

POLITICAL SCIENCE

Section B

1. **CONSTITUTIONAL DEVELOPMENT** – in India during British rule – A Historical perspective.
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PART I Nature of the Constitution

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CHAPTER 1 THE HISTORICAL BACKGROUND

Utility of a Historical Retrospect.

THE very fact that the Constitution of the Indian Republic is the product not of a political revolution but of the research and deliberations of a body of eminent representatives of the people who sought to improve upon the existing system of administration, makes a retrospect of the constitutional development indispensable for a proper understanding of this Constitution.

Practically the only respect in which the Constitution of 1949 differs from the constitutional documents of the preceding two centuries is that while the latter had been imposed by an

imperial power, the Republican Constitution was made by the people themselves, through representatives assembled in a sovereign Constituent Assembly. That explains the majesty and ethical value of this new instrument and also the significance of those of its provisions which have been engrafted upon the pre-existing system.

Government of India Act, 1858.

For our present purposes we need not go beyond the year 1858 when the British Crown assumed sovereignty over India from the East India Company, and Parliament enacted the first statute for the governance of India under the direct rule of the British Government,—the Government of India Act, 1858 (21 & 22 Vict., c. 106). This Act serves as the starting point of our survey because it was dominated by the principle of absolute imperial control without any popular participation in the administration of the country, while the subsequent history up to the making of the Constitution is one of gradual relaxation of imperial control and the evolution of responsible government. By this Act, the powers of the Crown were to be exercised by the Secretary of State for India, assisted by a Council of fifteen members (known as the Council of India). The Council was composed exclusively of people from England, some of whom were nominees of the Crown while others were the representatives of the Directors of the East India Co. The Secretary of State, who was responsible to the British Parliament, governed India through the Governor-General, assisted by an Executive Council, which consisted of high officials of the Government.

The essential features of the system² introduced by the Act of 1858 were—

(a) The administration of the country was not only unitary but rigidly centralised. Though the territory was divided into Provinces with a Governor or Lieutenant-Governor aided by his Executive Council at the

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head of each of them, the Provincial Governments were mere agents of the Government of India and had to function under the superintendence, direction and control of the Governor-General in all matters relating to the government of the Province.²

(b) There was no separation of functions, and, all the authority for the governance of India,—civil and military, executive and legislative,—was vested in the Governor-General in Council who was responsible to the Secretary of State.²

(c) The control of the Secretary of State over the Indian administration was absolute. The Act vested in him the 'superintendence, direction and control of all acts, operations and concerns which in any way related to the Government or revenues of India'. Subject to his ultimate responsibility to the British Parliament, he wielded the Indian administration through the Governor-General as his agent and his was the last word, whether in matters of policy or of details.³

(d) The entire machinery of administration was bureaucratic, totally unconcerned about public opinion in India.

Indian Councils Act, 1861.

The Indian Councils Act of 1861 introduced a grain of popular element insofar as it provided that the Governor-General's Executive which was so long composed exclusively of officials, should include certain additional non-official members, while transacting legislative business as a Legislative Council. But this Legislative Council was neither representative nor deliberative in any sense. The members were nominated and their functions were confined exclusively to a consideration of the legislative proposals placed before it by the Governor-General. It could not, in any manner, criticise the acts of the administration or the conduct of the authorities. Even in legislation, effective powers were reserved to the Governor-General, such as—(a) giving prior sanction to Bills relating to certain matters, without which they could not be introduced in the Legislative Council; (b) vetoing the Bills after they were passed or reserving them for consideration of the Crown; (c) legislating by Ordinances which were to have the same authority as Acts made by the Legislative Council.

Similar provisions were made by the Act of 1861 for Legislative Councils in the Provinces. But even for initiating legislation in these Provincial Councils with respect to many matters, the prior sanction of the Governor-General was necessary.

Indian Councils Act, 1892.

Two improvements upon the preceding state of affairs as regards the Indian and Provincial Legislative Councils were introduced by the Indian Councils Act, 1892, namely that (a) though the majority of official members were retained, the non-official members of the Indian Legislative Council were henceforth to be nominated by the Bengal Chamber of Commerce and the Provincial Legislative Councils, while the non-official members of the Provincial Councils were to be nominated by certain local bodies such as universities, district boards, municipalities; (b) the Councils were to have the power of discussing the annual statement of revenue and expenditure, i.e., the Budget and of addressing questions to the Executive.

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This Act is notable for its object, which was explained by the Under-Secretary of State for India thus:

"to widen the basis and expand the functions of the Government of India, and to give further opportunities to the non-official and native elements in Indian society to take part in the work of the Government."

Morley-Minto reforms and the Indian Councils Act, 1909.

The first attempt at introducing a representative and popular element was made by the Morley-Minto Reforms, known by the names of the then Secretary of State for India (Lord MORLEY) and the Viceroy (Lord MINTO), which were implemented by the Indian Councils Act, 1909.

The changes relating to the Provincial Legislative Councils were, of course, more advanced. The size of these Councils was enlarged by including elected non-official members so that the official majority was gone. An element of election was also introduced in the Legislative Council at the Centre but the official majority there was maintained.

The deliberative functions of the Legislative Councils were also increased by this Act by giving them the opportunity of influencing the policy of the administration by moving resolutions on the Budget, and on any matter of public interest, save certain specified subjects, such as the Armed Forces, Foreign Affairs and the Indian States.

On the other hand, the positive vice of the system of election introduced by the Act of 1909 was that it provided, for the first time, for separate representation of the Muslim community and thus sowed the seeds of separatism⁴ that eventually led to the lamentable partition of the country. It can hardly be overlooked that this idea of separate electorates for the Muslims was synchronous with the formation of the Muslim League as a political party (1906).

Subsequent to this, the Government of India Act, 1915 (5 & 6 Geo. V., c. 61) was passed merely to consolidate all the preceding Government of India Acts so that the existing provisions relating to the government of India in its executive, legislative and judicial branches could be had from one enactment.

Montagu-Chelmsford Report and the Government of India Act, 1919.

The next landmark in constitutional development of India is the Montagu-Chelmsford Report which led to the enactment of the Government of India Act, 1919. It was, in fact, an amending Act, but the amendments introduced substantive changes into the existing system.

The Morley-Minto Reforms failed to satisfy the aspirations of the nationalists in India inasmuch as, professedly, the Reforms did not aim at the establishment of a Parliamentary system of government in the country and provide for the retention of the final decision on all questions in the hands of the irresponsible Executive.

The Indian National Congress which, established in 1885, was so long under the control of Moderates, became more active during the First World War and started its campaign for self-government (known as the 'Home Rule' movement). In response to this popular demand, the British

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Government made a declaration on August 20, 1917, that the policy of His Majesty's Government was that of—

"Increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to progressive realisation of responsible government in British India as an integral part of the British Empire."

The then Secretary of State for India (Mr. E.S. Montagu) and the Governor-General (Lord CHELMSFORD), entrusted with the task of formulating proposals for carrying out the above policy and the Government of India Act, 1919, gave a legal shape to their recommendations.

Main Features of the System introduced by the Act of 1919.

The main features of the system introduced by the Government of India Act, 1919, were as follows:

I. Dyarchy in the Provinces. Responsible government in the Provinces was sought to be introduced, without impairing the responsibility of the Governor (through the Governor-General), for the administration of the Province, by resorting to device known as 'Dyarchy' or dual government. The subjects of administration were to be divided (by Rules made under the Act) into two categories—Central and Provincial. The Central subjects were those which were exclusively kept under the control of the Central Government. The Provincial subjects were subdivided into 'transferred' and 'reserved' subjects.

Of the matters assigned to the Provinces, the 'transferred subjects' were to be administered by the Governor with the aid of Ministers responsible to the Legislative Council in which the proportion of elected members was raised to 70 per cent. The foundation of responsible government was thus laid down in the narrow sphere of 'transferred' subjects.

The 'reserved subjects', on the other hand, were to be administered by the Governor and his Executive Council without any responsibility to the Legislature.

II. Relaxation of Central control over the Provinces. As stated already, the Rules made under the Government of India Act, 1919, known as the Devolution Rules, made a separation of the subjects of administration into two categories—Central and Provincial. Broadly speaking, subjects of all-India importance were brought under the category 'Central', while matters primarily relating to the administration of the provinces were classified as 'Provincial'. This meant a relaxation of the previous Central control over the provinces not only in administrative but also in legislative and financial matters. Even the sources of revenue were divided into two categories so that the Provinces could run the administration with the aid of revenue raised by the Provinces themselves and for this purpose, the provincial budgets were separated from the Government of India and the Provincial Legislature was empowered to present its own budget and levy its own taxes relating to the provincial sources of revenue.

At the same time, this devolution of power to the Provinces should not be mistaken for a federal distribution of powers. Under the Act of 1919, the

Provinces got power by way of delegation from the Centre. The Central Legislature, therefore, retained power to legislate for the whole of India, relating to any subject, and it was subject to such paramount power of the Central Legislature that the Provincial Legislature got the power "to make laws for the peace and good government of the territories for the time being constituting that province".

The control of the Governor-General over Provincial legislation was also retained by a laying down that a Provincial Bill, even though assented to by the Governor, would not become law unless assented to also by the Governor-General, and by empowering the Governor to reserve a Bill for the consideration of the Governor-General if it related to matters specified in this behalf by the Rules made under the Act.

III. The Indian Legislature made more representative. No responsibility was, however, introduced at the Centre and the Governor-General in Council continued to remain responsible only to the British Parliament through the Secretary of State for India. Nevertheless, the Indian Legislature was made more representative and, for the first time, bi-cameral. It was to consist of an Upper House, named the Council of State, composed of 60 members of whom 34 were elected, and a Lower House, named the Legislative Assembly, composed of about 144 members of whom 104 were elected. The powers of both the Houses were equal except that the power to vote supply was given exclusively to the Legislative Assembly. The electorates were, however, arranged on a communal and sectional basis, developing the Morley-Minto device further.

The Governor-General's overriding powers in respect of Central legislation were retained in the following forms—(i) his prior sanction was required to introduce Bills relating to certain matters; (ii) he had the power to veto or reserve for consideration of the Crown any Bill passed by the Indian Legislature; (iii) he had the converse power of certifying any Bill or any grant refused to be passed or made by the Legislature, in which case it would have the same effect as if it was passed or made by the Legislature; (iv) he could make Ordinances, having the force of law for a temporary period, in case of emergency.

Shortcomings of the Act of 1919

The Reforms of 1919, however, failed to fulfil the aspiration of the people in India, and led to an agitation by the Congress (then under the leadership of Mahatma Gandhi) for 'Swaraj' or 'self-government', independent of the British Empire, to be attained through 'Non-cooperation'. The shortcomings of the 1919 system, mainly, were—

(i) Notwithstanding a substantial measure of devolution of power to the Provinces the structure still remained unitary and centralised "with the Governor-General in Council as the keystone of the whole constitutional edifice; and it is through the Governor-General in Council that the Secretary of State and, ultimately, Parliament discharged their responsibilities for the peace, order and good government of India".⁷ It was the Governor-General and not the Courts who had the authority to decide whether a particular subject was Central or Provincial. The Provincial Legislature could not,

without the previous sanction of the Governor-General, take up for consideration any bill relating to a number of subjects.

(ii) The greatest dissatisfaction came from the working of Dyarchy in the Provincial sphere. In a large measure, the Governor came to dominate ministerial policy by means of his overriding financial powers and control over the official block in the Legislature. In practice, scarcely any question of importance could arise without affecting one or more of the reserved departments. The impracticability of a division of the administration into two water-tight compartments was manifested beyond doubt. The main defect of the system from the Indian standpoint was the control of the purse. Finance being a reserved subject, was placed in charge of a member of the Executive Council and not a Minister. It was impossible for any Minister to implement any progressive measure for want of funds and together with this was the further fact that the members of the Indian Civil Service, through whom the Ministers were to implement their policies, were recruited by the Secretary of State and were responsible to him and not to the Ministers. Above all was the overriding power of the Governor who did not act as a constitutional head even with respect to the transferred subjects. There was no provision for collective responsibility of the Ministers to the Provincial Legislature. The Ministers were appointed individually, acted as advisers of the Governor, and differed from members of the Executive Council only in the fact that they were non-officials. The Governor had the discretion to act otherwise than in accordance with the advice of his Ministers; he could certify a grant refused by the Legislature or a Bill rejected by it if it was regarded by him as essential for the due discharge of his responsibilities relating to a reserved subject.

It is no wonder, therefore, that the introduction of ministerial government over a part of the Provincial sphere proved ineffective and failed to satisfy Indian aspirations.

The Simon Commission.

The persistent demand for further reforms, attended with the dislocation caused by the Non-cooperation movement, led the British Government in 1927 to appoint a Statutory Commission, as envisaged by the Government of India Act, 1919 itself (s. 84A), to inquire into and report on the working of the Act and in 1929 to announce that Dominion Status was the goal of Indian political developments. The Commission, headed by Sir John Simon, reported in 1930.

The Report was considered by a Round Table Conference consisting of the delegates of the British Government and of British India as well as of the Rulers of the Indian States (in as much as the scheme was to unite the Indian States with the rest of India under a federal scheme). A White Paper, prepared on the results of this Conference, was examined by a Joint Select Committee of the British Parliament and the Government of India Bill was drafted in accordance with the recommendations of that Select Committee, and passed, with certain amendments, as the Government of India Act, 1935.

"Communal Award."

Before analysing the main features of the system introduced by this Act, it should be pointed out that this Act went another step forward in perpetuating the communal cleavage between the Muslim and the non-Muslim

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communities, by prescribing separate electorates on the basis of the 'Communal Award' which was issued by Mr. Ramsay MacDonald, the British Prime Minister, on August 4, 1932, on the ground that the two major communities had failed to come to an agreement. From now onwards, the agreement between the two religious communities was continuously hoisted as a condition precedent for any further political advance. The Act of 1935, it should be noted, provided separate representation not only for the Muslims, but also for the Sikhs, the Europeans, Indian Christians and Anglo-Indians and thus created a serious hurdle in the way of the building up of national unity, which the makers of the future Constitution found it almost insurmountable to overcome even after the Muslims had partitioned for a separate State.

The main features of the governmental system prescribed by the Act of 1935 were as follows—

Main features of the system introduced by the Government of India Act, 1935.

(a) Federation and Provincial Autonomy. While under all the previous Government of India Acts, the government of India was unitary, the Act of 1935 prescribed a federation, taking the Provinces and the Indian States as units. But it was optional for the Indian States to join the Federation; and since the Rulers of the Indian States never gave their consent, the Federation envisaged by the Act of 1935 never came into being.

But though the Part relating to the Federation never took effect, the Part relating to Provincial Autonomy was given effect to since April, 1937. The Act divided legislative powers between the Provincial and Central Legislatures, and within its defined sphere, the Provinces were no longer delegates of the Central Government, but were autonomous units of administration. To this extent, the Government of India assumed the role of a federal government vis-a-vis the Provincial Government, though the Indian States did not come into the fold to complete the scheme of federation.

The executive authority of a Province was also exercised by a Governor on behalf of the Crown and not as a subordinate of the Governor-General. The Governor was required to act with the advice of Ministers responsible to the Legislature.

But notwithstanding the introduction of Provincial Autonomy, the Act of 1935 retained control of the Central Government over the Provinces in a certain sphere—by requiring the Governor to act 'in his discretion' or in the exercise of his 'individual judgment' in certain matters. In such matters, the Governor was to act without ministerial advice and under the control and directions of the Governor-General, and, through him, of the Secretary of State.

(b) Dyarchy at the Centre. The executive authority of the Centre was vested in the Governor-General (on behalf of the Crown), whose functions were divided into two groups—

(i) The administration of defence, external affairs, ecclesiastical affairs, and of tribal areas, was to be made by the Governor-General in his discretion with the help of 'counsellors', appointed by him, who were not

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responsible to the Legislature, (ii) With regard to matters other than the above reserved subjects, the Governor-General was to act on the advice of a 'Council of Ministers' who were responsible to the Legislature. But even in regard to this latter sphere, the Governor-General might act contrary to the advice so tendered by the ministers if any of his 'special responsibilities' was involved. As regards the special responsibilities, the Governor-General was to act under the control and directions of the Secretary of State.

But, in fact, neither any 'Counsellors' nor any Council of Ministers responsible to the Legislature came to be appointed under the Act of 1935; the old Executive Council provided by the Act of 1919 continued to advise the Governor-General until the Indian Independence Act, 1947.

(c) The Legislature. The Central Legislature was bi-cameral, consisting of the Federal Assembly and the Council of State.

In six of the Provinces, the Legislature was bi-cameral, comprising a Legislative Assembly and a Legislative Council. In the rest of the Provinces, the Legislature was unicameral.

The legislative powers of both the Central and Provincial Legislatures were subject to various limitations and neither could be said to have possessed the features of a sovereign Legislature. Thus, the Central Legislature was subject to the following limitations:

(i) Apart from the Governor-General's power of veto, a Bill passed by the Central Legislature was also subject to veto by the Crown.

(ii) The Governor-General might prevent discussion in the Legislature and suspend the proceedings in regard to any Bill if he was satisfied that it would affect the discharge of his special responsibilities.

(iii) Apart from the power to promulgate Ordinances during the recess of the Legislature, the Governor-General had independent powers of legislation, concurrently with those of the Legislature. Thus, he had the power to make temporary Ordinances as well as permanent Acts at any time for the discharge of his special responsibilities.

(iv) No bill or amendment could be introduced in the Legislature without the Governor-General's previous sanction, with respect to certain matters, e.g., if the Bill or amendment sought to repeal or amend or was repugnant to any law of the British Parliament extending to India or any Governor-General's or Governor's Act, or if it sought to affect matters as respects which the Governor-General was required to act in his discretion.

There were similar fetters on the Provincial Legislature.

The Instruments of Instructions issued under the Act further required that Bills relating to a number of subjects, such as those derogating from the powers of a High Court or affecting the Permanent Settlement, when presented to the Governor-General or a Governor for his assent, were to be reserved for the consideration of the Crown or the Governor-General, as the case might be.

(d) Distribution of legislative powers between the Centre and the Provinces. Though the Indian States did not join the Federation, the federal provisions

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of the Government of India Act, 1935, were in fact applied as between the Central Government and the Provinces.

The division of legislative powers, between the Centre and the Provinces is of special interest to the reader in view of the fact that the division made in the Constitution between the Union and the States proceeds largely on the same lines. It was not a mere delegation of power by the Centre to the Provinces as by Rules made under the Government of India Act, 1919. As already pointed out, the Government of India Act of 1935 itself divided the legislative powers between the Central and Provincial Legislatures and, subject to the provisions mentioned below, neither Legislature could transgress the powers assigned to the other.

A three-fold division was made in the Act—

(i) There was a Federal list over which the Federal Legislature had exclusive powers of legislation. This List included matters such as External affairs; Currency and coinage; Naval, military and air forces; census, (ii) There was a Provincial list of matters over which the Provincial Legislature had exclusive jurisdiction, e.g., Police, Provincial Public Service, Education. (iii) There was a Concurrent list of matters over which both the Federal and Provincial Legislature had competence, e.g., Criminal law and procedure, Civil procedure, Marriage and divorce, Arbitration.

The Federal Legislature had the power to legislate with respect to matters enumerated in the Provincial list if a Proclamation of Emergency was made by the Governor-General. The Federal Legislature could also legislate with respect to a Provincial subject if the Legislatures of two or more Provinces desired this in their common interest.

In case of repugnancy in the Concurrent field, a Federal law prevailed over a Provincial law to the extent of the repugnancy, but if the Provincial law having been reserved for the consideration of the Governor-General received his assent, the Provincial law prevailed, notwithstanding such repugnancy.

The allocation of residuary power of legislation in the Act was unique. It was not vested in either the Central or the Provincial Legislature but the Governor-General was empowered to authorise either the Federal or the Provincial Legislature to enact a law with respect to any matter which was not enumerated in the Legislative lists.

It is to be noted that 'Dominion Status', which was promised by the Simon Commission in 1929, was not conferred by the Government of India Act, 1935.

Changes introduced by the Indian Independence Act, 1947.

The circumstances leading to the enactment of the Indian Independence Act, 1947,⁸ will be explained in the next Chapter. But the changes introduced by this Act into the structure of government pending the drawing up of a Constitution for independent India by Constituent Assembly, should be pointed out in the present context, so as to offer a correct and comprehensive picture of the background against which the Constitution was made.

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In pursuance of the Indian Independence Act, the Government of India Act, 1935, was amended by the Adaptation Orders, both in India and Pakistan, in order to provide an interim Constitution to each of the two Dominions until the Constituent Assembly could draw up the future Constitution.

The following were the main results of such adaptations:—

(a) Abolition of the Sovereignty and Responsibility of the British Parliament. As has been already explained, by the Government of India Act, 1858, the Government of India was transferred from the East India Company to the Crown. By this Act, the British Parliament became the direct guardian of India, and the office of the Secretary of State for India was created for the administration of Indian affairs,—for which the Secretary of State was to be responsible to Parliament. Notwithstanding gradual relaxation of the control, the Governor-General of India and the Provincial Governors remained substantially under the direct control of the Secretary of State until the Indian Independence Act, 1947, so that—

"in constitutional theory, the Government of India is a subordinate official Government under His Majesty's Government."

The Indian Independence Act altered this constitutional position, root and branch. It declared that with effect from the 15th August, 1947 (referred to as the 'appointed day'), India ceased to be a Dependency and the suzerainty of the British Crown over the Indian States and the treaty relations with Tribal Areas also lapsed from the date.

The responsibility of the British Government and Parliament for administration of India having ceased, the office of the Secretary of State for India was abolished.

(b) The Crown no longer the source of authority. So long as India remained a Dependency of the British Crown, the Government of India was carried on in the name of His Majesty. Under the Act of 1935, the Crown came into further prominence owing to the scheme of the Act being federal, and all the units of the federation, including the Provinces, drew their authority direct from the Crown. But under the Independence Act, 1947, neither of the two Dominions of India and Pakistan derived its authority from the British Isles.

(c) The Governor-General and Provincial Governors to act as constitutional heads. The Governors-General of the two Dominions became the constitutional heads of the two new Dominions as in the case of the other Dominions. This was, in fact, a necessary corollary from 'Dominion Status' which had been denied to India by the Government of India Act, 1935, but conceded by the Indian Independence Act, 1947.

According to the adaptations under the Independence Act, there was no longer any Executive Council as under the Act of 1919 or 'counsellors' as envisaged by the Act of 1935. The Governor-General or the Provincial Governor was to act on the advice of a Council of Ministers having the confidence of the Dominion Legislature or the Provincial Legislature, as the case might be. The words "in his discretion", "acting in his discretion" and "individual judgment" were effaced from the Government of India Act,

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1935, wherever they occurred, with the result that there was now no sphere in which these constitutional heads could act without or against the wishes of the Ministers. Similarly, the powers of the Governor-General to require Governors to discharge certain functions as his agents were deleted from the Act.

The Governor-General and the Governors lost extraordinary powers of legislation so as to compete with the Legislature, by passing Acts, Proclamations and Ordinances for ordinary legislative purposes, and also the power of certification. The Governor's power to suspend the Provincial Constitution was taken away. The Crown also lost its right of veto and so the Governor-General could not reserve any bill for the signification of His Majesty's pleasure.

(d) Sovereignty of the Dominion Legislature. The Central Legislature of India, composed of the Legislative Assembly and the Council of States, ceased to exist on August 14, 1947. From the 'appointed day' and until the Constituent Assemblies of the two Dominions were able to frame their new Constitutions and new Legislatures were constituted there under,—it was the Constituent Assembly itself, which was to function also as the Central Legislature of the Dominion to which it belonged. In other words, the Constituent Assembly of either Dominion (until it itself desired otherwise), was to have a dual function, constituent as well as legislative.

The sovereignty of the Dominion Legislature was complete and no sanction of the Governor-General would henceforth be required to legislate on any matter, and there was to be no repugnancy by reason of contravention of any Imperial law.

REFERENCES

1. The Constitution of India was adopted on 26-11-1949 and some of its provisions were given immediate effect. The bulk of the Constitution, however, became operative on 26-1-1950, which date is referred to in the Constitution as its 'Date of Commencement', and is celebrated in India as the "Republic Day".
2. Report of the Indian Statutory Commission (Simon Report), Vol. I, pp. 112 et seq.

3. SETON, India Office, p. 81.
4. PANIKKAR, Asia and Western Dominance, 1953, p. 155.
5. NEHRU, Discovery of India, 1956, p. 385.
6. Simon Report, Vol. I, pp. 122-26, 148-56.
7. Report of the Joint Parliamentary Committee; Simon Report, Vol. I, pp. 232-38.
8. For the text of the Government of India Acts, 1800-1935, the Indian Councils Acts, 1861-1909, the Indian Independence Act, 1947 and Orders there under, see BASU, Constitutional Documents, Vol. I (1969).

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CHAPTER 2 THE MAKING OF THE CONSTITUTION

Demand for a Constitution framed by a Constituent Assembly.

THE demand that India's political destiny should be determined by the Indians themselves had been put forward by Mahatma Gandhi as early as in 1922.

"Swaraj will not be a free gift of the British Parliament; it will be a declaration of India's full self-expression. That it will be expressed through an Act of Parliament is true but it will be merely a courteous ratification of the declared wish of the people of India even as it was in the case of the Union of South Africa."

The failure of the Statutory Commission and the Round Table Conference which led to the enactment of the Government of India Act, 1935, to satisfy Indian aspirations accentuated the demand for a Constitution made by the people of India without outside interference, which was officially asserted by the National Congress in 1935. In 1938, Pandit Nehru definitely formulated his demand for a Constituent Assembly thus:

"The National Congress stands for independence and democratic state. It has proposed that the constitution of free India must be framed, without outside interference, by a Constituent Assembly elected on the basis of adult franchise."

This was reiterated by the Working Committee of the Congress in 1939.

Cripps Mission.

This demand was, however, resisted by the British Government until the outbreak of World War II when external circumstances forced them to realise the urgency of solving the Indian constitutional problem. In 1940, the Coalition Government in England recognised the principle

that Indians should themselves frame a new Constitution for autonomous India, and in March 1942, when the Japanese were at the doors of India, they sent Sir Stafford Cripps, a member of the Cabinet, with a draft declaration on the proposals of the British Government which were to be adopted (at the end of the War) provided the two major political parties (Congress and the Muslim League)¹ could come to an agreement to accept them, viz.:—

(a) that the Constitution of India was to be framed by an elected Constituent Assembly of the Indian people;

(b) that the Constitution should give India Dominion Status,—equal partnership of the British Commonwealth of Nations;

(c) that there should be one Indian Union comprising all the Provinces and Indian States; but

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(d) that any province (or Indian State) which was not prepared to accept the Constitution would be free to retain its constitutional position existing at that time and with such non-acceding Provinces the British Government could enter into separate constitutional arrangements.

But the two parties failed to come to an agreement to accept the proposals, and the Muslim League urged—

(a) that India should be divided into two autonomous States on communal lines, and that some of the Provinces, earmarked by Mr. Jinnah, should form an independent Muslim State, to be known as Pakistan;

(b) that instead of one Constituent Assembly, there should be two Constituent Assemblies, i.e., a separate Constituent Assembly for building Pakistan.

Cabinet Delegation.

After the rejection of the Cripps proposals (followed by the dynamic 'Quit India' campaign launched by the Congress), various attempts to reconcile the two parties were made including the Conference held at the instance of the Governor-General, Lord WAVELL. These having failed, the British Cabinet sent three of its own members² including Cripps himself, to make another serious attempt. But the Cabinet Delegation, too, failed in making the two major parties come to any agreement and were, accordingly, obliged to put forward their own proposals, which were announced simultaneously in India and in England on the 16th May, 1946.

The proposals of the Cabinet Delegation sought to effect a compromise between a Union of India and its division. While the Cabinet Delegation definitely rejected the claim for a separate Constituent Assembly and a separate State for the Muslims, the scheme which they recommended involved a virtual acceptance of the principle underlying the claim of the Muslim League.

The broad features of the scheme were—

(a) There would be a Union of India, comprising both British India and the States, and having jurisdiction over the subjects of Foreign Affairs, Defence and Communications. All residuary powers would belong to the Provinces and the States.

(b) The Union would have an Executive and a Legislature consisting of representatives of the Provinces and States. But any question raising a major communal issue in the Legislature would require for its decision a majority of the representatives of the two major communities present and voting as well as a majority of all the members present and voting.

The Provinces would be free to form Groups with executives and legislatures, and each Group would be competent to determine the provincial subjects which would be taken up by the Group organisation.

H.M.G.'s statement of December 6, 1946.

The scheme laid down by the Cabinet Mission was, however, recommendatory, and it was contemplated by the Mission that it would be adopted by agreement between the two major parties. A curious situation, however, arose after an election for forming the Constituent Assembly was held. The Muslim League joined the election and its candidates were returned. But a difference of opinion had in the meantime arisen between the Congress and the League regarding the interpretation of the

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'Grouping clauses' of the proposals of the Cabinet Mission. The British Government intervened at this stage, and explained to the leaders in London that they upheld the contention of the League as correct, and on December 6, 1946, the British Government published the following statement—

"Should a constitution come to be framed by the Constituent Assembly in which a large section of the Indian population had not been represented. His Majesty's Government would not contemplate forcing such a constitution upon any unwilling part of the country."

For the first time, thus, the British Government acknowledged the possibility of two Constituent Assemblies and two States. The result was that on December 9, 1946, when the Constituent Assembly first met, the Muslim League members did not attend, and the Constituent Assembly began to function with the non-Muslim League members.

H M G 's statement of February 20, 1947.

The Muslim League next urged for the dissolution of the Constituent Assembly of India on the ground that it was not full representative of all sections of the people of India. On the other hand, the British Government, by their Statement of the 20th February, 1947, declared,—

(a) that British rule in India would in any case end by June, 1948, after which the British would certainly transfer authority to Indian hands;

(b) that if by that time a fully representative Constituent Assembly failed to work out a constitution in accordance with the proposals made by the Cabinet Delegation,—

"H.M.G. will have to consider to whom the powers of the Central Government in British India should be handed over, on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Government, or in such other way as seems most reasonable and in the best interests of the Indian people."

The result was inevitable and the League did not consider it necessary to join this Assembly, and went on pressing for another Constituent Assembly for 'Muslim India'.

The British Government next sent Lord MOUNTBATTEN to India as the Governor-General, in place of Lord WAVELL, in order to expedite the preparations for the transfer of power, for which they had fixed a rigid time limit. Lord MOUNTBATTEN brought the Congress and the League into a definite agreement that the two 'problem' provinces of the Punjab and Bengal would be partitioned so as to form absolute Hindu and Muslim majority blocks within these Provinces. The League would then get its Pakistan—which the Cabinet Mission had so ruthlessly denied it,—minus Assam, East Punjab and West Bengal, while the Congress which was taken as the representative of the people of India other than the Muslims would get the rest of India where the Muslims were in minority.

and of June 3, 1947.

The actual decisions as to whether the two Provinces of the Punjab and Bengal were to be partitioned was, however, left to the vote of the members of the Legislative Assemblies of these two Provinces, meeting in two parts, according to a plan known as the 'Mountbatten Plan'. It was given a formal shape by a Statement made by the British Government of June 3, 1947, which provided, inter alia, that:

The Mountbatten Plan.

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"The Provincial Legislative Assemblies of Bengal and the Punjab (excluding European members) will, therefore, each be asked to meet in two parts, one representing the Muslim majority districts and the other the rest of the Province.... The members of the two parts of each Legislative Assembly sitting separately will be empowered to vote whether or not the Province should be partitioned. If a simple majority of either Part decides in favour of Partition, division will take place and arrangements will be made accordingly. If partition were decided upon, each part of the Legislative Assembly would decide, on behalf of the areas it represented, whether it would join the existing or a new and separate Constituent Assembly."

It was also proposed that there would be a referendum in the North Western Frontier Province and in the Muslim majority district of Sylhet as to whether they would join India or Pakistan. The Statement further declared H.M.G.'s intention "to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according to decisions taken as a result of the announcement."

The result of the vote according to the above Plan was a foregone conclusion as the representatives of the Muslim majority areas of the two Provinces (i.e., West Punjab and East Bengal) voted for partition and for joining a new Constituent Assembly. The referendum in the North Western Frontier and Sylhet was in favour of Pakistan.

On the 26th July, 1947, the Governor-General announced the setting up of a separate Constituent Assembly for Pakistan. The Plan of June 3, 1947, having been carried out, nothing stood in the way of effecting the transfer of power by enacting a statute of the British Parliament in accordance with the declaration.

The Indian Independence Act, 1947.

It must be said to the credit of the British Parliament that it lost no time to draft the Indian Independence Bill upon the basis of the above Plan, and this Bill was passed and placed on the Statute Book, with amazing speed, as the Indian Independence Act, 1947 (10 & 11 Geo. VI, c. 30). The Bill, which was introduced in Parliament on July 4, received the Royal Assent on July 18, 1947, and came into force from that date.

The most outstanding characteristics of the Indian Independence Act was that while other Acts of Parliament relating to the Government of India (such as the Government of India Acts from 1858 to 1935) sought to lay down a Constitution for the governance of India by the legislative will of the British Parliament,—this Act of 1947 did not lay down any such constitution. The Act provided that as from the 15th August, 1947 (which date is referred to in the Act as the 'appointed date'), in place of 'India' as defined in the Government of India Act, 1935, there would be set up two independent Dominions, to be known as India and Pakistan, and the Constituent Assembly of each Dominion was to have unlimited power to frame and adopt any constitution and to repeal any Act of the British Parliament, including the Indian Independence Act.

Under the Act, the Dominion of India got the residuary territory of India excluding the Provinces of Sind, Baluchistan, West Punjab, East Bengal, and the North Western Frontier Province and the district of Sylhet in Assam (which had voted in favour of Pakistan at a referendum, before the Act came into force).

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Constituent Assembly of India.

The Constituent Assembly, which had been elected for undivided India and held its first sitting on the 9th December, 1946, reassembled on the 14th August, 1947, as the sovereign Constituent Assembly for the Dominion of India.

As to its composition, it should be remembered, that it had been elected by indirect election by the members of the Provincial Legislative Assemblies (Lower House only), according to the scheme recommended by the Cabinet Delegation [see Table II, in the Appendix]. The essentials of this scheme were as follows:—

- (1) Each province and each Indian State or group of States were allotted the total number of seats proportional to their respective populations roughly in the ratio of one to a million. As a result, the Provinces were to elect 292 members while the Indian States were allotted a minimum of 93 seats.
- (2) The seats in each province were distributed among the three main communities, Muslim, Sikh and General, in proportion to their respective populations.
- (3) Members of each community in the Provincial Legislative Assembly elected their own representatives by the method of proportional representation with single transferable vote.
- (4) The method of selection in the case of representatives of Indian States was to be determined by consultation.

As a result of the Partition under the Plan of June 3, 1947, a separate Constituent Assembly was set up for Pakistan, as stated earlier. The representatives of Bengal, Punjab, Sind, North Western Frontier Province, Baluchistan and the Sylhet district of Assam (which had joined Pakistan by a referendum) ceased to be members of the Constituent Assembly of India, and there was a fresh election in the new Provinces of West Bengal and East Punjab. In the result, when the Constituent Assembly reassembled on the 31st October, 1947, the membership of the House was reduced to 299, as in Table II, post. Of these, 284 were actually present on the 26th November, 1949, and appended their signatures to the Constitution as finally passed.

The salient principles of the proposed Constitution had been outlined by various committees of the Assembly³ such as the Union Constitution Committee, the Union Powers Committee, Committee on Fundamental Rights, and, after a general discussion of the reports of these Committees, the Assembly appointed a Drafting Committee on the 29th August, 1947. The Drafting Committee, under the Chairmanship of Dr. Ambedkar, embodied the decision of the Assembly with alternative and additional proposals in the form of a 'Draft Constitution of India' which was published in February, 1948. The Constituent Assembly next met in November, 1948, to consider the provisions of the Draft, clause by clause. After several session the consideration of the clauses or second reading was completed by the 17th October, 1949.

Passing of the Constitution.

The Constituent Assembly again sat on the 14th November, 1949, for the third reading and finished it on the 26th November, 1949, on which date the Constitution received the signature of the President of the Assembly and was declared as passed.

Date of Commencement of the Constitution.

The provisions relating to citizenship, elections, provisional Parliament, temporary and transitional provisions, were given immediate effect, i.e., from November 26, 1949. The rest of the Constitution came into force on the 26th January, 1950, and this date is referred to in the Constitution as the Date of its Commencement.⁴

REFERENCES

1. As stated earlier, the Muslim League, professedly a communal party, was formed in 1906. While its earlier objective was to secure separate representation of the Muslims in the political system, in its Lahore Resolution of 1940, it asserted its demand for the creation of a separate Muslim State in the Muslim majority areas. This idea was developed into the claim for dividing India into two independent States, when the Cripps offer was announced.

2. The Cabinet Mission consisted of Lord PETHICK-LAWRENCE, Sir Stafford Cripps and Mr. A.V. Alexander.

3. The important committees of the Constituent Assembly were,—

(a) Union Powers Committee. It had 9 members. Shri Jawaharlal Nehru was its chairman, (b) Committee on Fundamental Rights and Minorities. It had 54 members. Sardar Vallabhbhai Patel was its chairman, (c) Steering Committee. It had 3 members. Dr. K.M. Munshi (chairman), Shri Gopalswamy Ayyangar and Shri Bishwanath Das. (d) Provincial Constitution Committee. 25 members. Sardar Patel as chairman. (e) Committee on Union Constitution. 15 members. Pt. Nehru as chairman.

The draft was prepared by Sir B.N. Rau, Adviser to the Constituent Assembly. A 7-member committee chaired by Sir Alladi Krishnaswamy Iyer was set up to examine the draft. Dr. B.R. Ambedkar who was minister for law from 15-8-1947 to 26-1-1950 piloted the draft constitution in the Assembly.

4. Since that date, the Constitution has been freely amended, according to the procedure laid down in Art. 368,—no less than 83 times, by 2000 (see Table IV, post). For a text of the original Constitution, with its subsequent amendments, see Author's Constitution Amendment Acts; Constitutional Law of India, 6th Ed. (Prentice-Hall of India).

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CHAPTER 3 THE PHILOSOPHY OF THE CONSTITUTION

EVERY Constitution has a philosophy of its own.

The Objectives Resolution.

For the philosophy underlying our Constitution we must look back into the historic Objectives Resolution of Pandit Nehru which was adopted by the Constituent Assembly on January 22, 1947,¹ and which inspired the shaping of the Constitution through all its subsequent stages. It reads thus—

"This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution:

(2) WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and

(3) WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting there from; and

(4) WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of Governments are derived from the people; and

(5) WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) WHEREIN shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilised nations; and

(8) The ancient land attain its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind."

In the words of Pandit Nehru, the aforesaid Resolution was "something more than a resolution. It is a declaration, a firm resolve, a pledge, an undertaking and for all of us a dedication".

The Preamble.

It will be seen that the ideal embodied in the above Resolution is faithfully reflected in the Preamble to the Constitution, which, as amended in 1976,² summarises the aims and objects of the Constitution :

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"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR² DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

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

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

FRATERNITY assuring the dignity of the individual and the unity and integrity² of the Nation:

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

The importance and utility of the Preamble has been pointed out in several decisions of our Supreme Court. Though, by itself, it is not enforceable in a Court of law,³ the Preamble to a written Constitution states the objects which the Constitution seeks to establish and promote and also aids the legal interpretation of the Constitution where the language is found to be ambiguous} For a proper appreciation of the aims and aspirations embodied in our Constitution, therefore, we must turn to the various expressions contained in the Preamble, as reproduced above.

The Preamble to our Constitution serves, two purposes:

- (a) it indicates the source from which the Constitution derives its authority;
- (b) it also states the objects which the Constitution seeks to establish and promote.

Independent and Sovereign

As has been already explained, the Constitution of India, unlike the preceding Government of India Acts, is not a gift of the British Parliament. It is ordained by the people of India through their representatives assembled in a sovereign Constituent Assembly which was competent to determine the political future of the country in any manner it liked. The words—'We, the people of India.... adopt, enact and give to ourselves this Constitution', thus, declare the ultimate sovereignty of the people of India and that the Constitution rests on their authority.³

Sovereignty means the independent authority of a State. It means that it has the power to legislate on any subject; and that it is not subject to the control of any other State or external power.

Republic.

The Preamble declares, therefore, in unequivocal terms that the source of all authority under the Constitution is the people of India and that there is no subordination to any external authority. While Pakistan remained a British Dominion until 1956, India ceased to be a Dominion and declared herself a 'Republic' since the making of the Constitution in 1949. It means a government by the people and for the people.

We have an elected President at the head of our State, and all office including that of the President will be open to all citizens.

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Sovereignty not inconsistent with membership of the Commonwealth.

On and from the 26th Jan., 1950, when the Constitution came into force, the Crown of England ceased to have any legal or constitutional authority over India and no citizen of India was to have any allegiance to the British Crown. But though India declared herself a Republic, she did not sever all ties with the British Commonwealth as did Eire, by enacting the Republic of Ireland Act, 1948. In fact, the conception of the Commonwealth itself has undergone a change owing to India's decision to adhere to the Commonwealth, without acknowledging allegiance to the Crown which was the symbol of unity of the Old British Empire and also of its successor, the 'British Commonwealth of Nations'.⁵ It is this decision of India which has converted the 'British Commonwealth',— a relic of imperialism,—into a free association of independent nations under the honourable name of the 'Commonwealth of Nations'. This historic decision took place at the Prime Ministers' Conference at London on April 27, 1949, where, our Prime Minister, Pandit Nehru, declared that notwithstanding her becoming a sovereign independent Republic, India will continue—"her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of the independent nations and as such the Head of the Commonwealth."

It is to be noted that this declaration is extra-legal and there is no mention of it in the Constitution of India. It is a voluntary declaration and indicates a free association and no obligation. It only expresses the desire of India not to sever her friendly relations with the English people even though the tie of political subjugation was severed. The new association was an honourable association between independent States. It accepts the Crown of England only as a symbolic head of the Commonwealth (having no functions to discharge in relation to India as belonged to him prior to the Constitution), and having no claim to the allegiance of the citizens of India. Even if the King or Queen of England visits India, he or she will not be entitled to any precedence over the President of India. Again though as a member of the Commonwealth, India has a right to be represented on Commonwealth conferences, decisions at Commonwealth conferences will not be binding on her and no treaty with a foreign power or declaration of war by any member of the Commonwealth will be binding on her, without her express consent. Hence, this voluntary association of India with the Commonwealth does not affect her sovereignty to any extent and it would be open to India to cut off that association at any time she finds it not to be honourable or useful. As Pandit Nehru explained—

"It is an agreement by free will, to be terminated by free will."⁶

Promotion of International Peace.

The great magnanimity with which India took this decision in the face of a powerful opposition at home which was the natural reaction of the manifold grievances under the imperialistic rule, and the great fortitude with which the association has still been maintained, under the pressure of repeated disappointments, the strain of baffling international alignments and the 1976 upsurge of racialism in England, speak volumes about the sincerity of India's

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pledge to contribute 'to the promotion of world peace' which is reiterated in Art. 51 of the Constitution:

"The State shall endeavor to—

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organised people with one another ; and
- (d) encourage settlement of international disputes by arbitration."

The fraternity which is professed in the Preamble is thus not confined within the bounds of the national territory; it is ready to overflow them to reach the loftier ideal of universal brotherhood; which can hardly be better expressed than in the memorable words of Pandit Nehru:

"The only possible, real object that we, in common with other nations, can have is the object of co-operating in building up some kind of a world structure, call it one world, call it what you like."⁷

Thus, though India declares her sovereignty to manage her own affairs, in no unmistakable terms, the Constitution does not support isolationism or Jingoism'. Indian sovereignty is consistent with the concept of 'one world', international peace and amity.

Democracy.

The picture of a 'democratic republic' which the Preamble envisages is democratic not only from the political but also from the social standpoint; in other words, it envisages not only a democratic form of government but also a democratic society, infused with the spirit of 'justice, liberty, equality and fraternity'.

A Representative Democracy

(a) As a form of government, the democracy which is envisaged is, of course, a representative democracy and there are in our Constitution no agencies of direct control by the people, such as 'referendum, or 'initiative'. The people of India are to exercise their sovereignty through a Parliament at the Centre and a Legislature in each State, which is to be elected on adult franchise⁸ and to which the real Executive, namely, the Council of Ministers, shall be responsible. Though there shall be an elected President at the head of the Union and a Governor nominated by the President at the head of each State, neither of them can exercise any political function without the advice of the Council of Ministers⁹ which is collectively responsible to the people's representatives in the respective Legislatures (excepting functions which the Governor is authorised by the Constitution itself to discharge in his discretion or on his individual responsibility). The Constitution holds out equality to all the citizens in the matters of choice of their representatives, who are to run the governmental machinery.

Government of the People, by the People and for the People.

The ideal of a democratic republic enshrined in the Preamble of the Constitution can be best explained with reference to the adoption of universal suffrage (which has already been explained) and the complete equality between the sexes not only before the law but also in the political sphere. Political Justice means the absence of any arbitrary distinction between man and man in the political sphere. In order to ensure the 'political' justice held out by the Preamble, it was

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Political Justice.

essential that every person in the territory of India, irrespective of his proprietary or educational qualifications, should be allowed to participate in the political system like any other person. Universal adult suffrage was adopted with this object in view. This means that every five years, the members of the Legislatures of the Union and of each State shall be elected by the vote of the entire adult population, according to the principle—'one man, one vote'.

(b) The offering of equal opportunity to men and women, irrespective of their caste and creed, in the matter of public employment also implements this democratic ideal. The treatment of the minority, even apart from the constitutional safeguards, clearly brings out that the philosophy underlying the Constitution has not been overlooked by those in power. The fact that members of the Muslim and Christian communities are as a rule being included in the Council of Ministers of the Union as well as the States, in the Supreme Court, and even in Diplomatic Missions, without any constitutional reservation in that behalf, amply demonstrates that those who are working the Constitution have not missed its true spirit, namely, that every citizen must feel that this country is his own.

A Democratic Society.

That this democratic Republic stands for the good of all the people is embodied in the concept of a 'Welfare State' which inspires the Directive Principles of State Policy. The 'economic justice'

assured by the Preamble can hardly be achieved if the democracy envisaged by the Constitution were confined to a 'political democracy'. In the words of Pandit Nehru:10

"Democracy has been spoken of chiefly in the past, as political democracy, roughly represented by every person having a vote. But a vote by itself does not represent very much to a person who is down and out, to a person, let us say, who is starving or hungry. Political democracy, by itself, is not enough except that it may be used to obtain a gradually increasing measure of economic democracy, equality and the spread of good things of life to others and removal of gross inequalities.""

Or, as Dr. Radhakrishnan has put it—

"Poor people who wander about, find no work, no wages and starve, whose lives are a continual round of sore affliction and pinching poverty, cannot be proud of the Constitution or its law.""

In short, the Indian Constitution promises not only political but also social democracy, as explained by Dr. Ambedkar in his concluding speech in the Constituent Assembly:

"Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity which are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity."

The State in a democratic society derives its strength from the cooperative and dispassionate will of all its free and equal citizens.¹² Social and economic democracy is the foundation on which political democracy would be a way of life in the Indian polity¹³.

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Economic Justice.

(c) The banishment of poverty, not by expropriation of those who have, but by the multiplication of the national wealth and resources and an equitable distribution thereof amongst all who contribute towards its production, is the aim of the State envisaged by the Directive Principles. Economic democracy will be installed over our sub-continent to the extent that this goal is reached. In short, economic justice aims at establishing economic democracy and a 'Welfare State'.

The ideal of economic justice is to make equality of status meaningful and life worth living at its best removing inequality of opportunity and of status—social, economic and political.¹⁴

Social Justice.

Social justice is a fundamental right.¹⁵ Social justice is the comprehensive form to remove social imbalance by law harmonising the rival claims or the interests of different groups and/or sections

in the social structure or individuals by means of which alone it would be possible to build up a welfare State.¹⁶

Liberty, equality and fraternity.

The three have to be secured and protected with social justice and economic empowerment and political justice to all the citizens under the rule of law.¹⁷

Liberty.

Democracy, in any sense, cannot be established unless certain minimal rights, which are essential for a free and civilized existence, are assured to every member of the community. The Preamble mentions these essential individual rights as 'freedom of thought, expression, belief, faith and worship' and these are guaranteed against all the authorities of the State by Part III of the Constitution [vide Arts. 19, 25-28], subject, of course, to the implementation of the Directive Principles, for the common good [Art. 31C] and the 'fundamental duties', introduced [Art. 51A], by the 42nd Amendment, 1976.

'Liberty' should be coupled with social restraint and subordinated to the liberty of the greatest number for common happiness.¹⁸

Equality.

Guaranteeing of certain rights to each individual would be meaningless unless all inequality is banished from the social structure and each individual is assured of equality of status and opportunity for the development of the best in him and the means for the enforcement of the rights guaranteed to him. This object is secured in the body of the Constitution, by making illegal all discriminations by the State between citizen and citizen, simply on the ground of religion, race, caste, sex or place of birth [Art. 15]; by throwing open 'public places' to all citizens [Art. 15(2)]; by abolishing untouchability [Art. 17]; by abolishing titles of honour [Art. 18]; by offering equality of opportunity in matters relating to employment under the State [Art. 16]; by guaranteeing equality before the law and equal protection of the laws, as justiciable rights [Art. 14].

In addition to the above provisions to ensure civic equality the Constitution seeks to achieve political equality by providing for universal adult franchise [Art. 326] and by reiterating that no person shall be either

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excluded from the general electoral roll or allowed to be included in any general or special electoral roll, only on the ground of his religion, race, caste or sex [Art. 325].

Apart from these general provisions, there are special provisions in the Directive Principles [Part IV] which enjoin the State to place the two sexes on an equal footing in the economic sphere, by

securing to men and women equal right to work and equal pay for equal work [Art. 39, Cls. (a), (d)].

From a Socialistic Pattern of Society to Socialism.

The realisation of so many objectives would certainly mean an expansion of the functions of the State. The goal envisaged by the Constitution, therefore, is that of a 'Welfare State'¹⁹ and the establishment of a 'socialist state'². At the Avadi session in 1955, Congress explained this objective as establishing a 'socialistic pattern of society' by a resolution—

"In order to realise the object of Congress. . . . and to further the objectives stated in the Preamble and Directive Principles of State Policy of the Constitution of India, planning should take place with a view to the establishment of a socialistic pattern of society, where the principal means of production are under social ownership or control, production is progressively speeded up and there is equitable distribution of the national wealth."

How far this end has been already achieved will be explained in Chap. 9, where it will also be pointed out how, till 1992, the trend had been from a 'socialistic pattern' towards a 'socialistic state', bringing industries and private enterprises under State ownership and management and carrying on trade and business as a State function.

42nd Amendment, 1976.

That the goal of the Indian polity is socialism was ensured by inserting the word 'socialist' in the Preamble, by the Constitution (42nd Amendment) Act, 1976. It has been inserted "to spell out expressly the high ideals of socialism". It is to be noted, however, that the 'socialism' envisaged by the Indian Constitution is not the usual scheme of State socialism which involves 'nationalisation' of all means of production, and the abolition of private property. As the then Prime Minister Indira Gandhi explained²⁰—

"We have always said that we have our own brand of socialism. We will nationalise the sectors where we feel the necessity. Just nationalisation is not our type of socialism."²⁰

Though the word 'Socialism' is vague, our Supreme Court has observed that its principal aim is to eliminate inequality of income and status and standards of life, and to provide a decent standard of life to the working people. The Indian Constitution, therefore, does not seek to abolish private property altogether but seeks to put it under restraints so that it may be used in the interests of the nation, which includes the upliftment of the poor. Instead of a total nationalisation of all property and industry, it envisages a 'mixed economy', but aims at offering 'equal opportunity' to all, and the abolition of 'vested interests'.²¹⁻²² From 1992 onwards the trend is now away from socialism to privatisation. Investment in many public enterprises has been divested in favour of private persons and many industries and services which were reserved for the government sector have been thrown open for private enterprise. This is in keeping with the worldwide trend after the

collapse of socialism in the U.S.S.R., and East European countries. But the constitutional obligation to pay compensation to the private owner for State acquisition has been taken away by repealing Art. 31, by the Constitution (44th Amendment) Act, 1978, as will be further explained under Chap. 8, post.

Need for Unity and Integrity of the Nation.

Unity amongst the inhabitants of this vast sub-continent, torn asunder by a multitude of problems and fissiparous forces, was the first requisite for maintaining the independence of the country as well as to make the experiment of democracy successful. The ideal of unity has been buttressed by adding the words 'and integrity' of the Nation, in the Preamble, by the Constitution (42nd Amendment) Act, 1976. But neither the integration of the people nor a democratic political system could be ensured without infusing a spirit of brotherhood amongst the heterogeneous population, belonging to different races, religions and cultures.²³

The 'Fraternity' cherished by the framers of the Constitution will be achieved not only by abolishing untouchability amongst the different sects of the same community, but by abolishing all communal or sectional or even local or provincial anti-social feelings which stand in the way of the unity of India.

Fraternity.

Democracy would indeed be hollow if it fails to generate this spirit of brotherhood amongst all sections of the people,—a feeling that they are all children of the same soil, the same Motherland. It becomes all the more essential in a country like India, composed of so many races, religions, languages and cultures.

Article 1 of the Declaration of, Human Rights (1948), adopted by the United Nations, says:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brother-hood."

It is this spirit of brotherhood that the Preamble of our Constitution reflects.²⁴

A Secular State, guaranteeing Freedom of Religion to all.

The unity and fraternity of the people of India, professing numerous Faiths, has been sought to be achieved by enshrining the ideal of a 'secular State', which means that the State protects all religions equally and does not itself uphold any religion as the State religion. The question of Secularism is not one of sentiments, but one of law. The secular objective of the State has been specifically expressed by inserting the word 'secular' in the Preamble by the Constitution (42nd Amendment) Act, 1976. Secularism is a part of the basic structure of the Constitution.²⁴ There is no provision in the Constitution making any religion the 'established Church' as and other Constitutions do. On the other hand, the liberty of 'belief, faith and worship' promised in the Preamble is implemented by incorporating the fundamental rights of all citizens relating to

'freedom of religion' in Arts. 25-29, which guarantee to each individual freedom to profess, practise

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and propagate religion, assure strict impartiality on the part of the State and its institutions towards all religions (see Chap. 8, post).

This itself is one of the glowing achievements of Indian democracy when her neighbors, such as Pakistan,²⁵ Bangladesh, Sri Lanka (Ceylon) and Burma, uphold particular religions as State religions.

[For further discussion on 'Secularism', see under Chap. 8, Art. 25, post.]

Dignity of the Individual.

A fraternity cannot, however, be installed unless the dignity of each of members is maintained. The Preamble, therefore, says that the State, in India, will assure the dignity of the Individual. The Constitution seeks to achieve this object by guaranteeing equal fundamental rights to each individual, so that he can enforce his minimal rights, if invaded by anybody, in a court of law. Seeing that these justiciable rights may not be enough to maintain the dignity of an individual if he is not free from wants and misery, a number of Directives have been included in Part IV of the Constitution, exhorting the State so to shape its social and economic policies that, inter alia, "all citizens, men and women equally, have the right to an adequate means of livelihood" [Art. 39(a)], "just and humane conditions of work" [Art. 42], and "a decent standard of life and full enjoyment of leisure and social and cultural opportunities"[Art. 43]. Our Supreme Court has come to hold that the right to dignity is a fundamental right.²⁶

In order to remove poverty and to bring about a socio-economic revolution, the list of Directives was widened by the Constitution (42nd Amendment) Act, 1976, and it was provided that,—in order that such welfare measures for the benefit of the masses may not be defeated,—any measure for the implementation of any of the Directives shall be immune from any attack in the Courts on the ground that such measure contravenes any person's fundamental rights under Art. 14 or 19.²⁷

Fundamental Duties.

The philosophy contained in the Preamble, as explained in the foregoing pages, has been further highlighted by emphasising that each individual shall not only have the fundamental rights in Part III of the Constitution to ensure his liberty of expression, faith and worship, equality of opportunity and the like, but also a corresponding fundamental duty, such as to uphold the sovereignty, unity and integrity of the nation, to maintain secularism and the common brotherhood amongst all the people of India. This has been done by inserting Art. 51A, laying down ten 'Fundamental Duties', by the Constitution (42nd Amendment) Act, 1976 (see, further, under Chap. 8, post).

A fitting commentary on the foregoing contents of the Preamble to our Constitution can be best offered by quoting a few lines from Prof. Ernest Barker, one of the modern thinkers on democratic government.²⁸

".....there must be a capacity and a passion for the enjoyment of liberty—there must be a sense of personality in each, and of respect for personality in all, generally spread through the whole community—before the democratic State can be truly achieved . . . Perhaps it can be fairly demanded only in a community which has achieved a sufficient standard of material existence, and a sufficient degree of

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national homogeneity to devote itself to an ideal of liberty which has to be worked out in each common effort of all. If the problems of material existence are still absorbing... the ideal of living a common life of freedom—in other words, of attaining a particular quality of life—will seem an ideal dream. If, again, the problems of national homogeneity are still insistent, and there is no common feeling of fellowship—if some sections of the community are regarded by others, whether on the ground of their inferior education, or on the ground of their inferior stock or any other ground, as essentially alien and heterogeneous—the ideal of the common life of freedom will seem equally illusory...."²⁸

Combining the ideals of political, social and economic democracy with that of equality and fraternity, the Preamble seeks to establish what Mahatma Gandhi described as "the India of My Dreams", namely,—

"an India, in which the poorest shall feel that it is their country in whose making they have an effective voice; . . .an India in which all communities shall live in perfect harmony. There can be no room in such an India for the curse of untouchability or the curse of intoxicating drinks and drugs. Women will enjoy the same rights as men"²⁹

No wonder such a successful combination in the text of our Preamble would receive unstinted approbation from Ernest Barker, who has reproduced this Preamble at the opening of his book on Social and Political Theory, observing that the Preamble to the Constitution of India states,

"in a brief and pithy form the argument of much of the book, and it may

accordingly serve as a key-note."³⁰

REFERENCES

1. (1947) C.A.D. 304 (moved by Pandit Jawaharlal Nehru on December 13, 1946).
2. The words in italics were inserted by the Constitution (42nd Amendment) Act, 1976. See Author's Constitutional Law of India, Preamble.

3. Gopalan v. State of Madras, (1950) S.C.R. 88 (798); Union of India v. Madan Gopal, (1954) S.C.R. 541 {555}.

4. Re Berubari Union, A. 1960 S.C. 845 {846}.

5. So called since the Imperial Conference 1926. Later it has come to be mentioned simply as "The Commonwealth" [Cf. BARKER, Essays on Government (1956), pp. 16-18].

The concept of Commonwealth as an association has considerably weakened when the United Kingdom virtually segregated itself by refusing to protest against the Racist atrocities committed by the Government of South Africa and later by imposing the visa system upon immigrants from India and some other states.

6. C.A.D., 16-5-1949.

7. C.A.D., 22-1-1947.

8. The survival of this representative democracy and Parliamentary Government in India for about five decades since Independence should silence her critics, since military regime prevailed in her neighboring countries until recently. In 1981, the Constitution of Pakistan of 1972 was supplanted by the Provisional Constitution Order, 1981, under which Martial Law was imposed under Gen. Zia-ul-Haq as the Chief Martial Law Administrator, who assumed power in 1977. It is only after Zia's death that in December, 1988, elections were held. But the future is not so certain. Similarly, in Bangladesh, Martial Law was imposed since the assassination of Mujibar Rahaman and the assumption of military rule by Ziaur Rahaman, in 1975 and later on by Lt. General Ershad, until 1986 when an election was held and General Ershad elected President amidst a tumultuous situation. President Ershad handed over his power to a neutral Vice-President for conducting fresh elections. At the election Begum Khaleda Zia became the Prime Minister in March, 1991. In November, 1994, Parliament was dissolved, and, at the fresh election, Mrs. Hasina Wazed was elected the new Prime Minister.

9. This is now expressly ensured by amending Art. 74 (1) by the Constitution (42nd Amendment) Act, 1976, and the 44th Amendment Act, 1978.

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10. Inaugural address of Pandit Nehru at the Seminar on Parliamentary Democracy on 25-2-1956.

11. Speech of the Vice-President, *ibid*.

12. State of Punjab v. G.S. Gill, A.I.R. 1997 S.C. 2324.

13. Samantha v. State of A.P., A.I.R. 1997 S.C. 3297.

14. Dalmia Cement (Bharat) Ltd. v. Union of India, (1996) 10 S.C.C. 104.

15. Ashok Kumar Gupta v. State of U.P., (1997) 5 S.C.C. 201.
16. Dalmia Cement (Bharat) Ltd. v. Union of India, (1996) 10 S.C.C. 104.
17. S.S. Bola v. B.D. Sardana, (1997) 8 S.C.C. 522.
18. S.S. Bola v. B.D. Sardana, (1997) 8 S.C.C. 522.
19. Cf. Crown Aluminum Works v. Workmen, (1958) S.C.R. 651.
20. Statesman, 25-10-1976, p. 1; 28-10-1976, p. 1.
21. See, further, Author's Constitutional Law of India, Preamble.
22. It must be pointed out, in this context, that both 'socialism' and 'secularism' are vague words and, in the absence of any explanation of these words in the Constitution, such vagueness is liable to be capitalised by interested political groups and to create confusion in the minds of the masses of the Republic to instruct whom is one of the objects of the Preamble. The Janata Party sought to offer such explanation, by amending Art. 366 of the Constitution by the 45th Amendment Bill, 1976, which, however, was thwarted by the Congress opposition in the Rajya Sabha.

In the absence of such explanation, it would remain a matter of controversy whether the object of 'socialism' under the Indian Constitution simply means 'freedom from exploitation' or State Socialism or even Marxism. Similarly, 'secularism' might be used as an instrument of unrestrained communalism or bigotry or even anti-religionism, as distinguished from 'equal respect for all religions'. Instead of these words serving to elucidate the articles of the Constitution, the meaning of these words shall have to be gathered from the operative provisions, which, in legal interpretation, cannot be controlled by the Preamble. Thus, from Art. 43A, which has been introduced by the same 42nd Amendment Act, 1976, it is clear that 'socialism', as envisaged by the Preamble, will include 'participation of workers' in the management' of an industry, and consequently, profit-sharing. This is, obviously, a step forward from Capitalism to collectivism.

The Supreme Court is also facilitating the advent of socialism by interpreting other provisions of the Constitution in the light of the word 'socialism' in the Preamble [Excel Wear v. Union of India, A. 1979 S.C. 25 (para 24); Randhir v. Union of India, A. 1982 S.C. 879 (para 8); Nakara v. Union of India, A. 1983 S.C. 130 (paras 33-34); Minerva Mills v. Union of India, A. 1980 S.C. 1789].

According to the Supreme Court, the goal of Indian Socialism is "a blend of Marxism and Gandhism, leaning heavily towards Gandhian socialism" [Nakara v. Union of India, *ibid.*].

The budget for 1992-93 showed and subsequent budgets confirm that the trend of the Government is now away from collective ownership of means of production. Power, steel, airways and many other fields have been opened for free enterprise. The demise of U.S.S.R. has

hastened this change of approach. Public sector undertakings are being privatised, the Industrial Finance Corporation Act has been repealed and the corporation has been converted into a company. Same has been the fate of many government corporations. It will not be far away from the truth to assert that the pendulum has now swung from Socialism to the other direction of laissez faire, under which Indian industry will not have to face open competition from formidable foreign rivals.

23. The Supreme Court has pointed out that in promoting the unity of India, the common culture and heritage of India, of which the foundation is the Sanskrit language, must play a leading part [Santosh v. Secretary, Ministry of H.R.D., A. 1995 S.C. 293 (para 18)].

24. Bommai v. Union of India, A.I.R. 1994 S.C. 1918. Also see Sri Adi Visheshwar of Kashi Vishwanath Temple, Varanasi v. State of U.P., (1997) 4 S.C.C. 606 (para 26).

25. Islam is the State religion of Pakistan under the Constitution of 1972. This position had been maintained by the Provisional Constitution Order, 1981, issued by General Zia-ul-Haq, who assumed power in 1977 as the Chief Martial Law Administrator. In Bangladesh, Lieut. General Ershad, the President and Chief Martial Law Administrator declared that Islam would be the State religion [Statesman, 30-12-1982].

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26. L.I.C. v. Consumer Centre, A.I.R. 1995 S.C. 1811.

27. This amendment of Art. 31C, by the 42nd Amendment, has not been touched by the 44th Amendment Act, 1978, because the Congress Opposition in the Rajya Sabha thwarted the Janata attempt, through the 45th Amendment Bill, to revert to the pre-1976 position.

