% stake and ICICI Bank, HDFC, HDFC Bank and NSE Strategic Investment Corporation Ltd with 10% stake each.
- GSTN had awarded Infosys Ltd the contract to develop the hardware and software for GST.
- The idea behind GSTN was to set up an entity that is equidistant from both the Central government and the state governments, as it will advise both the Centre and the states on the information technology network

Controversy around GSTN

It is argued by some as a private company therefore not under government control. It may lead to a breach of tax data into private hands and manipulation of the same for the advantage of some corporates.

To this allegation, the Finance minister replied in the parliament that this arrangement was decided by the empowered committee of the previous government and the present

government has endorsed it by considering the fact that private professionals are required to such high octane system. Further, he said that if in future there seem to be any problem with the current structure then it can be changed through the GST Council debate and discussion.

Further, GSTN website clarifies that the strategic control over GSTN is with the government given the sensitivity of the role of GSTN and the information that would be available to it. The strategic control of the government over GSTN is ensured through measures such as the composition of the board, mechanism of special resolution and shareholders agreement, induction of government officers on deputation and agreements between GSTN and governments.

GST Council

- It is the 1st Federal Institution of India, as per the Finance minister.
- It will approve all decision related to taxation in the country.
- It consists of Centre, 29 states, Delhi and Puducherry.
- Centre has 1/3rd voting rights and states have 2/3rd voting rights.
- Decisions are taken after a majority in the council.

For the implementation of GST, apart from the Constitution Amendment Act, some other statutes are also necessary. The following four GST related Acts were passed by the Parliament on 6 April 2017 and notified on 12 April 2017:

1. The Central Goods and Services Tax Act 2017 (The CGST Act)
2. The Integrated Goods and Services Tax Act 2017 (The IGST Act)
3. The Union Territory Goods and Services Tax Act 2017 (The UTGST Act)
4. The Goods and Services Tax (Compensation to the States) Act 2017 (The Compensation Act)
5. And a state GST will be passed by the respective state legislative assemblies.

The major features of these Acts may be seen here.

- The 14th Goods and Services Tax (GST) Council Meeting, held at Srinagar, Jammu and Kashmir on 18 May 2017 broadly approved the GST rates for goods at nil rate, 5%, 12%, 18% and 28% to be levied on certain goods. The Council has also broadly approved the rates of GST Compensation Cess to be levied on certain goods.
- On 3 June 2017 GST council declared that Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal, and articles thereof; imitation jewellery; coin etc. would attract 3% GST while rough diamond will attract 0.25%.

Consequent to the GST Council's recommendation, the Cabinet in its meeting on 30 August, 2017 approved promulgation of an ordinance to suitably amend the Goods

and Services Tax (Compensation to States) Act, 2017, so as to increase the maximum rate, at which the Compensation cess can be levied from 15% to 25% on certain motor vehicles for transport of not more than thirteen persons , including the driver, like SUVs.

- Further, a cess would be levied on certain goods such as luxury cars, aerated drinks, pan masala and tobacco products, over and above the rate of 28% for payment of compensation to the States.
- However, which goods and services fall into which bracket is still an enormous task to be completed by the GST council.
- Highest tax slab is pegged at **40%**.

ISSUES ARISEN OR UNRESOLVED

1) **Not all items are covered:** Taxation for certain items such as Alcohol, Tobacco etc. are still not under the GST domain. States argue that including them would hamper their revenue and they would suffer a huge resource. However, some experts say that the real reason is the nexus of politicians with some business class and high profile lobbying. Further, the Finance minister of India has said in the parliament that the consensus to include alcohol and tobacco under GST regime is possible in foreseeable future.
2) **Decision criteria for the tax bracket:** There are apprehensions that how to decide about the items and the criteria that which item will fall into which tax bracket. It may lead to lobbying. To this, the Finance minister has said that the decision will be taken by the GST Council only and after due diligence and most probably by the consensus.
3) **Multiple tax rates and brackets:** The philosophical idea that GST means "One Nation one Tax" is currently diluted due to multiple tax rates and brackets. To this, the Finance minister has said that since the target consumer of goods and services have different capabilities and therefore there must be a system similar to the democratic lines where **higher value consumer pays more taxes**.
4) **Power to impose tax taken away by Central Government from the Parliament:** The Central GST Bill, 2017 allows the central government to notify CGST rates, subject to a cap. This implies that the government may change rates subject to **a cap of 20%**, without requiring the approval of Parliament. Under the Constitution, the power to levy taxes is vested in Parliament and state legislatures. Though the proposal to set the rates through delegated legislation meets this requirement, the question is whether it is appropriate to do so without prior parliamentary scrutiny and approval.

5) **Confusion regarding the location of consumption:** Under GST, both state and Centre can tax the services based on their **location of consumption**. Now the confusion arises since the general rule to determine the location of the recipient is his location or address on record; there are specific rules for various services such as telecom, property, transportation, etc. This means that while a service may be consumed across multiple states, the tax revenue would be attributed to the state where the recipient is registered or his office is located. This could lead to higher tax attributed to states that have more registered offices. **For example**, suppose a company is located in Bangalore and advertises its products in the Kolkata edition of a newspaper, which has its registered office in Delhi. In this case, one may argue that the service is being finally consumed in Kolkata. However, as the recipient of services is in Bangalore, the tax would accrue to Karnataka.

6) **Anti-Profiteering Clause:** The government is planning to set up an authority to see if any reduction in tax rates after GST is passed on to the consumer by companies or not. The industry and businesses are not taking this idea kindly and they see it as a backdoor entry of inspector raj. Experts say that prices should be market determined and no government authority has the business of deciding prices for goods and services.

7) **Confusion regarding the control over taxation:** To avoid dual control, the GST council has reached a compromised formula. 90 percent of tax assesses with an annual turnover of Rs 1.5 crore or less, will be assessed by states and the rest by the Centre. For those with a turnover of over Rs 1.5 crore, the states and the Centre will share it equally. **However, this 'solution' has its own set of issues**. For example, if an entity with a turnover of less than Rs 1.5 crore in one year, posts a turnover of Rs 1.5 crore in the following financial year, who would be the new authority to take over the assessment? And, how will the existing investigations, if any, against the entity be addressed, and by whom? "There are a lot of procedural issues, and if these issues are not addressed properly, they would lead to litigations.

8) **The issue of casual taxable person:** If a person registered in one state moves to another state for a short period for some business transaction – say to participate in a fair or exhibition, then that person would have to get himself registered in that state for that period.

MODULE - 06

CONSTITUTIONAL POSITION OF JAMMU AND KASHMIR

A. ARTICLE 370 OF THE CONSTITUTION

Jammu and Kashmir is a constituent State of the Indian Union, but its constitutional position, and its relation with the Central Government, somewhat differ from that of the other States.

The instrument of accession signed by the Ruler of Jammu and Kashmir was accepted by the Governor-General of India on 27-10-1947. Under this instrument, only three subjects-external affairs, defence and communications-were surrendered by the State to the Dominion.

The two characteristic features of the special relationship are:

(1) the State has a much greater measure of autonomy and power than enjoyed by the other States; and

(2) the Centre's jurisdiction within the State is more limited than what it has with respect to the other States.

Due to these special features not all the provisions of the Indian Constitution apply to the State; some of the provisions apply, some do not apply at all, while others apply in a modified form.

The constitutional position of the State has not remained static since it became a constituent unit of the Indian Union. It has been growing with time towards a closer affinity of the State with the Indian Union,[85] and more and more provisions of the Constitution have been applied to it in course of time.

In 1950, when the Indian Constitution was on the anvil, the future picture of the relationship between India and the State was not very clear due to many complications existing at the time. Therefore, the Constitution contains Art. 370 which enables the constitutional position of the State vis-avis the Indian Union to be defined from time to time without much difficulty.[86]

Article 370 makes "temporary provisions" with respect to the State. Article 370 clearly recognizes the special position of the State of Jammu and Kashmir. Art. 370 makes Art. 1 of the Constitution which defines the territory of the Union, and Art. 370 itself, applicable to the State at once.

Article 370(1)(b) limits the power of Parliament to make laws for the State to the following:(i) Those matters in the Union List and the Concurrent List,4 as correspond to the

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[85]. See, JAGOTA, Development of Constitutional Relations between Jammu and Kashmir and India: 1950-1960, 2 JILI, 519 (1960); A.S. ANAND, THE CONSTITUTION OF JAMMU & KASHMIR, (III Ed., 1998). Also, Md. Maqbool v. State of J.K., AIR]972 SC 963: (1972) 1 SCC 536.

[86]. For comments on Art. 370, see, S.M.S. Naqishbandi v. ITO, Salary Circle, AIR 1971 J & K 120.

subjects specified in the State's Instrument of Accession.

The elaboration of these subjects in terms of the entries in the two Lists is to be done by the President by order in consultation with the State Government.

In the Instrument of Accession three major heads have been mentioned, viz., defence, foreign affairs and communications. Each of these broad heads has a number of items which are also listed in the Instrument.

Besides the three major heads, a number of ancillary matters have also been mentioned in the Instrument of Accession, e.g., election of the President. It was necessary to identify those items in the Union and Concurrent Lists and this task was left to the President to be performed by him in consultation with the State Government.

(ii) Such other subjects in the Union or Concurrent Lists as the President may by order specify with the concurrence of the State Government.

This clause means that subjects other than those mentioned in the Instrument of Accession [as envisaged in (i) above] can be brought within the purview of Parliament. But while in (i) above, only consultation with the State Government is required, in (ii), the concurrence of the State Government has been stipulated.

Article 370(1)(d) lays down that other provisions of the Constitution, besides the above, can be applied to the State with or without modifications by order of the President. Such an Order is not to be issued by the President-

(1) without consulting the State Government if matters to be specified in the Order relate to those mentioned in the Instrument of Accession;

(2) without the concurrence of the State Government if the matters to be specified in the Order relate to matters other than those mentioned in the Instrument.

Article 370(2) further provided that if the State Government gave its concurrence, as mentioned above, before the convening of the State Constituent Assembly, "it shall be placed before such Assembly for such decision as it may take on". As the Constituent Assembly exists no more, Art. 370(2) has exhausted itself.

In a way, Art. 370 empowers the President to define the constitutional relationship of the State in terms of the provisions of the Indian Constitution, subject to the stipulation that he can do so with reference to the matters in the Instrument of Accession in consultation with, and with reference to other matters with the concurrence of, the State Government.

The word 'modification' in Art. 370 is to be given the widest amplitude. Thus, the President has power to vary, amend or modify a constitutional provision, in any way he deems necessary, while applying it to the State. The power to 'modify' is co-extensive with the power

to amend and is not confined to minor alterations only.

Article 370 is a special provision for amending the Constitution in its application to the State of Jammu and Kashmir. Article 368) does not curtail the power of the President under Art. 370. Even a radical alteration can be made in a constitutional provision in its application to the State.

The Supreme Court has refused to interpret the word 'modification' as used in Art. 370(1) in any "narrow or pedantic sense". The Supreme Court has observed on this point:[87]

"We are therefore of opinion that in the context of the Constitution we must give the widest effect to the meaning of the word "modification" used in Art. 370(1) and in that sense it includes an amendment. There is no reason to limit the word "modifications" as used in Art. 370(1) only to such modifications as do not make any "radical transformation".

Further, Art. 370 authorizes the President to modify a constitutional provision not only when it is applied to the State for the first time, but even subsequently after it has been applied.[88]

An amendment made to the Constitution does not automatically apply to the State of Jammu and Kashmir. It can apply only with the concurrence of the State Government, and when the President issues an order under Art. 370

Thus, Art. 370 empowers the President to adapt the constitutional provisions applied or to be applied to the State of Jammu and Kashmir in the light of the situation existing in the State from time to time. This is a flexible arrangement under which the constitutional position of the State can be defined from time to time.

B. THE CONSTITUTION (APPLICATION TO JAMMU & KASHMIR) ORDER, 1954

Under Art. 370(1)(b)(ii), the Constitution (Application to Jammu and Kashmir) Order, 1950, was promulgated by the President of India in consultation with the Government of Jammu and Kashmir. The Order specified the matters with respect to which the Union Parliament was to be competent to make laws for the State.

The Order of 1950 was then replaced by an Order with the same title in 1954. This is the basic Order which, as amended and modified from time to time, regulates the constitutional status of the State.

Today not only those provisions of the Indian Constitution which pertain to the matters mentioned in the Instrument of Accession, but many other provisions relating to several matters not specified in the Instrument, apply to the State. Briefly, the essentials of the constitutional position of the State are as follows.

(a) Provisions of the Constitution relating to the Central Government apply to the State with

[87]. Puranlal Lakhanpal v. Union of India, AIR 1961 SC 1519, 1521 : (1962) 1 SCR 688.

[88]. Sampat Prakash v. State of Jammu & Kashmir, AIR]970 SC 1118 : (1969) 1 SCC 562.

a few modifications. The State has six members in the Lok Sabha elected directly by the people of the State.

(b) The jurisdiction of the Supreme Court extends over the State except for Arts. 1359 and 139.

(c) The State is governed under a Constitution of its own drafted by its Constituent Assembly.

This Constitution came into force on January 26, 1957, and it is patterned closely on the model of the Indian Constitution. Therefore, the provisions of the Indian Constitution relating to the State Governments (Legislature, Executive and High Court) do not apply to the State except for the following provisions concerning the High Court Judges:

(i) The Judges of the State High Court can be removed from office in the same manner as the Judges of any other High Court.

(ii) Restriction on retired High Court Judges to plead and act before any Court or authority except the Supreme Court and other High Courts apply to the Judges of the State High Court.

(iii) A Judge may be transferred to or from the State High Court after consultation with the Governor.

(iv) The State High Court has been given power along with the Supreme Court of India to issue writs for the enforcement of the Fundamental Rights. This power is in pari-materia with the power of other High Courts under Art. 226 with this difference, however, that the State High Court can issue writs only for the enforcement of the Fundamental Rights and not 'for any other purpose.'

(d) In the field of the Centre-State relationship, the legislative power of Parliament vis-a-vis the State extends to the matters specified in List I excluding entries 8, 9, 34, 60, 79, 9716 In a few other entries, such as (3, 67, 81), some modifications have been made in their application to the State. Parliament has no residuary power vis-a-vis the State.

Originally List III was also made not applicable to the State under the Order of 195418 But, subsequently, through amendments of the 1954 order,19 the Concurrent List has been made applicable to the State to some extent.

Parliament can legislate for the State in the Concurrent List except for entries 2,3,5 to 10, 12 to 15, 17, 20, 21; 27, 28, 29, 31, 32, 37, 38, 40, 44. In entries 1, 30 and 45, slight modifications have been effected. The State List has been dropped in the State.

It means that Parliament can legislate with reference to the entries in List I and List III (except those excluded) and all the rest of the legislative power vests in the State Legislature.

Parliament's power to legislate to enforce a treaty is subject to the limitation that no decision affecting the disposition of the State

is 'to be made by the Government of India without the consent of the State Government.

(e) A Proclamation of Emergency under Art. 352(1) cannot have any effect in relation to the State (except in regard to the distribution of revenue) unless it has been made at the request or with the concurrence of the State Government.

A Proclamation can be made by the President under Art. 356 if he is satisfied that the Government of the State cannot be carried on in accordance with the provisions of the Constitution of India, or the Constitution of the State. When a Proclamation under Art. 356 is in operation, Parliament becomes entitled to legislate for matters not enumerated in the Union List.

No Proclamation under Art. 360 applies to the State.

(f) The power of Parliament to re-organise the boundaries, etc., of the State is conditioned by the restriction that no Bill for such a purpose is to be introduced in Parliament without the consent of the State Legislature.

(g) The executive power of the Centre vis-a-vis the State extends to the matters within the Parliamentary legislative field.

The State is to exercise its executive power so as to ensure compliance with the laws made by Parliament and as not to impede or prejudice the exercise of the executive power of the Union.

(h) Art. 365 does not apply to the State.

(i) The State is also bound to acquire or requisition property for the Union if required.

(j) Within the ambit of its administrative power, Centre can do all those things in the State which it can do in relation to the other States.

(k) As regards the sharing of revenue between the Centre and the State, the general scheme applies?9 (l) Provisions relating to freedom of trade and commerce,30 services31 and citizenship32 apply to the State.

(l) The Ejection Commission has jurisdiction over elections held in the State under its Constitution. Like the rest of India, election petitions in the State are heard by the High Court from where an appeal lies to the Supreme Court.

(m) No provisions regarding Minorities apply to the State except those for the Scheduled Castes and Backward Classes; seats are to be reserved in the Lok Sabha for the Scheduled Castes.

(n) Provisions of the Constitution relating to the Official Language apply to the State only in so far as they relate to-(i) the Official Language of the Union; (ii) the Official Language of inter State and Central-State communication; and (iii) the language of the Supreme Court proceedings.

(o) An amendment made to the Constitution under Art. 368 does not take effect in the

State unless applied by a Presidential order under Art. 370(1)36

(p) Directive Principles of State Policy do not operate in the State.

(q) Fundamental Rights operate in the State with slight modifications, some of the important ones being:

1) The power of legislation regarding preventive detention v,ests in the State Legislature alone and not in Parliament, and Art. 22 stands modified to this extent.,

2) The State Legislature, notwithstanding any Fundamental Right, has power to define persons who may be permanent residents of the State and to confer on them any special rights, or impose on others any restrictions, as respects employment under the State Government, acquisition of property within the State, settlement in the State and right to scholarships provided by the State.

It will be apparent from the above that from time to time through Presidential orders passed under Art. 370, a large number of the provisions of the Constitution have already become applicable to the State of Jammu and Kashmir. The only condition precedent for the exercise of this power by the President is the concurrence of the State Government. There is no limitation on the exercise of the power by the President in relation to one or more of the remaining provisions of the Constitution. The process of extending the various provisions of the Constitution to the State has been gradual and as a result of consensus between the Government of India and the State as dictated by experience and mutual advantage of both.

On February 24, 1975, Prime Minister Indira Gandhi made a Statement on the future relationship between the State and the Indian Union.4o The highlight of the Statement is that this constitutional relationship will continue as hitherto, and that the extension of further provisions of the Constitution to the State will continue to be governed by the procedure prescribed in Art. 370.

