THE CRITICAL PROBLEMS OF THE INDIAN CONSTITUTION
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Chimanlal Setalvad Lectures
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by

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INTRODUCTION

I APPRECIATE the great honour extended to me by this invitation of the University of Bombay to deliver these Chimanlal Setalvad Law Lectures. The Chimanlal Setalvad Law Lectureship has the great object of encouraging studies in Constitutional Law and International Law, the two crucial stakes of mankind in the 20th century. It declares:

‘The subject of the lectures shall be a topic of law, preferably Constitutional Law. The Subject shall be selected by a Committee consisting of the Vice-Chancellor of the University, the Rector, the Dean of the Faculty of Law of the University, the Chief Justice of Bombay and the Advocate-General of Bombay.’

For India and the world these subjects are of vital concern. I thank the authorities of the Endowment of Chimanlal Setalvad Lectures and of the Bombay University for the opportunity they have given me. I chose the field of Constitutional Law as nearer home and more immediate, intimate and growing anxiety. The authorities very kindly and appropriately left the actual topics to my choice.

Like the Indian Society, the Indian Constitution is passing through a crisis. Many challenges are thrown. They demand vigilance, comprehension, and understanding. The discipline of a Constitution is not learnt in a day. It is learnt in the hard school of experience, in everyday administration where hard knocks and unpredictable situations forge the necessary wisdom which cannot be learnt in schools, colleges, and libraries.

It is not difficult to draw a Constitution. Any text book on political science can give you the clue or even the blue print. What is difficult is to learn how to work it. It is easy to phrase and record Fundamental Rights, political aspirations and Directive Principles, and divide legislative, executive and judicial powers. But when it comes to applying, upholding and ac-
tually administering these constitutional arrangements that the fitness of a democracy is tested. Some of the grave symptoms that have appeared in the Indian constitutional scene in recent times cause great anxiety in the mind of every thinking citizen. The forms are there, Parliament, Legislatures, Courts, and administrations. But what use are the people making of these arrangements? Basically this great interrogation raises the whole problem of national character and national psychology. The Indian genius has a flare for the absolute and the ideal and almost a congenital disregard verging on contempt for the practical and the concrete. It makes constitutional law difficult, and its institutional framework weak. The Indian Constitution is eclectic and has all the idealism and aspiration of an eclectic Constitution and the practical deficiency of eclecticism. It is not so much that a Constitution fails as the national character fails. Here also in constitutional jurisprudence, as in ethics and morality, it is not that the spirit is not strong but the flesh is weak.

The topic I have chosen, therefore, is THE CRITICAL PROBLEMS OF THE INDIAN CONSTITUTION. It is not a running commentary on the Indian Constitution. Nor is it a dissertation on the principles of constitutional law. It picks out areas and problems under the Indian Constitution which are showing the stress and strain of both constitutional and unconstitutional challenges. The three chapters of these lectures, therefore, relate to, the Executive, the Legislative and the Judicial areas, only so far as these critical problems are concerned. Similarly, in three other chapters on the nature of Indian Federalism, the Role of Conventions and the Rule of Law the emphasis is on these critical problems only. These lectures might also have carried easily the title THE GROWING CRISIS UNDER THE INDIAN CONSTITUTION. I do not adopt the title because I do not believe in a crisis mentality and because there are certain fundamental aspects about these lectures which are bound to govern constitutional jurisprudence in India, crisis or no crisis. It is, therefore, hoped that the readers or listeners will bear in mind the connecting link of THE CRITICAL PROBLEMS UNDER THE INDIAN CONSTITUTION running throughout the chain of these six lectures.
INTRODUCTION

My reflection and experience in dealing with the Indian Constitution both in the field of research as well as in the Courts for a lifetime have convinced me that it is necessary to have periodic conventions on the Constitution to take stock of the working of the Constitution in the intervals of time, so that progress, achievements, failures and actual administration are periodically under critical scrutiny to keep the Constitution as the living and dynamic symbol of a growing and developing nation like India. Such a convention should not be confined to professional politicians, parliamentarians and legislators but should also be thrown upon to experts and experienced persons in the world of law, sociology, finance, economics, business, and sciences. Such a convention on the Constitution should be a national convention. It might help to make for order in chaos and answer effectively and optimistically this prophetic warning of Kahlil Gibran:

"My friends and my road fellows:

Pity the nation that is full of beliefs and empty of religion.
Pity the nation that wears a cloth it does not weave, eats a bread it does not harvest, and drinks a wine that flows not from its own wine-press.
Pity the nation that acclaims the bully as hero and that deems the glittering conqueror bountiful.
Pity the nation that despises a passion in its dream yet submits in its awakening.
Pity the nation that raises not its voice save when it walks in a funeral, boasts not except among its ruins, and will rebel not save when its neck is laid down between the sword and the block.
Pity the nation, whose statesman is a fox, whose philosopher is a juggler, and whose art is the art of patching and mimicking.
Pity the nation that welcomes its new ruler with trumpetings, and farewells him with hootings, only to welcome another with trumpetings again.
Pity the nation whose sages are dumb with years and whose strong men are yet in the cradle.
Pity the nation divided into fragments, each fragment deeming itself a nation."
INTRODUCTION

My notion of constitutional law is unconventional. Constitutional law in my way of thinking is not a mere academic exercise in Jurisprudence. It is the life story of a nation struggling to find, preserve and evolve its soul.

P. B. Mukharji

Bombay
The 21st November, 1966
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Chapter One

THE EXECUTIVE POWER AND THE EXECUTIVE INSTITUTION OF THE INDIAN CONSTITUTION

A Study of the Indian President and

The State Governors under the Indian Constitution

Constitutional law does not depend on a written Constitution. It is the art of Government within the framework of law. Great Britain has no written Constitution but has a highly developed constitutional law. Constitutional law is not exhausted by the ambit of justiciability of constitutional propositions in Courts. Exclusive and over-exaggerated pre-occupation with judicial review of legislation and governmental action which has marked the opening phase of constitutional consciousness in India has so far prevented an all-round and healthy growth and study of constitutional law in India.

The foundation for an enduring democracy is a constitution based on the tacit consensus to govern and be governed and on the voluntary self-restraints of the people. The quest of constitutional law is how to make these self-restraints and consensus effective and operative. Are they to be left to mere chance and good sense? Are they to have regular institutions through which they make themselves effective?

Modern constitutional jurisprudence and legal sociology favour institutions. Institutionalisation of a constitutional principle provides not only a buffer against unpredictable and sudden swings in public and political hysteria but also provides a custodian of more durable nature for these self-
restraints and consensus in the midst of changing govern-
ments and political parties. A government may be a demo-
cratic government but it is not the people. That is why, an
unlimited legislature or an absolute majority party rule fails
to represent the people as a whole and its deeper urges. Here
in this chapter an endeavour is made to study the executive
institutions in the Indian Constitution.

The Executive under the Indian Constitution works
through diverse institutions. The President, the Council of
Ministers and the Union Civil Services form the constitutional
institutions of the Federal Executive of the Union. The
State Executive institutions are represented by their State
counterparts, the Governor, the State Council of Ministers
and the State Civil Services.

The constitutional debate, whether the Indian Constitu-
tion reflects the presidential form of government or the par-
lliamentary form of government, cannot be answered in a
theoretical and dogmatic way. It is wrong to say that the
Indian Constitution is a Presidential form of Government.
It is equally wrong to say that it is a Parliamentary Govern-
ment. It is neither and it is both. India is not only a cul-
tural mixture but also a complex constitutional mixture.

The Executive Power of the Union is expressly vested in
the President and is exercisable by him either directly or
through officers subordinate to him in accordance with the
Constitution. Naturally therefore the Constitution provides
that there shall be a President of India. He is the constitu-
tional superhead of the Executive. (Arts. 52 and 53 of the
Constitution.)

Typically enough, as the holder of the Executive Power
of the Union, the Indian President is vested with the supreme
command of the defence forces of the Union. But in the
exercise of that power he shall be regulated by law. (Art.
53(2) of the Constitution.) Again typically enough as the
custodian of the Executive Power, he has the familiar author-
ity of granting pardons, reprieves, respites or remissions of
punishment or to suspend, remit or commute the sentence of
any person convicted of an offence as laid down in Article 72
of the Constitution.

The President of India is both trusted and guarded.
Functions conferred by any law existing at the time of the
Constitution on the government of any State or other autho-
rities are not deemed to have been transferred to the Presi-
dent. This is the first guard. At the same time Parliament
is not prevented from conferring by law, functions on autho-
rities other than the President. This is the second guard.
(Art. 53(3)(a) and (b) of the Constitution.) These pro-
visions of Article 53 of the Constitution have not yet received
the legal and constitutional scrutiny that they deserve. They
make strange reading and create and raise high constitutional
complexities.

The first guard is a ghost of constitutional history. Sec-
tion 124 of the Government of India Act 1935, the imme-
diate ancestor of India’s present Constitution, provided for
the delegation of any of the functions of the Executive autho-
rity of the then Federation to the then Provinces not only
by Acts of Federal Legislature but also by the Executive. If
this guard was intended to protect such delegation, then it
was wholly unnecessary because of Part 21 of the Constitu-
tion and specially Articles 372, 372A and 373 thereof. Such
prior delegations are either unconstitutional today and void
or are curable by the curatory provisions of the Constitution.
But even then the constitutional position created by this guard
is wholly indefensible because provisions similar to Section
124 of the Government of India Act are made in such Arti-
cles as 252 and 258 of the present Indian Constitution. If
one examines such prior delegations intended to be protected
by the guard, one finds precious little or nothing at all to
protect.

The second guard is more illogical and detrimental.
When the Executive power of the Union is vested in the
President and exercised by him either directly or through
officers subordinate to him in accordance with the Constit-
tution under Article 53(1) of the Constitution and when he
is vested with the supreme command of the defence forces
of the Union regulated by law, then it is difficult to imagine how and in what circumstances Parliament will be empowered with the right to confer functions on authorities other than the President. No doubt, Parliament can only do so by law, but that is of little consequence because Parliament in this respect can only act by law and by no other means. The Constitution lays down no guide or standard whatever to direct Parliament in what "circumstances" and on what "subjects", Parliament can make such law to invest other authorities with Presidential powers and divest the President of his executive power of the Union.

A learned commentator on the Indian Constitution (D. Basu's *Indian Constitution*, 5th Edition, Vol. II, page 372) ventured to say that Article 53(3)(b) was only intended to help Parliament in "delegating subordinate or ministerial functions to any other person or authority" to relieve the President. That view, it is submitted, is erroneous because that delegation is already there in the express provision in Article 53 using the expression "either directly or through subordinate officers". Again Article 53(3)(b) is not limited to "subordinate or ministerial" functions which the commentator seemed to assume. The question under the Constitution is why does the Constitution permit Parliament by law to confer functions on authorities other than the President when the Constitution expressly says that he is vested with the Executive Power of the Union without any reservation? In one breath the President is vested with the Union's Executive Power without qualification and in the other breath he can be divested of the same power by Parliament by law. This reduces the President's position to the point of serious constitutional weakness. In sharp contrast is the provision of the American Constitution in this respect, where there can be no such divestiture.

Further encroachment on the Indian President's constitutional position is made in Article 70 of the Constitution providing again that Parliament may make such provision as it thinks fit for the discharge of the functions of the President in "any contingency" not provided for in that Chapter. This denudes the President's position still further. In the
Constitution, no question of "contingency" can arise where the Executive power of the Union is vested in the President in general terms and no contingency is conceivable thereafter which the Constitution can be said to have not provided for in Chapter I of Part V of the Constitution. Attempt has been made by some constitutional jurists to defend Article 70 by saying that it provides for the contingency when both the President and the Vice-President are unavailable at the same time by death, resignation, removal or otherwise. This construction is unconstitutional because there can be no constitutional inter-regnum in the Presidency of India for the reason that Article 52 says "There shall be a President of India". As of the King of England it can be rightly said "The King is dead. Long live the King", so it is with the President of India, under the Indian Constitution.

In defence of Article 70, this can be said, that, unlike Article 53(3)(b), Article 70 provides a guide and limitation for Parliament by using the words "contingency" and "provision". "Provision" in Article 70 need not be "law" in the strict sense as in Article 53(3)(b), and "contingency" may be as in the example given by Professor Alan Gledhill, of a President under notice of impeachment, trying to destroy the Constitution. I have discussed this in the chapter on Legislative Power. The Constitution is not content with these provisions but proceeds with the erosion of that vested power, by opening the floodgates in Article 73 by limiting the extent of the Executive Power. It circumscribes the Executive Power by first making it subject to the provisions of the Constitution and secondly by imposing two limitations specifically to the effect that the Executive Power of the Union shall extend (a) to the matters with respect to which Parliament has power to make laws and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

This provision suffers from serious constitutional handicaps. In the first place, definition of Executive Power by a written Constitution is a constitutional impossibility and is always and necessarily inadequate and makes for a weak
Executive. In the second place, there is a grave constitutional confusion created by making the Executive power co-extensive with the legislative ambit of Parliament. There is no constitutional principle, and no legal reason or even common sense to say that the Executive Power must subserve the limits of Legislative Power. It implies a radical confusion between the Executive Power and the Legislative Power in the Constitution.

It has been said rightly that the Indian Constitution, unlike the American Constitution, has not accepted the plenitude of the constitutional doctrine of separation of powers. Its reverse is, however, not true that the Indian Constitution does not at all recognise the separation of powers, executive, legislative and judicial. If a Constitution did that, it would be a charter of legalised tyranny. The Indian Constitution does not do it.

But the point is that the Indian Constitution nevertheless expressly creates an “executive power of the Union” and expressly “vests” it in the President. (Art. 53). In sharp contrast, the Indian Constitution does not expressly “create” and vest “Legislative Power” and “Judicial Power” as under the American Constitution. Although the Indian Constitution does not expressly create and vest Legislative Power as such, yet the effect of Part XI of the Indian Constitution, Articles 245 to 255 read with the Legislative Lists of the Seventh Schedule of the Indian Constitution, is constitutionally and virtually the same. Similarly there is an express and clear Directive Principle in Article 50 of the Constitution to separate the Executive from the Judiciary.

Professor C. H. Alexandrowicz in his *Constitutional Developments in India* expressed the view, “with the definite adoption of parliamentary government the vesting clause in Article 53(1) remained to a great extent meaningless as real executive power was in the Ministry. The President remained therefore divested of such executive power by those conventions which are generally at the basis of parliamentary government” page 130. This is a serious and growing problem under the Indian Constitution, if its express provisions are
written off by unwritten "conventions". It is submitted that this view is wrong.

The reason given for this view is that it was originally proposed in the Constituent Assembly that the vesting of power would follow the pattern of the American Constitution of separately vesting executive, legislative and judicial powers. In fact it was proposed to vest legislative and executive powers separately in the two respective organs of the State (Constituent Assembly Debates, Vol. IV, pp. 745-9 and 923). But the vesting of legislative power was later dropped from the Draft Constitution and executive power alone remained vested in the President. Surely then this cannot be a reason for holding that the Constitution adopted wholesale parliamentary government. On the contrary that very reason lends support to the conclusion that the Constitution makers deliberately chose to keep the executive power vested in the President and President alone, as a check upon the legislative power.

In the third place, it is difficult to imagine why the Constitution must expressly provide that the Executive Power of the Union shall extend to rights, authority and jurisdiction exercisable by the Government of India by virtue of any treaty or agreement. Normally without such express mandate they would come under the Executive Power. Under Article 51 of the Directive Principles of the Constitution, it is provided that the State shall endeavour to foster respect for international law and treaty obligations. By Article 253 of the Constitution, Parliament has power to make any law for the whole or any part of the territory of India, for implementing any treaty or agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Again under items 13 and 14 of the Union Legislative List, it is Parliament’s legislative ambit to provide for participation in international conferences, associations and other bodies and for implementing decisions made thereat and also for entering into treaties and agreements with foreign countries and implementing treaties, agreements and conventions with foreign countries. It is, therefore, a constitutional puzzle to find that Article 73
of the Constitution expressly had to provide for the extension of the Executive power of the Union to the exercise of such right, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. Either it is unnecessary because normally that is Executive Power or it is derogatory of the legislative power, as distinguished from the Executive Power, in respect of a treaty or agreement. The American Constitution expressly provides for power of the American President to make treaties with the advice and consent of the Senate.

The recent decision of the Supreme Court in (Berubari Case in 1960) 3 S.C.R.250 is an illustration of this point and contains some relevant discussions on the subject.

The confusion between legislative and executive powers continues in the proviso in Article 73(x). Having made the Executive Power co-extensive with Parliament's Legislative Power, it provides as a brake that such executive power shall not extend in any State to matters with which State Legislatures have power to make laws. Such provision is a constitutional conundrum. Either the States in India have legislative power in respect of treaties or agreement, which they have not under the Constitution in which event this provision is meaningless, or they have, in which event this is in derogation of State legislative competence.

Sub-Article 2 of Article 73 of the Constitution reflects a sense of temporary apprehension. What it says is that until Parliament provides otherwise, a State or any officer or authority of a State, may, in spite of this Article, continue to exercise in the field of matters covered by parliamentary legislation for that State, such Executive Power or functions as that State or officer or authority thereof could exercise immediately before the commencement of the Constitution. This provision has little reason behind it because the Executive Power of the Union has been expressly extended already to matters with respect to which Parliament has power to make laws, and if that was covered by the situation contemplated under Sub-Article 2 of Article 73, then there is no further reason to support such a provision.
The criticism follows that the Indian Constitution lacks self-confidence in the nature and extent of its executive power. This lack of self-confidence is exemplified in such Articles as Article 292 and Article 298 of the Constitution. Article 298 lays down explicitly that, "the executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and making of contracts for any purpose," and to limiting that power to respective legislativeambits of Parliament and State Legislatures. What is the reason behind such a constitutional provision? Trade, business, holding and disposal of property and making of contracts cannot be anything but executive. There was no scope for constitutional confusion that any one of these activities could be even remotely thought of as judicial or legislative. It only typifies the proposition that the Indian Constitution is never sure of its executive power. Again in Article 292 of the Constitution the same hesitancy appears to make it expressly say that the executive power of the Union extends to borrowing on the security of the Consolidated Fund of India within limits laid down there, as if without such express provision borrowing would not be covered by the executive power. This perhaps led Sir Ivor Jennings to say: "The result in the Indian Constitution is a suspicion of the powers of government which will certainly prove embarrassing." (Sir Ivor Jennings, Some Characteristics of the Indian Constitution, page 6.) This constant hesitancy has made the executive weak and self-contradictory in the Indian Constitution. In a materially under-developed country like India, this has created unfortunate results and a litigious constitution.

After all executive power can never be constitutionally defined and all constitutional efforts to define it must necessarily fail. Executive power is an undefinable multi-dimensional constitutional concept varying from time to time, from situation to situation and with the changing concepts of State in political philosophy and political science. Plato's or Aristotle's executive power, the Roman Executive Power, Rousseau's, Locke's or Montesquieu's Executive power are not the executive power of the modern State. An easy way of defin-
ing it has been resorted to by courts and constitutional jurists when they say that it is the "residuary power" that remains after exhausting the legislative power and the judicial power in the State. See the Supreme Court observations in Ram Jawaya Kapur vs. Punjab, (1955) 2 S.C.R. 225 at pp. 235-236. It is submitted that in constitutional law, executive power cannot be reduced to this kind of constitutional arithmetic of subtraction. Executive power is a pervasive constitutional doctrine and invades the legislative and judicial spheres. Execution of laws is executive and not legislative power and execution of Courts' decrees and orders may often have to take the help of executive power. Constitutionally, executive power is imminent in every sphere of a political State and cannot be separated as sheep from the goat. Executive power is nothing short of "the whole state in action" in its manifold activities. In one sense, the legislative power and the judicial power, in order to graduate from phrase to facts, have finally to culminate in executive power to become effective.

Having discussed the nature of the Executive power and the nature of it's vesting in the President under the Indian Constitution it will be appropriate to examine what the Constitution provides for the *modus operandi* of such Executive power. It is said by Article 74 that there shall be a Council of Ministers with the Prime Minister as the head to "aid and advise" the President in the exercise of his function. That "function" will necessarily include Executive functions of the Union vested in the President. The Constitution then provides in Article 77 that all Executive action of the Government of India shall be expressed to be taken in the name of the President. Orders and other instruments made or executed in the name of the President shall be authenticated in such manner as may be specified in the Rules to be made by the President. It is also provided that the validity of such an order or instrument is beyond the pale of challenge on the ground that the order or instrument was not made or executed by the President. The duty is cast upon the President to make rules for more convenient transaction of the
business of the Government of India and for the allocation among ministers of such business.

The Prime Minister acts as the central focus on the point in this respect. The Constitution places upon him the duty 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, to furnish such information on the above matters as the President may call for and if the President so required the Prime Minister shall submit for 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 Ministers.

A great constitutional controversy on this point is gathering storm and has started blowing round the position of the President under the Indian Constitution. Is he a mere figurehead or nominee of the party in power, acting no more than as a rubber stamp of the Council of Ministers collectively or individually or of the department that is advising him? Or is the President a dynamic symbol of an adult Nation, *sui juris*, not to be written off by facile constitutional comparisons with the British monarch but vested with original authority independent on his own constitutional rights and status under the express provisions of the Indian Constitution sufficient to make him effective, powerful, dominant and an indispensable factor in the daily working of the Indian Constitution.

The Indian President was intended to be a model of his own and not the copy of any constitutional institution or experiment of other countries. He is not a mere Title Page for the Indian Constitution. His original tentative name as “The Head of the Federation” was finally replaced in the Constitution by the present name “The President of India”. This was not a mere change in the nomenclature. It was intended to signify a constitutional position. Mr. Nehru, the former Prime Minister, said in the Constituent Assembly (Debates, Volume IV, page 734):

“.... At the same time we did not want to make the President just a mere figurehead like the French Pre-
sident. We did not give him any real power but we have made his position one of great authority and dignity."

That statement marks the beginning of the intellectual confusion that prevails even today. What is this hair-splitting logic of distinction between "real power" and "great authority"? In plain English and etymology, authority means power. This intellectual confusion was still more confounded by Dr. Ambedkar's contradictory statement, first that the Indian President is a figurehead and that the President could not act and will not act except on the advice of his Ministers (Constituent Assembly Debates, Vol. VIII, p. 215) and secondly, in the same Constituent Assembly Debates (Volume VII, page 1158) Dr. Ambedkar announced that "like the English King, our President will have not only Bagehot's three rights (the right to advise, to warn and to be consulted), but also the 'prerogative powers' of appointing the Prime Minister and the dissolution of the House." It is common learning that the Indian Constitution does not utter the word "prerogative." The constitutional question is asked, where is the prerogative in the Indian Constitution, who has given it to whom? The President "appoints" the Prime Minister not by a prerogative but by the express provision of Article 75(1) of the Constitution and the entire Council of Ministers including the Prime Minister holds office during the pleasure of the President under Article 75(3) and therefore is dismissable by the President under such express provision of the Constitution and not by a fancied or imaginary prerogative.

Even a preliminary student of elementary constitutional law reads with pleasure the observation that the British monarch rules but does not govern, the American President governs but does not rule and the pre-De Gaulle French President neither ruled nor governed. The constitutional question springs, what is the position of the Indian President compared to that constitutional trinity of the world's first three democracies? Is the Indian President a constitutional fiction?

The unique character of the status rights and obligations of the Indian President under the Constitution needs emphasis in the present context. The Indian President is not a figure-
head to which he has been reduced by overt and covert interpretation, convention and practice. The many constitutional reasons on this point must be plainly stated and understood.

In the first place, the method and manner of his election to that office are of significant constitutional importance to show that he is an independent institution with independent authority and independent functions. It makes him entirely different from the British monarch who is hereditary, who does not seek election and whose term is for life and not for a specified period of five years. The Indian President was not intended by the Constitution to be chosen as a political party candidate with a political ticket, unlike the American President who seeks election on a Republican Party or a Democratic Party ticket. It was intended that the Indian President should be a non-political and a non-party man. It is a mistake to consider that he is only an additional institution to buttress the majority party rule, for had he been so, he need not have been elected as a special representative with an all-India character, through the Electoral College consisting of elected members of not only both Houses of Parliament but also of the State Legislative Assemblies, with an insistence on the uniformity in the scale of representation of the different States at the election of the President with elaborate constitutional provision for securing such uniformity with the aid of the system of proportional representation by means of single transferable vote on secret ballot. Article 55 of the Constitution bears testimony to that anxiety of the Indian Constitution to make his election truly representative of all-India character. Why is the election of the President so carefully and elaborately provided? To make him a “Real Head” and not a figurehead. The very second question in the Questionnaire of the Constituent Assembly on President’s Powers is a significant pointer:

“If the President is to be the real head he may have to be elected, otherwise than by the Legislature.”