28. BARKER, Reflections on Government (Paperback), pp. 192-93.

29. M.K. GANDHI, India of My Dreams, pp. 9-10.

30. BARKER, Principles of Social and Political Theory (1951, Paperback), Preface, pp. vi, ix.

In recent cases {side author's Shorter Constitution of India, Preamble), the Supreme Court is relying more and more on the Preamble in interpreting the enacting provisions and implementing the Directive Principles (Part IV) of the Constitution.

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CHAPTER 4 OUTSTANDING FEATURES OF OUR CONSTITUTION

Drawn from different sources.

I. THE Constitution of India is remarkable for many outstanding features which will distinguish it from other Constitutions even though it has been prepared after "ransacking all the known Constitutions of the world and most of its provisions are substantially borrowed from others. As Dr. Ambedkar observed,¹—

"One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled when the first written Constitution was drafted. It has been followed by many other countries reducing their Constitutions to writing . . . Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there be any, in a 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."¹

So, though our Constitution may be said to be a 'borrowed' Constitution, the credit of its framers lies in gathering the best features of each of the existing Constitutions and in modifying them with a view to avoiding the faults that have been disclosed in their working and to adapting them to the existing conditions and needs of this country. So, if it is a 'patchwork', it is a 'beautiful patchwork'.²

There were members in the Constituent Assembly² who criticised the Constitution which was going to be adopted as a 'slavish imitation of the West' or 'not suited to the genius' of the people. Many apprehended that it would be unworkable. But the fact that it has survived for more than fifty years, while Constitutions have sprung up only to wither away in countries around us, such as Burma and Pakistan, belies the apprehension of the critics of the Indian Constitution.

Supplemented by multiple amendments, and practically recast by the 42nd, 43rd and 44th Amendments, 1976-78.

II. It must, however, be pointed out at the outset that many of the original features of the 1949-Constitution have been substantially modified by the 78 Amendments which have been made up to 1996,—of which the 42nd Amendment Act, 1976 (as modified by the 43rd and 44th Amendment Acts, 1977-78), has practically recast the Constitution in vital respects.

The 73rd Amendment Act which was brought into force in April 1993 has added 16 articles which provide for establishment of and elections to Panchayats. They comprise a new part, Part IX. By the same Amendment a

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new schedule (Sch. 11) has been added which enumerates the functions to be delegated to the Panchayats.

The 74th Amendment Act was passed to establish Municipalities and provides for elections to them. It has inserted Part 9A consisting of 18 articles. Schedule 12 inserted by the Amendment mentions the functions to be assigned to the Municipalities. This Amendment came into force on 1st June 1993.

The longest known Constitution.

III. The Constitution of India has the distinction of being the most lengthy and detailed constitutional document the world has so far produced. The original Constitution contained as many as 395 Articles and 8 Schedules (to which additions were made by subsequent amendments). Even after the repeal of several provisions it still (in 2000) contains 442 Articles and 12 Schedules.³

During the period 1950-2000, while a number of Articles have been omitted,—64 Articles and 4 Schedules have been added to the Constitution, viz., Arts. 31A-31C, 35A, 39A, 43A, 48A, 51A, 131A, 134A, 139A, 144A, 224A, 233A, 239A, 239AA, 239AB, 239B, 243, 243A to 243ZG, 244A, 257A, 258A, 290A, 300A, 312A, 323A, 323B, 350A, 350B, 361A, 363A, 371A-371-I, 372A, 378A, 394A.

This extraordinary bulk of the Constitution is due to several reasons :

Incorporates the accumulated experience of different Constitutions.

(i) The framers sought to incorporate the accumulated experience gathered from the working of all the known Constitutions and to avoid all defects and loopholes that might be anticipated in the light of those Constitutions. Thus, while they framed the Chapter on the Fundamental Rights upon the model of the American Constitution, and adopted the Parliamentary system of Government from the United Kingdom, they took the idea of the Directive Principles of State Policy from the Constitution of Eire, and added elaborate provisions relating to Emergencies in the light of the Constitution of the German Reich and the Government of India Act, 1935. On the other hand, our Constitution is more full of words than other Constitutions because it has embodied the modified results of judicial decisions made elsewhere interpreting comparable provisions, in order to minimise uncertainty and litigation.

Detailed administrative provisions included.

(ii) Not contented with merely laying down the fundamental principles of governance (as the American Constitution does), the authors of the Indian Constitution followed and reproduced the Government of India Act, 1935, in providing matters of administrative detail,—not only because the people were accustomed to the detailed provisions of that Act, but also because the authors had the apprehension that in the present conditions of the country, the Constitution might be perverted unless the of administration was also included in it. In the words of Ambedkar,¹

"... It is perfectly possible to pervert the Constitution without changing the form of administration."

Any such surreptitious subversion of the Constitution was sought to be prevented by putting detailed provisions in the Constitution itself, so that they might not be encroached upon without amending the Constitution.

The very adoption of the bulk of the provisions from the Government of India Act, 1935, contributed to the volume of the new Constitution inasmuch as the Act of 1935 itself was a lengthy and detailed organic law. So much was borrowed from that Act because the people were familiar with the existing system.

It was also felt that the smooth working of an infant democracy might be jeopardised unless the Constitution mentioned in detail things which were left in other Constitutions to ordinary legislation. This explains why we have in our Constitution detailed provisions about the organisation of the Judiciary, the Services, the Public Service Commissions, Elections and the like. It is the same ideal of 'exhaustiveness' which explains why the provisions of the Indian Constitution as to the division of powers between the Union and the States are more numerous than perhaps the aggregate of the provisions relating to that subject in the Constitution of the U.S.A., Australia and Canada.

Pecularity of the Problems to be solved.

(iii) The vastness of the country (see Table I), and the peculiar problems to be solved have also contributed towards the bulk of the Constitution. Thus, there is one entire Part [Part XVI] relating to the Scheduled Castes and Tribes and other backward classes; one Part [Part XVIII] relating to Official Language and another [Part XVII] relating to Emergency Provisions.

Contribution of the Units also included.

(iv) While the Constitution of the United States deals only with the Federal Government and leaves the States to draw up their own Constitutions, the Indian Constitution provides the Constitutions of both the Union and the Units (i.e., the States), with the same fullness and precision. Since the Units of the federation differed in their historical origins and their political development, special provisions for different classes of the Units⁵ had to be made, such as the Part B States (representing the former Indian States), the Part C States (representing the Centrally Administered areas) and some smaller Territories in Part D. This also contributed to the bulk of the 1949-Constitution (see Table HI).

Special provision for Jammu & Kashmir.

Though, as has just been said, the Constitution of the State was provided by the Constitution of India, the State of Jammu and Kashmir was accorded a special status and was allowed to make its own State Constitution. Even all the other provisions of the Constitution of India did not directly apply to Jammu and Kashmir but depended upon an Order made for the President in Constitution with the Government of State,—for which provision had to be made in Art. 370 [see Chap. 15].

Nagaland, Sikkim, etc.

Even after the inauguration of the Constitution, special provisions have been inserted [e.g., Arts. 371-371I], to meet the regional problems and demands in

certain States, such as Nagaland, Assam, Manipur, Andhra Pradesh, Maharashtra, Gujarat, Sikkim, Mizorma, etc.

Federal Relations elaborately dealt with.

(v) Not only are the provisions relating to the Units elaborately given, the relations between the Federation and the Units and the Units inter se, whether legislative or administrative, are also exhaustively codified, so as to eliminate conflicts as far as possible. The lessons drawn from the political history of India which induced the framers of the Constitution to give it a unitary bias, also prompted them to make detailed provisions "regarding the distribution of powers and functions between the Union and the States in all aspects of their administrative and other activities",⁶ and also as regards inter-State relations, co-ordination and adjudication of disputes amongst the States.

Both Justiciable and Non-justiciable Rights included: Fundamental Rights, Directive Principles, and Fundamental Duties.

(vi) There is not only a Bill of Rights containing justiciable fundamental rights of the individual [Part III] on the model of the Amendments to the American Constitution but also a Part [Part IV] containing Directive Principles, which confer no justiciable rights upon the individual but are nevertheless to be regarded as 'fundamental in the governance of the country,—being in the nature of 'principles of social policy' as contained in the Constitution of Eire (i.e., the Republic of Ireland). It was considered by the makers of our Constitution that though they could not, owing to their very nature, be made legally enforceable, it was well worth to incorporate in the Constitution some basic non-justiciable rights which would serve as moral restraints upon future governments and thus prevent the policy from being torn away from the idea which inspired the makers of the organic law.

Even the Bill of Rights [i.e., the list of Fundamental Rights) became bulkier than elsewhere because the framers of the Constitution had to include novel matters owing to the peculiar problems of our country, e.g., untouchability, preventive detention.

To the foregoing list, a notable addition has been made by the 42nd Amendment inserting one new Chapter of Fundamental Duties of Citizens [Part IVA, Art. 51A], which though not attended with any legal sanction, have now to be read along with the Fundamental Rights [see, further, under Chap. 8, post].

More Flexible than Rigid.

IV. Another distinctive feature of the Indian Constitution is that it seeks to impart flexibility to a written federal Constitution.

It is only the amendment of a few of the provisions of the Constitution that requires ratification by the State Legislatures and even then ratification by only 1/2 of them would suffice (while the American Constitution requires ratification by 3/4 of the States).

The rest of the Constitution may be amended by a special majority of the Union Parliament, i.e., a majority of not less than 2/3 of the members of

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each House present and voting, which, again, must be majority of the total membership of the House [see Chap. 10].

On the other hand, Parliament has been given the power to alter or modify many of the provisions of the Constitution by a simple majority as is required for general legislation, by laying down in the Constitution that such changes "shall not be deemed to be 'amendments' of the Constitution". Instances to the point are—(a) Changes in the names, boundaries, areas of, and amalgamation and separation of States [Art. 4]. (b) Abolition or creation of the Second Chamber of a State Legislature [Art. 169]. (c) Administration of Scheduled Areas and Scheduled Tribes [Para 7 of the 5th Schedule and Para 21 of the 6th Schedule]; (d) Creation of Legislatures and Council of Ministers for certain Union Territories [Art. 239A(2)].

Legislation as supplementing the Constitution.

Yet another evidence of this flexibility is the power given by the Constitution itself to Parliament to supplement the provisions of the Constitution by legislation. Though the makers of the Constitution aimed at exhaustiveness, they realised that it was not possible to anticipate all exigencies and to lay down detailed provisions in the Constitution to meet all situations and for all times.

(a) In various Articles, therefore, the Constitution lays down certain basic principles and empowers Parliament to supplement these principles by legislation. Thus, (i) as to citizenship, Arts. 5-8 only lay down the conditions for acquisition of citizenship at the commencement of the Constitution and Art. 11 vests plenary powers in Parliament to legislate on this subject. In pursuance of this power, Parliament has enacted the Citizenship Act, 1955, so that in order to have a full view of the law of citizenship in India, study of the Constitution has to be supplemented by that of the Citizenship Act. (ii) Similarly, while laying down certain fundamental safeguards against preventive detention, Art. 22(7) empowers Parliament to legislate on some subsidiary matters relating to the subject. The laws made under this power, have, therefore, to be read along with the provisions of Art. 22. (iii) Again, while banning 'untouchability', Art. 17 provides that it shall be an offence 'punishable in accordance with law', and in exercise of this power, Parliament has enacted the Protection of Civil Rights Act, 1957 which must be referred to as supplementing the constitutional prohibition against untouchability. (iv) While the Constitution lays down the basic provisions relating to the election of the President and Vice-President, Art. 71(3) empowers Parliament to supplement these constitutional provisions by legislation, and by virtue of this power Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952.

The obvious advantage of this scheme is that the law made by Parliament may be modified according to the exigencies for the time being, without having to resort to a constitutional amendment.

(b) There are, again, a number of articles in the Constitution which are of a tentative or transitional nature and they are to remain in force only so long as Parliament does not legislate on the subject, e.g., exemption of Union property from State taxation [Art. 285]; suability of the State [Art. 300(1)].

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The Constitution, thus, ensures adaptability by prescribing a variety of modes in which its original text may be changed or supplemented, a fact which has evoked approbation from Prof. Wheare—

"This variety in the amending process is wise but is rarely found."⁸

This wisdom has been manifested in the ease with which Sikkim, a Protectorate since British days, could be brought under the Constitution—first, as an 'associate State' (35th Amendment Act), and then as a full-fledged State of the Union (36th Amendment Act, 1975).

Reconciliation of a written Constitution with Parliamentary sovereignty.

V. This combination of the theory of fundamental law which underlies the written Constitution of the United States with the theory of 'Parliamentary sovereignty' which underlies the unwritten Constitution of England is the result of the liberal philosophy of the framers of the Indian Constitution which has been so nicely expressed by Pandit Nehru:

"While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital, organic people. . . In any event, we could not make this Constitution as rigid that it cannot be adapted to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what we may do to-day may not be wholly capable tomorrow."⁹

The flexibility of our Constitution is illustrated by the fact that during the first 50 years of its working, it has been amended 83 times. Vital changes have thus been effected by the First, Fourth, Twenty-fourth, Twenty-fifth, Thirty-ninth, Forty-second, Forty-fourth, Seventy-third and Seventy-fourth Amendments to the Constitution, including amendments to the fundamental rights, powers of the Supreme Court and the High Courts.

Dr. Jennings¹⁰ characterised our Constitution as rigid for two reasons: (a) that the process of amendment was complicated and difficult, (b) that matters which should have been left to ordinary legislation having been incorporated into the Constitution, no change in these matters is possible without undergoing the process of amendment. We have seen that the working of the Constitution during five decades has not justified the apprehension that the process of

amendment is very difficult [see also Chap. 10, post]. But the other part of his reasoning is obviously sound. In fact, his comments on this point have proved to be prophetic. He cited Art. 224 as an illustration of a provision which had been unnecessarily embodied in the Constitution:

"An example taken at random is article 224, which empowers a retired judge to sit in a High Court. Is that a provision of such constitutional importance that it needs to be constitutionally protected, and be incapable of amendment except with the approval of two-thirds of the members of each House sitting and voting in the Union Parliament?"¹¹

As Table IV will show it has required an amendment of the Constitution, namely, the Seventh Amendment of 1956, to amend this article to provide for the appointment of Additional Judges instead of recalling retired Judges. Similar amendments have been required, once to provide that a Judge of a High Court who is transferred to another High

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Court shall not be entitled to compensation [Art. 222] and, again, to provide for compensation. It is needless to multiply such instances since they are numerous.

The greatest evidence of flexibility, however, has been offered by the amendments since 1976. The 42nd Amendment Act, 1976, after the Constitution had worked for over quarter of a century, introduced vital changes and upset the balance between the different organs of the State.¹¹ Of course, behind this flexibility lies the assumption that the Party in power wields more than a two-thirds majority in both Houses of Parliament.¹¹

Role of Conventions under the Constitution.

VI. It is also remarkable that though the framers of the Constitution attempted to make an exhaustive code of organic law, room has been left for the growth of conventions to supplement the Constitution in matters where it is silent. Thus, while the Constitution embodied the doctrine of Cabinet responsibility in Art. 75, it was not possible to codify the numerous conventions which answer the problems as they may arise in England, from time to time, in the working of the Cabinet system. Take, for instance, the question whether the Ministry should resign whenever there is an adverse vote against it in the House of the People, or whether it is at liberty to regard an accidental defeat on a particular measure as a 'snap vote'.¹² Again, the Constitution cannot possibly give any indication as to which issue should be regarded as a 'vital issue' by a Ministry, so that on a defeat on such an issue the Ministry should be morally bound to resign. Similarly, in what circumstances a Ministry would be justified in advising the President to dissolve Parliament instead of resigning upon an adverse vote, can only be established by convention.

Sir Ivor Jennings¹⁰ is, therefore, justified in observing that—

"The machinery of government is essentially British and the whole collection of British constitutional conventions has apparently been incorporated as conventions."

Fundamental Rights and Constitutional Remedies.

VII. While the Directive Principles are not enforceable in the Courts, the Fundamental Rights, included in Part III, are so enforceable at the instance of any person whose fundamental right has been infringed by any action of the State,—executive or legislative—and the remedies for enforcing these rights, namely, the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, are also guaranteed by the Constitution. Any law or executive order which offends against a fundamental right is liable to be declared void by the Supreme Court or the High Court.

It is through a misapprehension of these provisions that the Indian Constitution has been described by some critics as a 'lawyer's paradise'.¹² According to Sir Ivor Jennings,¹⁰ this is due to the fact that the Constituent Assembly was dominated by 'the lawyer-politicians'. It is they who thought of codifying the individual rights and the prerogative writs though none in England would ever cherish such an idea. In the words of Sir Ivor—

"Though no English lawyer would have thought of putting the prerogative writs into a Constitution, the Constituent Assembly did so. . . These various factors have given India a most complicated Constitution. Those of us who claim to be

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constitutional lawyers can look with equanimity on this exaltation of our profession. But constitutions are intended to enable the process of Government to work smoothly, and not to provide fees for constitutional lawyers. The more numerous the briefs the more difficult the process of government becomes. India has perhaps placed too much faith in us."¹⁰

Judicial review makes the Constitution legalistic.

With due respect to the great constitutional expert,¹⁰ these observations disclose a failure to appreciate the very foundation of the Indian Constitution. Sir Ivor omits to point out that the fathers of the Indian Constitution preferred the American doctrine of 'limited government' to the English doctrine of Parliamentary sovereignty.

In England, the birth of modern democracy was due to a protest against the absolutism of an autocratic executive and the English people discovered in Parliamentary sovereignty an adequate solution of the problem that faced them. The English political system is founded on the unlimited faith of the people in the good sense of their elected representatives. Though, of late, detractions from its omnipotent authority have taken place because the ancient institution at Westminster has grown incapable of managing myriads of modern problems with the same ease as in Victorian age, nonetheless, never has anybody in England thought of placing limitations on the authority of Parliament so that it might properly behave.

The Founding Fathers of the American Constitution, on the other hand, had the painful experience that even a representative body might be tyrannical, particularly when they were concerned with a colonial Empire. Thus it is that the Declaration of Independence recounts the attempts of the British "Legislature to extend an unwarrantable jurisdiction over us" and how the

British people had been "deaf of the voice of justice". At heavy cost had the colonists learnt about the frailty and weakness of human nature when the same Parliament which had forced Charles I to sign the Petition of Right (1628) to acknowledge that no tax could be levied without the consent of Parliament, did, in 1765, and the years that followed, insist on taxing the colonies, regardless of their right of representation, and attempt to enforce such undemocratic laws through military rule.

Hence, while the English people, in their fight for freedom against autocracy, stopped with the establishment of the supremacy of the law and Parliament as the sole source of that law, Americans had to go further and to assert that there is to be a law superior to the Legislature itself and that it was the restraints of this paramount written law that could only save them from the fears of absolutism and autocracy which are ingrained in human nature itself.

As will be more fully explained in the Chapter on Fundamental Rights, the Indian experience of the application of the British Rule of Law in India was not altogether happy and there was a strong feeling that it was not administered with even hands by the foreign rulers in India as in their own land. The "Sons of Liberty" in India had known to what use the flowers of the English democratic system, viz., the Sovereignty of Parliament and the Rule of Law, could be put in trampling down the rights of man under an

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Imperial rule. So, in 1928, long before the dawn of independence in India, the Motilal Nehru Committee asserted that

"Our first care could be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances."

Now, judicial review is a necessary concomitant of 'fundamental rights', for, it is meaningless to enshrine individual rights in a written Constitution as 'fundamental rights' if they are not enforceable, in Courts of law, against any organ of the State, legislative or executive. Once this choice is made, one cannot help to be sorry for the litigation that ensues. Whatever apprehensions might have been entertained in some quarters in India at the time of the making of the Indian Constitution, there is hardly anybody in India to-day who is aggrieved because the Supreme Court, each year, invalidates a dozen of statutes and a like number of administrative acts on the ground of violation of the fundamental rights.

At the same time, it must be pointed out that since the inauguration of the Constitution, various provisions have been inserted into the Constitution by amendments, which have taken out considerable areas from the pale of judicial review, e.g., by inserting Arts. 31A-31C; and by 1995 as many as 284 Acts,—Central and State,—have been shielded from judicial review on the ground of contravention of the Fundamental Rights, by enumerating them under the 9th Schedule, which relates to Art. 31B.¹¹

VIII. An independent Judiciary, having the power of 'Judicial review', is another prominent feature of our Constitution.

On the other hand, we have avoided the other-extreme, namely, that of 'judicial supremacy', which may be a logical outcome of an overemphasis on judicial review, as the American experience demonstrates.

Judicial power of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution.¹³

Compromise between Judicial Review and Parliamentary Supremacy.

Indeed, the harmonisation which our Constitution has effected between Parliamentary Sovereignty and a written Constitution with a provision for Judicial Review, is a unique achievement of the framers of our Constitution. An absolute balance of powers between the different organs of government is an impracticable thing and, in practice, the final say must belong to some one of them. This is why the rigid scheme of Separation of Powers and the checks and balances between the organs in the Constitution of the United States has failed in its actual working, and the Judiciary has assumed supremacy under its powers of interpretation of the Constitution to such an extent as to deserve the epithet of the 'safety valve' or the 'balance-wheel' of the Constitution. As one of her own Judges has said (Chief Justice HUGHES), "The Constitution (of the U.S.A.) is what the Supreme Court says it is". It has the power to invalidate a law duly passed by the Legislature not only on the ground that it transgresses the legislative powers vested in it by the Constitution or by the prohibitions contained in the Bill of Rights but also on the ground that it is opposed to some general principles said to underlie vague expressions, such as due process, the contents of which not being

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explicitly laid down in the Constitution, are definable only by the Supreme Court. The American Judiciary thus sits over the wisdom of any legislative policy as if it were a third Chamber or super-Chamber of the Legislature.

Under the English Constitution, on the other hand, Parliament is supreme and "can do everything that is not naturally impossible" (Blackstone) and the Courts cannot nullify any Act of Parliament on any ground whatsoever. As MAY puts it—

"The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to the principles of sound government. But Parliament is not controlled in its discretion and when it errors, its errors can be corrected only by itself."

So, English Judges have denied themselves any power "to sit as a court of appeal against Parliament".

The Indian Constitution wonderfully adopts the via media between the American system of Judicial Supremacy and the English principle of Parliamentary Supremacy, by endowing the Judiciary with the power of declaring a law as unconstitutional if it is beyond the competence of the Legislature according to the distribution of powers provided by the Constitution, or if it is in

contravention of the fundamental rights guaranteed by the Constitution or of any other mandatory provision of the Constitution, e.g., Arts. 286, 299, 301, 304; but, at the same time, depriving the Judiciary of any power of 'judicial review' of the wisdom of legislative policy. Thus, it avoided expressions like 'due process', and made fundamental rights such as that of liberty and property subject to regulation by the Legislature.¹¹ But the Supreme Court has discovered 'due process' in Art. 21 in *Maneka Gandhi*.¹⁴ Further the major portion of the Constitution is liable to be amended by the Union Parliament by a special majority, if in any case the Judiciary proves too obtrusive. The theory underlying the Indian Constitution in this respect can hardly be better expressed than in the words of Pandit Nehru:

"No Supreme Court, no Judiciary, can stand in judgment over the sovereign will of Parliament, representing the will of the entire community. It can pull up that sovereign will if it goes wrong, but, in the ultimate analysis, where the future of the community is concerned, no Judiciary can come in the way. . . Ultimately, the fact remains that the Legislature must be supreme and must not be interfered with by the Courts of Law in such measures as social reform."

Our Constitution thus places the supremacy at the hands of the Legislature as much as that is possible within the bounds of a written Constitution. But, as has been mentioned earlier, the balance between Parliamentary Sovereignty and Judicial Review was seriously disturbed, and a drift towards the former was made, by the Constitution (42nd Amendment) Act, 1976, by inserting some new provisions, e.g., Arts. 31D, 32A, 131A, 144A, 226A, 228A, 323A-B, 329A.

The Janata Government, coming to power in 1977, restored the pre-1976 position, to a substantial extent, through the 43rd and 44th Amendments, 1977-78, by repealing the following Articles which had been inserted by the 42nd Amendment—31D, 32A, 131A, 144A, 226A, 228A, 329A; and by restoring Art. 226 to its original form (substantially).

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On the other hand, the Judiciary has gained ground by itself declaring that 'judicial review' is a 'basic feature' of our Constitution, so that so long as the Supreme Court itself does not revise its opinion in this behalf, any amendment of the Constitution to take away judicial review of legislation on the ground of contravention of any provision of the Constitution shall itself be liable to be invalidated by the Court (see at the end of this Chapter).

Fundamental Rights subject to reasonable regulation by Legislature.

IX. The balancing between supremacy of the Constitution and sovereignty of the Legislature is illustrated by the novel declaration of Fundamental Rights which our Constitution embodies.

The idea of incorporating in the Constitution a 'Bill of Rights' has been taken from the Constitution of the United States. But the guarantee of individual rights in our Constitution has been very carefully balanced with the need for the security of the State itself.

American experience demonstrates that a written guarantee of fundamental rights has a tendency to engender an atomistic view towards society and the State which may at times prove to be

dangerous to the common welfare. Of course, America has been saved from the dangers of such a situation by reason of her Judiciary propounding the doctrine of 'Police Powers' under which the Legislature is supposed to be competent to interfere with individual rights wherever they constitute a 'clear danger' to the safety of the State and other collective interests.

Instead of leaving the matter to the off-chance of judicial protection in particular cases, the Indian Constitution makes each of the fundamental rights subject to legislative control under the terms of the Constitution itself, apart from those exceptional cases where the interests of national security, integrity or welfare should exclude the application of fundamental rights altogether [Arts. 31A-31C].¹¹

Social Equality also guaranteed by the Constitution.

X. Another peculiarity of the Chapter on Fundamental Rights in the Indian Constitution is that it aims at securing not merely political or legal equality, but social equality as well. Thus, apart from the usual guarantees that the State will not discriminate between one citizen and another merely on the ground of religion, race, caste, sex or place of birth,—in the matter of appointment, or other employment, offered by the State,—the Constitution includes a prohibition of 'untouchability, in any form and lays down that no citizen may be deprived of access to any public place, of the enjoyment of any public amenity or privilege, only on the ground of religion, race, caste, sex or place of birth.

We can hardly overlook in this context that under the Constitution of the U.S.A., racial discrimination persists even to-day, notwithstanding recent judicial pronouncements to the contrary. The position in the United Kingdom is no better as demonstrated by current events.

Fundamental Rights checkmated by Fundamental Duties.

XI. Another feature, which was not in the original Constitution has been introduced by the 42nd Amendment, 1976, by introducing Art. 51A as Part IV of the Constitution.

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42nd Amendment 1976.

Though the Directives in Part IV of the Constitution were not enforceable in any manner and had to give way before the Fundamental Rights, under the original Constitution, the situation was reversed, through the backdoor, by the 42nd Amendment, 1976, by amending Art. 31C¹¹—shielding all the Directives in Part IV of the Constitution from the Fundamental Rights in Part III. But this object has been frustrated by the majority decision in the case of *Minerva Mills v. Union of India*,¹⁵ as a result of which Art. 31C will shield from unconstitutionality on the ground of violation of Art. 13 those laws which implement only the Directives specified in Art. 39(b)-(c) and not any other Directive included in Part IV of the Constitution.

In the same direction, the 42nd Amendment Act introduced 'Fundamental Duties', to circumscribe the Fundamental Rights, even though the Duties, as such, cannot be judicially enforced (see, further, under Chap. 8, post).

Universal Franchise without Communal Representation.

XII. The adoption of universal adult suffrage [Art. 326], without any qualification either of sex, property, taxation or the like, is a 'bold experiment' in India, having regard to the vast extent of the country and its population, with an over-whelming illiteracy (see Table I, post). The suffrage in India, it should be noted, is wider than that in England or the United States. The concept of popular sovereignty, which underlies the declaration in the Preamble that the Constitution is adopted and given by the 'people of India' unto themselves, would indeed have been hollow unless the franchise—the only effective medium of popular sovereignty in a modern democracy—were extended to the entire adult population which was capable of exercising the right and an independent electoral machinery (under the control of the Election Commission) was set up to ensure the free exercise of its. The electorate has further been widened by lowering the voting age from 21 to 18, by the 61st Constitution Amendment Act, 1988.

That, notwithstanding the outstanding difficulties, this bold experiment has been crowned with success will be evident from some of the figures¹⁶ relating to the first General Election held under the Constitution in 1952. Out of a total population of 356 million and an adult population of 180 million, the number of voters enrolled was 173 million and of these no less than 88 million, i.e., over 50 per cent of the enrolled voters, actually exercised their franchise. The orderliness with which eleven General Elections have been conducted speaks eloquently of the political attainment of the masses, though illiterate, of this vast sub-continent. In the eleventh General Election held in 1996, the number of persons on the electoral roll had come up to 550 million.

No less creditable for the framers of the Constitution is the abolition of communal representation, which in its trail had brought in the bloody and lamentable partition of India. In the new Constitution there was no reservation of seats except for the Scheduled Castes and Scheduled Tribes and for the Anglo-Indians,—and that only for a temporary period (this

period was 10 years in the original Constitution, which has been extended to 60 years, i.e., up to 2010 A.D., by subsequent amendments of Art. 334).¹⁷

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XIII. It has been stated at the outset, that the form of government introduced by our Constitution both at the Union and the States is the Parliamentary Government of the British type.¹⁸ A primary reason for the choice of this system of government was that the people had a long experience of this system under the Government of India Acts,¹⁹ though the British were very slow in importing its features to the fullest length.

The makers of our Constitution rejected the Presidential system of government, as it obtains in America, on the ground that under that system the Executive and the Legislatures are separate

from and independent of each other,²⁰ which is likely to cause conflicts between them, which our infant democracy could ill afford to risk.

But though the British model of Parliamentary or Cabinet form of government was adopted, a hereditary monarch or ruler at the head could not be installed, because India had declared herself a 'Republic'. Instead of a monarch, therefore, an elected President was to be at the head of the Parliamentary system. In introducing this amalgam, the makers of our Constitution followed the Irish precedent.

Parliamentary Government combined with an elected President at the Head.

As in the Constitution of Eire, the Indian Constitution superimposes an elected President upon the Parliamentary system of responsible government. But though an elected President is the executive head of the Union, he is to act on the advice of his ministers, although whether he so acts according to the advice of his ministers is not questionable in the courts and there is no mode, short of impeachment, to remove the President if he acts contrary to the Constitution.

On the other hand, principle of ministerial responsibility to the Legislature, which under the English system rests on convention, is embodied in the express provisions of our Constitution [Art. 75(3)].

In the words of our Supreme Court,²¹

"Our Constitution though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of government policy and its transmission into law, though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. . . In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England..."²¹

42nd Amendment, 1976.

But our Constitution is not an exact replica of the Irish model either. The Constitution of Eire lays down that the constitutional powers of the President can only be exercised by him on the advice of Ministers, except those which are left to his discretion by the Constitution itself. Thus, the Irish President has an absolute discretion to refuse dissolution of the Legislature to a defeated Prime Minister, contrary to the English practice and convention. But in the Indian Constitution there is no provision authorising the President to act in his discretion' on any matter. On the other hand, by

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amending Art. 74(1), the 42nd Amendment Act has explicitly codified the proposition which the Supreme Court had already laid down in several decisions,²¹ that the President "shall, in the exercise of his functions, act in accordance with such advice," i.e., the advice tendered by the Council of Ministers.

44th Amendment, 1978.

The Janata Government has preferred not to disturb this contribution of the 42nd Amendment, except to empower the President by the 44th Amendment, 1978, to refer a matter back to the Council of Ministers, for reconsideration.

A Federal System with Unitary Bias.

XIV. Perhaps the most remarkable achievement of the Indian Constitution is to confer upon a federal system the strength of a unitary government. Though normally the system of government is federal, the Constitution enables the federation to transform itself into a unitary State (by the assumption of the powers of States by the Union),—in emergencies [Part XVIII].

Such a combination of federal and unitary systems in the same constitution is unique in the world. For a correct appreciation of this unique system it is necessary to examine the background upon which federalism has been introduced into India, in the light of the experience in other federal countries. This deserves a separate treatment [see Chap. 5, post].

Integration of Indian States.

XV. No less an outstanding feature of the new Constitution is the union of some 552 Indian States with the rest of India under the Constitution. Thus, the problem that baffled the framers of the Government of India Act, 1935, and ultimately led to the failure of its federal scheme, was solved by the framers of the Constitution with unique success. The entire sub-continent of India has been unified and consolidated into a compact State in a manner which is unprecedented in the history of this country.

The process by which this formidable task has been formed makes a story in itself.

Status of Indian States under the British Crown.

At the time of the constitutional reforms leading to the Government of India Act, 1935, the geographical entity known as India was divided into two parts—British India and the Indian States. While British India comprised the nine Governors' Provinces and some other areas administered by the Government of India itself, the Indian States comprised some 600 States which were mostly under the personal rule of the Rulers or proprietors. All the Indian States were not of the same order. Some of them were States under the rule of hereditary Chiefs, which had a political status even from before the Mahomedan invasion; others (about 300 in number) were Estates or Jagirs granted by the Rulers as rewards for services or otherwise, to particular individuals or families. But the common feature that distinguished these States from British India was that the Indian States, had not been annexed by the British Crown. So, while British India was under the direct rule of the Crown through its representatives and according to the statutes of Parliament and enactments of the Indian Legislatures,—the

Indian States were allowed to remain under the personal rule of their Chiefs and Princes, under the 'suzerainty' of the Crown, which was assumed over the entire territory of India when the Crown took over authority from the East India Company in 1858.

Incidents of Paramountcy.

The relationship between the Crown and the Indian States since the assumption of suzerainty by the Crown came to be described by the term 'Paramountcy'. The Crown was bound by engagements of a great variety with the Indian States. A common feature of these engagements was that while the States were responsible for their own internal administration, the Crown accepted responsibility for their external relations and defence. The Indian States had no international life, and for external purposes, they were practically in the same position as British India. As regards internal affairs, the policy of the British Crown was normally one of non-interference with the monarchical rule of the Rulers, but the Crown interfered in cases of misrule and mal-administration, as well as for giving effect to its international commitments. So, even in the internal sphere, the Indian States had no legal right against non-interference.

Nevertheless, the Rulers of the Indian States enjoyed certain personal rights and privileges, and normally carried on their personal administration, unaffected by all political and constitutional vicissitudes within the neighboring territories of British India.

Place of Indian States in the Federal Scheme proposed by the Government of India Act, 1935.

The Government of India Act, 1935 envisaged a federal structure for the whole of India, in which the Indian States could figure as units, together with the Governors' Provinces. Nevertheless, the framers of the Act differentiated the Indian States from the Provinces in two material respects, and this differentiation ultimately proved fatal for the scheme itself. The two points of difference were—(a) While in the case of the Provinces accession to the Federation was compulsory or automatic,—in the case of an Indian State it was voluntary and depended upon the option of the Ruler of the State. (b) While in the case of the Provinces, the authority of the Federation over the Provinces (executive as well as legislative) extended over the whole of the federal sphere chalked out by the Act,—in the case of the Indian States, the authority of the Federation could be limited by the Instrument of Accession and all residuary powers belonged to the State. It is needless to elaborate the details of the plan of 1935, for, as has been stated earlier, the accession of the Indian States to the proposed Federation never came true, and this Part of that Act was finally abandoned in 1939, when World War II broke out.

When Sir Stafford Cripps came to India with his Plan, it was definitely understood that the Plan proposed by him would be confined to settling the political destinies of British India and that the Indian States would be left free to retain their separate status.

Proposal of the Cabinet Mission.

But the Cabinet Mission supposed that the Indian States would be ready to co-operate with the new development in India. So, they recommended

that there should be a Union of India, embracing both British India and the States, which would deal only with Foreign Affairs, Defence and Communications, while the State would retain all powers other than these.

Lapse of Paramountcy under the Indian Independence Act.

When the Indian Independence Act, 1947, was passed, it declared the lapse of suzerainty (paramountcy) of the Crown, in s. 7(1)(b) of the Act, which is worth reproduction:

7. (1) As from the appointed day—

(b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at the date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority, or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise; and

Provided that notwithstanding anything in paragraph (b). . . of this sub-section, effect shall, as nearly as may be, continue to be given to the provision of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the Rulers of the Indian States. . . on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.'

But though paramountcy lapsed and the Indian States regained their position which they had prior to the assumption of suzerainty by the Crown, most of the States soon realised that it was no longer possible for them to maintain their existence independent of and separate from the rest of the country, and that it was in their own interests necessary to accede to either of the two Dominions of India and Pakistan. Of the States situated within the geographical boundaries of the Dominion of India, all (numbering 552) save Hyderabad, Kashmir, Bahawalpur, Junagadh and the N.W.F. States (Chitral, Phulra, Dir, Swat and Amb) had acceded to the Dominion of India by the 15th August, 1947, i.e., before the 'appointed day' itself. The problem of the Government of India as regards the States after the accession was two-fold:

(a) Shaping the Indian States into sizeable or viable administrative units, and (b) fitting them into the constitutional structure of India.

(A) The first objective was sought to be achieved by a three-fold process of integration (known as the 'Patel scheme' after Sardar Vallabhbhai Patel, Minister in-charge of Home Affairs)—

Integration and merger.

(i) 216 States were merged into the respective Provinces, geographically contiguous to them. These merged States were included in the territories of the States in Part B in the First Schedule of the Constitution. The process of merger started with the merger of Orissa and Chhattisgarh States with the then Province of Orissa on January 1, 1948, and the last instance was the merger of Cooch-Bihar with the State of West Bengal in January, 1950.

(ii) 61 States were converted into Centrally administered areas and included in Part C of the First Schedule of the Constitution. This form of integration was resorted to in those cases in which, for administrative, strategic or other special reasons, Central control was considered necessary.

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(iii) The third form of integration was the consolidation of groups of States into new viable units, known as Union of States. The first Union formed was the Saurashtra Union consolidating the Kathiawar States and many other States (February 15, 1948), and the last one was the Union of Travancore-Cochin, formed on July 1, 1949. As many as 275 States were thus integrated into 5 Unions—Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin. These were included in the States in Part B of the First Schedule. The other 3 States included in Part B were—Hyderabad, Jammu and Kashmir and Mysore. The cases of Hyderabad and Jammu and Kashmir were peculiar. Jammu and Kashmir acceded to India on October 26, 1947, and so it was included as a State in Part B, but the Government of India agreed to take the accession subject to confirmation by the people of the State, and a Constituent Assembly subsequently confirmed it, in November, 1956. Hyderabad did not formally accede to India, but the Nizam issued a Proclamation recognising the necessity of entering into a constitutional relationship with the Union of India and accepting the Constitution of India subject to ratification by the Constituent Assembly of that State, and the Constituent Assembly of that State ratified this. As a result, Hyderabad was included as a State in Part B of the First Schedule of the Constitution.

(B) We have so far seen how the States in Part B were formed as viable units of administration,—being the residue of the bigger Indian States, left after the smaller States had been merged in the Provinces or converted into Centrally Administered Areas. So far as the latter two groups were concerned, there was no problem in fitting them into the body of the Constitution framed for the rest of India. There was an agreement between the Government of India and the Ruler of each of the States so merged, by which the Rulers voluntarily agreed to the merger and ceded all powers for the governance of the States to the Dominion Government, reserving certain personal rights and privileges for themselves.

But the story relating to the States in Part B is not yet complete. At the time of their accession to the Dominion of India in 1947, the States had acceded only on three subjects, viz., Defence, Foreign Affairs and Communications. With the formation of the Unions and under the influence of political events, the Rulers found it beneficial to have a closer connection with the Union of India and all the Rajpramukhs of the Unions as well as the Maharaja of Mysore, signed revised Instruments of Accession by which all these States acceded to the Dominion of India in respect of all matters included in the Union and Concurrent Legislative Lists, except only those relating to taxation. Thus, the States in Part B were brought at par with the States in Part A, subject only

to the differences embodied in Art. 238 and the supervisory powers of the Centre for the transitional period of 10 years [Art. 371]. Special provisions were made only for Kashmir [Art. 370] in view of its special position and problems. That article makes special provisions for the partial application of the Constitution of India to that State, with the concurrence of the Government of that State.

It is to be noted that the Rajpramukhs of the five Unions as well as the Rulers of Hyderabad, Mysore, Jammu and Kashmir all adopted the Constitution of India, by Proclamations.

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Reorganisation of States.

The process of integration culminated in the Constitution (7th Amendment) Act, 1956, which abolished Part B States as a included all the States in Part A and B in one list.²² The special provisions in the Constitution relating to Part B States were, consequently, omitted. The Indian States thus lost their identity and became part of one uniform political organisation embodied in the Constitution of India.²³

The process of reorganisation is continuing still and the recent trend is towards conceding the demands of smaller units which were previously Part B States, Union Territories or autonomous parts of States, by conferring upon them the status of a 'State', e.g., Nagaland, Meghalaya, Himachal Pradesh, Manipur, Tripura, Mizoram, Goa. Delhi has been made the National Capital Territory. This process will be further elaborated in Chap. 6 (Territory of India), post.

Outstanding and 'basic' features of the Constitution.

Before closing this Chapter, however, it should be pointed out that since the observations in the case of *Golak Nath*²⁴ culminating with *Keshavananda*,²⁵ the Supreme Court had been urging that there are certain basic features of the Constitution, which were immune from the power of amendment conferred by Art. 368, which, according to the Court, was subject to 'implied' limitations. On the other hand, the Indira Government had been attempting to thwart this doctrine by successive amendments of Art. 368, starting with the 24th Amendment, 1971, and ending with 42nd Amendment Act, 1976, so as to obviate any such conclusion by the Supreme Court.²⁶ The Court has, however, adhered to its view notwithstanding any of these amendments.²⁷ The present Chapter does not enter into that controversy, which will be dealt with in Chap. 10 (Procedure for Amendment), post. [See that Chapter as to the list of basic feature].

The comparative study of any Constitution will reveal that it has certain prominent features which distinguish it from other Constitutions. It is those prominent features which have been summarised in this Chapter by way of introducing the reader to the various provisions of the Indian Constitution.

REFERENCES

1. VII C.A.D., pp. 35-38.

2. VII C.A.D., 2, 242; XI C.A.D., 613, 616.
3. The Constitution of the United States, with all its amendments up to date, consists of not more than 7,000 words.
4. C.A.D., Vol. XI, pp. 83940.
5. Of course, some of these provisions have been eliminated by the Constitution (7th Amendment) Act, 1956, which abolished the distinction between different classes of States.
6. DR. RAJENDRA PRASAD, C.A.D., Vol. X, p. 891.
7. The original title of this Act was the 'Untouchability (Offences) Act, 1955'. It has been extensively widened and made more rigorous, and renamed as the 'Protection of Civil Rights Act, 1955', by Act 106 of 1976.
8. WHEARE, Modern Constitutions, p. 143.
9. C.A.D. dated 8-11-1948, pp. 322-23.
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10. JENNINGS, Some Characteristics of the Indian Constitution, 1953, pp. 2, 6, 25-26.
11. The major changes made by the 42nd Amendment Act have been elaborately and critically surveyed in the Author's Constitution Amendment Acts, pp. 117-34, which should be read along with this book.
12. C.A.D., Vol. VII, p. 293.
13. G.C. Kanungo v. State of Orissa, (1995) 5 S.C.C. 96 (paras 17 and 18) : A.I.R. 1995 S.C. 1655; L. Chandra Kumar v. Union of India, (1997) 3 S.C.C. 261 (paras 62 and 76) : A.I.R. 1997 S.C. 1125 and State of A.P. v. K. Mohanlal, (1998) 5 S.C.C. 468 (para 9).
14. Maneka Gandhi v. Union of India, A. 1978 S.C. 597.
15. Minerva Mills v. Union of India, A. 1980 S.C. 1789 (paras 21-26).
16. Report of the First General Elections in India (1951-52), Vol. I.
17. Vide the Constitution (79th Amendment) Act, 1999.
18. Prime Minister Nehru in the Lok Sabha, on 28-3-1957.
19. IV C.A.D., 578 (Sardar Patel).

20. VII C.A.D., 984 (Munshi).

21. Ram jawaya v. State of Punjab, (1955) 2 S.C.R. 225; Shamser Singh v. State of Punjab, A. 1974 S.C. 2192.

22. As will be more fully explained in a later Chapter, the number of the States,—all of one category,—is 28 at the end of 2000. Besides, there are 7 Union Territories.

23. It should be mentioned, in this context, that the last vestiges of the princely order in India have been done away with by the repeal of Arts. 291 and 362, and the insertion of Art. 363A, by the Constitution (26th Amendment) Act, 1971 (w.e.f. 28-12-1971), which abolished the Privy Purse granted to the Rulers of the erstwhile Indian States and certain other personal privileges accorded to them under the Constitution—as a result of which the heads of these pre-Independence Indian States have now been brought down to a level of equality with other citizens of India.

24. Golak Nath v. State of Punjab, A. 1967 S.C. 1643.

25. Keshavananda v. State of Kerala, A. 1973 S.C. 1461.

26. The Janata Government's efforts to enshrine the 'basic features theory' in the Constitution itself, by requiring a referendum to amend four 'basic features', failed owing to Congress opposition to the relevant amendments of Art. 368 of the Constitution, as proposed by the 45th Amendment Bill, 1978. The four basic features mentioned in that Bill were—(i) Secular and democratic character of the Constitution; (ii) Fundamental Rights under Part III; (iii) Free and fair elections to the Legislatures; (iv) Independence of the Judiciary.

27. Minerva Mills v. Union of India, A. 1980 S.C. 1789 (paras 21-26, 28, 91, 93-94); Sampat v. Union of India, A. 1987 S.C. 386; Union of India v. Raghubir, A. 1989 S.C. 1933 (para 7).

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CHAPTER 5 NATURE OF THE FEDERAL SYSTEM

India, a Union of States.

ARTICLE 1(1) of our Constitution says—"India, that is Bharat, shall be a Union of States."

While submitting the Draft Constitution, Dr. Ambedkar, the Chairman of the Drafting Committee, stated that "although its Constitution may be federal in structure", the Committee had used the term "Union" because of certain advantages. These advantages, he explained in the Constituent Assembly,² were to indicate two things, viz., (a) that the Indian federation is not the result of an agreement by the units, and (b) that the component units have no freedom to secede from its.

The word 'Union', of course, does not indicate any particular type of federation, inasmuch as it is used also in the Preamble of the Constitution of the United States—the model of federation; in the Preamble of the British North America Act (which, according to Lord HALDANE, did not create a true federation at all); in the Preamble to the Union of South Africa Act, 1909, which patently set up a unitary Constitution; and even in the Constitution of the U.S.S.R. (1977), which formally acknowledges a right of secession [Art. 72] to each Republic, i.e., unit of the Union.³

We have, therefore, to examine the provisions of the Constitution itself, apart from the label given to it by its draftsman, to determine whether it provides a federal system as claimed by Dr. Ambedkar, particularly in view of the criticisms (as will be presently seen) levelled against its federal claim by some foreign scholars.

Different types of Federal Constitution in the modern World.

The difficulty of any treatment of federalism is that there is no agreed definition of a federal State. The other difficulty is that it is habitual 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 numerous countries in the world have, since 1787, adopted Constitutions having federal features and, if the strict historical standard of the United States be applied to all these later Constitutions, few will stand the test of federalism save perhaps Switzerland and Australia. Nothing is, however, gained by excluding so many recent Constitutions from the federal class, for, according to the traditional classification followed by political scientists, Constitutions are either unitary or federal. If, therefore, a Constitution partakes of some features of both types, the only alternative is to analyse those features and to ascertain

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whether it is basically unitary or federal, although it may have subsidiary variations. A liberal attitude towards the question of federalism is, therefore, inevitable particularly in view of the fact that recent experiments in the world of Constitution-making are departing more and more from the 'pure' type of either unitary or a federal system. The Author's views on this subject, expressed in the previous Editions of this book as well as in the Commentary on the Constitution of India,⁴ now find support from the categorical assertion of a research worker⁵ on the subject of federalism (who happens to be an American himself), that the question whether a State is federal or unitary is one of degrees and the answer will depend upon "how many federal features it possesses". Another American scholar⁶ has, in the same strain, observed that federation is more a 'functional' than an 'institutional' concept and that any theory which asserts that there are certain inflexible characteristics without which a political system cannot be federal ignores the fact "that institutions are not the same things in different social and cultural environments".

Indian Constitution basically Federal, with unitary features.

To anticipate the Author's conclusion, the constitutional system of India is basically federal, but, of course, with striking unitary features.⁷ In order to come to this conclusion, we have to

formulate the essential minimal features of a federal system as to which there is common agreement amongst political scientists.

Essential features of a Federal polity.

Though there may be difference amongst scholars in matters of detail, the consensus of opinion is that a federal system involves the following essential features:

(i) Dual Government. While in a unitary State, there is only one Government, namely the national Government, in a federal State, there are two Governments,—the national or federal Government and the Government of each component State.

Though a unitary State may create local sub-divisions, such local authorities enjoy an autonomy of their own but exercise only such powers as are from time to time delegated to them by the national government and it is competent for the national Government to revoke the delegated powers or any of them at its will.

A federal State, on the other hand, is the fusion of several States into a single State in regard to matters affecting common interests, while each component State enjoys autonomy in regard to other matters. The component States are not mere delegates or agents of the federal Government but both the Federal and State Governments draw their authority from the same source, viz., the Constitution of the land. On the other hand, a component State has no right to secede from the federation at its will. This distinguishes a federation from a confederation.

(ii) Distribution of Powers. It follows that the very object for which a federal State is formed involves a division of authority between the Federal Government and the States, though the method of distribution may not be alike in the federal Constitutions.

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(iii) Supremacy of the Constitution. A federal State derives its existence from the Constitution, just as a corporation derives its existence from the grant of a statute by which it is created. Every power—executive, legislative, or judicial—whether it belongs to the federation or to the component States, is subordinate to and controlled by the Constitution.

(iv) Authority of Courts. In a federal State the legal supremacy of the Constitution is essential to the existence of the federal system. It is essential to maintain the division of powers not only between the coordinate branches of the government, but also between the Federal Government and the States themselves. This is secured by vesting in the Courts a final power to interpret the Constitution and nullify and action on the part of the Federal and State Governments or their different organs which violates the provisions of the Constitution.

Not much pains need to be taken to demonstrate that the political system introduced by our Constitution possesses all the aforesaid essentials of a federal polity. Thus, the Constitution is the supreme organic law of our land, and both the Union and the State Governments as well as their respective organs derive their authority from the Constitution, and it is not competent for the

States to secede from the Union. There is a division of legislative and administrative powers between the Union and the State Governments and the Supreme Court stands at the head of our Judiciary to jealously guard this distribution of powers and to invalidate any action which violates the limitations imposed by the Constitution. This jurisdiction of the Supreme Court may be resorted to not only by a person⁸ who has been affected by a Union or State law which, according to him, has violated the constitutional distribution of powers but also by the Union and the States themselves by bringing a direct action against each other, before the Original Jurisdiction of the Supreme Court under Art. 131.⁹ It is because of these basic federal features that our Supreme Court has described the Constitution as 'federal'.¹⁰

Peculiar features of Indian Federalism.

But though our Constitution provides these essential features of a federation, it differs from the typical federal systems of the world in certain fundamental respects:

(A) The Mode of formation. A federal union of the American type is formed by a voluntary agreement between a number of sovereign and independent States, for the administration of certain affairs of general concern.

But there is an alternative mode of the Canadian type (if Canada is admitted into the family of federations), namely, that the provinces of a unitary State may be transformed into a federal union to make themselves autonomous. The provinces of Canada had no separate or independent existence apart from the colonial Government of Canada, and the Union was not formed by any agreement between them, but was imposed by a British statute, which withdrew from the Provinces all their former rights and then re-divided them between the Dominion and the Provinces. Though the Indian federation resembles the Canadian federation in its centralising

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tendency, it even goes further than the Canadian precedent. The federalism in India is not a matter of administrative convenience, but one of principle.¹¹

India had a thoroughly centralised unitary constitution until the Government of India Act, 1935. The Provincial Governments were virtually the agents of the Central Government, deriving powers by delegation from the latter (see pp. 1-8, ante).

To appreciate the mode of formation of federation in India, we must go back to the Government of India Act, 1935, which for the first time introduced the federal concept, and used the expression 'Federation of India' (s. 5) in a Constitution Act relating to India, since the Constitution has simply continued the federal system so introduced by the Act of 1935, so far as the Provinces of British India are concerned.

Federation as envisaged by the Government of India Act, 1935.

By the Act of 1935, the British Parliament set up a federal system in the same manner as it had done in the case of Canada, viz., "by creating autonomous units and combining them into a

federation by one and the same Act". All powers hitherto exercised in India were resumed by the Crown and redistributed between the Federation and the Provinces by a direct grant. Under this system, the Provinces derived their authority directly from the Crown and exercised legislative and executive powers, broadly free from Central control, within a defined sphere. Nevertheless, the Centre retained control through 'the Governor's special responsibilities' and his obligation to exercise his individual judgment and discretion in certain matters, and the power of the Centre to give direction to the Provinces.¹²

The peculiarity of thus converting a unitary system into a federal one can be best explained in the words of the Joint Parliamentary Committee on Indian Reforms:

"Of course in thus converting a unitary State into a federation we should be taking a step for which there is no exact historical precedent. Federations have commonly resulted from an agreement between independent or, at least, autonomous Governments, surrendering a defined part of their sovereignty or autonomy to a new central organism. At the present moment the British Indian Provinces are not even autonomous for they are subject to both administrative and legislative control of the Government and such authority as they exercise has been in the main devolved upon them under a statutory rule-making power by the Governor-General in Council. We are faced with the necessity of creating autonomous units and combining them into a federation by one and the same Act."

Not the result of a compact.

It is well worth remembering this peculiarity of the origin of the federal system in India. Neither before nor under the Act of 1935, the Provinces were in any sense 'sovereign' States like the States of the American Union. The Constitution, too, has been framed by the 'people of India' assembled in the Constituent Assembly, and the Union of India cannot be said to be the result of any compact or agreement between autonomous States.² So far as the Provinces are concerned, the progress had been from a unitary to a federal organisation, but even then, this has happened not because the Provinces desired to become autonomous units under a federal union, as in Canada. The Provinces, as just seen, had been artificially made autonomous,

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within a defined sphere, by the Government of India Act, 1935. What the makers of the Constitution did was to associate the Indian States with these autonomous Provinces into a federal union, which the Indian States had refused to accede to, in 1935.

Some amount of homogeneity of the federating units is a condition for their desire to form a federal union. But in India, the position has been different. From the earliest times, the Indian States had a separate political entity, and there was little that was common between them and the Provinces which constituted the rest of India. Even under the federal scheme of 1935 the Provinces and the Indian States were treated differently; the accession of the Indian States to the system was voluntary while it was compulsory for the Provinces, and the powers exercisable by the Federation over the Indian States were also to be defined by the Instruments of Accession. It is because it was optional with the Rulers of the Indian States that they refused to join the federal

system of 1935. They lacked the 'federal sentiment' (Dicey), that is, the desire to form a federal union with the rest of India. But, as already pointed out, the political situation changed with the lapse of paramountcy of the British Crown as a result of which most of the Indian States acceded to the Dominion of India on the eve of the Independence of India.

The credit of the makers of the Constitution, therefore, lies not so much in bringing the Indian States under the federal system but in placing them, as much as possible, on the same footing as the other units of the federation, under the same Constitution. In short, the survivors of the old Indian States (States in Part B13 of the First Schedule) were, with minor exceptions, placed under the same political system as the old Provinces (States in Part A13). The integration of the units of the two categories has eventually been completed by eliminating the separate entities of States in Part A and States in Part B and replacing them by one category of States, by the Constitution (7th Amendment) Act, 1956.¹³

(B) Position of the States in the Federation. In the United States, since the States had a sovereign and independent existence prior to the formation of the federation, they were reluctant to give up that sovereignty any further than what was necessary for forming a national government for the purpose of conducting their common purposes. As a result, the Constitution of the federation contains a number of safeguards for the protection of 'State rights', for which there was no need in India, as the States were not 'sovereign' entities before. These points of difference deserve particular attention:

(i) While the residuary powers are reserved to the States by the American Constitution, these are assigned to the Union by our Constitution [Art. 248].

This alone, of course, is not sufficient to put an end to the federal character of our political system, because it only relates to the mode of distribution of powers. Our Constitution has simply followed the Canadian system in vesting the residuary power in the Union.

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No State excepting Kashmir, can draw its own Constitution.

(ii) While the Constitution of the United States of America merely drew up the constitution of the national government, leaving it "in the main (to the State) to continue to preserve their original Constitution", the Constitution of India lays down the constitution for the States as well, and, no State, save Jammu and Kashmir, has a right to determine its own (State) constitution.

(iii) In the matter of amendment of the Constitution, again, the part assigned to the State is minor, as compared with that of the Union. The doctrine underlying a federation of the American type is that the union is the result of an agreement between the component units, so that no part of the Constitution which embodies the compact can be altered without the consent of the covenanting parties. This doctrine is adopted, with variations, by most of the federal systems.

But in India, except in a few specified matters affecting the federal structure (see Chap. 10, post), the States need not even be consulted in the matter of amendment of the bulk of the Constitution, which may be effected by a Bill in the Union Parliament, passed by a special majority.

(iv) Though there is a division of powers between the Union and the States, there is provision in our Constitution for the exercise of control by the Union both over the administration and legislation of the States. Legislation by a State shall be subject to disallowance by the President, when reserved by the Governor for his consideration [Art. 201]. Again, the Governor of a State shall be appointed by the President of the Union and shall hold office 'during the pleasure' of the President [Arts. 155-156]. These ideas are repugnant to the Constitution of the United States or of Australia, but are to be found in the Canadian Constitution.

(v) The American federation has been described by its Supreme Court as "an indestructible Union composed of indestructible States".¹⁴

It comprises two propositions—

(a) The Union cannot be destroyed by any State seceding from the Union at its will.¹⁵

(b) Conversely, it is not possible for the federal Government to redraw the map of the United States by forming new States or by altering the boundaries of the States as they existed at the time of the compact without the consent of the Legislatures of the States concerned. The same principle is adopted in the Australian Constitution to make the Commonwealth "indissoluble", with the further safeguard superadded that a popular referendum is required in the affected State to alter its boundaries.

No right to secede.

(a) It has been already seen that the first proposition has been accepted by the makers of our Constitution, and it is not possible for the States of the Union of India, to exercise any right of secession. It should be noted in this context that by the 16th Amendment of the Constitution in 1963, it has been made clear that even advocacy of secession will not have the protection of the freedom of expression.¹⁶

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But consent of a State is not required for altering its boundaries by Parliament.

(b) But just the contrary of the second proposition has been embodied in our Constitution. Under our Constitution, it is possible for the Union Parliament to reorganise the States or to alter their boundaries, by a simple majority in the ordinary process of legislation [Art. 4(2)]. Constitution does not require that the consent of the Legislature of the States is necessary for enabling Parliament to make such laws; only the President has to 'ascertain' the views of the Legislature of the affected States to recommend a Bill for this purpose to Parliament. Even this obligation is not mandatory insofar as the President is competent to fix a time-limit within which a State must express its views, if at all [Proviso to Art. 3, as amended]. In the Indian federation, thus, the

States are not "indestructible" units as in the U.S.A. The ease with which the federal organisation may be reshaped by an ordinary legislation by the Union Parliament has been demonstrated by the enactment of the States Reorganisation Act, 1956, which reduced the number of States from 27 to 14 within a period of six years from the commencement of the Constitution. The same process of disintegration of existing States, effected by unilateral legislation by Parliament, has led to the formation, subsequently, of several new States—Gujarat, Nagaland, Haryana, Karnataka, Meghalaya, Himachal Pradesh, Manipur, Sikkim, Tripura, Mizoram, Arunachal Pradesh, Goa.

It is natural, therefore, that questions might arise in foreign minds as to the nature of federalism introduced by the Indian Constitution.

(vi) Not only does the Constitution offer no guarantee to the States against affecting their territorial integrity without their consent,—there is no theory of 'equality of State rights' underlying the federal scheme in our Constitution, since it is not the result of any agreement between the States.

One of the essential principles of American federalism is the equality of the component States under the Constitution, irrespective of their size or population. This principle is reflected in the equality of representation of the States in the upper House of the Federal Legislature (i.e., in the Senate),¹⁷ which is supposed to safeguard the status and interests of the States in the federal organisation. To this is superadded the guarantee that no State may, without its consent, be deprived of its equal representation in the Senate [Art. V].

No equality of State representation.

Under our Constitution, there is no equality of representation of the States in the Council of States. As given in the Fourth Schedule, the number of members for the several States varies from 1 to 31. In view of such composition of the Upper Chamber, the federal safeguard against the interests of the lesser States being overridden by the interests of the larger or more populated States is absent under our Constitution. Nor can our Council of States be correctly described as a federal Chamber insofar as it contains a nominated element of twelve members as against 238 representatives of the States and Union Territories.

Status of Sikkim.

(vii) Another novel feature introduced into the Indian federalism was the admission of Sikkim as an

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'associate State', without being a member of the Union of India, as defined in Art. 1, which was made possible by the insertion of Art. 2A into the Constitution, by the Constitution (35th Amendment) Act, 1974.

This innovation was, however, shortlived and its legitimacy has lost all practical interest since all that was done by the 35th Amendment Act, 1974, has been undone by the 36th Amendment Act, 1975, by which Sikkim has been admitted into the Union of India, as a full-fledged State under the First Schedule with effect from 26th April, 1975 (see under Chap. 6, post). The original federal scheme of the Indian Constitution, comprising States and the Union Territories, has thus been left unimpaired.

Of course, certain special provisions have been laid down in the new Art. 371F, as regards Sikkim, to meet the special circumstances of that State. Article 371G makes certain special provisions relating to the State of Mizoram, while Arts. 371H and 371I insert special provisions for Arunachal Pradesh and Goa.

(C) Nature of the Polity. As a radical solution of the problem of reconciling national unity with 'State rights', the framers of the American Constitution made a logical division of everything essential to sovereignty and created a dual polity, with a dual citizenship, a double set of officials and a double system of Courts.

No double citizenship.

(i) An American is a citizen not only of the State in which he resides but also of the United States, i.e., of the federation, under different conditions; and both the federal and State Governments, each independent of the other, operate directly upon the citizen who is thus subject to two Governments, and owes allegiance to both. But the Indian Constitution, like the Canadian, does not introduce any double citizenship, but one citizenship, viz.,—the citizenship of India [Art. 5], and birth or residence in a particular State does not confer any separate status as a citizen of that State.

No division of public services.

(ii) As regards officials similarly, the federal and State Governments in the United States, have their own officials to administer their respective laws and functions. But there is no such division amongst the public officials in India. The majority of the public servants are employed by the States, but they administer both the Union and the State laws as are applicable to their respective States by which they are employed. Our Constitution provides for the creation of All-India Services, but they are to be common to the Union and the States [Art. 312]. Members of the Indian Administrative Service, appointed by the Union, may be employed either under some Union Department (say, Home or Defence) or under a State Government, and their services are transferable, and even when they are employed under a Union Department, they have to administer both the Union and State laws as are applicable to the matter in question. But even while serving under a State, for the time being, a member of an all-India Service can be dismissed or removed only by the Union Government, even though the State Government is competent to initiate disciplinary proceedings for that purpose.

No dual system of Courts.

(iii) In the U.S.A., there is a bifurcation of the Judiciary as between the Federal and State Governments. Cases arising out of the federal Constitution and federal laws are tried by the federal Courts, while State Courts deal with cases arising out of the State Constitution and State laws. But in India, the same system of Courts, headed by the Supreme Court, will administer both the Union and State laws as they are applicable to the cases coming up for adjudication.

(iv) The machinery for election, accounts and audit is also similarly integrated.

(v) The Constitution of India empowers the Union to entrust its executive functions to a State, by its consent [Art. 258], and a State to entrust its executive functions to the Union, similarly [Art. 258A]. No question of 'surrender of sovereignty' by one Government to the other stands in the way of this smooth co-operative arrangement.

(vi) While the federal system is prescribed for normal times, the Indian Constitution enables the federal government to acquire the strength of a unitary system in emergencies. While in normal times the Union Executive is entitled to give directions to the State Governments in respect of specified matters, when a Proclamation of Emergency is made, the power to give directions extends to all matters and the legislative power of the Union extends to State subjects [Arts. 353, 354, 357]. The wisdom of these emergency provisions (relating to external aggression, as distinguished from 'internal disturbance') has been demonstrated by the fact that during the Chinese aggression of 1962 or the Pakistan aggression of 1965, India could stand as one man, pooling all the resources of the States, notwithstanding the federal organisation.

(vii) Even in its normal working, the federal system is given the strength of a unitary system—

Union control in normal times.