C. STATUS OF ARTICLE 370

Article 370 has been characterized in the Constitution as being of a temporary nature. Article 370(3) says that the President, by public notification, may declare that Art. 370 shall cease to be operative, or shall be operative only with such exceptions, and modifications, and from such date as he may specify. But before the President can issue any such notification, the recommendation of the Constituent Assembly of the "shall be necessary".

Since the Constituent Assembly of the State exists no more, Art. 370(3) is no longer operative. Therefore, if any modification is to be made to Art. 370, recourse will have to be had to Art. 368 regarding amendment of the Constitution.

But, a moot point is whether any amendment made to Art. 370 under Art. 368,

without the concurrence of, or consultation with, the State Government will be effective. The Constitution (Application to J & K) Order, 1950, lays down that any amendment to the Constitution does not apply to the State unless it is extended there- to by a Presidential Order under Art. 370(1) which again involves "concurrence of', or "consultation with", the State Government.

D. ADVANTAGE OF ARTICLE 370

1. It has preserve and protect the ecology environment and biodiversity in J&K to some extent.
2. Government jobs are still available to residence of J&K.
3. Local brands are still running here due to less competition.
4. Maintains the status of J&K with union of India
5. Less crime rate and traffic but terrorist is high which is the main negative issue.
6. Less pollution as there are not very much industries i.e. not giving any permission for opening new business and industries.
7. Maintain the inland quality.
8. Has to maintain Indian claims over Kashmir in world eye.

E. DISADVANTAGES OF ARTICLE 370

Indian constitution deals with the special status given to the state of J&K.

- J&K citizen have dual citizenship.
- Jammu and Kashmir national flag is different.
- Jammu and Kashmir legislative assembly term is 6 years whereas its 5years for the states of India.
- The order of state of India are not valid in Jammu and Kashmir.
- Parliament of India may makes laws in extremely limited areas in terms of Jammu and Kashmir.
- In Jammu and Kashmir if a women's marries a person of any other state of India, citizenship to the female ends.
- If a women marries a man in other Indian states she loses her citizenship whereas if any women marry a Pakistani she will be entitle to have a citizenship of Jammu and Kashmir.
- Outsider cannot own a land in Jammu and Kashmir
- RTI does not apply on Jammu and Kashmir, RTE is not implemented, CBI does not apply, Indian laws are not applicable Shariah law is applicable to women in Kashmir.
- There are no rights to panchayat in Kashmir, minorities in Kashmir (Hindu, Sikh) does not get 16% reservation.
- Indian parliament does not have any major rights over Kashmir it can only control issue of defence, international relation and communication.
- Lack of medical facilities, no single private hospital in Jammu which include adjoining districts.

- Terrorism in state is because of 370 and because Pakistan claims over Kashmir.
- Lack of basic modern facilities like high speed internet, 24 hours electricity and 24 hours of water supply.
- Less competition makes the progress of student slow and dull that means grow and development is low.
- No opportunity for state student to appear in other state exam.
- No industrial sector is available.
- Jammu is always ignores in comparison to Kashmir just because it's an international issue.
- It has hindered the progress of our state to a large extent.
- Corruption is much more in J&K than from others because of special status and laws. Only Muslim can become chief minister of J&K, no Hindu can become chief minister of J&K.
- It has reduce the participation of non-Muslim community in politics and other fares.
- Education has suffered a lot due to this.
- Less GDP as well as revenue i.e. net income is less, growth is less, less jobs and unemployment are the major problem due to this Article. Due to this youth can more participate in terrorism.
- Lack of control on government of India and their policy on our state.
- The main problem is gender base, many claim to have a negative thought about the Article 370 as it disqualifies women from the state of property rights.
- However it is less known that the Article, itself was gender neutral but the definition of permanent resident in the state constitution based on the notification issued in April 1927 and June 1932 during the Maharaja rule was thought to be discriminatory.

F. REASONS - WHY ARTICLE 370 BE REMOVED

1. Temporary and Transition Provision Article 370 was introduced under temporary and transition provision, it is but still in existence. So who will decide what was actually meant by the term temporary and transition provision.
2. Does not fulfill the criteria of Section 5 of the instrument of accession which says "The terms of this my instrument of accession shall not be varied by any amendment of the Act or the Indian Independence Act, unless such amendments are accepted by me by instrument supplement to this instrument".
3. Encourages Separationist tendency As per the Article published in Indian republic, Kahmiri locals do not think of them as part of India and often asks people coming from different states to Kashmir, if they have you come from India. This shows that even the concept of unity in integrity, which is one of

the best attribute of India's most cherished culture, is losing its meaning.

4. It affects the economic development As per the provisions of Article 370 people from outside Kashmir cannot invest in Kashmir, they cannot buy any property or carry on any business. Where rest of the India enjoys right to move freely and carry on trade in any part of India thereby developing India as a whole, Kashmir due to restriction put by Article 370 is closing doors of development for itself.
5. Permitting corruption - As we have CAG, Lokpal, CBI to investigate corruption issues in other States of India, Kashmir due to Article 370 does not come under these anti corruption bodies. When corruption is on its toll in India it becomes a very important issue of debate that since the top most investigation bodies of India does not have its operation in Kashmir, is Kashmir totally a corruption free State and does not need such authorities.
6. Restricts women rights According to the Article published in F. Politics Dated Dec 2, 2013, with heading "Sorry Omar, It's you who are ill-informed and not only Modi" The writer has tried to make out clearly the exact status of law on rights of Women marrying outside Kashmir as far as their Permanent resident status is concerned. It mentions the Fact that in a historic case of State of J & K v. Sheela Shawney The court has struck down the discriminatory law regarding women's Permanent Status after marrying a person who does not belong to Kashmir and held that," there is no provision in existing law dealing with the status of a female Permanent Resident who marries a non- resident person. The provision of women losing their status of permanent resident after marrying outside the State therefore did not have any legal basis". But the efforts of PDP Government led by Mehbooba Mufti who tried to pass a bill named Permanent Resident (Disqualification) Bill 2004 which says that if a women marries a person from outside Kashmir will lose her permanent Resident status and the same was well supported by Omar Abdulla's party National Conference, shows that the government of Jammu and Kashmir is in favour of such discrimination.
7. Also, women in Kashmir do not enjoy same property rights as men. In 21st century when whole world is talking about women empowerment and her rights, it seems Kashmir is still in stone ages, thereby restricting women's rights.
8. There is threat to Indian security It is well known to all that Pakistan is a great threat to India due to its deep involvements in terrorism. The Article also gives Pakistan's citizens entitlement to Indian citizenship, if he marries a Kashmiri girl. This is very sensitive issue and needs to be looked upon

with great care and precautions. This way we are welcoming terrorists thereby making them our son in laws. How can this be justified when terrorism is not only a national issue of concern but global as well and more importantly when Kashmir is the eye of Pakistan right from the time of Independence.

9. Chief Minister Omar Abdulla on Article 370. Chief Minister of Kashmir Shri. Omar Abdulla's statements are no less than threats. It is well known to all that law is a dynamic concept and needs to get changed with the expectation and need of the time. Then when he makes statements like, "we the people of J & K would like to categorically tell BJP that it is not possible to withdraw Article 370 and any attempt by anyone will be on our dead bodies". As he says that Article 370 forms the basis of Kashmir's accession. But a very important fact is that Article 370 is not as it was framed it has been changed so many times with different Presidential orders only for the benefit of the State. Now for the benefit of the Sate only if Article is removed than why Mr. Abdulla is making such statements. Also, as per the Article published in First post, Dated 28th May 2014, where Mr. Abdulla came up with a new story that he has got an ancient stone and something is written on it which means that if Article 370 is abrogated then it is going to cause earth quake separating Kashmir from India. Such statements and story does not give a sound footing to support Article 370. As this is something very unusual. Kashmir is part of India only for the services mentioned in the Article otherwise not it seems to be very mean and selfish attitude. And the relation between manmade Article causing natural phenomena like earthquake is also not digestible and acceptable.
10. Again as per the news published in Times of India especially mentioning the tweet by Mr. Abdulla "Mark my words and save this tweet – long after the Modi Govt. is distant memory either J & K won't be part of India or Art 370 will still exist" which was made by his after The State Minister Mr. Singh Said that they are open for debate over Article 370, it seems that Mr. Abdulla is not even ready for an open discussion. Whereas, if we look at the people's opinion including Kasmiri's on one of the site maps of India. com with a heading "What is your opinion – Should the Govt. take a step to abolish Article 370 or not?". Almost every person has given the pinion that Article 370 should be removed. And Mr. Omar Abdulla seems to give only his opinion on Article 370 what has he done to get opinion of each and every person living in J & K. where the voices of are people it's only the politicians who are shouting over Article 370.

THE CONSTITUTIONAL (APPLICATION TO JAMMU & KASHMIR) ORDER 1954.

Both the Articles of the constitution i.e. Article 35 A and Article 370 concern the State of Jammu and Kashmir, both of them being temporary provisions. The difference is with respect to their subject, where Article 35 A protects the rights of the people with respect to employment, property and aids by the state government whereas Article 370 protects and grants special status to the sovereignty of the state giving the power to make a separate set of laws to be applied for its governance.

Article 35A is a provision incorporated in the Constitution giving the J&K Legislature a power to decide who all are 'permanent residents' of the State and confer on them special rights and privileges in public sector jobs, acquisition of property in the State, scholarships and other public aid and welfare. The provision mandates that no act of the legislature coming under it can be challenged for violating the Constitution or any other law of the land.

Background:

Article 35A was incorporated into the Constitution in 1954 by a *Presidential order of the then President Rajendra Prasad* on the advice of the Jawaharlal Nehru Cabinet. The controversial Constitution (Application to Jammu and Kashmir) Order of 1954 followed the 1952 Delhi Agreement entered into between Nehru and the then Prime Minister of Jammu and Kashmir Sheikh Abdullah, which extended Indian citizenship to the 'State subjects' of Jammu and Kashmir.

The Presidential Order was issued under Article 370 (1) (d) of the Constitution. This provision allows the President to make certain "exceptions and modifications" to the Constitution for the benefit of 'State subjects' of Jammu and Kashmir. So Article 35A was added to the Constitution as a testimony of the special consideration the Indian government accorded to the 'permanent residents' of Jammu and Kashmir.

Article 35A is the result of the 1954 order.

Article 35A – (The Article doesn't find mention in any of the bare text of Constitution published in INDIA, including the one kept in the Parliament) Saving of laws with respect to permanent residents and their rights. — Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State –

a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or
b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—
   (i) employment under the State Government;
   (ii) acquisition of immovable property in the State;

(iii) settlement in the State; or

(iv) right to scholarships and such other forms of aid as the State Government may provide,

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this part."

So from this deciphering the provisions of Article 35A, it is clear that –

1) It gives special rights to the "permanent residents" of the state where it empowers the state legislature to define permanent residents and then give them special treatment, privileges and rights. This special treatment is with respect to 'employment with the state government, acquisition of immovable property in the state, settlement in the state, or right to scholarships and such other forms of aid as the state government may provide'.
2) By flipping through the pages of the constitutional history of India we find it interesting to note that this provision was enacted by a Presidential Order in 1954. Presidential Orders are issued with respect to the state of Jammu and Kashmir under Article 370, which is a temporary provision in the Constitution as discussed earlier.

This clears the difference between them, also recently there have been various opinions and thoughts regarding the necessity of these Articles in today's' time when "integration of Jammu and Kashmir fully into India" is one of the top priorities of the current government.

The present situation:

An NGO, We the Citizens, challenged Article 35A in Supreme Court in 2014 on grounds that it was not added to the Constitution through amendment under Article 368. It was never presented before Parliament, and came into effect immediately. In another case in SC, in September 2017 two Kashmiri women argued that the state's laws, flowing from Article 35A, had disenfranchised their children. which restrict the basic right to property if a native woman marries a man not holding a permanent resident certificate.

To find an effective solution to these impending constitutional questions of law and to determine the rights of a a section of citizens aggrieved by the provisions of Article 35A the Supreme Court has set up a three-judge bench to hear the matter in 2017.

Why is Article 35A in news now?

- The issue came up when a Kashmiri woman, **Charu Wali Khan** filed a petition to change the constitutional provision as she wanted succession rights in the state though she is settled outside the state.
- This has led to a major controversy in the state.
- The state government filed a counter petition, but the central government did not do.

- The Central Government has submitted before the Supreme Court that it is ready to discuss on scrapping of Article 35A which does not allow people from outside the state of Jammu & Kashmir to work, settle or own property in the state.
- The NDA Government wants to have a larger debate over the Article 35A challenging the constitutional validity of the clause.
- An NGO, 'We the Citizens' have filed a writ petition to strike down Article 35A.
- The ruling party believes that the special status, certain rights and privileges are enjoyed only by the residents of the state which has given rise to alienation and separatist identity to the people of Jammu and Kashmir.
- The provision does not allow people from outside the state of Jammu & Kashmir to work, settle or own property in the state. Scholarships, forms of aid etc are also not allowed to non-residents of the state.

What is Judiciary's take on Article 35A?

- Supreme Court was ready to have a discussion on scrapping Article 35A while the state government opposed such a move.
- The matter has been referred to three judge bench and has been given a six-week deadline to settle the dispute.
- The state BJP leaders are vocal about repealing the Article 35A. As the matter is sub judice, the court's decision should be binding on all. This stand by the BJP has led to rifts between the BJP and PDP.
- The Supreme Court hinted at referring petitions against Articles 370 and 35A of the Constitution — which give special provisions to Jammu and Kashmir — to a Constitution bench.
- The top court said all petitions that demand scrapping of the Articles should be heard together.

Arguments against scrapping Article 35A

- Scrapping the Article 35A is seen as an assault on the special status of the Jammu and Kashmir by the state government.
- Article 35A cannot be challenged on the ground that they affect the fundamental rights of the other Indian Citizens.
- The rights of the state legislature are not unlimited and can be given only in the case of – Employment, Property, Settlement and Scholarship.
- Kashmiris are apprehensive that such a move would be dominated by the Hindu nationalist groups.
- Former chief minister Omar Abdullah also stated that this would create a bigger agitation as was witnessed in 2008 over the transfer of land to the Amarnath Shrine Board.

Arguments in favour of scrapping Article 35A

- Article 35A was not a part of the original Constitution but was added later by a presidential order of 1954.
- Article 370 is another matter of discussion as it is not permanent but a temporary clause.
- The definition can be altered by the state government by passing a law with two third majority.

What is the difference between Article 35A and Article 370?

Article 35A

- Empowers the Jammu and Kashmir state's legislature to define "permanent residents" of the state and provide special rights and privileges to those permanent residents.
- **Added to the Constitution through a Presidential Order**, i.e., The Constitution (Applications to Jammu & Kashmir) Order, 1954 - issued by the President of India on 14 May 1954, "in exercise of the powers conferred by" clause (1) of Article 370 of the Constitution, with the concurrence of the Government of the State of Jammu and Kashmir.

Article 370

- Gives autonomous status to the state of Jammu and Kashmir.
- The Article is drafted in Part XXI of the Constitution: Temporary, Transitional and Special Provisions.

The State's Constituent Assembly was empowered to recommend the Articles of the Indian constitution to be applied to the state or to abrogate the Article 370 altogether. After the state Constituent Assembly dissolved itself without recommending abrogation, the Article 370 was deemed to have become a permanent feature of the Indian Constitution.

THE JAMMU AND KASHMIR REORGANISATION ACT, 2019

The Jammu and Kashmir Reorganization Bill, 2019 was introduced in Rajya Sabha on August 5, 2019 by the Minister of Home Affairs, Mr. Amit Shah. The Bill provides for reorganization of the state of Jammu and Kashmir into the Union Territory of Jammu and Kashmir and Union Territory of Ladakh.

- **Reorganization of Jammu and Kashmir:** The Bill reorganizes the state of Jammu and Kashmir into: (i) the Union Territory of Jammu and Kashmir with a legislature, and (ii) the Union Territory of Ladakh without a legislature. The Union Territory of Ladakh will comprise Kargil and Leh districts, and the Union Territory of Jammu and Kashmir will comprise the remaining territories of the existing state of Jammu and Kashmir.

- **Lieutenant Governor:** The Union Territory of Jammu and Kashmir will be administered by the President, through an administrator appointed by him known as the Lieutenant Governor. The Union Territory of Ladakh will be administered by the President, through a Lieutenant Governor appointed by him.
- **Legislative Assembly of Jammu and Kashmir:**

The Bill provides for a Legislative Assembly for the Union Territory of Jammu and Kashmir. The total number of seats in the Assembly will be 107. Of these, 24 seats will remain vacant on account of certain areas of Jammu and Kashmir being under the occupation of Pakistan. Further, seats will be reserved in the Assembly for Scheduled Castes and Scheduled Tribes in proportion to their population in the Union Territory of Jammu and Kashmir. In addition, the Lieutenant Governor may nominate two members to the Legislative Assembly to give representation to women, if they are not adequately represented.

- The Assembly will have a term of five years, and the Lieutenant Governor must summon the Assembly at least once in six months. The Legislative Assembly may make laws for any part of the Union Territory of Jammu and Kashmir related to: (i) any matters specified in the State List of the Constitution, except "Police" and "Public Order", and (ii) any matter in the Concurrent List applicable to Union Territories. Further, Parliament will have the power to make laws in relation to any matter for the Union Territory of Jammu and Kashmir.
- **Council of Ministers:** The Union Territory of Jammu and Kashmir will have a Council of Ministers of not more than ten percent of the total number of members in the Assembly. The Council will aide and advise the Lieutenant Governor on matters that the Assembly has powers to make laws. The Chief Minister will communicate all decisions of the Council to the Lieutenant Governor.
- **High Court:** The High Court of Jammu and Kashmir will be the common High Court for the Union Territories of Ladakh, and Jammu and Kashmir. Further, the Union Territory of Jammu and Kashmir will have an Advocate General to provide legal advice to the government of the Union Territory.
- **Legislative Council:** The Legislative Council of the state of Jammu and Kashmir will be abolished. Upon dissolution, all Bills pending in the Council will lapse.
- **Advisory Committees:** The central government will appoint Advisory Committees, for various purposes, including: (i) distribution of assets and liabilities of corporations of the state of Jammu and Kashmir between the two Union Territories, (ii) issues related to the generation and supply of electricity and water, and (iii) issues related to the Jammu and Kashmir State Financial Corporation. These Committees must submit their reports within six months to the Lieutenant Governor of Jammu

and Kashmir, who must act on these recommendations within 30 days.