Now, two points arise on this question. “The Legislature” there obviously meant Parliament. But the Indian President under the Constitution is not elected by Parliament only. He is elected by the elected representatives of all the State Legislative Assemblies as well. He is the elected representative of
Parliament and the State Legislative Assemblies. Secondly
does the election through elected representatives of such legis-
latures mean that he is not the real head but a subservient
institution subordinate to such legislatures. If that were so,
what was the constitutional need for such a useless and subor-
dinate duplication of institution, at such a heavy cost on pub-
lic exchequer. The answer appears to be in the negative from
the second reason that follows.

Secondly, Indian President's position as a non-partisan
representative in the constitutional context is emphasised by
the clear provision of Article 59 of the Constitution. It insists
that the President shall not be a member of either House of
Parliament or of State Legislature, in spite of the fact that he
has been elected by an Electoral College which consists of
elected members of Parliament and State Legislative Assem-
blies. Indeed if he had already been such a member, the
Constitution insists that he must be deemed to vacate the
seat on the date he enters his office as President. The signi-
ficance of this constitutional provision contained in Article
59(1) of the Constitution is hardly realised. The Indian Pre-
sident therefore, though elected by the elected representatives
of Parliament and State Legislative Assemblies, is neither
their member nor their representative in the sense, that he
can be recalled by them or expelled or a vote of no-confidence
passed against him. The fact that the Indian President is
elected and is eligible for re-election makes B. N. Rau, the
Constitutional Jurist, conclude: "He is therefore answerable
to his constituents for his acts, which implies that he should
have freedom to act as he thinks right. He should not, there-
fore, he held, to be bound by any convention to act upon the
advice of others even when he considers such advice unsound."
(B. N. Rau, India's Constitution in the Making, p. 377.)

Thirdly, the whole object of the provisions in Articles 55
and 59 of the Constitution is to prevent parliamentary demo-
cracy in India from becoming a constitutional dictatorship
and parliamentary anarchy. The intention was that the Pre-
sident was to represent the Executive power of the Union and
the whole country and not merely the party in power at the
centre and with all the necessary and consequential requisite
authority and responsibility to effectively act as the guardian of the democratic processes and forms recognised by the Constitution including not merely the Fundamental Rights guaranteed by the Constitution, but also the Directive Principles of State Policy and many other constitutional obligations expressly consigned to his charge and care.

A broad survey of the diverse constitutional obligations of the Indian President will serve to illustrate his specific constitutional duties.

This survey may begin with the "Directive Principles of State Policy" a very special feature of the Indian Constitution. Article 37 of the Constitution makes it clear that although these Directive Principles shall not be enforceable by Courts, and are not in that sense justiciable rights in favour of individuals, yet the Constitution expressly lays down that they are "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." Two essential points are to be noticed. The first emphasis is that these Directive Principles are constitutionally recognised as "fundamental in the governance of the country", even though they are not Fundamental Rights guaranteed by the Constitution, and enforceable by the Courts. "Governance of the country" is an expression which in constitutional law includes Executive power and therefore involves the President. The second emphasis is on the application of these Directive Principles in the legislation of the country. The primary duty of "making laws" is upon Parliament and the State Legislature and it is their primary duty to apply these Directive Principles to these laws. But if they do not apply them or commit breach of these Directive Principles, who is the institution to check them. It is the President under the clause "fundamental in the governance of the country." While, therefore, Courts cannot enforce Directive Principles, the President cannot take the same attitude as the Courts, and for the "governance of the country" he has to bear the constitutional obligation to see that such Directive Principles are applied and not violated, in such governance. True the "Directive Principles of State Policy" are not Fundamental Rights nevertheless they are expressly made "fundamental in
the governance of the country". If a Bill is passed by both Houses of Parliament, which in the opinion of the President, violates any one or more of these Directive Principles, and if the Ministers advise the President to assent to such Bill, the question arises, is the President bound to accept such advice and to assent to such a Bill? If he accepts such advice he will be committing an act, which in his own view, will be a violation of the Constitution, and therefore, a breach of his Oath and therefore liable to impeachment. Logically it must therefore follow that in such a case the Indian President must be free to exercise his own discretion in such matters in spite of any conventions, British or otherwise, and to refuse to accept such advice. It is no answer for the President under the Indian Constitution to say that by following the convention of accepting the advice of his Council of Ministers either in an act which he considers is a breach of Fundamental Rights, no doubt curable by other agencies such as the Courts or in an act in breach of Directive Principles laid down in the Constitution not enforceable by the Courts, he can pass on the blame and liability to the Council of Ministers. The constitutional responsibilities in this regard are upon the President and not upon the Ministers or the Council of Ministers. Nor is it an answer to say as a constitutional jurist has said that the Indian Constitution is concerned not with what is "legally permissible" but what is "politically wise". (B. N. Rau, *India's Constitution in the Making*, p. 380.) A detailed written Constitution such as that of India cannot afford to seek political wisdom outside the Constitution where the written word of the written Constitution is explicit.

A scrutiny of other provisions of the Indian Constitution also leads to the conclusion that the Indian President enjoys a constitutional independence which must be clearly understood, applied, and which shows that the President can or has to act otherwise than on ministerial advice in many instances. For example, in the choice of a new Prime Minister the President is not obliged to consult the outgoing Prime Minister. Again Article 103 of the Constitution requires that if any question arises whether any member of either House of Parliament has become subject to any disqualification
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mentioned in Article 102(1) of the Constitution, then that question shall be referred for the decision of the President and his decision shall be final. No doubt, before giving any decision of such question, it is provided that the President shall obtain the opinion of the Election Commission and shall act according to such opinion. But the point of importance to note here is that the President's decision on this point in any event though based on Election Commission's opinion, is not on the aid and advice of his Ministers. Again in Article 111 of the Constitution the President has to declare whether he assents to the Bill or he withholds his assent and except in the case of Money Bill the President may by message request both Houses of the Parliament that they do consider the Bill or any specified provisions thereof and in particular consider the desirability of introducing any such amendments as the President may recommend in his message. In performing this duty the President obviously does not act on the aid or advice of his Ministers because the Bill having been passed was so passed with the aid and advice of the Ministers, although no doubt Parliament has the power notwithstanding such Presidential Message to refuse the request of the President, in which event the President is bound to assent.

The Constitution of India casts many duties of a specific nature upon the President. Their range and variety emphasise the President's responsibilities in the context of the Indian Constitution. He has to administer the Union Territory under Article 239 of the Constitution and he has to make regulation for the peace, progress and good government of the Union Territories under Article 240 of the Constitution. It is the Indian President again who has to constitute the Finance Commission and who has to cause every recommendation advanced by the Finance Commission together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament under Articles 280 and 281 of the Constitution. He again has to appoint a commission and committee of Parliament on Official Language under Article 344 of the Constitution and on a demand made in that behalf, the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any lan-
guage spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify under Article 347 of the Constitution. This constitutional responsibility of the Indian President for the languages is peculiarly important for the multi-lingual Indian Republic of sensitive linguistic traditions whose careless handling has produced language riots and suicides. The Indian President has again special constitutional obligations for (1) the administration of Scheduled Areas, (2) the welfare of (a) the Scheduled Tribes, (b) the backward classes, and (3) the Scheduled Classes, under Articles 338-342 of the Indian Constitution. These provisions include the President’s obligation to appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States and the Executive power of the Union extends to the giving of directions to a State to draw up and execute schemes, specified in such direction to be essential for the welfare of the Scheduled Tribes and the States. (Art. 339). He also has the power to appoint a Commission to investigate the condition of socially and educationally “backward classes and difficulties under which they labour and to make recommendations on the steps to be taken by the Union or the State to remove such difficulties and to improve their conditions. (Art. 340). These specific obligations of the Indian President are of great constitutional importance in the multi-racial Republic of India, and cannot be minimised in the recent context of events in Mizo Hill Tribes, Nagas and adibasis in Bastar.

The President of India has again special emergency powers as laid down in part 18, Articles 352-360 of the Constitution and part 19, Article 365 of the Constitution. These are significant constitutional obligations upon the Indian President, onerous, serious and grave in their nature and far-reaching in their constitutional impact. Article 352 says: “If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation,
make a declaration to that effect.” The constitutional question arises, who is to be “satisfied”? The Constitution says: “If the President is satisfied.” Can it be anything other than the President’s discretionary power? This is not an unusual expression in the Indian Constitution. The expression “President is satisfied” is to be found also in Article 347 of the Constitution as well as in Article 123 relating to the President’s power to promulgate Ordinances. The power of the President to promulgate Ordinances as a measure of immediate action is therefore left to the President’s “satisfaction.” Innumerable authorities of the highest Courts have construed the word “satisfaction” to involve personal judgment and discretion. Another type of expression used by the Constitution is the expression “in the opinion of the President” in Article 124(3) (c) of the Constitution. It is suggested that the opinion must be the opinion of the President and not of his Council of Ministers. Again the expression “it appears to the President” in Article 263 of the Constitution must obviously mean the President and not his Council of Ministers. In addition to all these powers of the President he has specific powers of adaptation of laws in Sub-Articles 2 and 3 of Article 372 of the Constitution and power to remove difficulties under Article 392 of the Constitution, apart from his other miscellaneous powers such as with regard to ports and aerodromes in Article 364 of the Constitution.

This brief survey is intended to show the variety, complexity and the responsibility of the President’s powers and functions under the Indian Constitution. The meticulous care and pain taken in the Indian Constitution in framing such elaborate provisions and going into such details and particulars do not give the impression that the Indian Constitution was indulging in decorative superfluities and thinking in all these diverse provisions of only a ceremonial or a titular or a figurehead President.

Fourthly, imitation of British parliamentary forms, conventions, rights and privileges illustrated in Articles 75, 77, 78, 108, 109(2) and 110 is carried to an extreme in Article 105 of the Constitution. It is typical on this point of imitation and Sub-Article 3 thereof makes frank confession that
powers, privileges and immunities of each House of Parliament and of the members of the Committee of each House, shall, in other respects, be such as may from time to time be defined by Parliament by law and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and Committees at the commencement of this Constitution. In the making and drafting of the Constitution of a free independent and sovereign Republic, it is against national dignity and constitutional convention to refer to Parliaments and Legislatures of other countries. It is more than a constitutional indiscretion. It creates constitutional deadlock. It is like fitting the parts of a ship or an aeroplane to an automobile on the road. British conventions of the British Houses of Parliament in the unwritten British Constitution when dovetailed in the written Constitution of India in an Indian Parliament create unpredictable situations, whose manifestations we see inside Parliament and outside and in the recent conflict between the judiciary and the legislature in Uttar Pradesh. The point of constitutional law here involved is this that the import of British conventions cannot be read, construed and applied to divest the President of the Executive power of the Union and to qualify the express clauses of the Constitution on the point.

Fifthly, the Oath which the Indian President has to take confirms the constitutional significance of the Indian President’s position under the Constitution. The terms of the President’s Oath are provided by Article 60 of the Constitution and it must be emphasised that no Vice President or Minister takes such an Oath in such terms. The Indian President by terms of his Oath has “to preserve, protect and defend the Constitution and the law” and this is very different from the Oath of Vice-President or his Ministers.

The constitutional relationship between the President and the Cabinet of Ministers or what is known as the Council of Ministers is assuming controversial significance and requires careful consideration because it raises questions of high principles of Indian constitutional law. The President appoints
and dismisses the Prime Minister. The other Ministers are also appointed by the President on the advice of the Prime Minister.

The famous expression in Article 74 of the Constitution "to aid and advise the President" is expressly limited to the exercise of the President's function. The President's "function" in Article 74 of the Constitution is not limited only to his executive function and it cannot be overemphasised that the President has many functions other than executive, such as his legislative, judicial and specific constitutional duties which the Constitution has enjoined. The constitutional question arises whether the apparently unqualified word "function" in Article 74 of the Constitution includes his legislative, judicial and special constitutional responsibilities within the ministerial "aid and advice" clause. Article 53(1) of the Constitution expressly recognises the President's right to exercise the executive power of the Union "directly" or through "officers subordinate to him" in accordance with the Constitution. If the President can act "directly" or "through subordinate officers" then it will be unconstitutional to read a limitation there and conclude that the President cannot act without the intervention of the Ministers or the Council of Ministers in the exercise of his executive power. The express language of Article 53(1) of the Constitution gives the President power to act without the intervention of the Minister or the Council of Ministers. Again, the "aid and advice" provision in Article 74 of the Constitution does not impose an invariable and inescapable obligation upon the President to always accept such "aid and advice." The functions contained in Sub-clauses a, b and c of Article 78 of the Constitution would then be wholly unnecessary if the President was invariably or inescapably bound by the aid and advice of the Council of Ministers. Sir B. N. Rau, expressed the view in his India's Constitution in the Making—Notes and Study:

"Even if in any particular instance the President acts otherwise than on ministerial advice, the validity of the act cannot be questioned in a Court on that ground."
It is significant to note that in the Commonwealth, of which India is a part, the Dominion Constitutions in the Commonwealth have no institution like the Indian President. They have normally what is called the Governor General, who, unlike the Indian President, is not elected by the nation to embody the will of the people.

To pursue this constitutional study still further on this point of the President’s relationship with the Council of Ministers in the Indian Constitution, it is essential to take notice of the important constitutional provisions which indicate that the President can act independently and was intended to act independently under the Indian Constitution, and even contrary to the stand taken by the Council of Ministers. In the first place, notice has already been taken of Article 78 of the Constitution which gives independent rights and authority to the Indian President as against the Council of Ministers. If the President were not the real head or even the elective head, there would be no constitutional significance in casting the duty upon the Prime Minister to communicate the decisions of the Council of Ministers to the President or to furnish the information relating to administration of the affairs of the Union and proposals for legislation as the President may call for or to submit to the President’s requirements to have one Minister’s consideration reviewed by the whole Council of Ministers. If the President cannot make his voice and influence effective, then there is no point in making him a mere archive of “information” and “proposals.” The President’s right to information without any right to act on such information will make this provision ineffective and meaningless.

Secondly, the Legislative power of the President contained in Article 123 of the Constitution signifies a field where the President can act without the aid and advice of the Council of Ministers during a time when both Houses of Parliament are not in session. Thirdly, the President’s right of veto on Legislation under Article 111 of the Constitution is also a proof of his right and authority to act without the aid and advice of the Council of Ministers. This veto is
not confined to what is known as the non-official bills. It is wrong to think that it is only the President’s discretionary power. It is his clear constitutional obligation. If a bill violates a fundamental right or the constitutional limits of State powers, the President is bound to exercise this veto or else he would be guilty of a failure to protect the Constitution.

Fourthly, Article 143 of the Constitution gives the Indian President the power to consult the Supreme Court and obtain the Supreme Court’s consideration and report on any question of law or fact which is of public importance. Obviously, this is an independent power of the Indian President, independent of the Council of Ministers to resolve the otherwise unbridgeable constitutional difference between him and his Cabinet or Council of Ministers, raising such question of public importance with a view to safeguarding the Constitution either normally or in times of crisis. Fifthly, another mode constitutionally open to the Indian President for obtaining independent advice is through the Attorney-General of India, whom he appoints under Article 76 of the Constitution and who has to perform duties of legal character which, from time to time, the President may refer or assign to him and the Attorney-General has to discharge the functions conferred on him by or under the Constitution or any other law for the time being in force. It is needless to point out that the Constitution expressly provides that the Attorney-General holds office during the pleasure of the President. If by any fancied convention or otherwise the President was always bound by the “aid and advice” of his Council of Ministers, what is the constitutional necessity of providing him access to the Supreme Court or the Attorney-General?

Obviously, the President cannot be aided and advised by his Ministry, in the nature of things in such constitutional areas as:

1) when the President dismisses a Prime Minister who does not enjoy his leadership of his party;

2) when the President dismisses a Ministry which loses confidence of the people;
3) when he dismisses the House of the People which appears to have lost confidence of the people;

4) in the exercise of the power as the supreme commander in an emergency when the Council of Ministers has failed to defend and protect the country.

The Constitution provides for the impeachment of the President. That implies a personal responsibility for the President in certain spheres of action, otherwise there could be no question of his impeachment just as there is no question of impeachment of the British Crown by the House of Commons. Under the British Constitution the King can do no wrong but not so the President of India, and if the President does anything wrong, he can be impeached for such wrong in an appropriate case. Be it noted that the Vice-President cannot be impeached and he can only be removed under Proviso (b) of Article 67 of the Constitution. Article 61 of the Constitution speaks of the impeachment of the President for the violation of the Constitution and lays down the procedure. If the responsibility were entirely on the Ministers or the Council of Ministers for whatever the President did then there would be no constitutional significance in providing for his impeachment and not that of the Ministers and the Council of Ministers.

Professor Alan Gledhill in his *The Republic of India* tabulated the sharp differences between the Indian President and the British Crown on as many as five grounds of (1) the Oath, (2) the principle of election, (3) the basis of allegiance of the people, (4) Impeachment and (5) powers specially conferred involving personal discretion.

These constitutional features and provisions are not pious wishes devoid of constitutional and legal substance, but are specific tenets of the Indian Constitution. Their wisdom lies in the fact that the President is a constitutional and effective check on cabinet dictatorship, and what has recently been described by a former Attorney-General as "constitutional dictatorship", flowing out of the overwhelming strength of a single political party without any effective opposition. The President of India by these provisions is plainly
intended to be also an effective constitutional check on the danger to the State-Federal structure of the Union, democratic processes of multi-lingual, multi-racial and multi-religious mechanics of the Indian nationality, where freedom guaranteed by the Constitution becomes a matter not merely of constitutional theories, but is the very practical stake of the very life of the people and culture of its diverse communities. If the President were to accept the ministerial aid and advice regardless of his own independent view then he endangers the diverse communities placed under the protection of the Constitution.

At the same time let no one think that the Indian Constitution makes for any dictatorial President. There is no scope for Presidential dictatorship in the Indian Constitution. If he is in conflict with his Council or Cabinet of Ministers, he has two courses open to him either to dismiss the Ministry and appoint another Prime Minister who must be acceptable to Parliament or he may dismiss the Ministry and dissolve the House. If the President in every case overrides his Council of Ministers, then the Council of Ministers can present a united front and the difficulty of finding an alternative Prime Minister who would form a stable ministry along with the danger and possible adverse vote of Parliament and the possible reaction on public opinion would keep the President’s power in check.

It will be appropriate here to refer to Professor Alan Gledhill’s illustration of an instance which he contemplates where the President without violating the Constitution can establish an authoritarian Government. (The Republic of India by Alan Gledhill, 1951 p.108.) The illustration is this. A notice is given under Article 61 to impeach the President for violation of the Constitution. Before a Resolution is moved in a fortnight’s time, the President dissolves Parliament. Before a new House is elected, the President appoints a new ministry and starts issuing Ordinances. Then the President makes a Proclamation of Emergency and suspends Fundamental Rights. Lastly as the Commander-in-Chief of the Army, the President uses the Armed Forces in support of his policy. Professor Gledhill thinks that the
illustration is not as imaginary as it reads because according to him that is what happened when the Weimar Constitution in Germany was destroyed.

It is submitted that the situation Professor Gledhill contemplates is neither conceivable nor can it practically arise in the context of the Indian Constitution. A President against whom steps are being taken on fourteen days' notice under Article 61(2) (a) can be immediately immobilised by Parliament under Article 70 of the Constitution, which empowers Parliament to "make such provision as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter." Surely if the President starts acting in the manner indicated by Professor Gledhill, that would be a "contingency" of this nature. Even apart from Article 70, Professor Gledhill's illustration cannot work. A President under notice of impeachment under Article 61(2) (a) cannot dissolve the House of People under Article 85(2) (b) on that ground, for such dissolution will be a fraud upon the Constitution and that Article and will therefore be not only unconstitutional but also in breach of conventions for dissolving the House. For the same reasons therefore the President's dismissal of the ministry will be both unconstitutional and in breach of convention. Professor Gledhill's contemplation about Presidential reign under Proclamation of Emergency by Ordinances is equally unfounded because of the special limitation of two months provided by Article 352, without Resolutions of both Houses of Parliament. Professor Gledhill's fearful illustration is therefore beyond the realm of practical constitutional consideration.

Constitutionally the President is the guardian of many constitutional trusts. The citizen looks to him in the first instance before the law is made for the protection of his fundamental rights. The judiciary looks to him for fairness and independence and for the maintenance of fearless conditions of judicial work. The States look to him for safeguarding the Directive Principles of State Policy, their State Rights, autonomy, political, cultural, religious and administrative balance. The entire nation looks to him for protection in any emergency. If the President abdicates his constitutional powers
to the Prime Minister or the Council of Ministers, the whole structure of the Union and the States and their delicate and complex constitutional relationship under the Indian Constitution are in peril.

The subject under discussion is the Executive power and the Executive institution. The picture on this point with regard to the States demands a very careful scrutiny. The President’s role and responsibility in the complex constitutional nexus between the Union and States is the key to the letter and spirit of the Constitution of India. It is expressly laid down in the Second Chapter of Part XI of the Indian Constitution under the title ‘Administrative Relations’ that the Executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and the existing laws which apply in that State. It does not rest there but proceeds to lay down that the Executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. That makes the States’ Executive power subservient to the Union’s Executive power. This follows from the language of Article 256 of the Constitution. Besides, there is a further control by the Union over the States in certain cases. It is expressly commanded that the Executive power of every State must be so exercised as not to impede or prejudice the exercise of the Executive power of the Union and even there the Executive power of the Union shall extend to the giving of such direction to a State as may appear to the Government of India to be necessary for that purpose. Because the power of the Government of the Union is plenary under the expression “as may appear to the Government of India to be necessary for that purpose” it requires to be exercised with caution and within strict limits imposed by the words “necessary” and “for the purpose.” Who is to be constitutional custodian and marksman for these limits? Can the Government of India by-pass these limits by saying that it “appears” to them to be “necessary” and for the purpose. But then this is executive power and it is vested in the President and he, it is submitted, has a constitutional responsibility to see that nothing beyond what is
"necessary" and "the purpose" is done under the cover of these directions. Inconsiderate use of these directions can upset the constitutional balance between the Union-State relationship. No doubt these directions from the Union may relate (a) to the construction and maintenance of means of communication of national or military importance, (b) protection of railways within the States as provided for in Article 257 of the Constitution, but then such a provision is only illustrative and not exhaustive and obviously there can be and are in fact directions in other fields of executive power.

As a concession of little constitutional consequence, Article 258 of the Constitution gives power to the Union to confer functions upon the States in certain cases, but this is only one side and similar power is granted by the Constitution for the States to entrust functions to the Union under Article 258 (a) of the Constitution. The constitutional problem then is who is to check and observe that the Union or the State functions within and does not exceed the limits of these transferred functions under this system of constitutional agency. So far as these transferred functions are executive functions, the President being the vested authority is the person who alone is charged with this constitutional responsibility.

The proverbial full faith and credit Clause in a Federal Constitution appears in Article 261 of the Indian Constitution to say that full faith and credit shall be given throughout India to public acts, records and judicial proceedings of the Union and of every State. To whom again does the nation look for the implementation of the full faith and credit obligation but to the President under the Indian Constitution?

The other significant feature of State-Union relationship and the President's power in relation thereto appears in Article 263 of the Constitution. It provides power to the President in public interest to establish an inter-State Council to enquire into and advise upon disputes between States or between States and the Union and for making recommendation on such subject for the better co-ordination of policy and action. It is submitted that here also the President is the
authority to determine the only criterion of "public interest" and is not bound by the aid and advice of the ministers or their council.

The focal point of the State Executive is the Governor of the State. Article 154 of the Constitution, almost in similar terms as in Article 253 of the Constitution with regard to the President, lays down that the Executive power of the State shall be vested in the Governor, and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. This is followed immediately by Sub-Clause 2 of Article 154 which goes on to say that nothing in that Article shall be deemed to transfer to the Governor any functions conferred by any existing law to any other authority or prevent Parliament or State Legislature from conferring by law functions on any authority subordinate to the Governor.

But the Governor unlike the President is not an elected person. He represents no popular voice. He is appointed by the President and holds his office during the pleasure of the President for a term of five years. Unlike the President, the Governor cannot be impeached, under the Constitution.