(a) By endowing the Union with as much exclusive powers of legislation as has been found necessary in other countries to meet the ever-growing national exigencies, and, over and above that, by enabling the Union Legislature to take up some subject of State competence, if required in the national interest'. Thus, even apart from emergencies, the Union Parliament may assume legislative power (though temporarily) over any subject included in the State List,¹⁸ if the Council of States (Second Chamber of Parliament) resolves, by a two-thirds vote, that such legislation is necessary in the 'national interest' [Art. 249]. There is, of course, a federal element in this provision inasmuch as such expansion of the power of the Union into the State sphere is possible only with the consent of the Council of States where the States are represented. But, in actual practice, it will mean an additional weapon in the hands of the Union vis-a-vis the States so long as the same party has a solid majority in both the Houses of the Union Parliament.

Strong central bias

Even though there is a distribution of powers central between the Union and the States as under a federal system, the distribution has a strong Central bias and

the powers of the States are hedged in with various restrictions which impede their sovereignty even within the sphere limited to them by the distribution of powers basically provided by the Constitution.

(b) By empowering the Union Government to issue directions upon the State Governments to ensure due compliance with the legislative and administrative action of the Union [Arts. 256-257], and to supersede a State Government which refuses to comply with such directions [Art. 365].

(c) By empowering the President to withdraw to the Union the executive and legislative powers of a State under the Constitution if he is, at any time, satisfied that the administration of the State cannot be carried on in the normal manner in accordance with the provisions of Constitution, owing to political or other reasons [Art. 356]. From the federal standpoint, this seems to be anomalous inasmuch as the Constitution-makers did not consider it necessary to provide for any remedy whatever for a similar breakdown of the constitutional machinery at the Centre. Hence, Panikkar is justified in observing---"The Constitution itself has created a kind of paramountcy for the Centre by providing for the suspension of State Governments and the imposition of President's rule under certain conditions such as the breakdown of the administration". Secondly, the power to suspend the constitutional machinery may be exercised by the President, not only on the report of the Governor of the State concerned but also *sou motu*, whenever he is satisfied that a situation calling for the exercise of this power has arisen. It is thus a coercive power available to the Union against the units of the federation.

A critique of the Federal System.

But though the above scheme seeks to avoid the demerits of the federal system, there is perhaps such an emphasis on the strength of the Union government as affects the federal principle as it is commonly understood. Thus, a foreign critic (Prof. Wheare)¹⁹ was led to observe that the Indian Constitution provides—

"a system of Government which is quasi-federal . . . a Unitary State with subsidiary federal features rather than a Federal State with subsidiary unitary features."

In his later work in *Modern Constitutions*²⁰ he puts it, generically, thus—

"In the class of quasi-federal Constitution it is probably proper to include the Indian Constitution of 1950. . . ."

Prof. Alexandrowicz²¹ has taken great pains to combat the view that the Indian federation is 'quasi-federation'. He seems to agree with this Author,²² when he says that "India is a case *sui generis*". This is in accord with the Author's observation that—

"the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type. It enshrines the principle that in spite of federalism the national interest ought to be paramount."²²

In fact, anybody who impartially studies the Indian Constitution from close quarters and acknowledges that Political Science today admits of different variations of the federal system cannot but observe that the Indian

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system is 'extremely federal',²³ or that it is a 'federation with strong centralising tendency'.²⁴

Strictly speaking, any deviation from the American model of pure federation would make a system quasi-federal, and, if so, the Canadian system, too, can hardly escape being branded as quasi-federal. The difference between the Canadian and the Indian system lies in the degree and extent of the unitary emphasis. The real test of the federal character of a political structure is, as Prof. Wheare has himself observed¹⁹—

"That, however, is what appears on paper only. It remains to be seen whether in actual practice the federal features entrench or strengthen themselves as they have in Canada, or whether the strong trend towards centralisation which is a feature of most Western Governments in a world of crises, will compel these federal aspects of the Constitution to wither away."

The working of federalism in India.

A survey of the actual working of our Constitution for the last 50 years would hardly justify the conclusion that, even though the unitary bonds have in some respects been further tightened, the federal features have altogether 'withered away'.

Some scholars in India²⁵ have urged that the unitary bias of our Constitution has been accentuated, in its actual working, by two factors so much so that very little is left of federalism. These two factors are—(a) the overwhelming financial power of the Union and the utter dependence of the States upon Union grants for discharging their functions; (b) the comprehensive sweep of the Union Planning Commission, set up under the concurrent power over planning. The criticism may be justified in point of degree, but not in principle, for two reasons—

(i) Both these controls are aimed at securing a uniform development of the country as a whole. It is true that the bigger States are not allowed to appropriate all their resources and the system of assignment and distribution of tax resources by the Union [Arts. 269, 270, 272] means the dependence of the States upon the Union to a large extent. But, left alone, the stronger and bigger States might have left the smaller ones lagging behind, to the detriment of our national strength.

(ii) Even in a country like the United States, such factors have, in practice, strengthened the national Government to a degree which could not have been dreamt of by the fathers of the Constitution. Curiously enough, the same complaint, as in India, has been raised in the United States. Thus, of the centralising power of federal grants, an American writer²⁶ has observed—

"Here is an attack on federalism, so subtle that it is scarcely realised . . . Control of economic life and of these social services (viz., unemployment, old-age, maternity and child welfare) were the

two major functions of a State and local governments. The first has largely passed into national hands; the second seems to be passing. If these both go, what we shall have left of State autonomy will be a hollow shell, a symbol."

In fact, the traditional theory of mutual independence of the two governments,—federal and States, has given way to "co-operative federalism' in most of the federal countries today.²⁷

An American scholar explains the concept of 'co-operative federalism' in these words²⁷—

"... the practice of administrative co-operation between general and regional governments, the partial dependence of the regional governments upon payments from the general governments, and the fact that the general governments, by the use of conditional grants, frequently promote developments in matters which are constitutionally assigned to the regions."

Hence, the system of federal co-operation existing under the Indian Constitution, through allocation by the Union of the taxes collected, or direct grants or allocation of plan funds do not necessarily militate against the concept of federalism and that is why Granville Austin²⁸ prefers to call Indian federalism as 'co-operative federalism' which "produces a strong central . . . government, yet it does not necessarily result in weak provincial governments that are largely administrative agencies for central policies."

In fact, the federal system in the Indian Constitution is a compromise between two apparently conflicting considerations:

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- (i) There is a normal division of powers under which the States enjoy autonomy within their own spheres, with the power to raise revenue;
- (ii) The need for national integrity and a strong Union government, which the saner section of the people still consider necessary after 50 years of working of the Constitution.

Indian federalism as judicially interpreted.

The interplay of the foregoing two forces has been acknowledged even by the Supreme Court in interpreting various provisions of the Constitution, e.g., in explaining the significance of Art. 301²⁹ thus—

"The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the conditions then prevailing, a distribution of powers and a basic part of our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Art. 1 that India is a Union of States and in interpreting the Constitution one must keep in the view the essential structure of a federal or quasi-federal Constitution, namely, that the units of the Union have also certain powers as has the Union itself.

In evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations. . . first, in the larger interest of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, the regional interests must not be ignored altogether, and third, there must be a power of intervention by the Union in case of crisis to deal with particular problems that may arise in any part of India . . . Therefore, in interpreting the relevant articles in Part XIII we must have regard to the general scheme of the Constitution of India with special reference to Part III, Part XII . . . and their inter-relation to Part XIII in the context of a federal or quasi-federal Constitution in which the States have certain powers including the power to raise revenues for their purposes by taxation."

At the same time, there is no denying the fact that the States have occasionally smarted³⁰ against 'Central dominion' over the States in their exclusive sphere, even in normal times, through the Planning Commission (which itself was not recognised by the Constitution like the Finance Commission, the Public Service Commission or the like). But this is not because the Constitution is not federal in structure³¹ or that its provisions envisage unitary control; the defect is political, namely, that it is the same Party which dominates both the Union and State Governments and that,

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naturally, complaints of discrimination or interference with State autonomy are more common in those States which happen to be, for the time being, under the rule of a Party different from that of the Union Government. The remedy, however, lies through the ballot box. It is through political forces, again, that the Union Government may be prevented from so exercising its constitutional powers as to assume an 'unhealthy paternalism'³²; but that is beyond the ken of the present work. The remedy for a too frequent use of the power to impose President's rule in a State, under Art. 356, is also political.³³

Survival of Federation in India.

The strong Central bias has, however, been a boon to keep India together when we find the separatist forces of communalism, linguism and scramble for power, playing havoc notwithstanding all the devices of Central control, even after five decades of the working of the Constitution. It also shows that the States are not really functioning as agents of the Union Government⁷ or under the directions of the latter, for then, events like those in Assam (over the language problem) or territorial dispute between Karnataka and Maharashtra could not have taken place at all.

That the federal system has not withered away owing to the increasing impact of Central bias would be evidenced by a number of circumstances which cannot be overlooked [see, further, Chap. 33, post]:

(a) The most conclusive evidence of the survival of the federal system in India is the co-existence of the Governments of the parties in the States different from that of the Centre. Of course, the reference of the Kerala Education Bill by the President for the advisory opinion of the Supreme Court instead of giving his assent to the Bill in the usual course, has been criticised in

Kerala as an undue interference with the constitutional rights of the State, but thanks to the wisdom and impartiality of the Supreme Court, the opinion delivered by the Court³² was prompted by a purely legalistic outlook free from any political consideration so that the federal system may reasonably be expected to remain unimpaired notwithstanding changes in the party situation so long as the Supreme Court discharges its duties as a guardian of the Constitution.

(b) That federalism is not dead in India is also evidenced by the fact that new regions are constantly demanding Statehood and that already the Union had to yield to such demand in the cases of Meghalaya, Nagaland, Manipur, Tripura, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh,³⁴ Uttaranchal³⁵ and Jharkhand.³⁶

(c) Another evidence is the strong agitation for greater financial power for the States. The case for greater autonomy for the States in all respects was first launched by Tamil Nadu, as a lone crusader, but in October, 1983, it was joined by the States ruled by non-Congress Parties, forming an

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'Opposition Conclave', though all the Parties were not prepared to go to the same extent. The enlargement of State powers at the cost of the Union, in the political sphere is not, however, shared by other States, on the ground that a weaker Union will be a danger to external security and even internal cohesion, in present-day circumstances. But there is consensus amongst the States, in general, that they should have larger financial powers than those

conferred by the existing Constitution, if they are to efficiently discharge their development programmes within the State sphere under List II of the 7th Schedule. The Morarji Desai Government (1977) sought to pacify the States by conceding substantial grants by way of 'Plan assistance', by what has been called the 'Desai award'.³⁷

Sarkaria Commission.

It is doubtful, however, whether the agitation for larger constitutional powers in respect of finance will be set at rest by such ad hoc palliatives. It is interesting to note that the suggestion, in a previous edition of this book, that the remedy perhaps lay in setting up a Commission for the revision of the Constitution, so that the question of finance may be taken up along with the responsibilities of the Union and the States, on a more comprehensive perspective, has borne fruit in the appointment, in March, 1983, of a one-man Commission, headed by an ex-Supreme Court Judge, SARKARIA, J., empowered to recommend changes³⁸ in the Centre-State relations' in view of the various developments which have taken place since the commencement of the Constitution. The Commission submitted its Report in 1988. The Supreme Court referred to the report in S.R. Bommar⁷ (see also under 'Inter-State Council', post).

The proper assessment of the federal scheme introduced by our Constitution is that it introduces a system which is to normally work as a federal system but there are provisions for converting it into a unitary or quasi-federal system under specified exceptional circumstances.³⁹ But the exceptions cannot be held to have overshadowed the basic and normal structure.⁴⁰ The

exceptions, are, no doubt, unique and numerous; but in cases where the exceptions are not attracted, federal provisions are to be applied without being influenced by the existence of the exceptions. Thus, it will not be possible either for the Union or a State to assume powers which are assigned by the Constitution to the other Government, unless such assumption is sanctioned by some provisions of the Constitution itself. Nor would such usurpation or encroachment be valid by consent of the other party, for the Constitution itself provides the cases in which this is permissible by consent [e.g., Arts. 252, 258(1), 258A]; hence, apart from these exceptional cases, the Constitution would not permit any of the units of the federation to subvert the federal structure set up by the Constitution, even by consent. Nor would this be possible by delegation of powers by one Legislature in favour of another.

Conclusion.

In fine, it may be reiterated that the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type.⁴¹ It enshrines the principle that "in spite of federalism, the national interest ought to be paramount".⁴²

REFERENCES

1. Draft Constitution, 21-2-1948, p. iv. [The word 'Union', in fact, had been used both in the Cripps proposals and the Cabinet Mission Plan (see under Chap. 2, ante), and in the Objectives Resolution of Pandit Nehru in 1947 (Chap. 3, ante), according to which residuary powers were to be reserved to the units].
2. C.A.D. Vol. VII, p. 43.
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3. See Author's Select Constitutions of the World, 1984 Ed., p. 188.
4. Author's Commentary on the Constitution of India, 7th (Silver Jubilee) Ed., Vol. A, pp. 33 et seq.
5. Prof. W.T. WAGNER, Federal States and their Judiciary (Moulton and Co., 1969), p. 25.
6. LIVINGSTONE, Federation and Constitutional Change, 1956, pp. 6-7.
7. This view of the Author has been affirmed by the 9 Judge Bench Supreme Court decision in S.R. Bommai v. Union of India, A. 1994 S.C. 1918 (para 211).
8. Cf. Gujarat University v. Sri Krishna, A. 1963 S.C. 703 (715-76); Waverly Mills v. Rayman & Co., A. 1963 S.C. 90 (95).
9. Cf. State of West Bengal v. Union of India, A. 1963 S.C. 1241.

10. Cf. *Atiabari Tea Co. v. State of Assam*, (1961) 1 S.C.R. 809 (860); *Automobile Transport v. State of Rajasthan*, A. 1962 S.C. 1406 (7476); Ref. under Art. 143, A. 1965 S.C. 745 (para 39).
11. *Bommai v. Union of India*, A. 1994 S.C. 1918; affirming by and large, the views of the author at pp. 35-55 of C7, Vol. A.
12. Though the federal system as envisaged by the Government of India Act, 1935, could not fully come into being owing to the failure of the Indian States to join it, the provisions relating to the Central Government and the Provinces were given effect to as stated earlier [see under 'Federation and Provincial Autonomy', ante].
13. Vide Table III, col. (A).
14. *Texas v. White*, (1869) 7 Wall. 700.
15. A contrary instance is to be found in the Constitution of the U.S.S.R. which expressly provides that "each Union Republic shall retain the right freely to secede from the U.S.S.R." [Art. 72 of the Constitution of 1977; see Author's *Select Constitutions of the World*, 1984 Ed., p. 188].
16. Author's *Constitutional Law of India* (6th Ed., 1991, Prentice-Hall of India, p. 46).
17. Each of the 50 States of U.S.A. has two representatives in the Senate.
18. There are three legislative lists in the Seventh Schedule; 99 items in the Union List, 61 items in the State List and 52 items in the Concurrent List [see Table XIX, post].
19. K.C. WHEARE, *Federal Government*, 1951, p. 28. He relaxes this view in the 4th Ed. (1963), pp. 26, 77.
20. WHEARE, *Modern Constitutions*, 2nd Ed. (1966), p. 21.
21. C.H. ALEXANDROWICZ, *Constitutional Developments in India*, 1957, pp. 157-70.
22. Vide Author's *Commentary on the Constitution of India*, 7th Ed., Vol. A, p. 55.
23. APPLEBY, *Public Administration in India* (1953), p. 51.
24. JENNINGS, *Some Characteristics of the Indian Constitution*, p. 1.
25. E.g. SANTHANAM, *Union-State Relations in India*, 1960, pp. vii; 51, 59, 63. At p. 70, the learned Author observes—

"India has practically functioned as a Unitary State though the Union and the States have tried to function formally and legally as a Federation."

26. GRIFFITH, *The Impasse of Democracy* 1939, p. 196, quoted in GODSHALL, *Government in the United States*, p. 114.

27. Cf. BIRCH, *Federalism*, pp. 305-06.

28. GRANVILLE AUSTIN, *The Indian Constitution* (1966), pp. 187 et seq.

29. *Automobile Transport v. State of Rajasthan*, A. 1962 S.C. 1406 (1415-16). In *Keshavananda v. Union of India*, A. 1973 S.C. 1461, some of the judges (paras 302, 599, 1681) considered federalism to be one of the 'basic features' of our Constitution. A nine-Judge Supreme Court Bench has in *Bommai v. Union of India*, A. 1994 S.C. 1918 laid down that the Constitution is federal and some of the Judges characterised federalism as its basic feature.

30. Vide Report of the Centre-State Relations Committee (Rajamannar Committee) (Madras, 1971, pp. 7-9).

31. It is interesting to note that even the Rajamannar Committee characterises the system under the Constitution of India as 'federal' (para 5, p. 16, *ibid.*), but suggests amendment of some of its features which have a unitary trend (para 6, p. 16).

32. *Re. Kerala Education Bill*, A. 1958 S.C. 956.

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33. It is unfortunate that even the Janata Government formed in 1977 which was determined to undo all mischief alleged to have been caused by the long Congress rule, was not convinced of the need to effectively control the frequent use of the drastic power conferred by Art. 356", and that the amendments effected by the 44th Amendment, 1978, in respect of this Article, are not good enough from this standpoint.

34. Vide *The Madhya Pradesh Reorganisation Act, 2000*.

35. Vide *The Uttar Pradesh Reorganisation Act, 2000*.

36. Vide *The Bihar Reorganisation Act, 2000*.

37. *Statesman*, Calcutta, dated 26-2-1979, p. 1.

38. Rao Government, which was in office all 1995, did not implement any of the recommendations made in the report of the Sarkaria Commission.

39. As Dr. Ambedkar explained in the Constituent Assembly (VII C.A.D. 33-34), the political system adopted in the Constitution could be "both unitary as well as federal according to the requirements of time and circumstances".

40. How far the 9-Judge Bench of the Supreme Court in Bommai's case (A. 1994 S.C. 1918) has adopted the Author's views as expressed in the foregoing discussion will be evident from its following observation:

"The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-a-vis the States does not mean that states are mere appendages of the Centre. Within the sphere allotted to them, States are supreme . . . More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. . . let it be said that federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle—the outcome of our own historical process and a recognition of the ground realities (para 276).

This view, expressed by Jeevan Reddy and Agrawal, JJ. is joined by Pandian, J. (para 2). The view is supported by Sawant and Kuldeep Singh, JJ. in these words (para 99);

". . . the States have an independent constitutional existence. . . they are not satellites nor agents of the Centre. The fact that during emergency and in certain other eventualities their powers are overridden or invaded by the Centre is not destructive of the essential federal feature of our Constitution. . . they are exceptions and have to be resorted to only to meet the exigencies of the special situations. The exceptions are not a rule (para 99).

41. GRANVILLE AUSTIN [The Indian Constitution (1966), p. 186] agrees with this view when he describes the Indian federation as 'a new kind of federalism to meet India's peculiar needs'.

42. JENNINGS, Some Characteristics of the Indian Constitution, p. 55.

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CHAPTER 6 TERRITORY OF THE UNION

Name of the Union.

AS has been already stated, the political structure prescribed by the Constitution is a federal Union. The name of the Union is India or Bharat [Art. 1(1)] and the members of this Union at present¹ are the 28 States of Andhra Pradesh, Assam,² Bihar, Gujarat, Haryana, Karnataka,³ Kerala, Madhya Pradesh, Tamil Nadu,⁴ Maharashtra, Nagaland, Orissa, Punjab, Rajasthan, Uttar Pradesh, West Bengal, Jammu & Kashmir, Himachal Pradesh, Manipur, Tripura, Meghalaya,² Sikkim,¹ Mizoram, Arunachal Pradesh, Goa, Chhattisgarh,⁵ Uttaranchal⁶ and Jharkhand⁷. Barring Jammu & Kashmir, which has still a special position under the Constitution (see post, Chap. 15), the provisions of the Constitution relating to the States now apply to all these States on the same footing.¹

Territory of India.

The expression 'Union of India' should be distinguished from the expression 'territory of India.' While the 'Union' includes only the States which enjoy the status of being members of the federal

system and share a distribution of powers with the Union, the "territory of India" includes the entire territory over which the sovereignty of India, for the time being, extends.

Thus, besides the States, there are two other classes of territories, which are included in the 'territory of India', viz.: (i) 'Union Territories', and (ii) Such other territories as may be acquired⁸ by India.

(i) The Union Territories are, since 1987, seven⁹ in number—Delhi, the Andaman & Nicobar Island; Lakshadweep;¹⁰ Dadra & Nagar Haveli;⁹ Daman & Diu; Pondicherry; and Chandigarh.

For the Union territory of Pondicherry, the Parliament has by enacting a law, viz. Pondicherry (Administration) Act, 1962 under Art. 239A made provision for a legislature etc. By an amendment to the Constitution two new articles, viz. 239AA and 239AB were inserted in 1992 providing for a legislature and a ministry for Delhi which has been named as National Capital Territory of Delhi by Art. 239AA.¹¹

Rest of the Union territories are Centrally administered areas, to be governed by the President, acting through an 'Administrator' appointed by him, and issuing Regulations for their good government [Arts. 239-240].

(ii) Any territory which may, at any time, be acquired by India by Purchase, treaty, cession or conquest, will obviously form part of the territory of India. These will be administered by the Government of India subject to legislation by Parliament [Art. 246(4)].

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Thus, the French Settlement of Pondicherry (together with Karaikal, Mahe and Yanam), which was ceded to India by the French Government in 1954, was being administered as an 'acquired territory' until 1962, inasmuch as the Treaty of Cession had not yet been ratified by the French Parliament. After such ratification, the territory of these French Settlements was constituted a 'Union Territory', in December, 1962.

The constitutional developments in Sikkim by way of its integration under the Constitution of India are dramatic.

Sikkim, a new State.

During British days, Sikkim was an Indian State, under a hereditary monarch called Chogyal, subject to British paramountcy. Its external frontier in the Himalayas was demarcated by agreement with China, in 1890. The Chogyal was a member of the Chamber of Princes.

When India became independent, there was a section of public opinion in Sikkim for merger with India. But the Princely Rule of that State and its strategic position stood in the way. Hence, after the lapse of paramountcy, a treaty was entered into between Sikkim and the Government of India, by which the latter undertook the responsibility with regard to the defence, external affairs and communications of Sikkim. Government of India was represented in Sikkim by a Political

Officer, who was also assigned to Bhutan. Sikkim thus became a Protectorate of the Union of India.

In May, 1974, the Sikkimese Congress decided to put an end to monarchical rule, and the Sikkim Assembly passed the Government of Sikkim Act, 1974, for the Progressive realisation of a fully responsible government in Sikkim and for furthering its relationship with India. This Act empowered the Government of Sikkim to seek participation and representation of the people of Sikkim in the political institutions of India, for the speedy development of Sikkim in social, economic and political fields.

The Chogyal was made to give his assent to the Government of Sikkim Bill, under which effective power went into the hands of a representative Sikkim Assembly and the Chogyal was turned into a normal constitutional head. The Sikkim Assembly, by virtue of its powers under the Government of Sikkim Act, passed a resolution, expressing its desire to be associated with the political and economic institutions of India and for seeking representation for the people of Sikkim in India's Parliamentary system.

35th Amendment.

The Constitution (35th Amendment) Act, 1974, was promptly passed to give effect to this resolution. The main provisions of this Amendment Act were—

(i) Sikkim will not be a part of the territory of India, but an 'associate State', which was brought within the framework of the Indian Constitution by inserting Art. 2A and 10th Schedule in the Constitution which were subsequently omitted by the Constitution (36th Amendment) Act, 1975.

(ii) Sikkim would be entitled to send two representatives to the two Houses, whose rights and privileges would be the same as those of other members of Parliament, except that the representatives of Sikkim would not

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be entitled to vote at the election of the President or Vice-President of India. They would also be subject to the disqualifications for members of Parliament under the Indian Constitution.

(iii) The defence, communications, external affairs and social welfare of Sikkim would be a responsibility of the Government of India and the people of Sikkim would have the right of admission to institutions for higher education, to the All-India Services and the political institutions in India.

(iv) The Government of Sikkim shall retain residual power on all matters not provided for in 10th Schedule to the Constitution of India.

There is little doubt that the 35th Amendment Act, 1974, introduced innovations into the original scheme of the Constitution of India. There was no room for any 'associate State' under the Constitution of 1949. India was a federal union of 'States', Union Territories and 'acquired

territories' [Art. 1(3)]. Of course, Article 2 empowered the Parliament of India to admit new 'States' into the 'Union'. But the Constitution (35th Amendment) Act did not seek to admit Sikkim as a new State of the Indian Union. It was to be a territory associated with India, and would have representatives in the Indian Parliament without being a part of the territory of India.

The criticism of the introduction of the status of an 'associate State' into the Indian federal system has, however, lost all practical significance, because Sikkim has shortly thereafter been admitted¹² into the Indian Union as the 22nd State in the First Schedule of the Constitution of India.

We shall now advert to this later development. While the Indian Parliament was enacting the Constitution (35th Amendment) Act, the Chogyal resented and sought to invoke international intervention. This provoked the progressive sections of the people of Sikkim and led to a resolution being passed by the Sikkim Assembly on April 10, 1975, declaring that the activities of the Chogyal were prejudicial to the democratic aspirations of the people of Sikkim and ran counter to the Agreement of May, 1974, executed by the Chogyal. The Assembly further declared and resolved that.

"This institution of the Chogyal is hereby abolished and Sikkim shall henceforth be a constituent unit of India, enjoying a democratic and fully responsible government."

36th Amendment.

This resolution of the Assembly was submitted to the people of Sikkim for their approval. At the referendum so held, there was an overwhelming majority, and the Chief Minister of Sikkim, on behalf of his Council of Ministers, urged the Government of India to implement the result of the referendum. This led to the passing by the India .1 Parliament of the Constitution (36th Amendment) Act, 1975, which was later ratified by the requisite number of States under Art. 368(2), Proviso. By the 36th Amendment Act, Sikkim has been admitted into the Union of India as a State, by amending the First and the Fourth Schedules, Art. 80-81, and omitting Art. 2A and the 10th Schedule, with retrospective effect from 26-4-1975. Art. 371F has, further, been inserted to make some special provisions relating to the administration of Sikkim.

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Formation of new States and Alteration of Boundaries, etc.

It has already been pointed out that the Indian federation differs from the traditional federal system insofar as it empowers Parliament to alter the territory or integrity of its units, namely, the States, without their consent or concurrence. Where the of federal system is the result of a compact or agreement between independent States, it is obvious that the agreement cannot be altered without the consent of the parties to it. This is why the American federation has been described as "an indestructible Union of indestructible States". It is not possible for the national Government to redraw the map of the United States by forming new States or by altering boundaries of the States as they existed at the time of the compact without the consent of the Legislatures of the States concerned. But since federation in India was not the result of any

compact between independent States, there was no particular urge to maintain the initial organisation of the States as outlined in the Constitution even though interests of the nation as a whole demanded a change in this respect. The makers of our Constitution, therefore, empowered Parliament to reorganise the States by a simple procedure, the essence of which is that the affected State or States may express their views but cannot resist the will of Parliament.

The reason why such liberal power was given to the national government to reorganise the States is that the grouping of the Provinces under the Government of India Acts was based on historical and political reasons rather than the social, cultural or linguistic divisions of the people themselves. The question of reorganising the units according to natural alignments was indeed raised at the time of the making of the Constitution but then there was not enough time to undertake this huge task, considering the magnitude of the problem.

The provisions relating to the above subjects are contained in Art. 3-4 of the Constitution.

Article 3 says:

Parliament may by law—

- (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State,
- (b) increase the area of any State,
- (c) diminish the area of any State,
- (d) alter the boundaries of any State,
- (e) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired."

Article 4 provides that any such law may make supplemental, incidental and consequential provisions for making itself effective and may amend the First and Fourth Schedules of the Constitution, without going through the special formality of a law for the amendment of the Constitution

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as prescribed by Article 368. These Articles, thus, demonstrate the flexibility of our constitution. By a simple majority and by the ordinary legislative process Parliament may form new States or

alter the boundaries, etc., of existing States and thereby change the political map of India. The only conditions laid down for the making of such a law are—

(a) No Bill for the purpose can be introduced except on the recommendation of the President.

Procedure for Reorganisation of States.

(b) The President shall, before giving his recommendation, refer the Bill to the Legislature of the State which is going to be affected by the changes proposed in the Bill, for expressing its views on the changes within the period specified by the President. The President is not, however, bound by the views of the State Legislature, so ascertained.

Here is, thus, a special feature of the Indian federation, viz., that the territories of the units of the federation may be altered or redistributed if the Union Executive and Legislature so desire.¹³

Since the commencement of the Constitution, the foregoing power has been used by Parliament to enact the following Acts:

1. The Assam (Alteration of Boundaries) Act, 1951, altered the boundaries of Assam by ceding a strip of territory from India to Bhutan.
2. The Andhra State Act, 1953, formed a new State named Andhra, by taking out some territory from the State of Madras as it existed at the commencement of the Constitution.
3. The Himachal Pradesh and Bilaspur (New State) Act, 1954, merged the two Part C States of Himachal Pradesh and Bilaspur to form one State, namely, Himachal Pradesh.
4. The Bihar and West Bengal (Transfer of Territories) Act, 1956, transferred certain territories from Bihar to West Bengal.
5. The States Reorganisation Act, 1956, reorganised the boundaries of the different States of India in order to meet local and linguistic demands. Apart from transferring certain territories as between the existing States, it formed the new State of Kerala and merged the former States of Madhya Bharat, Pepsu, Saurashtra, Travancore Cochin, Ajmer, Bhopal, Coorg, Kutch and Vindhya Pradesh in other adjoining States.
6. The Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959, transferred certain territories from the State of Rajasthan to that of Madhya Pradesh.
7. The Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, made alterations in the boundaries of the States of Andhra Pradesh and Madras.
8. The Bombay Reorganisation Act, 1960, partitioned the State of Bombay to form the new State of Gujarat and to name the residue of Bombay as Maharashtra. Thus, the State of Bombay was split up into two States—Maharashtra and Gujarat.

9. The Acquired Territories (Merger) Act, 1960, provided for the merger into the State of Assam, Punjab and West Bengal of certain territories acquired by agreements between the Government of India and Pakistan, in 1958 and 1959.

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A similar transfer of certain territories from West Bengal and Assam to Pakistan under the aforesaid agreement, was provided for by enacting the Constitution (9th Amendment) Act, 1960, because the Supreme Court opined that no territory can be ceded from India to a foreign country without amending the Constitution.¹⁴

10. The State of Nagaland Act, 1962, formed the new State of Nagaland, with effect from 1-2-1964, comprising the territory of the 'Naga Hills-Tuensang Area' which was previously a Tribal Area in the Sixth Schedule of the Constitution, forming part of the State of Assam.

11. The next change was introduced by the Punjab Reorganisation Act, 1966, by which the State of Punjab was split up into the State of Punjab and Haryana and the Union Territory of Chandigarh with effect from 1-11-1966.

12. The Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968.

13. The Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968.

14. The Assam Reorganisation (Meghalaya) Act, 1969, created an autonomous sub-State named Meghalaya, within the State of Assam.

15. Himachal Pradesh was upgraded from the status of a Union Territory to that of a State by the State of Himachal Pradesh Act, 1970.

16. The North Eastern Areas (Reorganisation) Act, 1971, similarly, brought up Manipur, Tripura and Meghalaya into the category of States, and added Mizoram and Arunachal Pradesh to the list of Union territories.

17. The Haryana and Uttar Pradesh (Alteration of Boundaries) Act, 1979.

18. Mizoram which had been made a Union Territory by the Act of 1971, was elevated to the status of a State, by the State of Mizoram Act, 1986.

19. Arunachal Pradesh a Union Territory was made a State by State of Arunachal Pradesh Act, 1986.

20. Goa became a State by virtue of Goa, Daman and Diu Reorganisation Act, 1987, separating it from Daman and Diu with effect from 30-5-1987.

21. A new State of Chhattisgarh was created by carving out its territory from that of the territories of the Madhya Pradesh by enacting the Madhya Pradesh Reorganisation Act, 2000 (w.e.f. 1-11-2000).

22. The State of Uttaranchal came into being on 9-11-2000 by separating its territory out of the territories of the Uttar Pradesh vide the Uttar Pradesh Reorganisation Act, 2000.

23. By enacting the Bihar Reorganisation Act, 2000, the State of Jharkhand was created on 15-11-2000 by carving its territory out of the territories of the Bihar State.

REFERENCES

1. In the original Constitution, there were 27 States placed under three categories,—in Parts A, B and C of the First Schedule, having different status and features (as shown in Table III, Col. A). These States underwent some changes by subsequent legislation until the

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Constitution (7th Amendment) Act of 1956 abolished the three categories and placed all the States on the same footing (being 15 in number),—as a result of the reorganisation made by the States Reorganisation Act, 1956, which was incorporated in the Constitution (7th Amendment) Act

2. The 22nd Amendment Act, 1969, was passed to form an autonomous sub-State within the State of Assam, comprising the tribal areas specified in Part A of the Table to para 20 of the 6th Schedule of the Constitution, to meet the demands of the Hill Tribes for a separate State for themselves, which has since been created and named Meghalaya.

3. The name of Mysore has been changed into 'Karnataka' by the Mysore State (Alteration of Name) Act, 1973.

4. The name of Madras has similarly been changed into 'Tamil Nadu' by the Madras State (Alteration of Name) Act, 1968.

5. Vide The Madhya Pradesh Reorganisation Act, 2000.

6. Vide The Uttar Pradesh Reorganisation Act, 2000.

7. Vide The Bihar Reorganisation Act, 2000.

8. 'Acquired' means acquired according to any of the modes recognised by International Law *Masthan Sahib v. Chief Commr.*, A. 1962 S.C. 797 (803).

9. The Portuguese enclaves of Dadra and Nagar Haveli, having been integrated with India, after the judgment of the International Court in India's favour, the territory of these two enclaves was constituted a Union Territory, by the Constitution (10th Amendment) Act, 1962. Goa, Daman

and Diu was added as a Union Territory, by the Constitution (12th Amendment) Act, 1962, and the French Possession of Pondicherry was added by the Constitution (14th Amendment) Act, 1962. The Union Territories of Mizoram and Arunachal Pradesh were formed out of the north-eastern territories of Assam, by the North-Eastern Areas (Reorganisation) Act, 1971. Chandigarh was added as a Union Territory by the Constitution (12th Amendment) Act, 1962.

10. The name of the Laccadive, Minicoy and Amindivi Islands has been changed to 'Lakshadweep' by an Act of 1973.

11. Delhi has now got a special status by the constitution 69th Amendment, 1991, but has not been promoted to the status of a full-fledged State. See the Author's Shorter Constitution of India, 12th Ed., p. 756.

12. *Pondyal v. Union of India*, A. 1993 S.C. 1804 (para. 115). [In this case it has been further held that the power of Parliament under Article 2 to admit a new State is not unlimited but is subject to judicial review, and it is open to the Court to examine whether the terms and conditions for such admission as provided by Parliament are consistent with the Constitutional Scheme and the basic features of the Indian Constitution.]

13. *State of W.B. v. Union of India*, A. 1963 S.C. 1241.

14. *Re Berubari Union*, A. 1960 S.C. 845. [This cession could not be effected because the constitutionality of the transfer was challenged in the Courts. Though the Supreme Court upheld the transfer, some part of this ceded territory has been retained by West Bengal by agreement with the then Mujibur Rahaman Government of Bangla Desh, in 1974.]

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CHAPTER 7 CITIZENSHIP

Meaning of Citizenship.

THE population of a State is divided into two classes—citizens and aliens. While citizens enjoy full civil and political rights, aliens do not enjoy all or them. Citizens are members of the political community to which they belong. They are the people who compose the State.

Constitutional Rights and Privileges of Citizens of India.

The question of citizenship became particularly important at the time of the making of our Constitution because the Constitution sought to confer certain rights and privileges upon those who were entitled to Indian citizenship while they were to be denied to 'aliens'. The latter were even placed under certain disabilities.

Thus, citizens of India have the following rights under the Constitution which aliens shall not have:

- (i) Some of the Fundamental Rights belong to citizens alone, such as,—Arts. 15, 16, 19.
- (ii) Only citizens are eligible for certain offices, such as those of the President [Art. 58(1)(a)]; Vice-President [Art. 66(3)(a)]; Judge of the Supreme Court [Art. 124(3)] or of a High Court [Art. 217(2)]; Attorney-General [Art. 76(2)]; Governor of a State [Art. 157]; Advocate-General [Art. 165].
- (iii) The right of suffrage for election to the House of the People (of the Union) and the Legislative Assembly of every State [Art. 326] and the right to become a member of Parliament [Art. 84] and of the Legislature of a State [Art. 191 (d)] are also confined to citizens.

All the above rights are denied to aliens whether they are 'friendly' or 'enemy aliens'. But 'enemy aliens' suffer from a special disability; they are not entitled to the benefit of the procedural provisions in Cls. (1)-(2) of Art. 22 relating to arrest and detention. An alien enemy includes not only subjects of a State at war with India but also Indian citizens who voluntarily reside in or trade with such a State.

Constitutional and statutory basis of Citizenship in India.

The Constitution, however, did not intend to lay down a permanent or comprehensive law relating to citizenship in India. It simply described the classes of persons who would be deemed to be the citizens of India at the date of the commencement of the Constitution and left the entire law of citizenship to be regulated by some future law made by Parliament. In exercise of this power, Parliament has enacted the Citizenship Act (57 of

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1955), making elaborate provisions for the acquisition and termination of citizenship subsequent to the commencement of the Constitution the provisions of this Act¹ are to be read with the provisions of Part II of the Constitution, in order to get a complete picture of the law of Indian citizenship.

In view of the fact that the Act of Parliament only deals with the modes of acquisition of citizenship subsequent to the commencement of the Constitution, it would be convenient to deal with them separately.

A. Persons who became Citizens on January 26, 1950.

A. Under Arts. 5-8 of the Constitution, the following persons became citizens of India at the commencement of the Constitution—

- I. A person born as well as domiciled in the 'territory of India'—irrespective of the nationality of his parents [Art. 5(a)].

II. A person domiciled in the 'territory of India', either of whose parents was born in the territory of India,—irrespective of the nationality of his parents or the place of birth of such person [Art. 5(b)].

III. A person who or whose father or mother was not born in India, but who (a) had his domicile² in the 'territory of India', and (b) had been ordinarily residing within the territory of India for not less than 5 years immediately preceding the commencement of the Constitution. In this case also, the nationality of the person's parents is immaterial. Thus, a subject of a Portuguese Settlement, residing in India for not less than 5 years immediately preceding the commencement of the Constitution, with the intention of permanently residing in India, would become a citizen of India at the commencement of the Constitution [Art. 5(c)].

IV. A person who had migrated from Pakistan, provided—

(i) He or either of his parents or grand-parents was born in 'India as defined in the Government of India Act, 1935 (as originally enacted)' and—

(ii) (a) if he had migrated before July 19, 1948—he has ordinarily resided within the "territory of India" since the date of such migration (in his case no registration of the immigrant is necessary for citizenship); or

(b) if he had migrated on or after July 19, 1948, he further makes an application before the commencement of this Constitution for registering himself as a citizen of India to an officer appointed by the Government of India, and is registered by that officer, being satisfied that the applicant has resided in the territory of India for at least 6 months before such application [Art. 6].

V. A person who migrated from India to Pakistan after the 1st March, 1947, but had subsequently returned to India under a permit issued under the authority of the Government of India for resettlement or permanent return or under the authority of any law provided he gets himself registered in the same manner as under Art. 6(b)(ii) [Art. 7].

VI. A person who, or any of whose parents or grand-parents was born in 'India' as defined in the Government of India Act, 1935 (as originally enacted) but who is ordinarily residing in any country outside India (whether before or after the commencement of this Constitution), on application in the

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prescribed form, to the consular or diplomatic representative of India in the country of his residence [Art. 8]. (Provision was thus made for Indians living in foreign countries at the date of commencement of the Constitution.)

B. Acquisition of Citizenship after January 26, 1950.

B. The various modes of acquisition of citizenship prescribed by the Citizenship Act, 1955 as follows:

(a) Citizenship by birth. Every person born in India on or after January 26, 1950, shall be a citizen of India by birth.

(b) Citizenship by descent. Broadly speaking, a person born outside India on or after January 26, 1950, shall be a citizen of India by descent, if either of his parents is a citizen of India at the time of the person's birth.

(c) Citizenship by registration. Several classes of persons (who have not otherwise acquired Indian citizenship) can acquire Indian citizenship by registering themselves to that effect before the prescribed authority, e.g., persons of Indian origin who are ordinarily resident in India and have been so resident for five years immediately before making the application for registration; persons who are married to citizens of India.

(d) Citizenship by naturalisation. A foreigner can acquire Indian citizenship, on application for naturalisation to the Government of India.

(e) Citizenship by incorporation of territory. If any new territory becomes a part of India, the Government of India shall specify the persons of that territory who shall be the citizens of India.

Loss of Indian citizenship.

The Citizenship Act, 1955, also lays down how the citizenship of India may be lost,—whether it was acquired under the Citizenship Act, 1955, or prior to it—under the provisions of the Constitution [i.e., under Arts. 5-8). It may happen in any of the three ways—renunciation, termination and deprivation.

(a) Renunciation is a voluntary act by which a person holding the citizenship of India as well as that of another country may abjure one of them.³

(b) Termination shall take place by operation of law as soon as a citizen of India voluntarily acquires the citizenship of another country.

(c) Deprivation is a compulsory termination of the citizenship of India, by an order of the Government of India, if it is satisfied as to the happening of certain contingencies, e.g., that Indian citizenship had been acquired by a person by fraud, or that he has shown himself to be disloyal or disaffected towards the Constitution of India.

One citizenship in India.

It should be noted in this context, that our Constitution, though federal, provides for one citizenship only namely, the citizenship of India. In federal States like the U.S.A. and Switzerland, there is a dual citizenship, namely, federal or national citizenship and citizenship of

the State where a person is born or permanently resides, and there are distinct rights and obligations flowing from the two kinds of citizenship. In India, a person born or resident

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in any State can acquire only one citizenship, namely, that of India and the civic and political rights which are conferred by the Constitution upon the citizens of India can be equally claimed by any citizens of India irrespective of his birth and residence in any part of India.

Permanent residence within a State may, however, confer advantages in certain other matters, which should be noted in this context:

(a) So far as employments under the Union are concerned, there shall be no qualification for residence within any particular territory, but by Article 16(3) of the Constitution, Parliament is empowered to lay down that as regards any particular class or classes of employment under a State or a Union Territory residence within that State or Territory shall be a necessary qualification. This exception in the case of State employments has been engrafted for the sake of efficiency, insofar as it depends on familiarity with local conditions.

It is to be noted that it is Parliament which would be the sole authority to legislate in this matter and that State Legislatures shall have no voice. To this extent, invidious discrimination in different States is sought to be avoided. Parliament, in the exercise of this power, enacted the Public Employment (Requirement as to Residence) Act, 1957, for a temporary duration. By this Act, Parliament empowered the Central Government to make rules, having force for a specified period, prescribing a residential requirement only for appointment to non-Gazetted posts in Andhra Pradesh, Himachal Pradesh, Manipur and Tripura. Since the expiry of this Act in 1974, nobody can be denied employment in any State on the ground of his being a non-resident in that State.⁴

(b) As will be seen in the Chapter on Fundamental Rights, Art. 15(1), which prohibits discrimination on grounds only of race, religion, caste, sex or place of birth, does not mention residence. It is, therefore, constitutionally permissible for a State to confer special benefits upon its residents in matters other than those in respect of which rights are conferred by the Constitution upon all citizens of India. One of these, for instance, is the matter of levying fees for admission to State educational institutions. The Supreme Court has held that because discrimination on the ground of residence is not prohibited by Article 15, it is permissible for a State to offer a concession to its residents in the matter of fees for admission to its State Medical College.⁵

(c) So far as the State of Jammu and Kashmir is concerned, the Legislature of the State is authorised⁶ to confer special rights and privileges upon persons permanently resident in the State 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.

REFERENCES

1. The Act is reproduced at pp. 135 et seq. of Author's Commentary on the Constitution of India, 7th Ed., Vol. AI.

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2. Domicile' has been defined to be the country which is taken to be a man's permanent home.

3. When a person establishes that he had acquired the citizenship of India but Government contends that he has subsequently lost that citizenship by reason of having voluntarily acquired the citizenship of a foreign State, e.g., by obtaining a Pakistani passport, that question must be determined by the Central Government under s. 9(2) of the Citizenship Act before any action can be taken against such person as a foreigner. The Central Government is vested with exclusive jurisdiction to determine the foregoing question, namely, whether a person, who was a citizen of India, has lost that citizenship by having voluntarily acquired the citizenship of a foreign State, and this question cannot be determined by the State Government or by any Court, either by suit or in a proceeding under Article 226 or under Article 32 (Govt. of A.P. v. Syed Md., A. 1962 S.C. 1778; State of M.P. v. Peer Md., A. 1963 S.C. 645 (647)).

4. Pandurangrao v. A.P.P.S.C, A. 1963 S.C. 268 (272).

So far as Andhra Pradesh is concerned, separate provisions have since been made in Article 371D, which has been inserted in the Constitution, by the Constitution (32nd Amendment) Act, 1973. Article 371D empowers the President to provide, by an order, for equal opportunities, in the matter of public employment and education, for "the people belonging to different parts of the State," and to set up an Administrative Tribunal, with final powers, to adjudicate upon matters of employment as may be specified in the order.

5. Joshi v. State of Bombay, (1955) 1 S.C.R. 1215.

6. By Art. 35A, inserted in the Constitution of India, by the Constitution (Application to Jammu & Kashmir) Order, 1954, made by the President in exercise of his power under Article 370.

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CHAPTER 8 FUNDAMENTAL RIGHTS AND FUNDAMENTAL DUTIES

Individual Rights and Fundamental Rights.

THE Constitution of England is unwritten. Hence, there is, in England, no code of Fundamental Rights as exists in the Constitution of the United States or in other written Constitutions or the world. This does not mean, however, that in England there is no recognition of those basic rights of the individual without which democracy becomes meaningless. The object, in fact, is secured here in a different way. The foundation of individual rights in England may be said to be negative, in the sense that an individual has the right and freedom to take whatever action he likes, so long as he does not violate any rule of the ordinary law of the land. Individual liberty is secured by judicial decisions determining the rights of individuals in particular cases brought before the Courts.

The position in England.

The Judiciary is the guardian of individual rights in England as elsewhere; but there is a fundamental difference. While in England, the Courts have the fullest power to protect the individual against executive tyranny, the Courts are powerless as against legislative aggression upon individual rights. In short, there are no fundamental rights binding upon the Legislature in England. The English Parliament being theoretically 'omnipotent, there is no law which it cannot change. As has been already said, the individual has rights, but they are founded on the ordinary law of the land which can be changed by Parliament like other laws. So, there is no right which may be said to be 'fundamental' in the strict sense of the term. Another vital consequence of the supremacy of Parliament is that the English Court has no power of judicial review over legislation at all. It cannot declare any law as unconstitutional on the ground of contravention of any supposed fundamental or natural right.

Bill of Rights in the U.S.A.

The fundamental difference in approach to the question of individual of rights between England and the United States is that while the English were anxious to protect individual rights from the abuses of executive power, the framers of the American Constitution were apprehensive of tyranny not only from the Executive but also from the Legislature,—i.e., a body of men who for the time being form the majority in the Legislature.

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So, the American Bill of Rights (contained in the first Ten Amendments of the Constitution of the U.S.A.) is equally binding upon the Legislature as upon the Executive. The result has been the establishment in the United States of a 'judicial supremacy', as opposed to the 'Parliamentary supremacy' in England. The Courts in the United States are competent to declare an Act of Congress as unconstitutional on the ground of contravention of any provision of the Bill of Rights. Further, it is beyond the competence of the Legislature to modify or adjust any of the fundamental rights in view of any emergency or danger to the State. That power has been assumed by the Judiciary in the United States.

History of the demand for Fundamental Rights in India.

In India, the Simon Commission and the Joint Parliamentary Committee which were responsible for the Government of India Act, 1935, had rejected the idea of enacting declarations of fundamental rights on the ground that "abstract declarations are useless, unless there exist the will and the means to make them effective". But nationalist opinion, since the time of the Nehru Report,¹ was definitely in favour of a Bill of Rights, because the experience gathered from the British regime was that a subservient Legislature might serve as a handmaid to the Executive in committing inroads upon individual liberty.

Regardless of the British opinion, therefore, the makers of our Constitution adopted Fundamental Rights to safeguard individual liberty and also for ensuring (together with the Directive Principles) social, economic and political justice for every member of the community.² That they have succeeded in this venture is the testimony of an ardent observer of the Indian Constitution.³

"In India it appears that the Fundamental Rights have both created a new equality. . . and have helped to preserve individual liberty. . . The number of rights cases brought before High Courts and the Supreme Court attest to the value of the Rights, and the frequent use of prerogative writs testifies to their popular acceptance as well. The classic arguments against the inclusion of written rights in a Constitution have not been borne out in India, In fact, the reverse may have been the case".³

Courts have the power to declare as void laws contravening Fundamental Rights.

So, the Constitution of India has embodied a number of Fundamental Rights in Part III of the Constitution, which are (subject to exceptions, to be mentioned hereafter) to act as limitations not only upon the powers of the Executive but also upon the powers of the Legislature. Though the model has been taken from the Constitution of the United States, the Indian Constitution does not go so far, and rather effects a compromise between the doctrines of Parliamentary sovereignty and judicial supremacy. On the other hand, the Parliament of India cannot be said to be sovereign in the English sense of legal omnipotence,—for, the very fact that the Parliament is created and limited by a written Constitution enables our Parliament to legislate only subject to the limitations and prohibitions imposed by the Constitution, such as, the Fundamental Rights, the distribution of legislative powers, etc. In case any of these limitations are transgressed, the Supreme Court and the High Courts are competent to declare a law as unconstitutional and void. So far as the contravention of Fundamental

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Rights is concerned, this duty is specially enjoined upon the Courts by the Constitution [Art. 13], by way of abundant caution. Clause (2) of Art. 13 says—

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

To this extent, our Constitution follows the American model rather than the English.

But the powers of the Judiciary vis-a-vis the Legislature are weaker in India than in the United States in two respects:

Fundamental Rights under Indian Constitution distinguished from American Bill of Rights.

Firstly, while the declarations in the American Bill of Rights are absolute and the power of the State to impose restrictions upon the fundamental rights of the individual in the collective interests had to be evolved by the Judiciary,—in India, this power has been expressly conferred upon the Legislatures by the Constitution itself in the case of the major fundamental rights, of course, leaving a power of judicial review in the hands of the Judiciary to determine the reasonableness of the restrictions imposed by the Legislature.

44th Amendment, 1978. The right to property.

Secondly, by a somewhat hasty step, the Janata Government, headed by Morarji Desai, has taken out an important fundamental right, namely, the right of Property, by omitting Arts. 19(1)(f) and 31, by the 44th Amendment Act, 1978. Of course, the provision in Art. 31(1) has, by the same amendment, been transposed to a new article,—Art. 300A, which is outside Part III of the Constitution and has been labelled as 'Chapter IV' of Part XII (which deals with 'Finance, Property, Contracts and Suits'),—but that is not a 'fundamental right'.

While under the Congress rule for 30 years, the ambit of the Fundamental Rights embodied in Part III of the original Constitution had been circumscribed by multiple amendments, bit by bit, the death blow to one of the Fundamental Rights came from the Janata Government.

The net result of the foregoing amendments inflicted upon the right to Property are—

(i) The right not to be deprived of one's property save by authority of law is no longer a 'fundamental right'. Hence, if anybody's property is taken away by executive fiat without the authority of law or in contravention of a law, the aggrieved individual shall have no right to move the Supreme Court under Art. 32.

(ii) If a Legislature makes a law depriving a person of his property, he cannot challenge the reasonableness of the restrictions imposed by such law, invoking Art. 19(1)(f), because that provision has ceased to exist.⁴

(iii) Since Cl.(2) of Art. 31 has vanished, the individual's right to property is no longer a guarantee against the Legislature in respect of any compensation for loss of such property. Article 31(2) [in the original Constitution] embodied the principle that if the State makes a compulsory

acquisition or requisitioning of private property, it must (a) make a law; (b) such law must be for a public purpose; and (c) some compensation must be paid to the expropriated owner.

Of course, by the 25th Amendment of 1971, during the regime of Mrs. Gandhi, the requirement of 'compensation' was replaced by 'an amount', the adequacy of which could no longer be challenged before the Courts. Nevertheless, the Supreme Court held, the aggrieved individual might complain if the 'amount' so offered was illusory or amounted to 'confiscation'.⁵ But even such an innocuous possibility has been foreclosed by the 44th Amendment.

The short argument advanced in the Statement of Objects and Reasons of the 45th Amendment Bill for deleting the fundamental right to property is that it was only being converted into a legal right. What is meant is that while Arts. 19(1)(f) and 31(2) of the original Constitution operated as limitations on the Legislature itself, the 45th Amendment Bill installs the Legislature as the guardian of the individual's right to property, without any fetter on its goodwill and wisdom. But if the Legislature could be presumed to be so infallible and innocent, this would be a good argument for omitting all the fundamental rights from Part III. As it has been pointed out earlier, the very justification of putting limitations on the Legislature by adopting a guarantee of Fundamental Rights is that history has proved that the group of human beings constituting, for the time being, the majority in a Legislative body, are not always infallible and that is why constitutional safeguards are necessary to permanently protect the individual from legislative tyranny.

Thirdly, by subsequent amendments, the arena of Fundamental Rights has been narrowed down by introducing certain exceptions to the operation of fundamental rights, namely, Articles 31A, 31B, 31C, 31D.⁶

Exceptions to Fundamental Rights.

(a) Of these, Arts. 31A, 31C are exceptions to the fundamental rights enumerated in Articles 14 and 19; this means that any law falling under the ambit of Art. 31A (e.g., a law for agrarian reform), or Art. 31C (a law for the implementation of any of the Directive Principles contained in Part IV of the Constitution), cannot be invalidated by any Court on the ground that it contravenes any of the fundamental rights guaranteed by Art. 14 (equality before law); Art. 19 (freedom of expression, assembly, etc.).

(b) Art. 31B, however, offers almost complete exception to all the fundamental rights enumerated in Part III. If any enactment is included in the 9th Schedule, which is to be read along with Art. 31B, then such enactment shall be immune from constitutional invalidity on the ground of contravention of any of the fundamental rights. But shall be open to challenge on the ground of damage to the basic structure of the Constitution subsequent to 24-4-1973 (i.e. the date of decision in Kesavananda's case)/

Fundamental Duties.

Fourthly, by the 42nd Amendment Act, 1976, a countervailing factor has been introduced, namely, the Fundamental Duties mentioned in Art. 51A. Though these Duties are not themselves enforceable in the Courts nor their violation, as such, punishable, nevertheless, if a Court, before which a fundamental right is sought to be enforced, has to read all parts of the

Constitution, it may refuse to enforce a fundamental right at the instance of an individual who has patently violated any of the Duties specified in Art. 51 A.8 If so, the emphasis of the original Constitution on fundamental rights has been minimised.

Enumeration of Fundamental Rights in Part III, exhaustive.

Fifthly, the category of 'fundamental rights' under our Constitution is exhaustively enumerated in Part III of the Constitution. The American Constitution (9th Amendment) expressly says that the enumeration of certain rights in the Bill of Rights "shall not be construed to deny or disparage others retained by the people." This rests on the theory of inalienable natural rights which can by no means be lost to the individual in a free society; the guarantee of some of them in the written Constitution cannot, therefore, render obsolete any right which inhered in the individual even before the Constitution, e.g., the right to engage in political activity. But there is no such unremunerated right under our Constitution.

As was observed in the early case of *Gopalan v. State of Madras*,⁹ the Legislatures under our Constitution being sovereign except insofar as their sovereignty has been limited by the Constitution either expressly or by necessary implication, the Courts cannot impose any limitation upon that sovereignty either on the theory of the 'spirit of the Constitution' or of that of 'natural rights', i.e., rights other than those which are enumerated in Part III of the Constitution.¹⁰ Any expansion of the Fundamental Rights under the Indian Constitution must, therefore, rest on judicial interpretation and the Supreme Court has gone ahead in this direction by enlarging the scope of Art. 21.¹¹

Rights following from other provisions of the Constitution.

It should not be supposed, however, that there is no other justiciable right provided by our Constitution outside Part III. Limitations upon the State are imposed by other provisions of the Constitution and these limitations give rise to corresponding rights to the individual to enforce them in a Court of law if the Executive or the Legislature violates any of them. Thus, Art. 265 says that "no tax shall be levied or collected except by authority of law". This provision confers a right upon an individual not to be subjected to arbitrary taxation by the Executive, and if the Executive seeks to levy a tax without legislative sanction, the aggrieved individual may have his remedy from the Courts.¹² The new provision in Art. 300A belongs to this category.¹³ Similarly, Art. 301 says that "subject to the provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free". If the Legislature or the Executive imposes any restriction upon the freedom of trade or intercourse which is not justified by the other provisions of Part XIII of the Constitution, the individual who is affected by such restriction may challenge the action by appropriate legal proceedings.¹⁴

What, then, is the distinction between the 'fundamental rights' included in Part III of the Constitution and those rights arising out of the limitations contained in the other Parts¹⁵ which are equally justiciable? Though the rights of both these classes are equally justiciable, the constitutional remedy by way of an application direct to the Supreme Court

Difference between Fundamental Rights and Rights secured by other provisions of Constitution.

under Art. 32, which is itself included in Part III, as a 'fundamental right', is available only in the case of fundamental rights. If the right follows from some other provision of the Constitution, say, Art. 265 or Art. 301, the aggrieved person may have his relief by an ordinary suit or, by an application under Art. 226 to the High Court, but an application under Art. 32 shall not lie, unless the invasion of the non fundamental right involves the violation of some fundamental right as well.¹⁶

As the word 'fundamental' suggests, under some Constitutions, fundamental rights are immune from constitutional amendment; in other words, they are conferred a special sanctity as compared with other provisions of the Constitution. But this principle has been rejected by the Indian Constitution, as it stands interpreted by amendments of the Constitution themselves and judicial decisions.

Of course, no part of the Constitution of India can be changed by ordinary legislation unless so authorised by the Constitution itself (e.g., Art. 4); but all parts of the Constitution except the basic features can be amended by an Amendment Act passed under Art. 368, including the fundamental rights. This proposition has been established after a history of its own:

Amendability of Fundamental Rights; Basic Features.

A. Until the case of *Golak Nath*,¹⁷ the Supreme Court had been holding that no part of our Constitution was unamendable and that Parliament might, by passing a Constitution Amendment Act, in compliance with the requirements of Art. 368, amend any provision of the Constitution, including the Fundamental Rights and Art. 368 itself.¹⁸

According to this earlier view,¹⁸ thus, the Courts could act as the guardian of fundamental rights only so long as they were not amended by the Parliament of India by the required majority of votes. In fact, some of the amendments of the Constitution so far made were effected with a view to superseding judicial pronouncements which had invalidated social or economic legislation on the ground of contravention of fundamental rights. Thus, the narrow interpretation of Cl. (2) of Art. 19 by the Supreme Court in the cases of *Ramesh Thappar v. State of Madras*¹⁹ and *Brij Bhushan v. State of Delhi*²⁰ was superseded by the Constitution (1st Amendment) Act, 1951, while the interpretation given to Art. 31 in the cases of *State of West Bengal v. Gopal*,²¹ *Dwarkadas v. Sholapur Spinning Co.*,²² and *State of West Bengal v. Bela Banerjee*,²³ was superseded by the Constitution (4th Amendment) Act, 1955.

B. But the Supreme Court cried halt to the process of amending the Fundamental Rights through the amending procedure laid down in Art. 368 of the Constitution, by its much-debated decision in *Golak Nath v. State of Punjab*.¹⁷ In this case,¹⁷ overruling its two earlier decisions,¹⁸ the Supreme Court held that Fundamental Rights, embodied in Part III, had been given a

'transcendental position' by the Constitution, so that no authority functioning under the Constitution, including Parliament exercising the

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amending power under Art. 368, was competent to amend the Fundamental Rights.

C. But by the 24th Amendment Act, 1971, Arts. 13 and 368 were amended to make it clear that Fundamental Rights were amendable under the procedure laid down in Art. 368, thus overriding the majority decision of the Supreme Court in *Golak Nath v. State of Punjab*.¹⁷

The majority decision in *Kesavananda Bharati's case*¹⁷ upheld the validity of these amendments and also overruled *Golak Nath's case*,¹⁷ holding that it is competent for Parliament to amend Fundamental Rights under Art. 368, which does not make any exception in favour of fundamental rights; nor does Art. 13 comprehend Acts amending the Constitution itself. At the same time *Kesavananda's case*⁷ also laid down that there were implied limitations on the power to 'amend' and that power cannot be used to alter the 'basic features' of the Constitution.

A big limitation that stands in the way of Parliament, acting by a special majority, to introduce drastic changes in the Constitution, is the judicially innovated doctrine of 'basic features' which can be eliminated only if a Bench larger than the '13 Judge Bench in *Kesavananda's case*¹⁷ be prepared to overturn the decision in that case. In the meantime, applying *Kesavananda*¹¹ the majority of the Constitution Bench has invalidated Cls. (4) and (5) of Art. 368 as violative of the basic features of the Constitution [*Minerva Mills v. Union of India*, A. 1980 S.C. 1789 (paras 21, 28)].

Classification of Fundamental Rights.

The provisions of Part III of our Constitution which enumerate the Fundamental Rights are more elaborate than those of any other existing written constitution relating to fundamental rights, and cover a wide range of topics.

I. The Constitution itself classifies the Fundamental Rights under seven groups as follows:

- (a) Right to equality.
- (b) Right to particular freedoms.
- (c) Right against exploitation.
- (d) Right to freedom of religion.
- (e) Cultural and educational rights.
- (f) Right to property.

(g) Right to constitutional remedies.

Right to property omitted.

Of these the Right to Property has been eliminated by the 44th Amendment Act, so that only six freedoms now remain, in Art. 19(1) [see under '44th Amendment', ante].

The rights falling under each of the six categories are shown in Table V.

II. Another classification which is obvious is from the point of view of persons to whom they are available. Thus—

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(a) Some of the fundamental rights are granted only to citizens—(i) Protection from discrimination on grounds only of religion, race, caste, sex or place of birth [Art. 15]; (ii) Equality of opportunity in matters of public employment [Art. 16]; (iii) Freedoms of speech, assembly, association, movement, residence and profession [Art. 19]; (iv) Cultural and educational rights of minorities [Art. 30].

(b) Some of the fundamental rights, on the other hand, are available to any person on the soil of India—citizen or foreigner—(i) Equality before the law and equal protection of the Laws [Art. 14]; (ii) Protection in respect of conviction against ex post facto laws, double punishment and self-incrimination [Art. 20]; (iii) Protection of life and personal liberty against action without authority of law [Art. 21]; (iv) Right against exploitation [Art. 23]; (v) Freedom of religion [Art. 25]; (vi) Freedom as to payment of taxes for the promotion of any particular religion [Art. 27]; (vii) Freedom as to attendance at religious instruction or worship in State educational institutions [Art. 28].

III. Some of the Fundamental Rights are negatively worded, as prohibitions to the State, e.g., Art. 14 says—"The State shall not deny to any person equality before the law. . ." Similar are the provisions of Arts. 15(1); 16(2); 18(1); 20, 22(1); 28(1). There are others, which positively confer some benefits upon the individual [e.g., the right to religious freedom, under Art. 25, and the cultural and educational rights, under Arts. 29(1), 30(1)].

IV. Still another classification may be made from the standpoint of the extent of limitation imposed by the different fundamental rights upon legislative power.

(i) On the one hand, we have some fundamental rights, such as under Art. 21, which are addressed against the Executive but impose no limitation upon the Legislature at all. Thus, Art. 21 simply says that—

"No person shall be deprived of his life or personal liberty except according to the procedure established by law."

It was early held by our Supreme Court⁹ that a competent Legislature is entitled to lay down any procedure for the deprivation of personal liberty, and that the Courts cannot interfere with such law on the ground that it is unjust, unfair or unreasonable. In this view,⁹ the object of Art. 21 is not to impose any limitation upon the legislative power but only to ensure that the Executive does not take away a man's liberty except under the authority of a valid law, and in strict conformity with the procedure laid down by such law.²³ In later cases, however, the Supreme Court has found it difficult to immunise laws made under Art. 21 from attack on the ground of 'unreasonableness' under a relevant clause of Art. 19(1), or Art. 14, and recent Supreme Court decisions show an increasing inclination in that direction.²⁴

(ii) To the other extreme are Fundamental Rights which are intended as absolute limitations upon the legislative power so that it is not open to the Legislature to regulate the exercise of such rights, e.g., the rights guaranteed by Arts. 15, 17, 18, 20, 24.