- **Extent of laws:** The Schedule lists 106 central laws that will be made applicable to Union Territories of Jammu and Kashmir and Ladakh on a date notified by the central government.

These include the Aadhaar Act, 2016, the Indian Penal Code, 1860, and the Right to Education

Act, 2009. Further, it repeals 153 state laws of Jammu and Kashmir. In addition, 166 state laws will remain in force, and seven laws will be applicable with amendments. These amendments include lifting of prohibitions on lease of land to persons who are not permanent residents of Jammu and Kashmir.

The JAMMU AND KASHMIR REORGANISATION ACT, 2019 of Parliament received the assent of the President on the 9th August, 2019, and came into force.

MODULE - 07

OTHER CONSTITUTIONAL INSTITUTIONS / AUTHORITIES:

1. COMPTROLLER AND AUDITOR-GENERAL OF INDIA

(Articles 148 TO 151)

Financial control of the administration is the bulwark of parliamentary democracy and for exercising financial control an independent audit agency is an essential pre requisite. The Constitution provides for a Comptroller and Auditor-General of India being appointed by the President. To ensure the independence of this office from the executive government of the day, it has been provided that the Comptroller and Auditor-General shall not be removed from his office except on grounds of proved misbehaviour or incapacity, on an address passed by each of the two Houses of Parliament by two-thirds majority of those present and voting and a majority of the total membership of each House being presented to the President in the same manner as applicable to the judges of the Supreme Court under Article 124(4). Also, the Comptroller and Auditor-General has been made ineligible for any other office under the Government of India or any State Government. His salary etc. is left to be determined by Parliament by law. The Comptroller and Auditor-General (Duties, Powers and Conditions of Service) Act, 1971, as amended regulates the position. The salary, etc. of Comptroller and Auditor-General have been equated with the judges of the Supreme Court. The service conditions of those serving in the Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General are to be laid down by the President by rules framed after consultation with the Comptroller and Auditor-General. The administrative expenses of the office of the Comptroller and Auditor-General are to be charged upon the Consolidated Fund of India (Article 148).

The form in which the accounts of the Union and of the States are to be maintained is to be determined by the President on the advice of the Comptroller and Auditor-General. The Constitution left it to Parliament to lay down the duties and powers of Comptroller and Auditor-General in regard to the accounts of the Union and the States (Articles 149 and 150). Article 151, however, specifically lays down that the Comptroller and Auditor-General shall submit to the President reports relating to the accounts of the Union and the President shall cause them to be laid before both Houses of Parliament. Similarly reports in regard to the accounts of the States will be submitted to the respective State Governors and shall be laid before the House/ s of the concerned legislatures.

2. ADMINISTRATION OF UNION TERRITORIES (Articles 239 to 241)

The Union Territories may be defined as areas directly administered by the Union. At present there are seven Union Territories, viz. Andaman and Nicobar Islands, Lakshadweep, Dadra and Nagar Haveli, Daman and Diu, Puducherry, Chandigarh and Delhi (First Schedule). The erstwhile Union Territory of Delhi which had a Metropolitan Council and Executive Councillors has now emerged as the National Capital Territory of Delhi with a legislature and a Council of Ministers (Articles 239AA and 239 AB inserted by the sixty-ninth amendment, 1991).

The Parliament may by law provide for the administration of Union Territories. Subject thereto, the administration of Union Territories is to be handled by the President through an administrator appointed by him. The administrator is usually called the Lt. Governor. The President may also appoint the Governor of a neighbouring State as the administrator of a Union Territory. A Governor so appointed shall discharge the functions of IIH' administrator independently of the advice of the Councilor Ministers of the State (Article 239). Parliament may by law create for any territory a legislature and a Council of Ministers. Such a legislature and Council of Ministers exist for the Union Territory of Puducherry and for the National Capital Territory of Delhi. The Legislative Assembly in Puducherry may make laws in respect of matters in Lists II and III of the Seventh Schedule in so far as these matters are applicable to the Union Territory. This applies to the Delhi Assembly also but there the legislative and executive powers in respect of public order, police and land and all matters related to these three areas have been retained by the Union to be handled through the Lt. Governor of Delhi. The Union Territory of Andaman and Nicobar Islands has a nominated body in place of a legislature (Article 239 A). The administrator of a Union Territory enjoys powers of promulgating' ordinances like the Governors of States (Article 239B). The President has been empowered to make regulations for peace, progress and good government of all the Union Territories except where a legislature is functioning (Article 239A and 240). Parliament may by law constitute a High Court for a Union Territory or declare any Court to be the High Court for its purposes (Article 241).

3. STRUCTURE POWERS AND FUNCTIONS OF PANCHAYATS (Articles 243 to 243O)

The Constitution (73rd Amendment) Act, 1992 and the Constitution (74th Amendment) Act, 1992 have added new Parts IX and IX A to the Constitution. Under these two parts, we have as many as 34 new Articles-243 to 243ZG and two new schedules viz. schedules 11 and 12. The 73rd Amendment gives constitutional recognition to the

Panchayats and the 74th Amendment to the Municipalities. Thus, to the Union and the States, a third tier of governmental instrumentalities has been added.

There is nothing entirely new about the institutions of Panchayats and Municipalities. Both these have existed for long. There were local self-government and Panchayati Raj laws in many parts of India. But, unfortunately these institutions were not able to function satisfactorily for any length of time. Often, they stood superceded. Despite the Gandhian approach of treating the villages as units of polity and Gandhiji's love for Panchayati Raj institutions, Dr. Ambedkar in the Constituent Assembly did not favour them and even said some very harsh things like these being dens of corruption, localism, backwardness etc. Finally, as a compromise or a concession to Gandhi's views, Article 40 was included under the non-enforcable Part IV on the Directive Principles of State Policy. It said that the state shall take steps to organise Village Panchayats and endow them with necessary authority "to function as units of self-government" .

Hardly any attention was paid to Article 40 at the level of Union Parliament until Prime Minister Rajiv Gandhi took serious interest and initiative to bring forward a constitutional amendment. It was, however opposed on grounds of its being an effort to reach the Panchayats directly, bypassing the States. The amended amendment became a reality during Narasimha Rao's time.

The seventy-third and seventy-fourth constitutional' amendments made some fundamental changes in our political structure and in the status of local institutions. These institutions acquired constitutional protection. The two amendments provided for the State legislatures making their own laws under the constitutional provisions for establishing Panchayats, Municipalities, etc. and conferring on them such powers and authority as may be necessary to enable them to function as institutions of self-government. In every State, a three-tier system was envisaged. Panchayats were to be established at the Village and district levels and at the intermediate level. States which had a population of less than two million did not need to have the intermediate level Panchayats.

Statement of Objects and Reasons appended to the Constitution (Seventy-second Amendment) Bill, 1991 which was enacted as the Constitution (Seventy-third Amendment) Act, 1992

STATEMENT OF OBJECTS AND REASONS

Though the Panchayati Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged supersession, insufficient

representation of weaker sections like Scheduled Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources.

2. Article 40 of the Constitution which enshrines one of the Directive Principles of State Policy lays down that the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. In the light of the experience in the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayati Raj Institutions to impart certainty, continuity and strength to them.

3. Accordingly, it is proposed to add a new Part relating to Panchayats in the Constitution to provide for among other things, Gram Sabha in a village or group of villages; constitution of Panchayats at village and other level or levels; direct elections to all seats in Panchayats at the village and intermediate level, if any, and to the offices of Chairpersons of Panchayats at such levels; reservation of seats for the Scheduled Castes and Scheduled Tribes in proportion to their population for membership of Panchayats and office of Chairpersons in Panchayats at each level; reservation of not less than one-third of the seats for women; fixing tenure of 5 years for Panchayats and holding elections within a period of 6 months in the event of supersession of any Panchayat; disqualifications for membership of Panchayats; devolution by the State Legislature of powers and responsibilities upon the Panchayats with respect to the preparation of plans for economic developments and social justice and for the implementation of development schemes; sound finance of the Panchayats by securing authorisation from State Legislatures for grants-in-aid to the Panchayats from the Consolidated Fund of the State, as also assignment to, or appropriation by, the Panchayats of the revenues of designated taxes, duties, tolls and fees; setting up of a Finance Commission within one year of the proposed amendment and thereafter every 5 years to review the financial position of Panchayats; auditing of accounts of the Panchayats; powers of State Legislatures to make provisions with respect to elections to Panchayats under the superintendence, direction and control of the chief electoral officer of the State; application of the provisions of the said Part to Union territories; excluding certain States and areas from the application of the provisions of the said Part; continuance of existing laws and Panchayats until one year from the commencement of the proposed amendment and barring interference by courts in electoral matters relating to Panchayats.

4. The Bill seeks to achieve the aforesaid objectives.

The Constitution (seventy-third amendment) At, 1992 inserted new Part IX.- After Part VIII of the Constitution, the following Part shall be inserted, namely: THE PANCHAYATS. Art. 243 gives important definitions like -

(a) "district" means a district in a State;

(b) "Gram Sabha" means a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village level;

(c) "Intermediate level" means a level between the village and district levels specified by the Governor of a State by public notification to be the intermediate level for the purposes of this Part;

(d) "Panchayat" means an institution (by whatever name called) of self-government constituted under article 243B, for the rural areas;

(e) "Panchayat area" means the territorial area of a Panchayat;

(f) "population" means the population as ascertained at the last preceding census of which the relevant figures have been published;

(g) "village" means a village specified by the Governor by public notification to be a village for the purposes of this Part and includes a group of villages so specified.

Art. 243A gives provision of Gram Sabha.- A Gram Sabha may exercise such powers and perform such functions at the village level as the Legislature of a State may, by law, provide.

Art.243B. Constitution of Panchayats.- (1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part.

(2) Notwithstanding anything in clause (1), Panchayats at the intermediate level may not be constituted in a State having a population not exceeding twenty lakhs.

Art.243C. Composition of Panchayats.- (1) Subject to the provisions of this Part, the Legislature of a State may, by law, make provisions with respect to the composition of Pancayats:

Provided that the ratio between the population of the territorial area of a Panchayat at any level and the number of seats in such Panchayat to be filled by election shall, so far as practicable, be the same throughout the State.

(2) All the seats in a Panchayat shall be filled by persons chosen by direct election from territorial constituencies in the Panchayat area and; for this purpose, each Panchayat area shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the Panchayat area.

(3) The Legislature of a State may, by law, provide for the representation-

(a) of the Chairpersons of the Panchayats at the village level, in the Panchayats at the intermediate level or, in the case of a State not having Panchayats at the intermediate level, in the Pancayats at the district level;

(b) of the Chairpersons of the Panchayats at the intermediate level, in the Panchayats at the district level;

(c) of the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly a Panchayat area at a level other than the village level, in such Panchayat;

(d) of the members of the Council of States and the members of the Legislative Council of the State, where they are registered as electors within-

(i) a Panchayat area at the intermediate level, in Panchayat at the intermediate level;

(ii) a Panchayat area at the district level, in Panchayat at the district level.

(4) The Chairperson of a Panchayat and other members of a Panchayat whether or not chosen by direct election from territorial constituencies in the Panchayat area shall have the right to vote in the meetings of the Panchayats.

(5) The Chairperson of -

(a) a Panchayat at the village level shall be elected in such manner as the Legislature of a State may, by law, provide; and

(b) a Panchayat at the intermediate level or district level shall be elected by, and from amongst, the elected members thereof.

Art. 243D. Reservation of seats.- (1) Seats shall be reserved for-

(a) the Scheduled Castes; and

(b) the Scheduled Tribes,

in every Panchayat and the number of seats of reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the

Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide:

Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State:

Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women:

Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens.

Art. 243E. Duration of Panchayats, etc.-(1) Every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Panchayat at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Panchayat shall be completed-

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Panchayat would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Panchayat for such period.

(4) A Panchayat constituted upon the dissolution of a Panchayat before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Panchayat would have continued under clause (1) had it not been so dissolved.

Art. 243F. Disqualifications for membership.-(1) A person shall be disqualified for being chosen as, and for being, a member of a Panchayat-

(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State.

(2) If any question arises as to whether a member of a Panchayat has become subject to any of the disqualifications mentioned in clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide.

Art. 243G. Powers, authority and responsibilities of Panchayats.- Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein, with respect to-

(a) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

243H. Powers to impose taxes by, and Funds of, the Panchayats.-The Legislature of a State may, by law,-

(a) authorise a Panchayat to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits;

(b) assign to a Panchayat such taxes, duties, tolls and fees levied and collected by the State Government for such purposes and subject to such conditions and limits;

(c) provide for making such grants-in-aid to the Panchayats from the Consolidated Fund of the State; and

(d) provide for Constitution of such Funds for crediting all moneys received, respectively, by or on behalf of the Panchayats and also for the withdrawal of such moneys therefrom,

as may be specified in the law.

Art. 243-I. Constitution of Finance Commission to review financial position.-(1) The Governor of a State shall, as soon as may be within one year from the commencement of the Constitution (Seventy-third Amendment) Act, 1992, and thereafter at the expiration of every fifth year, constitute a Finance Commission to review the financial position of the Panchayats and to make recommendations to the Governor as to-

(a) the principles which should govern-

(i) the distribution between the State and the Panchayats of the net proceeds of the taxes, duties, tolls and fees leviable by the State, which may be divided between them under this Part and the allocation between the Panchayats at all

levels of their respective shares of such proceeds;

(ii) the determination of the taxes, duties, tolls and fees which may be assigned to, or appropriated by, the Panchayat;

(iii) the grants-in-aid to the Panchayats from the Consolidated Fund of the State;

(b) the measures needed to improve the financial position of the Panchayats;

(c) any other matter referred to the Finance Commission by the Governor in the interests of sound finance of the Panchayats.

(2) The Legislature of a State may, by law, provide for the composition of the commission, the qualifications which shall be requisite for appointment as members thereof and the manner in which they shall be selected.

(3) The Commission shall determine their procedure and shall have such powers in the performance of their functions as the Legislature of the State may, by law, confer on them.

(4) The Governor shall cause every recommendation made by the Commission under this article together with an explanatory memorandum as to the action taken thereon to be laid before the Legislature of the State.

Art. 243J. Audit of accounts of Panchayats.- The Legislature of a State may, by law, make provisions with respect to the maintenance of accounts by the Panchayats and the auditing of such accounts.

Art. 243K. Elections to the Panchayats.- (1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:

Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1).

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats.

Art. 243L. Application to Union territories.-The provisions of this Part shall apply to the Union territories and shall, in their application to a Union territory, have effect as if the references to the Governor of a State were references to the Administrator of the Union

territory appointed under article 239 and references to the Legislature or the Legislative Assembly of a State were references, in relation to a Union territory having a Legislative Assembly, to that Legislative Assembly:

Provided that the President may, by public notification, direct that the provisions of this Part shall apply to any Union territory or part thereof subject to such exceptions and modifications as he may specify in the notification.

Art. 243M. Part not to apply to certain areas.-(1) Nothing in this Part shall apply to the Scheduled Areas referred to in clause (1), and the tribal areas referred to in clause (2), of article 244.

(2) Nothing in this Part shall apply to-

(a) the States of Nagaland, Meghalaya and Mizoram;

(b) the Hill Areas in the State of Manipur for which District Councils exist under any law for the time being in force.

(3) Nothing in this Part-

(a) relating to Panchayats at the district level shall apply to the hill areas of the District of Darjeeling in the State of West Bengal for which Darjeeling Gorkha Hill Council exists under any law for the time being in force;

(b) shall be construed to affect the functions and powers of the Darjeeling Gorkha Hill Council constituted under such law.

(4) Notwithstanding anything in this Constitution,-

(a) the Legislature of a State referred to in sub-clause (a) of clause (2) may, by law, extend this Part to that State, except the areas, if any, referred to in clause (1), if the Legislative Assembly of that State passes a resolution to that effect by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting;

(b) Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the tribal areas referred to in clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of article 368.

Art. 243N. Continuance of existing laws and Panchayats.-Notwithstanding anything in this Part, any provision of any law relating to Panchayats in force in a State immediately before the commencement of the Constitution (Seventy-third Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier:

Provided that all the Panchayats existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that

State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State.

Art. 243-O. Bar to interference by courts in electoral matters.- Notwithstanding anything in this Constitution,-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243K, shall not be called in question in any court;

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.'.

Constitution, after sub-clause (b), the following sub-clause shall be inserted, namely:-

"(bb) the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Panchayats in the State on the basis of the recommendations made by the Finance Commission of the State;".

Constitution, the following Schedule shall be added, namely:-

ELEVENTH SCHEDULE (Article 243G)

1. Agriculture, including agricultural extension.
2. Land improvement, implementation of land reforms, land consolidation and soil conservation.
3. Minor irrigation, water management and watershed development.
4. Animal husbandry, dairying and poultry.
5. Fisheries.
6. Social forestry and farm forestry.
7. Minor forest produce.
8. Small scale industries, including food processing industries.
9. Khadi, village and cottage industries.
10. Rural housing.
11. Drinking water.
12. Fuel and fodder.
13. Roads, culverts, bridges, ferries, waterways and other means of communication.
14. Rural electrification, including distribution of electricity.
15. Non-conventional energy sources.
16. Poverty alleviation programme.
17. Education, including primary and secondary schools.
18. Technical training and vocational education.
19. Adult and non-formal education.
20. Libraries.
21. Cultural activities.
22. Markets and fairs.
23. Health and sanitation, including hospitals, primary health centres and dispensaries.
24. Family welfare.
25. Women and child development.
26. Social welfare, including welfare of the handicapped and mentally retarded.
27. Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes.
28. Public distribution system.
29. Maintenance of community assets.".

Thus the important thing was that now Panchayats had to be elected directly by the people in the same manner as members of the popular houses at the Union and State levels were elected i.e. through territorial constituencies and on the principle of 'one man one vote'. For a Village Panchayat, the electorate would be the Gram Sabha which would consist of those registred in the electoral rolls. These Panchayats cannot remain superceded for long; fresh elections would have to be held within six months of the dissolution of a Panchayat. Secondly, in all panchayats, seats would be reserved for women, Scheduled Castes and Scheduled Tribes. There shall be a fixed five year term for all Panchayats. They shall have their own budget, power of taxation and list of items in their jurisdiction. In their respective areas, the Panchayats shall be able to formulate their own development plans and implement them. Every State shall have a State Election Commissioner for conducting Panchayat elections and every five years a State Finance Commission shall be constituted to take stock of the economic condition of the Panchayats.