But here again the Governor as the custodian of the Executive power of the States is not a partisan politician. Article 158 of the Constitution insists that the Governor, like the President, shall not be a member of either House of Parliament or of any House of the State Legislature, and if he happens to be one such, he must be deemed to have vacated his seat of such House on the date he enters his office as Governor. His oath also like that of the President requires him to "preserve, protect and defend the Constitution".

The same constitutional confusion between Legislative and Executive power as in the case of the President, marks the office of the Governor. Article 162 of the Constitution makes a similar attempt to define Executive power to extend to matters with respect to which State Legislature has power to make laws, with the added handicap that the State executive power is subject to and limited by the executive power
conferred by the Constitution or by any law made by Parliament upon the Union or the authorities thereof.

Again here in the State there is the Council of Ministers with the Chief Minister as the Head to aid and advise the Governor in the exercise of his functions, but with this significant express provision in Article 163 of the Constitution which says, "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion." No such provision is to be found in Article 74 of the Constitution. There is, therefore, in the case of the Governor of the State, as the vested custodian of the Executive power of the State a clear recognition of his right and function in the field of his discretion where he is not controlled by the "aid and advice" of his Council of Ministers. What is more Sub-Clause 2 of Article 163 of the Constitution expressly makes the Governor's decision in any question whether the matter is under his discretion or not final and the validity of anything done by the Governor cannot be questioned on the ground that he ought or ought not to have acted in his discretion. A point has been made on this contrast between Article 74(1) and Article 163 of the Constitution to say that while a Governor has a discretionary field to act unhampered by Ministers, the President of India has no such discretion. It is necessary to test such a constitutional proposition.

The Chief Minister is appointed by the Governor and the other Ministers are also appointed by the Governor on the advice of the Chief Minister. As the Union executive action is carried on in the name of the President, so the executive action of the States is expressed to be taken in the name of the Governor. The duty is cast by Article 167 of the Constitution upon the Chief Minister of each State (a) to communicate to the Governor all decisions of his Council of Ministers relating to the Administration of the affairs of the State and to the proposals for Legislation; (b) to furnish such information relating to the administration of the affairs of the State and proposals for Legislation as the Governor may call for and (c) if the Governor 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. This is comparable to the President's position under Article 78 of the Constitution. The same comments as those made on Article 78 apply to Article 167.

The question of discretionary powers of the President and the Governors under the Indian Constitution has a history behind it. The origin of that history lies in the Instrument of Instructions. It will be interesting to note that at one stage of constitution making on this point a suggestion was made to provide for an Instrument of Instructions to bind the President. This proposal to incorporate Instructions to bind the President to the advice of the Ministers was suggested in the following terms:

"In all matters within the scope of the Executive power of the Union, the President shall, in the exercise of the power conferred upon him, be guided by the advice of the Ministers."

These draft Instructions proposed by the Constituent Assembly were rejected by the Assembly. That is an indication from constitutional history that there are spheres of action in the exercise of the Executive power of the Union by the President, where he can act without the advice of the Ministers or even in spite of it. The second feature which points out to the same conclusion is that an attempt was made by the Constituent Assembly at one stage to incorporate the provisions of Article 13(9) and (11) of the Irish Constitution providing that the "powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in absolute discretion," and "no power or function conferred on the President by law shall be exercisable or performable by him, save only on the advice of the Government." But this proposal also was ultimately rejected by the Constituent Assembly. B. N. Rau in his *India's Constitution in the Making* at page 376 therefore expressed the view "nothing similar to these provisions appears in the Indian Constitution. We must, therefore, infer that the omission was deliberate."
If the omission was deliberate, why should not effect be given to the proposition that the Constitution does not bind the President to invariably accept the "aid and advice" of his Council of Ministers?

We have already noticed that unlike the Irish Constitution the Indian Constitution does not expressly provide for absolute discretion or any other discretion for the Indian President. At the same time, express reference to such discretion is made in the case of the Governors of the States. Here again the constitutional history explains and throws some light on the point. There were several matters in the Government of India Act 1935 in which the Governor was required to act in his discretion. But then there are no such provisions left any more in the Constitution of India. Although the Government of India Act, 1935 did not require the Governor to act on the advice of his Ministers there were Instrument of Instructions which laid down this duty. But then again as we have seen there is no such duty under the Constitution, and there is no such Instrument of Instructions. The constitutional question arises, what then are the fields in which Governor’s discretion can work with reference to Article 163 of the Constitution?

A typical example can be drawn from the constitutional provisions in case of a failure of the constitutional machinery in States. Article 356 of the Constitution enables the President on the receipt of a report from the Governor, or even otherwise, to make a Proclamation assuming to himself all or any of the functions of the Governor of the State. The question arises, is this report from the Governor, a report of his Council of Ministers? It is submitted that this "report" is not and need not necessarily be the report of the Council of State Ministers. This report, therefore, is a report expressing more likely and appropriately the Governor's individual view and his individual discretion in the matter.

It is also submitted that wherever there is direction from the Union upon the States under the constitutional provisions already discussed under the legislative and administrative relationship between the Union and the States spe-
cially in Part XI of the Constitution covering Articles 245 and 263, the Governor is not necessarily bound to accept or act on the aid and advice of his Council of Ministers and can exercise his discretion. The exercise of his discretion in these matters cannot make him a dictator for the simple reason that these constitutional provisions contain their own safeguards and the directions on the point of Legislative or administrative relationship between the Union and the States or co-ordination between the States can always be withdrawn and modified on the basis of those Articles.

The Governor will also have to exercise his discretion, independently and in spite of the aid and advice of his Ministers, in performing his duties under Article 200 of the Constitution. He has similar powers, like the President, of assenting to a bill or withholding his assent. But in addition, the second proviso of Article 200 of the Constitution imposes an interdict on the Governor that he shall not assent to, but shall reserve for the consideration of the President, any bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill. Article 160 of the Constitution gives the President the power to make such provisions as he thinks fit for the discharge of the functions of the Governor of the State in any contingency not provided in Part 6, Chapter 1 of the Constitution. Here again, is a field where the Governor may have to exercise his discretion. As in the case of the President, so in the case of the Governor, the Governor will have to give a decision on a question about the disqualification of a member of the House of the Legislature of a State and his decision shall be final, though no doubt, before giving such decision, the Governor shall, like the President, obtain the opinion of the Election Commission and shall act upon such opinion. But the point again is that though the Governor shall act on the opinion of the Election, he does not act on the advice of his Ministers. The fifth and the sixth Schedules relating to the administration and control of Scheduled Areas and Scheduled Tribes, divided into two parts, one relating to all the States other than Assam and
the other relating to the State of Assam, are relevant on the Governor's discretionary powers. Item 3 of the fifth Schedule casts upon the Governor the duty to make a report whenever required by the President or annually, regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to giving of directions to the State regarding such administration. Item 4 casts upon the Governor the duty to make rules prescribing or regulating the composition and conduct of the Tribes Advisory Council. Item 5 of the fifth Schedule entitles the Governor to make regulation for the peace and good government of a Scheduled Area.

The varieties of the Governor’s duty can also be illustrated from such extensive provisions as: (1) the Governor’s power to entrust State functions to the Union (Art. 258A), and (2) to frame rules (a) regarding authentication of orders and other instrument (Art. 166(2)), (b) regarding conditions of service, etc. of the Chairman and members of the State Public Service Commission (Art. 318), (c) regarding convenient transaction of Government business (Art. 166(3)) (d) regarding procedure in respect of communications between Houses of State Legislatures (Art. 208(3)), (e) regarding recruitment of Officers etc., for a High Court (Art. 229 proviso), (f) regarding recruitment of the secretarial staff of a State Legislature (Art. 187(3)), (g) to grant pardons etc. and to suspend, remit or commute sentences (Art. 161), (h) to nominate Anglo-Indians to Legislative Assembly, (i) to appoint a member of the State Legislative Council to fill temporary vacancies in the office of the Speaker (Art. 180(1)), (j) to appoint a member of the State Legislative Council to fill vacancies for the office of Chairman (Art. 180(1)), and (k) to nominate members in the Legislative Council (Art. 171).

It will, therefore, be constitutionally incorrect to say that because there is no more Instrument of Instruction under the Indian Constitution, there is, therefore, no scope left for the Governor's or President's discretion. Under the Government of India Act, 1935, it used to be the duty of the Secretary of State to lay before the British Parliament the draft of any Instrument of Instruction which, it was proposed to recom-
mend to the British Crown to issue to the Governor General. The history of the British Empire in India shows that historically these Instrument of Instructions had been one of the effective weapons by which constitutional advance had been obtained. The Instrument of Instruction was really then a British Crown prerogative. But if there was any contravention of the Instrument by the Governor-General the only appeal was to the Secretary of State and the matter could not be canvassed in the Courts. It was the office of the Instrument of Instruction to define with precision the scope of each of the "safeguards" or "special responsibilities" and to designate the occasions for the interference in the mechanism of the Constitution. (See British Parliamentary Debates, Vol. 302, Vols. 630 and 631 and Sir Samuel Hoare's Speech reported in the Command Paper 4805.)

In fact, Section 52 of the Government of India Act, 1935 the precursor of the Indian Constitution specified the special responsibilities of the Governor by listing and naming them as: (a) the prevention of any grave menace to the peace or tranquility of the Province or any part thereof; (b) the safeguarding of the legitimate interests of minorities; (c) the securing to, and to the dependents of, persons who are or have been members of the public services of any rights provided or preserved for them by or under that Act, and the safeguarding of their legitimate interests; (d) the securing in the sphere of executive action of the purposes which the provisions of Chapter III of Part V of that Act are designed to secure in relation to legislation; (e) the securing of the peace and good government of areas which by or under the provisions of this Part of that Act are declared to be partially Excluded Areas; (f) the protection of the rights of any Indian State and the rights and dignity of the Ruler thereof; and (g) the securing of the execution of orders or directions lawfully issued to him under Part VI of this Act by the Governor-General in his discretion.

It may be emphasised here that under the scheme of the Government of India Act, 1935, in so far as the Governor was required to act in his discretion or to exercise his individual judgment, he was under the general control of and
had to comply with such particular directions as from time to time could be given by, the Governor-General in his discretion.

From this discussion it will appear that the present Constitution of India inherited both the need and the ideology of special responsibilities, personal discretion and individual judgement and the inheritance is reflected in both the President and the Governor. But what the Constitution did not do was to list or specify under any particular Articles, the specific fields of such personal discretion or individual judgment or special responsibilities. But nevertheless the Articles that are discussed in this Chapter indicate the field of personal discretion, individual judgment and special responsibilities of both the President and the Governor.

A constitutional problem of great significance and practical import centres round the rule-making power of the Executive. No executive can function without rule-making power. The complex administration of a political State in the modern age and the variety of administration that it has to take charge of, make it a constitutional necessity that the Executive’s rule-making power must be clearly recognised, no doubt, under constitutional safeguards for protection against their misuse or abuse. The Indian Constitution in this respect is confused. The only general principle that can be predicated under the Constitution is that Union Parliament or State Legislature has the legislative power to “make” laws and therefore under the Indian Constitution the power to ‘execute’ laws, which, as already indicated is a necessary incident of Executive Power, does not imply the power to make rules and regulations for implementing laws, unless the laws themselves have expressly provided for such powers. Therefore, what is being done under the Indian Constitution is by \textit{ad hoc} legislation on manifold and diverse subjects, the various Acts have started conferring powers in divergent terms to the Executive under those Acts to make the rules. The result has been an uncontrolled and unmanageable growth of “administrative laws” where it is difficult to find any cohesion or pattern either in principle or in procedure. This has led to an alarming increase of the powers of irres-
ponsible bureaucracy without effective check and control, where political influences and personal prejudices are creating administrative chaos, suffering and frustration. Constitutionally this is one of the main causes that have crippled the strength, decisiveness purposefulness and effectiveness of the executive power in India.

Apart from the express powers of the President of the Union and the Governors of the States discussed above, the question of their implied powers is also a matter of concern. Doctrines of conventions and implied powers require careful appreciation and still more careful application in a detailed written Constitution like that of India. The warning of Lord Chancellor Loreburn in Attorney General for Ontario vs. Attorney-General for Canada 1912 A.C. 571 at 583 which is usually cited as the classic on the subject is: “In the interpretation of the completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit, the text is conclusive, alike in what it directs and what it forbids.”

No doubt, where the Constitution is explicit, it is conclusive. But then human languages and words have their inherent limitation and even the most explicit of all explicit texts sometimes carry implicit connotation and denotation. Powerful examples can be drawn from the Indian Constitution to illustrate this principle. We have already examined the provisions of the Indian Constitution that the Executive power of the Union extends to all matters in the Union List. Matters in the Union List have implicit connotations. It is submitted that they have wider connotation than all such expressions as “power to execute laws” used in Locke’s famous definition of Executive Power. Several elements of Executive power follow as the logical and natural consequence of the general scheme of power “to make” laws under the Indian Constitution. The Indian Constitution only provides that the Union Parliament shall have power to “make” laws with respect to the matters specified in the Union and Concurrent Lists. Naturally to this power of legislation must be super added the power to execute and carry out the laws and that
is executive power. This constitutional question regarding the extent of the President's authority becomes acute in the realm of external affairs. Foreign affairs naturally is an item of the Union List of Legislation. That means that the Union Parliament has only power to "make" laws in respect of foreign affairs. But the entire executive power in relation to them must necessarily by implication be vested in the President of India and consequently it is the President who is entitled to exercise power of appointment and removal of diplomatic and consular representatives, reception of representatives of foreign States, negotiation and conclusion of treaties or international conventions, and declarations of war and peace. Because the Indian Constitution does not confer on the Union Parliament any power other than the power to "make" laws by treaties and international agreement, it is clear that all other powers centering round such legislation must necessarily be the Executive power vested in the President. It must follow that the President of India has the power to conclude treaties and agreements with foreign States without intervention of the Union Parliament except of course where treaties necessitate legislation to implement them, for instance, amendment of such Acts as Trade Marks or Shipping Acts adapting international conventions and international agreements. No doubt, this treaty making power is subject to the two limitations we have noticed, the first being that the Union Parliament may regulate the exercise of this power by virtue of its authority to make laws and secondly, the power of the President to conclude treaties must be subject to the criticism and control of Parliament. Similarly again the Executive power of the Union must impliedly include the power to declare war and peace because the power of the Union Parliament is only limited to make "laws" in respect of war and peace. In this respect the Indian Constitution goes further than the American Constitution where the power to declare war vests in the Federal Congress. This constitutional position however must not be confused with the accepted wisdom that politically no executive would take the responsibility of exercising the power to declare war or peace without the assent and approval of Parliament.
From an analysis of the Executive Power of the Union and the States it is abundantly clear that the Executive power was intended to be strong, effective and efficient, but in fact it is weak and has become irresponsible. The President and the Governor are not only vested with the Executive powers of the Union and the State, but also under the Constitution were intended to be an integral, indispensable, and independent part of the Constitution. No doubt, they are intended to be constitutional, and a constitutional President and a constitutional Governor are not intended, and cannot in law surrender, to other agencies the powers to be discharged by them under the Constitution. Normally, the President and the Governor should certainly work in harmony with the Council of Ministers as the elected representatives of the people. Every effort should be made in the realm of discussion and negotiation between the President and the Governors, on the one hand, and their Council of Ministers on the other to respect each others constitutional powers. But that respect does not mean that the President and the Governor are to be mere echoes of the voice of their Council of Ministers. That is not the Indian Constitution. It has been said, "the voice of reason is more readily heard when it can persuade but no longer coerce" and on that ground the President of India and the Governors of the States have been advised by B. N. Rau to "eschew legal powers, standing outside the clash of parties and gaining in moral authority." (B. N. Rau's *India's Constitution in the Making*, page 382.) There is no question of "eschewing" legal powers in a written Constitution like India. Nor is the letter of constitutional law concerned with moral authority as distinguished from legal authority of institutions under the Constitution. If any institution under this Constitution, be it the President or the Governor or the Council of Ministers, eschews legal powers, that institution violates the Constitution and commits a breach of it. The Indian Constitution is systems of checks and balances because the Constitution insists on the protection of many institutions, races, languages, cultures, religions and communities in India. Remove one link or check, or dislocate a balance, the Constitution is violated and the peace and good government of the
country are in peril. Those who have the wisdom to see the writing on the wall can see the signs of those perils all over the country. The language riots, the communal dissensions, the States Reorganisations, inter-State Commerce, and allocations of Federal and State revenue are decisive pointers. In this connection the wide-spread misconception should be corrected that Parliament is supreme in India. It is plainly not so in the Indian Constitution. If anyone is supreme apart from the people, it is the Constitution which is supreme. It will be, therefore, a dangerous constitutional innovation to import doctrines of British constitutional supremacy of Parliament and utter Blackstonian slogans that Parliament can make black white and white black and the only limitation is its incapacity to change the sex, or alter the laws of physical or biological sciences.

A proper, legal and constitutional administration and working of the Constitution of India is not merely a theoretical exercise in constitutional jurisprudence. It is vital for the national life, its political, economic and administrative security. It has often been said that in the first sixteen years of the Constitution the Indian Executive has been weak, vacillating and has not succeeded in co-ordinating effectively the clash of interests consigned to the care and protection of the Constitution. Both internal and external insecurity have grown apace because of the Executive weakness and its indecisiveness.

Many comments are heard about law's delays. It is said that cases and litigations are kept hanging in Courts for a long time until they are finally disposed of. The time has come to focus public attention on Executive delays. When roads, bridges, projects, ports, non-clearance of ships, development of rural and urban areas, industrial agricultural and educational needs have to wait, they cost astronomical figures for the administration and the tax payers and hardship for millions of people. Law's delays are bad enough but they are confined to the individual rights in individual cases. But executive delays cause nationwide loss, inefficiency and insecurity.
If the Indian Executive applied its constitutional powers and worked what the Constitution intended it to do then the picture would have been different.

It is submitted on this analysis that the Indian Executive is authorised by the Constitution to be strong and effective. But by wrong action and wrong interpretation of the constitutional provisions it has been reduced to a degree of ineffectiveness which unless corrected is going to create not only constitutional problems but extra-constitutional problems which might spell disaster for the country. India up till now has had only two Presidents. This great constitutional issue of Executive power was raised by Dr. Rajendra Prasad, the first President of India on the occasion of the laying of the foundation of the Indian Law Institute. He protested with his usual dignity against the attempts that were going on to divest the President of the powers under the Constitution. The second clash which Dr. Rajendra Prasad had, on this point, was on the Hindu Code. The issue, therefore, has been struck. The constitutional jurists will watch with interest how this issue is ultimately decided. No democracy, liberal or militant, can afford to have a weak and indecisive executive. It is less defensible in the case of an underdeveloped country like India where disciplines of democracy have yet to be learnt.

Sir Ivor Jennings criticised the Indian Constitution as "impregnated with the idea that law and government are dangerous and ought to be kept in concentration camps." He also criticised the Indian Constitution because of "the vast powers which are legally vested," in the President of the Union and the Governors of the States. If Sir Ivor Jennings were alive today he would have seen what use has been made of those "vast powers" legally vested in the President of India and the Governors of the States. Indeed it has been said by another constitutional lawyer that the Indian Constitution "conferred such immense powers on the Executive Authorities of the Republic. (Sirdar D. K. Sen's A Comparative Study of the Indian Constitution, Vol. I. Preface.)"
On this great problem of Executive power and Executive Institutions the gulf between the Constitution in practice and the Constitution in theory is widening. The powers of the bureaucracy are increasing and the powers of the President and the Governors are diminishing.
Chapter Two

THE LEGISLATIVE POWER AND THE LEGISLATIVE INSTITUTIONS OF THE INDIAN CONSTITUTION

A Study of the Indian Parliament and the State Legislatures under the Indian Constitution

The institutions for legislation in the Indian Constitution are primarily Parliament and the State Legislatures. Derivatively in the field of delegated and subordinate legislation, there are hundreds of law-making authorities under diverse statutes, whose laws are known as rules or regulations or bye-laws. These authorities, statutory and administrative are additional legislative institutions, which operate in numerous areas and in particular under fiscal, taxing revenue, labour, company, corporation, municipal and licensing laws. Proliferation of laws is assuming large proportions in India. These laws are becoming unmanageable in their nature, extent, variety and complexity. Formal statutes are pouring in torrents and subordinate legislation in floods throughout the country. Legislative power has become massive and pervasive. The examples of the exercise of such vast legislative powers are not only confined to Acts and Statutes of Parliament and State Legislatures but express themselves also in the forms of resolutions of these legislative institutions and rules, regulations, bye-laws, schemes and orders of subordinate law-making bodies.

Article 79 of the Constitution provides: “There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of the States and the House of the People.” Parliament’s constitution or composition or of the State Legislature
is not the subject of this discussion, nor their legislative procedure for passing Bills. Its legislative power is the subject of the present study.

Parliament may make laws for the whole or any part of India. The legislature of a State may make laws for the whole or any part of the State. Extra-territorial operation is not a ground for the invalidity of any law made by Parliament. (Art. 245).

The pattern of division of legislative power between the Union and the States is peculiar to India. It does not follow the American pattern. It is materially different from the pattern of many other Constitutions of the Commonwealth countries. Threefold division of the Legislative Power distributed in the Union List, Concurrent List and the State List is its significant feature.

Parliament has exclusive power to make laws with respect to any matters enumerated in the Union List of the 7th Schedule of the Constitution. The Concurrent List (List 3) in the same Schedule enumerates matters with respect to which both Parliament and State Legislatures have Concurrent powers to make laws. Thirdly, the State Legislatures have exclusive power to make laws with respect to any of the matters enumerated in the State List (List 2) of the 7th Schedule of the Indian Constitution. In the case of any part of the territory of India which is not included in a State, Parliament is given the power to make laws for that territory with respect to any matters as enumerated in the State List. (Art. 246).

Having made the triple division of legislative power as the Union List, Concurrent List and the State List, the Constitution proceeds to make the exceptions.

The first exception is Parliament’s significant and extraordinary power to make laws providing for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to any matter enumerated in the Union List. (Art. 247). While the present Indian Constitution has an unified system of laws
and an unified system of courts to administer these laws and no distinction in India is made from that point of view between the Federal Laws and the State Laws or the Federal Courts and the State Courts as in America, yet this Article 247 contains the germ for a departure in the future. It permits additional courts for better administration of Union Laws. It is "courts" in the regular sense of the word and not administrative or other tribunals or commissions that this power implies. Such courts, however, can only be "additional" courts and not courts in substitutions of the existing courts. The constitutional question will arise in future when conflict between such additional courts and existing courts takes place; for they will have common subject of administration namely, "better administration of laws made by Parliament or any existing laws with respect to a matter enumerated in the Union List" as stated in Article 247 of the Constitution. Federal laws and laws of the Union List are administered today by the State High Courts and other State Courts in addition to the Supreme Court. Therefore with subjects common for judicial administration these "additional" courts and other courts will come into conflict. The expression "better administration of laws" is bound to raise deep controversies. What are the limits of "better administration" and why "additional" courts for "better administration"? Are they going to be "quality" courts? Why not improve the existing courts instead of setting up "additional courts"?

Pausing here on the law-making power to make additional courts for better administration of Union laws, a reference to the legislative lists of the 7th Schedule of the Indian Constitution will provide room for considerable thought and anxiety. The constitution, organisation, jurisdiction and powers of the Supreme Court of India, including contempt of such Court and the fees taken therein, and the persons entitled to practise before the Supreme Court are already within the ambit of the Union List of Legislation (Item 66 List 1). Again the constitution and the organisation of the High Courts, of the States, except provisions as to their officers and servants, as well as persons entitled to practise before such High Courts and the extension or ex-
clusion of the jurisdiction of a High Court with respect to any Union territory are within the ambit of the Legislative Power of Parliament under the Union List (Item 78, and 79, List 1). Lastly jurisdiction and power of all Courts, except the Supreme Court, with respect to any matters in List 1 as well as admiralty jurisdiction are also within the ambit of the Legislative Power of Parliament in the Union List (Item 95, List 1). The residuary clause in Item 97 of List 1 giving legislative power to Parliament to make laws with respect to "any other matter not enumerated in List 2 or List 3 including any tax not mentioned in either of those Lists makes the legislative power of the Parliament wide enough to cover legislation in respect of courts for better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List as contemplated in Article 247 of the Constitution.

The State List clearly provides that administration of justice, constitution and organisation of all Courts (except the Supreme Court and the High Courts) the officers and the servants of the High Courts, procedure in Rent and Revenue Courts and fees taken in all Courts (except the Supreme Court) are within the legislative power of the State Legislatures. (Item 3, List 2). Besides jurisdiction and power of all Courts (except the Supreme Court) with respect to any of the matters in List 2 are also brought within the ambit of the legislative power of the State Legislatures (Item 65, List 2).