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(iii) In between the two classes stand the rights guaranteed by Art. 19 which itself empowers the Legislature to impose reasonable restrictions upon the exercise of these rights, in the public interest. Though the individual rights guaranteed by Art. 19 are, in general, binding upon both the Executive and the Legislature, these 'authorities' are permitted by the Constitution to make valid exceptions to the rights within limits imposed by the Constitution. Such grounds, in brief, are security of the State, public order, public morality and the like.

Fundamental Rights-a guarantee against State action.

All the above rights are available against the State. It is now settled that the rights which are guaranteed by Arts. 19²⁵ and 21²⁶ are guaranteed against State action as distinguished from violation of such rights by private individuals. In case of violation of such rights by individuals, the ordinary legal remedies may be available but not the constitutional remedies.

'State action', in this context, must, however, be understood in a wider sense. For interpreting the words 'State' wherever it occurs in the Part on Fundamental Rights, a definition has been given in Art. 12 which says that, unless the context otherwise requires, 'the State' will include not only the Executive and Legislative organs of the Union and the States, but also local bodies (such as municipal authorities) as well as 'other authorities'.²⁷ This latter expression refers to any authority or body of persons exercising the power to issue orders, rules, bye-laws or regulations having the force of law, e.g., a Board having the power to issue statutory rules, or exercising governmental powers. Even the act of a private individual may become an act of the State if it is enforced or aided by any of the authorities just referred to.²⁸

It should be noted, however, that there are certain rights included in Part III which are available not only against the State but also against private individuals, e.g., Art. 15(2) [equality in regard to access to and use of places of public resort]; Art. 17 [prohibition of untouchability]; Art. 18(3)-(4) [prohibition of acceptance of foreign title]; Art. 23 [prohibition of traffic in human beings]; Art. 24 [prohibition of employment of children in hazardous employment]-. But these provisions in Part III are not self-executory, that is to say, these articles are not directly

enforceable; they would be indirectly enforceable; only if some law is made to give effect to them, and such law is violated. It follows that the classification of fundamental rights into executory and self-executory is another possible mode of classification.

We may now proceed to a survey of the various fundamental rights, in particular.

Article 14 of the Constitution provides—

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Art. 14: Equality before the Law and Equal Protection of the Laws.

Prima facie, the expression 'equality before the law' and 'equal protection of the laws' may seem to be identical, but, in fact, they mean different things. While equality before the law is a somewhat negative concept implying the absence of any special privilege by reason of birth, creed or the like, in favour of any individual and the

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equal subjection of all classes to the ordinary law,—equal protection of the laws is a more positive concept, implying the right to equality of treatment in equal circumstances.

The concept of equality and equal protection of laws in its proper spectrum encompasses social and economic justice in a political democracy.²⁹

Equality before Law.

Equality before the law, as a student of English Constitutional law knows, is the second corollary from Dicey's³⁰ concept of the Rule of Law. Equality before law is correlative to the concept of Rule of Law for all round evaluation of healthy social order.³¹ It means that no man is above the law of the land and that every person, whatever be his rank or status, is subject to the ordinary law and amenable to the jurisdiction of the ordinary tribunals. Against, every citizen from the Prime Minister down to the humblest peasant, is under the same responsibility for every act done by him without lawful justification and in this respect, there is no distinction between officials and private citizens. It follows that the position will be the same in India. But even in England, certain exceptions are recognised to the above rule of equality in the public interests.

The exceptions allowed by the Indian Constitution are—

(1) The President or the Governor of a State shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.

(2) No criminal proceeding whatsoever shall be instituted or continued against the President or a Governor in any Court during his term of office.

(3) No civil proceeding in which relief is claimed against the President or the Governor of a State shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President or Governor of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the causa of action there for, the name, description any place of residence of the party by whom such proceedings are to be instituted and the relief which he claims [Art. 361].

The above immunities, however, shall not bar—(i) Impeachment proceedings against the President. (ii) Suits or other appropriate proceedings against the Government of India or the Government of a State.

Besides the above constitutional exceptions, there will, of course, remain the exceptions acknowledged by the comity of nations in every civilized country, e.g., in favour of foreign Sovereigns and ambassadors.

Equal Protection of the Laws.

Equal protection of the laws, on the other hand, would mean "that among equals, the law should be equal and equally administered, that like should be

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treated alike. . ." Equal protection requires affirmative action by the State towards unequals by providing facilities and opportunities.³²

In other words, it means the right to equal treatment in similar circumstances both in the privileges conferred and in the liabilities imposed by the laws.³³ None should be favoured and none should be placed under any disadvantage, in circumstances that do not admit of any reasonable justification for a different treatment. Thus, it does not mean that every person shall be taxed equally, but that persons under the same character should be taxed by the same standard.

But if there is any reasonable basis for clarification, the Legislature would be entitled to make a different treatment. The legislature is competent to exercise its discretion and make classification.³⁴ It is for the legislature to identify the class of the people to be given protection and on what basis such protection was to be given. The Court cannot interfere.³⁵ State has wide discretion in respect of classification of objects, persons and things for the purposes of taxation.³⁰ The Legislature can devise classes for the purpose of taxing or not taxing, exempting or not exempting, granting incentives and prescribing rate of tax, benefits or concessions.³⁷ Thus, it may (i) exempt certain classes of property from taxation at all, such as charities, libraries and the like; (ii) impose different specific taxes upon different trades and professions; (iii) tax real and personal property in different manner and so on.

The guarantee of 'equal protection', thus, is a guarantee of equal treatment of persons in 'equal circumstances', permitting differentiation in different circumstances. In other words—

The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance in the same position as the varying needs of different classes of persons often require separate treatment.

The principle does not take away from the State the power of classifying persons for legitimate purposes.

"A Legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate."³⁹

In order to be 'reasonable', a classification must not be arbitrary, but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation.⁴⁰ The reasonableness of a provision depends upon the circumstances obtaining at a particular time and the urgency of the evil sought to be controlled. The possibility of the power being abused is no ground for declaring a provision violative of Art. 14.⁴¹ In order to pass the test, two conditions must be fulfilled, namely, that (1) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.⁴²

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It is not possible to exhaust the circumstances or criteria which may accord a reasonable basis for classification in all cases. It depends on the object of the legislation in view and whatever has a reasonable relation to the object or purpose of the legislation is a reasonable basis for classification of the persons or things coming under the purview of the enactment. Thus—

(i) The basis of classification may be geographical.³⁸

(ii) The classification may be according to difference in time.³⁸

(iii) The classification may be based on the difference in the nature of the trade, calling or occupation, which is sought to be regulated by the legislation.⁴²

Similarly, higher educational qualification is a permissible basis of classification for promotion⁴³ as it has nexus with higher efficiency on the promotional post.⁴⁴

Thus, it has been held that—

(a) In offences relating to women, e.g., adultery, women in India may be placed in a more favourable position, having regard to their social status and need for protection⁴⁵ (see under Art. 15, post).

(b) In a law of prohibition, it would not be unconstitutional to differentiate between civil and military personnel, or between foreign visitors and Indian citizens,—for they are not similarly circumstanced from the standpoint of need for prohibition of consumption of liquor.⁴⁶

(c) Exemption to the candidate who stood first in the Forest Rangers College from selection as Assistant Conservator by the Public Service Commission, it being based on reasonable classification, is not ultra vires Art. 14.⁴⁷

The guarantee of equal protection applies against substantive as well as procedural laws.⁴⁸ The decision making process should be transparent, fair and open.⁴⁹ The procedure for distribution of State largesses must be transparent, just, fair and non-arbitrary. Non-transparency promotes nepotism and arbitrariness.⁵⁰ Hence the discretion vested by a statute is to be exercised fairly and judicially and not arbitrarily⁵¹ but subject to the requirements of law.⁵² In the absence of rules, the action of the government is required to be fair and reasonable.⁵³ From the standpoint of the latter, it means that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence, without discrimination. Of course, if the differences are of a minor or unsubstantial character, which have not prejudiced the interests of the person or persons affected, there would not be a denial of equal protection.³³ Again, a procedure different from that laid down by the ordinary law can be prescribed for a particular class of persons if the discrimination is based upon a reasonable classification having regard to the object which the legislation has in view and the policy underlying it. Thus, in a law which provides for the externment of undesirable persons who are likely to jeopardize the peace of the locality, it is not an unreasonable discrimination to provide that a suspected person shall have no right to cross-examine the witnesses who depose against him, for the very object of the legislation which is an extraordinary one would be defeated if such a right were given to the suspected person.⁵⁴ In the Reference on the Special Courts Bill, 1978,⁵⁵ the Supreme Court has held that the setting up of a Special Court for

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the expeditious trial of offences committed during the Emergency period [from 25-6-1975 to 27-3-1977] by high public officials, in view of the congestion of work in the ordinary Criminal Courts and in view of the need for a speedy termination of such prosecutions in the interests of the functioning of democracy under the Constitution of India, is a reasonable classification. But to include in the Bill any offence committed during any period prior to the Proclamation of Emergency in June, 1975, was unconstitutional inasmuch as such classification has no reasonable nexus with the object of the Bill.

The guarantee of equal protection includes absence of any arbitrary discrimination by the laws themselves or in the matter of their administration. Thus, even where a statute itself is not discriminatory, but the public official entrusted with the duty of carrying it into operation applies it against an individual, not for the purpose of the Act but intentionally for the purpose of

injuring him, the latter may have that executive act annulled by the Court on the ground of contravention of the guarantee of equal protection. Of course, it is for the aggrieved individual to establish beyond doubt that the law was applied against him by the public authority "with an evil eye and an unequal hand".³³ In short, Art. 14 hits 'arbitrariness' of State action in any form.^{24, 56}

An act which is discriminatory is liable to be labelled as arbitrary.⁵⁷

The court will not interfere in the policy decisions of the Govt. unless the government-action is arbitrary or invidiously discriminatory.⁵⁸ The Government policy is not subject to judicial review unless it is demonstrably arbitrary, capricious, irrational, discriminatory or violative of constitutional or statutory provisions.⁵⁹

It is the duty of State to allay fears of citizens regarding discrimination and arbitrariness.⁶⁰ However, protective discrimination in favour of SCs and STs is a part of constitutional scheme of social and economic justice⁶¹ to integrate them into the national mainstream so as to establish an integrated social order with equal dignity of person.⁶²

Relation between Arts. 14-16.

As the Supreme Court has observed,⁶³ Articles 14-16, taken together enshrine the principle of equality and absence of discrimination.

While the principle is generally stated in Article 14, which extends to all persons,—citizens or aliens, Articles 15 and 16 deal with particular aspects of that equality. Thus,

(a) Art. 15 is available to citizens only and it prohibits discrimination against any citizen in any matter at the disposal of the State on any of the specified grounds, namely, religion, race, caste, sex or place of birth.

(b) Art. 16 is also confined to citizens, but it is restricted to one aspect of public discrimination, namely, employment under the State.

In matters not coming under Arts. 15 and 16, if there is any discrimination, the validity of that can be challenged under the general Provision in Art. 14.

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As just stated, a particular aspect of the equality guaranteed by Art. 14 is the prohibition against discrimination contained in Art. 15 of the Constitution which runs thus:

"(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Art. 15: Prohibition of Discrimination on grounds of Religion, Race, Caste, Sex or Place of Birth.

(2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

It will be seen that the scope of this Article is very wide. While the prohibition in Cl. (1) is levelled against State action, the prohibition in Cl. (2) is levelled against individuals as well.

Cl. (1) says that any act of the State, whether political, civil or otherwise, shall not discriminate as between citizens on grounds only of religion, race, caste, sex, place of birth or any of them. The plain meaning of this prohibition is that no person of a particular religion, caste, etc., shall be treated unfavourably by the State when compared with persons of any other religion or caste merely on the ground that he belongs to the particular religion or caste, etc. The significance of the word 'only' is that if there is any other ground or consideration for the differential treatment besides those prohibited by this Article, the discrimination will not be unconstitutional.⁴⁵ Thus, discrimination in favour of a particular sex will be permissible if the classification is the result of other considerations besides the fact that the person belongs to that sex, e.g., physical or intellectual fitness for some work. For instance, women may be considered to be better fitted for the job of a nurse while they may not be considered eligible for employment in heavy industries like a steel factory. Such discrimination, being based on a ground other than sex, would not be considered to be unconstitutional.

But if a person is sought to be discriminated against simply because he belongs to a particular community, race or sex, he can get the State action annulled through a Court. While racial discrimination still persists as a malignant growth upon Western society, it speaks volumes for Indian achievement that a possible victim of racial discrimination, in India, can obtain relief direct from the highest Court of the land, by means of a petition for an appropriate writ, and, yet, no such complaint has so far come before the Courts.

As already stated, in regard to the public places specified in Cl. (2), the protection is available even against discriminatory acts by private individuals. Clause (2) provides that so far as places of public entertainment are concerned, no person shall be subjected to discrimination on the

grounds only of religion, race, caste, sex, place of birth or any of them, whether such discrimination is the result of an act of the State or of any other individual. Even wells, tanks, bathing ghats, roads, and places of public resort which are owned by private individuals are subject to this prohibition provided they are maintained wholly or partly out of State funds or they have been dedicated to the use of the general public.

The above prohibitions against discrimination, however, would not preclude the State from—

- (a) making special provision for women and children;
- (b) making special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

These exceptional classes of people require special protection and hence any legislation which is necessary for the making of special provisions for persons of these classes, would not be held to be unconstitutional. Thus, it has been held that s. 497 of the Indian Penal Code, which says that in an offence of adultery though the man is punishable for adultery, the woman is not punishable as an abettor, is not unconstitutional, because such immunity is necessary for the protection of women in view of their existing position in Indian society.⁴⁵

Similarly, though discrimination on the ground of caste only is prohibited by Cl. (1) of the Article, it would be permissible under Cl. (4) for the State to reserve seats for the members of the backward classes or of the Scheduled Castes or Tribes or to grant them fee concessions, in public educational institutions.⁶⁴ Art. 15(4) envisages the policy of compensatory or protective discrimination but it should be reasonable and consistent with the ultimate public interest i.e., national interest and the interest of community or society as a whole⁶⁵ but the provision cannot be justifiably invoked in granting remission to the convicted persons belonging to the scheduled castes and scheduled tribes as it would not be a measure for their 'advancement'. However, the benefit obtained was permitted to be retained.⁶⁶ It was held that an SC/ST candidate selected for admission to a course on the basis of merit as a general candidate, should not be treated as a reserved candidate⁶⁷ and reservation for admission to the specialities/ super-specialities in post-graduate and doctoral course in medicine is permissible.⁶⁸

Art. 16: Equality of opportunity in matters of Public Employment.

As a corollary from the general assurance of absence of discrimination by the State on grounds only of religion, race, caste, sex, or place of birth [Art. 15], the Constitution guarantees equality of opportunity in matters of public employment. Article 16 says that—

- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them, be ineligible forany office under the State."

The true import of equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities

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but on the presence of abilities and opportunity of excellence in each cadre/grade⁶⁹ as equality of opportunity means equality as between the members of the same class of employees and not between that of separate independent classes.⁷⁰

A person cannot be excluded from a State service merely because he is a Brahmin,⁷¹ even though this result is reached by reason of a distribution of posts amongst communities according to a ratio or quota.⁷¹ Government jobs or service cannot be denied to the persons suffering from AIDS.⁷² This equality is to be observed by the State not only in the matter of appointments to the public services, but also in the matter of any other public employment, where the relationship of master and servant exists between the State and the employee.⁷³ It bars discrimination not only in the matter of initial appointment but also of promotion and termination of the service itself⁷⁴ as "employment" includes promotion.⁷⁵

This right is a safeguard not only against communal discrimination, but also against local discrimination or even against discrimination against the weaker sex.

The only exceptions to the above rule of equality are—

(a) Residence within the State may be laid down by Parliament as a condition for particular classes of employment or appointment under any State or other local authority [Art. 16(3)].

By virtue of this power, Parliament enacted the Public Employment (Requirement as to Residence) Act, 1957, empowering the Government of India to prescribe residence as condition for employment in certain posts and services in the State of Andhra Pradesh and in the Union Territories of Himachal Pradesh, Manipur and Tripura. This Act having expired in 1974, there is no provision to prescribe residence as a condition for public employment, except that for Andhra Pradesh special provisions have been made by inserting a new Art. 371D (post) in the Constitution itself.

(b) The State may reserve any post or appointment in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the services under that State [Art. 16(4)]. This is to provide socio-economic equality to the disadvantaged.⁷⁶

(c) Offices connected with a religious or denominational institution may be reserved for members professing the particular religion or belonging to the particular denomination to which the institution relates [Art. 16(5)].

(d) The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration in the matter of appointment to services and posts under the Union and the States, as far as may be consistent with the maintenance of efficiency of the administration [Art. 335] but the proviso⁷⁷ to Art. 335 providing for giving relaxation in qualifying marks in any

examination or lowering the standard of evaluation in favour of the members of the SC & ST hits the consideration of maintenance of efficiency in administration and has done away with the emphasis on it laid down the Apex Court in some cases.⁷⁸ The Supreme Court has held⁷⁹ that while Art. 16(4) is apparently without any limitation upon the power of reservation conferred by it, it has to be read together with Art. 335 which

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enjoins that in taking into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointments in connection with the affairs of the Union or a State, the policy of the State should be consistent with "the maintenance of efficiency of administration".⁷⁹ The result is that—

"There can be no doubt that the Constitution-makers assumed. . .that while making adequate reservation under article 16(4) care would be taken not to provide for unreasonable, excessive or extravagant reservation. . .Therefore, like the special provision improperly made under article 15(4), reservation made under article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution."⁸⁰

It is to be noted carefully that the prohibition against discrimination in the matter of public employment is attracted where the discrimination is based only on any of the grounds enumerated, namely, religion, race, caste, sex, descent, place of birth or residence. It does not prevent the State, like other employers, to pick and choose from a number of candidates, either for appointment or for promotion, on grounds of efficiency, discipline and the like.⁸¹ It is also to be noted that though reservation in favour of backward classes is permissible under Cl. (4) of Art. 16, no such reservation is possible in favour of women; nor is any other discrimination in favour of women possible, e.g., relaxation of rules of recruitment or standard of qualification or the like.

For the furtherance of social equality, the Constitution provides for the abolition of the evil of 'untouchability' (see Art. 17, post) and the prohibition of conferring titles by the State.

The Mandal Commission case.

A nine-Judge Bench of the Supreme Court has in Indra Sawhney's case⁸² (popularly known as the Mandal Commission case) laid down the following important points which summarise the law on the issue of reservations in Government employment. [For further discussion, see Author's Shorter Constitution, 13th Ed., under Art. 16(4)].

1. Article 16 (4) is exhaustive of the provisions that can be made in favour of the backward classes in the matter of employment.
2. Backward classes of citizens is not defined in the Constitution. There is an integral connection between caste, occupation, poverty and social backwardness. In the Indian context, lower castes are treated as backwards. A caste may by itself constitute a class.

3. The backward classes can be identified in Hindu society with reference to castes along with other criteria such as traditional occupation, poverty, place of residence, lack of education etc., and in communities where caste is not recognised the rest of the criteria would apply.

4. The backwardness contemplated by Art. 16(4) is mainly social. It need not be both social and educational.

5. "Means-test" signifies imposition of an income limit for the purpose of excluding persons from the backward classes. Those whose income is above that limit are referred to as the 'creamy layer'. Income or the extent

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of property can be taken as a measure of social advancement and on that basis the 'creamy layer' of a given caste can be excluded.⁸²

6. For getting reservations a class must be backward and should not be adequately represented in the services under the State.

7. The reservations contemplated in Art. 16(4) should not exceed 50%.

8. The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, service or cadre etc.

9. Reservation of posts under Art. 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. If a reservation in promotion exists it shall continue for 5 years (16 Nov. 1997). By the Constitution (77th Amendment) Act, 1995, this limitation of time has been removed by inserting Cl. (4A) to enable it to continue reservation in promotion for the S.C. and S.T.

10. Identification of backward classes is subject to judicial review.

It is to be noted that many States are attempting to surpass the 50% limit. All those cases are under the consideration of the Supreme Court.

The vacancies reserved could be 'carried forward' for a maximum period of three years if candidates from backward classes were not available after which they were to lapse. By inserting Cl. (4B) in Art. 16 by the Constitution (81st Amendment) Act, 2000, the State has been empowered to consider such unfilled vacancies as a separate class to be filled up in any succeeding year or years.

Article 17 of the Constitution says—

Art. 17: Abolition of Untouchability.

"'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'untouchability' shall be an offence punishable in accordance with law."

Parliament is authorised to make a law prescribing the punishment for this offence [Art. 35], and, in exercise of this power, Parliament has enacted the Untouchability (Offences) Act, 1955, which has been amended and renamed (in 1976) as the Protection of Civil Rights Act, 1955.

The word 'untouchability' has not, however, been defined either in the Constitution or in the above Act. It has been assumed that the word has a well-known connotation,—primarily referring to any social practice which looks down upon certain depressed classes solely on account of their birth and disables them from having any kind of intercourse with people belonging to the so-called higher classes or castes. The Act declares certain acts as offences, when done on the ground of 'untouchability', and prescribes the punishments therefor, e.g.;

- (a) refusing admission to any person to public institutions, such as hospital, dispensary, educational institution;
- (b) preventing any person from worshipping or offering prayers in any place of public worship;
- (c) subjecting any person to any disability with regard to access to any shop, public restaurant, hotel or public entertainment or with regard to the

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use of any reservoir, tap or other source of water, road, cremation ground or any other place where 'services are rendered to the public'.

The sweep of the Act has been enlarged in 1976, by including within the offence of practising untouchability, the following—

- (i) insulting a member of a Scheduled Caste on the ground of untouchability;
- (ii) preaching untouchability, directly or indirectly;
- (iii) justifying untouchability on historical, philosophical or religious grounds or on the ground of tradition of the caste system.

The penal sanction has been enhanced by providing that (a) in the case of subsequent convictions, the punishment may range from one to two years' imprisonment; (b) a person convicted of the offence of 'untouchability' shall be disqualified for election to the Union or a State Legislature.

If a member of a Scheduled Caste is subjected to any such disability or discrimination, the Court shall presume, unless the contrary is proved, that such act was committed on the ground of 'untouchability'. In other words, in such cases, there will be a statutory presumption of an offence having been committed under this Act.

The prohibition of untouchability in the Constitution has thus been given a realistic and effective shape by this Act.

Art. 18: Abolition of Titles.

'Title' is something that hangs to one's name, as an appendage. During the British rule, there was a complaint from the nationalists that the power to confer titles was being abused by the Government for imperialistic purposes and for corrupting public life. The Constitution seeks to prevent such abuse by prohibiting the State from conferring any title at all.

It is to be noted that—

(a) The ban operates only against the State. It does not prevent other public institutions, such as Universities, to confer titles or honours by way of honouring their leaders or men of merit.

(b) The State is not debarred from awarding military or academic distinctions, even though they may be used as titles.

(c) The State is not prevented from conferring any distinction or award, say, for social service, which cannot be used as a title, that is, as an appendage to one's name. Thus, the award of Bharat Ratna or Padma Vibhushan cannot be used by the recipient as a title and does not, accordingly, come within the constitutional prohibition.

In 1954, the Government of India introduced decorations (in the form of medals) of four categories, namely, Bharat Ratna, Padma Vibhushan, Padma Bhushan and Padma Shri. While the Bharat Ratna was to be awarded for "exceptional services towards the advancement of Art, Literature and Science, and in recognition of public service of the higher order", the others would be awarded for "distinguished public service in any field, including

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service rendered by Government servants", in order of the degree of the merit of their service.

Though the foregoing awards were mere decorations and not intended to be used as appendage to the names of the persons to whom they are awarded, there was a vehement criticism from some quarters that the introduction of these awards violated Art. 18. The critics pointed out that even though they may not be used as titles, the decorations tend to make distinctions according to rank, contrary to the Preamble which promises 'equality of status'. The critics gained strength on this point from the fact that the decorations are divided into several classes, superior and inferior, and that holders of the Bharat Ratna have been assigned a place in the 'Warrant of Precedence' (9th place, i.e., just below the Cabinet Ministers of the Union), which is usually meant for indicating the rank of the different dignitaries and high officials of the State, in the interests of discipline in the administration. The result was the creation of a rank of persons on the basis of Government recognition, in the same way as the conferment of nobility would have done.

Another criticism, which seems to be legitimate, is that there is no sanction, either in the Constitution or in any existing law, against a recipient of any such decoration appending it to his name and, thus, using it as a title. Any such use is obviously inconsistent with the prohibition contained in Art. 18(1) but it is not made an offence either by the Constitution or by any law. The apprehensions of the critics on this point were unfortunately justified by the fact that in describing the author on the Title of an issue of the Hamlyn Lectures, the decoration 'Padma Vibhushan' was, in fact, appended as a title.

The protest raised by Acharya Kripalani against the award of such decorations, which went unheeded earlier was honoured by the Janata regime (1977),—by putting a stop to the practice of awarding Bharat Ratna, etc. by the Government. But it was restored by Mrs. Gandhi after her come-back.

In this context, it is to be noted that Art. 18(1) itself makes an exception in favour of granting by the State of any military⁸³ or academic distinction.

The matter was taken to Court, and the Supreme Court has now held⁸⁴ that non-military awards by way of recognition of merit of extraordinary work (e.g., the Padma awards) are not titles of nobility and hence, do not violate Art. 14 or 18, provided they are not used as titles or prefixes or suffixes to the name of the awardee.

Art 19: The Six Freedoms.

Apart from the rights flowing from the above prohibition, certain positive rights are conferred by the Constitution in order to promote the ideal of liberty held out by the Preamble. The foremost amongst these are the six fundamental rights in the nature of 'freedom' which are guaranteed to the citizens by the Constitution of India [Art. 19]. These were popularly known as the 'seven freedoms' under our Constitution. It has already been pointed out that in the original Constitution, there were 7 freedoms in Art. 19(1) but that one of them, namely, 'the right to acquire, hold and dispose of property' has been omitted by the Constitution (44th Amendment)

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Act, 1978, leaving only 6 freedoms in this Article. They are—1. Freedom of speech and expression. 2. Freedom of assembly. 3. Freedom of association. 4. Freedom of movement. 5. Freedom of residence and settlement. 6. freedom of profession, occupation, trade or business.

Since Art. 19 forms the core of our Chapter on Fundamental Rights, it is essential for the reader to be familiar with the text of this Article, as it stands amended:

"19. (1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India; and
- (f)85
- (g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clause (d)-(e) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law insofar as it relates to, or prevent the State from making any law relating to,—

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

Limitations upon the Freedoms.

Absolute individual rights cannot be guaranteed by any modern State. The guarantee of each of the above rights is, therefore limited by our Constitution itself by conferring upon the 'State' a power to impose by its laws reasonable restrictions as may be necessary in the larger interests of the community. This is what is meant by saying that the Indian Constitution attempts "to strike a balance between individual liberty and social control".⁸⁶ Since the

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goal of our constitutional system is to establish a 'welfare State', the makers of the Constitution did not rest with the enumeration of uncontrolled individual rights, in accordance with the philosophy of laissez faire, but sought to ensure that where collective interests were concerned, individual liberty must yield to the common good; but, instead of leaving it to the Courts to determine the grounds and extent of permissible State regulation of individual rights as the American Constitution does, the makers of our Constitution specified the permissible limitations in Cls. (2) to (6) of Art. 19 itself.

The 'State', in this context, includes not only the legislative authorities of the Union and the States but also other local or statutory⁸⁷ authorities, e.g., municipalities, local boards, etc., within the territory of India or under the control of the Government of India. So, all of these authorities may impose restrictions upon the above freedoms, provided such restrictions are reasonable and are relatable to any of the grounds of public interest as specified in Cls. (2)-(6) of Art. 19.

Thus—

(i) The Constitution guarantees freedom of speech and expression. But this freedom is subject to reasonable restrictions imposed by the State relating to (a) defamation; (b) contempt of court; (c) decency or morality; (d) security of the State; (e) friendly relations with foreign State; (f) incitement to an offence; (g) public order; (h) maintenance of the sovereignty and integrity of India.⁸⁸

'Decency or morality' is not confined to sexual morality alone. It indicates that the action must be in conformity with the current standards of behaviour or propriety.⁸⁹ Hence, seeking votes at an election on the ground of the candidate's religion in a secular state, is against the norms of decency and propriety of the society.⁹⁰

It is evident that freedom of speech and expression cannot confer upon an individual a licence to commit illegal or immoral acts or to incite others to overthrow the established government by force or unlawful means. No one can exercise his right of speech in such a manner as to violate another man's such right.⁹¹

(ii) Similarly, the freedom of assembly is subject to the qualification that the assembly must be peaceable and without arms and subject to such reasonable restrictions as may be imposed by the "State" in the interests of public order. In other words, the right of meeting or assembly shall not be liable to be abused so as to create public disorder or a breach of the peace, or to prejudice the sovereignty or integrity of India.⁸⁸

(iii) Again, all citizens have the right to form associations or unions, but subject to reasonable restrictions imposed by the State in the interests of public order or morality or the sovereignty or integrity of India. Thus, this freedom will not entitle any group of individuals to enter into a criminal conspiracy or to form any association dangerous to the public peace or to make illegal strikes or to commit a public disorder, or to undermine the sovereignty or integrity of India.⁹²

(vi) Similarly, though every citizen shall have the right to move freely throughout the territory of India or to reside and settle in any part of the

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country,—this right shall be subject to restrictions imposed by the State in the interests of the general public or for the protection of any Scheduled Tribe.

(v) Again, every citizen has the right to practise any profession or to carry on any occupation, trade or business, but subject to reasonable restrictions 'imposed by the State in the interests of the general public and subject to any law laying down qualifications for carrying on any profession or technical occupation, or enabling the State itself to carry on any trade or business to the exclusion of the citizens.

Scope for Judicial Review.

As pointed out earlier, one of the striking features of the provisions relating to Fundamental Rights in our Constitution is that the very declaration of the major Fundamental Rights is attended with certain limitations specified by the Constitution itself. In the United States the Bill of Rights itself does not contain any such limitations to the rights of the individuals guaranteed thereby, but in the enforcement of those rights the courts had to invent doctrines like that of 'Police Power of the State' to impose limitations on the rights of the individual in the interests of the community at large. But, as explained above, in Art. 19 of our Constitution, there is a distinct clause attached to each of the rights declared, containing the limitations or restrictions which may be imposed by the State on the exercise of each of the rights so guaranteed. For example, while the freedom of speech and expression is guaranteed, an individual cannot use this freedom to defame another which constitutes an offence under the law. A law which may be made by the State under any of the specified grounds, such as public order, defamation, contempt of court, cannot be challenged as unconstitutional or inconsistent with the guarantee of freedom of expression except where the restrictions imposed by the law can be held to be "unreasonable" by a court of law.

That is how the competing interests of individual liberty and of public welfare have been sought to be reconciled by the framers of our Constitution. As MUKHERJEA, J. explained in the leading case of *Gopalan v. State of Madras*⁸⁶—

"There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights . . . are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and morals of the community.

The question, therefore, arises in each case of adjusting the conflicting interests of the individual and of the society. . . Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social security. Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality.⁸⁶

It is by way of interpretation of the word 'reasonable' that the court comes into the field, and in each case when an individual complains to the

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court that his Fundamental Right has been infringed by the operation of a law, or an executive order issued under a law, the court has got to determine whether the restriction imposed by the law is reasonable and if it is held to be unreasonable in the opinion of the court, the court will declare the law (and the order, if any) to be unconstitutional and void.⁹³

Test of Reasonableness of a Restriction.

The expression 'reasonable restriction' seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of Art. 19(1) and the social control permitted by any of the exceptions in Cls. (2) to (6). It is to be seen, therefore, what criteria or tests have been laid down by the Supreme Court for determining whether the restriction is reasonable or not. The Supreme Court has said⁹⁴⁻⁹⁵ that a restriction is reasonable only when there is a proper balance between the rights of the individual and those of the society.

The test of reasonableness should, therefore, be applied to each individual statute impugned and not abstract or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.⁹⁶ Thus, the formula of subjective satisfaction of the Government and its officers with an advisory Board to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances (e.g., in providing internment or externment for the security of the State), and within the narrowest limits, and not to curtail a right such as the freedom of association, in the absence of any emergent or extraordinary circumstances.⁹⁶ All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice.⁹⁷

The Supreme Court has held that in examining the reasonableness of a statutory provision, whether it violated the fundamental right guaranteed under Art. 19, one has to keep in mind:

- (1) The Directive Principles of the State Policy.
- (2) The restrictions must not be arbitrary or of an excessive nature, going beyond the requirement of the interest of the general public.
- (3) No abstract or general pattern or a mixed principle to judge the reasonableness of the restrictions can be laid down so as to be of universal application and the same will vary from case to case as also with regard to the changing conditions, values of human life, social philosophy of the constitution, prevailing conditions and surrounding circumstances.
- (4) A just balance has to be struck between the restrictions imposed and social control envisaged by Art. 19 (6).
- (5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

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- (6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved by the Act, that being so a strong presumption in favour of the constitutionality of the Act will naturally arise.⁹⁸

It follows, therefore, that the question of reasonableness should be determined from both the substantive and procedural standpoints. Hence,—

Substantive and Procedural reasonableness

- (a) In order to be reasonable, the restriction imposed must have a reasonable relation to the collective object which the legislation seeks to achieve and must not go in excess of that object, or, in other words, the restriction must not be greater than the mischief to be prevented. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness.⁹⁵ Thus,—

The object of an Act was "to provide measures for the supply of adequate labour for agricultural proposes in bidi manufacturing areas". But the order of the Deputy Commissioner made there under forbade all persons residing in certain villages from engaging in the manufacture of bidis during the agricultural season. The Supreme Court invalidated the order on the ground that it imposed an unreasonable restriction upon the freedom of business [Art. 19(1)(g)] of those engaged in the manufacture of bidis because—

The object of the Act could be achieved by legislation restraining the employment of agricultural labour in the manufacture of bidis during the agricultural season or by regulating hours of work on the business of making bidis. A total prohibition of the manufacture imposes an unreasonable and excessive restriction on the lawful occupation of manufacturing bidis.⁹⁵

(b) While the foregoing aspect may be said to be the substantive aspect of reasonableness, there is another aspect, viz., the procedural aspect,—relating to the manner in which the restrictions have been imposed. That is to say, in order to be reasonable, not only the restriction must not be excessive, the procedure or manner of imposition of the restriction must also be fair and just. In order to determine whether the restrictions imposed by a law are procedurally reasonable, the court must take into consideration all the attendant circumstances such as the manner of its imposition, the mode of putting it into practice. Broadly speaking, a restriction is unreasonable if it is imposed in a manner which violates the principles of natural justice, for example, if it seeks to curtail the right of association or the freedom of business of a citizen without giving him an opportunity to be heard.⁹⁹ It has also been laid down that in the absence of extraordinary circumstances it would be unreasonable to make the exercise of a fundamental right depend on the subjective satisfaction of the Executive.⁹⁷

Freedom of the Press.

There is no specific provision in our Constitution guaranteeing the freedom of the press because freedom of the press is included¹⁰⁰ in the wider freedom of expression which is guaranteed by Art. 19(1)(a). Freedom of expression means the freedom to express not only one's own views but also the views of others and, by any means, including printing. But since the freedom of expression is not an absolute freedom and is subject to the limitations contained in Cl. (2) of Art. 19, laws may be passed by the State imposing reasonable restrictions on the freedom of the press in the interests of the security of the State, the sovereignty and integrity of India, friendly relations

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with foreign States, public order, decency or morality, or for the prevention of contempt of court, defamation or incitement to an offence. Absolute, unlimited and unfettered freedom of press at all times and in all the circumstances would lead to disorder and anarchy.¹⁰¹

The Press, as such, has no special privileges in India. From the fact that the measure of the freedom of the Press is the same as that of an ordinary citizen under Art. 19(i)(a), several propositions emerge¹⁰⁰—

I. The Press is not immune from—

- (a) the ordinary forms of taxation;
- (b) the application of the general laws relating to industrial relations;
- (c) the regulation of the conditions of service of the employees.

II. But in view of the guarantee of freedom of expression, it would not be legitimate for the State—

(a) to subject the Press to laws which take away or abridge the freedom of expression or which would curtail circulation¹⁰² and thereby narrow the scope of dissemination of information or fetter its freedom to choose its means of exercising the right or would undermine its independence by driving it to seek Government aid;¹⁰²

(b) to single out the Press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its right to choose the instruments for its exercise or to seek an alternative media;¹⁰²

(c) to impose a specific tax upon the Press deliberately calculated to limit the circulation of information.¹⁰⁰

When the constitutionality of an enactment specially directed against the Press is challenged, the Court has to test it by the standard of substantive and procedural reasonableness, as explained earlier. An enactment of this nature, the Punjab Special Powers (Press) Act, 1956, came up before the Supreme Court in *Virendra v. State of Punjab*,¹⁰³ and the Court annulled one of its provisions, while upholding another, on the following grounds:

A law which empowers the Government to prohibit, for a temporary period, the entry of literature of a specified class, likely to cause communal disharmony would not be held to be unreasonable, if it complies with the procedural requirements of natural justice. But it would be unreasonable if it empowered the State Government to prohibit the bringing into the State of any newspaper, on its being satisfied that such action was necessary for the maintenance of communal harmony or public order, inasmuch as it placed the whole matter at the subjective satisfaction of the State Government without even providing for a right of representation to the party affected.

Since the expiry of the Press (Objectionable Matter) Act, 1951, in 1956, there was no all-India Act for the control of the Press in India. But in 1976, Parliament enacted the Prevention of Publication of Objectionable Matter Act, 1976, with more rigorous provisions, and in a permanent form. In April, 1977, the Janata Government repealed this Act. Subsequently, however, this position was further buttressed by inserting a new Article in the Constitution itself,—Art. 361A¹⁰⁴—by the Constitution (44th Amendment) Act, 1978.

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Censorship.

Censorship of the press, again, is not specially prohibited by any provision of the Constitution. Like other restrictions, therefore, its constitutionality has to be judged by the test of 'reasonableness' within the meaning of Cl. (2).¹⁰³

Soon after the commencement of the Constitution and prior to the insertion of the word 'reasonable' in Cl. (2), the question of validity of censorship came up before our Supreme Court, in the case of *Brij Bhushan v. State of Delhi*.¹⁰⁵

The facts of this case were as follows:

Section 7(1)(c) of the East Punjab Safety Act, 1949, provided that "the Provincial Government ... if satisfied that such action is necessary for preventing or combating any activity prejudicial to the public safety or the maintenance of public order may, by order in writing addressed to a printer, publisher, editor require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny".

Similar provisions of the Madras Maintenance of Public Order Act, 1949, were challenged in the allied case of *Ramesh Thappar v. State of Madras*.¹⁰⁶

The majority of the Supreme Court had no difficulty in holding that the imposition of pre-censorship on a journal was an obvious restriction upon the freedom of speech and expression guaranteed by clause (1)(a) of article 19, that 'public safety' or 'public order' was not covered by the expression 'security of the State', and the impugned law was not, therefore, saved by clause (2) as it then stood.

Shortly after these decisions,¹⁰⁵ Cl. (2) was amended by the Constitution (1st Amendment) Act, 1951, inserting 'public order' in Cl. (2). Hence, the ground relied upon by the majority in the cases of *Ramesh Thappar*¹⁰⁵ and *Brij Bhushan*¹⁰⁵ is no longer available. The word 'reasonable' was also inserted in Cl. (2) by the same amendment. The result of this twofold amendment is that if censorship is imposed in the interests of public order, it cannot at once be held to be unconstitutional as fetter upon the freedom of circulation but its 'reasonableness' has to be determined with reference to the circumstances of its imposition. In this sense, the introduction of the word 'reasonable' has not been an unmixed blessing. For, censorship of the press, in times of peace, is something unimaginable either in England or in the United States in modern times. But under our Constitution, as the Supreme Court decision in *Virendra v. State of Punjab*¹⁰³ suggests, even at a time of peace, censorship may be valid if it is subjected to reasonable safeguards, both from the substantive and procedural standpoints, but not otherwise. The provisions before the Court¹⁰³ were ss. 2 and 3 of the Punjab Special Powers (Press) Act, 1956, which were similar to that in s. 7(1)(c) of the East Punjab Public Safety Act, 1949 (which had been impugned in *Brij Bhushan's* case),¹⁰⁵ except that in the Act of the 1956 what was authorised was even more drastic than pre-censorship, viz.,—a total prohibition. The Court held that s. 2, which provided for a right of representation against the order of the authority and limited the power to a specified period and as to publications of a specified class, was valid; but that s. 3, which had no such safeguards, constituted an unreasonable restriction.

It would, therefore, follow that a provision for pre-censorship for a limited period in emergent circumstances and subject to procedural

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safeguards, e.g., as in s. 144 of the Criminal Procedure Code, is valid.¹⁰⁶ If, however, it is left to the absolute discretion¹⁰³ of the executive authority, it must be held to be unreasonable. The Supreme Court has, similarly, upheld the validity of a law sanctioning pre-censorship of motion pictures to protect the interests safeguarded by Art. 19(2), e.g., public order and morality.¹⁰⁷

It should be noted that when a Proclamation of Emergency is made under Art. 352, Art. 19 itself remains suspended [Art. 358], so that pre-censorship may be imposed, without any restraint (see Chap. 25, post). Thus, immediately after the Proclamation of Emergency on the ground of internal disturbance¹⁰⁸ in June, 1975, a Censorship Order was issued (June 26, 1975), under Rule 48(1) of the Rules made under the Defence and Internal Security of India Act, 1971. It should be noted that on the defeat of Mrs. GANDHI at the election of 1977 the Proclamation of Internal Emergency¹⁰⁸ was revoked on the 21st, and the Press Censorship Order was revoked on the 22nd of March, 1977.

Article 19 would also be inapplicable in cases where Arts. 31A-31C are attracted. These exceptions to Fundamental Rights, which have been introduced by subsequent amendments, will be discussed at the end of this Chapter.

Art. 20: Protection in respect of conviction for Offences.

Article 20 guarantees protection in certain respects against conviction for offences, by prohibiting—

- (a) Retrospective criminal legislation, commonly known as ex post facto legislation.
- (b) Double jeopardy or punishment for the same offence more than once.
- (c) Compulsion to give self-incriminating evidence.

Prohibition against ex post facto Legislation.

A. The provision against ex post facto legislation is contained in Cl. (1) of Art. 20 of our Constitution which runs as follows—

"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

This is a limitation upon the law-making power of the Legislatures in India. A law is said to be prospective when it affects acts done or omission made after the law comes into effect. The majority of laws are prospective in their operation. But sometimes the Legislature may give retrospective effect to a law, that is to say, to bring within the operation of the law, not only future acts and omissions but also acts or omissions committed even prior to the enactment of the law in question. Though ordinarily a Legislature can enact prospective as well as retrospective laws, according to the present clause a Legislature shall not be competent to make a criminal law retrospective so as to provide that a person may be convicted for an act which was not an offence under the law in force at the time of commission of that act or to subject an accused to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In other words, when the Legislature declares an act to be an offence or

provides a penalty for an offence, it cannot make the law retrospective so as to prejudicially affect the persons who have committed such acts prior to the enactment of that law.¹⁰⁹

Immunity from Double Prosecution and Punishment.

B. The prohibition against double jeopardy is contained in Cl. (2) of Art. 20 which runs thus-

"No person shall be prosecuted and punished for the same offence more than once."

The expression 'double jeopardy' is used in the American law but not in our Constitution. Nevertheless, Cl. (2) of Art. 20, in effect, lays down a similar principle. As has been laid down by the Supreme Court in *Venkataraman v. Union of India*,¹¹⁰ Art. 20(2) refers to judicial punishment and gives immunity to a person from being prosecuted and punished for the same offence more than once. In other words, if a person has been prosecuted and punished in a previous proceeding of an offence, he cannot be prosecuted and punished for the same offence again in a subsequent proceeding. If any law provides for such double punishment, such law would be void. The Article, however, does not give immunity from proceedings other than proceedings before a court of law or a judicial tribunal. Hence, a Government servant who has been punished for an offence in a court of law may yet be subjected to departmental proceedings for the same offence, or conversely.¹¹⁰

Accused's Immunity from being compelled to give evidence against himself.

C. The immunity from self-incrimination is conferred by Cl. (3) of Art. 20 which says—

"No person accused of any offence shall be compelled to be a witness against himself."

The scope of this immunity has, *prima facie*, been widened by our Supreme Court by interpreting the word 'witness' to comprise both oral and documentary evidence, so that no person can be compelled to furnish any kind of evidence which is reasonably likely to support a prosecution against him. Such evidence must, however, be in the nature of a communication. The prohibition is not attracted where any object or document is searched and seized from the possession of the accused.¹¹¹ For the same reason, the Clause does not bar the medical examination of the accused or the obtaining of thumb-impression or specimen signature from him.¹¹²

Secondly, the immunity does not extend to civil proceedings or other than criminal proceedings.¹¹³ It has also been explained by the Supreme Court¹¹¹ that in order to claim the immunity from being compelled to make a self-incriminating statement, it must appear that a formal accusation has been made against the person at the time when he is asked to make the incriminating statement. He cannot claim the immunity at some general inquiry or investigation on the ground that his statement may at some later stage lead to an accusation.¹¹⁴

Art. 21: Freedom of person.

Freedom of person or personal liberty is sought to be ensured by our Constitution by means of a two-fold guarantee, namely,—

- (a) By providing that no person can be deprived of his liberty except according to law [Art. 21];
- (b) By laying down certain specific safeguards against arbitrary arrest or detention [Art. 22].

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A. Article 21 of our Constitution provides that—

Protection of life and personal liberty.

"No person shall be deprived of his life or personal liberty except according to the procedure established by law."

This Article reminds us of one of the famous clauses of the Magna Carta:

"No man shall be taken or imprisoned, disseized or outlawed, or exiled, or in any way destroyed save ... by the law of the land."

It means that no member of the Executive shall be entitled to interfere with the liberty of a citizen unless he can support his action by some provision of law. In short, no man can be subjected to any physical coercion that does not admit of legal justification. When, therefore, the State or any of its agents deprives an individual of his personal liberty, such action can be justified only if there is a law to support such action and the procedures prescribed by such law have been "strictly and scrupulously"¹¹⁵ observed.

Again, as under the English Constitution, personal freedom is secured by the Indian Constitution by the judicial writ of habeas corpus (see under 'Habeas Corpus', post) [Arts. 32 and 226] by means of which an arrested person may have himself brought before the Court and have the ground of his imprisonment examined, and regain his freedom if the Court finds that there is no legal justification for his imprisonment. The Court will also set the prisoner free where there is a law authorising the deprivation of liberty of a person but there has been no strict compliance with the conditions imposed by the law. The Supreme Court has more than once observed that "those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law".¹¹⁵

But in no country can there be any absolute freedom of the individual. The principle underlying the English Constitution is that it is the people's representatives, assembled in Parliament, who shall determine how far the rights of the individuals should go and how far they should be curtailed in the collective interests or for the security of the State itself, according to exigencies of the time. This was the theory adopted by the Constitution of India in saying that life and personal liberty are subject to "the procedure established by law". The Supreme Court has, however infused judicial review by holding that 'procedure' inherently meant a fair procedure, so

that Art. 21 has been turned into a safeguard against arbitrary legislation. The history of this change in view is as follows:

The Gopalan view.

I. Until the 1978-decision in *Marietta's case*,²⁴ the view which prevailed in our Supreme Court was that there was no guarantee in our Constitution against arbitrary legislation encroaching upon personal liberty. Hence, if a competent Legislature makes a law providing that a person may be deprived of his liberty in certain circumstances and in a certain manner, the validity of the law could not be challenged in a court of law on the ground that the law is unreasonable,

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unfair or unjust.¹¹⁶ Under the 'Due Process' Clause of the American Constitution (5th and 14th Amendments), the Court has assumed the power of declaring unconstitutional any law which deprives a person of his liberty otherwise than in accordance with the Court's notions of 'due process', that is, reasonableness and fairness. In England, this is not possible inasmuch as Courts have no power to invalidate a law made by Parliament. In the result, personal liberty is, in England, "a liberty confined and controlled by law". It exists only so far as it is not taken away or limited by laws made by the representatives of the people. In *Gopalan v. State of Madras*,¹¹⁶ the majority of our Supreme Court propounded the view that by adopting the expression 'procedure established by law', Art. 21 of our Constitution had embodied the English concept of personal liberty in preference to that of American 'Due Process', even though, according to the minority,¹¹⁶ the result of such interpretation was to throw "the most important fundamental right to life and personal liberty" "at the mercy of legislative majorities." The result, according to the majority, is due to the difference in the basic approach, namely, that—

"Although our Constitution has imposed some limitations on the legislative authorities yet subject to and outside such limitations our Constitution has left our Parliament and the State legislatures supreme in their respective fields. In the main ... our Constitution has preferred the supremacy of the legislature to that of the judiciary."¹¹⁶

It was also held¹¹⁶⁻¹¹⁷ that there is no safeguard for personal liberty under our Constitution besides Art. 21, such as natural law or common law. In the result, when personal liberty is taken away by a competent legislation, the person affected can have no remedy.¹¹⁷

Maneka v. Union of India.

II. It is a striking feature of the development of constitutional law of India that after a long struggle, which may be said to have started tangibly since 1971, the minority view in *Gopalan's case*¹¹⁶ has come to triumph in the 7 Judge decision in *Maneka's case*,²⁴ which we have already noted. This case²⁴ has categorically laid down the following propositions, overturning the majority in *Gopalan*.¹¹⁶

(a) Arts. 19 and 21 are not water-tight compartments. On the other hand, the expression of 'personal liberty' in Art. 21 is of the widest amplitude, covering a variety of rights of which some

have been included in Art. 19 and given additional, protection. Hence, there may be some overlapping between Arts. 19 and 21.

(b) In the result, a law coming under Art. 21 must also satisfy the requirements of Art. 19. In other words, a law made by the State which seeks to deprive a person of his personal liberty must prescribe a procedure for such deprivation which must not be arbitrary, unfair or unreasonable.

(c) Once the test of reasonableness is imported to determine the validity of a law depriving a person of his liberty, it follows that such law shall be invalid if it violates the principles of natural justice, e.g., if it provides for the impounding of a passport without giving the person affected an opportunity to be heard or to make a representation against the order proposed.²⁴

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From Gopalan¹¹⁶ to Maneka,²⁴ thus, the judicial exploration has completed its trek from the North to the South Pole. The decision in Maneka's case²⁴ is being followed by the Supreme Court in subsequent cases.

Apart from the foregoing judicial salvage, let us now advert to the safeguards which the Constitution itself has provided in Art. 22 against arbitrary arrest and detention. Hence, in a case coming under Art. 22, the requirements of both Arts. 21 and 22 must be complied with.⁸⁶

Protection against Arbitrary Arrest and Detention.

B. The procedural safeguards against arbitrary arrest and detention, provided for in Cls. (1) and (2) of Art. 22, are—(a) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest.

(b) No such person shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(c) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

The above safeguards are not, however, available to—(a) an enemy alien; (b) a person arrested or detained under a law providing for preventive detention.

The Constitution itself authorises the Legislature to make laws Providing for—

Art. 22: Preventive Detention.

"Preventive detention" for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community, or for

reasons connected with Defence, Foreign Affairs or the Security of India [7th Sch. List I, Entry 9; List III, Entry 3].

So, it would be competent to the Legislature to enact that a person should be detained or imprisoned without trial for any of the above reasons and against such laws, the individual shall have no right of personal liberty. The Constitution, however, imposes certain safeguards against abuse of the above power [Art. 22(4)-(7)]. It is these safeguards which constitute fundamental rights against arbitrary detention and it is because of these safeguards that 'preventive detention' has found a place in the Part of 'Fundamental Rights' in our Constitution. The relevant provisions of Art. 22 read as follows:

When a person has been arrested under a law of preventive detention—

(i) The Government is entitled to detain such person in custody only for three months. If it seeks to detain the arrested person for more than 3 months, it must obtain a report from an Advisory Board,—who will examine the papers submitted by the Government and by the accused,—as to whether the detention is justified.

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(ii) The person so detained shall, as soon as may be, be informed of the grounds of his detention excepting facts which the detaining authority considers to be against the public interest to disclose.

(iii) The person detained must have the earliest opportunity of making a representation against the order of detention.¹¹⁶

A law which violates any of the conditions imposed by Art. 22, as stated above, is liable to be declared invalid and an order of detention which violates any of these conditions will, similarly, be invalidated by the Court, and the detenu shall forthwith be set free.¹¹⁸

Parliament has the power to prescribe, by law, the maximum period for which a person may be detained under a law of preventive detention.

Meaning of Preventive Detention.

Preventive detention means detention of a person without trial. It is so called in order to distinguish it from punitive detention. The object of punitive detention is to punish a person for what he has done and after he is tried in the courts for the illegal act committed by him. The object of preventive detention, on the other hand, is to prevent him from doing something and the detention in this case takes place on the apprehension that he is going to do something wrong which comes within any of the grounds specified by the Constitution, viz., acts prejudicial to the security of the State, public order, maintenance of supplies and services essential to the community; defence; foreign affairs or security of India. In fact, preventive detention is resorted to in such circumstances that the evidence in possession of the authority is not sufficient to make

a charge or to secure the conviction of the detenu by legal proofs but may still be sufficient to justify his detention on the suspicion that he would commit a wrongful act unless he is detained.

Preventive detention is something unknown in the United States of America or the United Kingdom, in times of peace. The adoption (in India) on a permanent footing, of the power of the Executive to arrest persons on suspicion, which is tolerated in other countries only in emergencies, cannot, on principle, be justified by any lover of liberty. But no proper assessment of this provision of our Constitution is possible without taking note of the following circumstances:

History of Preventive Detention of India.

Firstly, detention without trial was not a new idea introduced by the makers of our Constitution, for the first time. It was in existence since the early days of British India, under the notorious Bengal Regulation III of 1818 (the Bengal State Prisoners Regulation) and similar enactments in Madras and Bombay which laid no fetters upon the powers of the Government to detain a person on suspicion. Then came Rule 26 of the Rules framed under the Defence of India Act, 1939, which authorised the Government to detain a person whenever it was "satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial" to the defence and safety of the country and the like.¹¹⁹ This was, of course, a wartime measure modelled on similar legislation in England, during World War II, the validity of which had been Upheld by the House of Lords.¹²⁰ But even after the cessation of the War,

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preventive detention was continued in India as an instrument to suppress apprehended breach of public order, public safety and the like by the Provincial Maintenance of Public Order Acts, under which there was a spate of litigation. The framers of our Constitution simply made it possible for such legislation to be continued under the Constitution, subject to certain safeguards laid down therein, because they painfully visualised that the circumstances which had necessitated such abnormal legislation in the past had not disappeared at the birth of India's Independence. It is common knowledge that the Republic had its birth amidst antisocial and subversive forces and the ravages of communal madness involving colossal loss of lives and property. In order to save the infant Republic from the inroads of any such subversive elements, therefore, this power had to be conferred upon the State. But the framers of the Constitution improved upon the existing law by subjecting the power of preventive detention to certain constitutional safeguards upon the violation of which the individual could have a right to approach the Supreme Court or the High Courts because the safeguards are fundamental rights, for the enforcement of which the constitutional remedies would lie. There have been a number of cases in which the Courts have nullified orders of preventive detention, in proceedings for habeas corpus.

Secondly, the above provisions of the Constitution are not self executory but require a law to be made by the Legislature, conforming to the conditions laid down in the Article, and preventive detention can subsist only so long as the Legislature permits. The Preventive Detention Act, 1950 was, thus, passed by the Indian Parliament which constituted the law of preventive

detention in India. It was a temporary Act, originally passed for one year only. Several times since then the term of the Act was extended until it expired at the end of 1969. The revival of anarchist forces obliged Parliament to enact a new Act, named the Maintenance of Internal Security Act (popularly known as MISA) in 1971, having provisions broadly similar to those of the Preventive Detention Act of 1950. In 1974, Parliament passed the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (commonly referred to as the COFEPOSA), as an economic adjunct of the MISA. While the MISA was, in general, aimed at subversive activities, the COFEPOSA is aimed at anti-social activities like smuggling, racketing in foreign exchange and the like. MISA was repealed in 1978, but COFEPOSA still remains. Further power of preventive detention has been conferred on the Central and State Governments to safeguard defence and security of the country and to maintain public order and essential supplies and services by enacting the National Security Act, 1980,¹²¹ and the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980.¹²² With the increase in terrorist activities the government had to pass in 1985 the Terrorist and Disruptive Activities (Prevention) Act, 1985 (commonly called TADA). This has widely been used to curb terrorism.

It may be mentioned that the number of detenus, during the Emergency of 1975-76, had soared up to 1,75,000. On the eve of coming to power, the Janata Party promised to abolish detention without trial. After coming to power, the Janata Government came to realise the reality of the problem. Eventually, in April, 1978, the MISA was repealed by Parliament. But the Government refused to repeal the COFEPOSA because while the

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former related to political detention, the latter was aimed at social offences which required extra power to check when inflation, black-marketing, smuggling and the like were rampant.

The provisions in Cls. (2)-(7) of Art. 22 could not be altogether omitted, so long as preventive detention was authorised by COFEPOSA. The Janata Government, therefore, sought to alleviate the rigours of the procedure for preventive detention, by effecting changes in Cls. (4) and (7), by enacting the Constitution (44th Amendment) Act, 1978. But the relevant provision of this Amendment Act could not be brought into effect immediately since some changes in the machinery of the Advisory Boards had to be made. Hence, the Amendment Act of 1978 empowered the Central Government to bring into force these provisions by issuing notifications. Paradoxically, however, before any such notification could be issued, the Janata Government had its fall and Mrs. Gandhi returned to power in January, 1980. The Government has not issued any such notification notwithstanding adverse comments by the Supreme Court in view of the inordinate delay.^{12'} In the result, the original Clauses relating to preventive detention in Art. 22 subsist till today and the relevant provisions of the Amendment Act of 1978, solemnly passed by Parliament, remain a dead-letter.

Legislative power to enact Preventive Detention Act.

Some States, e.g., Jammu and Kashmir and Madhya Pradesh have enacted State laws, authorising preventive detention¹²³ which recall the old Preventive Detention Act of 1950. It

should be pointed out in this context that the legislative power to enact law of preventive detention is divided by the Constitution between the Union and the States. The Union has exclusive power [Entry 9 of List I, 7th Sch.] only when such law is required for reasons connected with Defence, Foreign Affairs or the Security of India. A State has power, concurrently with the Union, to provide for preventive detention for reasons connected with security of the State, maintenance of public order, or the maintenance of supplies and services essential to the community [Entry 3 of List III]. A State has therefore a say in the matter of abolishing preventive detention on these grounds because it is a responsibility of the State to maintain public order [Entry 1 of List II], production, supply and distribution of goods [Entry 27 of List II].

So long as the concurrent power of the States to legislate for preventive detention with respect to the aforesaid grounds remains and any of them feels the need for retaining or making State laws for preventive detention, it is practically difficult for the Union Government to impose its will on such States. Till then, the existence of Art. 22 on the Constitution will be beneficial, rather than prejudicial, to the cause of liberty, because the validity of such State laws can be challenged on the ground of contravention of the safeguards laid down in Art. 22.¹¹⁶

In these circumstances, Art. 22 continues to be on the Constitution as a necessary evil.

Art 23: Right against Exploitation.

As an adjunct to the guarantee of personal liberty and the prohibition against discrimination, our Constitution lays down certain provisions to prevent

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exploitation of the weaker sections of the society by unscrupulous individuals or even by the State.

Article 23 says—

Prohibition of Traffic in Human Beings and Forced Labour.

"(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them." Slavery in its ancient form may not so much be a problem in every State today but its newer forms which are labelled in the Indian Constitution under the general term "exploitation" are no less a serious challenge to human freedom and civilisation. It is in this view that our Constitution, instead of using the word 'slavery' uses the more comprehensive expression 'traffic in human beings' which includes a prohibition not only of slavery but also of traffic in women or children or the crippled, for immoral or other purposes.¹²⁴ Our Constitution also prohibits forced labour of any form which

is similar to begar, an indigenous system under which landlords sometimes used to compel their tenants to render free service.¹²⁴⁻¹²⁵ What is prohibited by the clause is therefore the act of compelling a person to render gratuitous service where he was lawfully entitled either not to work or to receive remuneration for it. The clause therefore does not prohibit forced labour as punishment for a criminal offence. Nor would it prevent the State from imposing compulsory recruitment or conscription for public purposes, such as military or even social service.

Art. 23 has an element of force.¹²⁶

Special provision for the protection of children is made in Art. 24 which says—

Art. 24: Prohibition of Employment of Children in Factories, etc.

"No child below the age of fourteen years, shall be employed to work in any factory or mine or engaged in any other hazardous employment."

It is to be noted that the prohibition imposed by this Article is absolute and does not admit of any exception for the employment of a child in a factory or mine or in any other 'hazardous employment', e.g., in a railway or a port. The Supreme Court directed that children should not be employed in hazardous jobs in factories and positive steps should be taken for the welfare of such children as well as improving the quality of their life¹²⁷ and the employers of children below 14 years must comply with the provisions of the Child Labour (Prohibition and Regulation) Act providing for compensation, employment of their parents/ guardians and their education.¹²⁸

Arts. 25-28: Freedom of Conscience and Free Profession, Practice and Propagation of Religion.

India, under the Constitution, is a "Secular State", i.e., a State which observes an attitude of neutrality and impartiality towards all religions. A secular State is founded on the idea that the State is concerned with the relation between man and man and not with the relation between man and God which is a matter for individual conscience. The

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attitude of impartiality towards all religions is secured by the Constitution by several provisions [Arts. 25-28]:

Firstly, there shall be no "State religion" in India. The State will neither establish a religion of its own nor confer any special patronage upon any particular religion. It follows from this that—

(a) the State will not compel any citizen to pay any taxes for the promotion or maintenance of any particular religion or religious institution [Art. 27];

(b) no religious instruction shall be provided in any educational institution wholly provided by State funds;

(c) even though religious instruction be imparted in educational institutions recognised by or receiving aid from the State, no person attending such institution shall be compelled to receive that religious instruction without the consent of himself or of his guardian (in case the pupil be a minor). In short, while religious instruction is totally banned in State-owned educational institutions, in other denominational institutions it is not totally prohibited but it must not be imposed upon people of other religions without their consent [Art. 28].

Secondly, every person is guaranteed the freedom of conscience and the freedom to profess, practise and propagate his own religion, subject only—

(a) to restrictions imposed by the State in the interests of public order, morality and health (so that the freedom of religion may not be abused to commit crimes or anti-social acts, e.g., to commit the practice of infanticide, and the like);

(b) to regulations or restrictions made by the State relating to any economic, financial, political or other secular activity which may be associated with religious practice, but do not really appertain to the freedom of conscience;

(c) to measures for social reform and for throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Subject to the above limitations, a person in India shall have the right not only to entertain any religious belief but also to practise the observances dictated by such belief, and to preach his views to others [Art. 25].

Thirdly, not only is there the freedom of the individual to profess, practise and propagate his religion, there is also the right guaranteed to every religious group or denomination—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law [Art. 26].

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To those who have any idea as to what part religion plays in the entire being of the common man in India, the bold pronouncements in the above Articles must appear to be astoundingly progressive, and more so, if we consider that while the other half of the truncated territory, consisting of a large mass of Hindu minority, has adopted Islam as the State religion in her Constitution, India stands firm, regardless of her environments. It is to be noted that this guarantee is available not only to the citizens of India but to all persons, including aliens.¹²⁹

The ambit of the freedom of religion guaranteed by Arts. 25-26 has been widened by the judicial interpretation that what is guaranteed by Arts. 25 and 26 is the right of the individual to practise and propagate not only matters of faith or belief but also all those rituals and observances which are regarded as integral parts of a religion by the followers of its doctrines.¹²⁹ Of course, religion is a matter of faith but it is not necessarily theistic and there are well-known religions in India like Buddhism and Jainism which do not believe in God. On the other hand, though a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, it would not be correct to say that religion is nothing else but a doctrine of belief.¹²⁹ Similarly, each religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold.¹³⁰ Regulation by the State, again, cannot interfere with things which are essentially religious.¹³¹ But the Court has the right to determine whether a particular rite or observance is regarded as essential by the tenets of a particular religion,¹³² and to interfere if a particular practice offends against public health or morality,¹³¹ or, not being an essentially religious practice, contravenes any law of social, economic or political regulation.¹³¹

It should be pointed out in this context that the word 'secular' is a dubious word, capable of diverse meanings and one of its dictionary meanings is 'concerned with the affairs of the world' as opposed to religious affairs. This has not only caused confusion amongst teachers of Political Science and Law in India but has also been taken advantage of by interested parties. This state of confusion has been set at rest by authoritative pronouncements made by the Supreme Court, in a nine-Judge decision, as follows:¹³³

(a) Secularism, in India, does not mean that the State should be hostile to religion but that it should be neutral as between the different religions.¹³³

(b) Every individual has the freedom to profess and practise his own religion, and it cannot be contended that "if a person is a devout Hindu or a devout Muslim, he ceases to be secular".¹³³

(c) The use of the vague word 'secular' in the Preamble would not override the enacted provisions in Arts. 25-30 or Art. 351, so that the preference of Sanskrit in the academic syllabus as an elective¹³⁴⁻¹³⁵ subject, while not conceding this status to Arabic or Persian or the like, would not militate against the basic tenets of secularism (para 20).¹³⁴

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(d) The neutrality of the state would be violated if religion is used for political purposes and advocated by the political parties for their political ends. An appeal to the electorate on grounds of religion offends secular democracy (para 128).¹³³ Politics and religion cannot be mixed (para 131).¹³³ If a State Government does this, it will be a fit case for application of Art. 356 of the Constitution against it [Para 365(10)].¹³³

(e) It is in this sense that secularism is to be regarded as a basic feature of the Constitution [Paras 124, 231, 365(10)].¹³³

'Propagation' and Conversion.