4. MUNICIPALITIES

(Articles 243P to 243ZG)

Similarly, in the 74th Amendment, there were provisions for the setting up of Nagar Palikas and Nagar Panchayats. This Amendment of the Constitution of India has added Part IX-A to the Constitution of India. It is entitled as 'The Municipalities' and has inserted provisions from Articles 243-P to 243-ZG. In addition, the Amendment Act has also added Twelfth Schedule to the Constitution. It contains 18 functional items of municipalities listed under Article 243-W.

Statement of Objects and Reasons the Constitution (seventy-fourth Amendment) Act, 1992 stated that in many States local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions. As a result, Urban Local Bodies are not able to perform effectively as vibrant democratic units of self-government.

Having regard to these inadequacies, it is considered necessary that provisions relating to Urban Local Bodies are incorporated in the Constitution particularly for –

(i) putting on a firmer footing the relationship between the State Government and the Urban Local Bodies with respect to –

(a) the functions and taxation powers; and

(b) arrangements for revenue sharing;

(ii) Ensuring regular conduct of elections;

(iii) ensuring timely elections in the case of supersession; and

(iv) providing adequate representation for the weaker sections like Scheduled Castes, Scheduled Tribes and women.

Accordingly, it is proposed to add a new part relating to the Urban Local Bodies in the Constitution to provide for – (a) constitution of

three types of Municipalities: (i) Nagar Panchayats for areas in transition from a rural area to urban area;

(ii) Municipal Councils for smaller urban areas;

(iii) Municipal Corporations for larger urban areas. The broad criteria for specifying the said areas is being provided in the proposed article 243-O;

(b) composition of Municipalities, which will be decided by the Legislature of a State, having the following features: (i) persons to be chosen by direct election; (ii) representation of Chairpersons of Committees, if any, at ward or other levels in the Municipalities; (iii) representation of persons having special knowledge or experience of Municipal Administration in Municipalities (without voting rights);

(c) election of Chairpersons of a Municipality in the manner specified in the State law;

(d) constitution of Committees at ward level or other level or levels within the territorial area of a Municipality as may be provided in the State law;

(e) reservation of seats in every Municipality- (i) for Scheduled Castes and Scheduled Tribes in proportion to their population of which not less than one-third shall be for women; (ii) for women which shall not less than one-third of the total number of seats; (iii) in favour of backward class of citizens if so provided by the Legislature of the State; (iv) for Scheduled Castes, Scheduled Tribes and women in the office of Chairpersons as may be specified in the State law;

(f) fixed tenure of 5 years for the Municipality and re-election within six months of end of tenure. If a Municipality is dissolved before expiration of its duration, elections to be held within a period of six months of its dissolution;

(g) devolution by the State Legislature of powers and responsibilities upon the Municipalities with respect to preparation of plans for economic development and social justice, and for the implementation of development schemes as may be required to enable them to function as institutions of self-government;

(h) levy of taxes and duties by Municipalities, assigning of such taxes and duties to Municipalities by State Governments and for making grants-in-aid by the State to the Municipalities as may be provided in the State law;

(i) a Finance Commission to review the finances of the Municipalities and to recommend principles for - (1) determining the taxes which may be assigned to the Municipalities; (2) Sharing of taxes between the State and Municipalities; (3) grants-in-aid to the Municipalities from the Consolidated Fund of the State;

(j) audit of accounts of the Municipal Corporations by the Comptroller and Auditor-General of India and laying of reports before the Legislature of the State and the Municipal Corporation concerned;

(k) making of law by a State Legislature with respect to elections to the Municipalities to be conducted under the superintendence, direction and control of the chief electoral officer of the State; (l) application of the provisions of the Bill to any Union territory or part thereof with such modifications as may be specified by the President;

(m) exempting Scheduled areas referred to in clause (1), and tribal areas referred to in clause (2), of article 244, from the application of the provisions of the Bill. Extension of provisions of the Bill to such areas may be done by Parliament by law;

(n) disqualifications for membership of a Municipality;

(o) bar of jurisdiction of Courts in matters relating to elections to the Municipalities.

This Act may be called the Constitution (Seventy-fourth Amendment) Act, 1992. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Insertion of new Part IXA.-After Part IX of the Constitution, the following Part shall be inserted, namely:- `PART IXA THE MUNICIPALITIES

Art. 243P gives various definitions in this Part like -

(a) "Committee" means a Committee constituted under article 243S;

(b) "district" means a district in a State;

(c) "Metropolitan area" means an area having a population of ten lakhs or more, comprised in one or more districts and consisting of two or more Municipalities or Panchayats or other contiguous areas, specified by the Governor by public notification to be a Metropolitan area for the purposes of this Part;

(d) "Municipal area" means the territorial area of a Municipality as is notified by the Governor;

(e) "Municipality" means an institution of self-government constituted under article 243Q;

(f) "Panchayat" means a Panchayat constituted under article 243B;

(g) "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.

Art. 243Q. Constitution of Municipalities (1) There shall be constituted in every State,- (a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area; (b) a Municipal Council for a smaller urban area; and (c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part: Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

(2) In this article, "a transitional area", "a smaller urban area" or "a larger urban area" means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part.

Art. 243R. Composition of Municipalities.

(1) Save as provided in clause (2), all the seats in a Municipality shall be filled by persons chosen by direct election from the territorial constituencies in the Municipal area and for this purpose each Municipal area shall be divided into territorial constituencies to be known as wards.

(2) The Legislature of a State may, by law, provide- (a) for the representation in a Municipality of- (i) persons having special knowledge or experience in Municipal administration; (ii) the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area; (iii) the members of the Council of States and the members of the Legislative Council of the State registered as electors within the Municipal area; (iv) the Chairpersons of the Committees constituted under clause (5) of article 243S: Provided that the persons referred to in paragraph (i) shall not have the right to vote in the meetings of the Municipality; (b) the manner of election of the Chairperson of a Municipality.

Art. 243S. Constitution and composition of Wards Committees, etc.

(1) There shall be constituted Wards Committees, consisting of one or more wards, within the territorial area of a Municipality having a population of three lakhs or more.

(2) The Legislature of a State may, by law, make provision with respect to - (a) the composition and the territorial area of a Wards Committee; (b) the manner in which the seats in a Wards Committee shall be filled.

(3) A member of a Municipality representing a ward within the territorial area of the Wards Committee shall be a member of that Committee.

(4) Where a Wards Committee consists of- (a) one ward, the member representing that ward in the Municipality; or (b) two or more wards, one of the members representing such wards in the Municipality elected by the members of the Wards Committee, shall be the Chairperson of that Committee.

(5) Nothing in this article shall be deemed to prevent the Legislature of a State from making any provision for the constitution of Committees in addition to the Wards Committees.

Art. 243T. Reservation of seats.-

(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every

Municipally and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The officers of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens.

Art. 243U. Duration of Municipalities, etc.-

(1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer: Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed,- (a) before the expiry of its duration specified in clause (1); (b) before the expiration of a period of six months from the date of its dissolution: Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for

the remainder of the period for which the dissolved Municipality would have continued under clause (1) had it not been so dissolved.

Art. 243V. Disqualifications for membership.-

(1) A person shall be disqualified for being chosen as, and for being, a member of a Municipality- (a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned: Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years; (b) if he is so disqualified by or under any law made by the Legislature of the State.

(2) If any question arises as to whether a member of a Municipality has become subject to any of the disqualifications mentioned in clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide.

243W. Powers, authority and responsibilities of Municipalities, etc.- Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow-

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to- (i) the preparation of plans for economic development and social justice; (ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule. 243X. Power to impose taxes by, and Funds of, the Municipalities.-The Legislature of a State may, by law,- (a) authorise a Municipality to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits; (b) assign to a Municipality such taxes, duties, tolls and fees levied and collected by the State Government for such purposes and subject to such conditions and limits; (c) provide for making such grants-in-aid to the Municipalities from the Consolidated Fund of the State; and (d) provide for constitution of such Funds for crediting all moneys received, respectively, by or on behalf of the Municipalities and also for the withdrawal of such moneys therefrom. as may be specified in the law.

Art. 243Y. Finance Commission.-

(1) The Finance Commission constituted under article 243-I shall also review the financial position of the Municipalities and make recommendations to the Governor as to- (a) the

principles which should govern- (i) the distribution between the State and the Municipalities of the net proceeds of the taxes, duties, tolls and fees leviable by the State, which may be divided between them under this Part and the allocation between the Municipalities at all levels of their respective shares of such proceeds; (ii) the determination of the taxes, duties, tolls and fees which may be assigned to, or appropriated by, the Municipalities; (iii) the grants-in-aid to the Municipalities from the Consolidated Fund of the State; (b) the measures needed to improve the financial position of the Municipalities; (c) any other matter referred to the Finance Commission by the Governor in the interests of sound finance of the Municipalities.

(2) The Governor shall cause every recommendation made by the Commission under this article together with an explanatory memorandum as to the action taken thereon to be laid before the Legislature of the State.

Art. 243Z. Audit of accounts of Municipalities.-The Legislature of a State may, by law, make provisions with respect to the maintenance of accounts by the Municipalities and the auditing of such accounts.

Art. 243ZA. Elections to the Municipalities.-

(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in article 243K.

(2) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Municipalities. 243ZB. Application to Union territories.-The provisions of this Part shall apply to the Union territories and shall, in their application to a Union territory, have effect as if the references to the Governor of a State were references to the Administrator of the Union territory appointed under article 239 and references to the Legislature or the Legislative Assembly of a State were references in relation to a Union territory having a Legislative Assembly, to that Legislative Assembly: Provided that the President may, by public notification, direct that the provisions of this Part shall apply to any Union territory or part thereof subject to such exceptions and modifications as he may specify in the notification.

Art. 243ZC. Part not to apply to certain areas.-

(1) Nothing in this Part shall apply to the Scheduled Areas referred to in clause (1), and the tribal areas referred to in clause (2), of article 244.

(2) Nothing in this Part shall be construed to affect the functions and powers of the Darjeeling Gorkha Hill Council constituted under any law for the time being in force for the hill areas of the district of Darjeeling in the State of West Bengal.

(3) Notwithstanding anything in this Constitution, Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the tribal areas referred to in clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of article 368.

Art. 243ZD. Committee for district planning.-

(1) There shall be constituted in every State at the district level a District Planning Committee to consolidate the plans prepared by the Panchayats and the Municipalitiies in the district and to prepare a draft development plan for the district as a whole.

(2) The Legislature of a State may, by law, make provision with respect to- (a) the composition of the District Planning Committees; (b) the manner in which the seats in such Committees shall be filled: Provided that not less than four-fifths of the total number of members of such Committee shall be elected by, and from amongst, the elected mambers of the Panchayat at the district level and of the Municipalities in the district in proportion to the ratio between the population of the rural areas and of the urban areas in the district; (c) the functions relating to district planning which may be assigned to such Committees; (d) the manner in which the Chairpersons of such Committees shall be chosen.

(3) Every District Planning Committee shall, in preparing the draft development plan,- (a) have regard to- (i) matters of common interest between the Panchayats and the Municipalities including spatial planning, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservation; (ii) the extent and type of available resources whether financial or otherwise; (b) consult such institutions and organisations as the Governor may, by order, specify.

(4) The Chairperson of every District Planning Committee shall forward the development plan, as recommended by such Committee, to the Government of the State.

Art. 243ZE. Committee for Metropolitan planning.-

(1) There shall be constituted in every Metropolitan area a Metropolitan Planning Committee to prepare a draft development plan for the Metropolitan area as a whole.

(2) The Legislature of a State may, by law, make provision with respect to- (a) the composition of the Metropolitan Planning Committees; (b) the manner in which the seats in such Committees shall be filled: Provided that not less than two-thirds of the members of such Committee shall be elected by, and from amongst, the elected members of the Municipalities and Chairpersons of the Panchayats in the Metropolitan area in proportion to the ratio between the population of the Municipalities and of the Panchayats in that

area; (c) the representation in such Committees of the Government of India and the Government of the State and of such organisations and institutions as may be deemed necessary for carrying out the functions assigned to such Committees; (d) the functions relating to planning and coordination for the Metropolitan area which may be assigned to such Committees; (e) the manner in which the Chairpersons of such Committees shall be chosen.

(3) Every Metropolitan Planning Committee shall, in preparing the draft development plan,- (a) have regard to- (i) the plans prepared by the Municipalities and the Panchayats in the Metropolitan area; (ii) matters of common interest between the Municipalities and the Panchayats, including co-ordinated spatial planning of the area, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservation; (iii) the overall objectives and priorities set by the Government of India and the Government of the State; (iv) the extent and nature of investments likely to be made in the Metropolitan area by agencies of the Government of India and of the Government of the State and other available resources whether financial or otherwise; (b) consult such institutions and organisations as the Governor may, by order, specify.

(4) The Chairperson of every Metropolitan Planning Committee shall forward the development plan, as recommended by such Committee, to the Government of the State.

Art. 243ZF. Continuance of existing laws and Municipalities.- Notwithstanding anything in this Part, any provision of any law relating to Municipalities in force in a State immediately before the commencement of THE CONSTITUTION (Seventy-fourth Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier: Provided that all the Municipalities existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State.

Art. 243ZG. Bar to interference by courts in electoral matters.- Notwithstanding anything in this Constitution,- (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243ZA shall not be called in question in any court; (b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for

by or under any law made by the Legislature of a State.'.

This Amendment Act has made certain Amendment in Article 280. In clause (3) of article 280 of the Constitution, sub-clause (c) shall be relettered as sub-clause (d) and before sub-clause (d) as so relettered, the following sub-clause shall be inserted, namely:- "(c) the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State on the basis of the recommendations made by the Finance Commission of the State;".

This Amendment Act added Twelfth Schedule. (Article 243W) for -

1. Urban planning including town planning.
2. Regulation of land-use and construction of buildings.
3. Planning for economic and social development.
4. Roads and bridges.
5. Water supply for domestic, industrial and commercial purposes.
6. Public health, sanitation conservancy and solid waste management.
7. Fire services.
8. Urban forestry, protection of the environment and promotion of ecological aspects.
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
10. Slum improvement and upgradation.
11. Urban poverty alleviation.
12. Provision of urban amenities and facilities such as parks, gardens, playgrounds.
13. Promotion of cultural, educational and aesthetic aspects.
14. Burials and burial grounds; cremations, cremation grounds and electric crematoriums.
15. Cattle pounds; prevention of cruelty to animals.
16. Vital statistics including registration of births and deaths.
17. Public amenities including street lighting, parking lots, bus stops and public conveniences.
18. Regulation of slaughter houses and tanneries.".

In the matter of reservations, elections, power of taxation, formulation and implementation of development projects, constitution of a Finance Commission, fixed term, etc., the provisions were very similar to those in the 73rd Amendment in respect of Panchayats.

It gives constitutional status to the municipalities and has brought them under the purview of judicial review. In other words, the state governments are under a constitutional obligation to add this new system of municipalities in accordance with the provisions of the Act. The Act aims at revitalizing and strengthening the urban governments so that they may function as effective units of local government.

The Municipal Government:

The Act provides for the constitution of three kinds of municipalities in every state:

(1) Nagar panchayats for areas in transition from a rural area to an urban area.
(2) Municipal councils for smaller urban areas.
(3) Municipal corporation for larger urban areas.

A transitional area, a smaller urban area or a larger urban area means such areas as the governor may specify by public notification for this purpose with regard to (1) population density, (2) revenue and (3) percentage of employment in non-agricultural activities. All the members of a municipality are elected directly by the people of the municipal area. For this purpose, each municipal area is divided into territorial constituencies to be known as wards. The state legislature provides the manner of election of the chairperson of a municipality.

It may also provide the representation of persons having special knowledge or experience in municipal administration, the members of the Lok Sabha, the state legislative assembly, the Rajya Sabha and state legislative council and the chairpersons of committees. Ward committees shall be constituted consisting of one or more wards, within the territorial area of a municipality having population of three lakhs or more.

The state legislature may make provision with respect to the composition and the territorial area of a wards committee and the manner in which the seats in a ward committee should be filled. It may also make provisions for the constitution of committees in addition to the wards committees.

The reservation of seats for the Scheduled Castes and the Scheduled Tribes in every municipality in proportion of their population to the total population in the municipal area has been provided by the statute. It also provides for the reservation of not less than one-third of the total number of seats for women including the number of seats reserved for women belonging to the SCs and the STs.

The state legislature may provide for the manner of offices of chairpersons in the municipalities for the SCs, the STs and the women. It may also make any provision for the reservation of seats in any municipality or offices of chairpersons in municipalities in favour of backward classes. The term of office for every municipality is 5 years.

However, it can be dissolved before the completion of its term. The fresh election to constitute a municipality have to be completed (i) before the expiry of its duration of five years; or (ii) in case of dissolution, before the expiry of a period of six months from the date of its dissolution.

A person shall be disqualified for being chosen as or for being a member of a municipality if he is so disqualified under any law for the time being in force for the purposes of elections to the legislature of the state

concerned; or under any law made by the state legislature. However, no person shall be disqualified on the ground of age if he has attained the age of 21 years. All questions of disqualifications shall be referred to such authority as the state legislature may determine.

The Election Commission of the state shall have the power of superintendence, direction and control of the preparation of electoral rolls and the conduct of all elections to the municipalities. The state legislature has been vested with the power to endow the municipalities with authority as may be necessary to enable them to function as institutions of self-government.

The scheme may contain provisions for the devolution of powers and responsibilities with respect to the preparation of plans for development and social justice; and implementation of schemes, regarding 18 matters listed in the Twelfth Schedule. The state legislature can authorize a municipality to levy, collect and appropriate taxes, duties, tolls and fees, levied and collected by them or by the state government. It may provide for making grants-in-aid to the municipalities from the Consolidated Fund of the state; and provide for constitution of funds for crediting all moneys of the municipalities.

The Finance Commission with a term of five years is constituted by each state to review the financial position of panchayats and municipalities. It makes recommendations to the Governor about the principles which should govern the distribution between the state and the municipalities, the net proceeds of the taxes, duties, tolls and fees levied by the state, the determine of the taxes, duties, tolls and fees which may be assigned to the municipalities and the grants-in-aid to the munic ipalities from the Consolidated Fund of the state.