Finally the Concurrent List gives power both to Parliament and the State Legislatures to make laws with regard to "jurisdiction and powers of all Courts (except the Supreme Court) with respect to any matters in this List", and fees in respect of any of the matters in the Concurrent List but not including fees taken in any Court. (Items 46, 47 List 3).

It is plain from this analysis that "better administration" of Union Laws by Courts was already amply provided within the scheme of legislative power. On this review it will therefore appear that the special power expressly assumed by Parliament under the Constitution to legislate and set up
additional courts for the purpose mentioned is a potential danger to the regular existing courts and is bound to undermine their authority and public confidence. Parliament has not yet invoked Article 247 to make any law but there is a proposal reported recently in the press for setting up a Central High Court of India. It is just possible that this Article may be called in aid of necessary legislation, as the proposed High Court is reported inter-alia to have jurisdiction to deal with such revenue legislation as the Income Tax Act and is intended even to cover Company Act matters.

The second exception is Parliament’s exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or the State List, as in Article 248 (1). This is the residuary power of legislation in Parliament. Whatever does not belong to the Concurrent List or the State List is included in Parliament’s law-making power. This is an enlargement of the Union List. Unlike the American and other Constitutions, the Union in India is not one of enumerated powers only. It has certainly enumerated powers as in the Union List, but it has in addition this residuary power. In a sense this is a tautological constitutional provision for Item 97 of the Union List 1 of the 7th Schedule of the Constitution under Article 246 had already given Parliament the power to make law in respect of “any other matter not enumerated in List 2 or List 3”.

Pursuing this subject of tautological reference in the Indian Constitution under Article 248(2) one finds the provision “such power shall include the power of making any law imposing any tax not mentioned in either of those lists.” Here again the express provision in Item 97 of the 7th Schedule of Union List 1 under Art. 246 of the Indian Constitution had already granted these powers in these clear words, “Any other matter not enumerated in List 2 or List 3 including any tax not mentioned in either of those Lists.” To confer, therefore, law-making power to impose any tax under Article 248 (2) is an unnecessary constitutional clumsiness. The ordinary law-making power with respect to taxes so far as Parliament is concerned is sensibly and liberally covered by Items 82 to 98A of the Union List and those Items read
with Article 265 of the Constitution providing that "no tax shall be levied or collected except by authority of law," normally would be enough to cover Parliament's legislative competence for levying and collecting tax.

In the Dictionary Clause of the Constitution in Article 366(28) "Taxation includes the imposition of any tax or impost, whether general or local or special and "tax" shall be construed accordingly." There is a saving clause in Article 277 of the Constitution. This Article provides "any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the state, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law." This saving clause protects the existing taxes, duties, cesses or fees mentioned in the Union List and allows them to continue until Parliament's legislative power is exercised to the contrary.

The third exception is Parliament's power to legislate with respect to matters in the State List on the ground of "national interest." A precondition of this Parliamentary legislative invasion of the State List is a declaration by a Resolution of the Council of States by not less than two-third members present and voting that "it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution." Parliament's power to make such laws only remains in force while the resolution remains in force which is limited to a period not exceeding one year with an option to extend it for a further period of one year. A law made by Parliament on this basis ceases to have effect on the expiration of a period of six months after the resolution spends its force except as regards things done or omitted to be done before the expiration of the said period. (Art. 249).
The fourth exception is with regard to inconsistency between laws made by Parliament not only under Article 249 but also under the proclamation of emergency under Article 250 and laws made by the State Legislatures. In case of such repugnancy, the law made by Parliament shall prevail and not the law of the State. Parliament’s overriding legislative supremacy is therefore recognised in cases of (1) National interest and (2) Emergency. In such an event Parliament becomes the supreme law-making body with supreme legislative competence overriding the State Legislatures and the State Laws. (Art. 251).

The fifth exception in favour of Parliament is its power to legislate for two or more States by consent and adoption of such legislation by other States. If it appears to the legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States, except as provided in Articles 249 and 250, should be regulated in such States by Parliament by law and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly. Any Act so passed shall apply to such States and also to any other States by which it is adopted afterwards by resolution passed in that behalf by the House or Houses of the State Legislature of that State. Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner, but shall not as respects in the State to which it applies, be amended or repealed by an Act of the Legislatures of that State. (Art. 252 of the Constitution.)

The conditions on which such invasion by Parliament can be made are that (1) the States themselves must consider it desirable, and (2) the necessary resolutions of the State Legislatures will have to be passed. (Art. 252). It is necessary to add that there has been no such instance up-to-date of Parliament invoking this Article of the Constitution to make laws by consent of States concerned. Notwithstanding many desirable fields of common concern, the States in India have neither shown sufficient solidarity nor enough
political statesmanship to adopt such a course presumably because they are jealous of their own legislative powers under the Constitution. The utility of such a constitutional provision is also open to doubt on the ground that if the States themselves agree to making same laws, then such similar laws may separately be made by respective State Legislatures to cover common problems and there is no Constitutional need or justification for Parliament to make such laws for the consenting States.

The sixth and last exception relates to the inconsistency between laws made by Parliament and laws made by the Legislatures of States apart from the provision contained in Articles 249, 250 and 251 of the Constitution. It is provided in the Constitution that if any provision of a law made by State Legislatures is repugnant to any provision of a law made by Parliament which Parliament is competent to enact or to any provision of an existing law with respect to one of the matters in the Concurrent List then subject to certain provisions the law made by Parliament whether passed before or after the law made by the State Legislatures, or as the case may be, the existing law, shall prevail and the law made by State Legislatures shall be void to the extent of the repugnancy.

This kind of provision of making the law void only to the extent of repugnancy creates many constitutional and legal difficulties with the remnants of that law. Are these remnants going to remain good law, even though shorn of the repugnant parts? The truncated law may not make any sense, or make a very altered sense from that which the original law was intended to create.

It is further provided that where a law made by the State Legislatures with regard to one of the matters in the Concurrent List contains any provision repugnant to the provision of an earlier Parliamentary law or an existing law with regard to that matter, then in that event the law so made by the State Legislatures, if it has been reserved for the consideration of the President and has received the Pre-
sident's assent shall prevail in that State. But then it is provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to or amending, varying or repealing the law so made by the State Legislatures. (Art. 254).

This legislative nexus in the Indian Constitution therefore reveals a pattern of its own. In the first place, the President of India as much as Parliament with two Houses is an integral part of the Legislative institutions. (Art. 79). In the second place, the Constitution of the States is written in the Constitution of India. The result is that the States have no independent powers to amend their Constitution and there is no scope for experiment with the States' Constitutions by the States in India, as there is in Canada. Any change in any part of the Constitution of a particular State even though the Centre and other States may not be interested therein, is an affair for the whole of India. Even a decision to abolish the Legislative Council of a State requires an Act of Parliament. (Art. 169). Thirdly, the three legislative Lists in the 7th Schedule of the Constitution and the division of legislative power between the Union and the States are a characteristic compromise between unitary and federal systems of legislation. The residuary and the emergency powers of legislation in Parliament and the provisions for invasion of State Legislative power indicate a constitutional verdict for the Union against the States.

The Entries in the three Legislative Lists are prolix, and detailed, a fact which often raises many controversies on the "pith and substance" of those Items raising new conflicts in the exercise of legislative power. In India, the States affect the lives of the ordinary people and citizen just as much, if not more, than the Union. In the division of legislative power therefore the States are in a subordinate position, and yet they are more vitally concerned with the life and expression of its citizen. This is one of the basic reasons why conflicts between the States and the Centre have grown and are growing.
The Canadian constitutional pattern of distribution and division of legislative power has largely influenced the Indian Constitution. The State List with specific items for legislation, the Union List with specific items for legislation, the residuary powers of legislation in the Union Parliament and the absence of the grant of ancillary powers are the four points of similarity between the Indian Constitution and the Canadian Constitution on the subject of legislative power. On the other hand the three specific features of the legislative power in the Indian Constitution, namely (1) Parliament's power to legislate with respect to a matter in the State List under Article 249; (2) Parliament's power to legislate during a proclamation of emergency in respect of any matter in the State List; and (3) the other cases of Parliamentary legislative invasion by consent and adoption mentioned above illustrate the Indian constitutional tendency towards centralism, and mark the major departure from the Canadian Constitution on the nature and division of legislative power.

Generally speaking, division of legislative power in federalism follows three basic principles of (1) relations of "ordination" where the Union and the different State Governments co-operate to find the will of the one federal State and for which purpose the second chamber of Parliament as well as the basic constituencies of the upper House are designed to represent the component States; (2) relations of "co-ordination" where both the Union and the State Governments have specially defined spheres of legislation; and (3) relations of "subordination" in areas of conflict. The relevant constitutional provisions analysed in the Indian Constitution show the regard for these three major constitutional principles, "ordination", "co-ordination" and "subordination".

It will be appropriate at this stage to discuss the construction of legislative grant and the proper interpretation of the division of legislative power. Primarily the content and the extent of the powers of Parliament and State Legislatures depend on the three Legislative Lists enshrined in the 7th Schedule of the Constitution. Construction of these entries in the three Lists is of utmost constitutional importance. There
are many decisions of the Courts including the Supreme Court declaring and expounding the different canons of interpretation. No doubt, on the question of ancillary powers of legislation the former Federal Court of India in United Provinces *vs.* Atiqua Begam, A.I.R. 1941 FC 116, held in dealing with Legislative Lists under the Government of India Act 1935 that "none of the items in the List is to be read in a narrow and pedantic sense, and each general word should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended in it." In the present context of the Indian Constitution that principle may not succeed in operating with its full plenitude. If both the Union Parliament and the State Legislatures started taking broad views of their respective items of their legislation then frequent conflicts of legislative power are bound to arise in the ancillary sphere. In Shri Ram Narain *vs.* State of Bombay, A.I.R. 1959 SC 49, the Supreme Court observed, "It is well settled that these heads of legislation should not be construed in a narrow and pedantic sense but should be given a large liberal interpretation." The principle of beneficial construction with the widest possible amplitude of these powers, as laid down by the Privy Council in British Coal Corporation *vs.* The King, 1935 AC 500, was approved and followed as well as the decision of the former Federal Court in the United Province *vs.* Atiqua Begam, AIR 1941 FC 116, which enunciated the principle that the words in the Legislative List should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended in it. These decisions really followed the Supreme Court's previous decision in Nabin Chandra Mafatlal *vs.* The Commissioner of Income Tax of Bombay, AIR 1955 SC 58. From this can be deduced, the second principle of legislative construction which is the principle of reconciliation. The object of Federal legislative power, while it defines respective spheres of legislation is not to create conflict and contradiction but harmony. The former Federal Court of India while interpreting the entries of the Legislative List under the Government of India Act 1935 in the case of C. P. and Berar Sales of Motor and Spirit Lubricant Taxation Act 1938, reported in A.I.R. 1939 FC 1 emphasises first the canon of
reconciliation and it is only when that was not possible, the Court will have to issue its verdict in favour either of the Union or of the State as the Courts think proper under the Constitution. Gwyer, C. J. in that case in the Federal Court observed, "If indeed such a reconciliation should prove impossible, then and only then will the non-obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resort." Similar views were expressed by Lord Simonds in the Privy Council in the case of the Governor General in Council *vs.* Province of Madras, A.I.R. 1945 P.C. 98. The third principle of interpretation is contained in the rule of "pith and substance." To the Canadian Constitution belongs the credit of developing the pith and substance rule. The Privy Council in dealing with many cases under the Canadian Constitution formulated these principles. Lord Atkin in dealing with an Irish case in Gallagher *vs.* Lynn, (1937) AC, 853 enunciates the principle in the following terms:

"It is well established that you are to look at the true nature and character of the legislation, the pith and substance of the legislation. If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field."

On this basis of pith and substance, the Canadian case, Murphy *vs.* Canadian Pacific Railways, (1956) 1 DLR, 197, justified Canadian Parliament's Legislation regarding export marketing and movement of grain on the ground that it was regulation of trade and commerce within the ambit of Canadian Parliament's legislative power.

The principle of the pith and substance rule had been slowly establishing its authority in India even from before the Constitution and it has been accepted certainly after the Constitution. Such decisions as Dwarkadas Shrinivas *vs.* Sholapur Spinning and Weaving Co., AIR (1954) SC 199, and Subramanyam Chettiar *vs.* Muthuswami Goudan, AIR (1941) FC 47, are illustrations on the point.
In this connection it is essential to emphasise the significant words of Article 245 of the Indian Constitution "subject to the provisions of this Constitution" which expression is a limitation on the legislative power of both the Union Parliament and of the State Legislatures. It is an interesting constitutional enquiry to discuss and find out the nature of this limitation on the legislative power of Parliament and the State Legislatures. It follows that the grant of legislative power either in the specific Articles of the Indian Constitution or in the several Items in the three Legislative Lists in the 7th Schedule of the Constitution does not permit contravention of any of the other provisions of the Constitution, despite the fact that such legislative power is plenary within the ambit demarcated by the Constitution. The constitutional prohibitions are, therefore, an abridgement of the legislative power. The legal effect, whether the law contravenes the limits imposed by Articles 245 and 246 of the Constitution or whether it infringes any other prohibitions embodied in the other Articles of the Constitution, including certainly the provisions of the Fundamental Rights in Part III of the Constitution, should be the same. In other words, when a legislature, be it Parliament or a State Legislature, enacts a law beyond its powers, the law is a nullity ab initio. This nullity springs from the initial lack of legislative power caused either by transgressing the limit of Articles 245 and 246 or by violation of any provisions of the Constitution.

In that view of the matter the opinion expressed by Das, A. C. J., in Bhikaji Narain Dhakras vs. State of Madhya Pradesh, A.I.R. (1955) SC 781, appears to be directly opposed to this basic principle and is open to serious criticism. On the other hand, this fundamental doctrine appears to be more clearly recognised by Mahajan, C. J. in Behram Khurshid vs. State of Bombay, A.I.R. 1955 SC 123. The difficulty that the opinion of Das, A. C. J. in Bhikaji’s case created was recognised and that view was rejected by the majority of the Supreme Court in Deepchand vs. State of U.P. A.I.R. (1959) SC 648, where dissenting from the views of Das, A. C. J. from Bhikaji’s case, the majority of the Supreme Court held "the doctrine of eclipse has no application to post-Constitution
laws infringing the Fundamental Rights as they would be void *ab initio* to the extent of their contravention of the Fundamental Rights. The doctrine of eclipse had to be partialised by drawing a distinction between pre-Constitution and post-Constitution laws with the enunciation of the principles in Deepchand's case that "the doctrine of eclipse is applicable to a pre-Constitution law, which is void on the ground of infringement of a Fundamental Right but can be revived if the constitutional defect is removed." The Supreme Court here makes it clear "the doctrine of eclipse can be invoked only in the case of a law valid when made, but a shadow is cast on it by supervening constitutional inconsistency or supervening statutory inconsistency; when the shadow is removed, the impugned Act is freed from all blemish or infirmity." But it is submitted that this whole theory of eclipse is irrelevant in the case of a law initially void.

The waxing and waning of the moon is a very undependable symbol on which to hang a constitutional theory. Even the correctness of the decision in Deepchand's case is open to serious doubts. Articles 13 (1) and (2) alike make pre-constitutional laws as much as post-constitutional laws void to the extent of inconsistency or contraventions. The word "void" must carry the same meaning in both sub-Articles (1) and (2) of Article 13. In plain logic it should follow that in both cases the conflicting law must be regarded as nullity and as entirely void when the laws are in breach of the Fundamental Rights. For a law to remain in hibernation or suspended animation and then to revive and spring back to life is a theory difficult to justify juristically. Removal of constitutional defects make it a new law and not the old moon with the eclipse removed.

The distribution of legislative power has raised another problem of construction which goes by the name of the rule of severability when it declares in so many words that a law which violates a Fundamental Right is void only to the extent of the violation. But it is not limited to this sphere alone. It is also applicable in the field where the law is unconstitutional on the ground that the legislative institution which passed that law lacked the necessary legislative power.
This can be illustrated from the decision of the Supreme Court in Gopalan vs. the State of Madras, A.I.R. (1950) SC 27. The essence of this doctrine of severability is that when a provision in a statute is contrary to the provision of the Constitution, instead of declaring the entire statute unconstitutional, what is done is only to separate the offending provision and to declare the offending provision to be bad. But if no such separation is possible and no such separation can be made without upsetting the entire statute, then the whole statute has to go. Consequently, the doctrine has been evolved that if the invalid provisions of the statute "are essentially and inseparably connected in substance" with the valid provisions, the rule of severability cannot apply. This is further illustrated by the Supreme Court decision in the case Romesh Thappar vs. State of Madras, (1950) SCJ 418. Two other subsidiary corollaries for construction have also emerged on this point. One is the ancillary doctrine which says that if the valid portion of a statute are merely ancillary to the invalid portions, then also the whole statute must go. The other corollary of construction is the test that after severance what remains must not be such as to "change the nature or the structure or the object of the legislation." These corollaries of construction can also be deduced from the case of Gopalan vs. State of Madras, A.I.R. (1950) SC 27, and the observation of Griffiths C. J. in Whybrow's Case, 11 CLR, at page 27.

It follows from the above analysis that the Indian Constitution does not adopt the British principle of supremacy of Parliament, in the sense that Indian Parliament is not as omnipotent as the British Parliament, the validity of whose enactments or statutes could not be questioned by any court of law. Here in India the Constitution is supreme and not Parliament. The non-sovereign character of Parliament and State Legislatures follows from their necessary subservience to: (1) the Fundamental Rights in the Constitution and also (2) the other express or implied constitutional limitations discussed above.

It is now necessary to discuss the Constitution-amending power of Parliament as part of the legislative power. The
Constitution is the Supreme law of the land and power to amend it appropriately belongs to legislative power in that sense. Constitutional amendments have become a critical problem in India. While the British Parliament is not only a legislative body but also a constituent body and can pass laws affecting the British Constitution in the same manner and with the same ease as it can pass ordinary statutes or laws, the Indian Parliament or Legislatures stand on a different footing and their statute or law making power and Constitution-amending power cannot follow the same procedures. No doubt, the Constitution provides for its amendments but such an amendment, subject to certain exceptions, cannot be passed in the same way as ordinary laws and requires special procedure laid down in Article 368 of the Constitution. Parliament as such in the Indian Constitution is not a constituent body in the sense the British Parliament is.

The amendment of the Constitution properly falls within the sphere of Legislative Power of Parliament and in certain specified cases also of the State Legislatures. No doubt, the amending procedure is to some extent different from the ordinary legislative procedure for passing Bills, yet they have a similarity in major characteristics. The amendment of the Constitution is initiated only by the introduction of a Bill for that purpose in either House of Parliament. That is, the first initial stage of a proposal for initiating constitutional amendments. The second stage is when that Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-third of the members of that House present and voting. The third stage is when such a Bill so passed has to be presented to the President for his assent and lastly when such assent is given to that Bill the Constitution stands amended in accordance with the terms of the Bill.

But there are important reservations. In five special classes of amendments, which we shall presently discuss, such 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 an amendment is presented to the President.
for assent. This ratification makes the State Legislatures a part of the Constitution-amending machinery. To make ratification by only one-half of the total number of States, a bare majority as enough for amending the whole Indian Constitution is open to serious criticism. There should be a larger majority at least a majority of two-thirds of the States of India, for making such amendment of the Constitution of India. A majority of two-thirds of the States would have been in keeping with the importance of constitutional amendment and would have compared fairly with voting in Parliament itself in the opening paragraph of Article 368.

The five special classes of amendments requiring the special procedure for ratification by the States are: (1) Amendments of (a) Article 54 of the Constitution providing for the election of the President, (b) Article 55 of the Constitution providing for the manner and election of the President, (c) Article 73 providing for the extent of the executive power of the Union, (d) Article 162 of the Constitution providing for the extent of the executive power of the State and (e) Article 241 dealing with the High Courts and the Union territories; (2) Amendments of (a) Articles of the Union Judiciary, Articles 124-147, being Chapter 4 of Part V of the Constitution, (b) Articles of the State Judiciary, being Articles 214-231 being Chapter 5 of Part VI of the Indian Constitution and (c) Articles of Legislative relations dealing with distribution of legislative powers being Articles 245-255 in Chapter 1 of Part XI of the Indian Constitution; (3) Amendment of any of the Legislative Lists in the 7th Schedule of the Indian Constitution, (4) representation of States and Parliament; and (5) provision of Article 368 itself dealing with the amendment of the Constitutes.

The greatest defect of Article 368 of the Constitution dealing with its amendments is that Fundamental Rights can be amended without ratification by the States and they are therefore at the mercy of Parliamentary majority only although they are rights guaranteed by the Constitution to which every citizen and every State is deeply committed.
There is again always, a danger in making Parliament and the Legislatures constituent assemblies. The danger is (1) easy facility for amendment leading to too frequent amendments of the Constitution, generating an atmosphere of perpetual insecurity and uncertainty and (2) the ordinary elected representatives in Parliament and the Legislatures have no special or even general or implied mandate to amend the Constitution and when they start amending the Constitution, the Constitution becomes a pawn in the chessboard of party politics. The Constitution should be above political parties. When Parliament or the Legislatures are readily convertible into constituent assemblies, one easily assumes the character of the other, and the atmosphere, conscious and unconscious created thereby is detrimental to the sanctity of the Constitution.

Its practical significance is well illustrated by the numerous amendments made to the Indian Constitution. Up-to-date there have been as many as seventeen or rather eighteen amendments. That makes it, on an average, a constitutional amendment every year. That is not a good augury or a symbol of security or stability. A brief glance at the galaxy of amendments will be useful to illustrate the constitutional dangers indicated above.

The First Constitution Amendment Act was passed on 18th June, 1951 within barely a year after the coming into operation of the Constitution. The 17th Constitution Amendment Act came into force on 20th June, 1964. In 1966 other amendments are on the anvil. The very First Amendment of 1951 introduced two significant trends, one of encroachment of Fundamental Rights and the other of incorporating constitutionally objectionable Acts and Statutes as parts of the Indian Constitution, and thus giving them constitutional protection. These two trends have acquired greater accent and volume with passage of time. The First Amendment qualified, modified and substituted important Articles of the Constitution like Article 19 of Fundamental Rights, Article 31 on Acquisition of Estates and Validation of Certain Acts and Requisitions relating to land and proprietary right of estate.
Apart from other minor amendments for Articles 85, 87, 174, 176, 341, 342, 372 and 376 the innovation was introduced into the Constitution of India by the First Amendment Act by providing the 9th Schedule of the Constitution giving a list of 13 Acts of different States Legislatures and declaring those Acts not to be deemed “to be void or ever to have become void” on the ground that they or any of their provisions takes away or abridges any of the Fundamental Rights and that in spite of all judgments, decrees or orders of Courts or tribunals to the contrary. The 9th Schedule now, after the Constitution 16th Amendment Act 1963, has become the happy home of as many as 64 invalid Statutes.

The principle of throwing the cloak of constitutional protection upon otherwise infirm Acts of State Legislatures and making them part of the Constitution is an unprecedented constitutional practice. No Constitution of any democracy in the world has done this so far. The 9th Schedule is a standing confession of legislative failure to conform to constitutional mandates and is an affront to the Constitution. The debate on the 9th Schedule of the Constitution is gathering strength and volume and a bitter controversy is at present raging round this problem. The 9th Schedule of the Indian Constitution has become a critical constitutional issue. Voices of protest have arisen even among the members of the Bench of the Supreme Court in recent times. There is already difference of judicial opinion on the significant question how far Article 368 of the Constitution gives power to Parliament to amend the Constitution. In other words, the question is whether it merely prescribes the procedure for making the amendment. The recent decision of the Supreme Court in Sajan Singh vs. State of Rajasthan, A.I.R. (1965) SC 845; (1965) 1 SCR 933 shows the rift in judicial opinion. The dicta of Hidayatulla J, and Mudholkar J raised the question that “Article 368 merely lays down the procedure to be followed for amending the Constitution and does not confer a power to amend the Constitution.” It is difficult to accept this extreme proposition because there would be no obvious utility or purpose for providing procedure for amendment without the power of amendment.
Procedure in such cases must imply the power for which it is the procedure.

Even assuming that there is no doubt about the power of Parliament to amend the Constitution, a smaller though equally significant question is whether the said power to amend the Constitution could be exercised to take away or curtail the Fundamental Rights guaranteed in Part III of the Constitution. A learned Chief Justice of India once said that the question about the reasonableness, expediency or desirability of the amendment from a political point of view would be irrelevant in construing Articles 13 (2) and 368 of the Constitution. But the question is not solved by that simple technique. The words "any law" in Article 13 (2) of the Constitution cannot be devitalised by excluding "constitutional law" or amendment of the Constitution. It has already been said that it will be an unnatural and strange interpretation of the word "law" in Article 13 (2) to make it so anaemic.