It is amazing that some Christian leaders assert that the word 'propagate' in Art. 25(1) gives them a fundamental right to convert people of other Faiths into Christianity, by any means. This assertion, followed by agitation, is particularly amazing because it seeks to undermine the decision of the Supreme Court in *Stainislaus's case*¹³⁶ in January, 1977, which had been brought by a Christian Father, who sought to invalidate a Madhya Pradesh Act, because it made it a penal offence to convert or to attempt to convert a person by means of 'force, fraud or allurement'. Orissa had earlier passed a similar Act (which used the word 'inducement' in place of allurement') and the constitutionality of that Act had been challenged by several members of the Christian community, including a Christian Society, a Professor of Geology and several priests. Both the Acts were taken up together by the Supreme Court¹³⁶ and the contentions of the Christian community were rejected in toto, by the Supreme Court, laying down the following propositions of law which are, under the Constitution, binding upon all Courts in India:

(i) The right to 'propagate', in Art. 25(1), gives to each member of every religion the right to spread or disseminate the tenets of his religion (say, by advocacy or preaching), but it would not include the right to convert another, because each man has the same freedom of 'conscience' guaranteed by that very provision [Art. 25(1)], on which the Christians relied.

(ii) The equal freedom of conscience, belonging to each man, under Art. 25(1), means that he has the freedom to choose and hold any faith of his choice and not to be converted into another religion by means of force, fraud, inducement or allurement. He can, of course, voluntarily adopt another religion, but 'force, fraud, inducement or allurement' takes away the free consent from the would-be convert.

(iii) Even assuming that a particular religion had the right to propagate its tenets by any means, including conversion,—the State has the right and duty to intervene if such activity of conversion offended against 'public order, morality or health', because the guarantee of freedom of religion in Art. 25(1) is subject to the limitations of 'public order, morality, or health' as follows:

"25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

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(iv) If any such right to convert be conceded, such right would belong to every religion, so that there would inevitably be a breach of the public peace if every religious community carried on a campaign to convert people belonging to other faiths, by the use of force, fraud, inducement or allurement. The State was, therefore, constitutionally authorised, nay, enjoined—to maintain public order by prohibiting and penalising conversion (including attempt to convert) if force, fraud, inducement or allurement was used by the person or persons advocating conversion in any particular case. This is exactly what had been done by the M.P. and Orissa Acts.

The Supreme Court, therefore, upheld¹³⁶ the constitutional validity of both the M.P. and Orissa Acts, after rejecting every plea raised on behalf of the Christian parties. After this pronouncement of the Supreme Court, the Arunachal Pradesh Legislature passed a Bill, modelled exactly on the M.P. and Orissa Acts, which had been held to be valid by the Supreme Court and submitted it to the President for his assent; a private member of Parliament (Shri O.P. TYAGI) presented before the Lok Sabha a similar Bill, which, if passed by Parliament, would be applicable to all the States of India. The Christian community at once started agitations and demonstrations against these two Bills, with threats against severer resistance if these measures were passed. They politicised the issue, with the slogan that it was a campaign against the Christian religion in particular.¹³⁷ This contention involves suppressio veri (suppression of truth) on the following points:

- (i) Neither of the disputed Bills was levelled against the Christian religion as such but would have operated against any religious community (including the Hindu, Muslim, Sikh, etc.) which resorted to any of these unlawful means—force, fraud, inducement or allurement, in order to convert a member of another Faith to its own fold.
- (ii) That all the legal points now raised against these two pending Bills were taken by the Christian parties to the Madhya Pradesh and Orissa Acts case but were definitely rejected by the Supreme Court.

International covenant.

- (iii) Those who rely on the International Charters in support of their freedom to convert have not mentioned Art. 18(2) of the International Covenant on Civil and Political Rights, 1966, which says—

"No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

This freedom of every man to adopt a religion of his choice is guaranteed by Cl. (1) of Art. 18. The two clauses, read together, mean that every individual shall have the freedom to choose his own religion or belief in worship and this freedom shall not be impaired by the use of coercion by any individual attempting to induce him to adopt another religion. So far as the disputed Indian Bills ban the use of force as a means of conversion, it is perfectly in line with this International Charter. When fraud is used, the freedom of choice of the individual sought to be converted is similarly impaired. The only dispute which may possibly be raised by the Indian Christians is as to the use of inducement or allurement. But such means, too,

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impair the freedom of choice of an individual and his resultant choice or volition cannot be said to be free, within the meaning of Art. 18(1) of the International Covenant, referred to. The validity of use of these two words in an Indian Bill would rest not on the wording of the International Covenant which is the resultant of various international factors, but on the

interpretation of the words 'public order and morality' in Art. 25(1) of our Constitution, which constitutes the supreme law of this land.

(iv) If the agitators were dissatisfied with the Supreme Court's interpretation of Art. 25(1), they were free to challenge the constitutionality of the provisions of the disputed Bills after they were passed¹³⁷ and to persuade the Judges of the Supreme Court to revise their views as expressed in the Stainislaus case;¹³⁶ but there was not the least justification to denounce the Bills as a crusade against the Christians in particular, when they were nothing but a codification of the principles laid down by the highest tribunal of the land and on the model of the State statutes which had been approved by that tribunal in the Stainislaus case.¹³⁶

Apart from the foregoing guarantee of freedom of conscience and religion, there are certain general provisions which are aimed at ensuring the effectiveness of the above guarantee by prohibiting any discrimination by the State on the ground of religion alone:

(i) The State shall not discriminate against a citizen, in any matter [Art. 15(1)], and, in particular, in the matter of employment [Art. 16(2)], only upon the ground of religion.

(ii) Similar discrimination is banned as regards access to or use of public places [Art. 15(2)]; admission into any educational institution maintained or aided by the State [Art. 29(2)], the right to vote [Art. 325].

(iii) Where a religious community is in the minority, the Constitution goes further to enable it to preserve its culture and religious interests by providing that—

Art. 29.

(a) The State shall not impose upon it any culture other than the community's own culture [Art. 29(1)];

Art. 30

(b) Such community shall have the right to establish and administer educational institutions of its choice and the State shall not, in granting aid to educational institutions, discriminate against such an educational institution maintained by a minority community on the ground that it is under the management of a religious community [Art. 30]. Full compensation has to be paid if the State seeks to acquire the property of a minority educational institution [Art. 30 (1A)].

The sum-total of the above provisions make our State more secular than even the United States of America. The secular nature of our Constitution has been further highlighted by inserting this word in the Preamble, by the Constitution (42nd Amendment) Act, 1976.¹³⁸ A word of caution should, however, be uttered in this context. What is meant by 'secularism' or the safeguards of the minority, are exhaustively enumerated in Arts. 25-30 and allied provisions (as to minority rights, see, further, under Chap. 29, post). If a minority community presses for any extra favours

outside these specific provisions in the name of 'secularism' or the Party in power yields them for political reasons, it might be re-introducing those vices of communalism from which India suffered so much during the later British regime and which the fathers of the Constitution eliminated from the Constitution of free India, e.g., communal representation in the Legislatures¹³⁹ or communal reservation in public employment. For instance, if Government seeks to justify an appointment to a public office, high or low, not on the ground of merit, but on the ground that the appointee belongs to a religious minority, such discrimination would violate the fundamental right of any other community under Art. 16(2), not to be "discriminated against" on the ground of 'religion' or the like. Instead of safeguarding the rights of a minority community, it would deny the rights of the majority and other minority communities which are guaranteed by the Constitution itself. Neither secularism nor minority rights can, therefore, be allowed to be an argument for preference of the minority or to undermine the national unity and strength, for which the confidence of the majority is no less necessary. But a minority educational institution has the power to reserve only upto 50% seats for students belonging to its own community.¹⁴⁰

The Preamble to our Constitution aims at securing the 'unity and integrity of the nation'. Religious and cultural safeguards have been guaranteed by the Constitution to minority communities in order to ensure them 'justice, freedom of thought, expression, belief, faith and worship'. But if any minority community goes on clamouring for more than what the framers of the Constitution offered to them, it would simply perpetuate the insular objectives of these communities and India would never grow up into , a Nation, inspired with the ideal of 'unity and integrity of the Nation'. To revert to the ante-independence vortex of communalism and separatism would imperil the very foundation of Independence. On the other hand, secularism which means neutrality of the State towards all religions will itself be violated if the Government suppresses the religious or other legal rights of the majority community to appease the demands of an aggressive minority.

A history of the right to property under the Constitution of India.

The Constitution of 1949 had a three-fold provision for safeguarding the right of private the property. It not only guaranteed the right of private ownership but also the right to enjoy and dispose of property free from restrictions other than reasonable restrictions.

I. The Constitution of 1949.

Firstly, it guaranteed to every citizen the right to acquire any property by any lawful means such as inheritance, personal earning or otherwise, to hold it as his own and to dispose it freely, limited only by (a) reasonable restrictions to serve the exigencies of public welfare, and (b) any other reasonable restrictions that may be imposed by the State to protect the interests of any Scheduled Tribe [Art. 19(1)(f)].

The restrictions must, of course, be 'reasonable', from the substantive as well as the procedural standpoints. Thus—

(a) The restriction must not be in excess of the requirement of the interest of the general public for which the restriction is sought to be imposed.¹⁴¹

(b) A restriction would be procedurally unreasonable if, in the absence of extraordinary circumstances, it is imposed without notice or without hearing or without assigning any reason, on the subjective satisfaction of an administrative authority.¹⁴²

Secondly, the Constitution guaranteed that no person shall be deprived of his property save by the authority of law [Art. 31(1)]. This implied that, short of the consent of the owner, a man's property can be taken only by the consent of the nation as embodied in the laws passed according to the Constitution. Any property which is seized by the Police or the Government¹⁴³ without proper legal authority will be released at the intervention of the Courts. As against its own subjects, a sovereign cannot exercise an 'Act of State', and the private property of a subject cannot be taken away by an executive order,¹⁴⁴ as distinguished from an order made in exercise of power conferred by a statute.¹⁴⁴

This clause was intended to be a protection against executive, but not against legislative, appropriation of property. The Supreme Court, however, held that the law which seeks to deprive a person of his property must be a valid law, which means a law enacted by a competent Legislature and not inconsistent with any of the fundamental rights guaranteed by Part III of the Constitution.¹⁴⁵

Thirdly, the Constitution enjoined that if the State wants to acquire the private property of an individual or to requisition (that is, to take over its possession for a temporary period) it, it could do so only on two conditions—

(a) that the acquisition or requisitioning is for a public purpose;

(b) that when such a law is passed, it must provide for payment of an amount to the owner,—either by fixing the amount or by specifying the principle upon which it is to be determined and given [Art. 31(2)].

II. Amendments up to the 42nd Act, 1976.

The provisions of the Constitution as to the obligation to pay compensation for acquisition of property for public purposes, however, underwent serious changes as a result of amendments of the Constitution by the First, the Fourth, the Seventeenth, the Twenty-fifth and the Forty-second Amendment Acts.¹⁴⁶ The net result of these amendments is as follows—

A. Though the Legislature was under a constitutional obligation to pay compensation, the adequacy of the compensation shall not be liable to be questioned in a court of law. In other words, when a law provided for the acquisition of person's property for a public purpose, he would not be entitled to challenge the validity of that law in a court of law on the ground that the Legislature had not provided for payment of the full value of his property. This (Fourth) amendment (1955) in Art. 31(2) was necessitated by the fact that even the word 'compensation'

simpliciter was interpreted by the Supreme Court¹⁴⁷ as implying 'full compensation', that is, the market value

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of the property at the date of the acquisition. The Government thought that it was not practicable to implement its programme of national planning and development if the full market value was to be paid from the inadequate resources of the infant Republic for every inch of the property which was to be nationalised. But even after the foregoing amendment, the Supreme Court continued to hold that the very word 'compensation' implied full monetary equivalent of the property taken away from the owner, that is, its market value at the date of the acquisition.¹⁴⁸

The 25th Amendment.

By the 25th Amendment of 1971, therefore, the word 'compensation' in Cl. (2) of Art. 31 was substituted by the word 'amount'. But, again, the majority of the Supreme Court reserved an area for judicial intervention, in the Full Bench case of *Keshavananda v. State of Kerala*,¹⁴⁹ by holding that the amount which was fixed by the Legislature could not be arbitrary or illusory, but must be determined by a principle which is relevant to the acquisition of property. [The Indira Government reacted by putting specified laws of acquisition beyond the pale of Art. 31 altogether, by engrafting the exceptions in Arts. 31A-31D,¹⁴⁶ which will be mentioned presently.]

B. By a number of successive amendments, certain exceptions to Art. 31(2) were introduced, in Arts. 31A-31D,¹⁴⁶ to exclude the obligation to pay any amount as compensation in the case of laws providing for acquisition by the State or nationalisation, if such laws relate to matters specified in these exceptional provisions. These exceptions to the obligations under Art. 31 may now be examined in particular:

(a) Art. 31A relates to a law for the acquisition by the State of any 'estate' or other intermediate interest in land. The object of taking out the acquisition of intermediate interests in land from the obligation to pay compensation was to make it possible for the Government to effect agrarian reform which was so urgently needed to protect the interests of the tenants as well as to improve the agricultural wealth of the country.

In order to facilitate agrarian reform as well as social control of the means of production, it has been provided in Art. 31A that not only a law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, but also certain other laws, such as a law providing for the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, shall be constitutionally valid even though it takes away or abridges any of the rights conferred by Arts. 14 and 19.

(b) While Art. 31A excepts certain classes of laws, Art. 31B, read with the 9th Schedule, gives a blanket cover to particular enactments which are, for the time being specified in the 9th

Schedule. Their number, in 2000 is 284. They have been altogether immunised from attack, on the ground of contravention of any of the Fundamental Rights.

(c) Art. 31C, as inserted by the 25th Amendment Act, 1971, provided that any law which seeks to implement the Directive in Art. 39(b) or 39(c), i.e., the plan of socialistic distribution of wealth, and the means of production shall not be void for inconsistency with Arts. 14 or 19.

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But the effectiveness of Art. 31C was crippled by the decision of the majority of the Supreme Court in the case of Keshavananda¹⁴⁹ that judicial review is one of the essential features of the Indian Constitution which cannot be taken away by the process of amendment under Art. 368, and that, accordingly, that part of Art. 31C, which stated that any legislative declaration that a particular law was made to implement the Directives in Art. 39(b)-(c) shall not be open to question in a Court, is itself unconstitutional.

III. The 42nd Amendment, 1976.

Undaunted by Keshavananda,¹⁴⁹ Parliament enlarged the scope of Art. 31C, by the 42nd Amendment Act, 1976, by including within its protection any law to implement any of the Directive Principles enumerated in Part IV of the Constitution—not merely in Art. 39(b)-(c). As a result of this, if any law of acquisition was made with the object of giving effect to any of the Directives, the reasonableness of such a law cannot be questioned under Art. 14 or 19. Minerva Mills¹⁵⁰ has, however, nullified this extension.

(d) The last faggot of exceptions Article 31D, has been repealed by the 43rd (Constitution Amendment) Act, 1977, and need not bother the reader.¹⁴⁶

IV. The 44th Amendment, 1978.

While the Congress Government for over a quarter of a century had eaten into the vitals of Art. 31(2) by successive amendments, as outlined above, it was left to the Janata Government to eliminate the right of property altogether from the list of Fundamental Rights in Part III. This has been effected by the 44th Amendment Act, 1978, which we have already discussed in connection with Judicial Review. Nevertheless, its incidents may be recapitulated in order to give a definite idea as to how much of the right to property remains under the Indian Constitution after April, 1979, and in what shape.

(a) Art. 19(1)(f) has been repealed.

(b) Art. 31(1) has been taken out of Part III, and made a separate Article, viz., 300A, which reads as follows:

"No person shall be deprived of his property save by authority of law."

The result, in short, is that if an individual's property is taken away by a public official without legal authority or in excess of the power conferred by law in this behalf, he can no longer have speedy remedy direct from the Supreme Court under Art. 32 (because the right under Art. 300A is not a fundamental right). He shall have to find his remedy from the High Court under Art. 226 or by an ordinary suit.

(c) Cls. (2A)—(6) of Art. 31 have been omitted.

(d) Cl. (2) of Art. 31 has been omitted,¹⁵¹ but its Proviso has been transferred to Art. 30, as Cl. (1A) to that Article.

(e) Though Art. 31 itself has been deleted, Art. 31A which was originally inserted as an exception to Art. 31 has been retained, with the omission of any reference to Art. 31. Article 31A, therefore, remains to operate as an exception to Arts. 14 and 19, to shield the 5 classes of laws

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specified in Art. 31A(1). Curiously, however, the 2nd Proviso to Art. 31A(1) has been retained, giving a right to full compensation to the actual tiller, even though Art. 31 has been omitted and a reference to Art. 31 has been omitted from Cl. (1) to Art. 31A, to which the 2nd Proviso operates as an exception.

The above patchwork is bound to create confusion in the mind of a lay reader. It would, accordingly, be profitable to outline the vestiges of the right to compensation which survive the onslaught of the 44th Amendment. These are twofold:

Vestiges of the right to property, and comments thereon.

Though the mass of citizens shall no longer have any guaranteed right to compensation if his property is acquired or requisitioned and the Legislature shall have no constitutional obligation to provide for payment of any solatium to the expropriated owner, two exceptions to this general position are allowed by the 44th Amendment in two cases of acquisition:

(a) If the property acquired belongs to an educational institution established and administered by a minority, the law of acquisition must provide for such compensation as would not abrogate the right of a minority 'to establish and administer educational institution', which is guaranteed by Art. 30(1). Shorn of innuendo, this means that if the State chooses to acquire a minority educational institution, it must offer full market value or adequate compensation so that the minority community may set up that institution at a suitable alternative site.

(b) If the State seeks to acquire the land which is personally cultivated by the owner and such land does not exceed the statutory ceiling, the State must pay to such owner full market value of his land as well as any building or structure standing thereon or appurtenant thereto. Though both the foregoing exceptions may be beneficial so far as they go, there is much to comment from the standpoint of constitutional law as from the national standpoint.

(i) As regards the concession in favour of a minority educational institution,—it is somewhat inexplicable why no such guarantee should be made in favour of educational institutions managed by members of a majority community. Is not education as pure and adorable whether it comes through the Ganges or the Jordan? In their over-zealousness for the addition of a special guarantee in favour of the minority which the fathers of the original Constitution did not envisage,¹⁵² the fathers of the 44th Amendment took no time to ponder that by eliminating Art. 31(2), they were taking away a right which had been guaranteed to all persons in India. Legally speaking, the new provision in Art. 30(1A) is a tail which has lost its head by the repeal of Art. 31(2).¹⁵²

(ii) As to the right of a small tiller of land to full compensation for his land and building or other structures, one fails to understand why similar right should not be guaranteed to a poorer man who has not an inch of agricultural land but has a humble hut to lay his head at night. He may be a day labourer, a petty pensioner or a landless peasant who tills another man's land. Are they less deserving?

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Would it not be pertinent to point out in this context that even in the 1977-Constitution of the USSR, there was Art. 13 which stated¹⁵³—

"... The personal property of citizens of the USSR may include articles of everyday use, personal consumption and convenience, the implements and other objects of a small holding . . . or for building an individual dwelling. The personal property of citizens and the right to inherit it are protected by the State. . ."

In short, in the USSR, every individual had the guaranteed right to hold and inherit a dwelling, irrespective of his being an agriculturist, and the duty of the State to protect this right would obviously mean that the State cannot acquire or deprive the owner of his dwelling house unless otherwise provided by the Constitution.

The over-zealous political leaders of India should know that the provision in the 1982-Constitution of the Chinese Republic, too, is in the same strain. Though Art. 6 provides for social ownership of the 'means of production', Art. 13, at the same time guarantees to the individual to own personal property, acquired by his personal income:

"The State protects the right of citizens to own lawfully earned income, savings, houses and other lawful property."

Article 39, further, declares, as a fundamental right, that "The citizens'. . . homes are inviolable."

The net result of the foregoing provisions seems to be that the State cannot take away an individual's dwelling house and similar personal property, even by legislation, so that no question of compensation for compulsory acquisition may arise.

In view of the drastic effects of the abolition of Arts. 19(1)(f) and 31(2), some jurists in India have put forth their belief that the Supreme Court would come to the rescue of the expropriated owners by holding that notwithstanding the omission of such constitutionally guaranteed right to compensation, the Court would derive such right from the legislative power contained in Entry 42 of List III—'Acquisition and requisitioning of property', read with the common law doctrine of 'Eminent Domain'. Unfortunately, it has not been possible for the Author to persuade himself to this anachronistic assumption for reasons which have been elaborately given in the Author's bigger works.¹⁵³

In the circumstances, there is, a case for restoration of some relief for the poorer sections of property-owners (as distinguished from capitalists or owners of the means of production). But such relief can be more easily brought about by a further amendment of the Constitution than leaving it to the off-chances of 'judicial amendment'.

Art. 32: Constitutional Remedies For Enforcement of Fundamental Rights.

Abstract declarations of fundamental rights in the Constitution are useless, unless there is the means to make them effective. Constitutional experience in all countries shows that the reality of the existence of such rights is tested only in the Courts.

The power of the Courts to enforce obedience to the fundamental rights, again, depends not only upon the impartiality and independence of the Judiciary, but also upon the effectiveness of the instruments available to

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it to compel such obedience against the Executive or any other authority. Under the Anglo-American system, such means have been found in the writs or judicial processes such as habeas corpus, mandamus, prohibition, certiorari and quo warranto.

The Indian Constitution lays down the following provisions for the enforcement of the Fundamental Rights guaranteed by the Constitution, in the light of the above experience:

(a) The Fundamental Rights are guaranteed by the Constitution not only against the action of the Executive but also against that of the Legislature. Any act of the Executive or of the Legislature which takes away or abridges any of these rights shall be void and the Courts are empowered to declare it as void [Art. 13]. The Supreme Court strikes at the arbitrary action of the State.¹⁵⁴ It has jurisdiction to enforce the fundamental rights against private bodies and individuals and award compensation for violation of the fundamental rights. It can exercise its jurisdiction suo motu or on the basis of PIL.¹⁵⁵

(b) Apart from the power to treat a law as void for being in contravention of the provisions of the Constitution guaranteeing the fundamental rights, the Judiciary has been armed with the power to issue the writs mentioned above (habeas corpus, etc.), in order that it may enforce such rights against any authority in the State, at the instance of an individual whose right has been violated.

The power to issue these writs for the enforcement of the Fundamental Rights is given by the Constitution to the Supreme Court and High Courts [Arts. 32 and 226].

(c) The rights so guaranteed shall not be suspended except during a Proclamation of Emergency,—in the manner laid down by the Constitution [Art. 359].

Special Features of the Jurisdiction of the Supreme Court under Art. 32.

Though a fundamental right may be enforced by other proceedings, such as a declaratory suit under the ordinary law or an application under Art. 226 or by way of defence to legal proceedings brought against an individual, a proceeding under Art. 32 is described by the Constitution as a 'constitutional remedy' for the enforcement of the Fundamental Rights included in Part III and the right to bring such proceeding before the Supreme Court is itself a fundamental right in Part III.

Article 32 is thus the cornerstone of the entire edifice set up by the Constitution. Commenting on this Article, in the Constituent Assembly, 156 Dr. Ambedkar said—

"If I was asked to name any particular article of the Constitution as the most important—an article without which this Constitution would be a nullity—I would not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it."

The relevant provisions in Cls. (1) and (2) of Art. 32 should be noticed: "(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

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(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by this Part."

(a) Art. 32, thus, provides a guaranteed remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right, being included in Part III.¹⁵⁷ The Supreme Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such right, on technical grounds.¹⁵⁸ Thus, though a writ may ordinarily be refused on the ground that the Petitioner has another adequate legal remedy open to him, an application under Art. 32 cannot be refused merely on this ground where a fundamental right appears to have been infringed.¹⁵⁹

(b) The Supreme Court can make any order appropriate to the circumstances, unfettered by the technicalities of the English 'Prerogative writs'.¹⁵⁹

On the other hand,—

The sole object of Art. 32 is the enforcement of the fundamental rights guaranteed by the Constitution. Whatever other remedies may be open to a person aggrieved, he has no right to complain under Art. 32, where no 'fundamental' right has been infringed. For the same reason, no question other than relating to a fundamental right will be determined in a proceeding under Art. 32.¹⁶⁰

'Prerogative Writs'.

The expression 'prerogative writ' is one of English common law which refers to the extraordinary writs granted by the Sovereign, as fountain of justice, on the ground of inadequacy of ordinary legal remedies. In course of time these writs came to be issued by the High Court of Justice as the agency through which the Sovereign exercised his judicial powers and these prerogative writs were issued as extraordinary remedies in cases where there was either no remedy available under the ordinary law or the remedy available was inadequate. These writs are—habeas corpus, mandamus, prohibition, certiorari and quo warranto.

Difference between the Jurisdiction of the Supreme Court and the High Courts to issue writs.

In a sense, the power of the High Courts to issue these writs is wider than that of the Supreme Court inasmuch as under Art. 32 of the Constitution the Supreme Court has the power to issue these writs only for the purpose of enforcement of the Fundamental Rights whereas under Art. 226 a High Court can issue these writs not only for the purpose of enforcement of Fundamental Rights but also for the redress of any other injury or illegality, owing to contravention of the ordinary law, provided certain conditions are satisfied, for which, see Chap. 20, post.¹⁶¹

Thus,—(a) an application to a High Court under Art. 226 will lie not only where a Fundamental Right has been infringed but also where some other limitation imposed by the Constitution, outside Part III, has been violated, e.g., where a State Legislature has imposed a sales tax in contravention of the limitations imposed by Art. 286.¹⁶² But an application

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under Art. 32 shall not lie in any case unless the right infringed is a 'Fundamental Right' enumerated in Part III of the Constitution.¹⁶⁰

(b) Another point of distinction between the two jurisdictions is that while the Supreme Court can issue a writ against any person or Government within the territory of India, a High Court can, under Art. 226, issue a writ against any person, Government or other authority only if such person, Government or authority is physically resident or located within the territorial jurisdiction of the High Court, that is, within the State to which the territorial jurisdiction of the particular High Court extends or if the cause of action arises within such jurisdiction.¹⁶³

As stated earlier, the Supreme Court has been assigned by the Constitution a special role as "the protector and guarantor of fundamental rights,"¹⁵⁶ by Art. 32(1).

The Supreme Court as the guardian of Fundamental Rights.

Where, therefore, the infringement of a fundamental right has been established, the Supreme Court cannot refuse relief under Art. 32 on the ground—

(a) That the aggrieved person may have his remedy from some other Court or under the ordinary law;¹⁶⁴ or

(b) That disputed facts have to be investigated or evidence has to be taken before relief may be given to the petitioner;¹⁵⁰ or

(c) That the petitioner has not asked for the proper writ applicable to his case. In such a case, the Supreme Court must grant him the proper writ and, if necessary, modify it to suit the exigencies of the case.¹⁵⁶

(d) Generally only the person effected may move the Court but the Supreme Court has held that in social or public interest actions, any person may move the Court. This is called expansion of the 'right to be heard'. It favours Public Interest Litigation.¹⁵⁷ Following English and American decisions, the Supreme Court has admitted exceptions from the strict rules relating to affidavit locus standi and the like in the case of a class of litigations classified as 'public interest litigation' (PIL) i.e., where the public in general are interested in the vindication of some right or the enforcement of some public duty.¹⁶⁵

Another consequence which results from the guarantee of the constitutional remedy under Art. 32 is this:

Not only is this remedy immune from being overridden by legislation but any law which renders nugatory or illusory the Supreme Court's power to grant this remedy shall be void. This was illustrated in the leading case of *Gopalan v. State of Madras*,^{86, 166} where the Supreme Court invalidated s. 14 of the Preventive Detention Act, 1950, as it originally stood. The section was as follows:

"(1) No Court shall, except for the purpose of a prosecution for an offence punishable under sub-section (2), allow any statement to be made or any evidence to be given before it or the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order; and notwithstanding anything contained in any other law, no Court shall be entitled to require any public officer

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to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an advisory board or that part of the report of an advisory board which is confidential.

(2) It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-section (1)"

The Supreme Court struck down the above provision on the ground that it contravened Art. 32 by way of preventing the Supreme Court from effectively exercising its powers under Art. 32. The following observations of MAHAJANJ. are illuminating:

"This section is in the nature of an iron curtain around the acts of the authority making the order of preventive detention. The Constitution has guaranteed to the detained person the right to be told the grounds of detention. He has been given a right to make a representation [Vide article 22(5)], yet section 14 prohibits the disclosure of the grounds furnished to him or the contents of the representation made by him in a Court of law and makes a breach of this injunction punishable with imprisonment.

Now it is quite clear that if an authority passes an order of preventive detention for reasons not connected with any of the six subjects mentioned in the 7th Schedule, this court can always declare the detention illegal and release the detenu, but it is not possible for this court to function if there is a prohibition against disclosing the grounds which have been served upon him. It is only by an examination of the grounds that it is possible to say whether the grounds fall within the ambit of the legislative power contained in the Constitution or are outside its scope. Again something may be served on the detenu as being grounds which are not grounds at all. In this contingency it is the right of the detained person under article 32 to move this court for enforcing the right under Article 22(5) that he be given the real grounds on which the detention order is based. This Court would be disabled from exercising its functions under article 32 and adjudicating on the point that the grounds given satisfy the requirements of the sub-clause if it is not open to it to see the grounds that have been furnished. It is a guaranteed right of the person detained to have the very grounds which are the basis of the order of detention. This court would be entitled to examine the matter and to see whether the grounds furnished are the grounds on the basis of which he has been detained or they contain some other vague or irrelevant material. The whole purpose of furnishing a detained person with the grounds is to enable him to make a representation refuting these grounds and of proving his innocence. In order that this Court may be able to safeguard this fundamental right and to grant him relief it is absolutely essential that the detenu is not prohibited under penalty of punishment to disclose the grounds to the Court and no injunction by law can be issued to this Court disabling it from having a look at the grounds. Section 14 creates a substantive offence if the grounds are disclosed and it also lays a duty on the court not to permit the disclosure of such grounds. It virtually amounts to a suspension of a guaranteed right provided by the Constitution inasmuch as it indirectly by a stringent provision makes administration of the law by this court impossible and at the same time it deprives a detained person from obtaining justice from this court. In my opinion, therefore, this section when it prohibits the disclosure of the grounds contravenes or abridges the rights given by Part III to a citizen and is ultra vires the powers of Parliament to that extent."186

There is provision in the Constitution for empowering courts other than the Supreme Court or the High Courts to issue the writs, by making a law of Parliament. But no such law has yet been passed,—with the result that no courts other than the Supreme Court or the High Courts have got the power to issue these writs. The incidents of the several kinds of writs

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which our Supreme Court and the High Courts are authorised by the Constitution to issue may now be noted.

Scope of the Writs:

1. Habeas corpus.

A writ of habeas corpus is in the nature of an order calling upon the person who has detained another to produce the latter before the Court, in order to let the Court know on what ground he has been confined and to set him free if there is no legal justification for the imprisonment. The words 'habeas corpus' literally mean 'to have a body'. By this writ, therefore, the court secures the body of a person who has been imprisoned to be brought before itself to obtain knowledge of the reason why he has been imprisoned and to set him free if there is no lawful justification for the imprisonment. The writ may be addressed to any person whatever, an official or a private person, who has another person in his custody and disobedience to the writ is met with punishment for contempt of court. The writ of habeas corpus is thus a very powerful safeguard to the subject against arbitrary acts not only of private individuals but also of the executive. Habeas corpus petition becomes infructuous if the detenu is produced before the Magistrate.¹⁶⁷

The different purposes for which the writ of habeas corpus is available may, accordingly, be stated as follows:

(a) For the enforcement of fundamental rights. It has already been explained that under our Constitution the right of personal liberty is guaranteed against the State by Art. 21 which says that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. Hence, if the Executive has arrested and detained any person without the authority of any law or in contravention of the procedure established by the law which authorises the detention, or the law which authorises the imprisonment is itself invalid or unconstitutional, the High Court or the Supreme Court may issue a writ of habeas corpus against the authority which has kept the person in custody and order the release of the person under detention.

(b) It will also issue where the order of imprisonment or detention is ultra vires the statute which authorises the imprisonment or detention.¹⁶⁸

The writ of habeas corpus is, however, not issued in the following cases:

(i) Where the person against whom the writ is issued or the person who is detained is not within the jurisdiction of the Court.

(ii) To secure the release of a person who has been imprisoned by a court of law on a criminal charge.¹⁶⁹

(iii) To interfere with a proceeding for contempt by a Court of record or by Parliament.

II. Mandamus.

Mandamus literally means a command. It demands some activity on the part of the body or person to whom it is addressed. In short, it commands the person to whom it is addressed to perform some public or quasi-public legal duty which he has refused to perform and the performance of which cannot be enforced by any other adequate legal remedy. It is, therefore, clear that mandamus will not issue unless the applicant has a legal right to the performance of

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legal duty of a public nature and the party against whom the writ is sought is bound to perform that duty. It is a discretionary remedy and the High Court may refuse to grant mandamus where there is an alternative remedy for redress of the injury complained of. In the matter of enforcement of fundamental rights, however, the question of alternative remedy does not weigh so much with the Court since it is the duty of the Supreme Court or the High Court to enforce the fundamental rights. In India, mandamus will lie not only against officers and other persons who are bound to do a public duty but also against the Government itself for, Arts. 226 and 361 provided that appropriate proceedings may be brought against the Government concerned. The writ is also available against inferior courts or other judicial bodies when they have refused to exercise their jurisdiction and thus to perform their duty. The purposes for which a writ may be issued may now be analysed as follows:

(a) For the enforcement of fundamental rights. Whenever a public officer or a Government has done some act which violates the fundamental right of a person, the Court would issue a writ of mandamus restraining the public officer or the Government from enforcing that order or doing that act against the person whose fundamental right has been infringed. Thus, where the petitioner, who was otherwise eligible for appointment to the Subordinate Civil Judicial Service, was not selected owing to the operation of a 'Communal Rotation Order' which infringed the fundamental right guaranteed to the petitioner by Art. 16(1), the Court issued an order directing the State of Madras "to consider and dispose of the petitioner's application for the post after taking it on the file on its merits and without applying the rule of communal rotation".¹⁷⁰

(b) Apart from the enforcement of fundamental rights, mandamus is available from a High Court for various other purposes, e.g.,—

(i) To enforce the performance of a statutory duty where a public officer has got a power conferred by the Constitution or a statute. The Court may issue a mandamus directing him to exercise the power in case he refuses to do it.

(ii) The writ will also lie to compel any person to perform his public duty where the duty is imposed by the Constitution or a statute or statutory instrument.

(iii) To compel a court or judicial tribunal to exercise its jurisdiction when it has refused to exercise it.

(iv) To direct a public official or the Government not to enforce a law which is unconstitutional.

Mandamus will not be granted against the following persons:

(i) The President, or the Governor of a State, for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties [Art. 361, post].

(ii) Mandamus does not lie against a private individual or body whether incorporated or not except where the State is in collusion with such private

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party,¹⁶⁹ in the matter of contravention of any provision of the Constitution, or a statute or a statutory instrument.¹⁷¹

III. Prohibition.

The writ of prohibition is a writ issued by the Supreme Court or a High Court to an inferior court forbidding the latter to continue proceedings therein in excess of its jurisdiction or to usurp a jurisdiction with which it is not legally vested. In other words, the object of the writ is to compel inferior courts to keep themselves within the limits of their jurisdiction. The writ of prohibition differs from the writ of mandamus in that while mandamus commands activity, prohibition commands inactivity. Further, while mandamus is available not only against judicial authorities but also against administrative authorities, prohibition as well as certiorari are issued only against judicial or quasi-judicial authorities. Hence, prohibition is not available against a public officer who is not vested with judicial functions. Where excess of jurisdiction is apparent on the face of the proceedings, a writ of prohibition is not a matter of discretion but may be had of right. In India, a writ of prohibition may be issued not only in cases of absence or excess of jurisdiction but also in cases where the court or tribunal assumes jurisdiction under a law which itself contravenes some fundamental right guaranteed by the Constitution. The Supreme Court can issue the writ only where a fundamental right is affected by reason of the jurisdictional defect in the proceedings.

Though prohibition and certiorari are both issued against Courts or tribunals exercising judicial or quasi-judicial powers, certiorari is issued to quash the order or decision of the tribunal while prohibition is issued to prohibit the tribunal from making the ultra vires order or decision. It follows, therefore, that while prohibition is available during the pendency of the proceedings and before the order is made, certiorari can be issued only after the order has been made.

IV. Certiorari.

Briefly speaking, therefore, while prohibition is available at an earlier stage, certiorari is available at a later stage, on similar grounds. The object of both is to secure that the jurisdiction of an inferior court or tribunal is properly exercised and that it does not usurp the jurisdiction which it does not possess.

The conditions necessary for the issue of the writ of certiorari are—

I. There should be a tribunal or officer having legal authority to determine questions affecting rights of subjects and having a duty to act judicially.

II. Such tribunal or officer must have acted without jurisdiction or in excess of the legal authority vested in such quasi-judicial authority, or in contravention of the rules of natural justice or there is an 'error apparent on the face of its record'.

III. The Supreme Court, early, took the view that the writ of certiorari would not issue against purely administrative action. It would issue only if the authority has a duty to proceed judicially, that is to say, to come to a decision after hearing the parties interested in the matter and without reference to any extraneous consideration.¹⁷²

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But later decisions have obliterated the distinction between administrative and quasi-judicial bodies. The current view is that even if the governing statute does not require that before making an order affecting an individual, he must be heard, such a requirement would be implied by the Court where the right of property or some other civil right of the individual is affected. To omit to do this is to deny natural justice, and in such cases, the Court may quash the so-called administrative decision, by means of a writ of certiorari, under Art. 226.¹⁷³

IV. A tribunal may be said to act without jurisdiction in any of the following circumstances—

(a) Where the court is not properly constituted, that is to say, where persons who are not qualified to sit on the tribunal have sat on it and pronounced the decision complained against.

(b) Where the subject-matter of enquiry is beyond the scope of the tribunal according to the law which created it.

(c) Where the court has assumed a jurisdiction on the basis of a wrong decision of facts upon the existence of which the jurisdiction of the tribunal depends.

(d) Where there has been a failure of justice either because the tribunal has violated the principles of natural justice or because its decision has been obtained by fraud, collusion or corruption.

V. When the decision of an inferior tribunal is vitiated by an error 'apparent on the face of the record', it is liable to be quashed by certiorari, even though the Court may have acted within its jurisdiction. 'Error', in this context, means 'error of law'. Where the Tribunal states on the face of

the order the grounds on which they made it and it appeals that in law these grounds were not such as to warrant the decision to which they had come, certiorari would issue to quash the decision.¹⁷⁴

In all such cases a High Court can issue a writ of certiorari to quash the decision of the inferior tribunal; and the Supreme Court can also issue the writ in such cases, provided some fundamental right has also been infringed by the order complained against.

V. Quo warranto

Quo warranto is a proceeding whereby the court enquires into the legality of the claim which a party asserts to a public office, and to oust him from its enjoyment if the claim be not well founded.

The conditions necessary for the issue of a writ of quo warranto are as follows:

- (i) The office must be public and it must be created by a statute or by the constitution itself.
- (ii) The office must be a substantive one and not merely the function or employment of a servant at the will and during the pleasure of another.
- (iii) There has been a contravention of the Constitution or a statute or statutory instrument, in appointing such person to that office.¹⁷⁵

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The fundamental basis of the proceeding of quo warranto is that the public has an interest to see that an unlawful claimant does not usurp a public office. It is, however, a discretionary remedy which the Court may grant or refuse according to the facts and circumstances of each case. A writ of quo warranto may, thus, be refused where it is vexatious or where it would be futile in its result or where the petitioner is guilty of laches or where there is an alternative remedy for ousting the usurper. Where the application challenges the validity of an appointment to a public office, it is maintainable at the instance of any person, whether any fundamental or other legal right of such person has been infringed or not.

Quo warranto is thus a very powerful instrument for safeguarding against the usurpation of public offices.

Parliament's power to modify or restrict Fundamental Rights.

The limitations upon the enforcement of the Fundamental Rights are as follows:

- (i) Parliament shall have the power to modify the application of the Fundamental Rights¹⁷⁶ to the members of the Armed Forces, Police Forces or intelligence organisations so as to ensure proper discharge of their duties and maintenance of discipline amongst them [Art. 33].

In exercise of this power, Parliament has enacted the Army and Air Force Acts of 1950 and the Navy Act, 1957, which empower the Central Government to make Rules restricting the fundamental rights of the defence personnel, for the sake of discipline,—which is absolutely essential to maintain the security of India. By a Circular issued under such Rules, Government of India has ordered that no concession can be offered in favour of any member of the Defence Forces for the purpose of offering prayers during office hours. It is a pity that a fundamentalist Muslim Organisation, named All India Muslim Forum, has raised objection against the Circular articulated by Muslim members in Parliament, on various grounds. None of these grounds are, however, tenable in view of the express provision in Art. 33 of the Constitution of India, which silences the argument that no such restriction was imposed in respect of Muslims during the British regime and also that it would hurt the 'sentiments' of the Muslims. Nor does the argument that the withdrawal of such concession would be contrary to the guarantee of secularism hold water because, firstly, Art. 25(1) makes it 'expressly' subject to the other provisions of this Part, in which Art. 33 is included, Secondly, what Art. 25 guarantees is equality of treatment as amongst different religions. If no such concession exists in favour of the members of any other religion, no question of discrimination against Muslims can possibly arise. Above all, the defence of the nation is a secular duty of each citizen of India, regardless of his religious beliefs or rites. Nothing can be allowed by the independent Republic which can possibly jeopardise the defence of the Nation.

Needless to say, this dangerous move should be nipped in the bud before it assumes an uncontrollable situation, in the name of Muslims 'sentiment'. Any softness shown to it would be anti-national.

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A similar instance was the claim of a section of Muslims to postpone the elections fixed for February, 1995, on the ground of Ramzan. This has, of course, been turned down by the Election Commission on the ground that no such religious plea can stop the electoral process. It is also doubtful if there is any religious scripture which requires Muslims to suspend their normal duties on the days of fasting, which is spread over one month.

(ii) When martial law has been in force in any area, Parliament may, by law, indemnify any person in the service of the Union or a State for any act done by him in connection with the maintenance or restoration of order in such area or validate any sentence passed or act done while martial law was in force [Art. 34].

Suspension of Fundamental Rights during Proclamation of Emergency.

(iii) The fundamental rights guaranteed by the Constitution will remain suspended, while a Proclamation of Emergency is made by the President under Art. 32 [see post]. The effect of such Proclamation in this behalf is twofold-

(a) As soon as a Proclamation of Emergency is made, the State shall be freed from the limitations imposed by Art. 19. This means that the Legislature shall be competent to make any law and the Executive shall be at liberty to take any action, even though it contravenes or restricts the right of

freedom of speech and expression, assembly, association, movement, residence, profession or occupation. So far as these rights are concerned, the citizen shall thus have no protection against the executive or legislative authorities during the operation of the Proclamation of Emergency. The enlargement of the power of the State under Art. 358 will continue only so long as the Proclamation itself remains in operation; Art. 19 will revive as soon as the Proclamation expires. But the citizen shall have no remedy for acts done against him during the period of the Proclamation, in violation of the above rights [Art. 358].

(b) The other consequence depends upon the issue of a further Order by the President. Where a Proclamation of Emergency is in operation, the President may by Order declare that the right to move a Court for the enforcement of any of the Fundamental Rights shall remain suspended for the period during which the Proclamation remains in force [Art. 359]. In such a case, however, the right to move the Courts would be revived after the Proclamation ceases to be in force, or earlier, if so specified in the President's Order. In other words, if such an Order is issued, the Supreme Court and the High Courts shall be powerless to issue the prerogative writs or to make any other order for the enforcement of any fundamental right, including those which are conferred by Articles other than Art. 19 with the exception of those conferred by Arts. 20 and 21.

This Order of the President, however, shall not be final. Such Order shall, as soon as may be after it is made, be laid before each House of Parliament, and it will be within the competence of Parliament to disapprove of it.¹⁷⁷

The 44th Amendment, 1978.

The 44th Amendment Act, 1978, has further provided that a law or executive order will be shielded under Art. 358 or 359 only if the law in

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question contains a recital to the effect that it has been made in relation to the Proclamation of Emergency; and the executive order has been issued under such law. Secondly, Arts. 20-21 cannot be suspended by any Order under Art. 359.

As the Constitution stands today, two other matters must be mentioned which limit the operation of the Fundamental Rights, as they were devised in the 1949-Constitution, and are not confined to times of 'Emergency' but operate even in normal times. These are:

I. The exceptions to Fundamental Rights; and

II. The Fundamental Duties.

Exceptions to Fundamental Rights.

I. Arts. 31A-31D, introduced by successive amendments, constitute exceptions to the application of Fundamental Rights, wholly, or partially.⁶ Of these, Art. 31D has subsequently been repealed (by the 43rd Amendment Act, 1977).

Fundamental Duties.

II. The Fundamental Duties¹⁷⁸ are ten in number, incorporated in Art. 51A [Part IVA], which has been inserted by the 42nd Amendment Act, 1976. Under this Article, it shall be the duty of every citizen of India—

- (i) to abide by the Constitution and respect the National Flag and the National Anthem;
- (ii) to cherish and follow the noble ideals which inspired our national struggle for freedom;
- (iii) to protect the sovereignty, unity and integrity of India; (iv) to defend the country;
- (v) to promote the spirit of common brotherhood amongst all the people of India;
- (vi) to preserve the rich heritage of our composite culture;
- (vii) to protect and improve the natural environment;
- (viii) to develop the scientific temper and spirit of inquiry;
- (ix) to safeguard public property;
- (x) to strive towards excellence in all spheres of individual and collective activity.

'Composite culture'.

In this context, it would be better to remove a misnomer involved in the expression 'composite culture' in Cl. (f) of Art. 51A. The Supreme Court has now pointed out that the foundation of this composite culture is the Sanskrit language and literature which is the great binding force "for the different peoples of this great country and it should be preferred in the educational system for the preservation of that heritage,—apart from the duty of the Government under Art. 351".¹³³

To quote the Supreme Court—

"Though the people of this country differed in a number of ways, they all were proud to regard themselves as participants in a common heritage, and that heritage, emphatically, is the heritage of Sanskrit".¹³⁴

The reason is that the original population of India was Hindu. Thereafter this country was subjected to Muslim and British rule. Because of its wonderful tolerance, the Hindu culture imbibed these alien cultures and thus grew up a 'composite culture' in India [Para 118]:¹³⁵

"Hindu religion developed resilience to accommodate and imbibe with tolerance the cultural richness with religious assimilation and became a land of religious

tolerance [Para 118]¹³⁵ . . each religion made its contribution to enrich the composite Indian culture as a happy blend or synthesis. Our religious tolerance (thus) received reflections in our Constitutional creed [Para 126].¹³⁵

Enforcement of Fundamental Duties.

Of course, there is no provision in the Constitution for direct enforcement of any of these Duties¹⁷⁹ nor for any sanction to prevent their violation. But it may be expected that in determining the constitutionality of any law, if a Court finds that it seeks to give effect to any of these Duties, it may consider such law to be 'reasonable' in relation to Art. 14 or 19, and thus save such law from unconstitutionality. It would also serve as a warning to reckless citizens against anti-social activities such as burning the Constitution, destroying public property and the like.¹⁸⁰

The Supreme Court has held that since the Duties are obligatory for a citizen, it would follow that the State should also strive to achieve the same goal. The Court may, therefore, issue suitable directions in these matters, in appropriate cases.¹⁸¹

REFERENCES

1. Report published in 1928 by a Committee headed by Pandit Motilal Nehru which was appointed by the All Parties Conference to outline the principles for a Constitution of India.
2. Author's Human Rights in Constitutional Law (Prentice-Hall of India, 1994, pp. 1, 41, 46).
3. GRANVILLE AUSTIN, The Indian Constitution (1966), p. 114.
4. This amendment, thus, silences that voice of the Judiciary which had been articulated, prior to 1978, through cases such as Kochunni v. State of Madras, A. 1960 S.C. 1080 (1092); Panipat Sugar Mills v. Union of India, A. 1973 S.C. 537; Saraswati Syndicate v. Union of India, A. 1975 S.C. 460 [vide BASU, Shorter Constitution of India, 12th Ed., pp. 247, 886].
5. Cf. Kesavananda v. State of Kerala, A. 1973 S.C. 1461 (1554, 1606, 1637, 1776, 2051); State of Karnataka v. Ranganatha, A. 1978 S.C. 215 (228).
6. Art. 31D, which had been inserted by the Constitution (42nd Amendment) Act, 1976, has since been repealed by the 43rd Amendment Act, 1977.
7. See Author's Constitutional Law of India (1991, Prentice-Hall of India), pp. 109 et seq.
8. This is the result specifically provided for in Article 59 of the 1977-Soviet Constitution: "Citizens' exercise of their rights and freedoms is inseparable from the performance of their duties and obligations."
9. Gopalan v. State of Madras, (1950) S.C.R. 88.

10. This proposition has been buttressed by the decision in *A.D.M. v. Shukla*, A. 1976 S.C. 1207, that the embodiment of certain rights as 'fundamental rights' in Part III of the Constitution has completely replaced the pre-Constitution rights founded on common law or otherwise; for instance, the right to personal liberty is exclusively contained in Art. 21 and the validity of any law depriving personal liberty, to-day, cannot be challenged on the ground of violation of any common law rule in that behalf (paras 61, 77, 83, 247, 264, 280). But the situation has been muddled because some Judges have asserted 'Rule of Law' to be a 'basic feature' of our Constitution,—apart from its specific and express provisions [*Indira v. Rajnarayan*, A. 1975 S.C. 2299 (RAY, C.J., KHANNA, J., CHANDRACHUD, J.)].

11. E.g., right to travel abroad deduced from 'personal liberty' in Art. 21 [*Maneka v. Union of India*, A. 1978 S.C. 597 (para 54), affirming *Satwant v. Asstt. Passport Officer*, A. 1967 S.C. 1836 (1844-45)]; so also right to privacy deduced from Arts. 19(1)(d) and 21 [*Kharak Singh v. State of U.P.*, A. 1963 S.C. 1295, affirmed in *Maneka's case*, *ibid.*]. Similarly, the rights to speedy trial and free legal aid have been deduced from Art. 21 [*Sheela v. Union of India*, A. 1986 S.C. 1773; *Suk Das v. Arunachal Pradesh*, A. 1986 S.C. 991].

12. *State of Kerala v. Joseph*, A. 1958 S.C. 296; *Ghulam v. State of Rajasthan*, A. 1963 S.C. 379.

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13. *Bishamber v. State of U.P.*, A. 1982 S.C. 33.

14. *Aliabari Tea Co. v. State of Assam*, A. 1961 S.C. 232.

15. Excepting, of course, the non-justiciable rights, e.g., the 'Directive Principles of State Policy', in Part IV.

10. *Syed Ahmed v. State of Mysore*, A. 1975 S.C. 1443 (para 6); *Dt. Collector v. Ibrahim*, A. 1970 S.C. 1275.

17. *Golak Nath v. State of Punjab*, A. 1967 S.C. 1643. According to the majority in *Keshavananda v. State of Kerala*, A. 1973 S.C. 1461, the 'basic features' are not amendable at all, though, curiously, Fundamental Rights are not included in the list of basic features as formulated by the majority.

18. *Shankari Prasad v. Union of India*, (1952) S.C.R. 89; *Sajjan Singh v. State of Rajasthan*, A. 1965 S.C. 845.

19. *Ramesh Thappar v. State of Madras*, (1950) S.C.R. 594.

20. *Brij Bhushan v. State of Delhi*, (1950) S.C.R. 605.

21. *State of W.B. v. Subodh Gopal*, (1954) S.C.R. 587.

22. Dwarkadas v. Sholapur Spinning Co., (1954) S.C.R. 674; State of West Bengal v. Bela Banerjee, (1954) S.C.R. 558.
23. Ram Narain v. State of Delhi, S.C.R. 552.
24. Cf. Maneka v. Union of India, A. 1978 S.C. 597 (paras 54-56, 63—a seven judge Bench); Sunil v. Delhi Admn., A. 1978 S.C. 1675 (para 228); Hussainara v. State of Bihar A. 1979 S.C. 1360 (1365); State of Maharashtra v. Champalal, A. 1981 S.C. 1675 (7677); Sher Singh v. State of Punjab, A. 1983 S.C. 465.
25. Bishan Das v. State of Punjab, A. 1961 S.C. 1570.
26. Samdasani v. Central Bank, (1952) S.C.R. 391.
27. Ramana v. I.A.A.I., A. 1979 S.C. 1628.
28. Kochunni v. State of Madras (I), A. 1959 S.C. 725 (730).
29. Dalmia Cement (Bharat) Ltd. v. Union of India, (1996) 10 S.C.C. 104.
30. Law of the Constitution, 9th Ed., p. 202.
31. Dalmia Cement (Bharat) Ltd. v. Union of India, (1996) 10 S.C.C. 104.
32. Panchayal Varga Shramajivi Samudaik Sahakari Khedut Cooperative Society v. Haribhai Mevabhai, A.I.R. 1996 S.C. 2578.
33. State of West Bengal v. Anwar Ali, (1952) S.C.R. 289; Ramana v. I.A.A.I., A. 1979 S.C. 1628.
34. Anukul Chandra Pradhan v. Union of India, (1997) 6 S.C.C. 1.
35. D.C. Bhatia v. Union of India, (1995) 1 S.C.C. 104.
36. State of Kerala v. Aravind Ramakant Modawdakar, (1999) 7 S.C.C. 400 (para 6).
37. State of UP. v. Kamla Palace, (2000) 1 S.C.C. 557 (para 12) : A.I.R. 2000 S.C. 617.
38. Dhirendra v. Legal Remembrancer, (1955) 1 S.C.R. 224.
39. Chiranjit Lal v. Union of India, (1950) S.C.R. 869.
40. Ameeroonissa v. Mehboob, (1953) S.C.R. 404 (414); Pathumma v. State of Kerala, A. 1978 S.C. 771.
41. J.K. Industries Ltd. v. Chief Inspector of Factories & Boilers, (1996) 6 S.C.C. 655 (para 39).

42. State of West Bengal v. Anwar Ali, (1952) S.C.R. 289; Ramana v. I.A.A.I., A. 1979 S.C. 1628.
43. T.R. Kothandraman v. T.N. Water Supply & Drainage Board, (1994) 6 S.C.C. 282 (para 16); Assam State Electricity Board v. Gajendra Nath Palhak, (1997) 11 S.C.C. 3 (paras 6 and 7).
44. Food Corporation of India v. Om Prakash Sharma, (1998) 7 S.C.C. 767 (paras 19 and 32): A.I.R. 1998 S.C. 2682.
45. Yusuf v. State of Bombay, A. 1954 S.C. 321.
46. State of Bombay v. Balsara, (1951) S.C.R. 682.
47. S. Ramesha v. State of Karnataka, A.I.R. 1998 S.C. 718.
48. Lachmandas v. State of Bombay, (1952) S.C.R. 710 (726).
49. Dutta Associates Pvt. Ltd. v. Indo Merchandiles Pvt. Ltd., (1997) 1 S.C.C. 53 (para 7).
50. Common Cause, A Registered Society v. Union of India, (1996) 6 S.C.C. 530 (paras 24 and 25) : A.I.R. 1996 S.C. 3538.
51. Rakesh Kumar v. Sunil Kumar, (1999) 2 S.C.C. 489 (para 21) : A.I.R. 1999 S.C. 9351.
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52. Dharambir Singh v. Union of India, (1996) 6 S.C.C. 702 {para 4}.
53. Style (Dress Land) v. Union Territory , Chandigarh, (1999) 7 S.C.C. 89 (para 10).
54. Gurbachan v. State of Bombay, (1952) S.C.R. 737 (744).
55. In re. Special Courts Bill, 1978, A. 1979 S.C. 478 (paras 74, 78, 80-89—seven-Judge Bench).
56. Royappa v. State of T.N., A. 1974 S.C. 555; Ajay v. Khalid, A. 1981 S.C. 487; Nakara v. Union of India, A. 1983 S.C. 130 (para 14).
57. State of A.P. v. Mc Dowell & Co., (1996) 3 S.C.C. 709 (para 44) : A.I.R. 1996 S.C. 1627.
58. Shiba Kumar Dutta v. Union of India, (1997) 3 S.C.C. 545 (para 2).
59. Krishnan Kakkanth v. Government of Kerala, (1997) 9 S C.C. 495 (paras 35 to 38) : A.I.R. 1997 S.C. 128.
60. Style (Dress Land) v. Union Territory, Chandigarh, (1999) 7 S.C.C. 89 (para 9).

61. Ashok Kumar Gupta v. State of U.P., (1997) 5 S.C.C. 201 (para 46).
62. P.G.I, of Medical Education & Research v. K.L. Narasimhan, (1997) 6 S.C.C. 283 (para 24).
63. Dasaratha v. State of A.P., A. 1961 S.C. 564 (569); Devadasan v. Union of India, A. 1964 S.C. 179; General Manager v. Rangachari, A. 1962 S.C. 36 (40-41).
64. Chitralkha v. State of Mysore, A. 1964 S.C. 1823 (1827).
65. Preeti Srivastava (Dr.) v. State of M.P., (1999) 7 S.C.C. 120 (paras 13, 15 and 62) : A.I.R. 1999 S.C. 2894.
66. State of M.P. v. Mohan Singh, (1995) 6 S.C.C. 32 (para 5) : A.I.R. 1996 S.C. 2106.
67. P.G.I. of Medical Education & Research v. K.L. Narasimhan, (1997) 6 S.C.C. 283 (para 5).
68. Ibid (paras 21 and 23).
69. Jagdish Lal v. State of Haryana, (1997) 6 S.C.C. 538 (para 14) : A.I.R. 1997 S.C. 2366.
70. Union of India v. No. 664950 IM Havildar/Clerk, (1999) 3 S.C.C. 709 (para 15) : A.I.R. 1999 S.C. 1412.
71. Venkataramana v. State of Madras, A. 1951 S.C. 229.
72. 'X' v. Hospital 'Z', (1998) 8 S.C.C. 296 (para 45).
73. Achutan v. State of Kerala, A. 1959 S.C. 490.
74. General Manager v. Rangachari, A. 1962 S.C. 36; Kunj Behari v. Union of India, A. 1963 S.C. 518(527).
75. Ajit Singh (II) v. State of Punjab, (1999) 7 S.C.C. 209 (para 22).
76. State of U.P. v. Dr. Dina Nath Shukla, (1997) 9 S.C.C. 662 (para 7) : A.I.R. 1997 S.C. 1095.
77. Vide the Constitution (82nd Amendment) Act, 2000.
78. Indra Sawhney v. Union of India, (1992) Supp 3 S.C.C. 217 and S. Vinod Kumar v. Union of India, (1996) 6 S.C.C. 580.
79. General Manager v. Rangachari, A. 1962 S.C. 36 (42-44).
80. Balaji v. State of Mysore, A. 1963 S.C. 647 (664).
81. Banarsidas v. State of U.P., (1956) S.C.R. 358 (361-62).

82. Indra Sawhney v. Union of India, (1992) Supp. (3) S.C.C. 217. Parliament has enacted the National Commission for Backward Classes Act, 1993, to set up a National Commission for backward classes.

83. At present the Government of India awards decorations for acts of gallantry, such as Param Vir Chakra, Maha Vir Chakra, Vir Chakra.

84. Bala v. Union of India, (19%) 1 S.C.C. 361 (paras 18-30, 32) C.B.

85. Sub-Cl. (1) of Art. 19(1) has been omitted by the Constitution (44th Amendment), 1978, w.e.f. 20-6-1979.

86. Gopalan v. State of Madras, (1950) S.C.R. 88 (253-54).

87. Rajasthan State Electricity Board v. Mohan, A. 1967 S.C. 1856.

88. Sovereignty and Integrity of India were added as new grounds for the restriction of the freedoms of speech, assembly and association, by the Constitution (16th Amendment) Act, 1963. After this amendment, it would be competent for the Legislatures to combat movements like the D.M.K. movement in the South and the Plebiscite movement in Kashmir or parties advocating anarchism, by enacting appropriate laws. In pursuance of this amendment Parliament has enacted the Unlawful Activities (Prevention) Act, 1967 [see Author's Law of the Press (Prentice-Hall of India), 2nd Ed., pp. 455 et seq.].

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89. Ramesh Yeshwant Prabhoo (Dr.) v. Prabhakar Kashinath Kunte, (1996) 1 S.C.C. 130 (paras 28 and 29) : A.I.R. 199G S.C. 1113.

90. Ibid.

91. Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal, (1995) 2 S.C.C. 161 (para 152) : A.I.R. 1995 S.C. 1236.

92. Under the Unlawful Activities (Prevention) Act, 1967 an association may be declared unlawful leading to banning of its activities. This can be done only after a tribunal presided over by a High Court judge upholds the validity of the declaration after hearing the association. Earlier National Socialist Council of Nagaland, Liberation Tigers of Tamil Eelam (LITE), National Council of Khalistan and United Liberation Front of Assam (ULFA) were declared unlawful. Recently on 10-12-1992 the R.S.S., V.H.P., Bajrang Dal, Islamic Sevak Sangh and Jamait-e-Islami Hindi were declared unlawful. Justice Bahri tribunal has held that the ban on R.S.S. and Bajrang Dal is unjustified. Hence the notification pertaining to them has no effect.

93. Qureshi v. State of Bihar, (1959) S.C.R. 629.

94. Dwarka Prasad v. Stale of U.P., (1954) S.C.R. 803.

95. Chintamanrao v. State of M.P., (1952) S.C.R. 759; State of Maharashtra v. Himmatbhai, A. 1970 S.C. 1157.
96. State of Madras v. Row, (1952) S.C.R. 597 {607}; Laxmi v. State of U.P., A. 1981 S.C. 873. (This proposition is now to be read subject to the exceptions under Arts. 31B, 31C.)
97. Khare v. State of Delhi, (1950) S.C.R. 519; Gurbachan v. State of Bombay, (1952) S.C.R. 737 (742).
98. M.R.F. Ltd. v. Inspector Kerala Govt., (1998) 8 S.C.C. 227 (para 13).
99. Dwarka Prasad v. State of Uttar Pradesh, (1954) S.C.R. 803; A.P. Merchants' Association v. Union of India, A. 1971 S.C. 2346.
100. Express Newspapers v. Union of India, A. 1958 S.C. 578.
101. In re: Harijai Singh, (1996) 6 S.C.C. 466 (para 10) : A.I.R. 1997 S.C. 73.
102. Bennett Coleman v. Union of India, A. 1973 S.C. 106 [see Author's Casebook on Indian Constitutional Law, Vol. 1, pp. 207-49].
103. Virendra v. State of Punjab, A. 1958 S.C. 986.
104. See Author's Shorter Constitution of India, 12th Ed., Prentice-Hall of India, 1995, pp. 1129-30.
105. Brijbhushan v. State of Delhi, (1950) S.C.R. 605; Ramesh Thappar v. State of Madras, (1950) S.C.R. 594 [597].
106. Babulal v. State of Maharashtra, A. 1961 S.C. 884.
107. Abbas v. Union of India, A. 1971 S.C. 481; see Author's Casebook on Indian Constitutional Law, Vol. I, P. 276.
108. As will be more fully explained in Chap. 25, post, the 44th Amendment Act, 1978, has amended Art. 352(1), omitting 'internal disturbance' there from, so that it will no longer be possible to make any Proclamation of Emergency on the ground of internal disturbance. A Proclamation of Emergency can hereafter be valid under Art. 352(1) only on the ground of (a) war; or (b) external aggression; or (c) armed rebellion.
109. Kedar Nath v. State of W.B., (1954) S.C.R. 30.
110. Venkataraman v. Union of India, (1954) S.C.R. 1150.
111. Sharma v. Satish, (1954) S.C.R. 1077.