The commission may recommend other matters referred by the Governor in the interests of sound finance of municipalities. The Central Finance Commission may also suggest the measures needed to augment the Consolidated Fund of a state to supplement the resources on the basis of the recommendations made by the Finance Commission of the state.

The state legislature makes provisions with respect to the maintenance of accounts and the auditing of such accounts. The Act does not apply to the Scheduled Area and Tribal Areas (Article 244) and does not affect the functions and powers of the Darjeeling Gorkha Hill Council of West Bengal. The President may extend the provinces to union territories with exceptions.

Every state has to constitute a District Planning Committee to consolidate the plans prepared by panchayats and municipalities in the district, and to prepare a draft development plan for the district as a whole. The state legislature may make provision about the composition of such committees; and the manner of election of their members.

The functions of these committees in relation to district planning are determined by the legislature of the states. Four-fifths of the members of a District Planning Committee are elected by the elected members of the district panchayats and municipalities in the district from amongst themselves.

The representation of these members in the committee is in proportion to the ratio between the rural and urban population of the district. The DPC in preparing the Draft Development Plan gives regard to matters of common interest between the panchayats and the municipalities' spatial planning; sharing of water and natural resources; development of infrastructure and environment conservation.

The plan so prepared by the DPC is sent to the state government by the chairperson of the committee. The Act also provides for the establishment of a Metropolitan Planning Committee to prepare a draft development plan. The metropolitan area should have a population of 10 lakhs or more encompassing one or more districts and/or two or more municipalities or panchayats as contiguous area.

The state legislature may make provisions with respect to composition and representation in these committees and also their functions in relation to planning and coordination for metropolitan areas. The Act lays down that two-thirds of the members of a metropolitan planning committee have to be elected by the elected members of the municipalities and chairpersons of the panchayats in the metropolitan area from amongst themselves.

The 74th Amendment states that the Metropolitan Planning Committee shall prepare a draft development plan for the area as a whole. Not less than two-thirds of the members of such committees are elected by and from amongst the elected members of the municipalities and chairpersons of the panchayats in the municipalities and the panchayats in that area.

There were 23 metropolitan agglomerations in the country in 1993. The Draft Development Plan, takes account of local plans in the metropolitan area and the matters of common interest, hire spatial plans, water and resource, development, infrastructure and environ mental conservation. The overall objectives and priorities set by the Government of India and the state government are organised in view of resources available.

Like the Eleventh Panchayati Raj Schedule, the 74th Amendment contains the Twelfth Schedule of municipal functions which are 18 in number.

These basic urban functions are:

(1) Urban planning including town planning

(2) Regulation of land use and construction of buildings

(3) Planning for economic and social development

(4) Roads and bridges

(5) Water supply for domestic, industrial and commercial purposes

ADVERTISEMENTS:

(6) Public health, sanitation, conservancy and solid waste management

(7) Fire services

(8) Urban forestry protection of the environment and promotion of ecological aspects

(9) Safeguarding the interests of weaker sections of society including the handicapped and mentally retarded.

(10) Slum improvement and up gradation

(11) Urban poverty alleviation

(12) Provision of urban amenities and facilities such as parks, gardens, playgrounds

(13) Promotion of cultural, educational and aesthetic aspects

(14) Burials and burial grounds, cremations grounds and electric crematoriums

(15) Cattle ponds, prevention of cruelty to animals

(16) Vital statistics including registration of births and deaths

(17) Public amenities including street lighting, parking lots, bus stops and public conveniences

(18) Regulation of slaughter houses and tanneries.

The Variety of Urban Local Institution:

A look on the items of the schedule indicates that the Act has taken care of a wide variety of subjects and areas where municipal planning and services will be needed in future. It preserves the existing structure of urban local bodies and has further provided for unfunctional local institutions for experimentation in big cities.

The Act creates eight kinds of these urban local bodies for urban areas in states:

(1) Municipal Corporation

(2) Municipality

(3) Notified Area Committee

(4) Town Area Committee

(5) Cantonment Board

(6) Township

(7) Port Trust

(8) Special Purpose Agency.

Distribution of legislative powers between the Union and the States

Under the distribution of legislative powers between the Union and the States, local government in both rural and urban areas was in the exclusive State List. As it is, all the States-some reluctantly-have passed legislation as required under the new constitutional provisions. Elections to local bodies were held in almost all the States. Also, the 73rd and 74th Amendments do not apply to the States of Meghalaya, Mizoram, Nagaland and Jammu and Kashmir, the Union Territory of Delhi, hill areas in Manipur and Darjeeling in W. Bengal. Also, these do not apply unless extended to Scheduled Areas and Tribal Areas under Article 244. The Constitution (Eighty-third Amendment) of the year 2000 has added a clause to Article 243M to provide that reservation of seats for the

Scheduled Castes under Article 243D shall not apply to the State of Arunachal Pradesh.

It was hoped that the new Panchayats and Municipalities would begin a new era of real representative and participatory democracy with nearly three and a half million elected representatives-one-third of them women (increased to fifty percent in some States)-involved in the business of governance all over India thereby bringing power to the people where it belonged. As things stood, matters causing some concern were:

(i) The M.P. Local Area Development Scheme (MPLADS) which places at the disposal of every member of Union Parliament a sum of Rupees two crores every year for being spent in his /her area on his /her recommendation on items mentioned in the guide list. There are similar schemes placing funds at the disposal of MLAs at the level of States. All the items on which these large funds can be spent at the discretion of MPs and MLAs are covered by the eleventh and twelfth schedules of the Constitution listing schemes to be entrusted to the Panchayats, Municipalities etc. There is constant clamour and pressure for increasing the amounts under the LADS for M.~.s, MLAs and MLCs.

The Local Area Development Schemes and the like are tantamount to legislators' foray into the area of executive functions. Secondly, this may seem to be an affront to cind a violation of the federal scheme as also of the basic spirit of Panchayati Raj institutions.

(ii) Much can be said for and against the ex-officio membership of local Lok Sabha members and M.L.A.s on the district and intermediate level panchayats.

(iii) The ground realities indicate that, for their own reasons, those elected to Parliament and State Legislatures - the M.P.s, M.L.A.s and M.L.Cs - have not taken very kindly to the emerging leadership at the grassroots inasmuch as it may constitute a challenge to their monopoly of political power in the area and develop into new competitive power centres.

(iv) The details of functioning of the Local Government institutions are largely left to the initiative of the State Governments and are to be settled by them. The States have passed vastly varied laws according to their own perception of what and how much can be devolved on the local authorities. While the States naturally want the Union to transfer more of effective legislative, executive and financial powers in wider areas to them, the question is to what extent they would be themselves willing to decentralise further down and share effective power with local self-government institutions. In fact, from the perspective of Chief Ministers and States leadership, it is being argued that the power and jurisdiction of the States are being seriously eroded on the one hand by the Union extending its role and on the other by the local institutions taking over many of its functions

and powers. But, so far as the 73rd and 74th Constitution Amendments are concerned, these do not themselves confer any powers as such on Panchayats and Municipalities.

5. SERVICES AND PUBLIC SERVICE COMMISSIONS

(Articles 308 to 323)

In a modern democratic polity, civil services are an inevitable ingredient of the governmental apparatus. It is, in fact, the non-political and non-elected functionaries who are responsible for carrying on the administration under the direction and control of the elected representatives of the people and in accordance with rules and principles.

Indian bureaucracy or the civil service has been one of the most well-known in the world. In fact, the term 'civil service' was first used for the employees of the East India Company who served in departments other than military. One of the earliest demands of Indian nationalist opinion was to rationalize the structure and functions of the civil service to provide a greater share to Indians in the administration of their country. As a result of increasing pressure and resentment in India, in 1922 the British Government finally bowed to the demand for holding simultaneous Civil Service examinations in India and England. Also, from then on, the Imperial Civil Services (ICS) were to be called the Indian Civil Service (ICS).

The Motilal Nehru Committee report in 1928 recommended the discontinuance of the All India Services until the grant of responsible government to India. During negotiations at the first Round Table Conference, two Indian members of the Services Sub-Committee also called for immediate and total discontinuance of the All India Services. Later, Jawaharlal Nehru and other leaders were highly critical of the ICS. Nehru believed that the whole Government of India was controlled by the ICS. The Indian Civil Service was the backbone of the administration. The ICS were also described as a civilian British army of occupation in India. The ICS officers enjoyed vast powers and authority to take and implement major decisions in administration. They were trained to maintain a distance from the 'natives'. Referring to them as arrogant and overbearing and contemptuous of public opinion, Nehru felt that so long as the spirit of the ICS-the spirit of authoritarianism-pervaded Indian administration and its public services, no new order could be built up. In April 1940 Nehru went so far as to declare that the first and foremost task of the nationalist government would be to abolish the ICS.

The fact remains that at the time of independence, we· inherited a well organized framework of All India Services. In addition; there was a network of central, provincial and

subordinate services. There were nearly 1000 officers in the ICS, roughly half of them were Indians. Owing to the state of affairs prevailing in the country as well as to avoid creation of any void in the Services, the Interim Government under Nehru promised those who were inclined to continue in the service "the same terms as to scales of pay, leave, pension rights and safeguard in matters of discipline as hitherto". A resolution to this effect was incorporated in the Indian Independence Act, 1947 and finally in the Constitution of India (Article 314 which was repealed in 1972 by the Constitution (28th Amendment) Act.

Sardar Patel's consistent support for the rights and privileges for civil servants was clearly reflected in his speeches in the Constituent Assembly and at other fora. While strongly defending the constitutional safeguards for the civil services, Sardar Patel even threatened to resign if such guarantees were not incorporated in the Constitution. He almost eulogized the achievements of the civil services and asserted that they must get recognition and praise.

The two All India Services, the Indian Administrative Service and the Indian Police Service, were created in 1946 on the British pattern. The attainment of independence and the introduction of the system of parliamentary democracy made the civil services fully accountable to the political executive and the Parliament.

Although matters concerning Government services could be normally regulated by laws and the power to lay down detailed rules for recruitment and conditions of service of the Union and State employees was left to the respective legislatures *(vide* entry 70 of List I and entry 41 of List II), the Constitution-makers deemed it most prudent to assure the services by providing some constitutional guarantees and safeguards in the matter of recruitment, security of tenure, procedure tor disciplinary action, etc. In this connection, the Constitution also provided for the setting up of an independent Public Service Commission. The provisions for the Union and State Services applied to the whole of India except the State of Jammu & Kashmir (Article 308).

Article 309 provided for the regulation of recruitment and conditions of service of Union and State Government services by appropriate Legislatures subject to the provisions of the Constitution. Until any such laws were enacted, the services were to be regulated by rules made by the President or the Governor as the case may be.

Article 310 laid down the principle that every Government employee-in a defence service or a civil service-held his office during the pleasure of the President or the Governor. It was, however, possible to provide in special cases by contract to pay

compensation for early termination of service. Besides, there were special constitutional safeguards in case of certain high functionaries like the judges of the Supreme Court and High Courts, the Chief Election Commissioner, Comptroller and Auditor-General, members of the Public Service Commissions, etc. who could not be removed from their offices except in the manner laid down in relevant Articles (124,217,317,324 etc.). Also, separate provisions were made for regulating the recruitment and conditions of service of certain categories of public servants, *e.g.* officers and staff of Legislature Secretariats (Articles 98 and 187), employees of the Supreme Court and the High Courts (Articles 146 and 299) and persons serving the Indian Audit and Accounts Department (Article 148). Article 309 did not apply to them.

Article 311 sought to place certain limitations on the exercise of the pleasure principle in respect of civil servants. Thus, no civil servant could be dismissed or removed by an authority subordinate to the appointing authority and no civil servant could be dismissed or removed or reduced in rank except after an enquiry informing him of the charges against him and giving him a reasonable opportunity of being heard in respect of those charges. The protection was not available to defence employees and even in case of civil employees it did not apply if the penalty was any other than dismissal, removal or reduction in rank. The Article, however, made no distinction between a person holding a temporary post and one holding a permanent post.[89]

It has been held that the protection extended by Article 311 is only procedural in nature and not substantive. No remedy may lie if all the procedural requirements have been meticulously fulfilled. In the main these requirements are (a) that specific charges must be framed against a civil servant proposed to be proceeded against; (b) the charges must be formally conveyed; (c) he must be provided a reasonable opportunity of answering the charges; (d) he must be given an opportunity of defending himself by cross examining the witnesses and adducing all evidence on which he relies; and (e) the decision in the matter must be based on the facts and materials placed before the enquiring authority and no materials should be relied upon without the civil servant concerned having an opportunity to examine and explain them. The basic principle is that the enquiry must follow rules of natural justice.[90]

Article 311, it has been held, would not be attracted if there are no penal

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89. Narasimhachar v. State of My sore, AIR 1960 SC 247; Parshotam v. Union of India, AIR 1958 SC 36; State of Punjab v. Ram, AIR 1992 SC 2188.
90. Union of India v. Verma, AIR, 1957 SC 882.

consequences like loss of salary, allowances or pension accompanying the action against him. Whatever the words used, if these amount to removal or dismissal, the Article would apply. If the services are terminated in accordance with the terms of the contract or on superannuation or by way of compulsory retirement as per procedure for the same, Article 311 would not provide any protection. In case of reduction of rank also, the test is whether any penal consequences are involved. A person holding a post in a substantive capacity cannot be brought down to a lower post without following the Article 311 procedure of enquiry, etc. But, if it is reversion to the substantive post from an officiating one, it is not reduction in rank for purposes of Article 311 unless there are any penal consequences.[91]

The Supreme Court has, however held that the Government before deciding to retire a Government employee compulsorily from service, have to consider his entire record including the latest reports.[92]

The enquiry contemplated in Article 311 may, however, be dispensed with in certain cases like (a) when the person has been convicted on a criminal charge; (b) where the appropriate authority records in writing reasons for the enquiry not being practicable; (c) when the President or the Governor as the case may be is satisfied that in the interest of the security of the State it is not expedient to hold such an enquiry.

All India services are distinguished from Central and State services inasmuch as members of Central services are concerned with only the affairs of the Union and those of State services with State matters while members of the All India services are common to the Union and the States and serve by turns both the Union and State Governments. Two All India services-the Indian Administrative Service and Indian Police Service-are mentioned in the Constitution itself. Article 312 lays down that if Rajya Sabha passes a resolution by two-thirds majority to the effect that it is necessary or expedient in national interest to create one or more all India services, including All India Judicial Service, Parliament may by law provide for such services. Parliament has under this Article enacted the All India Services Act, 1951 creating certain all India Services in addition to the IAS and the IPS which had been already created in 1948. Article 312 also empowers Parliament to regulate the recruitment and conditions of service of persons appointed to All India services.

Article 312A inserted by the Constitution (28th Amendment) Act, 1972 empowers Parliament to vary or revoke

91. Parshotam v. Union of India.
92. State of Orissa v. Ram Chandra Dass, AIR 1996 SC 2436.

conditions of service of persons appointed to the Civil Service of the Crown in India before the commencement of the Constitution. Article 313 contains a transitional provision saying that until otherwise provided, all the laws in force applicable to any public service would continue. Article 314 which sought to provide protection to existing officers of certain services was repealed by the 28th Amendment.

Public Service Commissions

Article 315 lays down that there shall be a Public Service Commission for the Union and a Public Service Commission for each State. Two or more States may opt for a Joint Commission. On request, the Union Service Commission may also agree to serve all or any of the needs of a State.

The Public Service Commissions are envisaged as independent constitutional institutions not subject to governmental or political interference or control and charged with the responsibility of recruitment and management of public services. All expenses of the Union and State Service Commissions are charged on the Consolidated Fund of the Union or the State concerned (Article 322).

The Chairman and members of the Public Service Commissions are appointed by the President or the Governor as the case may be. As nearly as may be, half of the members must have had ten years' service in the Union or a State Government. Members shall hold office for a fixed term of six years or until the age of 65 in case of the Union and 62 in case of the State Commissions. A Commission member is not removable from his office except in case of insolvency, infirmity of mind or body, on engaging in another paid employment or on being found by the Supreme Court guilty of proved misbehaviour, for having an interest in a Government contract or sharing the profits of any such contract or agreement. Member of a Public Service Commission on expiration of his term of office is ineligible for reappointment to that office (Articles 316 317).[93]

Article 318 provides that the terms and conditions of service of a member of the Commission cannot be varied to his disadvantage after his appointment. The President or the Governor as the case may be may determine the number of members and staff of the Commission and regulate their conditions of service.

Members of the Commissions are not eligible for any other appointment under the Government. [94] The Chairman of a State Commission can become a member or chairman of UPSC or chairman of another State Commission. A member of the UPSC is

[93]. U.P. Public Service Commission v. Suresh, AIR 1-987 SC 1953; Hargovind v. Raghukul, AIR 1979 SC 1109

[94]. Union of India v. U.D.Dwivedi, AIR 1997 SC 1313.

eligible to become chairman of UPSC or of a State Commission and a member of a State Commission is eligible to become a member or chairman of UPSC or any State Commission (Article 319).

The functions of Public Service Commissions are:

i. to conduct examinations for appointment to the services of the Union/State;
ii. to make recommendations to the Union/State Government for appointment of persons to its services;
iii. to be consulted in regard to method of recruitment, principles in matters of appointments, promotions, transfers from one service to another, and disciplinary matters of civilian employees;
iv. to advise on any other matter that may be referred by the President/ Governor;
v. on request to assist two or more States in regard to schemes for joint recruitment;
vi. to present an annual report to the President/Governor who shall cause it\to be laid before Houses of Parliament/State Legislature;
vii. any other function that Parliament/State Assembly may by law assign.