But this is not the only problem. This amendment amends the 9th Schedule of the Constitution by adding 44 new entries, and thereby granting to these 44 specified statutes immunity from attack on the ground of their being inconsistent with any of the Fundamental Rights, in spite of the fact that some of the said statutes had already been pronounced in whole or in part void by the Supreme Court. Intricate questions of high constitutional importance arise over this problem. Has Parliament power to render valid Acts which are within the exclusive power of State Legislatures and which are completely outside the legislative power of Parliament, under the cover or guise of a constitutional amendment? The Constitution does not permit Parliament to encroach upon the State Legislatures by any of these provisions. No less important is the subsidiary question about the competence of Parliament, when the Supreme Court has already held some of these statute in whole or in part as unconstitutional and void. The question is, under what power Parliament makes unconstitutional statutes constitutional by the mere process of incorporating these unconstitutional Acts in the 9th Schedule of the Constitution. The 9th Schedule
is eroding the Constitution of India and writing off many constitutional provisions not only including Fundamental Rights but many other essential rights. This really is making a short circuit of the Constitution of India and is almost tantamount to introduction of the emergency through the back door, and without a Proclamation. The opinion of the majority in Sajjan Singh's case cannot be regarded as the last word on the subject and the constitutional jurisprudence of India is bound to see more effervescence on this controversy in future. See also in this connection the case of Shankari Prosad Singh vs. Union of India, (1952) SCR 89.

The Second Constitution Amendment Act of 1952 which came into operation on 1st May, 1953 made a minor amendment of Article 81. The Third Constitution Amendment Act of 1954 which came into force on 22nd February, 1955, substituted the new entry 33 for the old entry 33 of List 3 about trade and commerce.

The Fourth Constitution Amendment Act came into force on the 27th April, 1955. Again there was a further amendment of Article 31 of Fundamental Rights and a further amendment of Article 31A introduced in the First Amendment Act. It substituted a new Article for the old Article 305. It continued the device of validating invalid State Acts by the process of incorporating them into the Constitution through the 9th Schedule. This Fourth Amendment introduced 7 more Acts into that Schedule of which 4 were Parliamentary Statutes. The 9th Schedule of the Constitution by the Fourth Amendment increased from 13 to 20 statutes.

The Constitution Fifth Amendment Act came into force on the 24th December, 1955, substituting a new minor amendment by a proviso for the old one in Article 3 of the Constitution, relating to the procedure for introduction of Bills. The Constitution Sixth Amendment Act of 1956 came into force on 11th September 1956. It amends the 7th Schedule of the Constitution by introducing additional entries 92A in the Union List relating to taxes on the sale or purchase of goods other than newspapers where sale or purchase takes
place in course of inter-State trade or commerce and entry 54 of the State List is substituted by new entry dealing with taxes on sale or purchase of goods other than news paper subject to the provision of the new entry 92A of List A. There was also a further amendment of the 7th Schedule to the Constitution by omitting entry 33 of the Union List and entry 36 of the State List and by substituting entry 42 of the Concurrent List by the Item “acquisition and requisitioning of property”. This amendment was due to the decisions of the Supreme Court on taxes on sale and purchase of goods which raised intricate question of inter-State trade and commerce. This Amendment also modified Article 267 and Article 286 of the Constitution on these subjects.

The Constitution 7th Amendment Act came into force on 19th October, 1956. This is rather a long amendment covering a number of subjects. In the first place it modified Article 1 of the Constitution and the First Schedule. This came as a sequel to the States Reorganisation Act, 1956. Consequential amendments were made in Article 80 of the Constitution and the 4th Schedule to the Constitution and also Articles 81 and 82 were substituted by new Articles. In the second place Article 131 of the Constitution relating to the original jurisdiction of the Supreme Court was amended by substituting a new proviso for the old one. Thirdly Article 153 of the Constitution was amended providing for the appointment of the same person as the Governor of two or more States and consequential amendments were made to Article 158 of the Constitution. Apart from other minor amendments, there was an amendment of Article 220 of the Constitution prohibiting a permanent Judge of a High Court to plead or act before any authority in India excepting the Supreme Court and the other High Courts. There was also an amendment of Art. 224 of the Constitution regarding the appointment of additional and acting Judges. This 7th Amendment substituted new Articles 230, 231 and 232, and added six new Articles 258A, 290A, 350A, 350B, 372A, and 378A. Articles 298 and 371 of the Constitution were substituted by new Articles. There was also an amendment of the 2nd Schedule of the Constitution.
The Constitution 8th Amendment Act came into force on 5th January, 1960 and is a minor amendment. The Constitution 9th Amendment Act came into force on 28th December 1960 to give effect to the transfer of certain territories to Pakistan as a result of the agreement between India and Pakistan. This included Berubari. The Constitution 10th Amendment Act came into force on 16th August 1961 and was a minor amendment of the First Schedule of the Constitution. The Constitution 11th Amendment Act came into force in the same year on 19th December 1961 amending Articles 66 and 71 of the Constitution. The Constitution 12th Amendment Act came into force on 12th March 1962 as a result of the conflict between India and the Portuguese territories of Goa, Daman and Diu. The Constitution 13th Amendment Act came into force on 28th December, 1962, amending part 21 of the Constitution and introducing a new Article 371A making a special provision with regard to the new State of Nagaland. The Constitution 14th Amendment Act came into force on 28th December, 1962 amending inter alia the First Schedule of the Constitution and including Pondicherry, Karikal, Mahe, and Yanam, the French establishments in India. Special provisions were also made in this Article by introducing Article 239A in respect of Himachal Pradesh, Manipur, Tripura, Goa, Daman, Diu and Pondicherry.

The Constitution 15th Amendment Act 1963 came into force on 6th October, 1963. It amended Articles 124 and 128 of the Constitution and also Article 217 of the Constitution by raising the retiring age of High Court Judges from 60 to 62 years and by providing that “if any question arises as to the age of a High Court Judge the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final”. The other Articles altered by this amendment were Articles 222, 224 including the amendment authorising appointment of retired Judges at sittings of the High Court, with their consent. It also amended Article 226 of the Constitution extending the writ jurisdiction of the High Court Judge. The other important amendment was to substitute
new Articles for clauses 2 and 3 of Article 311, of the Constitution. It is also this amendment that deals with the question of notices with regard to charges and penalty in respect of government servants. There was also an amendment of Article 316 of the Constitution and of entry 78 of List 1 in the 7th Schedule by addition of the words “including vacation”.

The Constitution 16th Amendment Act came into force also on 6th October, 1963. It is here that the words “in the interest of” and “the sovereignty and integrity of India” were introduced in Clauses 2, 3 and 4 of Article 19 of the Constitution. It amended Articles 84, 173 and the 3rd Schedule of the Constitution.

Lastly, the Constitution 17th Amendment Act came into force on 20th June, 1964. This makes an important amendment of the Constitution. In the first place it amends Article 31A of the Constitution. In the second place it carries on with the practice of enlarging the 9th Schedule by introduction of diverse State Acts and giving them the constitutional protection from invalidity. The number is largely increased by the inclusion of 44 more Statutes and the 9th Schedule is now increased from 20 to 64 Statutes. The amendment of Article 31A of the Constitution was made on the ground that the expression “estate” was defined differently in different States and as a result of the transfer of land from one State to another on account of reorganisation of States the expression has come to be defined differently in different parts of the same State and on the ground that many of the land reform enactments relate to lands which are not included in an estate. This amendment had as one of its objects to restore several State Acts relating to land reform which were struck down by the Courts on the ground that the provisions of those Acts violated Articles 14, 19 and 31 of the Constitution and that the protection of Article 31A (without the present amendment) was not available to them.

This brief review of the number and nature of constitutional amendments shows in the first place that the Constitution is being amended too frequently—almost one amend-
ment every year. No Constitution in the world has this record of such frequency of amendments. Secondly, all these amendments have been not in furtherance or enlargement but in encroachment of Fundamental Rights previously guaranteed by the Constitution. This record is in sharp contrast to the amendments of the American Constitution which were mostly in favour of such rights and liberties. This record has two lessons for constitutional law. Either the Indian democracy has failed or the constitutional amendments have whittled down democracy. The future alone has the final verdict.

Many constitutional controversies are developing on the vexed problem: how far the legislatures can and should delegate their powers of legislation. Delegated legislation is a major and significant exercise of legislative power and the institutions that exercise such power are today legion. Delegation is a necessary evil in a modern State. No Parliament or legislature of a modern State has either the time or the skill or even the materials or the equipment to avoid delegation of powers to make appropriate rules, regulations and bye-laws. The constitutional problem is concerned with the limits within which a legislature can delegate its authority to legislate. This branch of the discussion is not intended to be a discourse on the whole field of delegated legislation but is only concerned with delegation with reference to the Constitution of India. One essential principle of British constitutional law is that so long the legislature does not completely divest itself of its legislative authority there is no constitutional bar to the delegation of its authority by the legislature. This constitutional principle appears to have found favour and acceptance by the Supreme Court and the High Courts of India. The American constitutional law on this point however is based on the doctrine of separation of powers that no organ of the Government can delegate its power to another. The principle is that the people and the Constitution have created their delegates in the shape of the legislature, the executive and the judiciary and these three delegates cannot in their turn disown their responsibility and further delegate their trust and authority on the well-known prin-
principle "delegatus non potest delegare". The Indian constitutional law as interpreted by the Indian Courts has not accepted this rigid separation of powers.

Under the Indian Constitution it is settled at least for the time being by the decision of the Supreme Court in the Delhi Laws Act case, (1951) SC 332; 1951 SCR 747 that the Indian Parliament and the Indian Legislatures have not an unlimited right of delegation of legislative power. The legislature has the power of delegation but its power of delegation is not of a plenary character, but can only be exercised within certain limits. The debate now is about the limits. One limit is that "essential" legislative power cannot be delegated. But this is very often a limit without limits because the debate is transferred to the word "essential". The second limit is that what is known as conditional legislation or subsidiary legislation is not unconstitutional so long as there is no delegation of matters of legislative policy.

The Supreme Court decision in the Delhi Laws Act case does not precisely define the limits of permissible delegation of legislative power. There are many materials in the different judgments of that case which raise many doubts and conflicts. It is submitted that neither Parliament nor a State Legislature can act beyond the limits imposed on its powers by the Constitution even in the field of delegation. It is submitted that where the Constitution specifies a special kind of legislation, where for example, the legislature has been given the power to impose reasonable restriction on the Fundamental Rights under Article 19 this power to impose reasonable restrictions cannot be delegated to any other organ or again for example such power as under Article 22(7) (b) or under Article 357(1) conferring on the President, the power of the legislature of a State cannot be re-delegated by the President. An attempt has also been made to draw a distinction between delegation of the power to make the laws and conferring of an authority and discretion as to its execution, to be exercised under and in pursuance of the law. This has led to the almost metaphysical distinction in constitutional jurisprudence that conferment of discretion to the executive to enforce the law made by the legislature is not a
delegation of a legislative power. See the Supreme Court decision in Gopalan *vs. The State of Madras, (1950) SCR 88.

Lurking behind this branch of the jurisprudence is the whole concept of legislative power and the meaning of legislation where the legislature lays down the policy and the standard. It has been recognised that details and subsidiary matters may be left to the executive or other organs to fill in. Out of this branch has evolved the doctrine of "subsidiary and ancillary" character of legislation. The Courts are more liberal in permitting legislation of subsidiary and ancillary character by executive and other agencies.

But then the difficulty is not completely solved. Articles 245 and 246 of the Constitution describe the extent and subject-matter of laws made by Parliament and State legislatures, but the problem remains, what is meant by law or legislation in that context. One view is that the word "law" used in those two Articles must include both matters of principle and policy as well as subsidiary matters or ancillary matters or matters of detail. See again the observation of Patanjali Shastri in Delhi Laws Act case, (1951) SCR 747 at 882. In that view of the matter it is not constitutionally easy to confine the meaning of legislative function to its essential part and separate it from its subsidiary or ancillary part. The constitutional notion is not difficult to grasp, but its application is difficult and liable to be confused.

The classes of legislation known as (1) conditional legislation and (2) subsidiary or ancillary legislation are two classes of legislation where delegation has been held to be permissible in India. Again thirdly the power of adaptation or modification within the restricted limits of existing laws may also be delegated to the executive. In fact according to the majority decision in the Delhi Laws Act case a power of adaptation annexed to a power to extend a law to a certain local area has been held to be valid, but then under its cover the executive cannot under any circumstances be empowered to alter the policy of the Act. See Raj Narain Singh *vs. Chairman P. A. Committee, (1955) SCR 290, Jatindra Nath Gupta *vs. Province of Bihar, (1949) FC 175. On that principle the
Supreme Court in Hareshankar Bagla vs. M.P. State, (1955) SCR 380, held that the power to repeal an Act was not capable of delegation by the legislature. The proverbial permissible types of delegation are rules and bye-laws of municipal and other local authorities and Court's powers to enact its own rules and procedure and those of subordinate courts. It has been held that the power to create offences is legislative and not executive. But rule-making power of a police or municipal nature is delegable and such power includes the powers to impose penalties.

Conditional legislation again is a controversial aspect of legislative power. It is not affected by the prohibition against delegation of legislative power. Indeed the Delhi Laws Act case is itself an illustration of the validity of conditional legislation. The leading authority on the subject of conditional legislation is Empress vs. Burah, 5 I.A. 178. The principle that the Privy Council was formulating there was based on the fact that where there are powers of legislation on particular subjects, they may very well be exercised either absolutely or conditionally. Conditional legislation on the use of particular powers on exercise of a limited discretion entrusted by the legislatures to persons in whom it places confidence, was pointed out by the Privy Council as not an uncommon thing and in many circumstances as "highly convenient". The validity of conditional legislation is explained usually by saying that the actual determination of the legislative policy with its formulation is done by the legislature itself, thus avoiding delegation and it is only the function to determine when, where and how the legislation should be brought into operation that is delegated to the extraneous authority. The proverbial examples are then the legislature authorises for instance the executive to determine (a) the time of the commencement of an Act, (b) the area of its application after determining certain facts, and (c) bringing in different sections of the Act at different times into operation. It includes other examples such as (1) a provision enabling the State Government to extend the jurisdiction of a civil court up to a specified limit, Bombay vs. Narottamdas, (1951) SC 69; (2) the validity of the legislative arrangement
in an Ordinance by which the local application of the provisions of a statute was left to be determined by the Chairman of a local administrative body, Emperor vs. Banwarilal, 72 I.A. 57; (3) power of State Governments to refer special cases to special courts for trial has been held to be permissible, (1952) SCR 435; (4) power to add new items mentioned in the Act or its Schedule has been held to be valid on the ground of conditional legislation, Bombay vs. F. N. Balsara, (1951) SCR 682; Edward Mills Co. Ltd., vs. State of Ajmir, (1955) SCR 735; (5) power to exempt from provisions of an Act has also been treated as permissible conditional legislation and not offending against the rule prohibiting delegation of legislative authority, Balsara case, (1951) SCR 682; (6) power to extend even the duration of the Act beyond the period mentioned in the Act was however held to be bad and it could not be justified even on the ground of conditional legislation. See Jatindra Nath Gupta vs. Province of Bihar, (1949) FC 175. It is debatable having regard to the numerous observations made in the Delhi Laws Act case whether the Federal Court’s view can still be held to be good law in all its aspects, specially on the point where the Government is given the power of extending up to a specified period the duration of a temporary Act. (7) A similar controversial question has arisen with regard to the problem where the power to terminate the operation of the Act is valid or not. In Hiralal vs. The State, ILR 1952 Nagpur 770, the view was expressed that the previous Full Bench decision of the Nagpur High Court in Lakshmi Bai vs. M. P. ILR 1951 Nagpur 563, that the delegation of power by the legislature to the Provincial Government to terminate by notification the operation of a temporary statute was not invalid, might no longer be correct having regard to the majority view in the Delhi Laws Act case. It is doubtful whether the subsequent opinion is sound and it may still be urged that the previous opinion of the Full Bench of the Nagpur High Court was correct on the ground that if legislative power to bring an Act into force in a particular area or at a particular time was valid, then there was no reason why the power to discontinue the operation of a temporary Act could not be valid.
Discussing the nature, extent and division of legislative power, another relevant question under the Constitution is the territorial extent of such legislative power. Article 245 of the Constitution primarily defines the territorial limits of the legislative powers of the Indian Parliament and the State Legislatures. But it expressly provides that no law made by Parliament shall be deemed to be invalid on the ground that it has extra-territorial operation. This stamp was borrowed from its precursor in Section 99 (2) of the Government of India Act 1935 with slight variation in the words. On an appropriate reading of the whole Article 245 of the Constitution it may be said that the State legislatures have no power to make laws with extra State operation. On this point an interesting question arose on the Bihar Hindu Religious Trusts Act and the management of the Baidyanath Temple under a scheme prepared by the district court of Burdwan in West Bengal and affirmed by the Calcutta High Court on appeal. See Baba Pritananda Ojha _vs._ President of Bihar State Board of Religious Trusts, AIR (1954) Pat. 264; ILR (33) Pat. 22.

From this it does not necessarily follow that the State Legislature has no power at all to make a law affecting matters or persons outside the territorial limits of the State. Having regard to Articles 245 and 246 of the Constitution and the three Legislative Lists in the 7th Schedule of the Constitution it is clear that the only limitation is this that the State Legislature cannot make such a law unless there is sufficient territorial relationship between the State and the person or matter to which or whom the law is intended to be applicable. See the observations in the cases, Radhabai _vs._ Bombay, ILR (1955) Bombay 1039, Bengal Immunity Co. _vs._ State of Bihar, AIR (1955) SC 661 at page 749, Pappatial _vs._ Madras, (1953) SCR 677, The State of Bombay _vs._ United Motors, (1953) SCR 1069, Wallace Brothers _vs._ Income Tax Commissioner, Bombay, (1948) PC 118 and State of Bombay _vs._ Chamarbaughwala, ILR (1955) Bombay 680.

The Constitutional problem has become acute in respect of the territorial limits of the constitutional jurisdiction of the State Legislature in regard to the levy of sales and purchase
tax and many cases have arisen under Article 286 of the Constitution on this point. Many principles are competing for recognition in this branch of constitutional jurisprudence. One is the principle of sufficient territorial nexus of taxation power of a State. This is the nexus theory. Then there is the theory of the place of contract and the place of delivery. It is followed by the doctrine of original package theory. This doctrine is based on the principle that the importation is not over so long as the goods are in the original package and hence a State had no power to tax the parts until the original package was broken. In India, a sale “in the course of export” is exempted from State taxation, a more expansive view than the American theory that unless all the goods have been put on board, the export does not begin and the State does not lose power to tax. On the other hand the Indian law takes a more restricted view than the American theory by rejecting the doctrine of original or unopened package. On this point the stream theory is one of the competitors in the field. See State of Travancore Cochin vs. Shanmugha Vilas Cashewnut Factory, (1954) S.C.R. 53. Interesting questions on extra territorial legislation have also arisen about how far territorial waters are covered by the State Legislatures.

It will be appropriate here to refer to certain well recognised constitutional limitations on legislative power, which have found their acknowledgement in the Indian Constitution. In the first place the Indian Constitution carries the usual bar against ex-post-facto laws in Article 20 (1) of the Constitution, providing that “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.” It corresponds to similar provisions against ex-post-facto legislations in the American Constitution. Primarily, the above provision is not an interdict on the legislative power. This provision says that no person shall be convicted nor be subjected to a penalty. It does not prima facie prohibit a law which makes something
an offence which was not an offence at the time of its commission, but purports to prohibit the conviction for such a thing as an offence. With regard to the prohibition of the actual infliction of a greater punishment for an offence than was permissible at the time of the commission of the offence, this Article however prohibits a law under which such enhanced punishment is attempted. In the American Constitution the bar is directed against passing of *ex post facto* laws. But Article 20 (1) of the Indian Constitution is directed against the conviction of a person or his subjectio to a penalty under *ex post facto* laws. A distinction, therefore, has been drawn between American and the Indian Constitutional law on this point by the suggestion that Article 20 (1) of the Indian Constitution is not merely confined to the passing or the validity of the law, but extends to the conviction or the sentence under such law and is based on its character of *ex post facto* laws. See Sib Bahadur Singh *vs.* Vindya Pradesha, (1953) SC 394 at page 398. Except as provided by Article 20 both Parliament and the State Legislatures however have displayed plenary powers of legislation over subjects within their jurisdiction and can make such laws retrospective in their effect. This Article however appears to be concerned with criminal proceedings before a court of law or a judicial tribunal. Use of such words as "convicted", "commission of the act charged as an offence", "be subjected to a penalty" and "and commission of the offence" suggest that the proceedings contemplated by this Article are in the nature of criminal proceedings before a court of law or a judicial tribunal. Therefore, Article 20 of the Constitution may not be construed as directed against Bills of Attainder, which may come more appropriately within the prohibition of the equality before law under Article 14 of the Indian Constitution.

It was held by the Supreme Court in the State of Bihar *vs.* Sailabala Debi, (1952) SCR 654 that where this law merely authorises restriction of a fundamental right retrospectively, but does not create an offence or impose a penalty, such law is not hit by Article 20(1) of the Constitution. This Article prohibits all convictions or penalties after the
Constitution in respect of an *ex post facto* law, and it does not matter whether such law was pre-constitutional or post-constitutional law. See the Supreme Court decision in *Kedarnath vs. State of West Bengal*, AIR 1953 SC 404 and also *Sib Bahadur Singh vs. State of Vindhya Pradesh*, AIR 1953 SC 394. The reason is the one already noticed that Article 20(1) is not directed merely at the passing of the *ex post facto* law, but prohibits conviction or imposition of penalty under an *ex post facto* law independently of the question whether such law was passed before or after the Constitution. The word ‘penalty’ in this Clause of the Article has been held not to apply to preventive detention. See the decision in *Prahlad Krishna vs. State of Bombay*, ILR 1952 Bombay 134. The prohibition is limited to conviction or penalty but is not applicable to trial and therefore an act which merely relates to evidence and procedure may be retrospective so as to apply to prosecution for trial already commenced and giving such retrospective effect to the act is not unconstitutional. See *Public Prosecutor vs. Pillai*, AIR 1953 Madras 337. The principle is that the prohibition is only against the conviction or the penalty under an *ex post facto* law but not the trial thereof.

The second constitutional prohibition on legislative power is provided by the prohibition of double jeopardy for the same offence. This follows from Article 20(2) of the Constitution providing “no person shall be prosecuted and punished for the same offence more than once.” It embodies a well known principle of criminal jurisprudence. Compare Section 403 of the Criminal Procedure Code and Section 26 of the General Clauses Act 1897. Section 403 of the Criminal Procedure Code provides that a person who has once been tried and acquitted, cannot again be tried for the same offence. But the constitutional prohibition in Article 20(2) makes it clear that no person shall be prosecuted and punished for the same offence. Therefore, it has been argued that if at the previous trial a person was acquitted, there would be no constitutional bar to his being tried again for same offence. From that point of view it has been said that the principle of criminal jurisprudence may appear to be wider than the prin-
principle of the constitutional prohibition in India. In other words, the constitutional prohibition is said to embody the principle of "Autrefois convict" and not the principle of "Autrefois Acquit." See in this connection Supreme Court observation in Maqbul Hossain v. State of Bombay, AIR 1953 SC 235. But this constitutional prohibition does not make a provision in a statute providing for imprisonment and in default a fine, as double punishment within the meaning of this provision. See Loomchand v. Official Liquidator, AIR 1953 Madras 595. The words "before a court of law or judicial tribunal" do not appear in Article 20(2). This has led to interesting controversies on the extent of legislative power on this point. Normally however prosecution and punishment are within the powers of a court of law or a tribunal. But the Supreme Court has held in Maqbul Hossain v. State of Bombay, AIR 1953 SC 325 that the Sea Customs authorities are not a judicial tribunal, and their adjudging the confiscation and increased rate of duty or penalty does not constitute a judgement or order of a court or a judicial tribunal necessary for the purpose of supporting the constitutional defence of double jeopardy. A civil action is not a prosecution within the meaning of Article 20(2) nor detention under the Preventive Detention Act. Similarly it has been held that departmental proceedings against public servants are not criminal prosecution and therefore such proceedings can be taken against a person who has already been prosecuted, convicted and sentenced in a criminal case. The other essential requisite of this constitutional prohibition is that it must be the "same offence." In other words, if the same act or omission constitutes an offence under two enactments, the offence would be one and the same and not two different offences. Question has arisen how far Section 403(3) or (4) of the Criminal Procedure Code is any longer valid after the Constitution.