112. State of Bombay v. Kathi Kalu, A. 1961 S.C. 1808.
113. Maqbool v. State of Bombay, (1953) S.C.R. 730.
114. Narayanlal v. Maneck, A. 1961 S.C. 2.9 (38); Veera v. State of Maharashtra, A. 1976 S.C. 1167.
115. Ram Narain v. State of Bombay, (1952) S.C.R. 652.
116. Gopalan v. State of Madras, (1950) S.C.R. 88; Jaynarayan v. State of W.B., A. 1970 S.C. 675.
117. A.D.M. v. Shukla, A. 1976 S.C. 1207.
118. Tarapada v. State of West Bengal, (1951) S.C.R. 212, for the grounds on which the Courts can interfere with an order of detention, see Author's Shorter Constitution of India, 12th Ed., pp. 184 et. seq; Constitutional Law of India. 1991, pp. 84 et. seq.
119. Emp. v. Sibnath, A. 1945 P.C. 156.
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120. Liversidge v. Anderson, (1942) A.C. 206.
121. Roly v. Union of India, A. 1982 S.C. 710 (paras 52, 113).
122. In order to cope with the increase in terrorist activities, Government was obliged to enact a temporary Act, viz. the Terrorist and Disruptive Activities (Prevention) Act, 1987 (called TADA). This Act has not been renewed after it lapsed, without affecting previous cases under the Act.
123. Some States have made laws authorising preventive detention relating to subject within their jurisdiction; e.g.,] & K. Public Safety Act, 1977; A.P. Detention Act, 1970; Rajasthan P.D. Act, 1970; U.P. Rashtra Virodhi Tatwa Nivaran Adhiniyam, 1970; West Bengal Prevention of Violent Activities Act, 1970; M.P. Security & Public Order Maintenance Act, 1980. Preventive detention is provided for by the following Central Acts; Cofeposa, 1974, Nasa, 1980. Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980.
124. Sanjit v. State of Rajasthan, A. 1953 S.C. 328 (para 4); People's Union v. Union of India, A. 1982 S.C. 1473 (paras 14-15).
125. A bold step towards the abolition of forced labour and of economic and physical exploitation of the weaker sections of the people has been taken by the enactment, by Parliament, of the Bonded Labour System (Abolition) Act, 1976.

126. State of Gujarat v. Hon'ble High Court of Gujarat, (1998) 7 S.C.C. 392 (paras 20 and 21) : A.I.R. 1998 S.C. 3164.
127. M.C. Mehta v. State of T.N., (1991) 1 S.C.C. 283 (paras 5, 7, 8, 9 and 11).
128. M.C. Mehta v. State of T.N., (1996) 6 S.C.C. 756 (paras 27-29) : A.I.R. 1997 S.C. 699 and Bandhua Mukti Morcha v. Union of India, (1997) 10 SCC 549 (para 12) : A.I.R. 1997 S.C. 2218.
129. Commissioner, Hindu Religious Endowments v. Lakshmindra, (1954) S.C.R. 1005.
130. Hanif Quareshi v. State of Bihar, A. 1958 S.C. 731.
131. Ratilal v. State of Bombay, (1954) S.C.R. 1055.
132. Sarup v. State of Punjab, A. 1959 S.C. 860 (866); Moti Das v. Sahi, A. 1959 S.C. 942 (950); Jagadiswaranand v. Police Commr., A. 1984 S.C. 51 (para 10).
133. In the opinion of the Author, once it is held that Sanskrit is the foundation of the common heritage and culture of India, nothing stands in the way of making it a compulsory subject at some stage of a child's education—as it was in the British days.
134. Sanlosh v. Ministry of H.R.D., (1994) 6 S.C.C. 579.
135. Bommai v. Union of India, A. 1994 S.C. 1918. A 9-Judge Bench decision.
136. Stainislaus v. State of M.P., A. 1977 S.C. 908.
137. Owing to the dissolution of Parliament on the resignation of Sri Desai, Tyagi's Bill has lapsed. The Arunachal Bill has become law with President's assent, but no challenge against it in the Courts appears to have yet been made. [A registered letter addressed to the Pope John Paul enquiring of the scriptural authority to justify conversion against a person's free will, remains unanswered.]
138. See Author's Constitutional Law of India (Prentice-Hall of India, 6th Ed., 1991), pp. 1, 3.
139. Nobody who has read Indian Constitutional History can afford to forget that it was the 'Communal Award' of 1932, providing for separate representation for the Muslims and non-Muslims, which ultimately led to the lamentable partition of India.
140. St. Stephens College v. University of Delhi, (1992) 1 S.C.C. 558. 141. State of Bombay v. Balsara, (1951) S.C.R. 682.
142. Raghubir v. Court of Wards, (1953) S.C.R. 1049.
143. Wazir Chand v. State of HP., A. 1954 S.C. 415; Virendra v. State of Punjab, A. 1957 S.C. 896.

144. Dwarka v. State of Bihar, A. 1959 S.C. 249; Virendra v. State of UP., (1955) 1 S.C.R. 415.

145. Kochunni v. State of Madras, A. 1960 S.C. 1080; Kunnathat v. State of Kerala, A. 1961 S.C. 552.

146. For the text of Arts. 31-31D, as amended up-to-date, see Author's Constitution Law of India (Prentice-Hall of India, 1991), pp. 97ff. Of these, Art. 31D has been omitted by the Constitution (43rd Amendment) Act, 1977.

147. State of W.B. v. Bela Banerjee, (1954) S.C.R. 558 (563).

148. Cooper v. Union of India, A. 1970 S.C. 564 (608, 614).

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149. Keshavananda v. State of Kerala, A. 1973 S.C. 1641.

150. Minerva Mills v. Union of India, A. 1980 S.C. 1787.

151. A serious controversy has been raised as to whether, notwithstanding such repeal, a law can be struck down on the ground that it provides for no compensation or illusory compensation.

In 1995, a Division Bench of the Supreme Court [Jilubhai v. State of Gujarat, A. 1995 S.C. 142] has answered this question in the affirmative.

152. The Janata Government, which undertook to unwind the changes introduced by the Indira Government into the Constitution, forgot, in the present context, that there was no Proviso to Cl. (2) of Art. 31 in the original Constitution of 1949. In 1971, when the word 'compensation' was substituted by the word 'amount, by the same 25th Amendment Act, the Proviso was introduced by Mrs. Gandhi to safeguard the right of a minority educational institution to full compensation while all the world outside had no such right under the Constitution of India as amended by her Government. It is that Proviso which was nurtured by the Janata Government, by the 44th Amendment Act, while repealing Art. 31(2) itself.

153. Author's Shorter Constitution of India, 9th Ed., pp. 668ff.; Comparative Constitutional Law, pp. 184 et seq.

154. R. Gandhi v. Union of India, (1999) 8 S.C.C. 106 (para 13).

155. Bodhisattawa Gautam v. Subbra Chakraborty, (1996) 1 S.C.C. 490 (paras 6 and 7) : A.I.R. 1996 S.C. 922.

156. (1948) VII C.A.D. 953.

157. Kochunni v. State of Madras (I), A. 1959 S.C. 725; Kharak Singh v. State of UP., A. 1963 S.C. 1295; Rashid Ahmed v. Municipal Board, (1950) S.C.R. 566.

158. Rural Litigation v. State of UP., (1989) Supp. (1) S.C.C. 504 (para 16).

159. Basappa v. Nagappa, (1955) 1 S.C.R. 250; Kharak Singh v. State of UP., A. 1963 S.C. 1295.

160. Amar Singhji v. State of Rajasthan, A. 1965 S.C. 504.

161. It should be pointed out in the present context that by the 42nd Amendment Act, 1976, various conditions and limitations had been imposed on the writ jurisdiction of both the Supreme Court and the High Courts, by introducing provisions such as Arts. 32A, 131A, 144A, 226A, 228A, and substituting Art. 226 itself [see Author's Constitution Amendment Acts, pp. 100-07; 126-28]. All these fetters have since been removed by the 43rd and 44th Amendment Acts, 1977-78, brought by the Janata Government, so that the provisions in Arts. 32 and 226 have been restored to their original condition.

But Arts. 323A and 323B, inserted in 1976, have been kept in tact. In pursuance of Art. 323A, the Administrative Tribunals Act has been enacted in 1985, by which service matters have been taken away from the jurisdiction of the High Courts under Art. 226, and vested in Administrative Tribunals, so far as Union Government servants are concerned [see, further, under Chap. 27, post] but subsequently in L. Chandra Kumar v. Union of India, (1997) 3 S.C.C. 261 (paras 62 and 76) the Supreme Court has declared the sections of the Arts. 323A and 323B and the legislations enacted in pursuance thereof infringing the powers of judicial review of the Supreme Court and the High Courts under Arts. 32 and 222/227 as unconstitutional.

162. State of Bombay v. United Motors, (1953) S.C.R. 1069.

163. See Cl. (1A), introduced in Art. 226, by the Constitution (15th Amendment) Act, which has been made Cl. (2), by the 42nd Amendment.

164. Himmatlal v. State of M.P., (1954) S.C.R. 1122.

165. People's Union v. Union of India, A.I.R. 1982 S.C. 1473 (para 1).

166. For the facts and principles of this decision of the Supreme Court and other leading cases, read Author's Casebook on Indian Constitutional Law, Vol. I, pp. 447 et seq.

167. Harbans Kaur v. Union of India, (1995) 1 S.C.C. 623 (para 16).

168. Makhan Singh v. State of Punjab, (1952) S.C.R. 368; Keshav v. Commr. of Police, (1956) S.C.R. 653.

169. Janardhan v. State of Hyderabad, (1951) S.C.R. 344.

170. Venkataramana v. State of Madras, A. 1951 S.C. 229.

171. Sohan Lal v. Union of India, A. 1957 S.C. 532.

172. Province of Bombay v. Khusaldas, (1950) S.C.R. 621.

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173. Kraipak v. Union of India, A. 1970 S.C. 150 (756); Kesava Mills v. Union of India, A. 1973 S.C. 389 (paras 7-8); D.F.O. v. Ram, A. 1973 S.C. 205; Erusian Equipment v. State of W.B., A. 1975 S.C. 266; Joseph v. Executive Engineer, A. 1978 S.C. 930.

174. Hari Vishnu v. Ahmad, (1955) 1 S.C.R. 1104 (1123); Nagendra v. Commr., A. 1958 S.C. 398(4 72).

175. The Supreme Court can issue this writ in a proceeding under Art. 32 only if a fundamental right has been violated by an appointment.

176. Article 33 was amended by the Constitution (50th Amendment) Act, 1984. For the amended text of Art. 33 see Author's Shorter Constitution of India, 12th Ed., pp. 293-94.

177. As to Proclamation of Emergency and Orders made under Art. 359, see, further, under Emergency Provisions, Chap. 25, post.

178. It is interesting to note that the Author suggested at p. 289 of Vol. A of the 6th Ed. of the Commentary, that a separate part should be engrafted to incorporate fundamental duties.

179. Ramsharan v. Union of India, A. 1989 S.C. 549 (para 14).

180. See, further, Author's Constitutional Law of India, 6th Ed., 1991, pp. 134-35.

181. Rural Litigation v. State of UP., A. 1987 S.C. 359 (para 20).

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CHAPTER 9 DIRECTIVE PRINCIPLES OF STATE POLICY

Classification of the Directive.

PART IV of the Constitution [Arts. 36-51] contains the Directive Principles of State Policy.

As shown in Table VI, these principles may be classified under several groups:

(i) Certain ideals, particularly economic, which, according to the framers of the Constitution, the State¹ should strive for.

(ii) Certain directions to the Legislature and the Executive intended to show in what manner the State should exercise their legislative and executive powers.

(iii) Certain rights of the citizens which shall not be enforceable by the Courts like the 'Fundamental Rights', but which the State¹ shall nevertheless aim at securing, by regulation of its legislative and administrative policy.

Scope of the Directives

It shall be the duty of the State¹ to follow these principles both in the matter of administration as well as in the making of laws. They embody the object of the State under the republican Constitution, namely, that it is to be a 'Welfare State' and not a mere 'Police State'. Most of these Directives, it will be seen, aim at the establishment of the economic and social democracy which is pledged for in the Preamble.

Nature of the Economic Democracy envisaged

According to Sir Ivor Jennings,² the philosophy underlying most of these provisions is "Fabian Socialism without the socialism, for, only 'the nationalisation'³ of the means of 'production, distribution and exchange' is missing". This much is clear, however, that our Constitution (as framed in 1949) did not adhere to any particular 'ism' but sought to effect a compromise between Individualism and Socialism by eliminating the vices of unbridled private enterprise and interest by social control and welfare measures as far as possible.

Socialistic pattern of society.

This is why a 'Socialistic pattern of society', not of 'socialism', was declared to be the objective of our Planning by Pandit Nehru⁴:

"Socialism to some people means two things: Distribution which means cutting off the pockets of the people who have too much money and nationalisation. Both these are desirable objectives, but neither is by itself Socialism.

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Any attempt to distribute by affecting the productive machinery is utterly wrong; to do so would be to weaken ourselves. The basis of Socialism is greater wealth; there cannot be any Socialism of poverty. Therefore, the process of equalisation has to be phased.

Secondly, there is the question of nationalisation. I think it is dangerous merely to nationalise something without being prepared to work it properly. To nationalise we have to select things. My idea of Socialism is that every individual in the State should have equal opportunity for progress."

Trends towards collectivism.

It must be mentioned, in this context, that the governmental policy, at the Union level, had demonstrated a greater bias towards collectivism during the regime of his daughter, Mrs. Indira Gandhi, and quite a number of industries, trades and other means of production were nationalised

during the three decades since independence, either directly or through the agency of State-owned or State-controlled corporations, e.g., banking, insurance, aviation, coal mines.

The 42nd Amendment

It should, however, be mentioned that though the objective of the State been described to be 'socialist', by the amendment of the Preamble by the 42nd Amendment Act, Mrs. Gandhi had said that this socialism did not indicate collectivism, but the offering of equal opportunities to all through socio-economic reform.⁵ By the same Amendment, certain other changes have been introduced in Part IV, adding new Directives, to accentuate the socialistic bias of the Constitution:

(i) Art. 39A has been inserted to enjoin the State to provide free legal aid to the poor and to take other suitable steps to ensure equal justice to all, which is offered by the Preamble.⁶

(ii) Art. 43A has been inserted in order to direct the State to ensure the participation of workers in the management of industry and other undertakings (this is what is known as 'profit-sharing'). This is a positive step in advancement of socialism in the sense of economic justice.⁷

The 44th Amendment.

The Janata Government sought to implement the promise of economic equality of opportunity assured by the Amendment. Preamble, by inserting Cl. (2) in Art. 38 (by the 44th Amendment Act, 1978), as follows:

"(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

This innocently-looking amendment is to be read along with elimination of the Fundamental Right to Property. They have paved the way for confiscatory taxation and for equalising salaries and wages for different vocations and different categories of work, which would usher in a socialistic society, even without resorting to nationalisation of the means of production.⁷

Art. 38 enjoins the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, the social order in which justice—social, economic and political—shall, inform all the institutions of national life striving to minimising inequalities in income and endeavour to

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eliminate inequalities in status, facilities, opportunities among individuals and groups of people residing in different areas or engaged in different avocations.⁸

The Directives, however, differ from the Fundamental Rights contained in Part III of the Constitution or the ordinary laws of the land, in the following respects:

Directives compared with Fundamental Rights.

(i) While the Fundamental Rights constitute limitations upon State action, the Directive Principles are in the nature of instruments of instruction to the Government of the day to do certain things and to achieve certain ends by their actions.

(ii) The Directives, however, require to be implemented by legislation, and so long as there is no law carrying out the policy laid down in a Directive, neither the State nor an individual can violate any existing law or legal right under colour of following a Directive.

Non-justiciability.

(iii) The directives are not enforceable in the Courts and do not create any justiciable rights in favour of the individuals.

From the standpoint of the individual, the difference between the Fundamental Rights and the Directives is that between justiciable and non-justiciable rights,—a classification which has been adopted by the framers of our Constitution from the Constitution of Eire. Thus, though the Directive under Art. 43 enjoins the State to secure a living wage to all workers, no worker can secure a living wage by means of an action in a Court, so long as it is not implemented by appropriate legislation. In other words, the Courts are not competent to compel the Government to carry out any Directive, e.g., to provide for free compulsory education within the time limited by Art. 45 or to undertake legislation to implement any of the Directive Principles.

Conflict between Fundamental Rights and Directive Principles.

(iv) It may be observed that the declarations made in Part IV of the Constitution under the head 'Directive Principles of State Policy' are in many cases of a wider import than declarations made in Part III as 'Fundamental Rights'. Hence, the question of priority in case of conflict between the two classes of provisions may easily arise. But while the Fundamental Rights are enforceable by the Courts [Arts. 32, 226(1)] and the Courts are bound to declare as void any law that is inconsistent with any of the 'Fundamental Rights', the Directives are not so enforceable by the Courts [Art. 37], and the Courts cannot declare as void any law which is otherwise valid, on the ground that it contravenes any of the 'Directives'. Hence, in case of any conflict between Parts III and IV of the Constitution, the former should prevail in the Courts.⁹

The foregoing general proposition, laid down by the Supreme Court in 1951,⁹ must now, however, be read subject to a major exception. Article 31C, introduced in 1971 and expanded by the Constitution [42nd Amendment) Act, says that though the Directives themselves are not directly enforceable in the Courts, if any law is made to implement any of the

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Directives contained in Part IV of the Constitution, it would be totally immune from unconstitutionality on the ground of contravention of the fundamental rights conferred by Arts. 14 and 19.¹⁰

This attempt to confer a primacy upon the Directives as against the Fundamental Rights has, however, been foiled by the majority of the Supreme Court in the *Minerva Mills* case¹¹ in two respects:

(a) It has struck down the widening of Art. 31C to include any or all of the Directives in Part IV, on the ground that such total exclusion of judicial review would offend the 'basic structure' of the Constitution. In the result, Art. 31C is restored to its pre-1976 position, so that a law would be protected by Art. 31C only if it has been made to implement the directive in Art. 39(b)-(c) and not any of the other Directives included in Part IV.

(b) It has been also held that there is a fine balance in the original Constitution as between the Directives and the Fundamental Rights, which should be adhered to by the Courts, by a harmonious reading of the two categories of provisions, instead of giving any general preference to the Directive Principles.

It is also to be noted that outside these two¹⁰ fundamental rights [in Arts. 14 and 19], the general proposition laid down in 1951⁹ shall subsist. Thus, by way of implementing the Directive in Art. 45,—to provide free and compulsory education to children,—the State cannot override the fundamental right, under Art. 30(1), of minority communities to establish educational institutions of their own choice.¹²

It has been held that the fundamental rights and the directive principles are the two wheels of the chariot as an aid to make social and economic democracy a truism.¹³

Sanction behind the Directives.

Though these Directives are not enforceable by the Courts and, if the Government of the day fails to carry out these objects, no Court can make the Government ensure them, yet these principles have been declared to be "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws" [Art. 37].

The sanction behind them is, in fact, political. As Dr. Ambedkar observed in the Constituent Assembly, "if any Government ignores them, they will certainly have to answer for them before the electorate at the election time".¹⁴ It would also be a patent weapon at the hands of the Opposition—to discredit the Government on the ground that any of its executive or legislative acts is opposed to the Directive Principles. The author discerns a more effective sanction for enforcement of the Directives, which does not appear to have been properly appreciated in any quarters so far. Article 355 says—

Whether Arts. 355, 365, can be applied to enforce implementation of Directives by the States.

"It shall be the duty of the Union ... to ensure that the government of every State is carried on in accordance with the provisions of this Constitution."

Indisputably, Part IV (containing the Directive Principles) is a part of the Constitution. On the other hand, even though the Directives are not

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enforceable in the Courts of law, Art. 37 unequivocally enjoins that "it shall be the duty of the State to apply these principles in making laws".

If so, it should be the duty of the Union to see that every State takes steps for implementing the Directives, as far as possible. Hence, it should be competent for the Union to issue directions against particular States to introduce "free and compulsory education for children" [Art. 45], or to prevent "slaughter of cows, calves and other milch and draught cattle" Art. 48], or to introduce "prohibition of consumption of alcoholic drinks" Art. 47], and so on. In case of refusal to comply with such directions issued by the Union, it may apply Art. 365 against such recalcitrant State. Otherwise, the Directives in Part IV shall ever remain a dead-letter.

Utility of the Directives.

Owing to the legal deficiencies of the Directives the utility of their incorporation in the Constitution, which is a legal instrument, has been questioned from different quarters. Sir Ivor Jennings,¹⁵ thus, characterised them as 'pious aspiration' and also questioned the utility of importing into India of the 19th Century English philosophy of 'Fabian socialism without the socialism'.

Prof. Wheare¹⁶ has criticised them in stronger terms—

"When one peruses the terms of these Articles one cannot deny that it would be foolish to allow Courts to concern themselves with these matters ... It may be doubted whether there is any gain, on balance, in introducing these paragraphs of generalities into a Constitution anywhere at all, if it is intended that the Constitution should command the respect as well as affection of the people. If the Constitution is to be taken seriously, the interpretation and fulfilment of these general objects of policy will raise great difficulties for legislatures, and these difficulties will bring the Constitution, the Courts and the legislature into conflict and disrepute. If these declarations are, however, to be treated as 'words', they will bring discredit upon the Constitution also."¹⁶

Nevertheless, their incorporation in the Constitution has been justified by a consensus of opinion, as well as the working of the Constitution since 1950.

(i) Sir B.N. Rau, who advised the division of individual rights into two categories—those which were enforceable in the Courts and those which were not, stated that the latter class which are known in the Constitution as 'Directives' were intended as "moral precepts for the authorities of the State . . . they have at least an educative value". That educative value is to remind those in power for the time being that the goal of the Indian polity is to introduce 'socialism in the economic sphere' (Panikkar), or 'economic democracy' as distinguished from 'political democracy' (Ambedkar), which simply means 'one man one vote'. It reminds the authorities that they must ensure "social security and better standards of sanitation" and emphasise "the duty

towards women and children and the obligations towards backward and tribal classes" (Panikkar).

Granville Austin¹⁷ considers these Directives to be "aimed at furthering the goals of the social revolution or ... to foster this revolution by establishing the conditions necessary for its achievement". He explains—

"By establishing these positive obligations of the State, the members of the Constituent Assembly made it the responsibility of future Indian governments to

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find a middle way between individual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate the powers of all men equally for contributions to the common good."¹⁷

The 42nd and 44th Amendments.

In short, the Directives emphasise, in amplification of the Preamble, that the goal of the Indian polity is not laissez faire, but a welfare State, where the State has a positive duty to ensure to its citizens social and economic justice and dignity of the individual. It would serve as an 'Instrument of Instructions' upon all future governments, irrespective of their party creeds. The socialistic approach has been further emphasised by the 42nd and 44th Amendment Acts, as pointed out earlier.

(ii) Though these Directives are not enforceable by the Courts and if the Government of the day fails to carry out these objects no court can make the Government ensure them, yet these principles have been declared to be fundamental in the governance of the country, and a Government which rests on popular vote can hardly ignore them, while shaping its polity.¹⁴

(iii) Again, while at the time of the drafting of the Constitution, the Directives were considered by many as a surplusage because they were not justiciable, the working of the Constitution during the last few years has demonstrated the utility of the Directives even in the Courts. Thus,

(a) Though the Courts cannot declare a law to be invalid on the ground that it contravenes a Directive Principle, nevertheless the constitutional validity of many laws has been maintained with reference to the Directives so that they do not serve as mere 'moral homily' as Prof. Wheare had anticipated in 1950. For instance, it has been held that when a law is challenged as constituting an invasion of the fundamental right specified in Art. 14 or 19,¹⁰ the Court would uphold the validity of such law if it had been made to implement a Directive, holding that it constituted a 'reasonable classification' for the purpose of Art. 14;¹⁸ a 'reasonable restriction' under Art. 19¹⁹ [or a 'public purpose' within the meaning of Art. 31 (2)].^{10, 20}

The Constitution has since been amended to dispense with the need for judicial interpretation to reach the above conclusion. In 1971, Art. 31C was inserted in the Constitution to provide that a law to implement Art. 39(b)-(c) would be immune from the limitation imposed by Art. 14, 19 or

31. In 1976, this protection was extended to any law to give effect to any of the Directives included in Part IV, by the 42nd Amendment Act. The Supreme Court has, however, resisted that extension.¹¹

(b) Even as regards fundamental rights other than those under Arts. 14, 19 [and 31],¹⁰ though the Directives cannot directly override them, in determining the scope and ambit of the fundamental rights themselves, the Court may not entirely ignore the Directive Principles and should adopt the principle of harmonious construction so as to give effect to both as much as possible.²¹ Again, the Supreme Court has relied upon Art. 39A in determining the duty of the State in making a law under Art. 21, depriving a person of his personal liberty, and held that where a prisoner has a right of

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appeal, the State should provide him a free copy of the judgment and also engage a counsel for him at the cost of the State/^{22 23}

(c) Not only in the matter of determining the constitutional validity of a legislation, but also in its interpretation of statutes, the Court should bear in mind the Directive Principles are not in conflict with but complementary to the Fundamental Rights, and enable the State to impose certain duties upon the citizens, insofar as the Directives are implemented, e.g., in making a law to ensure minimum wages to workers, in accordance with the Directive in Art. 43.²⁴

(d) Though the Directive Principles, as such, are not enforceable by the courts, of late the Supreme Court is issuing directives in proper cases, enjoining the Government to perform their positive duties to achieve the goals envisaged by the Directives.²⁵

(iv) On the other hand, the Constitution itself has been amended, successively (e.g.. First, Fourth, Seventeenth, Twenty-fifth, Forty-second and Forty-fourth Amendments), to modify those 'fundamental rights' by reason of whose existence the State was experiencing difficulty in effecting agrarian, economic and social reforms which are envisaged by the Directive Principles.²⁰

Implementation of the Directives.

It would not be an easy task to survey the progress made by the Governments of the Union and the States in implementing such a large number of Directives over a period of five decades since the promulgation of the Constitution. Nevertheless, a brief reference to some of the outstanding achievements may be made in order to illustrate that the Directives have not been taken by the Government in power as pious homilies, as was supposed by many when they were engrafted in the Constitution.

(a) The greatest progress in carrying out the Directives has taken place as regards the Directive [Art. 39(b)] that the State should secure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. The distribution of largesse of the State is for the common good and to subserve the common good of as many

persons as possible.²⁷ In an agrarian country like India, the main item of material resources is no doubt agricultural. Since the time of the Permanent Settlement this important source of wealth was being largely appropriated by a group of hereditary proprietors and other intermediaries known variously in different parts of the country, such as, zamindars, jagirdars, inamdars, etc., while the actual tillers of the soil were being impoverished by the operation of various economic forces, apart from high rents and exploitation by the intermediaries. The Planning Commission, in its First Plan, therefore, recommended an abolition of these intermediaries so as to bring the tillers of the soil in direct relationship with the State. This reform has, by this time, been carried out almost completely throughout India. Side by side with this, legislation has been undertaken in many of the States for the improvement of the condition of the cultivators as regards security of tenure, fair rents and the like. In order to prevent a concentration of land holdings even among the actual cultivators, legislation has been

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enacted in many of the States, fixing a ceiling, that is to say, a maximum area of land which may be held by an individual owner.

It has already been stated how these reforms have been facilitated by amending the Constitution²⁸ to shield these laws from challenge in the Courts.

(b) A large number of laws have been enacted to implement the directive in Art. 40 to organise village panchayats and endow them with powers of self-government. It is stated that there are 2,26,108 Gram Panchayats, 5736 Intermediate Tiers and 457 Zilla Panchayats in the country.²⁹ Though the constitution and functions of the panchayats vary according to the terms of the different State Acts, generally speaking, the panchayats, elected by the entire adult population in the villages, have been endowed with powers of civic administration such as medical relief, maintenance of village roads, streets, tanks and wells, provision of primary education, sanitation and the like.

Besides civic functions, the panchayats also exercise judicial powers. The judicial wing of a panchayat thus has a civic jurisdiction to try cases of a value not exceeding rupees five hundred, and is also competent to try minor offences punishable with moderate fines. Legal practitioners are excluded from these village tribunals. Though owing to lack of proper education, narrow-mindedness and sectional interests in the rural areas, the system of panchayat administration is still under controversy. After the constitution 73rd and 74th Amendment Acts almost all the States have enacted laws vesting various degrees of powers of self-government in the hands of panchayats.

(c) For the promotion of cottage industries [Art. 43], which is a State subject, the Central Government has established several Boards³⁰ to help the State Governments, in the matter of finance, marketing and the like. These are—All-India Khadi and Village Industries Board; All-India Handicrafts Board; All-India Handloom Board; Small-scale Industries Board; Silk Board; Coir Board. Besides, the National Small Industries Corporation has been set with certain statutory functions, and the Khadi and Village Industries Commission has been set up for the development of the Khadi and village industries.

(d) Legislation for compulsory primary education [Art. 45] has been enacted in most of the States and in three Union Territories.³¹

(e) For raising the standard of living [Art. 47], particularly of the rural population, the Government of India launched its Community Development Project in 1952. Later on Integrated Rural Development Programme (IRDP) (1978-79), National Rural Employment Programme (NREP), Rural Landless Employment Guarantee Programme (RLEGP), Drought Prone Areas Programme (DPAP), Desert Development Programme (DDP) and some other schemes were launched.

(f) Though legislation relating to prohibition of intoxicating drinks and drugs [Art. 47] had taken place in some of the Provinces long before the Constitution came into being, not much of effective work had been done until, in pursuance of the Directive in the Constitution, the Planning

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Commission took up the matter and drew up a comprehensive scheme through its Prohibition Enquiry Committee. Since then prohibition has been introduced in several States in whole or in part.³²

Though paucity of the financial resources of the States is the primary reason for the failure to fully implement this Directive so far, it would be only candid to record that ultimately, failure of the people to imbibe the Gandhian ideal of life is at the back of this failure. The spread of the malady of intoxication amongst the younger generation since independence is, in fact, alarming. It should be pointed out that a fresh impetus was given to the programme of prohibition by the Janata Prime Minister, Mr. Desai, a staunch advocate of the Gandhian philosophy in this matter.

(g) As to the separation of the executive from the judiciary [Art. 50], the slow progress and diverse methods in the various States has been replaced by a uniform system by Union legislation, in the shape of the Criminal Procedure Code, 1973, which has placed the function of judicial trial in the hands of the 'Judicial Magistrates', who are members of the judiciary and are under the complete control of the High Court.³³

Besides the Directives contained in Part IV, there are certain other Directives addressed to the State in other Parts of the Constitution. Those Directives are also non-justiciable. These are—

Directives contained in other Parts of the Constitution.

(a) Art. 350A enjoins every State and every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups.

(b) Art. 351 enjoins the Union to promote the spread of the Hindi language and to develop it so that it may serve as a medium of expression of all the elements of the composite culture of India.

(c) Art. 335 enjoins that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.³⁴

Though the Directives contained Arts. 335, 350A, 351 are not included in Part IV, Courts have given similar attention to them on the application of the principle that all parts of the Constitution should be read together.³⁵

REFERENCES

1. 'State', in this context, has the same meaning as in the Chapter on Fundamental Rights (see under 'Fundamental Rights—a guarantee against State action', ante). This means that not only the Union and State authorities, but also local authorities shall have a moral obligation to follow the Directives, e.g., the promotion of cottage industries, prohibition of consumption of intoxicants or of the slaughter of cows, calves and other milch cattle, improvement of public health and of the level of nutrition of the people.

2. JENNINGS, Some Characteristics of the Indian Constitution, p. 13.

3. A radicalist member of the Supreme Court has already expressed the view that the power to nationalise is implicit in Art. 39(b), if that is necessary to ensure a better 'distribution of the ownership of material resources to subserve the common good [State of Karnataka v. Ranganathan, A. 1978 S.C. 215 (paras 82-83).

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4. Hindustan Standard, Delhi, 17-5-1958, p. 7; see also Second Five Year Plan, p. 22.

5. See, further, Author's Constitutional Law of India (Prentice-Hall of India, 1991), pp. 2-3.

6. The Central Government notified the Legal Services Authority Act, 1987 to bring into force a piece of legislation that would provide free legal aid to the poor and arming the Lok Adalat with the status of a Civil Court.

7. Mere insertion of the word 'socialist' in the Preamble does not introduce Socialism in the collectivist sense, for, according to the canons of interpretation, a Preamble merely serves as a key to the enacting provisions but cannot add to or modify the law as laid down in the enacting provisions of the Constitution.

The Supreme Court has, however, observed that the insertion of the word 'socialist' in the Preamble would enable the Courts "to lean more and more in favour of nationalisation and State ownership of Industry" [Excel Wear v. Union of India, A.I.R. 1979 S.C. 25 (para 24)]. This means that in upholding laws of nationalisation, the Court would liberally interpret the Directives in the light of omission of Arts. 19(1)(f) and 31(2), by the Constitution (42nd Amendment) Act, 1976.

8. Dalmia Cement (Bharal) Ltd. v. Union of India, (1999) 10 S.C.C. 104 (para 21).
9. State of Madras v. Champakam, (1951) S.C.R. 523 {531}.
10. Art. 31 having been repealed, reference thereto has been omitted from Art. 31C, by the 44th Amendment Act, 1978.
11. Minerva Mills v. Union of India, A. 1980 S.C. 1789. The latest view of the Supreme Court is that Part IV and Part III of the Constitution are complementary to each other, one being read in the colour of the other.
12. Ref. on the Kerala Education Bill, 1957, A. 1958 S.C. 956.
13. Jilubhai Nanbhai Khachar v. State of Gujarat, 1995 Supp. (1) S.C.C. 596 (para 47) : A.I.R. 1995 S.C. 142.
14. VII C.A.D. 41, 476 (Dr. AMBEDKAR).
15. JENNINGS, Some Characteristics of the Indian Constitution (1953), pp. 31-33.
16. WHEARE, Modern Constitutions, p. 47.
17. GRANVILLE AUSTIN, The Indian Constitution, pp. 50-52.
18. Orient Weaving Mills v. Union of India, A. 1963 S.C. 98.
19. State of Bombay v. Balsam, A. 1951 S.C. 318; Hanif Quareshi v. State of Bihar, A. 1968 S.C. 731.
20. State of Bihar v. Kameshwar, A. 1952 S.C. 252 (MAHAJAN AND AIYYAR JJ.).
21. Ref. on the Kerala Education Bill, A. 1958 S.C. 956; State of T.N. v. Abu, A. 1984 S.C. 326 (paras 10-11); Bandhua v. Union of India, A. 1984 S.C. 802 (para 10).
22. Hoskot v. State of Maharashtra, A. 1978 S.C. 1548 (para 24).
23. Kishore v. State of I.P., (1991) 1 S.C.C. 286 (paras 12, 13).
24. C.B. Boarding & Lodging v. State of Mysore, A. 1970 S.C. 2042 (para 13).
25. Nakara v. Union of India, A. 1983 S.C. 130 (paras 33-34); Sheela v. State of Maharashtra, A. 1983 S.C. 378 (paras 1, 3); People's Union v. Union of India, A. 1982 S.C. 1473 (para 7); Lingappa v. State of Maharashtra, A. 1985 S.C. 389 (paras 14, 16).
26. Inserting Arts. 31A-31C and the Ninth Schedule in the Constitution.

27. Mahinder Kumar Gupta v. Union of India, (1995) 1 S.C.C. 85 (para 5).
28. India, 1990, p. 452.
29. India, 1990, p. 574ff. [see now the Constitution (72nd Amendment) Act, 1992, Table IV, post].
30. India, 1982, p. 47.
31. Ibid, pp. 94ff.
32. Ibid., p. 120.
33. Vide Author's Code of Criminal Procedure (Prentice-Hall of India, 1992), pp. 3, 28.
34. Balaji v. State of Mysore, A. 1963 S.C. 649 (664); Devadasan v. Union of India, A. 1964 S.C.179(188).
35. See, further, Author's Constitutional Law of India (1991), pp. 398; Dalavi v. State of T.N., A. 1976 S.C. 1559 (paras 4, 6).

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CHAPTER 10 PROCEDURE FOR AMENDMENT

Nature of the amending process.

THE nature of the amending process envisaged by the makers of our Constitution can be best explained by referring to the observation of Pandit Nehru (quoted under 'Reconciliation of a written Constitution with Parliamentary Sovereignty', ante), that the Constitution should not be so rigid that it cannot be adapted to the changing needs of national development and strength.

There was also a political significance in adopting a 'facile procedure' for amendment, namely, that any popular demand for changing the political system should be capable of realisation, if it assumed a considerable volume. In the words of Dr. Ambedkar, explaining the proposals for amendment introduced by him in the Constituent Assembly.¹

"Those who are dissatisfied with the Constitution have only to obtain in two-thirds majority, and if they cannot obtain even a two-thirds majority in the Parliament elected on adult franchise in their favour, their dissatisfaction with the Constitution cannot be deemed to be shared by the general public."¹

Elements of flexibility were therefore imported into a Federal Constitution which is inherently rigid in its nature. According to the traditional theory of federalism, either the process of amendment of the Constitution is entrusted to a body other than the ordinary Legislature or a special procedure is prescribed for such amendment in order to ensure that the federal compact

may not be disturbed at the will of one of the parties of the federation, viz., the federal legislature.

But, as has been explained at the outset, the framers of our Constitution were also inspired by the need for the sovereignty of the Parliament elected by universal suffrage to enable it to achieve a dynamic national progress. They, therefore, prescribed an easier mode for changing those provisions of the Constitution which did not primarily affect the federal system. This was done in two ways—

(a) By providing that the alteration of certain provisions of the Constitution were 'not to be deemed to be amendment of the Constitution'. The result is that such provisions can be altered by the Union Parliament in the ordinary process of legislation, that is, by a simple majority.

Procedure for Amendment.

(b) Other provisions of the Constitution can be changed only by the process of 'amendment' which is prescribed in Art. 368. But a differentiation has been

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again made in the procedure for amendment, according to the nature of the provisions sought to be amended.

While in all cases of amendment of the Constitution, a Bill has to be passed by the Union Parliament by a special majority, in the case of certain provisions which affect the federal structure, a further step is required, viz., a ratification by the Legislature of at least half of the States, before the Bill is presented to the President for his assent [Art. 368]. But even in these latter group of cases, the law which eventually effects the amendment is a law made by Parliament, which is the ordinary legislative organ of the Union. There is thus no separate constituent body provided for by our Constitution for the amending process. The procedure for amendment is—

I. An amendment of the Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority [i.e., more than 50%) 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, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.

II. If, however, such amendment seeks to make any change in the following provisions, namely,—

(a) The manner of election of the President [Arts. 54, 55]; (b) Extent of the executive power of the Union and the States [Arts. 73, 162]; (c) The Supreme Court and the High Courts [Art. 241, Chap. IV of Part V, Chap. V of Part VI]; (d) Distribution of legislative power between the Union

and the States [Chap. I of Part XI]; (e) Any of the lists in the 7th Schedule; (f) Representation of the States in Parliament [Arts. 80-81, 4th Schedule]; (g) Provisions of Art. 368 itself,—

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent² [Art. 368(2)].

General features of the Amending Procedure.

It is clear from the above that the amending process prescribed by our Constitution has certain distinctive features as compared with the corresponding provisions in the Procedure leading Constitutions of the world. The procedure for amendment must be classed as 'rigid' insofar as it requires a special majority and, in some cases, a special procedure for Amendment as compared with the procedure prescribed for ordinary legislation. But the procedure is not as complicated or difficult as in the U.S.A. or in any other rigid Constitution:

(a) Subject to the special procedure laid down in Art. 368, our Constitution vests constituent power upon the ordinary legislature of the Union, i.e., the Parliament (of course, acting by a special majority), and there is no separate body for amending the Constitution, as exists in some other Constitutions (e.g., a Constitutional Convention).

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(b) The State Legislatures cannot initiate any Bill or proposal for amendment of the Constitution. The only mode of initiating a proposal for amendment is to introduce a Bill in either House of the Union Parliament.

(c) Subject to the provisions of Art. 368, Constitution Amendment Bills are to be passed by the Parliament in the same way as ordinary Bills.³ In other words, they may be initiated in either House, and may be amended like other Bills, subject to the majority required by Art. 368. But for the special majority prescribed, they must be passed by both the Houses, like any other Bill.

No Joint-Session for Constitution Amending Bills.

It would be pointed out, in this context, that there is another important point on which the passage of a Constitution Amendment Bill differs from the procedure relating to the Amending Bills passage of a Bill for ordinary legislation: Art. 108 provides that if there is a disagreement between the two Houses of Parliament regarding the passage of a Bill, the deadlock may be solved by a joint session of the two Houses. But it is clear from Art. 108(1), that the procedure for joint session is applicable only to Bills for ordinary legislation which come under Chap. 2 of Part V of the Constitution, and not to Bills for amendment of the Constitution, which are governed by the self-contained procedure contained in Art. 368(2). The requirement of a special majority in both Houses, in Art. 368(2) would have been nugatory had the provision as to joint session been available in this sphere.

(d) The previous sanction of the President is not required for introducing in Parliament any Bill for amendment of the Constitution.

(e) The requirement relating to ratification by the State Legislatures is more liberal than the corresponding provisions in the American Constitution. While the latter requires ratification by not less than three-fourths of the States, under our Constitution ratification by not less than half of them suffices.

(f) In the case of an ordinary Bill, governed by Art. 111, when the Bill, after being passed by both Houses of Parliament, is presented to the President, he may, instead of assenting to it, declare that he 'withholds assent there from'. In the latter case, the Bill cannot become an 'Act'. But the amendment of Art. 368 in 1971 has made it obligatory for the President to give his assent to a Bill for amendment of the Constitution, when it is presented to him after its passage by the Legislature.

President Bound to give assent.

In short, though the formality of the President's assent has been retained in the case of an amendment of the Constitution, in order to signify the date when the amendment Bill becomes operative as a part of the Constitution, the President's power to veto a Bill for amendment of the Constitution has been taken away, by substituting the words "shall give his assent" in Cl. (2) of the Art. 368, as it stands after the Constitution (24th Amendment) Act, 1971.

There has been a historical controversy as to whether an amendment of the Constitution, made in the manner provided for under Art. 368, must

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have to conform to the requirements of Art. 13(2), as a 'law' as defined in Cl. (3) of Art. 13; or, in other words, whether a Constitution Amendment Act would be void if it seeks to take away or is inconsistent with a fundamental right enumerated in Part III of the Constitution.

Is Part III or any other part of the Constitution unamendable:

A. Until the case of *Golak Nath*,* the Supreme Court had been holding that no part of our Constitution was unamendable and that Parliament might, by passing a Constitution Amendment Act, in compliance with the unamendable? requirements of Art. 368, amend any provision of the Constitution, including the Fundamental Rights and Art. 368 itself.³ It was held³ that 'law' in Art. 13 (2) referred to ordinary legislation made by Parliament as a legislative body and would not include an amendment of the Constitution which was passed by the Parliament in its constituent capacity.

B. But, in *Golak Nath's* case,⁴ a majority of six Judges in a special Bench of eleven overruled the previous decisions³ and took the view that though there is no express exception from the ambit of Art. 368, the Fundamental Rights included in Part III of the Constitution cannot, by their very nature, be subject to the process of amendment provided for in Art. 368 and that if any of such

Rights is to be amended, a new Constituent Assembly must be convened for making a new Constitution or radically changing it.

Golak Nath.

The majority, in Golak Nath's case,⁴ rested its conclusion on the view that the power to amend the Constitution was also a legislative power conferred by Art. 245 by the Constitution, so that a Constitution Amendment Act was also a 'law' within the purview of Art. 13(2).

Keshavananda.

C. After the Golak Nath⁴ decision, Parliament sought to supersede it by amending Art. 368 itself, by the Constitution (24th Amendment) Act, 1971, as a result of which an amendment of the Constitution passed in accordance with Art. 368, will not be 'law' within the meaning of Art. 13 and the validity of a Constitution Amendment Act shall not be open to question on the ground that it takes away or affects a fundamental right [Art. 368(3)]. Even after this specific amendment of the Constitution, the controversy before the Supreme Court did not cease because the validity of the 24th Constitution Amendment Act itself was challenged in a case from Kerala (Keshavananda v. State of Kerala⁵), which was heard by a Full Bench of 13 Judges. The majority of the Full Court upheld the validity of the 24th Amendment and overruled the case of Golak Nath.⁴

The question has thus been settled in favour of the view that a Constitution Amendment Act, passed by Parliament, is not 'law' within the meaning of Art. 13. The majority, in Keshavananda's case,⁵ upheld the validity of Cl. (4) of Art. 13 [and a corresponding provision in Art. 368(3)], which had been inserted by the Constitution (24th Amendment) Act, 1971, and reads as follows:

"Nothing in this article [i.e., article 13], shall apply to any amendment made under article 368."

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Fundamental Rights amendable.

In the result, fundamental rights in India can be amended by an Act passed under Art. 368, and the validity of a Constitution Amending Act cannot be questioned on the ground that that Act invades or encroaches upon any Fundamental Right.

D. Another question which has been mooted since the case of Golak Nath⁴ is, whether, outside Part III (Fundamental Rights), there is any other provision of the Constitution of India which is immune from the process of amendment in Art. 368. Though the majority in Keshavananda's case⁵ has overturned the majority view in Golak Nath⁴ that Fundamental Rights cannot be amended under Art. 368, it has affirmed another proposition asserted by the majority in Golak Nath's case,⁴ namely, that—

'Basic Features' of the Constitution not amendable.

(i) There are certain basic features of the Constitution of India, which cannot be altered in exercise of the power to amend it, under Art. 368. If, therefore, a Constitution Amendment Act seeks to alter the basic structure or framework of the Constitution, the Court would be entitled to annul it on the ground of ultra vires, because the word 'amend', in Art. 368, means only changes other than altering the very structure of the Constitution, which would be tantamount to making a new Constitution.⁶

(ii) These basic features, without being exhaustive, are—sovereignty and territorial integrity of India, the federal system, judicial review, Parliamentary system of government.

(iii) Applying this doctrine that judicial review is a basic feature of the Constitution of India, the majority in *Keshavananda*⁵ held the second part of s. 3 of the Constitution (25th Amendment) Act, 1971, relating to Art. 31C, as invalid. The portion so invalidated read—

"and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy".

Article 31C, which was introduced by s. 3 of the 25th Amendment Act, provided—(a) that if any law seeks to implement the Directive Principle contained in Art. 39(b)-(c) i.e., regarding socialistic control and distribution of the material resources of the country, such law shall not be void on the ground of contravention of Art. 14 or 19; (b) it further provided that if anybody challenges the constitutionality of any such law, the Court would be precluded from entering even into the preliminary question, namely, whether such law is, in fact, a law, 'giving effect to' Art. 39(b) or (c), if on the face of the Act, there was a declaration of the Legislature that it is for giving effect to such Directive policy. In other words, by adding a declaration to an Act, the Legislature was empowered by the 25th Constitution Amendment Act, to deprive the Courts of their power to determine the validity of the Act on the ground that it contravened some provision of the Constitution. The majority held that Art. 368 did not confer any such power to take away judicial review, in the name of 'amending' the Constitution.⁵

The foregoing view of the majority in *Keshavananda's* case⁵ as to 'basic features' is debatable inasmuch as there is no express limitation upon the

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amending power conferred by Art. 368(1). If it is supposed that there are some implied limitations, it is difficult to appreciate how the Court, after holding that the Fundamental Rights did not constitute such inviolable part of the Constitution, could come to the conclusion that judicial review, which is an adjunct of Fundamental Rights, could be so considered. It would, therefore, be no wonder if another Full Bench of the Supreme Court comes to overturn this view in *Keshavananda's* case,⁵ on the grounds—

(i) that Art. 368(1), as it stands amended in 1971, makes it clear that not only the procedure, but also the 'power' to amend the Constitution is conferred by Art. 368 itself and cannot be derived from somewhere else, such as Art. 245. Hence, the limitations, if any, upon the amending power must be found from Art. 368 itself and not from any theory of implied limitation;

(ii) that the word 'repeal' in Art. 368(1) also makes it clear that 'amendment', under Art. 368, includes a repeal of any of its provisions, including any supposed 'basic' or 'essential' provision;

(iii) that the Constitution of India makes no distinction between 'amendment' and 'total revision', as do some other Constitutions, such as the Swiss. Hence, there is no bar to change the whole Constitution, in exercise of the amending power, which is described as the 'constituent power' [Art. 368(1)] and that, accordingly, it would not be necessary to convene a Constituent Assembly to revise the Constitution in toto.

The 42nd Amendment.

The Indira Government sought to arrest these implications of Keshavananda,⁵ and cut the fetters sought to be imposed on

the sovereignty of Parliament (as a constituent body), by inserting two Cls. (4)-(5) in Art. 368, by the 42nd Amendment Act, 1976." Clause (5) declares that "there shall be no limitation" "on the constituent power of Parliament to amend" the provisions of this Constitution and that at any rate, the validity of no Constitution Amendment Act "shall be called in question in any court on any ground" [Cl. (4)].

The foregoing attempt to preclude judicial review of Constitution Amending Acts has, however, been nullified by the Supreme Court, by striking down Cls. (4)-(5) as inserted in Art. 368 by the 42nd Amendment Act, by its decision in the *Minerva Mills* case,⁷ on the ground that judicial review is a 'basic feature' of the Indian Constitutional system which cannot be taken away even by amending the Constitution.

So far, the decision in Keshavananda⁵ has been followed in subsequent cases by the Supreme Court. As a result, Art. 368, as so interpreted by the highest Court, would lead to the following propositions:

(i) Any part of the Constitution may be amended after complying with the procedure laid down in Art. 368.

Art. 368 as interpreted by the Supreme Court.

(ii) No referendum or reference to Constituent Assembly would be required to amend any provision of the Constitution.

(iii) But no provision of the constitution or any part thereof can be amended if it takes away or destroys any of the 'basic features' of the Constitution. Thus, apart from the procedural limitation expressly laid down in Art. 368, substantive limitation founded on the doctrine of 'basic features', has been introduced into our Constitution, by judicial innovation.

List of basic features

The Supreme Court has refused to foreclose its list of basic features'. From the various decisions so far, the following list may be drawn up⁸:

- (a) Supremacy of the Constitution.
- (b) Rule of law.
- (c) The principle of Separation of Powers.
- (d) The objectives specified in the Preamble to the Constitution.
- (e) Judicial review; Arts. 32 and 226.
- (f) Federalism.
- (g) Secularism.
- (h) The sovereign, democratic, republican structure.
- (i) Freedom and dignity of the individual,
- (j) Unity and integrity of the Nation.
- (k) The principle of equality, not every feature of equality, but the quintessence of equal justice.
- (l) The 'essence' of other Fundamental Rights in Part III.
- (m) The concept of social and economic justice—to build a welfare State; Part IV in toto.
- (n) The balance between Fundamental Rights and Directive Principles.
- (o) The Parliamentary system of government.
- (p) The principle of free and fair elections.
- (q) Limitations upon the amending power conferred by Art. 368.
- (r) Independence of the Judiciary.
- (s) Effective access to justice.
- (t) Powers of the Supreme Court under Arts. 32, 136, 141, 142.
- (u) Legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act.⁹

A History of Amendments of the constitution Since 1950

Since its commencement on January 26, 1950, Constitution of India has been amended 53 times till December 2000 by passing Acts of Parliament in the manner prescribed by Art. 368 [see Table IV, post].¹⁰ Since all these Amendment Acts have been mentioned, with full particulars, in Table IV, post, it is needless to reproduce them in the present Chapter.

The 42nd Amendments

Nevertheless, the 42nd, 43rd and the 44th Amendments must be given a fuller treatment in view of its serious repercussions in the political as well as the legal world. All previous amendments paled into insignificance after the passing of the 42nd Amendment Act, 1976, which alone would illustrate how momentous is the amending power under the Indian Constitution, and how

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easy it is to change extensive and vital provisions of the Constitution, without any elaborate formalities, when the ruling Party has a comfortable majority in the two Houses of Parliament.¹⁰

The 42nd Amendment Act was practically a 'revision' of the Constitution, for the following reasons:

- (i) In extent, it introduced changes in the Preamble, as many as 53 Articles, as well as the 7th Schedule.
- (ii) As to substantive changes, it sought to change the vital principles underlying the 1949-Constitution:¹¹

I. Judicial Review of ordinary laws. It made, for the first time, a distinction between Union and State laws, for the purpose of challenging their constitutionality on the ground of contravention of any provision of the Constitution and provided, broadly, (a) that a High Court could not pronounce invalid any Central law, including subordinate legislation under such law, on the ground of unconstitutionality; (b) that the Supreme Court could not, in its jurisdiction under Art. 32, pronounce a State law as unconstitutional, unless a Central law had also been challenged in such proceeding. If any law was made to implement any of the directives included in Part IV [Art. 31C] or in exercise of the new power under Art. 31D to ban anti-national activities or associations the validity of such law could not be challenged on the ground of contravention of Arts. 14, 19, 31. Above all, an artificial majority of Judges was required both in the Supreme Court and the High Courts, in order to pronounce a law to be unconstitutional and invalid.

II. Judicial Review of Constitution Amendment Acts. By amending Art. 368, it was provided that a law, which is described as a Constitution Amendment Act, would be completely immune from challenge in a Court of law, whether on a procedural or substantive ground. Thus, even if such a Bill had not been passed in conformity with the procedure laid down in Art. 368 itself, nobody would be entitled to challenge it in any Court on that ground,—a position which is juristically absurd.

III. Fundamental Duties. For the first time, a Chapter on Fundamental Duties [Art. 51A] was introduced in order to counteract the sweep of Fundamental Rights. Even though no sanction has been appended to these Duties, it is obvious that if a Court takes these Duties into consideration along with fundamental rights, the scope of the free play of the rights would, to that extent, be narrowed down.

IV. Fundamental Rights devalued. By expanding the scope of Art. 31C, it was provided that if any law seeks to implement any of the Directive Principles included in Part IV, such law would be altogether immune from judicial review on the ground of contravention of Fundamental Rights. This is exactly the reverse of what was provided in the 1949-Constitution. The load on Fundamental Rights, in short, became ruthlessly heavy after the cumulative burden of Arts. 31A, 31B, 31C, 31D, 51A.

The 43rd and 44th amendments.

When the Janata Party came to power towards the end of March, 1977, they sought to take early steps to fulfil their election pledge to undo the extensive mischief which had been done to Constitution by the 42nd

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Amendment Act, as outlined above. But owing to the fact that the Janata had no majority,—not to speak of a 2/3 majority,—in the Rajya Sabha, which was required to pass a Constitution Amending Bill under Art. 368,¹⁰ their attempts in this behalf were chequered and only partially successful. The first step was abortive, namely, that the 43rd Amendment Bill which was introduced in the Lok Sabha in April, 1977, had to be left over till the next Session, hoping to gain some more seats in the Rajya Sabha at the periodical election to be held to that House in the meantime. Eventually, the 43rd Amendment Act, 1977 was passed with the aid of the votes of Congress(O).¹⁰ The attitude of that Party, however, changed, when the next Bill (viz., the 45th) was taken to the Rajya Sabha in 1978,¹⁰ as a result of which this Bill was enacted, only in a truncated shape, as the 44th Amendment Act, 1978.

The changes made by the 43rd and the 44th Amendment Acts are summarised in Table TV, post. Briefly speaking,—

(i) The 43rd Amendment Act, 1977, simply repealed those provisions which had been added by the 42nd Amendment Act to curb judicial review, e.g., Arts. 31D, 32A, 144A, 226A, 228A.

(ii) The changes made by the 44th Amendment Act are more extensive:

(a) It not only omitted some more of the Articles which had been inserted by the 42nd, e.g., Arts. 257A, 329A; but also made amendments in other Articles in order to restore those provisions to their ante-1976 text, e.g., Art. 226.

(b) Apart from combating the mischiefs introduced by the 42nd Amendment, the 44th Amendment Act introduced additional changes, e.g., by omitting the fundamental right to property in Art. 19(1)(f) and Art. 31(2).

(c) Since Janata failed to secure the passage of a number of clauses of the 45th Amending Bill, the stamp of the 42nd Amendment on various provisions, such as Art. 368, still remains. Besides, the Janata Government have themselves retained some of the provisions as amended by the 42nd Amendment, which they considered to be beneficial, e.g., Art. 74(1); Art. 311.

The 73rd and 74th Amendments.

Of the subsequent amendments, the 73rd and 74th Amendment Act of deserve special mention inasmuch as it has introduced the electoral system for the composition of the units of local government below the States, viz., the Panchayats in the rural areas, and the Municipalities in the urban areas.

Dangers of frequent Amendments

It is evident that, instead of being rigid,¹⁰ as some critics supposed during the early days of the Constitution,¹² the procedure for amendment has rather proved to be too flexible in view of the ease with which as many as 83 amendments have been made during the first 50 years of the working of the Constitution. So long as the Party in power at the Centre has a solid majority in Parliament and in more than half of the State Legislatures, the apprehension of impartial observers should be not as to the difficulty of amendment but as to the possibility of its being used too often either to achieve political purposes or to get rid of judicial decisions¹³ which may appear to be unwholesome to the party in power. Judges may, of course, err

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but, as has already been demonstrated, even the highest tribunal is likely to change its views in the light of further experience.¹⁴ In the absence of serious repercussions or emergent circumstances or a special contingency (e.g., to admit Sikkim—by the 35th and 36th Amendments), therefore, the process of constitutional amendment should not be resorted to for the purpose of overriding unwelcome judicial verdicts so often as would generate in the minds of the lay public an irreverence for the Judiciary,—thus shaking the very foundation of constitutional government.

REFERENCES

1. C.A.D., dated 25-11-1949, pp. 225-26.
2. See Table IV for instances where such ratification has been obtained for amending the Constitution.
3. Shankari Prasad v. Union of India, A. 1951 S.C. 458; Sajjan v. State of Rajasthan, A. 1965 S.C. 845.

4. Golak Nath v. State of Punjab, A. 1967 S.C. 1643.
5. Keshavananda v. State of Kerala, A. 1973 S.C. 1461 (F.B.).
6. See Author's Constitutional Law of India (Prentice-Hall of India, 1991), pp. 42.5-26. [The observations to the contrary in Sanjeev Coke Co. v. Bharat Coal Ltd., A. 1983 S.C. 239 (para. 13) do not suffice to over turn either Keshavananda or Minerva Mills.]
7. Minerva Mills v. Union of India, A. 1980 S.C. 1789. Clauses (4) and (5), inserted into Art. 368 by the Constitution (42nd Amendment) Act, 1976, have been declared invalid by the Supreme Court Constitution Bench, on the ground that these clauses which removed all limitations upon the power of Parliament to amend the Constitution and precluded judicial review of a Constitution Amendment Act, on any ground, sought to destroy an 'essential feature' or 'basic structure' of the Constitution.
8. See Author's Shorter Constitution of India, 12th Ed., Prentice-Hall of India, pp. 1144-45.
9. G.C. Kanungo v. State of Orissa, (1995) 5 S.C.C. 96 (para 28) : A.I.R. 1995 S.C. 1655.
10. The question of rigidity or flexibility of the procedure for amendment prescribed by Art. 368 was so long clouded by the fact that the Congress Party had a monolithic control over the Legislatures both at the Union and in the States. It was this extraordinary fact that enabled them to overcome the double majority safeguard in Art. 368(2), and to bring 83 amendments in 50 years. The rigidity of the double majority requirement has, on the other hand, been demonstrated by the difficulties which the Janata Government (1977-78) had to face to obtain the passage of an amendment bill to do away with the undemocratic features of the 42nd Amendment, on which they had the support of the consensus of enlightened public opinion. It is to be noted that—
 - (a) Art. 368(2) requires that, a Constitution Amendment Bill must be passed by the double majority in each House of Parliament, so that if the Janata Government failed to obtain that majority in the Rajya Sabha, it could not resort to a 'joint sitting' of both Houses, as prescribed by Art. 108 in the case of ordinary legislation.
 - (b) The requirement of double majority may be illustrated with the strength of the Janata Party in the Rajya Sabha in September, 1977. The Rajya Sabha having a total membership of 250 members (roughly),—under the first part of Art. 368(2), a Constitution Amendment Bill could be passed only if at least 126 members voted for it. But since the Janata Party had a following of 41 only (roughly) in the Rajya Sabha, they could not rely on their own strength, in obtaining a passage of such Bill.

The second part of Art. 368(2) is no less, perhaps more, rigorous. It requires that 2/3 of the members who are present on the date of voting on the Constitution Amendment Bill and actually tender their vote, must vote in favour of the Bill. If so, the Bill could be passed only if 168 members voted in its favour; and that was too much for the Janata Party commanding only 41 members of their own.

That is why the fate of the amendment Bill proposed by the Janata depended on the pleasure of the Congress Party. In order to avoid opposition from the Congress (O), the Janata Government, therefore, divided their proposals into two Bills. In the first instance, the less controversial proposals were included in the Bill which was passed in 1977 as the 43rd Amendment Act. The next Bill (45th Bill, which became the 44th Amendment Act,

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1978), met with stiffer resistance because Congress(O) now joined hands with Congress(I) to sabotage the more vital parts of this latter Bill,—thus defeating, for instance, the Clause which sought to amend Art. 368 itself,—to introduce referendum.

The same difficulty fated Mrs. Gandhi after her return to power in January, 1980. She failed to make any substantial amendment to the Constitution before 1984 as she could not command the required majority in the Rajya Sabha [Statesman, 4-11-1982, p. 1],

The Congress(I) Governments' two Bills (64th and 65th Amendment Bills, 1989) to amend the Constitution to insert provisions regarding Nagarpalika and Panchayats fell through in the Rajya Sabha on 13-10-1989, being just two votes short of the required majority. The Lok Sabha had passed them on 10-8-1989.

The Constitution (64th Amendment) Bill, 1990, relating to amendment of Art. 356 in relation to Punjab, was passed by Rajya Sabha on 28-3-1990.

In Lok Sabha (30th March, 1990) on the motion for consideration of the Bill only 236 votes were in favour (5 against). The motion was declared as not carried for want of required majority (majority of the total membership of the House). A fresh Bill had to be brought for passing the amendment.

The procedure prescribed by Art. 368(2), per se, cannot therefore be described as flexible.

11. For a fuller treatment, see Author's Constitutional Amendment Acts, with a Critical Survey of the 42nd Constitution Amendment Act, 1976 (pp. 99-134).

12. Cf. JENNINGS, Some Characteristics of the Indian Constitution, pp. 9-10.

13. Cf. RAMASWAMI AIYAR'S Foreword to KRISHNASWAMI AIYAR'S Constitution and Fundamental Rights, p. ix.

14. Thus, in *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603, the Supreme Court overruled its previous majority decision in *State of Bombay v. United Motors*, (1953) S.C.R. 1069, as regards the power of a State in which goods are delivered for consumption to tax the sale or purchase of such goods though it is in the course of inter-State trade or commerce. It was observed in this case that there was no provision in the Constitution to bind the Supreme Court by its own decisions.

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PART II Government of the Union

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CHAPTER 11 THE UNION EXECUTIVE

1. The President and the Vice-President.

Election of President.

At the head of the Union Executive stands the President of India. The President of India is elected¹ by indirect election, that is, by an electoral college, in accordance with the system of proportional representation by means of the single transferable vote.²

The electoral college³ shall consist of—

(a) The elected members of both Houses of Parliament; (b) the elected members of the Legislative Assemblies of the States; and (c) the elected members of the Legislative Assemblies of Union Territories of Delhi and Pondicherry [Art. 54].

As far as practicable, there shall be uniformity of representation of the different States at the election, according to the population and the total number of elected members of the Legislative Assembly of each State, and parity shall also be maintained between the States as a whole and the Union [Art. 55]. This second condition seeks to ensure that the votes of the States, in the aggregate, in the electoral college for the election of the President, shall be equal to that of the people of the country as a whole. In this way, the President shall be a representative of the nation as well as a representative of the people in the different States. It also gives recognition to the status of the States in the federal system.

The system of indirect election was criticised by some as falling short of the democratic ideal underlying universal franchise, but indirect election was supported by the framers of the Constitution, on the following grounds—

Qualifications for election as President.

(i) Direct election by an electorate of some 510 millions of people would mean a tremendous loss of time, energy and money. (ii) Under the system of responsible Government introduced by the Constitution, real power would vest in the ministry; so, it would be anomalous to elect the President directly by the people without giving him real powers.⁴

In order to be qualified for election as President, a person must—

(a) be a citizen of India;

- (b) have completed the age of thirty-five years;
- (c) be qualified for election as a member of the House of the People; and

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(d) must not hold 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 Government [Art. 58].

But a sitting President or Vice-President of the Union or the Governor of any State or a Minister either for the Union or for any State is not disqualified for election as President [Art. 58].

Term of Office of President

The President's term of office is five years from the date on which he enters upon his office; but he is eligible for re-election⁵ [Arts. 56-57].