The Supreme Court has held that the function of the Commission is purely advisory and if the Government fails to consult it in any matter specified for consultation, a public servant affected thereby cannot expect a remedy in a court of law under Article 320. But where consultation is provided for by law or regulation, it will constitute a legal obligation (Articles 320 321 and 323).[95]

Administrative tribunals

The Constitution (Forty-Second Amendment) Act, 1976 inserted a new part-Part XIV A-and Articles 323A and 323B to empower Parliament and State Legislatures to set up by law administrative tribunals for the adjudication of disputes and complaints in all service matters relating to recruitment and conditions of service of public employees. Tribunals may also be set up for certain other matters like taxation, labour and industry, land reforms, elections, rent laws etc. Several such tribunals have since been set up, excluding the jurisdiction of certain level of Courts. Thus the Administrative Tribunals Act 1985 setting up tribunals for resolving service disputes takes away the jurisdiction of High Courts while appeal lies to the Supreme Court under Article 136 only.[96] In L. *Chandra Kumar v. Union of India* (AIR 1997 SC 1125) it was held that clause 2 (d) of Article 323 A and clause 3 (d) of Article 323 B are

[95]. State of U.P. v. Srivastava, AIR 1957 se 912; State of U.P. v. Rajasthan, AIR 1988 SC 162; Keshav v. U.P. HESC, (1985) SCC 671; Neelima v. State of Haryana, AIR 1987 SC 169.

[96]. Sampath v. Union of India, AIR 1987 SC 386; Tamilmani v. Union of India, AIR 1992 SC 1120

unconstitutional to the extent that they exclude the jurisdiction of the High Courts and the Supreme Court.

Administrative Reforms

The Constitution Commission (NCRWC-2002) considered all those matters in depth and made recommendations of far-reaching importance. These included:

1. The questions of personnel policy including placements, promotions, transfers and fast-track advancements on the basis of forward-looking career management policies and techniques should be managed by autonomous Personnel Boards for assisting the high level political authorities in making key decisions.
2. Above a certain level-say the Joint Secretary level-all posts should be open for recruitment from a wide variety of sources including the open market.
3. Officials, before starting their career, in addition to the taking of an oath of loyalty to the Constitution, should swear to abide by the basic principles of good governance.
4. The constitutional safeguards have in practice acted to shield the guilty against swift and certain punishment for abuse of public office for private gain. A major corollary has been erosion of accountability. It has accordingly become necessary to re-visit the issue of constitutional safeguards under Article 311 to ensure that the honest and efficient officials are given the requisite protection but the dishonest are not allowed to prosper in office. A comprehensive examination of the entire concept of administrative jurisprudence has to be undertaken to rationalize and Simplify the procedure of administrative and legal action and to bring the theory and practice of security of tenure in line with the experience of the last sixty years.
5. The civil service regulations need to be changed radically in the light of contemporary administrative theory to introduce modem evaluation methodology.

6. ELECTIONS AND ELECTION COMMISSION

(Articles 324 to 329A)

The biggest revolution since the Independence of the country was the adoption of universal adult franchise for elections to the Lok Sabha and the Legislative Assemblies of the States. In a newly independent country with appalling backwardness, dismal poverty and rampant illiteracy, it was an act of faith for the founding fathers to give a vote to every citizen who was not less than 21 years of age (since reduced to 18) and not otherwise

disqualified under any law on grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice (Article 326).

Article 324 provides for a single Election Commission to superintend, direct and control all elections to Parliament and to the State Legislatures and to the offices of the President and the Vice-President. The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix. When any other Election Commissioners are appointed, the Chief Election Commissioner shall act as the Chairman. Until 1989, The Election Commission consisted of the Chief Election. Commissioner only. On 16 October 1989 two Election Commissioners were appointed by a Presidential notification. In less than three months, however the notification was revoked and the Election Commission reverted with effect from 2 January 1990 to being a single member body. It was held by the Supreme Court that it was entirely for the Executive to decide on the need of Election Commissioners other than the Chief Election Commissioner and that the termination of the services of two Election Commissioners on the abolition of the posts was therefore valid.[97] Again, in October 1993 two Election Commissioners were appointed and by an ordinance given the same position and status as the Chief Election Commissioner. Also, the Commission was required to act as a body taking decisions unanimously or by majority. The ordinance challenged unsuccessfully by the Chief Election Commissioner before the Supreme Court, was replaced by the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Act 1994. It was assented to by the President on 4 January 1994 and given retrospective effect from 1 October 1993.

Article 324 also provides for the appointment of Regional Commissioners at the time of General Elections after consultation with the Chief Election Commissioner. The Chief Election Commissioner cannot be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court and the conditions of his service cannot be varied to his disadvantage after his appointment. Other Election Commissioners, if any, can be removed only on the recommendation of the Chief Election Commissioner.

Article 325 lays down that there shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of a State Legislature. No person is to be ineligible for inclusion in the electoral roll on grounds of religion, race, caste or sex, nor can anyone claim to be included in any special electoral roll for any such constituency on any such ground.

[97]. Dhanoa v. Union of India, AIR 1991 SC 1745.

Article 327 vests legislative power in Parliament to make laws relating to all matters concerning elections to either House of Parliament or to the House or either House of a State Legislature, including the preparation of electoral rolls, the delimitation of constituencies and all other matters "necessary for securing the due constitution of such House or Houses".

Article 328 confers powers on State Legislatures to make laws relating to elections to the House, or either House of a State Legislature.

Article 329 seeks to bar interference by courts in electoral matters including (i) the validity of any law relating to delimitation of constituencies or the allotment of seats under Article 327 or 328 and (ii) election to either House of Parliament or a State Legislature. The latter can be questioned only by an election petition presented to such authority and in such manner as may be provided by law by the concerned legislature. Under the Representation of the People Act, the power to decide election disputes now vests in the High Courts with a right of appeal to the Supreme Court. Disputes relating to the election of the President or Vice-President are, however, to be settled by the Supreme Court.

Electoral Reforms

During the last six decades, 15 general elections for Lok Sabha and very large number for different State Assemblies have been held. By an large, these have been free and fair and have earned national and international acclaim. But, right from the first general election [1951-52] the need for electoral reforms has been the subject of wide ranging debates. Practically every report of the Election Commission has contained reform proposals and every successive Chief Election Commissioner has applied his mind to this matter. The recommendations of the all party Dinesh Goswami Committee on Electoral Reforms set up in 1990, also found wide support. For its part, the Lok Sabha unanimously passed a resolution on electoral reforms, moved by L.K. Advani, which based itself to an extent on the above Committee's recommendations. The Indrajit Gupta Committee (1998) was most particular about the all party agreement on State funding of elections. The Election Commission reacted to the electoral reform proposals that were sent by the Vajpayee Government for its comments. Also, the Commission made its own proposals.

The Law Commission published a voluminous report containing comprehensive reform proposals. NCRWC made an in-depth study of the problem. Report of NCRWC came at the end of March 2002. Before the government could get over the usual bureaucratic delays and insensitive ways of dealing with reports of such Commissions, the Supreme Court pronounced its judgement on a public interest petition on 2 May 2002. In its operative part, the judgment directed the Election Commission to work out within two

months modalities to call for information on affidavit from all candidates seeking election to Parliament or a State Legislature in regard to:

(a) whether the candidate had any conviction, acquittal or discharge on a criminal offence in the past, punishment or fine, if any, imposed;

(b) whether during the six months preceding the nomination, the candidate was accused of any offence punishable with imprisonment for two years or more and charges were framed ,by a court of law with details thereof;

(c) movable, immovable assets including bank balances etc of the candidate, spouse and dependents;

(d) liabilities, if any, particularly if there are any over dues of public financial institutions or government dues;

(e) educational qualifications of the candidate.

The Supreme Court, inter alia held: Fair election contemplates disclosure by the candidate of his past including the assets held by him so as to give a proper choice to the voter according to his thinking and opinion. If on affidavit a candidate is required to disclose the assets held by him at the time of election, voter can decide whether he could be re-elected even in case where he has collected tons of money.

To maintain the purity of elections and in particular to bring transparency in the process of elections, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of elections would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.

The right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy.

Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters' speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is must. Voter's right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law breakers as law makers.

The Election Commission referred the Supreme Court Directive to the government (Ministry of Law) on 14 May 2002 for considering necessary action by way of legislation or amendment of Rules regarding nomination papers. The government called an All Party meet to consider the matter on 8 July.

Since the two month limit was expiring, the Election Commission on 28 J lme issued its order which not only called for the information on the lines indicated by the court but also provided for the Returning Officers having the power to reject any nomination on the ground of the candidate not furnishing the required information or giving incomplete information.

The All-party meeting, attended by leaders of 21 parties, as was to be expected, reached a consensus strongly against some of the sought for disclosures in regard to educational qualifications, assets and liabilities etc. and arming the Returning Officers with discretionary powers to reject nomination papers for none or wrong disclosures. After the All party agreement on a draft legislation and all the drama on the issue of an ordinance, the representations made to the President and his returning the ordinance to seek some clarifications, the President finally signed it and the ordinance was issued. The ordinance provided for disqualification of.a candidate who had been charge-sheeted in two courts involving the heinous crimes of murder, rape, drug smuggling, kidnapping for ransom, treason, terrorist act leading to death etc. during a period of six months prior to the filing of the nomination.

On 4 October 2002, the Union Cabinet approved amendments to the effect that (1) besides those charged with crimes like murder and rape, those charged under the Prevention of Corruption Act or Prevention of Terrorism Act would also be covered by disqualification, and that (2) disqualification would be for a period of six years from the date of release. Thus the anomaly of a person being able to seek election while serving a prison sentence would be removed.

The Supreme Court put its foot down and reiterated its earlier directives regarding disclosure of full information by the candidates.

The entire question of electoral reforms is embroiled in political controversies and party considerations. The main problems are:

1) the high cost of elections and the question of finding legitimate funds;
2) the role of money, muscle and mafia power and electoral malpractices;
3) the scourge of communalism, casteism, criminalization and corruption;
4) hung legislatures, instable governments and too frequent elections;
5) the large size of constituencies and the question of representative character of legislators when under the first past the post system majority of them are elected by minority of votes cast;
6) absence of ideology-based healthy party system and the prevalence of a large number of parties without any internal party democracy;
7) Non-participation of people in selection of candidates.

While most of the needed reforms may not impact constitutional provisions and may be

matters for political consideration, consensus building, legislative action and administrative implementation, all these need to be examined in the context of the scheme of the Constitution, the nature of the polity and proposals for constitutional review.

CRIMINALISATION OF POLITICIANS AND POLITICAL PARITES

The significant development of criminalization of politicians and political parties raise public and court's alarm at the unimpeded rise of criminals, often facing heinous charges like rape and murder, encroaching into the country's political and electoral scenes.

So, the Supreme Court on 13th Feb. 2020 ordered political parties to publish the entire criminal history of their candidates for Legislative Assembly and Lok Sabha elections along with the reasons that goaded them to field suspected criminals over decent people.

The four-page judgment was based on a contempt petition filed by advocate Ashwini Upadhyay about the general disregard shown by political parties to a 2018 Constitution Bench judgment (Public Interest Foundation v. Union of India) to publish the criminal details of their candidates in their respective websites and print as well as electronic media for public awareness. "In this judgment (2018), this court was cognisant of the increasing criminalisation of politics in India and the lack of information about such criminalisation among the citizenry", Justice Nariman observed.

Justice Nariman wrote in his the judgment that "It appears that over the last four general elections, there has been an alarming increase in the incidence of criminals in politics. In 2004, 24% of the Members of Parliament had criminal cases pending against them; in 2009, that went up to 30%; in 2014 to 34%; and in 2019 as many as 43% of MPs had criminal cases pending against them". He ordered political parties to submit compliance reports with the Election Commission of India within 72 hours or risk contempt of court action.

Information should be detailed

- The published information on the criminal antecedents of a candidate should be detailed and include the nature of their offences, charges framed against him, the court concerned, case number, etc.
- A political party should explain to the public through their published material how the "qualifications or achievements or merit" of a candidate, charged with a crime, impressed it enough to cast aside the smear of his criminal background.
- A party would have to give reasons to the voter that it was not the candidate's "mere winnability at the polls" which guided its decision to give him ticket to contest elections.

Vacation of Seats: Article 101 lays down that a member shall be required to vacate his seat in a House if he is elected to both Houses of Parliament or to a House of State Legislature. In the latter case, if the member does not resign his seat in the State Legislature within a period of 14 days from the date of publication of the election result, his seat in the House of Parliament may be declared vacant. A seat may also stand vacated if a member becomes subject to any disqualification or voluntarily resigns his seat. The House may declare a seat vacant if the concerned member fails to attend the House for more than 60 days without permission.

This information should be published in a local as well as a national newspaper as well as the parties' social media handles. It should mandatorily be published either within 48 hours of the selection of candidates or less than two weeks before the first date for filing of nominations, whichever is earlier.

MODULE - 08

OTHER CONSTITUTIONAL PROVISIONS

1. BORROWING (Articles 292 to 293)

The executive power of the Union extends to borrowing upon the Consolidated Fund of India within limits, if any, set by Parliament by law (Article 292). A State could also similarly borrow subject to limits set by law by the State Legislature. Government of India, within its borrowing powers, could make loans to any State or give guarantees in respect of loans raised by the State. So long as any of such loans remained outstanding, the State Government could not raise any further loans without consent of Government of India (Article 293).

2. PROPERTY, CONTRACTS, RIGHTS, LIABILITIES, OBLIGATIONS AND SUITS (Articles 294 to 300)

Articles 294, 295 and 296 provide that any property, assets, rights, liabilities and obligations vesting in or accruing to the Government of the Dominion or of any of the Provinces or of any of the Indian States before the commencement of the Constitution shall vest in the Union or the concerned State.

Things of value within territorial waters or continental shelf and resources of the exclusive economic zone shall vest in the Union (Article 297).

The executive power of the Union and of each State shall extend to carrying on any trade or business and to acquire, hold or dispose of property and make contracts subject to any law made by the respective legislature (Article 298). This Article obviously is an independent or additional source of executive power outside Article 245. The Supreme Court in Khazan Singh v. State of U.P. (AIR 1974 SC 669) Held that the power of a State under Article 298 to carryon trade etc. extends to carrying on a trade in other States also.[98]

All contracts made in the exercise of the executive power of the Union or of a State (i) are to be expressed in the name of the President or the Governor as the case may be and (ii) shall be executed by such officers and (iii) in such manner as may be laid down by him. No personal liability is to attach to the President or the Governor or to the persons executing the contracts etc. (Article 299). It clearly follows that Article 299 is mandatory and no contracts etc. are valid unless they are entered into strictly in accordance with the requirements of this provision.[99]

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98. Also see Anraj v. State of Maharashtra, AIR 1984 SC 781
99. Bihar F.G.F. Cooperative Society v. Sipahi Singh, AIR 1977 SC 2149; Mu/anchand v. State of M.P., AIR 1968 SC 1818; State of West Bengal v. B.K.

The Government of India or of a State may sue or be sued by its name subject to any law made by Parliament or the State Legislature. If the Dominion of India was a party in any suit, the Union of India will stand substituted and if a Province or Indian State was a party it will be substituted by the corresponding State (Article 300).

Right to Property: Originally the Constitution had incorporated the right to property as a fundamental right under Articles 19(£) and 31. The 44th Constitution Amendment omitted Articles 19(f) and 31 with effect from 20 June 1979. Simultaneously, a new Article-Article 300Awas added to lay down that "no person shall be deprived of his property save by authority of law". Thus, the right to property ceased to be a fundamental right but remained a constitutional right and a legal right. In case of the violation of the right under Article 300A, while the Supreme Court's writ jurisdiction under Article 32 cannot be invoked, High Court can certainly be approached under Article 226. Validity of a law passed under Article 300A can be challenged on the ground of no provision being made for payment of compensation for depriving a citizen of his property.[100]

3. FREEDOM OF TRADE, COMMERCE AND INTERCOURSE

(Articles 301 to 307)

Article 301 lays down that trade, commerce and intercourse throughout the territory of India shall be free. Parliament may, however, impose by law restrictions in public interest on inter-State trade, commerce and intercourse (Articles 301 and 302). Neither Parliament nor a State Legislature can make a law that gives preference to one State over another in the matter of trade and commerce except that Parliament may by law authorize discrimination that may become necessary for dealing with a situation of scarcity of goods in any part of India (Article 303).

Regulatory measures or a compensatory legislation imposing tax for facilitating trade cannot be considered violative of the freedom of trade. Both intra State and inter State trade are covered by the freedom of trade provision. Trade, commerce and intercourse include movement of goods and persons.[101]

Freedom of trade etc. under Article 301 is subject to restrictions under Articles 302 and 303. Also, under Article 304, a State may impose a tax on goods coming from another State if similar goods from within the State are subject to a similar tax so as to ensure that there

Mondal, AIR 1962 SC 779; Karamshi v. State of Bombay, AIR 1964 SC 1714.

100. Bishamber v. State of U.P., AIR 1982 SC 33; Maneka Gandhi v. Union of india, AIR 1978 SC 597. Also see under Fundamental Rights

101. Atiabari Tea Ca. v. State of Assam, AIR 1961 SC 237; Automobile Transport v. State of Rajasthan, AIR 1962 SC 406; State of Bihar v. Harihar Prasad Debuka (1989) 2 SCC.

is no discrimination between the goods from the other State and those manufactured within the State. Restrictions may also be imposed by the State by law in public interest but a Bill for this purpose can be introduced only with the prior sanction of the President. Nothing in Articles 301 and 303 shall affect the existing laws and laws providing for State monopolies (Article 305).

Article 307 provides for the Parliament appointing an appropriate authority for implementing the provisions of Articles 301 to 304.

The Constitution Commission (NCRWC) recommended that for carrying out the objectives of Articles 301, 302, 303 and 304, and other purposes relating to the needs and requirements of inter-State trade and commerce and for purposes of eliminating barriers to inter-State trade and commerce Parliament should, by law, establish an authority called the "Inter-State Trade and Commerce Commission"

4. OFFICIAL LANGUAGE

(Articles 343 to 351)

Although there is a separate Part-Part XVII-devoted to 'Official Language', provisions pertaining to language are spread over different parts and chapters of the Constitution.

Protection of Linguistic Minority Rights and Non-Discrimination on Grounds of Religion

Article 29 enunciates the fundamental right of any section of citizens residing anywhere in India to conserve its distinct language, script or culture. No citizen can be denied admission in any educational institution maintained or aided by the State on grounds of language, religion, etc. Article 30 seeks to protect the rights of all minorities-based on religion or language-to establish and administer educational institutions of their choice. The State is enjoined not to discriminate against any educational institution on the ground of its language or religion-based management. (See under the 'Fundamental Rights' chapter).