The last principle of limitations on legislative power is the prohibition against self-incrimination. This is provided under Article 20(3) of the Constitution where it provides "no person accused of any offence shall be compelled to be a witness against himself."
This principle is recognised both in the British and the American constitutional law. So far as Indian Jurisprudence is concerned Section 342(4) of the Criminal Procedure Code provides that no oath shall be administered to the accused person against his consent. So again under Section 5 of the Indian Oaths Act no oath can be administered in a criminal proceeding to an accused person. Without oath or affirmation no evidence in a court of law by a witness can normally be given. Independently of the Constitution therefore under the criminal jurisprudence of the country a person accused of an offence cannot be compelled to be a witness against himself. But the constitutional bar is against testimonial compulsion and if the accused volunteers to give evidence in his own defence in a criminal case and wishes to examine himself as a witness the constitutional bar would seem inapplicable. Under the amended Criminal Procedure Code the accused is given the liberty mentioned there to examine himself as a witness. But the point remains that although the accused can be a witness in his own case he cannot be compelled to give evidence against himself and he can refuse to answer questions which will incriminate him. But the point requires a deeper consideration. The provision is there under Section 342 of the Criminal Procedure Code in India to examine the accused without oath and it is provided there in Sub-Section 3 that the answers given by the accused may be taken into consideration and it has been held that as it is not evidence in that sense of the term applied to witness, Section 342 of the Criminal Procedure Code is not repugnant to Article 20(3) of the Constitution. But it has been held in the United States of America that to draw an adverse inference against an accused person from his failure to examine himself in a criminal case although the law allowed him to do so is practically compelling the accused to be a witness against himself. On a parity of reasoning it is debatable whether Section 342 (2) and (3) of the Criminal Procedure Code in India is not liable to be challenged on that ground. But the saving grace in India perhaps is that the Criminal Procedure Code as amended prevents any adverse inference or comment on the accused's failure to examine him self. The
crux of the matter depends on the view of the nature of testimonial compulsion under the Indian Constitution.

Although Article 20 has just been discussed with a view to illustrate the three basic principles of limitations on legislative power, the general principle must always be kept in mind that each one of the Articles in the chapter of the Fundamental Rights is a limitation and qualification of the legislative power. It is not the purpose of this study to discuss and analyse the nature and scope of the Fundamental Rights. The only other reference to the chapter on Fundamental Rights bearing on the question of legislative power, which will be relevant, is Article 13 which provides for laws immediately before the commencement of the Constitution and for laws after such Constitution. Article 13(1), (2) and (3) reads as follows:

"13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) 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.

(3) In this Article, unless the context otherwise requires—(a) "law" includes any Ordinance, order, byelaw, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) "laws in force" include laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

The first two clauses of Article 13 only register an obvious effect of the Constitution because even without them, the result would have been the same. See Gopalan vs. State of Madras, 1950 SCR 88. Article 13 (1) was necessitated by
reason of Article 372 (1) of the Constitution. On Article 13 an interesting question has arisen on the scope and meaning of the words "inconsistency" and "contravention" respectively used in sub-clause (1) and sub-clause (2) thereof. The question is whether there is any difference between these two words. Inconsistency is a wider word than contravention. It is possible to argue that there can be an inconsistency without actual contravention. On Article 13 (1) it is now settled that the constitutional provision is not retrospective. Therefore, the effect is not to make the inconsistent provision of the law void ab initio. See Keshavan vs. State of Bombay, 1951 SCR 228. It is really from this concept that the Eclipse Theory was born.

This Article 13 renders inconsistent a contravening law to the extent of its inconsistency or contravention, void. This limitation on legislative power is however not the only limitation under the Constitution. The second kind of limitation arises when the law is ultra vires the legislative jurisdiction of the authority which purports to make it. The third kind of limitation is when there is repugnancy between the State Law and the Union Law, for instance, under Article 254 of the Constitution. The fourth limitation is by the Directive Principle of State Policy although that limitation cannot be tested in a court of law.

A highly sensitive and explosive constitutional controversy relates to the question of the right to secede. The question is: Has any State in the Union of India the legal of the constitutional right to secede from the Union. A Union or a federation or even a confederation or a quasi-federation does not in constitutional law carry as a matter of course the right to secede. In that context whether a State has a right to secede will depend on the actual terms of the federation or the confederation or the Union or a quasi-federation. A regular Union or a regular Federation unlike a loose confederation does not carry the constitutional right to secede.

The preamble of the Constitution of India makes it clear that "the people of India" are framing the Constitution. Therefore, it is the people and not the States as such who
constitute the Union. The Preamble, therefore, carries the inescapable implication that in the Indian Constitution there is no right of secession. The Constitution itself carries inherent proofs denying the right to secede.

Article 1 of the Constitution of India provides that India shall be of Union of States. Article 2 lays down that Parliament by law may admit into the Union, or establish, new States on such terms and conditions as it thinks fit. It is followed by Article 3 which gives power to Parliament by law to (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; and (e) alter the name of any State.

A critical analysis of these three different Articles, Article 1, 2 and 3 of the Constitution shows that once a State is admitted to the Union under the Constitution, no further right to secede from the Union is available to the State. The Indian Constitution is an unbreakable and indissoluble Union. The Constitution recognises no right of secession in any State in the Union. It grants no right of secession to any State of Union. The Union on the other hand has equally no right to expel a State out of the Union and Parliament cannot make any such law. Under Article 3 Parliament by law may unite a territory and bring it within the Union and form a State but it has no power to expel a State once it has become a part of the Union.

No Articles in Chapters 1 and 2 of Part XI of the Constitution dealing with the legislative relations and the administrative relations, the distribution of legislative power and co-ordination between the States suggest by express declaration or even by necessary implication any right to secede in any State within the Union. The same conclusion appears to follow from the constitutional distribution of revenues between the Union and the States and the financial relationship between Union and the different States contained in Part XII of the Constitution. The State List being List 2 in
the 7th Schedule in the Indian Constitution does not permit the State to make any law providing for the secession from the Union. Equally List 3 of the Concurrent List in the 7th Schedule of the Constitution does not permit secession by a State. The residuary powers of Union Parliament cannot be read to imply in the above context of the Constitution any power of legislation in Union Parliament to expel any State from the Union, firstly because the detailed express provisions of Parliament’s powers of law-making as to the admission, formation and area of the units of State must be held to have carefully, deliberately but impliedly excluded and prohibited the Union law-making power to expel an admitted State from the Union and secondly because such power if conceded to the Union will lead to the counterbalancing and corresponding demand for a State’s right to secede.

In recent times a constitutional storm has blown over this question. It has left some marks on the Constitution, which now require to be examined. Clause 2 of Article 19 of the Fundamental Rights under the Constitution was amended by the Constitution First Amendment Act 1959 and the Constitution Sixteenth Amendment Act 1963 enabling the legislature to impose restriction upon the freedom of speech and expression on inter alia the grounds of protection of (a) sovereignty and integrity of a State; and (b) security of State. The Sixteenth Amendment of the Constitution came into effect from 6th October, 1963. The constitutional and historical background for this amendment is to enable the State to meet the challenge of the demand for secession from organisations such as Dravida Kazhagam in South India, the Plebiscite Front in Kashmir on the north and Nagaland in the east. Many questions were asked in Parliament at that time about burning of the Constitution of India, refusal to take the oath of allegiance and hoisting flags simulating flags of foreign States even on non-festive or non-political occasion, trying to subvert allegiance to the Union of India, its territory and its integrity. Recently in June 1966 an Ordinance has been issued called the Unlawful Activities (Prevention) Ordinance which defines unlawful activity as one aimed at secession of part of the territory of India or its
secession from the Union. This Ordinance and the expected subsequent legislation presumably come under the above constitutional amendment. The punishment announced is fine and imprisonment up to ten years.

The problem however is not confined to the Fundamental Rights under Article 19 of the Constitution and capacity of Parliament and Legislatures to impose restrictions on such rights for preserving the interest of sovereignty and integrity of India and the security of the State. No doubt, that is necessary. But it is not enough. The constitutional problem must be answered once for all and it must be affirmed finally and unequivocally that no State within the Union of India has a constitutional right to secede. No scope should be left in the struggles under the Indian Constitution, great as they are, to permit repetition of the bitter experience of American constitutional history where there had to be a Dred Scott case, and a Civil War to settle this issue of an indissoluble and unbreakable Union.

On the subject of legislative power and its exercise it is necessary to discuss the legal character of Resolutions of Parliament and State Legislatures. Normally, the expression of legislative power is an Act or a statute. The interesting study in constitutional law is to enquire whether such a Resolution is in the nature of a statute and has it a binding force or is a mere expression of opinion. Is such Resolution a statute or law? No doubt the process and procedure by which a statute is made under the Indian Constitution does not apply to a Resolution. Dicey in his *Law of the Constitution* dismisses the claim of the British House of Commons to legal authority for its Resolutions as “a pretension”. But it is submitted that Dicey’s conclusion cannot be accepted without qualification under the Indian Constitution.

While no Resolution of either House, the Lok Sabha or the Rajya Sabha is an Act or statute in its strict sense, it is nevertheless clear that there are certain types of Resolutions, which if passed by the House, have the force or effect of Law. From this point of view Resolutions in Indian constitutional law can be divided into three classes namely,
(1) Resolutions with legal effect; (2) Resolutions with quasi-legal effect regarding control over the proceedings of the House itself and (3) Resolutions which are mere expression of opinion, with no legal but sometimes with political effect. Resolutions with legal effect are those to which the Constitution or statutes passed by Parliament or State Legislatures attach consequences. The Constitution of India provides for Resolutions and their legal and constitutional significance. Resolutions of Parliament or State Legislature create law and legal effect in that context by virtue of statutory or constitutional provisions.

A survey of the Indian Constitution on the subject of Resolutions reveals at least about sixteen constitutional provisions and they disclose five different legal effects of Resolutions under the Indian Constitution. They are as follows:

1. Article 61 (2) (a), (b) and (4) of the Constitution gives the resolution mentioned therein the “effect of removing the President from his office as from the date on which the resolution is so passed.”

2. Similarly Article 67 (b) of the Constitution provides that “a Vice President may be removed from his office by a resolution of the Council of States” as mentioned there.

3. Similarly Article 90 (c) of the Constitution provides that a member holding office as Deputy Chairman of the Council of States may be removed from his office by a resolution of the Council as mentioned above.

4. Again Article 94(c) of the Constitution provides for the removal of the Speaker or Deputy Speaker of the House of the People by a resolution of the House of the people as mentioned therein.

5. Article 123(2) (a) of the Constitution empowers both Houses of Parliament disapproving Ordinances promulgated by the President under Article 123 (1) and thereupon such Ordinance “shall cease to operate” as mentioned there. Such resolutions therefore nullify the President’s Ordinance which otherwise has “the same force and effect as an Act of Parliament”. In other words, this type of resolution has the same force as a repealing statute.
6. Article 169 (1) of the Constitution provides that the Legislative Assembly of a State may pass a resolution for abolishing or creating a Legislative Council of the State as mentioned there. This resolution has no direct statutory effect but creates a preliminary condition on which Parliament may pass a law accordingly.

7. Article 179 (c) of the Constitution provides that the Speaker or the Deputy Speaker of a State Legislative Assembly may be removed from his office by a resolution of the Assembly mentioned therein.

8. Similarly as mentioned in Article 183 (c) of the Constitution, a resolution of the State Legislative Council may remove the Chairman or the Deputy Chairman from his office.

9. Under Article 213 (2) (a) of the Constitution, a resolution of the State Legislative Assembly agreed to by the Legislative Council, may by resolution disapprove an Ordinance promulgated by the State Governor. Again such resolution is like a repealing statute because on the passing of such disapproving resolution the Governor’s Ordinance which has the “same force and effect as an Act” shall cease to operate.

10. Article 249 of the Constitution empowers the Council of States to declare by resolution as mentioned there, that it is necessary or expedient in national interest that Parliament should make laws with respect to any matter mentioned in the State List specified in the resolution. This resolution has no direct statutory effect but enables Parliament to make the necessary law on the basis of such resolution.

11. Resolutions of the Legislature of the States concerned also enable Parliament to legislate under Article 252 of the Constitution.

12. Article 312(1) of the Constitution empowers the Council of States to declare by resolution as mentioned there, that it is necessary and expedient in national interest to create one or more All India Services common to the Union and the States, and thereby Parliament is enabled to make the
necessary law accordingly. This again is an enabling provision for Parliament to make the necessary law.

13. Article 315(2) of the Constitution empowers two or more States by resolution of the State Legislatures concerned to agree to have one Public Service Commission and thereby enable Parliament to make necessary law accordingly for a Joint State Public Service Commission. This also is an enabling provision for Parliament.

14. The President’s proclamation of emergency under Article 152(1) of the Constitution shall cease to operate unless there are approving resolutions of both Houses of Parliament as mentioned there.

15. The President’s proclamations in cases of failure of the constitutional machinery in States are subject to the approving resolutions of both Houses of Parliament as mentioned in Article 356(3) and (4) of the Constitution. Without such resolutions, these Presidential proclamations “cease to be operative.” These types of resolutions therefore have legal and constitutional force.

16. Lastly Article 368 of the Constitution requires that the constitutional amendments mentioned there require to be ratified by the resolutions of the State Legislatures in the manner laid down in that Article. Such a resolution therefore is a constitutional requirement.

An analysis of these sixteen different constitutional provisions discloses five different legal effects of resolutions under the Indian Constitution namely (1) Resolutions removing certain persons recognised by the Constitution such as the President, Vice-President, Deputy Chairman of the Councils of States, Speaker or Deputy Speaker of the House of the People, Speaker or Deputy Speaker of the State Legislative Council, (2) Resolutions affecting the President’s and Governor’s ordinance having the force of law, (3) Resolutions enabling Parliament to legislate such as (i) State Assembly resolutions empowering Parliament to make laws creating or abolishing the State Legislative Councils and resolutions of Council of State empowering Parliament to make laws specified in the State Legislative List, and also (ii) Resolu-
tions of the State Legislatures concerned enabling Parliament to legislate under Article 252 of the Constitution and again (iii) Resolutions of the Council of States enabling Parliament to make necessary law to create one or more All India Services common to the Union and the States or Resolutions of State Legislatures concerned enabling Parliament to make law for a Joint State Public Service Commission and (4) Resolutions of Parliament on Presidential Proclamation of emergency and proclamation for the failure of the constitutional machinery of the States and lastly (5) Resolutions of the State Legislatures on constitutional amendment.

All these five classes of resolutions of Parliament or State Legislatures have legal consequences. The first has the legal effect of removing certain constitutionally recognised persons from their constitutional offices. The second has the legal effect on the presidential or gubernatorial ordinances. The third has the effect of legally enabling Parliament, which is otherwise constitutionally incompetent, to make certain laws. The fourth has the legal effect of qualifying the presidential proclamations either on emergency or on failure of the constitutional machinery of the States. The fifth has the legal effect of validating constitutional amendments.

It is therefore clear that the Constitution of India recognizes and accords legal force or effect to particular resolutions of Parliament and State Legislatures. Constitutional recognition of such resolutions distinguishes Indian constitutional jurisprudence from the British Constitutional Law on this point. This difference shows that Dicey’s broad proposition on the point that the Resolutions of neither House is law, cannot be accepted in India, without qualifications.

The next consideration is directed to the position of resolutions of Parliament and State legislatures under specific statutes. It raises an aspect of delegated legislation. Some statutes provide that rules or schemes or orders made thereunder should be laid before Parliament or State legislatures as the case may be and may require either an affirmative or negative resolution of the legislature on such rules or schemes
or orders. In many cases there is no provision for having any resolution at all and the statute is content by merely providing that they should be "laid on the table" of the House concerned. There are other statutes which provide for the need of a formal resolution. Naturally the legal or other effect of such resolutions provided in the statute depends on the terms of the statute itself and what it says that the resolutions must do. The variety of statutory provisions on the point of resolutions cannot be reduced to any uniform or inflexible pattern. It varies from statute to statute and according to the exigencies of the matter dealt with by the statutes. The resolutions required by statutes are an answer and device to control delegated or subordinate legislation. The vast amount of delegated legislation, its complexity and variety demand effective control of subordinate law-making bodies by Parliament. One such method of control is by parliamentary resolutions and resolutions of State legislatures. Where resolutions, so created by statutes, provide for control of delegated legislation, they have the force of law in the sense that they can qualify, amend or repeal such subordinate legislation as laid down in the statute providing for the resolution concerned.

Besides these, the next class of resolutions with quasi-legal effects is the class regarding the control over the proceedings of the House itself. In this respect the Indian Constitution largely follows the British Parliamentary practice and conventions expressly and also impliedly. President's messages and addresses under Article 86 (2) and Article 87 (2) require to be considered by Parliament. It is submitted that this can be done by the resolutions of the House of Parliament. The House can always control its own procedure both impliedly as a sovereign body and expressly under Art. 118 of the Constitution. These rules of procedure, it is submitted, may provide for occasions when resolutions of Houses are required. This however must be contrasted and not confused with Art. 119, which provides regulation only "by law" of the procedure in Parliament in relation to "financial" matters and appropriation of moneys out of the Consolidated Fund of India. The counterparts of these provisions so far as State Legislatures
are concerned are to be found in Articles 208 and 209 of the Constitution and the same remarks apply about their resolutions.

On resolutions regarding the control over the proceedings of the House itself, the problem can be examined from different angles. The House is sovereign within its four walls in the matter of procedure and conduct of its own business, subject of course to the Constitution. Resolutions on the procedure and conduct of business of the House, though not Acts and statutes, have nevertheless binding effect in the sense that the House and not the courts can enforce the resolutions. Technically they have not the force of law in the sense that they are not part of the general law of the country, enforced by the courts of law. Article 122 of the Constitution provides that the courts shall not call in question the validity of any proceedings in Parliament on the ground of any "alleged irregularity of procedure," and no officer or member of Parliament in whom powers are vested by or under the Constitution for "regulating procedure or the conduct of business or for maintaining order in Parliament" shall be subject to the jurisdiction of any court in respect of the exercise by him of "those powers." So far as the State Legislatures are concerned, similar constitutional provisions are to be found in Article 212 of the Constitution. The result is that Parliament or State Legislatures are supreme in matters "regulating procedure or conduct of business or for maintaining order within the House"; it must follow any resolutions passed for that purpose will bind members of the House whose breach may also be punished by the House. Therefore it is not inappropriate to say that resolutions on "procedure" and "conduct of business" have quasi-legal effects. It is, however, a suitable question sometimes to define what exactly is meant by the expression "proceedings of the House" or "proceedings in Parliament." In May's Parliamentary Practice, a rough and ready definition is attempted by saying that for all practical purposes, the expression means "some formal action, usually a decision, taken by the House in its collective capacity." This definition, it is submitted, is neither adequate nor precise nor accurate.
Finally there are resolutions which are mere expressions of opinion, with no legal effect but sometimes with political effect. It is submitted that Parliament and the State Legislatures in India in this respect have the unwritten powers and conventions to pass any resolution such as of thanksgiving or mourning or recognition of public service or similar kind of approbation and perhaps of reprobation on any matter of public, national or international affairs or situations or events. This type of resolutions provides the medium by which either the Government or private members obtain an expression of opinion to assist the Government in framing its policies. Although such a resolution has no legal effect of altering or adding to the laws of the State, yet it may have political effects, if the resolution is a decision on a motion which the Government treats as a motion of confidence. In this connection it will be relevant to quote rule 159 of the Rules of Procedure and Conduct of Business in the House of the People which provides:

“A Resolution may be in the form of a declaration of opinion or recommendation or may be in the form so as to record either approval or disapproval by the House of an act or policy of the Government, or convey a message; or command, urge, or request an action; or call attention to a matter or situation for recommendation by Government or in such other form as the Speaker may consider appropriate.”

An example is the Resolution of the Indian Parliament in September 1953, on the Prime Minister’s motion in the House of the People on the international situation in the following form:

“That the present international situation and the policy of the Government of India in relation thereto be taken into consideration and having considered the same, the House approves of this policy.”

The conclusion on Resolutions as source of law may be stated broadly. Some resolutions have both legal and constitutional effects. Such effects are created either by the provisions made in the Constitution or by the specific statutes. When statutes require resolutions they are of significant importance
in delegated legislation and administrative law. There are other resolutions which have quasi-legal effects in the sense that such effects are not controlled or justiciable by the courts of law but are controlled and enforced by the House itself. Such resolutions however are mostly, if not wholly, confined to "proceedings", "procedure", "conduct of business" and "maintaining order" inside the House itself, on the principle that the House is supreme in these matters. The other types of resolutions are those which are "mere expressions of opinion" with no legal or quasi-legal effect but some of which have "political" as distinguished from legal effects.

In the instances mentioned above, Resolutions of Parliament and State Legislatures, even though they are not Acts or Statutes, are examples of assertions and exercise of legislative power.

Legislative powers and legislative institutions, like other powers and institutions have to justify themselves and must be judged by the results that they produce. The response of Indian legislation to meet the economic and social challenge of progress in the modern age has been dynamic, if not always wise. Law is a constantly shifting equation between tradition and progress. It is the moving hyphen that is perpetually joining and rejoining stability with mobility. Legislation is an immense power and while it is good to have a giant's strength it is not good to use it as a giant. A good deal of wisdom, self-restraint and circumspection is necessary in the use of legislative power for true democracies and great societies can be ruined by the reckless use of legislative power. Legislation is the temperate and wise articulation of only that much of inertia of the social order which under the evolutionary pressure of time and progress has acquired the discipline and the right to express itself. Delivery before maturity leads to abortive births and much of the Indian legislation of today bears such marks.

Lord Tangley's recent Hamlyn Lectures on "New Law for New World" draw the attention to certain facts which exuberant legal reformers always looking for novelties in law may do well to remember. Lord Tangley says:
“(a) The law reformer must devise solutions to practical problems which would meet the needs of the day and not be too far out of accord with the prevalent state of public opinion.

(b) He must try to determine what survivals of an earlier tradition are so out of accord with public opinion as to need modification.

(c) He must be prepared to examine all legal institutions and their procedures in the light of efficiency.

(d) He must be prepared to determine the points at which public opinion, while questioning the presuppositions of tradition, is not sufficiently formed to justify the substitution of new law for old.

The law reformer must also remember when dealing with each category the overriding necessity of maintaining unbroken the continuity of society and he must always bear in mind the need to balance the leading of public opinion and the following of public opinion which is always a most delicate matter.”

But there are certain practical and critical problems in India that demand immediate attention. Indian statutes and Acts are largely imitating the statutes of other countries, specially those of Great Britain and the United States of America, and in some instances they imitate not only their ideas but also their language.