The President's office may terminate within the term of five years in either of two ways—

- (i) By resignation in writing under his hand addressed to the Vice-President of India,
- (ii) By removal for violation of the Constitution, by the process of impeachment [Art. 56]. The only ground for impeachment specified in Art. 61(1) is 'violation of the Constitution'.

An impeachment is a quasi-judicial procedure in Parliament. Either

Procedure for impeachment of the President

House may prefer the charge of violation of the Constitution before the other House which shall then either investigate the charge itself or cause the charge to be investigated.

But the charge cannot be preferred by a House unless—

- (a) a resolution containing the proposal is moved after a 14 days' notice in writing signed by not less than 1/4 of the total number of members of that House; and
- (b) the resolution is then passed by a majority of not less than 2/3 of the total membership of the House.

The President shall have a right to appear and to be represented at such investigation. If, as a result of the investigation, a resolution is passed by not less than 2/3 of the total membership of the House before which the charge has been preferred declaring that the charge has been sustained, such resolution shall have the effect of removing the President from his office with effect from the date on which such resolution is passed [Art. 61].

Since the Constitution provides the mode and ground for removing the President, he cannot be removed otherwise than by impeachment, in accordance with the terms of Arts. 56 and 61.

Conditions of President's Office

The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President. The president shall not hold any other office of profit [Art. 59(1)].

Emoluments and allowances of President.

The President shall be entitled without payment of rent to the use of his official residence and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law (and until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule of the Constitution).⁶ By passing the President's Emoluments and Pension (Amendment) Act, 1998, Parliament has raised the emoluments to Rs. 50,000/- per mensem. The emoluments and allowances of the President shall not be diminished during his term of office [Art. 59(3)].

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The Amendment Act, 1998 referred to above also provides for the payment of an annual pension of Rs. 3,00,000 to a person who held office as President, on the expiration of his term or on resignation, provided he is not re-elected to the office.

Vacancy in the Office of President.

A vacancy in the office of the President may be caused in any of the following ways—

- (I) On the expiry of his term of five years.
 - (ii) By his death.
 - (iii) By his resignation.
 - (iv) On his removal by impeachment.
 - (v) Otherwise, e.g., on the setting aside of his election as President [Art. 65(1)].
- (a) When the vacancy is going to be caused by the expiration of the term of the sitting President, an election to fill the vacancy must be completed before the expiration of the term [Art. 62(1)]. But in order to prevent an 'interregnum', owing to any possible delay in such completion, it is provided that the outgoing President must continue to hold office, notwithstanding that his term

has expired, until his successor enters upon his office [Art. 56(1)(c)]. (There is no scope for the Vice-President getting a chance to act as President in this case.)

(b) In case of a vacancy arising by reason of any cause other than the expiry of the term of the incumbent in office, an election to fill the vacancy must be held as soon as possible after, and in no case later than, six months from the date of occurrence of the vacancy.

Immediately after such vacancy arises, say, by the death of the President, and until a new President is elected, as above, it is the Vice-President who shall act as President [Art. 65(1)]. It is needless to point out that the new President who is elected shall be entitled to the full term of five years from the date he enters upon his office.

(c) Apart from a permanent vacancy, the President may be temporarily unable to discharge his functions, owing to his absence from India, illness or any other cause, in which case the Vice-President shall discharge his functions until the date on which the President resumes his duties [Art. 65(2)].

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Election of Vice- President

The election¹ of the Vice-President, like that of the President, shall be indirect and in accordance with the system of proportional representation by means of the single transferable vote. But his election shall be different from that of the President inasmuch as the State Legislatures shall have no part in it. The Vice-President shall be elected by an electoral college consisting of the members of both Houses Parliament⁷ [Art. 66(1)].

Qualifications for election for vice president

As in the case of the President, in order to be qualified to be elected as Vice-President, a person must be (a) a citizen of India; (b) over 35 years of age; and (c) must not hold an office of profit save that of President, Vice-President, Governor or Minister for the Union or State [Art. 66].

But while in order to be a President, a person must be qualified for election as a member of the House of the People, in order to be Vice-President, he must be qualified for election as a member of the Council of States. The reason for this difference is obvious, namely, that the Vice-President is normally to act as the Chairman of the Council of States.

Whether a member of legislature may become president

There is no bar to a member of the Union or State Legislature being elected President or Vice-President, but the two offices combined in one person. In case a member Legislature may of the Legislature is elected President or Vice-President President, he shall be deemed to have vacated his seat or Vice-President. in that House of the Legislature to which he belongs on the date on which he enters upon his office as President or Vice-President [Arts. 59(1); 66(2)].

Term of office of vice president

The term of office of the Vice-President is five years. His office may terminate earlier than the fixed term either by resignation or by removal. A formal impeachment is not required for his removal. He may be removed by a resolution of the Council of States passed by a majority of its members and agreed to by the House of People [Art. 67, Prov. (b)].

Though there is no specific provision (corresponding to Art. 57) making a Vice-President eligible for re-election, the Explanation to Art. 66 suggests that a sitting Vice-President is eligible for re-election and Dr. S. Radhakrishnan was, in fact, elected for a second term in 1957.

Functions of the Vice-President.

The Vice-President is the highest dignitary of India, coming next after the President [see Table IX]. No functions are, however, attached to the office of the Vice-President as such. The normal function of the Vice-President is to act as the ex-officio chairman of the Council of States. But if there occurs any vacancy in the office of the President by reason of his death, resignation, removal or otherwise, the Vice-President shall act as President until a new President is elected and enters upon his office [Art. 65(1)].

The Vice-President shall discharge the functions of the President during the temporary absence of the President, illness or any other cause by reason of which he is unable to discharge his functions [Art. 65(2)]. No machinery having been prescribed by the Constitution to determine when the President is unable to

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discharge his duties owing to absence from India or a like cause, it becomes a somewhat delicate matter as to who should move in the matter on any particular occasion. It is to be noted that this provision of the Constitution has not been put into use prior to 20th June, 1960, though President, Dr. Rajendra Prasad had been absent from India for a considerable period during his foreign tour in the year 1958. It was during the 15-day visit of Dr. Rajendra Prasad to the Soviet Union in June 1960, that for the first time, the Vice-President, Dr. Radhakrishnan was given the opportunity of acting as the President owing to the 'inability' of the President to discharge his duties.

The second occasion took place in May, 1961, when President Rajendra Prasad became seriously ill and incapable of discharging his functions. After a few days of crisis, the President himself suggested that the Vice-President should discharge the functions of the President until he resumed his duties. It appears that the power to determine when the President is unable to discharge his duties or when he should resume his duties has been understood to belong to the President himself. In the event of occurrence of vacancy in the office of both the President and the Vice-President by reason of death, resignation, removal etc. the Chief Justice of India or in his absence the senior most Judge of the Supreme Court available shall discharge the functions until a new President is elected. In 1969 when on the death of Dr. Zakir Hussain, the Vice-

President Shri V. V. Giri resigned, the Chief Justice Shri HIDEYATULLAH discharged the functions from 20-7-1969.

Emoluments.

When the Vice-President acts as, or discharges the functions of the President, he gets the emolument of the President; otherwise; he gets the salary of the chairman of the Council of States.⁸

When the Vice-President thus acts as, or discharges the functions of the President he shall cease to perform the duties of the Chairman of the Council of States and then the Deputy Chairman of the Council of States shall act as its Chairman [Art. 91].

Doubts and disputes relating to or connected with the election of a President or Vice President

Determination of doubts and disputes relating to the election of a President or Vice President is dealt to or connected with in Art. 71, as follows—

- (a) Such disputes shall be decided by the Supreme Court whose jurisdiction shall be exclusive and final.
- (b) No such dispute can be raised on the ground of any vacancy in the electoral college which elected the President or Vice-President.
- (c) If the election of a President or Vice-President is declared void by the Supreme Court, acts done by him prior to the date of such decision of the Supreme Court shall not be invalidated.
- (d) Barring the decision of such disputes, other matters relating to the election of President or Vice-President may be regulated by law made by Parliament.

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2. Powers and duties of the President.

Nature of the powers of the president

The Constitution says that the "executive power of the Union shall be vested in the President" [Art. 53]. The President of India shall thus be the head of the 'executive power' of the Union.

The 'executive power' primarily means the execution of the laws enacted by the Legislature, but the business of the Executive in a modern State is not as simple as it was in the days of Aristotle. Owing to the manifold expansion of the functions of the State, all residuary functions have practically passed into the hands of the Executive. The executive power may, therefore, be shortly defined as 'the power of carrying on the business of government' or 'the administration of

the affairs of the State', excepting functions which are vested by the Constitution in any other authority. The ambit of the executive power has been thus explained by our Supreme Court⁹—

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away, subject, of course, to the provisions of the Constitutions or of any law...

The executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State."⁹

Constitutional Limitations on president's powers

Before we take up an analysis of the different powers of the Indian President, we should note the constitutional limitations under which he is to exercise his executive powers.

Firstly, he must exercise these powers according to the Constitution [Art. 53(1)]. Thus, Art. 75(1) explicitly requires that Ministers (other than the Prime Minister) can be appointed by the President only on the advice of the Prime Minister. There will be a violation of this provision if the President appoints a person as Minister from outside the list submitted by the Prime Minister. If the President violates any of the mandatory provisions of the Constitution, he will be liable to be removed by the process of impeachment.

Secondly, the executive powers shall be exercised by the President of India in accordance with the advice of his Council of Ministers [Art. 74(1)].

The 42nd Amendment

I. Prior to 1976, there was no express provision in the Constitution that the President was bound to act in accordance with the advice tendered by the Council of Ministers, though it was judicially established¹⁰ that the President of India was not a real executive, but a constitutional head, who was bound

to act according to the advice of Ministers, so long as they commanded the confidence of the majority in the House of the People [Art. 75(3)].¹⁰ The 42nd Amendment Act, 1976 amended Art. 74(1) to clarify this position.

Article 74(1), as so amended, reads:

"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 word 'shall' makes it obligatory for the President to act in accordance with ministerial advice.

The 44th Amendments

II. The Janata Government retained the foregoing text of Art. 74(1), as amended by the 42nd Amendment Act. But by the 44th Amendment Act, a provision was added Art 74(1) as follows:

"Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration"

The net result after the 44th Amendment, therefore, is that except in certain marginal cases referred to by the Supreme Court¹⁰ (to be noticed presently), the President shall have no power to act in his discretion in any case. He must act according to the advice given to him by the Council of Ministers, headed by the Prime Minister, so that refusal to act according to such advice will render him liable to impeachment for violation of the Constitution. This is subject to the President's power to send the advice received from the Council of Ministers, in a particular case, back to them for their reconsideration; and if the Council of Ministers adhere to their previous advice, the President shall have no option but to act in accordance with such advice. The power to return for reconsideration can be exercised only once, on the same matter.

It may be said, accordingly, that the powers of the President will be the powers of his Ministers, in the same manner as the prerogatives of the English Crown have become the 'privileges of the people' [Dicey].¹¹ An inquiry into the powers of the Union Government, therefore, presupposes an inquiry into the provisions of the Constitution which vest powers and functions in the President.

The various powers that are included within the comprehensive expression 'executive power' in a modern State have been classified by political scientists under the following heads:

- (a) Administrative power, i.e., the execution of the laws and the administration of the departments of government.
- (b) Military power, i.e., the command of the armed forces and the conduct of war.
- (c) Legislative power, i.e., the summoning, prorogation, etc., of the legislature, initiation of and assent to legislation and the like.
- (d) Judicial power, i.e., granting of pardons, reprieves, etc., to persons convicted of crime.

The Indian Constitution, by its various provisions, vests power in the hands of the President under each of these heads, subject to the limitations just mentioned.

I. The Administrative Power. In the matter of administration, not being a real head of the Executive like the American President, the Indian President shall not have any administrative

function to discharge nor shall he have that Power of control and supervision over the Departments of the Government

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as the American President possesses. But though the various Departments of Government of the Union will be carried on under the control and responsibility of the respective Ministers in charge, the President will remain the formal head of the administration, and as such, all executive action of the Union must be expressed to be taken in the name of the President. The only mode of ascertaining whether an order or instrument is made by the Government of India will be to see whether it is expressed in the name of the President and authenticated in such manner as may be prescribed by rules to be made by the President [Art. 77]. For the same reason, all contracts and assurances of property made on behalf of the Government of India must be expressed to be made by the President and executed in such manner as the President may direct or authorise [Art. 299].

Again, though he may not be the 'real' head of the administration, all officers of the Union shall be his 'subordinates' [Art. 53(1)] and he shall have a right to be informed of the affairs of the Union [Art. 78(b)].

The administrative power also includes the power to appoint and remove the high dignitaries of the State. Under our Constitution, the President shall have the power to appoint—(i) The Prime Minister of India, (ii) Other Ministers of the Union, (iii) The Attorney-General for India, (iv) The Comptroller and Auditor-General of India, (v) The Judges of the Supreme Court, (vi) The Judges of the High Courts of the States, (vii) The Governor of a State, (viii) A Commission to investigate interference with water-supplies, (ix) The Finance Commission, (x) The Union Public Service Commission and Joint Commissions for a group of States, (xi) The Chief Election Commissioner and other members of the Election Commission. (xii) A Special Officer for the Scheduled Castes and Tribes, (xiii) A Commission to report on the administration of Scheduled Areas, (xiv) A Commission to investigate into the condition of backward classes, (xv) A Commission on Official Language, (xvi) Special Officer for linguistic minorities.

In making some of the appointments, the President is required by the Constitution to consult persons other than his ministers as well. Thus, in appointing the Judges of the Supreme Court the President shall consult the Chief Justice of India and such other Judges of the Supreme Court and of the High Courts as he may deem necessary [Art. 124(2)]. These conditions will be referred to in the proper places, in connection with the different offices.

The President shall also have the power to remove (i) his Ministers, individually; (ii) the Attorney-General for India; (iii) the Governor of a State; (iv) the Chairman or a member of the Public Service Commission of the Union or of a State, on the report of the Supreme Court; (v) a Judge of the Supreme Court or of a High Court or the Election Commissioner, on an address of Parliament.

No 'spoils system'.

It is to be noted that besides the power of appointing the above specified functionaries, the Indian Constitution does not vest in the President any absolute power to appoint inferior officers of the Union as is to be found in the American Constitution. The Indian Constitution thus seeks to avoid

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the undesirable 'spoils system' of America, under which about 20 per cent of the federal civil offices are filled in by the President, without consulting the Civil Service Commission, and as a reward for party allegiance. The Indian Constitution avoids the vice of the above system by making the 'Union Public Services and the Union Public Service Commission'—a legislative subject for the Union Parliament, and by making it obligatory on the part of the President to consult the Public Service Commission in matters relating to appointment [Art. 320(3)], except in certain specified cases. If in any case the President is unable to accept the advice of the Union Public Service Commission, the Government has to explain the reasons there for in Parliament. In the matter of removal of the civil servants, on the other hand, while those serving under the Union hold office during the President's pleasure, the Constitution has hedged in the President's pleasure by laying down certain conditions and procedure subject to which only the pleasure may be exercised [Art. 311(2)].

II. The Military Power. The military powers of the Indian President shall be lesser than those of either the American President or of the English Crown.

The Supreme command of the Defence Forces is, of course, vested in the President of India, but the Constitution expressly lays down that the exercise of this power shall be regulated by law [Art. 53(2)]. This means that though the President may have the power to take action as to declaration of war or peace or the employment of the Defence Forces, it is competent for Parliament to regulate or control the exercise of such powers. The President's powers as Commander-in-Chief cannot be construed, as in the U.S.A., as a power independent of legislative control.

Secondly, since the Constitution enjoins that certain acts cannot be done without the authority of law, it must be held that such acts cannot be done by the President without approaching Parliament for sanction, e.g., acts which involve the expenditure of money [Art. 114(3)], such as the raising, training and maintenance of the Defence Forces.

III. The Diplomatic Power. The diplomatic power is a very wide subject and is sometimes spoken of as identical with the power over foreign or external affairs, which comprise "all matters which bring the Union into relation with any foreign country". The legislative power as regards these matters as well as the power of making treaties and implementing them, of course, belongs to Parliament. But though the final power as regards these things is vested in Parliament, the Legislature cannot take the initiative in such matters. The task of negotiating treaties and agreements with other countries, subject to ratification by Parliament, will thus belong to the President, acting on the advice of his Ministers.

Again, though diplomatic representation as a subject of legislation belongs to Parliament, like the heads of other States, the President of India will represent India in international affairs and will have the power of appointing Indian representatives to other countries and of receiving diplomatic representatives of other States, as shall be recognised by Parliament.

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IV. Legislative Powers. Like the Crown of England, the President of India is a component part of the Union Parliament and here is one of the instances where the Indian Constitution departs from the principle of Separation of Powers underlying the Constitution of the United States. The legislative powers of the Indian President, of course according to ministerial advice, [Art. 74(1)] are various and may be discussed under the following heads:

(a) Summoning, Prorogation, Dissolution.

Like the English Crown our President shall have the power to summon or prorogue the Houses of Parliament and to dissolve the lower House.¹² He shall also have the power to summon a joint sitting of both Houses of Parliament in case of a deadlock between them [Arts. 85, 108].

(b) The Opening Address.

The President shall address both Houses of Parliament assembled together, at the first session after each general election to the House of the People and at the commencement of the first session of each year, and "inform Parliament of the causes of its summons" [Art. 87].

The practice during the last five decades shows that the President's Opening Address is being used for purposes similar to those for which the 'Speech from the Throne' is used in England, viz., to announce the programme of the Cabinet for the session and to raise a debate as to the political outlook and matters of general policy or administration. Each House is empowered by the Constitution to make rules for allotting time "for discussion of the matters referred to in such address and for the precedence of such discussion over other business of the House."

(c) The Right to Address and to send Messages.

Besides the right to address a joint sitting of both Houses at the commencement of the first session, the President shall also have the right to address either House or their joint sitting, at any time, and to require the attendance of members for this purpose [Art. 86(1)]. This right is no doubt borrowed from the English Constitution, but there it is not exercised by the Crown except on ceremonial occasions.

Apart from the right to address, the Indian President shall have the right to send messages to either House of Parliament either in regard to any pending Bill or to other matter, and the House must then consider the message "with all convenient despatch" [Art. 86(2)]. Since the time of George III, the English Crown has ceased to take any part in legislative or to influence it and messages are now sent only on formal matters. The American President, on the other hand, possesses the right to recommend legislative measures to Congress by messages though Congress is not bound to accept them.

The Indian President shall have the power to send messages not only on legislative matters but also 'otherwise'. Since the head of the Indian Executive is represented in Parliament by his Ministers, the power given to the President to send messages regarding legislation may appear to be

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superfluous, unless the President has the freedom to send message differing from the Ministerial policy, in which case again it will open a door for friction between the President and the Cabinet.

It is to be noted that during the first forty-six years of the working of our Constitution, the President has not sent any message to Parliament nor addressed it on any occasion other than after each general election and at the opening of the first session each year.

(d) Nominating Members to the Houses.

Though the main composition of the two Houses of Parliament is elective, either direct or indirect, the President has been given the power to nominate certain members to both the Houses upon the supposition that adequate representation of certain interests will not be possible through the competitive system of election. Thus,

(i) In the Council of States, 12 members are to be nominated by the President from persons having special knowledge or practical experience of literature, science, art and social service [Art. 80(1)]. (ii) The President is also empowered to nominate not more than two members to the House of the People from the Anglo-Indian community, if he is of opinion that the Anglo-Indian community is not adequately represented in that House [Art. 331].

(e) Laying Reports, etc., before Parliament.

The President is brought into contact with Parliament also through his power and duty to cause certain reports and statements to be laid before Parliament, so that Parliament may have the opportunity of taking action upon them. Thus, it is the duty of the President to cause to be laid before Parliament—(a) the Annual Financial Statement (Budget) and the Supplementary Statement, if any; (b) the report of the Auditor-General relating to the accounts of the Government of India; (c) the recommendations made by the Finance Commission, together with an explanatory memorandum of the action taken thereon; (d) the report of the Union Public Service Commission, explaining the reasons where any advice of the Commission has not been accepted; (e) the report of the Special Officer for Scheduled Castes and Tribes; (f) the report of the Commission on backward classes; (g) the report of the Special Officer for linguistic minorities.

(f) Previous sanction to legislation.

The Constitution requires the previous sanction or recommendation of the President for introducing legislation on some matters, though, of course, the Courts are debarred from invalidating any legislation on the ground that the previous sanction was not obtained, where the President has eventually assented to the legislation [Art. 255]. These matters are:

(i) A Bill for the formation of new States or the alteration of boundaries, etc., of existing States [Art. 3]. The exclusive power of recommending such legislation is given to the President in order to enable him to obtain the views of the affected States before initiating such legislation.

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(ii) A Bill providing for any of the matters specified in Art. 31A(1) [Prov. 1 to Art. 31A(1)].

(iii) A Money Bill [Art. 117(1)].

(iv) A Bill which would involve expenditure from the Consolidated Fund of India even though it may not, strictly speaking, be a Money Bill [Art. 117(3)].

(v) A Bill affecting taxation in which States are interested, or affecting the principles laid down for distributing moneys to the States, or varying the meaning of the expression of 'agricultural income' for the purpose of taxation of income, or imposing a surcharge for the purposes of the Union under Chap. I of Part XII [Art. 274(1)].

(vi) State Bills imposing restrictions upon the freedom of trade [Art. 304, Proviso].

(g) Assent to legislation and Veto.

Veto over Union Legislation.

(A) Veto over Union Legislation. A Bill will not be an Act of the Indian Parliament unless and until it receives the assent of the President. When a Bill is presented to the President, after its passage in both Houses of Parliament, the President shall be entitled to take any of the following three steps:

(i) He may declare his assent to the Bill; or

(ii) He may declare that he withholds his assent to the Bill; or

(iii) He may, in the case of Bills other than Money Bills, return the Bill for reconsideration of the Houses, with or without a message suggesting amendments. A Money Bill cannot be returned for reconsideration.

In case of (iii), if the Bill is passed again by both House of Parliament with or without amendment and again presented to the President, it would be obligatory upon him to declare to his assent to it [Art. 111].

Nature of veto power

Generally speaking, the object of arming the Executive with this power is to prevent hasty and ill-considered action by the Legislature. But the necessity for such power is removed or at least lessened when the Executive itself initiates and conducts legislation or is responsible for

legislation, as under the Parliamentary or Cabinet system of Government. As a matter of fact, though a theoretical power of veto is possessed by the Crown in England, it has never been used since the time of Queen Anne.

Where, however, the Executive and the Legislature are separate and independent from each other, the Executive, not being itself responsible for the legislation, should properly have some control to prevent undesirable legislation. Thus, in the United States, the President's power of veto has been supported on various grounds, such as (a) to enable the President to protect his own office from aggressive legislation; (b) to prevent a particular legislation from being placed on the statute book which the President considers to be unconstitutional (for though the Supreme Court possesses the power to nullify a statute on the ground of unconstitutionality, it can exercise that power only in the case of clear violation of the Constitution,

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regardless of any question of policy, and only if a proper proceeding is brought before it after the statute comes into effect); (c) to check legislation which he deems to be practically inexpedient or, which he thinks does not represent the will of the American people.

From the standpoint of effect on the legislation, executive vetos have been classified as absolute, qualified, suspensive and pocket vetos.

(B) Absolute Veto. The English Crown possesses the prerogative of absolute veto, and if it refuses assent to any bill, it cannot become law, notwithstanding any vote of Parliament. But this veto power of the Crown has become obsolete since 1700, owing to the development of the Cabinet system, under which all public legislation is initiated and conducted in the Legislature by the Cabinet. Judged by practice and usage, thus there is at present no executive power of veto in England.

(C) Qualified Veto. A veto is 'qualified' when it can be overridden by an extraordinary majority of the Legislature and the Bill can be enacted as law with such majority vote, overriding the executive veto. The veto of the American President is of this class. When a Bill is presented to the President, he may, if he does not assent to it, return the Bill within 10 days, with a statement of his objections, to that branch of Congress in which it originated. Each House of Congress then reconsiders the Bill and if it is adopted again in each House, by a two-thirds vote of the members present,—the Bill becomes a law, notwithstanding the absence of the President's signature. The qualified veto is then overridden. But if it fails to obtain that two-thirds majority, the veto stands and the Bill fails to become law. In the result, the qualified veto serves as a means to the Executive to point out the defects of the legislation and to obtain a reconsideration by the Legislature, but ultimately the extraordinary majority of the Legislature prevails. The qualified veto is thus a useful device in the United States where the Executive has no power of control over the Legislature, by prorogation, dissolution or otherwise.

(D) Suspensive Veto. A veto is suspensive when the executive veto can be overridden by the Legislature by an ordinary majority. To this type belongs the veto power of the French President.

If, upon a reconsideration, Parliament passes the Bill again by a simple majority, the President has no option but to promulgate it.

(E) Pocket Veto. There is a fourth type of veto called the 'pocket veto' which is possessed by the American President. When a Bill is presented to him, he may neither sign the Bill nor return the Bill for reconsideration within 10 days. He may simply let the Bill lie on his desk until the ten-day limit has expired. But, if in the meantime, Congress has adjourned (i.e., before expiry of the period of ten-days from presentation of the Bill to the President), the Bill fails to become a law. This method is known as the 'pocket veto', for, by simply withholding a Bill presented to the President during the last few days of the session of Congress the President can prevent the Bill to become law.

In India

The veto power of the Indian President is a combination of the absolute, suspensive and pocket vetos. Thus,—

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(i) As in England, there would be an end to a Bill if the President declares that he withholds his assent from it. Though such refusal has become obsolete in England since the growth of the Cabinet system under which it is the Cabinet itself which is to initiate the legislation as well as to advise a veto, such a provision was made in the Government of India Act, 1935. Even with the introduction of full Ministerial responsibility, the same provision has been incorporated in the Constitution of India. Normally, this power will be exercised only in the case of 'private' members' Bills. In the case of a Government Bill, a situation may, however, be imagined, where after the passage of a Bill and before it is assented to by the President, the Ministry resigns and the next Council of Ministers, commanding a majority in Parliament, advises the President to use his veto power against the Bill. In such a contingency, it would be constitutional on the part of the President to use his veto power even though the Bill had been duly passed by Parliament.¹³

(ii) If, however, instead of refusing his assent outright, the President remits the Bill or any portion of it for reconsideration, a re-passage of the Bill by an ordinary majority would compel the President to give his assent. This power of the Indian President, thus, differs from the qualified veto in the United States insofar as no extraordinary majority is required to effect the enactment of a returned Bill. The effect of a return by the Indian President is thus merely 'suspensive'. [As has been stated earlier, this power is not available in the case of Money Bills.]

(iii) Another point to be noted is that the Constitution does not prescribe any time-limit within which the President is to declare his assent or refusal, or to return the Bill. Article 111 simply says that if the President wants to return the Bill, he shall do it 'as soon as possible' after the Bill is presented to him. By reason of this absence of a time-limit, it seems that the Indian President would be able to exercise something like a 'pocket veto', by simply keeping the Bill on his desk for an indefinite time,¹⁴ particularly, if he finds that the Ministry is shaky and is likely to collapse shortly.

(F) Disallowance of State legislation. Besides the power to veto Union legislation, the President of India shall also have the power of disallowance or return for reconsideration of a Bill of the State Legislature, which may have been reserved for his consideration by the Governor of the State [Art. 201].

Reservation of a State Bill for the assent of the President is a discretionary power¹⁵ of the Governor of a State. In the case of any Bill presented to the Governor for his assent after it has been passed by both Houses of the Legislature of the State, the Governor may, instead of giving his assent or withholding his assent, reserve the Bill for the consideration of the President.

In one case reservation is compulsory, viz., where the law in question would derogate from the powers of the High Court under the Constitution [Art. 200, 2nd Proviso].

In the case of a Money Bill so reserved, the President may either declare his assent or withhold his assent. But in the case of a Bill, other than

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a Money Bill, the President may, instead of declaring his assent or refusing it, direct the Governor to return the Bill to the Legislature for reconsideration. In this latter case, the Legislature must reconsider the Bill within six months and if it is passed again, the Bill shall be presented to the President again. But it shall not be obligatory upon the President to give his assent in this case too [Art. 201],

It is clear that a Bill which is reserved for the consideration of the President shall have no legal effect until the President declares his assent to it. But no time limit is imposed by the Constitution upon the President either to declare his assent or that he withholds his assent. As a result, it would be open to the President to keep a Bill of the State Legislature pending at his hands for an indefinite period of time, without expressing his mind.

In a strictly Federal Constitution like that of the United States, the States are autonomous within their sphere and so there is no scope for the Disallowance of Federal Executive to veto measures passed by the State legislatures. Thus, in the Constitution of Australia, too, there is no provision for reservation of a State Bill for the assent of the Governor-General and the latter has no power to disallow State Legislation.

But India has adopted a federation of the Canadian type. Under the Canadian Constitution the Governor-General has the power not only of refusing his assent to a Provincial legislation, which has been reserved by the Governor for the signification of the Governor-General's assent, but also of directly disallowing a Provincial Act, even where it has not been reserved by the Governor for his assent. These powers thus give the Canadian Governor-General a control over Provincial legislation, which is unknown in the United States of America or Australia. This power has, in fact, been exercised by the Canadian Governor-General not only on the ground of encroachment upon Dominion powers, but also on grounds of policy, such as injustice, interference with the freedom of criticism and the like. The Provincial Legislature is to this extent subordinate to the Dominion Executive.

There is no provision in the Constitution of India for a direct disallowance of State legislation by the Union President, but there is provision for disallowance of, such bills as are reserved by the State Governor for assent of the President. The President may also direct the Governor to return the Bill to the State Legislature for reconsideration; if the Legislature again passes the Bill by an ordinary majority, the Bill shall be presented again to the President for his reconsideration. But if he refuses his assent again, the Bill fails. In short, there is no means of overriding the President's veto, in the case of State legislation. So, the Union's control over State legislation shall be absolute, and no grounds are limited by the Constitution upon which the President shall be entitled to refuse his assent. As to reservation by the Governor, it is to be remembered that the Governor is a nominee of the President. So, the power of direct disallowance will be virtually available to the President through the Governor.

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These powers of the President in relation to State legislation will thus serve as one of the bonds of Central control, in a federation tending towards the unitary type.

(h) The Ordinance-making Power.

The President shall have the power to legislate by Ordinances at a time when it is not possible to have a Parliamentary enactment on the subject, immediately [Art. 123].

The ambit of this Ordinance-making power of the President is coextensive with the legislative powers of Parliament, that is to say, it may relate to any subject in respect of which Parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament. Thus, an Ordinance cannot contravene the Fundamental Rights any more than an Act of Parliament. In fact, Art. 13 (3) (a) doubly ensures this position by laying down that " 'law' includes an 'Ordinance'."

Subject to this limitation, the Ordinance may be of any nature as Parliamentary legislation may take, e.g., it may be retrospective or may amend or repeal any law or Act of Parliament itself. Of course, an Ordinance shall be of temporary duration.

This independent power of the Executive to legislate by Ordinance is a relic of the Government of India Act, 1935, but the provisions of the Constitution differ from that of the Act of 1935 in several material respects as follows:

Firstly, this power is to be exercised by the President on the advice of his Council of Ministers (and not in the exercise of his 'individual judgment' as the Governor-General was empowered to act, under the Government of India Act, 1935).

Secondly, the Ordinance must be laid before Parliament when it reassembles, and shall automatically cease to have effect at the expiration of six weeks from the date of re-assembly unless disapproved earlier by Parliament. In other words an Ordinance can exist at the most only for six weeks from the date of re-assembly. If the Houses are summoned to reassemble on different dates the period of six weeks is to be counted from the later of those dates.

Thirdly, the Ordinance-making power will be available to the President only when either of the two Houses of Parliament has been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. He shall have no such power while both Houses of Parliament are in session. The President's Ordinance-making power under the Constitution is, thus, not a co-ordinate or parallel power of legislation available while the Legislature is capable of legislating.

Any legislative power of the executive (independent of the legislature) is unimaginable in the U.S.A., owing to the doctrine of Separation of Powers underlying the American Constitution and even in England, since the Case of Proclamations [(1610) 2 St. Tr. 723]. But the power to make Ordinances during recesses of Parliament has been justified in India, on the ground that

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the President should have the power to meet with a pressing need for legislation when either House is not in session.

"It is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be difficult to deal with a situation which may suddenly and immediately arise. The Executive must have the power to issue an Ordinance as the Executive cannot deal with the situation by resorting to the ordinary process of law because the Legislature is not in session."

Even though the legislature is not in session, the President cannot promulgate an Ordinance unless he is satisfied that there are circumstances which render it necessary for him to take 'immediate action'. Clause (1) of Art. 123 says—

"If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require."

Possibility of abuse of the Ordinance making power.

But 'immediate action' has no necessary connection with an 'emergency' such as is referred to in Art. 352. Hence, the promulgation of an Ordinance is not dependent upon the existence of an armed rebellion or external aggression. The only test is whether the circumstances which call for the legislation are so serious and imminent that the delay involved in summoning the Legislature and getting the measure passed in the ordinary course of legislation cannot be tolerated. But the sole judge of the question whether such a situation has arisen is the President himself and it was held in some earlier cases a Court cannot enquire into the propriety of his satisfaction even where it is alleged that the power was not exercised in good faith."

But if on the expiry of an Ordinance it is repromulgated and this is done repeatedly then it is an abuse of the power and a fraud on the Constitution.¹⁷

In Cooper's case,¹⁸ however, the Supreme Court expressed the view that the genuineness of the President's satisfaction could possibly be challenged in a court of law on the ground that it was mala fide, e.g., where the President has prorogued a House of Parliament in order to make an Ordinance relating to a controversial matter, so as to by-pass the verdict of the Legislature.

The 38th Amendment.

(I) The Indira Government wanted to silence any such judicial interference in the matter of making an Ordinance by inserting CI (4) in art 123 laying down that the President's satisfaction shall be final and could not be questioned in any Court on any ground.

The 44th Amendment

(II) The Janata Government overturned the foregoing change. The net result is that the observation in Cooper's case¹⁸ reenters the field and the door for judicial interference in a case of mala fides is reopened.¹⁶ To establish mala fides may not be an easy affair; but the revival of Cooper's observation¹⁸ may serve as a potential check on any arbitrary power to prorogue the House of Parliament in order to legislate by Ordinance.

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It is true that when the Ordinance-making power is to be exercised on the advice of a Ministry which commands a majority in Parliament, it makes little difference that the Government seeks to legislate by an Ordinance instead of by an Act of Parliament, because the majority would have ensured a safe passage of the measure through Parliament even if a Bill had been brought instead of promulgating the Ordinance. But the argument would not hold good where the Government of the day did not carry an overwhelming majority. Article 123 would, in such a situation, enable the Government to enact a measure for a temporary period by an Ordinance, not being sure of support in Parliament if a Bill had been brought. Even where the Government has a clear majority in Parliament, a debate in Parliament which takes place where a Bill is introduced not only gives a nation-wide publicity to the 'pros and cons' of the measure but also gives to the two Houses a chance of making amendments to rectify unwelcome features or defects as may be revealed by the debate. All this would be absent where the Government elects to legislate by Ordinance. It is evident, therefore, that there is a likelihood of the power being abused even though it is exercisable on the advice of the Council of Ministers,¹⁹ because the Ministers themselves might be tempted to resort to an Ordinance simply to avoid a debate in Parliament¹⁶ and may advise the President to prorogue Parliament at any time, having this specific object in mind.

Parliamentary safeguard.

It is clear that there should be some safeguard against such abuse. So far as the merits of the Ordinance are concerned, Parliament, of course, gets a chance to review the measure when Government seeks to introduce a Bill to replace it. It may also pass resolutions disapproving of the Ordinance, if and when the Government is obliged to summon the Parliament for other purposes [Art. 123(2)(a)]. But the real question is how to enable Parliament to tell the

Government, short of passing a vote of censure or of no-confidence, that it does not approve of the conduct of the Government in making the Ordinance instead of bringing a Bill for the purpose? The House of the people has made a Rule requiring that whenever the Government seeks to replace an Ordinance by a Bill, a statement "explaining the circumstances which necessitated immediate legislation by Ordinance" must accompany such Bill. The statement merely informs the House of the grounds advanced by the Government. A general discussion takes place on the resolution approving the Ordinance and generally a resolution is moved by the opposition disapproving the Ordinance.

(V) The Pardoning Power. Almost all Constitutions confer upon the head of the Executive the power of granting pardons to persons who have been tried and convicted of some offence. The object of conferring this 'judicial' power upon the Executive is to correct possible judicial errors, for, no human system of judicial administration can be free from imperfections.

In Kehar Singh's case²⁰ the following principles were laid down (a) The convict seeking relief has no right to insist on oral hearing, (b) No guideline need be laid down by the Supreme Court for the exercise of the power, (c) The power is to be exercised by the President on the advice of the Central Government, (d) The President can go into the merits of the case and take a different view, (e) Exercise of the power by the President is not open to

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judicial review, except to the limited extent as indicated in Maru Ram's case.²¹ The Court can interfere only where the Presidential decision is wholly irrelevant to the object of Art. 72 or is irrational, arbitrary, discriminatory or mala fide.

It should be noted that what has been referred to above as the 'pardoning power' comprises a group of analogous powers each of which has a distinct significance and distinct legal consequences, viz., pardon, reprieve, respite, remission, suspension, commutation. Thus, while a pardon rescinds both the sentence and the conviction and absolves the offender from all punishment and disqualifications, commutation merely substitutes one form of punishment for another of a lighter character, e.g., each of the following sentences may be commuted for the sentence next following it: death; rigorous imprisonment; simple imprisonment; fine. Remission, on the other hand, reduces the amount of sentence without changing its character, e.g., a sentence of imprisonment for one year may be remitted to six months. Respite means awarding a lesser sentence instead of the penalty prescribed, in view of some special fact, e.g., the pregnancy of a woman offender. Reprieve means a stay of execution of a sentence, e.g., pending a proceeding for pardon or commutation.

Pardoning power of president and governor compared.

Under the Indian Constitution, the pardoning shall be possessed by the President as well as the State Governors, under Arts. 72 and 161, respectively as follows—

President	Governor
1. Has the power to grant pardon,	1. No such power.

reprieve, respite, suspension, remission or commutation in respect of punishment or sentence by court-martial.	
2. Do, where the punishment or sentence is for an offence against a law relating to a matter to which the executive power of the union extends.	2. Powers similar to those of President in respect of an offence against a law relating to a matter to which the executive power of the State extends (except as to death sentence for which see below).
3. Do., in all cases where the sentence is one of death.	3. No power to pardon in case of sentence of death. But the power to suspend, remit or commute a sentence of death, if conferred by law, remains, unaffected.

In the result, the President shall have the pardoning power in respect of—

(i) All cases of punishment by a Court Martial. (The Governor shall have no such power.)

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(ii) Offences against laws made under the Union and Concurrent lists. (As regards laws in the Concurrent sphere, the jurisdiction of the President shall be concurrent with that of the Governor.) Separate provision has been made as regards sentences of death.

(iii) The only authority for pardoning a sentence of death is the President.

But though the Governor has no power to pardon a sentence of death, he has, under s. 54 of the Indian Penal Code and ss. 432-433 of the Criminal Procedure Code, 1973, the power to suspend, remit or commute a sentence of death in certain circumstances. This power is left intact by the Constitution, so that as regards suspension, remission or commutation, the Governor shall have a concurrent jurisdiction with the President.

(VI) Miscellaneous Powers. As the head of the executive power, the President has been vested by the Constitution with certain powers which may be said to be residuary in nature, and are to be found scattered amongst numerous provisions of the Constitution. Thus,

Rule-making Power.

(a) The President has the constitutional authority to make rules and regulations relating to various matters, such as, how his orders and instruments shall be authenticated; the paying into custody of and withdrawal of money from, the public accounts of India; the number of members of the Union Public Service Commission, their tenure and conditions of service; recruitment and conditions of service of persons serving the Union and the secretarial staff of Parliament; the prohibition of simultaneous membership of Parliament and of the Legislature of a State; the procedure relating to the joint sittings of the Houses of Parliament in consultation with the Chairman and the Speaker of the two Houses; the manner of enforcing the orders of the Supreme Court; the allocation among States of emoluments payable to a Governor appointed for two or

more States; the discharge of the functions of a Governor in any contingency not provided for in the Constitution; specifying Scheduled Castes and Tribes; specifying matters on which it shall not be necessary for the Government of India to consult the Union Public Service Commission.

(b) He has the power to give instructions to a Governor to promulgate an Ordinance if a Bill containing the same provisions requires the previous sanction of the President under the Constitution [Art. 213(1), Proviso].

(c) He has the power to refer any question of public importance for the opinion of the Supreme Court and already ten such references have been made since 1950 [Art. 143; see Chap. 22 under 'Advisory Jurisdiction'].

(d) He has the power to appoint certain Commissions for the purpose of reporting on specific matters, such as, Commissions to report on the administration of Scheduled Areas and welfare of Scheduled Tribes and Backward Classes; the Finance Commission; Commission on Official Language; an Inter-State Council.

(e) He has some special powers relating to 'Union Territories', or territories which are directly administered by the Union. Not only is the

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administration of such Territories to be carried on by the President through an Administrator, responsible to the President alone, but the President has the final legislative power (to make regulations) relating to the Andaman and Nicobar Islands; the Lakshadweep; Dadra and Nagar Haveli;²² and may even repeal or amend any law made by Parliament as may be applicable to such Territories [Art. 240].

(f) The President shall have certain special powers in respect of the administration of Scheduled Area and Tribes, and Tribal Area in Assam:

(i) Subject to amendment by Parliament, the president shall have the power, by order, to declare an area to be a Scheduled Area or declare that an area shall cease to be a Scheduled Area, alter the boundaries of Scheduled Areas, and the like [Fifth Sch., Para 6.]

(ii) A Tribes Council may be established by the direction of the President in any State having Scheduled Areas and also in States having Scheduled Tribes therein but not Scheduled Areas [Fifth Sch., Para 4].

(iii) All regulations made by the Governor of a State for the peace and good government of the Scheduled Areas of the State must be submitted forthwith to the President and until assented to by him, such regulations shall have no effect [Fifth Sch., Para 5(4)].

(iv) The President may, at any time, require the Governor of a State to make a report regarding the administration of Scheduled Areas in that State and give directions as to the administration of such Areas [Sch. V, Para 3].

(g) The President has certain special powers and responsibilities as regards Scheduled Castes and Tribes:

(i) Subject to modification by Parliament, the President has the power to draw up and notify the lists of Scheduled Castes and Tribes in each State and Union Territory. Consultation with the Governor is required in the case of the list relating to a State [Arts. 341-342].

(ii) The President shall appoint a Special Officer to investigate and report on the working of the safeguards provided in the Constitution for the Scheduled Castes and Tribes [Art. 338].

(iii) The President may at any time and shall at the expiration of ten years from the commencement of the Constitution, appoint a Commission for the welfare of the Scheduled Tribes in the States [Art. 339].

(VII) Emergency Powers. The foregoing may be said to be an account of the President's normal powers. Besides these, he shall have certain extraordinary powers to deal with emergencies, which deserve a separate treatment [Chap. 28, For the present, it may be mentioned that the situations that would give rise to these extraordinary powers of the President are of three kinds :

(a) Firstly, the President is given the power to make a "Proclamation of Emergency" on the ground of threat to the security of India or any part thereof, by war, external aggression or armed rebellion.²³ The object of this Proclamation is to maintain the security of India and its effect is, inter alia, assumption of wider control by the Union over the affairs of the States or any of them as may be affected by armed rebellion or external aggression.

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(b) Secondly, the President is empowered to make a Proclamation that the Government of a State cannot be carried on in accordance with the provisions of the Constitution. The break-down of the constitutional machinery may take place either as a result of a political deadlock or the failure by a State to carry out the directions of the Union [Arts. 356, 365]. By means of a Proclamation of this kind, the President may assume to himself any of the governmental powers of the State and to Parliament the powers of the Legislature of the State.

(c) Thirdly, the President is empowered to declare that a situation has arisen whereby "the financial stability or credit of India or of any part thereof is threatened" [Art. 360]. The object of such Proclamation is to maintain the financial stability of India by controlling the expenditure of the States and by reducing the salaries of the public servants, and by giving directions to the States to observe canons of financial propriety, as may be necessary.

3. The Council of Ministers

The framers of our Constitution intended that though formally all executive powers were vested in the President, he should act as the constitutional head of the Executive like the English Crown, acting on the advice of Ministers responsible to the popular House of the Legislature.

A body recognised by the Constitution,

But while the English Constitution leaves the entire system of Cabinet Government to convention, the Crown being legally vested with absolute powers and the Ministers being in theory nothing more than the servants of the Crown, the framers of our Constitution enshrined the foundation of the Cabinet system in the body of the written Constitution itself, though, of course, the details of its working had necessarily to be left to be filled up by convention and usage.²⁴

Appointment Ministers.

While the Prime Minister is selected by the President, the other Ministers are appointed by the President on the advice of the Prime Minister [Art. 75(1)] and the allocation of portfolios amongst them is also made by him. Further, the President's power of dismissing an individual Minister is virtually a power in the hands of the Prime Minister. In selecting the Prime Minister, the President must obviously be restricted to the leader of the party in majority in the House of the People, or, a person who is in a position to win the confidence of the majority in that House.

Council of ministers and cabinet

The number of members of the Council of Ministers is not specified in the Constitution. It is determined according to the exigencies of the time. At the end of 1961, the strength of the Council of Ministers of the Union was 47, at the end of 1975, it was raised to 60, and in 1977, it was reduced to 24, while in 1989, it was again raised to 58. The National Front Government (headed by Sri V.P. Singh) started with only 22 Ministers. All the Ministers, however, do not belong to the same rank.²⁵ The National Democratic Alliance Government (headed by Mr. A.B. Bajpai) has 29 Cabinet Ministers and 44 State Ministers (no Deputy Ministers). The Constitution does not classify the members of the Council of Ministers into

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different ranks. All this has been done informally, following the English practice. It has now got legislative sanction, so far as the Union is concerned, in s. 2 of the Salaries and Allowances of Ministers Act, 1952, which defines "Minister" as a "Member of the Council of Ministers, by whatever name-called, and includes a Deputy Minister." ²⁵

Salaries of ministers

The Council of Ministers is thus a composite body, consisting of different categories. At the Centre, these categories are three, as stated above. The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine. Each Minister gets a sumptuary allowance at a varying scale, according to his rank, and a residence, free of rent.

The rank of the different Ministers is determined by the Prime Minister according to whose advice the President appoints the Ministers [Art. 75(1)], and also allocates business amongst them [Art. 77]. While the Council of Ministers is collectively responsible to the House of the

People [Art. 75(3)], Art. 78(c) enjoins the Prime Minister, when required by the President, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council,—in practice, the Council of Ministers seldom meets as a body. It is the Cabinet, an inner body within the Council, which shapes the policy of the Government.

While Cabinet Ministers attend meetings of the Cabinet of their own right, Ministers of State are not members of the Cabinet and they can attend only if invited to attend any particular meeting. A Deputy Minister assists the Minister in charge of a Department of Ministry and takes no part in Cabinet deliberations.

Ministers may be chosen from members of either House and a Minister who is a member of one House has a right to speak in and to take part in the proceedings of the other House though he has no right to vote in the House of which he is not a member [Art. 88].

Under our Constitution, there is no bar to the appointment of a person from outside the Legislature as Minister. But he cannot continue as Minister for more than 6 months unless he secures a seat in either House of Parliament (by election or nomination, as the case may be), in the meantime. Article 75(5) says—

"A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister."

Ministerial Responsibility to Parliament.

As to Ministerial responsibility, it may be stated that the Constitution follows in the main the English principle except as to the legal responsibility of individual Ministers for acts done by or on behalf of the President.

Collective Responsibility.

(A) The principle of collective responsibility is codified in Art. 75(3) of the Constitution—

"The Council of Ministers shall be collectively responsible to the House of the People."

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So, the Ministry, as a body, shall be under a constitutional obligation to resign as soon as it loses the confidence of the popular House of the Legislature. The collective responsibility is to the House of the People even though some of the Ministers may be members of the Council of States.

The 'collective responsibility' has two meanings: the first that all the members of a government are unanimous in support of its policies and exhibit that unanimity on public occasions although while formulating the policies, they might have differed in the cabinet meeting; the second that

the Ministers, who had an opportunity to speak for or against the policies in the Cabinet are thereby personally and morally responsible for their success and failure.²⁶

Of course, instead of resigning, the Ministry shall be competent to advise the President or the Governor to exercise his power of dissolving the Legislature, on the ground that the House does not represent the views of the electorate faithfully.

Individual Responsibility to the President.

(B) The principle of individual responsibility to the head of the State is embodied in Art. 75(2)—

"The Ministers shall hold office during the pleasure of the the President.

The result, is that though the Ministers are collectively responsible to the Legislature, they shall be individually responsible to the Executive head and shall be liable to dismissal even when they may have the confidence of the Legislature. But since the Prime Minister's advice will be available in the matter of dismissing other Ministers individually, it may be expected that this power of the President will virtually be, as in England, a power of the Prime Minister against his colleagues,—to get rid of an undesirable colleague even where that Minister may still possess the confidence of the majority in the House of the People. Usually, the Prime Minister exercises this power by asking an undesirable colleague to resign, which the latter readily complies with, in order to avoid the odium of a dismissal.

Legal responsibility

(C) But, as stated earlier, the English principle of legal responsibility has not been adopted in our Constitution. In England, the Crown cannot do any public act without the counter-signature of a Minister who is liable in a Court of law if the act done violates the law of the land and gives rise to a cause of action in favour of an individual. But our Constitution does not expressly say that the President can act only through Ministers and leaves it to the President to make rules as to how his orders, etc., are to be authenticated; and on the other hand, provides that the Courts will not be entitled to enquire what advice was tendered by the Ministers to the executive head. Hence, if an act of the President is, according to the rules made by him, authenticated by a Secretary to the Government of India, there is no scope for a Minister being legally responsible for the act even though it may have been done on the advice of the Minister.

Special position of the Prime Minister in the Council of Ministers.

As in England, the Prime Minister is the "keystone of the Cabinet arch". Article 74(1) of our Constitution expressly states that the Prime Minister shall be "at the head" of the Council of Ministers. Hence, the other Ministers cannot function when the Prime Minister dies or resigns.

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In England, the position of the Prime Minister has been described by Lord MORLEY as 'primus inter pares', i.e., 'first among equals'. In theory, all Ministers or members of the Cabinet have an

equal position, all being advisers of the Crown, and all being responsible to Parliament in the same manner. Nevertheless, the Prime Minister has a pre-eminence, by convention and usage. Thus,—

- (a) The Prime Minister is the leader of the party in majority in the popular House of the legislature.
- (b) He has the power of selecting the other Ministers and also advising the Crown to dismiss any of them individually, or require any of them to resign. Virtually, thus, the other Ministers hold office at the pleasure of the Prime Minister.
- (c) The allocation of business amongst the Ministers is a function of the Prime Minister. He can also transfer a Minister from one Department to another.
- (d) He is the chairman of the Cabinet, summons its meetings and presides over them.
- (e) While the resignation of other Ministers merely creates a vacancy, the resignation or death of the Prime Minister dissolves the Cabinet.
- (f) The Prime Minister stands between the Crown and the Cabinet. Though individual Ministers have the right of access to the Crown on matters concerning their own departments, any important communication, particularly relating to policy, can be made only through the Prime Minister.
- (g) He is in charge of co-ordinating the policy of the Government and has, accordingly, a right of supervision over all the departments.

In India, all these special powers will belong to the Prime Minister inasmuch as the conventions relating to Cabinet Government are, in general, applicable. But some of these have been codified in the Constitution itself. The power of advising the President as regards the appointment of other Ministers is, thus, embodied in Art. 75(1). As to the function of acting as the channel of communication between the President and the Council of Ministers, Art. 78 provides—

"It shall be the duty of the Prime Minister—

- (a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;
- (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and
- (c) if the President so requires to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

Thus, even though any particular Minister has tendered any advice to the President without placing it before the Council of Ministers, the President has (through the Prime Minister) the power to refer the matter to be considered by the Council of Ministers. The unity of the Cabinet system will thus be enforced in India through the provisions of the written Constitution.

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4.The President in relation to his Council of Ministers.

It is no wonder that the position of the President under our Constitution has evoked much interest amongst political scientists in view of the plenitude of powers vested in an elected President holding for a fixed term, saddled with limitations of Cabinet responsibility.

In a Parliamentary form of government, the tenure of office of the virtual executive is dependent on the will of the Legislature; in a Presidential Government the tenure of office of the executive is independent of the will of the Legislature (Leacock). Thus, in the Presidential form of which the model is the United States,—the President is the real head of the Executive who is elected by the people for a fixed term. He is independent of the Legislature as regards his tenure and is not responsible to the Legislature for his acts. He may, of course, act with the advice of ministers, but they are appointed by him as his counsellors and are responsible to him and not to the Legislature. Under the Parliamentary system represented by England, on the other hand, the head of the Executive (the Crown) is a mere titular head, and the virtual executive power is wielded by the Cabinet, a body formed of the members of the Legislature and responsible to the popular House of the Legislature for their office and actions.

Indian president compared with American president and English Crown

Being a Republic, India could not have a hereditary monarch. So, an elected President is at the head of the executive power in India. The tenure of his office is for a fixed term of years as of the American President. He also resembles the American President inasmuch as Indian President he is removable by the Legislature under the special ZS President quasi-judicial procedure of impeachment. But, on the other hand, he is more akin to the English King than Crown. The American President insofar as he has no 'functions' to discharge, on his own authority. All the powers and 'functions' [Art. 74(1)] that are vested by the Constitution in the President are to be exercised on the advice of the Ministers responsible to the Legislature as in England. While the so-called Cabinet of the American President is responsible to himself and not to Congress, the Council of Ministers of our President shall be responsible to Parliament.

The reason why the framers of the Constitution discarded the American model after providing for the election of the President of the Republic by an electoral college formed of members of the Legislatures not only of the Union but also of the States, has thus been explained²⁷: In combining stability with responsibility, they gave more importance to the latter and preferred the system of 'daily assessment of responsibility' to the theory of 'periodic assessment' upon which the American system is founded. Under the American system, conflicts are bound to occur between the Executive, Legislature and Judiciary; and on the other hand, according to many modern American writers the absence of co-ordination between the Legislature and the

Executive is a source of weakness of the American political system. What is wanted in India on her attaining freedom from one and a half century of bondage is a smooth form of Government which would be conducive to the manifold development of the country without the least friction,—and to this end, the Cabinet or Parliamentary system of

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Government of which India has already had some experience, is better suited than the Presidential.

A more debatable question that has been raised is whether the Constitution obliges the President to act only on the advice of the Council of Ministers, on every matter. The controversy, on this question, was highlighted by a speech delivered by the President Dr. Rajendra Prasad at a ceremony of the India Law Institute (November 28, 1960)²⁸ where he urged for a study of the relationship between the President and the Council of Ministers, observing that—

"There is no provision in the Constitution which in so many words lays down that the President shall be bound to act in accordance with the advice of his Council of Ministers.

Status of the President of India.

The above observation came in contrast with the words of Dr. Rajendra Prasad himself with which he, as the President of the Constituent Assembly, summed up the relevant provisions of the Draft Constitution:²⁸

"Although there is no specific provision in the Constitution itself making it binding on the President to accept the advice of his ministers, it is hoped that the convention under which in England the King always acted on the advice of his ministers would be established in this country also and the President would become a constitutional President in all matters."

Politicians and scholars, naturally, took sides on this issue, advancing different provisions of the Constitution to demonstrate that the "President under our Constitution is not a figure-head" (Munshi)²⁹ or that he was a mere constitutional head similar to the English Crown.

When the question went up to the Supreme Court, the Court took the latter view, relying on the interpretation of the words 'aid and advise' in the Dominion Constitution Acts, in these words, in Ram Jawaya 's case⁹:

"Under article 53(1) of our Constitution the executive power of the Union is vested in the President. But under article 74 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional, head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in

England and the Council of Ministers consisting, as it does, of the members of the legislature is like the British 'Cabinet, 'a hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part' 9

The foregoing interpretation⁹ was reiterated by the Supreme court in several later decisions,³⁰ so that, so far as judicial interpretation was concerned, it was settled that the Indian President is a constitutional head of the Executive like the British Crown. In *Rao v. Indira*³⁰ a unanimous Court observed—

"The Constituent Assembly did not choose the Presidential system of Government."

The 42nd Amendment

The Indira Government sought to put the question beyond political controversy, by amending the Constitution itself. Article 74(1) was thus substituted, by the Constitution (42nd Amendment) Act, 1976:

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"(1) 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 43rd and 44th Amendment

Though the Janata Government sought to wipe off the radical changes infused into the Constitution by Mrs. Gandhi's Government, it has not disturbed the foregoing amendment made in Art 74(1). The only change made by the 44th Amendment Act over the 1976-provision is to add a Proviso which gives the President one chance to refer the advice given to the Council of Ministers back for a reconsideration; but if the Council of Ministers reaffirm their previous advice, the President shall be bound to act according to that advice. Article 74(1), as it stands after the 44th Amendment, 1978, stands thus:

"(1) 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.

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration."

The position to-day, therefore, is that the debate whether the President of India has any power to act contrary to the advice given by the Council of Ministers has become meaningless. By amending the Constitution in 1976 and 1978, a seal has been put to the controversy which had been mooted by President Rajendra Prasad at the Indian Law Institute²⁸ that there was no provision in the Indian Constitution to make it obligatory upon the President to act only in accordance with the advice tendered by the Council of Ministers, on each occasion and under all circumstances.

But, at the same time, the amendment so made has erred on the other side, by making it an absolute proposition, without keeping any reserve for situations when the advice of a Prime Minister is not available (e.g., in the case of death);¹⁹ or the advice tendered by the Prime Minister is improper, according to British conventions, e.g., when Prime Minister defeated in Parliament successively asks for its dissolution.³¹

(a) So far as the contingency arising from the death of the Prime Minister is concerned, it instantly operates to dissolve the existing Council of Ministers. Hence, it would appear that notwithstanding the 1976-78 amendments of Art. 74(1), the President shall have the power of acting without ministerial advice, during the time taken in the matter of choosing a new Prime Minister, who, of course, must command majority in the House of the People. In this contingency, no Council of Ministers exists, on the death of the erstwhile Prime Minister.

(b) But as regards the contingency arising out of a demand for dissolution by a Prime Minister who is defeated in the House of the People it cannot be said that no Council of Ministers is in existence. On the amended Art. 74(1), the President of India, must act upon the request of the defeated Council of Ministers even if such request is improper, e.g., on second occasion of defeat. If so, the position in India would differ from the principles of Cabinet Government as they prevail in the U.K.²⁴

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5. The Attorney-General for India.

The office of the Attorney-General is one of the offices placed on a special footing by the Constitution. He is the first Law Officer of the Government of India, and as such, his duty shall be—

(i) to give advice on such legal matters and to perform such other duties of a legal character as may, from time to time, be referred or assigned to him by the President; and (ii) to discharge the functions conferred on him by the Constitution or any other law for the time being in force [Art. 76].

Though the Attorney-General of India is not (as in England) a member of the Cabinet, he shall also have the right to speak in the Houses of Parliament or in any Committee thereof, but shall have no right to vote [Art. 88]. By virtue of his office, he is entitled to the privileges of a member of Parliament [Art. 105(4)]. In the performance of his official duties, the Attorney-General shall have a right of audience in all Courts in the territory of India.

The Attorney-General for India shall be appointed by the President and shall hold office during the pleasure of the President. He must have the same qualifications as are required to be a Judge of the Supreme Court. He shall receive such remuneration as the President may determine; and the President has determined that the Attorney-General shall be paid a monthly retainer of Rs. 5,000. But, he is not a whole-time counsel for the Government nor a Government servant.

6. The Comptroller and Auditor-General of India.

Another pivotal office in the Government of India is that of Comptroller and Auditor-General who controls the entire financial system of the country [Art. 148]—at the Union as well as State levels.

As observed by Ambedkar, the Comptroller and Auditor-General of India shall be the most important officer under the Constitution of India. For, he is to be the guardian of the public purse and it is his duty to see that not a farthing is spent out of the Consolidated Fund of India or of a State without the authority of the appropriate Legislature. In short, he shall be the impartial head of the audit and accounts system of India. In order to discharge this duty properly, it is highly essential that this office should be independent of any control of the Executive.

The foundation of parliamentary system of Government, as has been already seen, is the responsibility of the Executive of the Legislature and the Essence of such control lies in the system of financial control by the legislature. In order to enable the Legislature to discharge this function Properly, it is essential that this Legislature should be aided by an agency, fully independent of the Executive, who would scrutinise the financial transactions of the Government and bring the results of such scrutiny before the Legislature. There was an Auditor-General of India even under the government of India Act, 1935, and that Act secured the independence of the Auditor-General by making him irremovable except "in like manner and on the like grounds as a Judge of the Federal Court". The office of the Comptroller and Auditor-General, in the Constitution, is substantially

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modelled upon that of the Auditor-General under the Government of India Act, 1935.

Conditions of service.

The independence of the Comptroller and Auditor-General has been sought to be secured by the following provisions of the Constitution—

a. Though appointed by the President, the Comptroller and Auditor-General may be removed only on an address from both Houses of Parliament, on the grounds of (i) 'proved misbehaviour', or (ii) 'incapacity'.

He is thus excepted from the general rule that all civil servants of the Union hold their office at the pleasure of the President [Ch. Art. 310(1)].

b. His salary and conditions of service shall be statutory [i.e., as laid down by Parliament by law] and shall not be liable to variation to his disadvantages during his term of office. Under this power, Parliament has enacted the Comptroller and Auditor-General's (Conditions of Service) Act, 1971 which, as amended, provides as follows:

(i) The term of office of the Comptroller and Auditor-General shall be six years from the date on which he assumes office. But—

- (a) He shall vacate office on attaining the age of 65 years, if earlier than the expiry of the 6-year term;
- (b) He may, at any time, resign his office, by writing under his hand, addressed to the President of India;
- (c) He may be removed by impeachment [Arts. 148(1); 124(4)].
- (ii) His salary shall be equal to that of a Judge of the Supreme Court (which is now Rs. 30,000, w.e.f. 1-1-1996).
- (iii) On retirement, he shall be eligible to an annual pension of Rs. 15,000.
- (iv) In other matters his conditions of service shall be determined by the Rules applicable to a member of the I.A.S., holding the rank of a Secretary to the Government of India.
- (v) He shall be disqualified for any further Government 'office' after retirement³² so that he shall have no inducement to please the Executive of the Union or of any State.
- (vi) The salaries, etc., of the Comptroller and Auditor-General and his staff and the administrative expenses of his office shall be charged upon the Consolidated Fund of India and shall thus be non-votable [Art. 148].

On the above points, thus, the position of the Comptroller and Auditor-General shall be similar to that of a Judge of the Supreme Court.³³

Duties and powers,

The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as may be prescribed by Parliament. In exercise of this power, Parliament has enacted the Comptroller and Auditor-General's (Duties, Powers and Conditions of

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Service) Act, 1971, which, as amended in 1976, relieves him of his pre-Constitution duty to compile the accounts of the Union; and the States may enact similar legislation with the prior approval of the President,—to separate accounts from audit also at the State level, and to relieve the Comptroller and Auditor-General of his responsibility in the matter of preparation of accounts, either of the States or of the Union.

The material provisions of this Act relating to the duties of the Comptroller and Auditor-General are—

- (a) to audit and report on all expenditure from the Consolidated Fund of India and of each State and each Union Territory having a Legislative Assembly as to whether such expenditure has been in accordance with the law;
- (b) similarly, to audit and report on all expenditure from the Contingency Funds and Public Accounts of the Union and of the States;
- (c) to audit and report on all trading, manufacturing, profit and loss accounts, etc., kept by any Department of the Union or a State;
- (d) to audit the receipts and expenditure of the Union and of each State to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue;
- (e) to audit and report on the receipts and expenditure of (i) all bodies and authorities 'substantially financed' from the Union or State revenues; (ii) Government companies; (iii) other corporations or bodies, when so required by the laws relating to such corporations or bodies.

Compared with his British counterpart

As has been just stated, the duty of preparing the accounts was a relic of the Government of India Act, 1935 which has no precedent in the British system, under which the accounts are prepared, not by the Comptroller and Auditor-General, but by the respective Departments. The legislation to separate the function of preparation of accounts from the Comptroller and Auditor-General of India, thus, brings this office at par with that of his British counterpart in one respect.

But there still remains another fundamental point of difference. Though the designation of his office indicates that he is to function both as Comptroller and Auditor, our Comptroller and Auditor-General is so far exercising the functions only of an Auditor. In the exercise of his functions as Comptroller, the English Comptroller and Auditor-General controls the receipt and issue of public money and his duty is to see that the whole of the public revenue is lodged in the account of Exchequer at the Bank of England and that nothing is paid out of that account without legal authority. The Treasury cannot, accordingly, obtain any money from the public Exchequer without a specific authority from the Comptroller, and, this he issues on being satisfied that there is proper legal authority for the expenditure. This system of control over issues of the public money not only prevents withdrawal for an unauthorised purpose but also prevents expenditure in excess of the grants made by Parliament.