Article 350A inserted by the Seventh Amendment provides for local authorities in every State endeavoring to extend adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups and for the President issuing necessary directions to any State. The term 'linguistic minority group' has been interpreted to mean a group of people who are in a numerical minority in a State as a whole as distinguished from any particular area or region thereof.[102]

Article 350B provides for the appointment by the President of a special officer for linguistic minorities to investigate matters concerning safeguards for linguistic minorities and to report to the President at such intervals as the President may direct. All such reports may

[102]. In re Kerala Education Bill, AIR 1958 SC 956

be laid before Houses of Parliament and sent to the State Governments concerned.

Language of Legislatures

Article 120 lays down the official language of Parliament. It says inter alia that the business in Parliament shall be transacted in Hindi or in English. The Presiding Offi.cer of either House may, however, permit any member who cannot adequately express himself in Hindi or English to address the House in the mother tongue. Arrangements have since been made in both the Houses of Parliament for simultaneous interpretation of speeches from major regional languages into Hindi and English. In actual practice, however, most of the time, the entire business in either House is carried on in Hindi or English with full facilities of simultaneous interpretation from Hindi to English and vice versa.

The corresponding language provision for State Legislatures is Article 210. Business in a State Legislature may be transacted either in the official language or languages of the State or in Hindi or in English and the Presiding Officer of a House may allow a member who cannot adequately express himself in any of these languages to address the House in his mother tongue.

Official Language of the Union

Of the many formidable problems that the founding fathers of our Constitution faced, the question of establishing any one of our languages as a national language or even as an official language of the Union proved to be the most intractable. Finally, under a compromise formula embodied in Article 343, Hindi in Devanagari script was accepted as the official language of the Union with the international form of Indian numerals. For a period of 15 years, English was allowed to be continued to be used and even thereafter Parliament could by law provide for the use of English or Devanagari form of numerals for any specified purposes.

Article 344 provided for the setting up of a Commission after five years and thereafter every ten years to make recommendations to the President as to (i) the progressive use of Hindi f6r official purposes, (ii) restricting the use of English for official purposes, (iii) the language to be used in the Supreme Court and the High Courts, (iv) form of the numerals to be used and (v) any other matter regarding the official language of the Union and the language of communication between the Union and a State or between the States. The Commission was expected to pay due regard to the needs of industrial, cultural and scientific advancement of India and the just claims and interests of the non-Hindi speaking areas in regard to public services.

Article 344 also provide for the constitution of a 30 member committee of the members of the two Houses of Parliament to examine the recommendations of the Commission and to report to the President who could issue necessary directions thereon. Under

Article 349, no Bill or amendment in regard to language was to be allowed except after consideration of this committee report by the President. The first Official Language Commission was appointed in 1955. It submitted its report in 1956. The report was examined by the Committee of the members of the two Houses of Parliament and its opinion submitted to the President who issued an order on 27 April 1960 constituting a Standing Commission for evolution of Hindi terminology for scientific, administrative and legal literature and the translation of English works into Hindi. Actually, under this order, two Commissions were constituted, one under the then Ministry of Education and the other under the Ministry of Law, to evolve Hindi equivalents. The order inter alia provided for continuance of English as the medium of UPSC examinations with Hindi being introduced later as an alternative medium. Parliamentary legislation was to continue to be in English but authorized Hindi translations were to be provided.

As a follow-up of the report of the First Official Language Commission and under Article 343, Parliament enacted the Official Language Act, 1963. The Act laid down that even after 15 years, English may continue to be used along with Hindi for all official purposes of the Union and also for transaction of business in Parliament.

Hindi was introduced as an alternative medium for UPSC examinations in certain subjects. Later, candidates were given the option to write their answers in anyone of the recognized languages specified in the 8th Schedule.

Regional Languages and Link Language

Article 345 seeks to tackle the issue of the official language for each State and the language for inter-State communication at the governmental level The legislature of a State may by law adopt anyone or more of the languages in use in the State or Hindi for all or any of the official purposes and until that is done, English may continue to' be used as hithertofore. The language authorized to be used as the official language of the Union shall be ,the official language for communication between the States and between a State and the Union. But, two or more States were free to agree to use Hindi for communication between themselves (Article 346).

If a substantial proportion of the population of a State demand and the President is satisfied, he or she may order that the language used by them may also be officially recognized throughout the State or in any part thereof for such purposes as may be specified.

The 1963 Official Language Act provided that for purposes of communication between the Union and the non Hindi states, English shall be used and where Hindi is used for communication between a Hindi and a non-Hindi State, such communication shall be accompanied by an English translation.

Language of Higher Courts and Authoritative Texts of Laws etc.

Until Parliament by law provides otherwise, all proceedings in the Supreme Court and in every High Court are to be in English. Also, the authoritative texts of all Bills, amendments, Acts, ordinances, orders, rules, regulations and bye-laws at the Union and State levels have to be in English only. However, the Governor of a State may with the prior consent of the President, authorize the use of Hindi or any language used for any official purposes of the State in the proceedings of the High Court of the State provided that the judgments, decrees and orders must continue to be in English. (Article 348).

The 1963 Official Language Act, provided that Hindi translation of Acts etc. published under the authority of the President shall be deemed to be authoritative and that every Bill or amendment shall be accompanied by a Hindi translation.

The 1963 Act similarly provided for a Hindi translation of State Acts etc. in certain cases. For High Court judgments etc., the Act provided for the optional use of Hindi or other official language subject to the Governor obtaining the prior consent of the President and an English translation accompanying the judgment etc.

Language of Public Grievances

Article 350 made the very significant provision that every person, i.e. not only a citizen, was entitled to submit a representation for redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be. Thus, no government department, agency or officer can refuse to entertain a representation on the ground of its not being in the official language.

Development of Hindi

Under Article 351, the Union is duty bound to promote the spread and development of the Hindi language so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in other languages of India specified in the Eighth Schedule and by drawing, where necessary or desirable, its vocabulary, primarily on Sanskrit and secondarily on other languages.

A harmonious reading of the language provisions, particularly of Articles 343, 344 and 351, would show that the ultimate goal is the spread and development of Hindi and the gradual switchover to its use for official purposes and as a link language. There is no violation of Article 351 if use of English is extended beyond 15 years but the power given to Parliament under Article 343 is only to specify the particular purposes for which English may continue to be used by the Union depending upon the progress made by Hindi as

the official language.[103] In Dalavi v. State of Tamil Nadu (AIR 1976 S.C. 1559), the Supreme Court annulled an order of the State Government sanctioning pension to anti-Hindi agitators. The Court held that the order violated Article 351inasmuch as it excited emotion against Hindi instead of promoting it.

Authorized Hindi Text of the Constitution

A new Article 394A inserted by the 56th Amendment Act provided for an authoritative text of the Constitution in the Hindi language. An authoritative Hindi text of the Constitution has since been published.

The Eighth Schedule

Besides Hindi, our Constitution also recognizes other languages and the need for their development. The 22 languages of India listed in the Eighth Schedule are: Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Sindhi, Tamil, Telugu, Urdu, Bodo, Dogri, Maithili and Santhali. The last four were added by the Constitution (92nd Amendment) Act, 2013.

[103]. Union of India v. Murasoli, AIR 1977 SC 225

MODULE - 09
EMERGENCY PROVISIONS
GROUNDS, APPROVAL FOR CONTINUATION AND EFFECTS

The term 'emergency' may be defined as 'a difficult situation arising suddenly and demanding immediate action by public authorities under powers specially granted to them by the Constitution or otherwise to meet such exigencies'.

The founding fathers of our Constitution felt that extraordinary situations could arise under which it might not be possible for the normal scheme of the Constitution to function and it might become necessary to suspend the operation of certain parts or provisions to protect the independence and the security of the nation and to safeguard the Constitution and the democratic system.

Dr. Ambedkar claimed that the Indian federation was unique and unlike any other federation inasmuch as in times of emergency it could convert itself into an entirely Unitary State. The position was upheld by the Supreme Court in Gulam Sarwtar v. Union of India[104].

Briefly, the Emergency provisions of the Constitution envisage two kinds of emergencies, viz. (i) a national emergency under Article 352 due to threat of war, external aggression or armed rebellion and (ii) financial emergency under Article 360. The third kind of situation, that is, the one under Article 356 arising from a failure of the constitutional machinery in any particular State and necessitating President's rule, though included under the Part on 'Emergency Provisions', may not strictly speaking be considered an emergency situation.

I. NATIONAL EMERGENCY

Article 352 provides that if the President, after receiving a written communication of a Cabinet decision, is satisfied that a grave emergency exists whereby the security of India or any part thereof is threatened by war, external aggression or armed rebellion, he may issue a proclamation of emergency for the whole of India or part thereof. He may also issue different proclamations on different grounds. Every Proclamation of Emergency is required to be laid before each House of Parliament, and is to cease to operate at the expiration of one month from the date of its issue by the President unless in the meantime it has been. approved by resolutions of both the Houses. However, once-approved by Parliament, the Proclamation may continue in operation for six months at a time unless revoked by the President earlier by a subsequent Proclamation. Resolutions approving the Proclamation of Emergency or its continuance have to be passed

[104]. AIR 1967 SC 1335

by either House of Parliament by a majority of the total membership and not less than two-thirds of those present and voting. Also, if the Lok Sabha passes a resolution disapproving the proclamation or its continuance, it shall be revoked forthwith. If notice of a resolution signed by not less than one tenth of the total membership is given to the President/Speaker, a special sitting of the House shall be held within 14 days to consider it.

Article 353 read with Article 365 provides that once Emergency is proclaimed, the executive power of the Union extends to giving of directions to any State in regard to the exercise of the executive powers of the State and failure to comply with the directions would constitute enough justification for imposition of President's rule under Article 356.

During the operation of Emergency, the legislative power of Parliament also extends to conferring powers and imposing duties by law on Union authorities in matters not otherwise included in the Union List.

Under Article 354, the application of provisions relating to distribution of revenues (Articles 268 to 279) may be suitably modified during the period of the operation of Emergency. Article 358 provides for the suspension of the provisions of Article 19 during emergencies while Article 359 authorizes the President to suspend by order the enforcement of all the fundamental rights guaranteed in Part III of the Constitution except the rights of. protection in respect of conviction for offences and protection of life and liberty in Articles 20 and 21.

The effect of the exercise of powers under Articles 358 and 359 is that not only the legislature but also the executive can interfere with the fundamental rights of individuals except those under Articles 20 and 21.

Any law passed under Articles 358 and 359 in order to be valid must contain a recital to the effect that it is in relation to the Proclamation of Emergency in operation. Also, all such laws shall cease to have effect to the extent of incompetency under the Fundamental Rights as soon as the Emergency ceases or the Presidential order ceases to have effect.

There have been three proclamations of national emergency in India-in October 1962 at the time of the Chinese aggression, in December 1971 in the wake of the war with Pakistan and in June 1975 on grounds of internal disturbance. The first proclamation issued in October 1962 continued till January 1968. The second proclamation issued in December 1971 lasted till March 1977. The their proclamation issued in June 1975 while the second was still in operation was also revoked in March 1977 with the second. Since the, there has been no proclamation of emergency. During the periods of Emergency, extraordinary powers were assumed by the Union Government under several laws and constitutional amendments passed by Parliament.

There was widespread criticism of the misuse of powers during the period of internal emergency. In the general elections that followed, the ruling Congress (I) under the leadership of Indira Gandhi lost and a Janata Party Government was formed.

Before the 44th Constitution Amendment, state of emergency could be declared under Article 352 throughout the entire country only. The Amendment made it possible to cover only a part of the country, as may be deemed necessary, under emergency. Also, the provisions of Article 352 were made more stringent in 1978-79 by the Constitution (44th Amendment) Act, 1978 which came into effect from 20 June 1979. To prevent the misuse of emergency provisions, the words 'armed rebellion' were substituted for 'internal disturbance', a written communication of the decision by the Union Cabinet was made an essential pre condition for the issue of a Proclamation by the President, and the entire procedure for emergency provisions was streamlined to ensure dependence on approval of Parliament, particularly of the Lok Sabha. The Amendment made it possible for the President to modify the proclamation without revoking it subject to approval of Parliament. Thus, the Amendment confined the suspension of Article 19 only to situations of war or external aggression, i.e. where emergency was proclaimed on internal grounds of ' armed rebellion', freedoms under Article 19 could not be taken away. Also, the same amendment laid down that under no circumstances could the enforcement of rights under Articles 20 and 21 be denied even during an Emergency.

Several cases involving emergency provisions were decided by the Supreme Court before the 1978 amendment. These dealt with matters arising during periods of the first and second Emergencies proclaimed in 1962 and 1971. The Court upheld the Presidential order suspending the right of a citizen to move the Court to enforce the provisions of Articles 21 and 22.[105] In Makhan Singh v. State of Punjab[106] the Court tried to balance the fundamental rights of the citizens with the Emergency provisions and the needs of the security of the State. While conceding that if national security is in peril, individual rights must give way to the State, the Court said:

How long the Proclamation of Emergency should continue and what restrictions should be imposed on the fundamental rights of citizen~ during the pendency of the emergency, are matters which must inevitably be left to the executive because the executive knows the requirements of the situation and the effect of compulsive factors which operate during periods of grave crises.

But, the Court also held that it had the power to judge and examine the validity of emergency legislation under which persons were

[105]. Mohan Chowdhury v. Chief Commissioner, AIR 1964 SC 173.
[106]. AIR 1964 SC 381

detained with mala fide intentions or under excessive delegation of powers to the executive. In another case, the Court upheld the validity of the statute which invested the executive with drastic powers and observed that the power to detain without trial was basically an executive act not subject to judicial review.[107] In State of Maharashtra v. Prabhakar Pandurang Sanzgiri[108], the Court upheld the liberty of a detenu to send his book outside the jail for publication since there was no nexus between the Government order preventing it and the purpose of the enforcement of emergency rules. The stand was reiterated in K. Ananda Nambiar v. Chief Secretary [109] where Justice Gajendragadkar asserted that even during the operation of emergency, in considering the effect of a Presidential order suspending the enforcement of fundamental rights, the order should be strictly construed in favour of the citizen's fundamental rights. In Ram Manohar Lohia v. State of Bihar [110], it was held that the order of detention must prima facie be proper, that "maintenance of law and order" could not be equated with "maintenance of public order" and that action under Defence of India Rules would be valid only if taken in the "interests of public order" and not merely "in aid of law and order". While protecting the paramount interest of the security of the State during emergency, citizen's rights to freedom could not be taken away without the existence of justifying necessity specified in Defence of India Rules. On this ground, the Court declared a detention "clearly and plainly mala fide". [111] In PL. Lakhanpal v. Union of India [112] , the Supreme Court overruled the decision in the Sadhu Singh case and held that principles of natural justice should apply to the decision -to review an order of detention. The Court went further in State of Madhya Pradesh v. Bharat Singh[113] when it said: All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule ... Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others: it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and executive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid.

In Mohd. Yaqub v. State of J&K[114], the Supreme Court clearly observed that there was no scope for judicial review to find out any nexus between exercise of power under Article 359 and security of India in view of the suspension of the enforcement of fundamental

[107]. Sadhu Singh v. Delhi Administration, AIR 1966 SC 91.
[108]. (AIR 1966 SC 424
[109]. (AIR 1966 SC 657
[110]. (AIR 1966 SC 740
[111]. G. Sadanandan v. State of Kerala, 1966 SC 1925.
[112]. AIR 1967 SC 1507
[113]. AIR 1967 SC 1170
[114]. (AIR 1968 SC 765

rights in the interests of the security of the State by the President. In Bhut Nath v. State of W. Bengal[115] also, the Court declined to hold the continuance of emergency void. Justice Iyer said that the argument that there was no real emergency fell outside the orbit of judicial control. The position' was reiterated in Collector of Hyderabad v. Ibrahim and Co.[116]. The Court said: The executive order immune from attack is only that order which the' State was competent, but for the provisions contained in Article 19, to make. Executive action ... which is otherwise invalid is not immune from attack, merely because a proclamation of emergency is in operation when it is taken."

Article 358 made it clear that things done or omitted to be done during emergency could not be challenged even after the emergency was over on the ground of the concerned emergency law having violated Article 19.[117]

There appeared to be a considerable shift in the approach of the Supreme Court to cases of violation of Fundamental Rights vis a vis emergency provisions arising during the proclamation of internal emergency (1975-1977). Thus, in the Habeas Corpus case, the Court refused to interfere in matters of detention of persons as it believed that the intention clearly was to keep preventive detention controlled exclusively by the executive. Detenues could not move any Court for the writ of Habeas Corpus if a prima facie valid detention order existed.[118]

In Union of India v. Bhanudas[119] again, the Court held that all rights of personal liberty under Articles 19,21 and 22 could be suspended during national emergency due to Presidential Orders under Article 359. Most of these Court verdicts lost validity after the 44th amendment inter alia amended Articles 352, 358 and 359.

In the Minerva Mills case, it was held that the judiciary could act if it was established that the Union Government acted mala fide or on irrelevant or no facts. The remedy otherwise could be only political. A matter like the satisfaction of the President is beyond the Court. Only if it was shown that there was, in fact, no satisfaction at all, or the satisfaction was absurd, perverse or mala fide, the exercise of power would be unconstitutional. Courts could certainly act under their power of limited judicial review in such a case.[120] .

II. PRESIDENT'S RULE

It is the constitutional duty of the Union to protect its States against external aggression and internal disturbance and to ensure that the

[115]. AIR 1974 SC 806
[116]. AIR 1970 SC 1275
[117]. L Makhan Singh's case, op. cit.; Bennett Coleman and Co. Ltd. v. Union of India, AIR 1973 SC 106; A. Cooperative Agricultural and Industrial Society Ltd. v. Union of India, AIR 1976 SC 958.
[118]. Additional District Magistrate v. Shivkant Shukla, AIR 1976SC 1207
[119]. AIR 1977 SC 1027
[120]. Minerva Mills v. Union of India, AIR 1980 SC 1789

Government of every State is carried on in accordance with the Constitution (Article 355).

If on receipt of a Report from the Governor or otherwise, the President is satisfied that Government of the State cannot be carried on in accordance with the Constitution or that the constitutional machinery has failed, he may issue a proclamation taking over any of the functions and powers of the State Government including those of the Governor and other. State authorities (Article 356). The satisfaction of the President, of course, means the satisfaction of the Union Government and President's rule is actually rule by the Union Government. It is important that Article 356 is read with Articles 355, 256, 257, 353 and 365. This is usually not done. Insofar as Article 355 speaks of the duty of the Union to ensure that government of every state is carried on in accordance with the provisions of the Constitution, it is obvious that Article 356 is not the only one to take care of a situation of failure of constitutional machinery. The Union can also act in matters of 'external aggression' or 'internal disturbance' under Article 355 i.e. without imposing President's rule. Article 355 can stand on its own. Also, Union Government can issue certain directions under Articles 256, 257 and 353.