The two harmful effects of such widespread imitation have been (1) lack of originality in ideas in Indian legislation dealing with the special problems of India and (2) the planting of exotic laws in the Indian context, instead of producing the expected results, has produced many tensions and hybrid and unpredictable consequences. Then again, precision and accuracy in drafting laws have lamentably declined, with the consequence that amendments of statutes are becoming too frequent, clumsy and involved, thereby destroying the essential security and certainty of laws and legislation. The Supreme Court and the different State High Courts are making significant pronouncements on important
questions of construction of the Constitution and many vital public statutes and Acts. But there appears no serious attempt to collect and marshal these decisions and pronouncements methodically under the Constitution or the different statutes. The result is that the Drafting and the Legislative Departments of the Government cannot find in one place any well-ordered account of the various defects and difficulties pointed out by the numerous decisions of the Courts in their daily administration of these laws. This is one of the main reasons why the current amendments of statutes and Acts are neither well informed nor effective, nor well-designed to meet the needs of a growing society. It is suggested that there should be authentic quarterly or half-yearly publications on these subjects. It is also suggested that there should be regular restatements of law at periodic intervals on different branches of law and legislation seen in the light of decisions relating to them. Finally it is to be noticed that there is hardly any co-ordination or planning of laws and legislations either at the Union level or as between States on the State levels. We are busy planning for technology and projects for economics of industry and agriculture, but we have tragically ignored, so far, laws and legislations. With increasing volume, variety and complexity of modern legislation in a welfare and service State of a democracy, planning for laws and legislations is a basic and indispensable requirement. The Law Commissions both Federal and of the State, have been more busy with the smaller, though no doubt, useful job of amending and improving Acts and Statutes. But their contribution for planning legislation in the country has made no mark. Article 37 of the Directive Principles of State Policy in the Constitution lays down that it shall be the duty of the State to apply these principles in making laws and these principles at least provide guide lines for legislation. The present picture is of ad hoc legislation on the basis of ad hoc suggestions from different departments of the Government, often expressed in cumbrous phraseology. There is hardly any co-ordination or sense of urgency or priority in the making of laws. This absence of planning of laws has created a legal wilderness. In this jungle of laws, neither the Government nor the administrator, nor the judges, nor the people, know how to
find their way, what the laws actually are, and where are they are to be found in any intelligible and easily available arrangement. The traditional presumption that every citizen is supposed to know the law no longer holds good in India. The principle, *Ignorantia legis non excusat*, in a context of this description sheds most of its basic justification, and is fast becoming unrealistic. Official gazettes publishing the laws are so inordinately delayed and are so inadequate in number that they hardly reach the people for whom they are intended and what is worse even the persons who are required to enforce and administer them. Even current statutes with their latest amendments are neither easy nor in some places at all available. Law Quarterly Recorders are already out of date when they are actually published and made available. It is essential that there should be an annual conference where Parliamentarians and legislators throughout India can meet on a common platform to bring order and method out of this present legislative chaos. This anarchy in legislation is producing a climate where disrespect and disregard of laws are growing and breeding an atmosphere of uncertainty, insecurity and instability.
Chapter Three

THE JUDICIAL POWER AND THE JUDICIAL INSTITUTIONS OF THE INDIAN CONSTITUTION

Justice is the very first objective in the Preamble of the Indian Constitution. It declares that the sovereign democratic Republic of India has to secure to all the citizens 'justice'. This justice is 'social, economic and political'. The primary, though not exclusive, instrument of justice is the judiciary. As the entire judicial power is not vested in the Judiciary under the Indian Constitution, this responsibility to secure justice has to be borne by the Judiciary along with the other instrumentalities in the Constitution.

The Judicial power in India is extensive and intricate. Every federation or quasi-federal structure of a State requires a federal judiciary. That place is taken in the Indian Constitution by the Supreme Court of India. Article 124 of the Constitution of India lays down that 'there shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges'. The seat of the Supreme Court is at Delhi, but can be in such other place or places as the Chief Justice of India may, with the approval of the President, from time to time, appoint under Article 130 of the Constitution.

The Supreme Court is a Court of record and has all the powers of such a Court including the power to punish for contempt of itself (Art. 129). It has diverse jurisdiction and powers.

It has original jurisdiction to the exclusion of any other Court, but subject to the provisions of the Constitution in any
dispute (a) between the Government of India and one or more States, or (b) between the Government of India and any State or States on one side and one or more other States on the other, or (c) between two or more States. But this jurisdiction is dependent upon the condition that the dispute involves a question, either of law or of fact, on which the existence or extent of a legal right depends. This is provided by Article 131 of the Constitution to which a proviso is added to exclude disputes arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument executed before the commencement of the Constitution and continuing in operation after such commencement.

The Supreme Court has also appellate jurisdiction. An appeal lies to the Supreme Court from any judgment, decree or final order of the High Court, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution. Where the High Court refuses to give such a certificate, the Supreme Court itself may grant special leave to appeal provided the Supreme Court itself is satisfied that the case involves a substantial question of law. An appeal from any judgment, decree or final order in a civil proceeding in a High Court also lies to the Supreme Court if the High Court certifies that (a) the value or amount of the subject-matter in dispute in the Court of the first instance and still in dispute or appeal was and is not less than twenty thousand rupees or such other sum as may be specified by Parliament by law, or (b) that the judgement, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value, or (c) that the case is a fit one for appeal to the Supreme Court. There is a condition that where the judgment, decree or final order affirms a decision of the court immediately below in any case other than a case referred to in clause (c), the High Court has to further certify that the appeal involves some substantial question of law. This appellate jurisdiction of the Supreme Court is confined to the terms of Articles 132 and 133 of the Constitution. It is significant that Article 133 (3) provides that 'notwithstanding anything in this article, no appeal shall,
unless Parliament by law otherwise provides, lie to the Supreme Court from the judgement, decree or final order of one Judge of a High Court.' The idea behind this is to have the last word from a Division Bench in the High Court in appeal before any further appeal is taken to the Supreme Court. Provision is also made for the appellate jurisdiction of the Supreme Court in a criminal proceeding in the High Court. But this criminal appellate jurisdiction of the Supreme Court is limited by three specific provisions. Either the High Court appellate order has reversed an order of acquittal and sentenced the person to death or has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death or certifies that the case is a fit one for appeal to the Supreme Court. (See Article 134 of the Constitution.)

The previous jurisdiction of the old Federal Court of India is inherited by the Supreme Court under Article 135 which provides that the jurisdiction and powers of the Federal Court will continue to be exercised by the Supreme Court until Parliament by law otherwise provides. It is in addition to the provisions of Articles 133 and 134.

The overall jurisdiction of the Supreme Court to hear appeals from any judgement, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in India is exercised through the means of special leave under Article 136 of the Constitution with the exception of a court or tribunal constituted by or under any law relating to the Armed Forces. Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court has also the power to review its own judgment or order. (See Art. 137.) It appears to be accepted that the Supreme Court is not bound by its own precedents and can overrule them and has in fact done so. The *Stare decisis* doctrine therefore does not stand in the way of the Supreme Court.

The jurisdiction of the Supreme Court may also be enlarged by parliamentary laws. Parliament may by law confer
upon the Supreme Court further jurisdiction and powers with respect to any of the matters in the Union List. Parliament has not made any such laws as yet. Again Parliament by law may provide for the exercise of such further jurisdiction and powers in respect to any matters as the Government of India and the Government of any State may by special agreement confer. For this enlargement the first requisite is the agreement and the second requisite is the legislation by Parliament. (See Art. 138.) Parliament has made no such law nor have the States made any such special agreement.

The jurisdiction of the Supreme Court to issue writs is extensive. Article 32 of the Constitution provides that the right to move the Supreme Court by appropriate proceedings for enforcement of such rights under Part III of the Constitution is guaranteed. It is itself a guaranteed Fundamental Right. The Supreme Court shall have the power to issue directions, 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 Part III. This right cannot be suspended except as provided by the Constitution. But in addition to this great power Parliament may by law confer on the Supreme Court the power to issue directions, orders or writs including writs of the nature specified above for purposes other than those mentioned in Article 32(2) of the Constitution. (See Art. 139.) Parliament has not made any such law enlarging the writ jurisdiction of the Supreme Court.

The Constitution is careful to provide also ancillary power to the Supreme Court for the purpose of enabling it to effectively exercise the jurisdiction conferred upon it by or under the Constitution. They are supplemental powers not inconsistent with any of the provisions of the Constitution. (See Art. 140 of the Constitution.)

The supremacy of the judicial power exercised by the Supreme Court is established by Article 141 of the Constitution providing that the law declared by the Supreme Court
shall be binding on all courts within the territory of India and by Article 144 providing that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court. These provisions along with the full faith and credit clause (Art. 261) establish uniformity in the results and exercise of the judicial power in India to enable the Supreme Court to effectively discharge its functions and jurisdiction. Article 142 of the Constitution lays down that the Supreme Court may pass such decree or make such order as it considers necessary for doing complete justice and such decree or order shall be enforceable throughout the territory of India as may be prescribed by any parliamentary law or until then by the President. The Supreme Court also under this Article has power subject to the provisions of any law made by Parliament to make any order for securing the attendance of any person, the discovery or production of any document and the investigation or punishment of any contempt of itself throughout the territory of India.

Apart from the original, appellate, reviewing and writ jurisdictions the Supreme Court has consultative jurisdiction. The President can, under Article 143 of the Constitution, consult the Supreme Court on any question of law or fact which has not only arisen but is likely to arise provided it is of such a nature and of such public importance that the President considers it expedient to obtain the opinion of the Supreme Court. This consultative jurisdiction however is strictly limited in many respects. It is at best an opinion, consultative and advisory in its essential nature and character. The result is not a judgment or a decree by the Supreme Court but a report to the President containing the opinion. The Constitution does not say that this opinion contained in the report is binding on the President who seeks it. It is submitted that this opinion cannot be enforced by execution. The question may arise whether this opinion contained in the report under Article 143 of the Constitution is binding under Article 141 or Article 144 of the Constitution. It is doubtful whether "law declared" by the Supreme Court within the meaning of Article 141 of the Constitution would cover an opinion in a
report not a judgement under Article 143 of the Constitution. Similarly the expression “in aid of the Supreme Court” in Article 144 of the Constitution may not cover the question of aiding the opinion of the Supreme Court in its report under Article 143. The Privy Council also “advises” the monarch but this analogy is misleading and cannot be used to support any theory that the Consultative Jurisdiction of the Supreme Court under Article 143 is akin to and of the nature of the advisory Jurisdiction of the British Privy Council. The Privy Council as a Judicial institution (as distinguished from its other historic functions) hears appeals and its judgements although in the form of “advice” to the monarch decide actual *lis* between *litigants*. There is neither a *lis* nor a litigant in that sense before the Supreme Court under Article 143 of the Constitution. Therefore, while the judgements of the Privy Council can be *res judicata*, the opinion in the report of the Indian Supreme Court under Article 143 cannot be *res judicata*. It is submitted that this opinion of the Supreme Court under Article 143 of the Constitution cannot be immune from challenge in an actual litigation between specific parties including the Government of India and the Government of the States. In such a case it is further submitted that an appropriate Court dealing with the question has to decide the *lis* judicially and may come to a decision which does not agree with the opinion of the Supreme Court given under Art. 143. As an opinion of the Supreme Court it will no doubt carry a great weight but it will not be legally binding on other courts or even parties in a *lis*. How can such a consultative Jurisdiction be used to employ the Supreme Court to give an opinion on a “question of fact”? What can be such a question of fact of “public importance” and of “such a nature” that the President can conceivably think it expedient to consult the Supreme Court? In essence this is a constitutional device under which the Supreme Court only acts as a legal advisor to the President and not as a Court in giving its opinion and report under Article 143 of the Constitution. As the President’s legal advisor, this opinion of the Supreme Court, it is submitted, is not even binding on the President, who may or may not accept or act according to the opinion.
The observations of the Supreme Court in the recent conflict between judiciary and the legislature on the reference to the Supreme Court made by the President and now reported in A.I.R. 1965 SC 745 discuss some of the many aspects of this controversial problem. What is however not discussed there is the competence of the President in a matter in issue pending in an actual proceeding in a High Court between distinct parties. The constitutional issue is: Can a dispute pending in a Court be the subject-matter of reference by the President to the Supreme Court under Article 143? No doubt under that Article when it “appears to the President” that “a question of law or fact has arisen” it can be referred by the President. But can the word “arisen” cover a matter which has not only arisen but has already become the subject of a pending judicial trial and decision in a competent Court or a “bill” actually pending in Parliament or a State Legislature? Is such a reference contempt of the Court or Parliament or Legislature in seisin of the matter? What happens if both the Courts, the Supreme Court on the President’s reference and the Court already in seisin of the matter, or Parliament or Legislature proceed to hear the matter simultaneously and come to different conclusions? Seen in that light the Presidential Reference therefore of the Kerala Bill for education (1959 S.C.R. 956), is open to serious criticism. Is it desirable to use the Supreme Court as the legislative department to advise the Government on a pending bill before the House and thus defeat the democratic processes of jurisdiction of Parliament and the Legislatures? These are serious interrogations in constitutional jurisprudence in India and must await further clarification in future. It has been said in that Reference No. 1 of 1964 reported in (1965) S.C. 745 that the words “Court may” in Article 143 (1) of the Constitution leave the Supreme Court with the power to refuse to give the opinion sought by the President. This conclusion may have to be tested again in future. After the Supreme Court’s opinion on that Reference 1 of 1964, the legal position may be this: If it appears to the President that the “question of law or fact” is of “such a nature and of such public importance” that the President considers “it is expedient to obtain the opinion of the Supreme Court” under
the express language of Article 143 of the Constitution but
the Supreme Court considers it not expedient to give its
opinion then it may refrain from doing so. It is submitted
that this creates an anomaly that was not intended. It could
hardly be the intention of the Constitution that when the
President considers a question of law or fact to be of such a
nature and of such public importance that it appears to the
President that it is expedient to obtain the opinion of the
Supreme Court, it is for the Supreme Court to say that it is
inexpedient for it to express any opinion because the word
used is “may” and not “shall” in Article 143 of the Constitu-
tion. On the other hand the first “may” in Article 143 (1)
of the Constitution suggests that the President has a discretion
to refer or not to refer a question of law or fact for the opinion
of the Supreme Court, but once it appears expedient and he
does make the Reference to the Supreme Court the second
“may” in the words “Court may” in Article 143 should
mean “must”.

The appointment of officers and servants of the Supreme
Court shall be made by the Chief Justice of India or such
other Judge or Officer of the Court as he may direct. But
there is a limitation on that power which provides that the
President may by rule require that in such cases as may be
specified in the rule, no person not already attached to the
Court shall be appointed to any office connected with the
Court save after consultation with the Union Public Service
Commission. Subject to the provisions made by Parliament,
the conditions of service of officers and servants of the
Supreme Court shall be such as may be prescribed by rule
made by the Chief Justice of India or by some other Judge or
officer of the Court authorised by the Chief Justice of India
to make rules for the purpose. On this there is a limitation
providing that the rules made under this Clause shall so far
as they relate to salaries, allowances, leave or pensions, require
the approval of the President. It is expressly provided in the
Constitution that the administrative expenses of the Supreme
Court shall be charged upon Consolidated Fund of India
and any fees or other moneys taken by that Court shall form
part of that Fund (See Art. 146 of the Constitution). These
provisions emphasise the constitutional importance of the independence of the staff of the Supreme Court.

Finally the Supreme Court has rule-making power. But this rule-making power of the Supreme Court is subject to two conditions. In the first place it is subject to the provisions of law made by Parliament. In the second place the rules made by Parliament must have the approval of the President. These rules are for regulating generally the practice and procedure of the Court. It includes by way of illustration different subjects mentioned in paragraphs (a) to (j) in Article 145 of the Constitution.

The Supreme Court also has the power to fix the minimum number of Judges who are to sit for any purpose and may provide for the powers of single Judges and Division Courts, (Art. 145(2) of the Constitution.) There is again a limitation on this number of Judges which shall be five for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Art. 143. See 145 (3). This provision is important for the nation does not get the benefit of the highest Court sitting as a full Court. It sits with one, two, three or more Judges. It is wrong on principle for a Supreme Court in a federal or quasi-federal Constitution to sit in Division Benches for they effect the authority of a national court and make room for conflict of views among the different Benches of the national court. In this respect it may be mentioned that the American Supreme Court cannot divide itself into different Benches and sit in Division Benches but must sit as a whole Court as the Supreme Judiciary of the nation.

The Supreme Court has also a special jurisdiction in Article 71 of the Constitution which provides that all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be enquired into and decided by the Supreme Court, whose decision shall be final. If the election is declared void by the Supreme Court, acts done by the President or the Vice-President in the exercise of the performance of the powers and duties of their offices
on or before the date of the decision of the Supreme Court shall not be invalidated by reason of declaration. In exercising this jurisdiction under Article 71 of the Constitution the Supreme Court is like an Election tribunal in Presidential or Vice-Presidential election disputes or doubts.

The Chief Justice of India under Article 257 (4) of the Constitution has the constitutional powers to appoint an arbitrator in respect of the extra cost incurred by a State with regard to a dispute about the construction and maintenance of the means and communications of national or military importance. He has similar powers of appointing an arbitrator under Article 258 (3) of the Constitution. In performing these functions, it is submitted the Chief Justice of India, does not act as a member, or part of, or on behalf of the Supreme Court of India but acts only as a *persona designata* for appointing an arbitrator.

From the foregoing analysis it will be seen that the Supreme Court is not a Court of general appeal from the State High Courts in India. Both its original and appellate jurisdictions are limited. The writ jurisdiction is also limited as compared to such jurisdiction of the State High Courts under Article 226. The Supreme Court also has no power like that of the State High Courts under Article 227 of the Constitution. The Supreme Court again has no administrative control over the State High Courts. No doubt, the Chief Justice of India is a consulting authority for the appointment of a Judge of a State High Court and his transfer from one High Court to any other High Court, but he has no other administrative control over the High Courts and the Supreme Court as a court has no such power whatever.

The Constitution makes provision for the State High Courts at the apex of the State Judiciary. There is a High Court for each State (Article 214). Each such High Court is a Court of record and has all the powers of such a Court including the powers to punish for contempt of itself. As the Constitution stands at present, all the State High Courts are placed practically on the same uniform footing regarding
powers, jurisdictions and privileges. Historically in India the Chartered High Courts in India, at Bombay, Calcutta and Madras had larger powers than the more recent High Courts established since 1921. It is necessary however to remember that the powers of Chartered High Courts under the respective Charters no doubt subject to the Constitution, are larger than those of the other High Courts, set up under Statutes. A perusal of the respective Charters, Letters Patent and Statutes will reveal the difference on specific points.

The jurisdiction of and the law administered in a High Court existing at the time of the Constitution and the respective powers of Judges there with regard to the administration of justice in that Court including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts shall be the same as immediately before the commencement of this Constitution. But this is subject to (1) the provisions of this Constitution, and (2) the provisions of any law of an appropriate legislature made by virtue of powers conferred on that legislature under the Constitution (Art. 225.) It therefore preserves the powers, rights and jurisdiction of existing High Courts subject to the limitations mentioned above. There is one noticeable improvement. That improvement is with regard to the exercise of original jurisdiction by the High Court in respect of any matter concerning the revenue or concerning any act or order in the collection thereof. Formerly under the Government of India Act 1935 and for historic reasons, there was a restriction upon the exercise of such original jurisdiction by any High Court in respect of revenue matters. That restriction has been removed by the Proviso of Article 225. To that extent there has been an enlargement of the jurisdiction of the High Court on this point. The result of this Article therefore is that subject to the Constitution and to any law made by the appropriate legislature the High Court for each State continues to possess, enjoy and exercise both original and appellate, civil and criminal jurisdiction as they had at the commencement of the Constitution, in addition to the enlargement of jurisdiction in revenue matters.
Under Article 226 of the Constitution every High Court in the State has the power throughout the territories within its jurisdiction to issue to any person or authority including in appropriate cases any Government, within such jurisdiction, orders or writs including the writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them for the enforcement of any of the rights conferred by Part III dealing with Fundamental Rights and also for “any other purpose”. This power is in one sense larger than the power of the Supreme Court. In the first place it is expressly recognised by Art. 226 (2) of the Constitution that this power conferred on a High Court is not in derogation of the power conferred on the Supreme Court, Article 32 (2) of the Constitution. In other words this is a concurrent power which the High Court has with the Supreme Court. But while Article 32 confines the Supreme Court’s power to only fundamental rights, Article 226 gives additional power to the High Courts to issue these writs “for any other purpose”. No doubt Parliament by law can confer on the Supreme Court also this jurisdiction to issue these writs for any purposes other than those in Article 32 (2) by reason of Article 139 of the Constitution. Parliament has not passed any such law granting this jurisdiction to the Supreme Court.

The jurisdiction under Article 226 of the Constitution the High Court is not as new as it may look. The Chartered High Courts in India under the Charters and Letters Patent had a very limited jurisdiction to issue such writs within certain areas and such High Courts as well as other High Courts had also a limited right to issue some of these writs under special statutes like mandamus under Section 45 of the Specific Relief Act and Habeas Corpus under the Criminal Procedure Code. But this jurisdiction has, under Article 226 of the Constitution, been enlarged considerably to become an effective instrument of judicial review of many Acts and orders such were otherwise beyond the reach of the former jurisdiction.

Every High Court has superintendence over all courts and tribunals throughout the territories in relation to which
it exercises its jurisdiction, except a court or tribunal constituted by or under any law relating to the Armed Forces. A close analysis of Article 227 of the Constitution granting this power of superintendence to the High Court over other courts and tribunals within the States shows that this superintendence is complete and is both judicial as well as administrative. Under this power the High Court can call for return from other courts in the State and can make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts and also prescribe forms in which book entries and accounts shall be kept by officers of such courts. The High Court can also settle tables of fees to be allowed to the Sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein.

This power of superintendence granted to the State High Court is a significant power. The Supreme Court of India has no such similar power. No Article in the Constitution grants to the Supreme Court a power of superintendence of the scope, nature and effect as in Article 227 of the Constitution.

As a corollary of this power the High Court is given certain other powers over the subordinate courts of the State judiciary in Chapter 6, Part VI and specially by Articles 233 to 235 of the Constitution. Article 235 of the Constitution expressly provides that the control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to persons belonging to the judicial service of a State and holding any post inferior to the post of a district Judge shall be vested in the High Court. That makes the High Court the controlling authority over the district courts and the courts subordinate thereto. This control however expressly preserves the right of appeal of any such person which he may have under the law regulating the conditions of his service and prevents the High Court from dealing with him otherwise than in accordance with the conditions of his service prescribed under such law. Here again the Supreme Court has no similar
rights or powers either over the State High Courts or over any other courts in India.

It is expressly provided in Article 233 of the Constitution that appointment of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State but that must be in consultation with the High Court exercising jurisdiction in relation to such State. Though the High Court is the consulting authority this constitutional provision does not make it the appointing authority and it is the Governor who is the appointing authority for District Judges and their posting and promoting authority. With regard to the appointment of persons other than the District Judges to the judicial service of a State, there again the Governor of the State is the appointing authority in accordance with the rules made by him after consultation with the State Public Service Commission and the State High Court under Article 234 of the Constitution.

See the discussions on this point in the judgements of the Special Bench of the Calcutta High Court in Nripendra Nath Bagchi vs. Chief Secretary, Government of West Bengal reported in A.I.R. 1961 Calcutta 1; 65 C.W.N. 361 and on appeal affirmed by the Supreme Court in State of West Bengal vs. Nripendra Nath Bagchi reported in A.I.R. 1966 SC 447.

There is one other jurisdiction of the State High Court and that is with regard to the transfer of certain cases to the High Court. Under Article 228 of the Constitution, if the High Court is satisfied that a case pending in a subordinate court involves substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may (a) either dispose of the case itself or (b) determine the said question of law and return the case to the Court from which the case has been so withdrawn together with the copy of its judgement on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment. This special jurisdiction of transfer under Article 228 is limited by the
condition that the case must involve a substantial question of law about the interpretation of the Constitution and that such determination is necessary for the disposal of the case pending in the subordinate courts. The idea behind this provision is to avoid conflict as between subordinate courts on substantial question of constitutional law leading to uncertainty of constitutional rights and for ensuring, at least within the State, uniformity of decisions on constitutional law by the State High Court, at least so far as subordinate courts within the States are concerned.

The Constitution also provides for extension of the jurisdiction of a High Court to Union Territories and also for the establishment of a common High Court for two or more States. That is provided in Articles 230 and 231 of the Constitution. No such common High Courts have yet been set up, although some High Courts have hardly enough work for a High Court. Only recently, the Punjab and Haryana States have, I believe, agreed to have a Common High Court.

The appointment of officers and the expenses of the High Court are provided for by the Constitution. The appointment of officers and servants of the High Court have to be made by the Chief Justice of the High Court or such other Judge or Officer of the Court as he may direct. This is Article 229 of the Constitution. This is limited by a proviso stating that the rules made under this Clause shall so far as they relate to salaries, allowances, leave or pensions require the approval of the Governor of the State.

It is also provided by the Constitution that the administrative expenses of the High Court including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court shall be charged upon the Consolidated Fund of the State and any fees or other moneys taken by the Court shall form part of that fund.

From the foregoing analysis of the different constitutional provisions, both with respect to the Supreme Court as well as with respect to the State High Courts, it will be noticeable that there is no express and formal vesting of judicial power of the State either in the Supreme Court or in the State High
Courts. That may be contrasted with the provision in the American Constitution where judicial power is expressly vested in the Supreme Court of the United States. The question arises in constitutional law, does the absence of vesting of judicial power lead to any serious practical consequence? Although judicial power as such is not vested in the Indian Constitution in the judiciary, yet the extensive powers and jurisdictions which the Supreme Court and the State High Courts exercise normally and for practical purposes effectively, introduce the same result which would have followed from a formal vesting of judicial power in the judiciary.

But in one important respect it makes a big difference and that is with regard to the crucial problem of the independence of the judiciary in a democratic Constitution. It will therefore be necessary now to examine how far the independence of the judiciary is ensured by the Indian Constitution.