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In India, the Comptroller and Auditor-General has no such control over the issue of money from the Consolidated Fund and many Departments are authorised to draw money by issuing cheques without specific authority from the Comptroller and Auditor-General, who is concerned only at the audit stage when the expenditure has already taken place. This system is a relic of the past, for, under the Government of India Acts, even the designation 'Comptroller' was not there and the functions of the Auditor-General were ostensibly confined to audit. After the commencement

of the Constitution, it was thought desirable that our Comptroller and Auditor-General should also have the control over issues as in England, particularly for ensuring that "the grants voted and appropriations made by Parliament are not exceeded". But no action has as yet been taken to introduce the system of Exchequer Control over issues as it has been found that the entire system of accounts and financial control shall have to be overhauled before the control can be centralised at the hands of the Comptroller and Auditor-General.

The functions of the Comptroller and Auditor-General have recently been the subject of controversy, in regard to two questions:

(a) The first is, whether in exercising his function of audit, the Comptroller and Auditor-General has the jurisdiction to comment on extravagance and suggest economy, apart from the legal authority for a particular expenditure. The orthodox view is that when a statute confers power or discretion upon an authority to sanction expenditure, the function of audit comprehends a scrutiny of the propriety of the exercise of such power in particular cases, having regard to the interests of economy, besides its legality. But the Government Departments resent on the ground that such interference is incompatible with their responsibility for the administration. In this view, the Departments are supported by academicians such as Appleby,³⁴ according whom to the question of economy is inseparably connected with the efficiency of the administration and that, having no responsibility for the administration, the Comptroller and Auditor-General or his staff has no competence on the question of economy:

"Auditors do not know and cannot be expected to know very much about good administration; their prestige is highest with others who do not know much about administration... Auditing is a necessary but highly pedestrian function with a narrow perspective and very limited usefulness. "

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(b) Another question is whether the audit of the Comptroller and Auditor-General should be extended to industrial and commercial undertakings carried on by the Government through private limited companies, who are governed by the Articles of their Association, or to statutory public corporations or undertakings which are governed by statute. It was rightly contended by a former Comptroller and Auditor-General³⁵ that inasmuch as money is issued out of the Consolidated Fund of India to invest in these companies and corporations on behalf of the Government, the audit of such companies must necessarily be a right and responsibility of the Comptroller and Auditor-General, while, at present, the Comptroller and Auditor-General can have no such power unless the Articles of Association of such companies or the governing statutes provide for audit by the Comptroller and Auditor-General. The result is that the report of the Comptroller and

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Auditor-General does not include the results of the scrutiny of the accounts of these corporations and the Public-Accounts Committee or Parliament have little material for controlling these important bodies, spending public money. On behalf of the Government, however, this extension of the function of the Comptroller and Auditor-General has been resisted on the ground that the Comptroller and Auditor-General lacks the business or industrial experience which is essential

for examining the accounts of these enterprises and that the application of the conventional machinery of the Comptroller and Auditor-General is likely to paralyse these enterprises which are indispensable for national development.

As has just been stated, this defect has been partially remedied by the Act of 1971 which enjoins the Comptroller and Auditor-General to audit and report on the receipts and expenditure of 'Government companies' and other bodies which are 'substantially financed' from the Union or State revenues, irrespective of any specific legislation in this behalf.

REFERENCES

1. For the results of the elections so far held, see Table X.
2. As to how the system of Proportional Representation would work, see Author's Commentary on the Constitution of India, 7th Ed., Vol. E/I, pp. 84-90.
3. At the Presidential election held in 1997, the electoral college consisted of 4848 members of which the break-up was 543 Lok Sabha + 233 Rajya Sabha + 4072 State Assembly members.
4. C.A.D. , Vol. IV, pp. 734, 846.
5. In his speech in Parliament in 1961, Prime Minister Nehru observed that we should adopt a convention that no person shall be a President for more than two terms, and that no amendment of the Constitution was necessary to enjoin this.
6. Rs. 10,000 originally, raised to Rs. 20,000 in 1990 and to Rs. 50,000 in 1998 (w.e.f. 1-1-1996).
7. The original Constitution provided that the Vice-President would be elected by the two Houses of Parliament, assembled at a joint meeting. This cumbrous procedure of a joint meeting of the two Houses for this purpose has been done away with, by amending Art. 66(1) by the Constitution (11th Amendment) Act, 1961. As amended, the members of both Houses remain the voters, but they may vote by secret ballot, without assembling at a joint meeting.
8. Article 65(3) is to be read with para 4 of Part A of the 2nd Schedule,—the result of which is that until Parliament legislates on this subject (no such law has so far been passed by Parliament till 1987), a Vice-President, while acting as or discharging the functions of the President, shall receive the same emoluments and privileges and allowances as the President gets under Art. 59(3). Since 1996, that emolument is a sum of Rs. 50,000/- per mensem. '

When the Vice-President does not act as President, his only function is that of the Chairman, Council of States, under Art. 97. By passing the Salaries and Allowances of Officers of Parliament (Amendment) Act, 1998, the salary of the Chairman of the Council of States has been raised to Rs. 40,000/- per mensem, vide Act 26 of 1998 (w.e.f. 1-1-1996). He is entitled to daily allowance as admissible to Members of Parliament.

9. Ram Jawaya v. State of Punjab, (1955) 2 S.C.R. 225 (238-39).
10. Shamser Singh v. State of Punjab, A. 1974 S.C. 2192; Rao v. Indira, A. 1971 S.C. 1002 (1005); Sanjeevi v. State of Madras, A. 1970 S.C. 1102 (1106).
11. DICEY, Law of the Constitution, 10th Ed., p. 468.
12. The Council of States, also called the upper House, is not subject to dissolution, but is a permanent body. One-third of its members retire every two years [Art. 83(1)].
13. The only instance of the exercise of the President's veto power over a Bill passed by Parliament, so far, has been in regard to the PEPSU Appropriation Bill. It was passed by Parliament under Art. 357, by virtue of the Proclamation under Art. 356. The

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Proclamation was, however revoked on 7-3-1954, and the Bill was presented for assent of the President on 8-3-1954. The President withheld his assent to the Bill on the ground that on 8-3-1951, Parliament had no power to exercise the legislative powers of the PEPSU State and that, accordingly, the President could not give his assent to the Bill to enact a law which was beyond the competence of Parliament to enact on that date.

The Salary, Allowances and Pension of Members of Parliament (Amendment) Bill, 1991 was passed by the Houses of Parliament on the last day of its sitting, without obtaining the President's recommendation as required by Art. 117(1). It was presented to the President for his assent on 18th March, 1991. The President withheld his assent to it. (Rajya Sabha, Parliamentary Bulletin Part I, dated March 9, 1992).

This shows that the veto power is necessary to prevent the enactment of Bills which appear to be ultra vires or unconstitutional at the time when the Bill is ready for the President's assent. It also shows that there may be occasions when Government may have to advise the President to veto a Bill which had been introduced by the Government itself.

14. In 1986 both the Houses passed the Indian Post Office (Amendment) Bill, 1986. It was widely criticised as curtailing the Freedom of the Press. President Zail Singh did not declare his assent or that he withheld his assent. It was all the time in the 'pocket' of the President.

After the formation of the National Front Government in December, 1989, the President R. Venkataraman referred it back for reconsideration and the Prime Minister declared that it would be brought again before the Houses of Parliament, with suitable changes. It appears certain that it has been given up.

15. Hoechst Pharmaceuticals v. State of Bihar, A. 1953 S.C. 1019 (para 89).
16. Lakhinarayan v. Prov. of Bihar, A. 1950 F.C. 59; State of Punjab v. Satya Pal, A. 1969 S.C. 903 (912).

The proposition arrived at in these cases now stand modified in a case from Bihar, decided by the Supreme Court in December, 1986—*Wadhwa v. State of Bihar*, A. 1987 S.C. 579. In this case, it was established that the Government of Bihar, instead of laying before the State Legislature an Ordinance as required by Art. 213(2)(a) of the Constitution [corresponding to Art. 123(2) (a)] or having an Ordinance replaced by an Act of the Legislature, before the expiry of the Ordinance on the lapse of the time specified in the Constitution, would prolong its duration by re-promulgating it, i.e., by issuing another new Ordinance to replace the Ordinance which would have otherwise expired. In this manner, some 256 Ordinances were kept alive (up to a length of 14 years in some cases) without getting an Act passed by the State Legislature in place of the expiring Ordinance. The Supreme Court held that the power of the Governor to promulgate an Ordinance was in the nature of an emergency power. Hence, though in some rare cases when an Act to replace an Ordinance could not be passed by the Legislature in time as it was loaded with other business; but if it was made a usual practice so as to establish legislation by the Executive (or an 'Ordinance Raj') instead of by the Legislature, as envisaged by the Constitution, that would amount to a fraud on the Constitution, on which ground, the Court would strike down the repromulgated Ordinance. The substance of this decision is, therefore, that in extreme cases, a Court may invalidate an Ordinance on the ground of fraud and it affirms the trend since *Cooper's* case (f.n. 18, below).

17. *Wadhwa v. State of Bihar*, A. 1987 S.C. 579.

18. *Cooper v. Union of India*, A. 1970 S.C. 564 (588, 644); *A.K. Roy v. Union of India*, A. 1982 S.C. 710.

19. *Samsher v. State of Punjab*, A. 1974 S.C. 2192 (para 30).

20. *Kehar Singh v. Union of India*, A. 1989 S.C. 653.

21. *Mam Ram v. Union of India*, A. 1980 S.C. 2147, paras 62, 72(a) [Const. Bench] followed in *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1 (para 73)—9-Judge Bench.

22. As regards the Union Territories of (a) Goa, Daman & Diu, (b) Pondicherry, (c) Mizoram and (d) Arunachal Pradesh, the President's power to make regulations has ceased, since the setting up of a Legislature in each of these Territories, after the amendments of Art. 240(1), in 1962, 1971 and 1975. So far as Mizoram, Arunachal Pradesh and Goa are concerned, they have been promoted to the category of States, in 1986-87.

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23. The words 'armed rebellion' have been substituted for 'internal disturbance', by the 44th Amendment Act, 1978.

24. For further study of the Cabinet system in India, see Author's Commentary on the Constitution of India (7th Ed.), Vol. E/I, pp, 195-293.

25. In July, 1989, their number was (a) Members of the Cabinet—18; (b) Ministers of State—40 (total 58). In July 1990 (a) the Members of the Cabinet—18; (b) Ministers of State—18; and (c) Deputy Ministers—5. In March 1992 the total was 57. In September, 1995—(a) Members of the Cabinet—20, and (b) Ministers of State—50. In December 1996 there were 20 cabinet ministers and 19 ministers of State. In November 2000 there were 29 Cabinet Ministers, 44 State Ministers and no Deputy Ministers.

26. *Common Cause, A Registered Society v. Union of India*, (1999) 6 S.C.C. 667 (para 3) : A.I.R. 1999 S.C. 2979.

27. C.A.D., Vol. IV, pp. 580, 734; Vol. VII, pp. 32, 974, 984.

28. The suggestion of President Dr. Rajendra Prasad, in his speech at the Indian Law Institute, that the position of the Indian President was not identical with that of the British Crown, must be read with his quoted observation in the Constituent Assembly [X C.A.D. 988] which, as a contemporaneous statement, has a great value in assessing the intent of the makers of the Constitution, and the meaning behind Art. 74(1), as it stood up to 1976.

29. K.M. Munshi, *the President under the Indian Constitution* (1963), p. viii.

30. *Sanjeevi v. State of Madras*, A. 1970 S.C. 1102 (7 706); *Rao v. Indira*, A. 1971 S.C. 1002 (7005); *Shamser Singh v. State of Punjab*, A. 1974 S.C. 2192.

31. BASU, *Commentary on the Constitution of India*, 5th Ed., Vol. II, p. 593, where it is stated—

"Constitutional writers agree that a dismissal of the Cabinet by the Crown, would now be an unconstitutional act, except in the abnormal case of a Cabinet refusing to resign or to appeal to the electorate upon a vote of no confidence in the Commons." See the instances given in *Shamser Singh's case* [A. 1974 S.C. 2192 (para 153)].

32. There was a vehement public criticism that this prohibition in Art. 148(4) was violated by the appointment of a retired Comptroller and Auditor-General as the Chairman of the Finance Commission. According to judicial decisions, an 'office' is an employment, which embraces the ideas of tenure, duration, emolument and duties. Now, the Finance Commission is an office created by Art. 280 of the Constitution itself, with a definite tenure, emoluments and duties as defined by the Finance Commission (Miscellaneous Provisions) Act, 1951, read with Art 280 of the Constitution. Apparently, therefore, the membership of the Finance Commission is an office under the Government of India, which comes within the purview of Art. 148(4).

33. But, as Dr. Ambedkar pointed out in the Constituent Assembly (C.A.D., VIII, p. 407), in one respect the independence of the Comptroller and Auditor-General falls short of that of the Chief Justice of India. While the power of appointment of the staff of the Supreme Court has been given to the Chief Justice of India [Art. 146(1)], the Comptroller and Auditor-General has no power of appointment, and, consequently, no power of disciplinary control with respect to his subordinates. In the case of the Comptroller and Auditor-General, these powers have been

retained by the Government of India though it is obviously derogatory to the administrative efficiency of this highly responsible functionary.

34. APPLEBY, A., Re-examination of India's Administrative System, p. 28.

35. Narhari Rao's statement before the Public Accounts Committee, 1952.

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CHAPTER 12 THE UNION LEGISLATURE

Functions of Parliament.

AS has been explained at the outset, our Constitution has adopted the Parliamentary system of Government which effects a harmonious blending of the legislative and executive organs of the State inasmuch as the executive power is wielded by a group of members of the Legislature who command a majority in the popular Chamber of the Legislature and remain in power so long as they retain that majority. The functions of Parliament as the legislative organ follow from the above feature of the Parliamentary system:

I. Providing the Cabinet. It follows from the above that the first function of Parliament is that of providing the Cabinet and holding them responsible. Though the responsibility of the Cabinet is to the popular Chamber the membership of the Cabinet is not necessarily restricted to that Chamber and some of the members are usually taken from the upper Chamber.

II. Control of the Cabinet. It is a necessary corollary from the theory of ministerial responsibility that it is a business of the popular Chamber to see that the Cabinet remains in power so long as it retains the confidence of the majority in that House. This is expressly secured by Art. 75(3) of our Constitution.

III. Criticism of the Cabinet and of individual Ministers. In modern times both the executive and the legislative policies are initiated by the Cabinet, and the importance of the legislative function of Parliament has, to that extent, diminished from the historical point of view. But the critical function of Parliament has increased in importance and is bound to increase if Cabinet Government is to remain a 'responsible' form of Government instead of being an autocratic one. In this function, both the Houses participate and are capable of participating, though the power of bringing about a downfall of the Ministry belongs only to the popular Chamber {i.e., the House of the People} [Art. 75(3)].

While the Cabinet is left to formulate the policy, the function of Parliament is to bring about a discussion and criticism of that policy on the floor of the House, so that not only the Cabinet can get the advice of the deliberative body and learn about its own errors and deficiencies, but the nation as a whole can be appraised of an alternative point of view, on the evaluation of which representative democracy rests in theory.

IV. An organ of information. As an organ of information, Parliament is more powerful than the Press or any other private agency, for Parliament secures the information authoritatively, from those in the know of things. The

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information is collected and disseminated not only through the debates but through the specific medium of 'Questions' to Ministers.

V. Legislation. The next function of the Legislature is that of making laws [Arts. 107-108; 245] which belongs to the Legislature equally under the Presidential and Parliamentary forms of government. In India, since the inauguration of the Constitution the volume of legislation is steadily rising in order to carry out the manifold development and other measures necessary to establish a welfare State.

VI. Financial control. Parliament has the sole power not only to authorise expenditure for the public services and to specify the purposes to which that money shall be appropriated, but also to provide the ways and means to raise the revenue required, by means of taxes and other impositions and also to ensure that the money that was granted has been spent for the authorised purposes. As under the English system, the lower House possesses the dominant power in this respect, under our Constitution [Art. 109],

Constitution of Parliament.

The Parliament of India consists of the President and two Houses. The lower House is called the House of the People while the upper House is known as the Council of States' [Art. 79].

(The Hindi names 'Lok Sabha' and 'Rajya Sabha' have been adopted by the House of the People and the Council of States respectively.)

The President is a part of the Legislature, like the English Crown, for, even though he does not sit in Parliament, except for the purpose of delivering his opening address [Art. 87], a Bill passed by the House of Parliament cannot become law without the President's assent. The other legislative functions of the President, such as the making of Ordinances while both Houses are not in sitting, have already been explained.

Composition of Council of States.

The Council of States shall be composed of not more than 250 members, of whom (a) 12 shall be nominated by the President; and (b) the remainder (i.e., 238) shall be representatives of the States and the Union Territories elected by the method of indirect election² [Art. 80].

(a) Nomination. The 12 nominated members shall be chosen by the President from amongst persons having 'special knowledge or practical experience in literature, science, art, and social service'. The Constitution thus adopts the principle of nomination for giving distinguished persons a place in the upper Chamber.

(b) Representation of States. The representatives of each State shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(c) Representation of Union Territories. The representatives of the Union Territories shall be chosen in such manner as Parliament may prescribe [Art. 80(5)]. Under this power Parliament has prescribed² that the

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representatives of Union Territories to the Council of States shall be indirectly elected by members of an electoral college for that Territory, in accordance with the system of proportional representation by means of the single transferable vote.

The Council of States thus reflects a federal character by representing the Units of the federation. But it does not follow the American principle of equality of State representation in the Second Chamber. In India, the number of representatives of the States to the Council of States varies from 1 (Nagaland) to 31 (Uttar Pradesh).

Composition of the House of the people

The House of the People has a variegated composition. The Constitution prescribes a maximum number as

(a) Not more³ than 5304 [Art. 81(1)(a)] representatives of the States;

(b) Not more than 20 representatives of Union Territories [Art. 81(1)(b)].

(c) Not more than 2 members of the Anglo-Indian community, nominated by the President, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People [Art. 331].

(i) The representatives of the States shall be directly elected by the people of the State on the basis of adult suffrage. Every citizen who is not less than 18 years of age and is not otherwise disqualified, e.g., by reason of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to vote at such election [Art. 326],

There will be no reservation of seats for any minority community other than the Scheduled Castes and the Scheduled Tribes [Arts. 330, 341, 342].

The bulk of the members of the House are thus directly elected by the people.

(ii) The members from the Union Territories are to be chosen in such manner as Parliament may by law provide.

Under this power, Parliament has enacted⁶ that representatives of all the Union Territories shall be chosen by direct election.

(iii) Two members may be nominated from the Anglo-Indian community by the President to the House of the People if he is of opinion that the Anglo-Indian community has not been adequately represented in the House of the People [Art. 331]. (see Table VIII, post.)

Territorial Constituencies for election to the House of the people

The election to the House of the People being direct, requires that the territory of India should be divided into suitable territorial constituencies, for the purpose of holding such elections. Article 81(2), as it stands after the Constitution (7th Amendment) Act, 1956, has provided for uniformity of representation in two respects—(a) as between the different States, and (b) as between the different constituencies in the same State, thus:

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(a) there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and

(b) each State 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 is, so far as practicable, the same throughout the State.

Proportional Representation for Council of States.

While the system of separate electorates was abandoned by the Constitution, the system of proportional representation was partially adopted for the second Chamber in the Union and State Legislatures.

(a) As regards the Council of States, proportional representation by single transferable vote has been adopted for the indirect election by the elected members of the Legislative Assembly of each State, in order to give some representation to minority communities and parties [Art. 80(4)].

(b) Similarly, proportional representation is prescribed for election to the Legislative Council of a State by electorates consisting of municipalities, district boards and other local authorities and of graduates and teachers of three years standing resident in the State [Art. 171(4)].

As regards the House of the People [Art. 81] and the Legislative Assembly of a State, however, the system of proportional representation has been abandoned and, instead, the Constitution has adopted the single member constituency with reservation of seats (at the general election) for some backward communities, namely, the Scheduled Castes and Tribes [Arts. 330, 332].

The reasons for not adopting proportional representation for the House of the People were thus explained in the Constituent Assembly—

Why proportional representation not adopted for House of the People Assembly

(i) Proportional representation presupposes literacy on a large scale. It presupposes that every voter should be a literate, at least to the extent of being in a position to know the numerals and mark them on the ballot paper and having regard to the position of literacy in this country at present, such a presumption would be extravagant.

(ii) Proportional representation is ill-suited to the Parliamentary system of government laid down by the Constitution. One of the disadvantages of the system of proportional representation is the fragmentation of the Legislature into a number of small groups. Although the British Parliament appointed a Royal Commission in 1910 to consider the advisability of introducing proportional representation and the Commission recommended it, Parliament did not eventually accept the recommendations of the Commission on the ground that the proportional representation would not permit a stable Government. Parliament would be so divided into small groups that every time anything happened which displeased certain groups in Parliament, they would on those occasions withdraw support to the Government with the result that the Government, losing the support of certain groups, would fall to pieces.

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What India needed, at least in view of the existing circumstances, was a stable Government, and, therefore, proportional representation in the lower House to which the Government would be responsible could not be accepted. In this connection, Dr. Ambedkar said in the Constituent Assembly,—

"I have not the least doubt in my mind, whether the future Government provides relief to the people or not, our future Government must do one thing—they must maintain a stable Government and maintain law and order."⁷

Duration of Houses of Parliament.

(a) The Council of States is not subject to dissolution. It is a permanent body, but (as nearly as possible) 1/3 of its members retire on the expiration of every second year, in accordance with provisions made by Parliament in this behalf. It follows that there will be an election of 1/3 of the membership of the Council of States at the beginning of every third year [Art. 83(1)]. The order of retirement of the members is governed by the Council of States (Term of Office of Members) Order, 1952, made by the President in exercise of powers conferred upon him by the Representation of the People Act, 1951.

(b) The normal life of the House of the People is 5 years,⁸ but it may be dissolved earlier by the President.

On the other hand, the normal term may be extended by an Act passed by Parliament itself during the period when a 'Proclamation of Emergency' (made by the President under Art. 352) remains in operation. The Constitution, however, sets a limit to the power of Parliament thus to extend its own life during a period of Emergency: the extension cannot be made for a period

exceeding one year at a time (i.e., by the same Act of Parliament), and, in any case, such extension cannot continue beyond a period of six months after the Proclamation of Emergency ceases to operate [Proviso to Art. 83].

Sessions of Parliament

The President's power—(a) to summon either House, (b) to prorogue either House, and (c) to dissolve the House of the People has already been noted (in the Chapter— The Union Executive', ante).

As regards summoning, the Constitution imposes a duty upon the President, namely, that he must summon each House at such intervals that six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session [Art. 85(1)]. The net result of this provision is that Parliament must meet at least twice a year and not more than six months shall elapse between the date on which a House is prorogued and the commencement of its next session.

Adjournment prorogation and dissolution.

It would, in this context, be useful to distinguish prorogation and dissolution from adjournment. A 'session' is the period of time between the first meeting of a Parliament, and its prorogation or dissolution. The period between the prorogation of Parliament and its re-assembly in a new session is termed 'recess'.

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Within a session, there are a number of daily 'sittings' separated by adjournments, which postpone the further consideration of business for a specified time—hours, days or weeks.

The sitting of a House may be terminated by (a) dissolution, (b) prorogation, or (c) adjournment:

(i) As stated already, only the House of the People is subject to dissolution. Dissolution may take place in either of two ways—(a) By efflux of time, i.e., on the expiry of its term of five years, or the terms as extended during a Proclamation of Emergency, (b) By an exercise of the President's power under Art. 85(2).

(ii) While the powers of dissolution and prorogation are exercised by the President on the advice of his Council of Ministers, the power to adjourn the daily sittings of the House of the People and the Council of States belongs to the Speaker and the Chairman, respectively.

A dissolution brings the House of the People to an end (so that there must be a fresh election), while prorogation merely terminates a session. Adjournment does not put an end to the existence of a session of Parliament but merely postpones the further transaction of business for a specified time, hours, days or weeks.

(iii) A dissolution ends the very life of the existing House of the People so that all matters pending before the House lapse with the dissolution. If these matters have to be pursued, they must be re-introduced in the next House after fresh election. Such pending business includes not only notices, motions, etc., but Bills, including Bills which originated in the Council and were sent to the House, as well as Bills originating in the House and transmitted to the Council which were pending in the Council on the date of dissolution. But a Bill pending in the Council which has not yet been passed by the House shall not lapse on dissolution. A dissolution would not, however, affect a joint sitting of the two Houses summoned by the President to resolve a disagreement between the Houses if the President has notified his intention to hold a joint sitting before the dissolution [Art. 108(5)].

Though in England prorogation also wipes all business pending at the date of prorogation, in India, all Bills pending in Parliament are expressly saved by Art. 107(3). In the result, the only effect of a prorogation is that pending notices, motions and resolutions lapse, but Bills remain unaffected.

Adjournment has no such effect on pending business.

Qualification for membership of parliament

In order to be chosen a member of Parliament, a person (a) must be a citizen of India; (b) must be not less than 30 years of age in the case of Council of States and not less than 25 years of age in the case of the House of the People.

Disqualifications for membership.

Additional qualifications may be prescribed by Parliament by law [Art. 84]. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

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(a) if he holds any office of profit under the Government of India or the Government of any State (other than an office exempted by Parliament by law) but not a Minister for the Union or for a State; or

(b) if he is of unsound mind and stands so declared by a competent Court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India or has voluntarily acquired citizenship of a foreign State or is under acknowledgment of allegiance or adherence to a foreign power;

(e) if he is so disqualified by or under any law made by Parliament [Art. 102].

It may be noted that sex is no disqualification for membership of Parliament and that in the Thirteenth General Election, as many as 32 women secured election to the House of the People.

If any question arises as to whether a member of either House of Parliament has become subject to any of the above disqualifications, the President's decision, in accordance with the opinion of the Election Commission, shall be final [Art. 103].

A penalty of Rs. 500 per day may be imposed upon a person who sits or votes in either House of Parliament knowing that he is not qualified or that he is disqualified for membership thereof [Art. 104].

Vacation of seats by members.

A member of Parliament shall vacate his seat in the following cases [Art 101]:

(i) Dual membership, (a) If a person be chosen to membership of both Houses of Parliament he must vacate his seat in one of the two Houses, as may be prescribed by Parliament by law. (b) Similarly, if a person is elected to the Union Parliament and a State Legislature then he must resign his seat in the State Legislature; otherwise his seat in Parliament shall fall vacant at the expiration of the period specified in the rules made by the President.

(ii) Disqualification. If a person incurs any of the disqualifications mentioned in Art. 102 (e.g., becoming of unsound mind), his seat will thereupon become vacant immediately.

(iii) Resignation. A member may resign his seat by writing addressed to the Chairman of the Council of States or the Speaker of the House of the People, as the case may be, and thereupon his seat shall be vacant.

(iv) Absence without permission. The House may declare a seat vacant if the member in question absents himself from all meetings of the House for a period of 60 days without permission of the House.

Salaries and Allowances of Members of Parliament.

Under the Salaries, Allowances and Pension of Members of Parliament Act, 1954, as amended by Act 16 of 1999, a member of Parliament is entitled to a salary at the rate of Rs. 2500 per mensem during the whole term of his office plus an allowance at the rate of Rs. 150 for each day during any period of residence on duty at the place where Parliament or

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any Committee thereof is sitting or where any other business connected with his duties as Member of Parliament is transacted. Together with this, he is entitled to travelling allowance, free transit by railways, steamer and other facilities as prescribed by rules framed under the Act. He shall also be entitled to a pension, since a 1976 amendment, on a graduated scale for each 5 year term as member of either House.

Officers of Parliament

Each House of Parliament has its own presiding officer and secretarial staff.

Speaker

There shall be a Speaker to preside over the House of the People. In general, his position is similar to that of the Speaker of the English House of Commons.

The House of the People will, as soon as may be after its first sitting, choose two members of the House to be, respectively, Speaker and Deputy Speaker [Art. 93]. The Speaker or the Deputy Speaker will normally hold office during the life of the House, but his office may terminate earlier in any of the following ways (i) By his ceasing to be a member of the House. (ii) By resignation in writing, addressed to the Deputy Speaker, and vice versa, (iii) By removal from office by a resolution, passed by a majority of all the then members of the House [Art. 94]. Such a resolution shall not be moved unless at least 14 days' notice has been given of the intention to move the resolution. While a resolution for his removal is under consideration, the Speaker shall not preside but he shall have the right to speak in, and to take part in the proceedings of, the House, and shall have a right of vote except in the case of equality of votes [Art. 96].

Powers of the Speaker.

At other meetings of the House the Speaker shall preside. The Speaker will not vote in the first instance, but shall have and exercise a casting vote in the case of equality of votes. The absence of vote in the first instance will make the position of the Speaker as impartial as in England, and the casting vote is given to him only to resolve a deadlock.

The Speaker will have the final power to maintain order within the House of the People and to interpret its Rules of Procedure. In the absence of a quorum, it will be the duty of the Speaker to adjourn the House or to suspend the meeting until there is a quorum.

The Speaker's conduct in regulating the procedure or maintaining order in the House will not be subject to the jurisdiction of any Court [Art. 122],

Besides presiding over his own House, the Speaker possesses certain powers not belonging to the Chairman of the Council of States—

- (a) The Speaker shall preside over a joint sitting of the two Houses of Parliament [Art. 118(4)].
- (b) When a Money Bill is transmitted from the Lower House to the Upper House, the Speaker shall endorse on the Bill his certificate that it is a Money Bill [Art. 110(4)]. The decision of the Speaker as to whether a Bill is Money Bill is final and once the certificate is endorsed by the Speaker on a

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Bill, the subsequent procedure in the passage of the Bill must be governed by the provisions relating to Money Bills.

Deputy Speaker.

While the office of Speaker is vacant or the Speaker is absent from a sitting of the House, the Deputy Speaker presides, except when a resolution for his own removal is under consideration.

Chairman.

While the House of the People has a Speaker elected by its members from among themselves, the Chairman of the Council of States (who presides over that House) performs that function ex-officio. It is the Vice-President of India who shall ex-officio be the Chairman of the Council of States and shall preside over that House and shall function as the Presiding Officer of that House so long as he does not officiate as the President of India during a casual vacancy in that office. When the

Chairman acts as the President of India, the Office of the Chairman of the Council of States falls vacant and the duties of the office of the Chairman shall be performed by the Deputy Chairman. The Chairman may be removed from his office only if he is removed from the office of the Vice-President, the procedure for which has already been stated. Under the Salaries and Allowances of Officers of Parliament Act, 1953, as amended, the salary of the Chairman is the same as that of the Speaker, viz., Rs. 40,000 plus a sumptuary allowance of Rs. 1,000 per mensem, but when the Vice-President acts as the President he shall be entitled to the emoluments and allowances of the President [Art. 65(3)] and during that period he shall cease to earn the salary of the Chairman of the Council of States. The functions of the Chairman in the Council of States are similar to those of the Speaker in the House of the People except that the Speaker has certain special powers according to the Constitution, for instance, of certifying a Money Bill, or presiding over a joint sitting of the two Houses, which have been already mentioned.

Privileges are certain rights belonging to each House of Parliament collectively and some others belonging to the members individually, without which it would be impossible for either House to maintain its independence of action or the dignity of its position.

Power, privileges and Immunities of Parliament and its Members

Both the Houses of Parliament as well as of a State Legislature have similar privileges under our Constitution. Clauses (1)-(2) of Arts. 105 and 194 of our Constitution deal only with two matters, viz., freedom of speech and right of publication.

As regard privileges relating to other matters, the position, as it stands after the 44th Amendment, 1978, is as follows—The privileges of members of our Parliament were to be the same as those of members of the House of Commons (as they existed at the commencement of the Constitution), until our Parliament itself takes up legislation relating to privileges in whole or in part. In other words, if Parliament enacts any provision relating to any particular privilege at any time, the English precedents will to that extent be superseded in its application to our Parliament. No such legislation having been made by our Parliament, the privileges were the same as in the House

of the Commons, subject to such exceptions as necessarily follow from the difference in the constitutional set-up in India. Reference to House of Commons was omitted in 1978.

In an earlier case,¹⁰ the Supreme Court held that if there was any conflict between the existing privileges of Parliament and the fundamental rights of a citizen, the former shall prevail, for, the provisions in Arts. 105(3) and 194(3) of the Constitution, which confer upon the Houses of our Legislatures the same British privileges as those of the House of Commons, are independent provisions and are not to be construed as subject to Part III of the Constitution, guaranteeing the Fundamental Rights. For instance, if the House of a Legislature expunges a portion of its debates from its proceedings, or otherwise prohibits its publication, anybody who publishes such prohibited debate will be guilty of contempt of Parliament and punishable by the House and the Fundamental Right of freedom of expression [Art. 19(1)(a)] will be no defence. But in a later case,¹¹ the Supreme Court has held that though the existing privileges would not be fettered by Art. 19(1)(a), they must be read subject to Arts. 20-22 and 32.

Privileges Classified

The privileges of each House may be divided into two groups—(a) those which are enjoyed by the members individually, and (b) which belong to each of house of Parliament, as a collective body.

(A) The privileges enjoyed by the members individually are (i) Freedom from arrest; (ii) Exemption from attendance as jurors and witnesses; (iii) Freedom of speech.

(i) Freedom from Arrest. Section 135A of the C.P. Code, as amended by Act 104 of 1976, exempts a member from arrest during the continuance of a meeting of the Chamber or Committee thereof of which he is a member or of a joint sitting of the Chambers or Committees, and during a period of 40 days before and after such meeting or sitting. This immunity is, however, confined to arrest in civil cases and does not extend to arrest in criminal case or under the law of Preventive Detention.

(ii) Freedom of Attendance as Witness. According to the English practice, a member cannot be summoned, without the leave of the House, to give evidence as a witness while Parliament is in session.

(iii) Freedom of Speech. As in England, there will be freedom of speech within the walls of each House in the sense of immunity of action for anything said therein. While an ordinary citizen's right of speech is subject to the restrictions specified in Art. 19(2), such as the law relating to defamation, a Member of Parliament cannot be made liable in any court of law in respect of anything said in Parliament or any Committee thereof. But this does not mean unrestricted licence to speak anything that a member may like, regardless of the dignity of the House. The freedom of speech is therefore 'subject to the rules' framed by the House under its powers to regulate its internal procedure.

The Constitution itself imposes another limitation upon the freedom of speech in Parliament, namely, that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court

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or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge [Art. 121].

(B) The privileges of the House collectively are—(i) The right to publish debates and proceedings and the right to restrain publication by others; (ii) The right to exclude others; (iii) The right to regulate the internal affairs of the House, and to decide matters arising within its walls; (iv) The right to publish Parliamentary misbehaviour; (v) The right to punish members and outsiders for breach of its privileges.

Thus, each House of Parliament shall have the power—

(i) To exclude strangers from the galleries at any time. Under the Rules of Procedure, the Speaker and the Chairman have the right to order the 'withdrawal of strangers from any part of the House'.

(ii) To regulate its internal affairs. Each House of Parliament has the right to control and regulate its proceedings and also to decide any matter arising within its walls, without interference from the Courts. What is said or done within the walls of Parliament cannot be inquired into in a Court of Law.

(iii) To punish members and outsiders for breach of its privileges. Each House can punish for contempt or breach of its privileges, and the punishment may take the form of admonition, reprimand or imprisonment. Thus, in the famous Blitz case, the Editor of the newspaper was called to the Bar of the House of the People and reprimanded for having published an article derogatory to the dignity of a member in his capacity as member of the House. In 1990, Sri K.K. Tewari, a former Minister was reprimanded by the Rajya Sabha. What constitutes breach of privileges or contempt of Parliament has been fairly settled by a number of precedents in England and India. Broadly speaking—

"Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such House in the discharge of his duty or which has a tendency, directly or indirectly, to produce such results as may be treated as a contempt, even though there is no precedent of the offence"!2

The different stages in the legislative procedure in Parliament relating to Bills other than Money Bills are as follows:

Legislative Procedure:

I. Ordinary Bills.

1. Introduction.

A Bill other than Money or financial Bills may be introduced in either House of Parliament [Art. 107(1)] and requires passage in both Houses before it can be presented for the President's assent. A Bill may be introduced either by a Minister or by a private Member. The difference in the two cases is that any Member other than a Minister desiring to introduce a Bill has to give notice of his intention and to ask for leave of the House to introduce which is, however, rarely opposed. If a Bill has been published in the official gazette before its introduction, no motion for leave to introduce the Bill is necessary. Unless published earlier, the Bill is published in the official gazette as soon as may be after it has been introduced.

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2. Motions after introduction. After a Bill has been introduced or on some subsequent occasion, the Member in charge of the Bill may make one of the following motions in regards to the Bill, viz.—

(a) That it be taken into consideration.

(b) That it be referred to a Select Committee.

(c) That it be referred to a Joint Committee of the House with the concurrence of the other House.

(d) That it be circulated for the purpose of eliciting public opinion thereon.

On the day on which any of the aforesaid motions is made or on any subsequent date to which the discussion is postponed, the principles of the Bill and its general provisions may be discussed. Amendments to the Bill and clause by clause consideration of the provisions of the Bill take place when the motion that the Bill be taken into consideration is carried.

3. Report by Select Committee. It has already been stated that after introduction of the Bill the Member in charge or any other Member by way of an amendment may move that the Bill be referred to a Select Committee. When such a motion is carried, a Select Committee of the House considers the provisions of the Bill (but not the principles underlying the Bill which had, in fact, been accepted by the House when the Bill was referred to the Select Committee). After the Select Committee has considered the Bill, it submits its report to the House and after the report is received, a motion that the Bill as returned by the Select Committee be taken into consideration lies. When such a motion is carried, the clauses of the Bill are open to consideration and amendments are admissible.

4. Passing of the Bill in the House where it was introduced. When a motion that the Bill be taken into consideration has been carried and no amendment of the Bill has been made or after the amendments are over, the Member in charge may move that the Bill be passed. This stage may be compared to the third reading of a Bill in the House of Commons. After the motion that the Bill may be passed is carried,¹³ the Bill is taken as passed so far as that House is concerned.

5. Passage in the other House.- When a Bill is passed in one House, it is transmitted to the other House. When the Bill is received in the other House it undergoes all the stages as in the originating House subsequent to its introduction. The House which receives the Bill from another House can, therefore, take either of the following courses:

(i) It may reject the Bill altogether. In such a case the provisions of Art. 108(1) (a) as to joint sitting may be applied by the President.

(ii) It may pass the Bill with amendments. In this case, the Bill will be returned to the originating House. If the House which originated the Bill accepts the Bill as amended by the other House, it will be presented to the President for his assent [Art. 111]. If however the originating House does not agree to the amendments made by the other House and there is final

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disagreement as to the amendments between the two Houses, the President may summon a joint sitting to resolve the deadlock [Art. 108(1)(b)].

(iii) It may take no action on the Bill, i.e., keep it lying on its Table. In such a case if more than six months elapse from the date of the reception of the Bill, the President may summon a joint sitting [Art. 108(1)(c)].

6. President's Assent. When a Bill has been passed by both Houses of Parliament either singly or at a joint sitting as provided in Art. 108, the Bill is presented to the President for his assent. If the President withholds his assent, there is an end to the Bill. If the President gives his assent, the Bill becomes an Act from the date of his assent. Instead of either refusing assent or giving assent, the President may return the Bill for reconsideration of the Houses with a message requesting them to reconsider it. If, however, the Houses pass the Bill again with or without amendments and the Bill is presented to the President for his assent after such reconsideration, the President shall have no power to withhold his assent from the Bill.

II. Money Bills.

A Bill is deemed to be a 'Money Bill' if it contains only provisions dealing with all or any of the following matters:

(a) the imposition, abolition, remission, alteration or regulation of any tax; (b) the regulation of the borrowing of money by the Government; (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such fund; (d) the appropriation of moneys out of the Consolidated Fund of India; (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure; (f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f) [Art. 110].

But a Bill shall not be deemed to be a Money Bill by reason only that it provides for imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final. This means that the nature of a Bill which is certified by the Speaker as a Money Bill shall not be open to question either in a Court of law or in the either House or even by the President.

When a Bill is transmitted to the Council of States or is presented for the assent of the President, it shall bear the endorsement of the Speaker that it is a Money Bill. As pointed out earlier, this is one of the special powers of the Speaker.

The following is the procedure for the passing of Money Bills in Parliament:

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A Money Bill shall not be introduced in the Council of States.

After a Money Bill has been passed by the House of the People, it shall be transmitted (with the Speaker's certificate that it is a Money Bill) to the Council of States for its recommendations. The Council of States cannot reject a Money Bill nor amend it by virtue of its own powers. It must, within a period of fourteen days from the date of receipt of the Bill, return the Bill to the House of the People which may thereupon either accept or reject all or any of the recommendations of the Council of States.

If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it is passed by the House of the People without any of the amendments recommended by the Council of States.

If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People [Art. 109].

Money Bill and Financial Bill.

Generally speaking, a Financial Bill may be said to be any Bill which relates to revenue or expenditure. But it is in a technical sense that the expression is used in the Constitution.

I. The definition of a 'Money Bill' is given in Art. 110 and no Bill is a Money Bill unless it satisfies the requirements of this Article. It lays down that a Bill is a Money Bill if it contains only provisions dealing with all or any of the six matters specified in that Article or matters incidental thereto. These six specified matters have already been stated [See under 'Money Bills', ante].

On the question whether any Bill comes under any of the sub-clauses of Art. 110, the decision of the Speaker of the House of the People is final and his certificate that a particular Bill is a Money Bill is not liable to be questioned. Shortly speaking, thus, only those Financial Bills are Money Bills which bear the certificate of the Speaker as such.

II. Financial Bills which do not receive the Speaker's certificate are of two classes. These are dealt with in Art. 117 of the Constitution—

(i) To the first class belongs a Bill which contains any of the matters specified in Art. 110 but does not consist solely of those matters, for example, a Bill which contains a taxation clause, but does not deal solely with taxation [Art. 117(1)].

(ii) Any ordinary Bill which contains provisions involving expenditure from the Consolidated Fund is a Financial Bill of the second class [Art. 117(3)].

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III. The incidents of these three different classes of Bills are as follows—

(i) A Money Bill cannot be introduced in the Council of States nor can it be introduced except on the recommendation of the President. Again, the Council of States has no power to amend or reject such a Bill. It can only recommend amendments to the House of the People.

(ii) A Financial Bill of the first class, that is to say, a Bill which contains any of the matters specified in Art. 110 but does not exclusively deal with such matters, has two features in common with a Money Bill, viz., that it cannot be introduced in the Council of States and also cannot be introduced except on the recommendation of the President. But not being a Money Bill, the Council of States has the same power to reject or amend such a Financial Bill as it has in the case of non-Financial Bills subject to the limitation that an amendment other than for reduction or abolition of a tax cannot be moved in either House without the President's recommendation. Such a Bill has to be passed in the Council of States through three readings like ordinary Bills and in case of a final disagreement between the two Houses over such a Bill, the provision for joint sitting in Art. 108 is attracted. Only Money Bills are excepted out of the provisions relating to a joint sitting [Art. 108(1)].

(iii) A Bill which merely involves expenditure and does not include any of the matters specified in Art. 110, is an ordinary Bill and may be initiated in either House and the Council of States has full power to reject or amend it. But it has only one special incident in view of the financial provision {i.e., provision involving expenditure contained in it} viz., that it must not be passed in either House unless the President has recommended the consideration of the Bill. In other words,

the President's recommendation is not a condition precedent to its introduction as in the case of Money Bills and other Financial Bills of the first class but in this case it will be sufficient if the President's recommendation is received before the Bill is considered. Without such recommendation, however, the consideration of such Bill cannot take place [Art. 117(3)].

But for this special incident, a Bill which merely involves expenditure is governed by the same procedure as an ordinary Bill, including the provision of a joint sitting in case of disagreement between the two Houses.

Provisions for removing deadlock between two Houses of Parliament.

It has already been made clear that any Bill, other than a Money Bill, can become a law only if it is agreed to by both the Houses, with or without amendments. A machinery should then exist, for resolving a deadlock between the two Houses if they fail to agree either as to the provisions of the Bill as introduced or as to the amendments that may have been proposed by either House.

(A) As regards Money Bills, the question does not arise, since the House of the People has the final power of passing it, the other House having the power only to make recommendation for the acceptance of the House of the People. In case of disagreement over a Money Bill, thus, the

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lower House has the plenary power to override the wishes of the upper Houses, i.e., the Council of States.

(B) As regards all other Bills (including 'Financial Bills'), the machinery provided by the Constitution for resolving a disagreement between the two Houses of Parliament is a joint sitting of the two Houses [Art. 108].

The President may notify to the Houses his intention to summon them for a joint sitting in case of disagreement arising between the two Houses in any of the following ways:—

If, after a Bill has been passed by one House and transmitted to the other Houses—

- (a) the Bill is rejected by the other House; or
- (b) the Houses have finally disagreed as to the amendments to be made in the Bill; or
- (c) more than six months have elapsed from the date of the reception of the Bill by the other House without the Bill being passed by it.

No such notification can be made by the President if the Bill has already lapsed by the dissolution of the House of the People; but once the President has notified his intention to hold a joint sitting, the subsequent dissolution of the House of the People cannot stand in the way of the joint sitting being held.

Procedure at Joint sitting.

As stated earlier, the Speaker will preside at the joint sitting; in the absence of the Speaker, such person as is determined by the Rules of Procedure made by the President (in consultation with the Chairman of Council of States and the Speaker of the House of People) shall preside [Art. 118(4)]. The Rules, so made, provide that

"During the absence of the Speaker from any joint sitting, the Deputy Speaker of the House or, if he is also absent, the Deputy Chairman of the Council or, if he is also absent, such other person as may be determined by the Members present at the sitting, shall preside.

There are restrictions on the amendments to the Bill which may be proposed at the joint sitting:

(a) If, after its passage in one House, the Bill has been rejected or has not been returned by the other House, only such amendments may be proposed at the joint sitting as are made necessary by the delay in the passage of the Bill.

(b) If the deadlock has been caused because the other House has proposed amendments to which the originating House cannot agree, then (i) amendments necessary owing to the delay in the passage of the Bill, as well as (ii) other amendments as are relevant to the matters with respect to which the House have disagreed, may be proposed at the joint sitting.

If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both the Houses.

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Joint sitting cannot be resorted to, for passing Constitution Amending Bill.

It is to be carefully noted that the procedure for joint sitting, as prescribed by Art. 108, is confined to Bills for ordinary legislation and does not extend to a Bill for amendment of the Constitution, which is governed by Art. 368(2), and must, therefore, be passed by each House, separately, by the special majority laid down. That is why the 43rd Amendment Bill, introduced in the Lok Sabha in April 1977, could not overcome the apprehended resistance in the Rajya Sabha, by resorting to a joint sitting, as carelessly suggested in some newspaper articles. The 45th Amendment Bill suffered mutilation in the Rajya Sabha, for the same reason.

Financial legislation in Parliament.

At the beginning of every financial year, the President shall, in respect of the financial year, cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year. This is known as the "annual financial statement" (i.e., the 'Budget') [Art. 112]. It also states the ways and means of meeting the estimated expenditure.

Policy Statement in the Budget.

In conformity with the usual Parliamentary practice in the United Kingdom, the Budget not only gives the estimates for the ensuing year but offers an opportunity to the Government to review and explain its financial and economic policy and programme to the Legislature to discuss and criticise it. The Annual Financial Statement in our Parliament thus contains, apart from the estimates of expenditure, the ways and means to raise the revenue,—

(a) An analysis of the actual receipts and expenditures of the closing year, and the causes of any surplus or deficit in relation to such year;

(b) An explanation of the economic policy and spending programme of the Government in the coming year and the prospects of revenue.

Votable and non-votable Expenditure.

The estimates of expenditure embodied in the annual financial statement shall show separately—
(a) the sums required to meet expenditure described by this 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.

(a) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament but each House is competent to discuss any of these estimates.

(b) So much of the estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and that House shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein. No demand for a grant shall however be made except on the recommendation of the President [Art. 113].

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In practice, the presentation of the Annual Financial Statement is followed by a general discussion in both the Houses of Parliament. The estimates of expenditure, other than those which are charged, are then placed before the House of the People in the form of 'demands for grants'.

No money can be withdrawn from the Consolidated Fund except under an Appropriation Act, passed as follows:

As soon as may be after the demands for grants have been voted by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of India of all moneys required to meet—

(a) the grants so made by the House of the People; and (b) the expenditure charged on the Consolidated Fund of India.

This Bill will then be passed as a Money Bill, subject to this condition that no amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund [Art. 114].

The following expenditure shall be expenditure charged on the Consolidated Fund of India \Art. 112(3)1—

Expenditure charged on the Consolidated Fund of India.

(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; (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; (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 this Constitution or by Parliament by law to be so charged.

Relative parts played by the two Houses in financial legislation.

As has been already explained, financial business in Parliament starts with the presenting of the Annual Financial Statement. This Statement is caused to be laid by the President before both Houses of Parliament [Art. 112]. After the Annual Financial Statement is presented, there is a general discussion of the Statement as a whole in either House. This discussion is to be a general discussion relating to a policy involving a review and criticism of the administration and a valuation of the grievances of the people. No motion is moved at this stage nor is the Budget submitted to vote.

(b) The Council of States shall have no further business with the Annual Financial Statement beyond the above general discussion. The voting of the grants, that is, of the demands for expenditure made by Government, is an

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exclusive business of the House of the People. In the House of the People, after the general discussion is over, estimates are submitted in the form of demands for grants on the particular heads and it is followed by a vote of the House on each of the heads [Art. 113(2)].

(c) After the grants are voted by the House of the People, the grants so made by the House of the People as well as the expenditure charged on the Consolidated Fund of India are incorporated in

an Appropriation Bill. It provides the legal authority for the withdrawal of these sums from the Consolidated Fund of India.

Similarly, the taxing proposals of the budget are embodied in another Bill known as the Annual Finance Bill.

Both these Bills being Money Bills, the special procedure relating to Money Bills shall have to be followed. It means that they can be introduced only in the House of the People and after each Bill is passed by the House of the People, it shall be transmitted to the Council of States which shall have the power only to make recommendations to the House of the People within a period of 14 days but no power of amending or rejecting the Bill. It shall lie at the hands of the House of the People to accept or reject the recommendations of the Council of States. In either case, the Bill will be deemed to be passed as soon as the House of the People decides whether it would accept or reject any of the recommendations of the Council of States and thereafter the Bill becomes law on receiving the assent of the President.

The financial system consists of two branches—revenue and expenditure.

Parliament's control over the Financial System.

(i) As regards revenue, it is expressly laid down by our Constitution [Art. 265] that no tax shall be levied or collected except by authority of law. The result is that the Executive cannot impose any tax without legislative sanction. If any tax is imposed without legislative authority, the aggrieved person can obtain his relief from the courts of law.

(ii) As regards expenditure, the pivot of parliamentary control is the Consolidated Fund of India. This is the reservoir into which all the revenues received by the Government of India as well as all loans raised by it are paid and the Constitution provides that no moneys shall be appropriated out of the Consolidated Fund of India except in accordance with law [Art. 266(3)]. This law means an Act of Appropriation passed in conformity with Art. 114. Whether the expenditure is charged on the Consolidated Fund of India or it is an amount voted by the House of the People, no money can be issued out of the Consolidated Fund of India unless the expenditure is authorised by an Appropriation Act [Art. 114(3)]. It follows, accordingly, that the executive cannot spend the public revenue without parliamentary sanction.

While an Act of Appropriation ensures that there cannot be any expenditure of the public revenues without the sanction of Parliament, Parliament's control over the expenditure cannot be complete unless it is able to ensure economy in the volume of expenditure. On this point, however, a reconciliation has to be made between two conflicting principles,

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namely, the need for parliamentary control and the responsibility of the Government in power for the administration and its policies.

Committee on Estimates.

The Government has the sole initiative in formulating its policies and in presenting its demands for carrying out those policies. Parliament can hardly refuse such demands or make drastic cuts in such demands without reflecting on the policy and responsibility of the Government in power. Nor is it expedient to suggest economies in different items of the expenditure proposed by the Government when the demands are presented to the House for its vote, in view of the shortage of time at its disposal. The scrutiny of the expenditure proposed by the Government is, therefore, made by the House in the informal atmosphere of a Committee, known as the Committee on Estimates. After the Annual Financial Statement is presented before the House of the People, this Committee of the House, annually constituted, examines the estimates, in order to:

- (a) report to the House what economies, improvements, in organisation, efficiency or administrative reform, consistent with the policy underlying the estimates, may be effected;
- (b) suggest alternative policies in order to bring efficiency and economy in administration;
- (c) examine whether the money is well laid out within the limits of the policy implied in the estimates;
- (d) suggest the form in which estimates are to be presented to Parliament.

Though the report of the Estimates Committee is not debated in the House, the fact that it carries on its examination throughout the year and places its views before the members of the House as a whole exerts a salutary influence in checking Governmental extravagance in making demands in the coming year, and in moulding its policies without friction in the House.

The third factor to be considered is the system of parliamentary control to ensure that the expenditure sanctioned by Parliament has actually been spent in terms of the law of Parliament, that is, the Appropriation Act or Acts. The office of the Comptroller and Auditor-General is the fundamental agency which helps Parliament in this work. The Comptroller and Auditor-General is the guardian of the public purse and it is his function to see that not a paisa is spent without the authority of Parliament. It is the business of the Comptroller and Auditor-General to audit the accounts of the Union and to satisfy himself that the expenditure incurred has been sanctioned by Parliament and that it has taken place in conformity with the rules sanctioned by Parliament. The Comptroller and Auditor-General then submits his report of audit relating to the accounts of the Union to the President who has to lay it before each House of Parliament.

Committee on Public Accounts.

After the report of the Comptroller and Auditor-General is laid before the Parliament, it is examined by the Public Accounts Committee. Though this is a Committee of the House of the People (having 15 members from that House),

by an agreement between the two Houses, seven members of the Council of States are also associated with this Committee, in order to strengthen it. The Chairman of the Committee is generally a member of the Lok Sabha who is not a member of the ruling party.

In scrutinising the Appropriation Accounts of the Government of India and the report of the Comptroller and Auditor-General thereon it shall be the duty of the Committee on Public Accounts to satisfy itself—

- (a) that the moneys shown in the accounts as having been disbursed were legally available for and applicable to the service or purpose to which they have applied or charged;
- (b) that the expenditure conforms to the authority which governs it; and
- (c) that every re-appropriation has been made in accordance with the provisions made in this behalf under rules framed by competent authority.

This Committee, in short, scrutinises the report of the Comptroller and Auditor-General in details and then submits its report to the House of the People so that the irregularities noticed by it may be discussed by Parliament and effective steps taken.

All moneys received by or on behalf of the Government of India will be credited to either of two funds—the Consolidated Fund of India, or the 'public account' of India. Thus,

Consolidated Fund of India.

- (a) Subject to the assignment of certain taxes to the States, all revenues received by the Government of India, all loans raised by the Government and all moneys received by that Government in repayment of loans shall form one consolidated fund to be called "the Consolidated Fund of India" [Art. 266(1)].

Public Account of India.

- (b) All other public moneys received by or on behalf of the Government of India shall be credited to the Public Account of India [Art. 266(2)], e.g., moneys received by an officer or Court in connection with affairs of the Union [Art. 284].

No money out of the Consolidated Fund of India (or of a State) shall be appropriated except in accordance with a law of Appropriation. The procedure for the passing of an Appropriation Act has been already noted.

Contingency Fund of India.

- (c) Art. 267 of the Constitution empowers Parliament and the Legislature of a State to create a 'Contingency Fund' for India or for a State, as the case may be. The 'Contingency Fund' for India has been constituted by the Contingency Fund of India Act, 1950. The Fund will be at the disposal of the executive to enable advances to be made, from time to time, for the purpose of

meeting unforeseen expenditure, pending authorisation of such expenditure by the Legislature by supplementary, additional or excess grants. The amount of the Fund is subject to be regulated by the appropriate Legislature.

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The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, withdrawal of moneys there from, custody of public moneys other than those credited to such Funds, their payment into the public accounts of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law by Parliament, and, until provision in that behalf is so made shall be regulated by rules made by the President [Art. 283].

Constitutional position of the Council of States as compared with that of the House of the People.

Though our Council of States does not occupy as important a place in the constitutional system as the American Senate, its position is not so inferior as that of the House of Lords as it stands to-day. Barring the specific provisions with respect to which the lower House has special functions, e.g., with respect to money Bills (see below), the Constitution proceeds on a theory of equality of status of the two Houses.

This equality of status was explained by the Prime Minister Pandit Nehru himself,¹⁴ in these words—

"Under our Constitution Parliament consists of two Houses, each functioning in the allotted sphere laid down in the Constitution. We derive authority from that Constitution. Sometimes we refer back to the practice and conventions prevailing in the Houses of Parliament of the United Kingdom and even refer erroneously to an Upper House and a Lower House. I do not think that is correct. Nor is it helpful always to refer back to the procedure of the British Parliament which has grown up in the course of several hundred years and as a result of conflicts originally with the authority of the King and later between the Commons and the Lords. We have no such history behind us, though in making our Constitution we have profited by the experience of others.

Our guide must, therefore, be our own Constitution which has clearly specified the functions of the Council of States and the House of the People. To call either of these Houses an Upper House or a Lower House is not correct. Each House has full authority to regulate its own procedure within the limits of the Constitution. Neither House by itself, constitutes Parliament. It is the two Houses together that are the Parliament of India ...That Constitution treats the two Houses equally, except in certain financial matters which are to be the sole purview of the House of the People. In regard to what these are, the Speaker is the final authority."

The Constitution also makes no distinction between the two Houses in the matter of selection of Ministers. In fact, during all these years, there have been several Cabinet Ministers from amongst the members of the Council of States, such as the Ministers for Home Affairs, Law, Railway and

Transport, Production, Works, Housing and Supply, etc. But the responsibility of such member, as Minister, is to the House of the People [Art. 75(3)].

The exceptional provisions which impose limitations upon the powers of the Council of States, as compared with the House of the People are:

(1) A Money Bill shall not be introduced in the Council. Even a Bill having like financial provisions cannot be introduced in the Council.

(2) The Council has no power to reject or amend a Money Bill. The only power it has with respect to Money Bills is to suggest 'recommendations' which may or may not be accepted by the House of the People,

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and the Bill shall be deemed to have been passed by both Houses of Parliament, without the concurrence of the Council, if the Council does not return the Bill within 14 days of its receipt or makes recommendations which are not accepted by the House.

(3) The Speaker of the House has got the sole and final power deciding whether a Bill is a Money Bill.

(4) Though the Council has the power to discuss, it has no power to vote money for the public expenditure and demands for grants are not submitted for the vote of the Council.

(5) The Council of Ministers is responsible to the House of the People and not to the Council [Art. 75(3)].

(6) Apart from this, the Council suffers, by reason of its numerical minority, in case a joint session is summoned by the President to resolve a deadlock between the two Houses [Art. 108(4)].

On the other hand, the Council of States has certain special powers which the other House does not possess and this certainly adds to the prestige of the Council:

(a) Art 249 provides for temporary Union legislation with respect to a matter in the State list, if it is necessary in the national interest, but in this matter a special role has been assigned by the Constitution to the Council. Parliament can assume such legislative power with respect to a State subject only if the Council of States declares, by a resolution supported by not less than two-thirds of its members present and voting, that it is necessary or expedient in the national interest that Parliament should make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(b) Similarly, under Art. 312 of the Constitution, 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 Council of States has declared 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 so to do.

In both the above matters, the Constitution assigns a special position to the Council because of its federal character and of the fact that a resolution passed by two-thirds of its members would virtually signify the consent of the States.

Notwithstanding these special functions and the theory of equality propounded by Pandit Nehru, it is not possible for the Council of States, by reason of its very composition, to attain a status of equality with the House of the People. Even though there is no provision in the Constitution, corresponding to Art. 169 relating to the upper Chamber in the States, for the abolition of the upper Chamber in Parliament, there has been, since the inauguration of the Constitution, a feeling in the House of the People that the Council serves no useful purpose and is nothing but a 'device to flout the voice of the People',¹⁴ which led even to the motion of a Private Member's Resolution for the abolition of the Council. It was stayed for the

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time being only at the intervention of the then Prime Minister Pandit Nehru on the ground that the working of the Council was yet too short to adjudge its usefulness.¹⁴

(c) The most extreme instance of its importance, during its career, has recently been shown by the Council of States in the matter of constitutional amendment. Under Art. 368(2), a Bill for the amendment of the Constitution, in order to be law, must be passed in each House of Parliament by the specified special majority, and the device of joint sitting under Art. 108 is not available to remove the opposition by the Rajya Sabha in respect of a Bill for amendment of the Constitution. While the Janata Party had an overwhelming majority in the Lok Sabha, the Congress [(O) and (I) together] had an imposing majority in the Rajya Sabha so that there was no chance of the 43rd Amendment Bill, 1977, being passed by a two-thirds majority in the Rajya Sabha, as its composition existed in April, 1977. The progress of the 43rd Amendment Bill had, therefore, to be halted after its introduction in the Lok Sabha, since the Congress Party declared its intention to oppose the consideration of this Bill. The opposition of the two Congress Parties also truncated the 45th Constitution Amendment Bill, while in the Rajya Sabha.

The Constitution (64th Amendment) Bill, 1989 and the Constitution (65th Amendment) Bill, 1989 could not secure the requisite majority in the Rajya Sabha and hence could not be passed (13-10-1989), even though they had earlier been duly passed by the Lok Sabha.

REFERENCES

1. The first general election under the Constitution took place in the winter of 1951-52. The first Lok Sabha, which held its first sitting on 13-5-1952 was dissolved by the President on 4-4-1957.

The second general election was held in the winter of 1956-57, and the second Lok Sabha held its first sitting on 10-5-1957.

The third general election was held in February, 1962, and the third Lok Sabha had its first sitting on 16-4-1962.

The fourth general election was held in February, 1967, and the fourth Lok Sabha had its first sitting on 16-3-1967 and was prematurely dissolved on 27-12-1970.

The fifth general election, which was thus a mid-term election, was held in March, 1971, and the fifth Lok Sabha had its first sitting on March 19, 1971.

The sixth general election was held in March 1977, after the dissolution of the Lok Sabha on 18th January, 1977, during its second extended term. Excepting in Kerala, there was no simultaneous election to the Legislative Assemblies of the States. The sixth Lok Sabha had its first sitting on 25-3-1977.

The seventh general election was held in January, 1980 and the first sitting was on 21-1-1980.

The eighth general election was held in December, 1984 and the first sitting was on 15-1-1985.

The ninth general election was held in November, 1989 and the ninth Lok Sabha had its first sitting on 18th December 1989.

The tenth general election was held on 20th May, 12th and 15th June, 1991 and the tenth Lok Sabha had its first sitting on 20-6-1991.

The eleventh general election was held in May 1996 and the Eleventh Lok Sabha had its first sitting on 22-5-1996.

The twelfth general election was held in February, 1998 and the twelfth Lok Sabha had its first sitting on 23-3-1998.

The Thirteenth general election was held in September and October, 1999 and the thirteenth Lok Sabha had its first sitting on 20-10-1999.

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The Rajya Sabha was first constituted on 3-4-1952 and it held its first sitting on 13-5-1952, and the retirement of the first batch of the members of the Rajya Sabha took place on 2-4-1954.

2. Sections 27A, 27H of Representation of the People Act, 1950.

3. The actual number of members of the two Houses now is given in Table VIII.

4. As amended by the Constitution (31st Amendment) Act, 1973, and by the Goa, Daman and Diu Reorganisation Act, 1987 w.e.f. 30-5-1987.

5. As amended by the Constitution (61st Amendment) Act, 1988.

6. The Union Territories (Direct Election to the House of the People) Act, 1965.
7. VII C.A.D. 1262.
8. By the 42nd Amendment Act, 1976, the Indira Government, extended this term to (i years but it has been restored to 5 years, by the 44th Amendment Act, 1978.
9. This power was used during the Emergency on the ground of internal disturbance (1975- 77).
10. Sharma v. Shri Krishna, A. 1959 S.C. 395.
11. Ref. under Art. 143, A. 1965 S.C. 745 (764, 767).
12. May, Parliamentary Practice, 15th Ed., p. 109.
13. Except in the case of Bills for the amendment of the Constitution (Art. 368), all Bills and other questions before each House are passed or carried by a simple majority [Art. 100(1)].
14. Statement in the Rajya Sabha, dated 6-5-1953. Similar views were reiterated in the other House (H.P. Deb, 12-5-1953).