It is true that Article 356 clearly authorizes the President to issue a proclamation imposing President's rule over a State if he is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution" but a question may be asked when can the President lawfully hold that such a situation has actually arisen. A very specific and categorical answer is contained in Article 365 when it says that where a State fails to comply with Union directions (under Articles 256,257 and others) "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 this Constitution". It is unfortunate that before rushing to issue a proclamation under Article 356, no effort appeared to have been made to ensure that (i) the Union had done all that it could in discharge of its duty under Article 355 and (ii) that the State had "failed to comply with, or give effect to" directions. It seems in many cases recourse to 356 has been taken without keeping other provisions in view.

Under the proclamation under Article 356, the powers of the State Legislature may become exercisable by or on the authority of Parliament. The State Assembly may be dissolved or kept under suspended animation. The President may take all other steps that may be necessary including suspension of the operation of any constitutional provisions relating to any body or authority in the State except the High Courts. Every proclamation must cease to operate at the expiry of two months unless approved by resolutions of the two Houses. After Parliament's approval also, a

proclamation may continue for not more than six months at a time and not for more than a total of three years except in case of a proclamation issued in May 1987 in respect of Punjab which was allowed to continue for five years under the Constitution (68th Amendment) Act, 1991 (Article 356).

During the operation of President's rule under Article 356, Parliament may confer the legislative power of the State on the President and authorize him to delegate these powers to other authorities (Article 357).

Article 356, enabling the imposition of President's rule over the States by the Union, has been one of the most criticized and controversial provisions of the Constitution. Under this provision, State Governments have been taken over by the Union on nearly 120 occasions during the last 60 years (1950-2009) i.e. on an average twice each year. Opposition members and critics have said that the Article has been used, more often than not, for political and partisan purposes by the party in power at the Union level, usually to dismiss State Governments of parties in opposition. In the Constituent Assembly, while replying to the critics of this provision, Dr. Ambedkar had expressed the hope that it might remain a dead letter and might never be used except as a last resort, after everything else failed.

In State of Rajasthan v. Union of India [121] , the Supreme Court held that a proclamation under 356 depends on the subjective satisfaction of the President and the Court could not substitute its own satisfaction for that of the President nor could it, in view of Article 74(2), enquire into the advice given to the President by the Council of Ministers. The Court, however, significantly added that if the satisfaction of the President was mala fide, based on extraneous or irrelevant considerations or no satisfaction at all, it could interfere. Thus, exercise of President's power under Article 356 was brought under judicial review to that extent.

In the Bommai ease, the Court went much further. It was held (i) that the question of the State Government losing the confidence of the House should be decided on the floor of the House and until that is done the Ministry should not be unseated, (ii) that dissolution of the Assembly by Presidential Proclamation is subject to judicial review, and (iii) that if the court finds that relevant material justifying the proclamation did not exist or that mala fide was involved, it may strike it down and restore the Ministry S. R. Bommai v. Union of India[122].

The Constitution Commission (NCRWC) has recommended:

(1) Article 356 should not be deleted. But it must be used sparingly and only as a remedy of the last resort and after exhausting action under other Articles like 256, 257 and 355,

(2) In case of political breakdown, necessitating invoking of Article 356, before issuing a

[121]. AIR 1977 SC 1361

[122]. JT (1994) 2 SC 215

proclamation there under, the concerned State should be given an opportunity to explain its position and redress the situation, unless the situation is such, that following the above course would not be in the interest of security of State, or defence of the country, or for other reasons necessitating urgent action.

(3) The question whether the Ministry in a State has lost the confidence of the Legislative Assembly or not, should be decided only on the floor of the Assembly and nowhere else. If necessary, the Union Government should take the required steps, to enable the Legislative Assembly to meet and freely transact its business. The Governor should not be allowed to dismiss the Ministry so long as it enjoys the confidence of the House. It is only where a Chief Minister refuses to resign after his Ministry is defeated on a motion of no-confidence, that the Governor can dismiss the State Government. In a situation of political breakdown, the Governor should explore all possibilities of having a Government enjoying majority support in the Assembly.

(4) Article 356 should be amended so as to ensure that the State Legislative Assembly should not be dissolved either by the Governor or the President before the proclamation issued under Article 356(1) has been laid before Parliament and it has had an opportunity to consider it.

III. FINANCIAL EMERGENCY

The President is authorized by Article 360 of the Constitution to declare by a proclamation financial emergency if he is satisfied that the financial stability or credit of India or of any part of its territory is threatened. Such a proclamation may be revoked-or varied by a subsequent proclamation. It has to be laid before both Houses of Parliament and ceases to operate at the expiration of two months unless meanwhile approved by resolutions of the two Houses. Once approved by Parliament, unlike proclamations under Article 352, it may continue indefinitely until revoked or varied ..

During the operation of financial emergency, the executive authority of the Union extends to the giving of directions to any State to observe certain specified canons of financial propriety and such other directions that the President may find necessary or adequate. These directions may include reduction of salaries and allowances of all those serving a State and reserving for the President's consideration all money Bills and other Bills under Article 207 after these are passed by State Legislatures. The President may also direct reduction in salaries and allowances of all those serving in connection with the affairs of the Union including judges of the Supreme Court and the High Courts. Fortunately, thus far, during the last 60 years of the operation of the Constitution, the has been no occasion for the promulgation of Financial Emergency.

MODULE - 10

COMMISSIONS AND COMMITTEES ON UNION-STATE RELATIONS - OBJECTIVES AND RECOMMENDATIONS

An attempt is made in this Module to touch upon the recommendations of some important commissions which were appointed with a direction to suggest changes in the provisions of the constitution relating to union-state relations. Their terms of reference were to examine the entire question regarding the relationship that should exist between the two governments in a federal set up and to suggest amendments to the constitution so as to secure utmost autonomy to the states.

1. The administrative reforms Commission (1969)

The Administrative Reforms Commission set up under the Chairmanship of Sri. K. Hanumanthayya and this Commission submitted its report in 1969. It made 22 recommendations to improve Centre State relations. It ruled out any constitutional amendment and considered the existing provisions as sufficient to regulate federal tensions. The important recommendations are given out of 22 recommendations in the following:

1) Establishment of an Inter-state council under Article 263 of the constitution
2) Delegation of powers to the maximum extent to the states
3) Augmenting financial resources of the states through fiscal transfers from the centre.
4) Appointment of non-partisan persons having long experience in public life and administration as Governor of a state

Other Recommendations

- It made the strong suggestion that Article 370 was not a transitory provision. This appears to have been made specifically in response to "one all-India political party" that demanded the deletion of Article 370 "in the interests of national integration.
- It recommended that the residuary powers of legislation in regard to taxation matters should remain exclusively in the
- competence of Parliament while the residuary held other than that of taxation should be placed on the concurrent list.
- That the enforcement of Union laws, particularly those relating to the concurrent sphere, is secured through the machinery of the states.
- To ensure uniformity on the basic issues of national policy, with respect to the subject of a proposed legislation, consultations may be carried out with the state governments individually and collectively at the forum of the proposed Inter-Governmental Council. It

was not recommended that the consultation be a constitutional obligation.

- Ordinarily, the Union should occupy only that much field of a concurrent subject on which uniformity of policy and action is essential in the larger interest of the nation, leaving the rest and details for state action.
- On administrative relations, Sarkaria made some observation: "Federalism is more a functional arrangement for cooperative action, than a static institutional concept.
- Article 258 (power of the Union to confer powers etc on states in certain cases) provides a tool by the liberal use of which cooperative federalism can be substantially realized in the working of the system.
- A more generous use of this tool should be made than has hitherto been done, for progressive decentralization of powers to the governments of the states.
- The Commission strongly recommended the establishment of permanent Inter-State Council.
- In addition, it desired that both the Centre and the States should have the concern for the development of backward territory or areas.
- If the economic development of these backward regions are undertaken in a planned manner, the separatist tendencies will be automatically controlled.
- Differences between the Union and the States should be resolved by mutual consultation.
- It has taken a favourable view on the demand of the States to provide more financial resources at their disposal.
- In order to improve Centre-State relations in the country, it has suggested economic liberalization and suitable amendments to the Constitution.

2. Rajamannar Commission, 1969

In 1969, the Tamil Nadu government appointed Rajmannar Commission to look into this aspect and it submitted its report in 1971. It demanded readjustment of the VII schedule and residuary power to the states. Its other important recommendations are given in the following:

- Setting of an Inter-State council immediately
- Finance commission to be made a permanent body
- Deletion of Articles 356, 357 and 365 which dealt with the President's rule
- Abolition of All-India Services (lAS, IPS and IFS)
- Planning Commission to be replaced by a statutory body
- The Central government completely ignored its recommendations.

Criticisms against P.V. Rajamannar Commission

Many critics criticized the Rajamannar Committee Report.

- M. C. Setalvad, the noted Jurist, emphatically criticized the recommendations by the P.V. Rajamannar Committee. He argued that the country has several destructive and divisive forces raising their ugly heads now and then in the form of linguism, communalism, casteism and other narrow loyalties, such far-reaching changes would prove highly disastrous in the process of nation-building and national solidarity.''
- Several articulated sections in India including certain interest groups have also opposed the recommendations.

It is also interesting to note that even some of regional parties like Akali Dal and National Conference had expressed their disagreement with the recommendations.

The Union government also rejected outright the recommendations made by P.V. Rajamannar Committee. Further, the centre was not bound to accept these recommendations as the committee was appointed by a state government.

A careful observation of P.V. Rajamannar Committee and the Administrative Reforms Committee reveals that the P.V. Rajamannar Committee pleaded for the protection and consolidation of the identity, the territorial integrity and independence of the state governments. As against this, the Administrative Reforms Commission sought the extension of state's autonomy but emphasized the unity of India was a paramount importance.

The Commission also recommended delegation of more financial and administrative functions and powers to the states. This, according to the Commission would introduce more efficiency and economy in administration and would create an atmosphere for better and smoother relations between the two governments.

3. Sarkaria Commission, 1983

The agitation for State autonomy led to the creation of Sarkaria Commission by the Central Government to recommend changes in Centre-State relationship. The Commission submitted its report in 1988. The founding fathers of the Indian Constitution were deeply concerned about ensuring the unity and integrity of the country. They were aware of the forces of disruption and disunity working within the country. These dangers at the time of independence could be handled only by a strong government at the Centre. Therefore, the framers of the Constitution assigned a predominant role to the Centre. At the same time they made provisions for the establishment of a co-operative federalism.

The working of the Indian federation during the last five decades clearly shows that the relations between the Centre and the States have not always been cordial. The administrative Reforms Commission and several other Commissions were appointed by the Government of India from time to time to regulate Centre State relations. The Union

Government appointed Sarkaria Commission to suggest ways and means to improve Centre-State relations. The claim for more autonomy led to the constitution of Sarkaria Commission in 1983 which was asked to examine and review existing arrangements between the Centres and the States in all spheres and recommend appropriate changes and measures.

An extraordinary situation, the need to defeat the emergency regime of Indira Gandhi, brought them together. With the return of the Congress party under Indira Gandhi's leadership with secure majority, the movements for state autonomy slowly receded in the background. At the present moment, there is no movement for state autonomy like earlier even though the struggle to get more financial resources for the state continues. In 1990 a visible change came in the correlation of forces active in the Indian politics.

Major Recommendations of Sarkaria Commission

The Sarkaria Commission finally submitted its report in the year 1988. The Sarkaria Commission's charter was to examine the relationship and balance of power between state and central governments in the country and suggest changes within the framework of Constitution of India. In spite of the large size of its reports – the Commission recommended, by and large, status quo in the Centre-State relations, especially in the areas, relating to legislative matters, role of Governors and use of Article 356.

Role of Governor and Issue of Appointment of Governor

On the issue of appointment of the Governors, it made some important recommendations as given in the following:

- The Governor should be eminent in some walk of life and from outside the state. He should be a detached figure without intense political links or should not have taken part in politics in recent past.
- Besides, he should not be a member of the ruling party.
- He should be appointed after effective consultations with the state Chief Minister and Vice President and Speaker of the Lok Sabha should be consulted by the PM before his selection.
- As far as possible, the governor should enjoy the term of five years.
- He should be removed before his tenure only on the grounds as mentioned in the constitution or if aspersions are cast on his morality, dignity,
- In the process of removal, state government may be informed and consulted

Regarding use of Article 356

The Sarkaria Commission made the following recommendations:

- This Article should be used very sparingly and as a matter of last resort. It can be invoked only in the event of political crisis,

internal subversion, physical breakdown and non-compliance with the constitutional directives of the centre.

- Before that, a warning should be issued to the errant state in specific terms and alternate course of action must be explored before invoking it.
- The material fact and grounds on the basis of which this Article is invoked should be made an integral part of the Proclamation; it will ensure effective Parliamentary control over the invocation of the President Rule.
- The Governor's report must be a 'speaking document' and it should be given wide publicity. So the Sarkaria Commission was an important attempt to streamline the centre-state relations. It has become a reference point for any discussion on centre-state relations and it has been frequently referred to even by the judiciary.
- On its recommendation, the Inter-State council was established in 1990 and it has considered its recommendations.
- However, many of its important recommendations have not been implemented and tensions in federal relations are a recurrent feature.

Relating to Legislative Matters

While it made the general observation that the Constitution is basically sound and there is no need for drastic changes in the basic character of the Constitution, nevertheless it gave following recommendations:

1. Ordinarily, the Union should occupy only that much field of a concurrent subject on which uniformity of Policy and Action is required in the larger interest of the Nation, leaving the rest of the details for State action, within the abroad frame-work of the Policy laid down in the Union Law.
2. Whenever, the Union proposes to undertake Legislation on a subject belonging to the Concurrent List, the States' views must be ascertained through inter-Governmental Councils.
3. Parliamentary law passed under Article 252 (1), on request of two or more States should not be perpetual but should be for specific period not exceeding three years.
4. On receipt of a resolution from a State recommending creation or abolition of a Legislative Council, the same will be presented before the Parliament within a reasonable time.

4. Punchi Commission 2007

The Central government constituted the Punchi Commission in 2007 to examine centre-state relations along with the possibility of giving sweeping powers to the centre for suo motu deployment of Central forces in states and investigation of crimes affecting national security. It was chaired by the former Chief Justice of India M.M. Punchi. It submitted its recommendation in 2009. Some of its important recommendations are given in the following:

1. It called for giving a fixed term of five years to the governors and their removal by the process of impeachment (similar to that of the President) by the State Legislature.
2. The governor should have the right to sanction prosecution of a minister against the advice of the council of ministers.
3. It called for an amendment of Articles 355 and 356 to enable centre to bring special trouble-torn areas under its rule for a limited period. Hence, it proposed 'localizing emergency provisions' under which either a district or parts of a district can be brought under the central rule instead of the whole state. Such an emergency should not be for more than 3 months.
4. It proposed that Centre should have power to deploy its forces in case of communal conflagration without state's consent for a short period of a week.
5. Among the significant suggestions made by the Commission is, lying down of clear guidelines for the appointment of chief ministers. Upholding the view that a pre-poll alliance should be treated as one political party, it lays down the order of precedence that ought to be followed by the governor in case of a hung house:
    a. Call the group with the largest pre-poll alliance commanding the largest number;
    b. The single largest party with support of others;
    c. The post-electoral coalition with all parties joining the government; and last
    d. The post electoral alliance with some parties joining the government and remaining including Independents supporting from outside.
6. The panel also feels that governors should have the right to sanction prosecution of a minister against the advice of the council of ministers. However, it wants the convention of making them chancellors of universities done away with.
7. As for qualifications for a governor, the Punchhi commission suggests that the nominee not have participated in active politics at even local level for at least a couple of years before his appointment. It also agrees with the Sarkaria recommendation that a governor be an eminent person and not belongs to the state where he is to be posted.
8. The commission also criticizes arbitrary dismissal of governors, saying, "the practice of treating governors as political football must stop".
9. There should be critical changes in the role of the governor - including fixed five-year tenure as well as their removal only through impeachment by the state Assembly. It has also recommended that the state chief minister have a say in the appointment of governor.

10. Underlining that removal of a governor be for a reason related to his discharge of functions, it has proposed provisions for impeachment by the state legislature along the same lines as that of President by Parliament. This, significantly, goes against the doctrine of pleasure upheld by the recent Supreme Court judgment.
11. Endorsing an NCRWC recommendation, it says appointment of governor should be entrusted to a committee comprising the Prime Minister, Home Minister, Speaker of the Lok Sabha and chief minister of the concerned state. The Vice-President can also be involved in the process.
12. Unlike the Sarkaria report, the Punchhi report is categorical that a governor be given fixed five-year tenure. The Punchhi Commission report also recommends that a constitutional amendment be brought about to limit the scope of discretionary powers of the governor under Article 163 (2). Governors should not sit on decisions and must decide matters within a four-month period.
13. The creation of an overriding structure to maintain internal security along the lines of the US Homeland Security department, giving more teeth to the National Integration Council.
14. For the National Integration Council (NIC), the commission has proposed that it should meet at least once a year. In case of any communal incident, it has said that a delegation of five members of the Council, who would be eminent persons, should visit the affected area within two days National debate and submit a fact-finding report.
15. The commission, however, rejects a suggestion from some stakeholders as well as the Liberhan Commission that the NIC be accorded constitutional status.
16. The commission has also studied new set-ups like the National Investigation Agency, and recommended procedures to ensure smooth co-operation of the states in terror investigations entrusted to NIA. One can say that the extreme politicization of the post of Governor must be decried and certain specific norms for the appointment and removal have to be evolved.
17. The recent ruling of the Supreme Court has indicated that the sanctity of this constitutional post should be preserved. In democracy, nobody can have absolute power in the name of smooth administration and good governance. The administrative apparatus has to be in the line of the constitution, which was prepared by the people of the country and amended by the elected representative of the people of India. The 'doctrine of pleasure' has to be understood in this light.

Thus, the issue of state autonomy has been a major issue in the dynamics of Indian federalism.

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