Theoretically speaking the judicial power not being vested by the Constitution in the Judiciary, this judicial power in the State is notionally shared by all the three organs of the State, the executive, the legislative and the judiciary. Constitutionally this is the result of not recognising the doctrine of separation of powers in its technical sense. At the same time, one of the clearest Directive Principles of State Policy is enshrined in Article 50 of the Constitution directing “The State shall take steps to separate the judiciary from the executive in the public sources of the State.” Some States in India, but not all, have done this either wholly or partially.

The independence of the Judges of the Supreme Court and the State High Courts is attempted to be secured by a number of provisions. In the case of the Supreme Court Judge his tenure of office is until 65 years, (Art. 124(2) ) and in the case of the High Court Judge his tenure of office is 62 years. (Art. 217 of the Constitution as amended.) They cannot be removed from office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total member-
ship of that House and by a majority of not less than two third members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Parliament may be law regulate the procedure for the presentation of an address and for the investigation and proof of such misbehaviour or incapacity. Legislation is on the anvil on this point. (Art. 124(4), (5) and Art. 218.) The privileges or the allowances or the rights in respect of leave of absence or pensions of a judge cannot be varied to his disadvantage after his appointment (Arts. 125 and 221). The salaries payable to the Judges of the Supreme Court and the High Courts are specified in the second schedule of the Constitution and are therefore constitutionally protected. Article 121 of the Constitution provides that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or the 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 under Article 124 (4) of the Constitution. Similar restriction is provided by Article 211 of the Constitution that no discussion shall take place in the legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties. The salaries and the allowances and the pensions of the Supreme Court Judges are charged on the Consolidated Fund of India (Art. 112 (3)) and are non-votable by Parliament (Art. 113). Similarly the expenditure in respect of the salaries and allowances of the Judges of the High Court are charged on the Consolidated Fund of each State and are non-votable in the State Legislative Assembly (Arts. 202 (3) and (203)). There is a curious contrast between Article 112 (3) (d) and Article 202 (3) (d) and that contrast is the exclusion of the word “pension” in respect of High Court Judges being charged on the Consolidated Fund of the State, presumably because such pension of High Court Judges are charged on the Consolidated Fund of India under Article 212 (3) (d) (iii). It is difficult to understand why the salary of a High Court Judge is a charge on the Consolidated Fund of the State but not his pension.
But there the picture ends. Many serious problems have arisen on this vital issue of the independence of the judiciary under the Constitution. In the first place the retirement of High Court Judges at the age of 62, three years earlier than the age of retirement of the Supreme Court Judges is illogical and is an indefensible distinction. The Supreme Court Judges and the High Court Judges have equally responsible judicial work to perform. In fact all the Judges of the Supreme Court except one come from the State High Court Bench. To say in that context that a High Court Judge retires at the age of 62 and a Supreme Court Judge at 65 is to make an utterly irrational distinction, specially when the conditions of service are similar. A Judge of a High Court who is thought fit to be retired at the age of 62 is regarded not unfit for the Supreme Court Bench, if he is taken to the Supreme Court for then he gets an immediate lease for three years more. The Supreme Court Judges and the High Court Judges under the Constitution, it is submitted, should have the same age of retirement, and the discrimination on the age of retirement should be removed. The question has arisen what should be the age limit for retirement. Judges of the superior courts of records in democracies such as the British and the American, have a much higher age limit of retirement and in some cases there was even recently no limit at all. Again Judges of the superior courts of records all over the world have a higher age limit of retirement than the higher administrative service in these States. Judicial tenure, demanding as the work does, experience, maturity and scholarship should normally be a life tenure. In India if there is to be a limit of retiring age for Judges of the Supreme Court and the High Courts, it is submitted, that the age of retirement must be the same for both the courts and that it should not be less than 70, subject to medical fitness.

In the second place independence of the judiciary depends on the economic security of the Judges. That economic security has been severely threatened in the present time. The Second Schedule of the Constitution fixed for the Supreme Court Rs. 5000 for its Chief Justice and Rs. 4000 for any other Judge and for the State High Courts Rs. 4000 for the
Chief Justice and Rs. 3500 for any other Judge. This emolument when fixed at the time of the Constitution in 1950, was unreasonable enough, but it has become more unreasonable and seriously detrimental to the economic independence of the judiciary by reason of increasing taxation and rising cost of living. Even ordinary directors of companies in business and some business executives are paid at a much higher rate. When the Constitution fixed those salaries of Judges, they were intended to come immediately after the President and the Governors but now even ordinary civil servants and specially in public sectors are drawing more than Supreme Court and High Court Judges. The above scales of salaries of High Court Judges were fixed more than 150 years ago when the cost of living was infinitely lower and there was no taxation at all. Far from increasing the salaries, the Constitution has decreased such salaries. This decrease in salaries has seriously threatened recruitment of best talents from the Bar to the Bench. In every age and in every country whenever a practising lawyer with a fair practice accepts a seat of the Bench he has to make a sacrifice of his income, but that sacrifice must have some limits. The present scale of judicial salary has broken those limits and has fallen very much below them. The result is literally disastrous. No good lawyer with any fair practice at the Bar cares today to come to the Bench. This has seriously and adversely affected the quality and the standard of Judges in India. The Bench no longer attracts the first class legal brains in the country. It is doubtful even if it attracts the second class brain. A Bench manned by utter mediocrity cannot either inspire public confidence or maintain Judicial independence. With the present rates of salary and taxation and cost of living, it is impossible for any Judge of the Supreme Court or the High Court to maintain any decent law library of reasonable standards. It is not an uncommon sight to find Judges selling their private libraries, after they are placed on the Bench. In all other countries in the democracies of the world Judges’ salaries have increased, their amenities have been enhanced to give them economic security, but it is only in India that the Judges’ salary has remained stationary for the last 150
years and has even been recently lowered. It has become a serious problem which demands immediate redress.

Closely allied to this question of living conditions for Judges and their economic security is the question not only of early retirement at the age of 62 or 65 as at present but also the pitiable pension on which they are expected to live after retirement. The Judge in India gets a pension on which he cannot maintain himself and his family with any decency. The maximum pension varies between the limits of Rs. 1500 or 2000 per month and that even is subject to rising taxation and cost of living. For a judge with a family, with sons to settle and daughters to marry and a family of dependents to maintain, with cultural interest in keeping his scholarship and study up-to-date, the salary and the pension are entirely and wholly inadequate in the present economic context. The result has been unfortunate. It is not an uncommon spectacle to-day to find retired Judges at the age of 62 or 65, trying to get employment either with the Government or with other organisations, to keep them going in old age. This search for employment and job hunting after retirement seriously affects the independence of the judiciary and the fearless and courageous discharge of their onerous duties while in office. A Judge’s pension, it is submitted should never be below his salary even after retirement.

A more serious threat to the judiciary in India is the confiscation of the Judges’ right to practise in his own High Court, a professional right for which he has qualified in his life. Today the price of a seat on the Bench is the confiscation of that professional right to practise in the High Court, of his home, in the High Court where he was enrolled and where he practised before being elevated to the Bench. When the Constitution came into force in 1950, confiscation of this right to practise was total and complete and a Judge of the High Court could not practise before any Court or tribunal anywhere in India. The folly and injustice of such a confiscation were soon realised and by the Constitution 7th Amendment Act on the 19th October, 1956 a limited right to practise was granted to Judges of the High Court who
leave the Bench. That right of practise for a High Court Judge was given only before the Supreme Court and High Courts, other than the High Court of which he was a Judge. This was hardly any relief. For a Judge from Maharashtra, Kerala, Andhra or Calcutta to go after his retirement or earlier after leaving the Bench, to practise before the Supreme Court at Delhi and other High Courts of other States is not a practical proposition with any practical benefit to the Judges of this class at that age leaving their house, family and the associations they have. The very principle by which a Judge of the High Court is debarred from practising in the High Court of which he was a Judge is a sinister principle and an insult to the judiciary, the legal profession and to human dignity and nature. Neither Great Britain nor America has such confiscatory provision in their Constitution. It is also a serious threat to the independence of the judiciary. A permanent Judge in a State High Court, if he has a difference with the government and wants to resign on that ground, cannot do so for the simple practical reason that if he has to earn his livelihood thereafter by practising his profession for which he is qualified in his life, in his town in his own context, he cannot do so. Why is it that this ban is imposed? When the reason is analysed the only ground for this ban appears to be the preposterous consideration that somehow or other a person who has once been a Judge in the High Court can, after coming back to the Bar of that High Court, influence the other Judges and the administration of justice.

This is an insult to the Judges and the judiciary and the administration of justice in the country. Judicial work is done in open Court in the presence of contesting parties, before the legal profession and before the public, by Judges who have to deliver reasoned and considered judgments in open Court. Their errors can be corrected by a hierarchy of Courts in appeal and revision. They are not like other administrative officers in the Income Tax Department and the Audit services, where orders can be made departmentally and whose sittings are not open to the public as a general rule.
A person who has been a Judge of the Supreme Court is debarred from practising in any Court within the territory of India under Article 124 (7) of the Constitution. This again is a badge of slavery. This bar is irrational and cannot be supported on the very same reasons given above. A person who has been a Judge of the Supreme Court at Delhi, cannot by the wildest latitude of imagination be thought of as influencing administration of justice if he returns to private practice, either at the Supreme Court or in the High Court of his home State or in any other High Court that he may choose.

This constitutional bar and restriction on Judges preventing them from coming down from the Bench to practise at the Bar strikes at the very root of the independence of the judiciary. The confiscation of the professional right to practise tends to induce servility in the Judges and the judiciary. It is submitted that this ban and restriction on the Supreme Court and High Court Judges should immediately be removed from the Constitution of India. That will improve the quality and standard of Judges in India and go a long way to ensure their real independence.

There is one other provision which is not calculated to ensure judicial independence. That is the provision of transfer of a Judge from one High Court to another. Article 222 of the Constitution provides that the President may after consultation with the Chief Justice of India transfer a Judge from one High Court to any other High Court. There is no guarantee against the abuse of this power by the Government. A Judge not liked in a State may under this provision be transferred from the High Court of that State to some other High Court. The Judge can be transferred or whisked away without his consent to some other State. No reason need be given or disclosed under the Constitution. This does not make for the independence of the Judges. Fear of transfer makes a judge servile. It might cause in many instances a good deal of harassment to the Judge concerned. It not only threatens to uproot the Judge but also to upset his family and children's education with each State having a different regional language. The judiciary in the State High Court is
not like an ordinary service. A Judge in order to be able to
discharge his duties properly and effectively has to under-
stand the psychology, the sociology and the climate of the
State in which he functions. An English Judge disbelieved a
truthful witness because he said that although his parents
were rich, he was brought up by his maternal grandfather
who was very fond of him and this happened because the
English Judge was unaware of the social mores of this country
where such instances are numerous. The knowledge of the
regional language of the State and the habits of the people
of the State and their behaviour and their reaction are
essential materials for a proper interpretation of laws and
their effects and for the assessment of evidence, act and
conduct under judgment. Transfer therefore of one High
Court Judge to another High Court disregards those basic con-
ditions of service of a Judge of the High Court. It has been
used as an argument that transfer of a Judge from one High
Court to another will lead to integration of different States in
India. It is submitted that it is not the way to build up integra-
tion. It causes more heart-burning and the transferee Judge is
regarded as an interloper in the State to which he is trans-
ferred. From the economic, social and family points of view
such transfer is detrimental to the conditions of service of a
High Court Judge. If transfer is at all to be permissible then
it should be permissible only with the consent of the Judge
to be transferred.

Again the system of appointing additional and acting
Judges, which was not originally there in the Constitution,
but was introduced by the Constitution 7th Amendment Act,
1956 for a period not exceeding two years in the event of
any temporary increase of any business of the High Court
or by reasons of work therein, is not conducive to the
independence of the judiciary. Additional and acting Judges
are likely to have an eye to make their appointments
permanent and in order to do so their mental and situational
climate prevents them from being as independent as a Judge
with a permanent tenure can afford to be. The Amendment
introduced by Art. 224A by the Constitution 5th Amendment
Act 1963 providing for the appointment of retired Judges at
the sitting of the High Court and giving them such allowances as the President may by order determine is also detrimental to the independence of the judiciary. It will lead to picking and selecting from among retired Judges which is bound to create resentment and discrimination and the feeling is present that such appointments will also be made in favour of the Judges who are agreeable to the Government.

Finally there has been yet another Constitutional Amendment which affects the independence of the judicial tenure of office. This Amendment has been introduced also by the Constitution 15th Amendment Act 1963. Different standards have been now laid for determining the age of a Judge of the Supreme Court on the one hand and the age of a Judge of the High Court on the other hand. The amended Article 124 of the Constitution has brought a new Clause (2A) which provides "the age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide". Parliament has not made any law on this point as yet, although this Amendment to the Constitution has been made for the last three years. But in the case of the age of a Judge of the High Court, a very curious amendment has been made by the amended Clause 3 in Article 217 of the Constitution, providing that "if any question arises as to the age of the Judge of the High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final". This is an extraordinary provision. The manner and time of making this amendment were equally extraordinary because at that time an actual case was pending in the Supreme Court regarding the age of a High Court Judge. The age of a Judge, whether of the Supreme Court or of the High Court, one should have thought, will be fixed at the time of his appointment as a Judge. To change that age after his appointment is to affect the security and the independence of the Judicial tenure of officer. What is worse the age of a Supreme Court Judge can only be determined by such authority and in such manner as Parliament may by law provide. But in the case of the age of a Judge of the High Court it is not Parliament
but the President in consultation with the Chief Justice of India. Why is this discrimination, one age by the legislature and the other age by the executive, one age by Parliamentary legislation and the other age a subject of the Constitution itself? It is worse still that this determination of the age of the High Court Judge by the President after consultation with the Chief Justice of India does not even provide that it should be so done after hearing and dealing with the representation of the Judge concerned. The Constitution makes the President’s decision on a High Court Judge’s age as final. A disputed question of fact is left to the President for decision whose machinery and equipment are not at all adequate for the purpose and this is bound to make the President a controversial figure in an individual dispute, a consequence which is always undesirable. In a sense this amendment is also in derogation of and in conflict with Article 124 (4), (5) and Article 218 of the Constitution, because the President’s decision on the age of a Judge can mean virtually his removal from office without observing the procedure laid down in Articles 124 (4), (5) and Article 218 of the Constitution! The Supreme Court in Jyoti Prokash Mitter vs. H. K. Bose, A.I.R. 1956 S.C. 961 takes the view that now the age of a Judge of the High Court has to be determined only in one way and that is the way prescribed by the amended Article 217 (3) of the Constitution. In other words the Supreme Court reads Article 217 (3) as an exception to Article 124 (4), (5) and Article 218 of the Constitution so far as the age of a High Court Judge is concerned. The Supreme Court was of the opinion that even the procedure to be followed and the opportunity to be given to the Judge by the President in deciding the disputed age of the Judge was entirely within the discretion of the President and having said that, also expressed the view that such decision by the President was final and beyond the scrutiny of the Courts. That being the Constitutional position, it is an infraction of the principle of independence of the tenure of judicial office after the Judge’s appointment. Such a law is not to be found in any of the democracies of the world observing the rule of law.
(1) Confiscation of the professional right to practise at the Bar of his own Court in his own Home State, (2) the salary, (3) the pension, (4) the age of retirement, (5) the method of determining disputed age after appointment, (6) transfer, and (7) appointment of acting, additional and ad hoc Judges are the seven specific features which have seriously undermined the independence of the judiciary in India and have led to the decline in the standard and quality of Judges in India. Immediate attention is necessary to remove these serious dangers to the independence of the judiciary.

Insidiously and almost unnoticed there is growing in India the system of promotion of Judges, be they from the Subordinate Judiciary to the High Court or from the High Court to the Supreme Court. Sir Alfred Denning in his *The Road to Justice* condemned this system of promotion as detrimental to judicial independence at pages 17-18 in the following terms:

"We have no system of promotion of Judges in England. Once a man becomes a Judge, he has nothing to gain from further promotion and does not seek it. The judges of the Supreme Court are all paid the same, no matter whether they sit to try cases at first instance or whether they sit in the Court of Appeal. The Court of Appeal is made up mostly of men who have been judges of first instance. Some judges when invited to go to the Court of Appeal, refuse the invitation and no one thinks it strange. It is only a different kind of work. Those who like dry points of law accept the invitation; whereas those who like the human side of life refuse it. A man who accepts the office of a judge in England must reckon that he will stay in that position always. He has taken it on as his life work and must stand by it. This is the same whether he is a High Court Judge or a Country Court judge or a stipendiary magistrate. Each normally stays where he is throughout his judicial career. The reason is that we think that the decisions of a judge should not be influenced by the hope of promotion."
The signal fact of judicial power in India under the Indian Constitution is now recognised by the judicial power of Judges of the Supreme Court and the State High Courts to declare Statutes and Acts passed by Parliament and State Legislatures as invalid and ultra vires the Constitution. This judicial power in India also extends to-day to include the power to declare executive and administrative actions invalid and ultra vires the Constitution and the Statutes. The Indian Constitution has adopted an integrated and single judiciary so that both the Supreme Court as well as the State High Courts have the judicial power to deal with both Federal Laws and State Laws, their construction, interpretation and validity. In this respect India has not adopted the parallel systems of State and Federal judiciary as in the United States of America. It is submitted that the Indian example is more suited not only to create and maintain public confidence but also to ensure uniformity in fundamental, civil and criminal laws, their interpretation, their impact and their validity.

The judicial power in India, particularly as expressed through judicial review involves (1) decisions on Constitutional controversies which are often associated with political aspirations, (2) statutory interpretation by the Courts, (3) judicial review of laws and governmental action, and (4) judicial review of the lower and the subordinate judiciary. In the present time and having regard to these responsibilities of the modern judicial power, the Courts have come out of their isolation and the Judges and their judgments in the Courts naturally have become the subject of many public controversies, not all of which have been helpful for judicial independence. In the first place this judicial power often leads the judiciary to the areas of direct conflict with Parliament and Legislatures on the one hand and the executive and the administration on the other. The high water-marks of these conflicts are well-illustrated by (1) the creation and gradual enlargement of the 9th Schedule of the Indian Constitution, (2) the competition for power between the judiciary and the legislatures as evinced in the recent historic dispute represented by the Presidential reference reported in A.I.R. 1965 S.C. 745, (3) the frequent Ordinances and
Amendments of statutes to overcome decisions of the Courts adversely effecting the interests of the executive, the administration and the legislatures, and (4) the growing tendency in Acts and Statutes to exclude and restrict access to the Courts by the aggrieved parties. Particularly these four specific areas are eloquent with the increasing problems of power and conflict in the world of law and jurisprudence in India. This atmosphere is bound to affect the judicial climate. There is discernible in the public mind, the press and the platform, a desire to play off these differences. Rules and decision against Parliament, legislatures and the Government receive a far wider publicity but decisions upholding legislative and administrative interests are considerably toned down and do not receive the emphasis that they deserve. The Judges have to protect themselves from the insidious influence of such a climate. They have to resist the temptation and glamour of cheap and sensational popularity. This is a climate which breeds the desire to side with the "dominant opinion" as noticed in the United States. It will be a sad day for India if that desire engulfs the judiciary.

It has been noticed by an American commentator that judicial review is assuming controversial proportions. An extremely sophisticated commentator in recent years has expressed the belief that in the matter of the exercise of judicial review, judges are playing the role of active politicians in controversial political questions. Brooks Adams in his well-known work *The Theory of Social Revolution* (pp. 49 and 125) expressed the view: "The American constitutional system breeds in the Judge the conviction that he is superior to the legislature. His instinct, under adequate pressure, is always to overrule anything repugnant to him that a legislative assembly may have done." At the same time it is just as well to recall the older orthodox view expressed by Lord Bryce, in his celebrated work *The American Commonwealth*, (3rd Edition, Vol. I, page 252), where Lord Bryce observed, "Now the American Judges have no will in the matter. The will that prevails is the will of the people, expressed in the Constitution which they had enacted,—all that the Judges have to do is to discover from the enactments before them
what the will of the people is, and apply that will to the facts of a given case.” Much water has flown down the river since the age of Lord Bryce. The principle which he voiced no doubt in theory still remains. But the whole problem on this point is, that when the will of one has to be interpreted by the will of another there are bound to be difference, divergence and resentment. In theory Judges never legislate, but in actual practice through the process of interpretation they do more than legislate. By judicial interpretation, Acts representing the will of the elected representative may find their meanings enlarged or restricted or qualified. No doubt such judicial legislation is done through the process of interpretation and construction or as Mr. Justice Holmes described through the “interstics”. No one for a moment doubts that judicial legislation and legislative legislation stand on entirely different levels and are marked by essential differences that should be carefully grasped. Normally legislative legislation is general in nature and prospective in effect. On the other hand Courts’ decisions are always specific and retrospective for they decide individual disputes that have already arisen. The Courts’ decisions therefore are from that point of view negative in character and the courts are passive and not active. Again on the other hand the whole framework of legislative action,—organisation of party pressure, election, assessment of general political, economic and social problems,—is radically different from the context and methodology of the Courts.

The judicial power in the modern world and specially the Indian Constitution today is pitch-forked between its traditional role of judicial work and its new and increasing role as the guardian of constitutional checks and balances. The trial of judicial power and the bid for judicial supremacy are gathering momentum in its work as the custodian of constitutional harmony. In this capacity the Judges have to function as constitutional statesmen. As constitutional statesmen, the Judges will have ultimately to arrive at some accommodation with the dominant opinion. Alan F. Westin writing on “The Quest for Freedom” has observed: “The imperative of democracy and the need for broad confidence in the Court requires this. But the Justices must seek to
influence the dominant opinion, as well. The creative challenge is to find exactly the right combination of judicial command, creative suggestion and respectful non-interference.” It is to that new task and to that new mission that the Indian Judiciary has been called in this exciting age of government of laws and not of men. Somewhere and somehow a certain balance will have to be found by the Judiciary between men making laws and laws making men.

In doing this very responsible work of constitutional statesmanship, many of the problems are new to the judicial climate. Mr. Justice Brandeis and Mr. Justice Cardozo have analysed the place of prejudice in human judgment. Judicial interpretation, however well-disciplined and well-trained, cannot eliminate the personal bias in interpretation. All men in the world are more or less partisan. Emotions, great and small, compel the Judge to choose his side. When once that choice is made historical events, social, economic and individual facts, judicial precedents and philosophy, are all marshalled and emphasised in such a way as to voice this prejudice. This prejudice is not conscious but is insidious. In ordinary judicial work it hardly ever comes into prominence except perhaps in certain specified fields but in constitutional politics, its impact is real and it may play havoc. The Indian judiciary has the thankless but the supremely responsible task of holding democracy in judicial tutelage as the modern mechanism for fostering discipline and responsibility in a people divided by all kinds of tensions, struggles, pressures and conflicts, religious, racial, cultural, linguistic, economic, political, social, psychological, and ecological. It has that supreme task of judicial review as a deliberate check upon democracy through an organ of the Government not subject to popular control. According to some, if Judges want to be preachers, they should dedicate themselves to the pulpit. According to others, if Judges want to create and save policies, they should seek their place in the legislatures and Parliament and not in Courts. To many, self-willed Judges are the greatest offenders of Government under the law. The fact remains that the ground of judicial decisions and their general directions permeate the public mind and the operation of the
Government. Therefore, Judges cannot free themselves from the responsibility of the inevitable effect of their opinions in limiting or enlarging the force of law throughout the Government and the broad horizons of political, social and economic policies. Justice is an equation between the event and the law. The result depends on how much of the event has agreed or disagreed with the law. That equation has assumed large proportions in constitutional law. Legal interpretation is not taxonomic like the Latin names for flowers. It is always contextual. That context is not only of word or language of the Constitution or the Statute but also the context of the State, the society and the time in which the event happens to be interpreted by the judicial power. The law in the last analysis is both utilitarian and idealistic. It exists for the realisation of the practical needs of the community and aspires to guide it to a higher course of conduct in life. The legal mind is not apt to overestimate the efficacy of words. Justice cannot be laid to the line or the plummet. The material is too intractable, too psychological, to be dealt with by mechanical processes, hard and fast rules and fixed patterns. The judicial mind requires the enthusiasm of the naturalist to whom nothing is mean or insignificant and the whole panorama is instinct with diverse messages. If the judges do not represent the will of the people, they claim to represent their conscience. A proper growth demands that the will sometimes should subserve the conscience.

The increasing tendency to-day to shift the struggles between the political parties and ideology from the Parliamentary arena to the Courts of Justice is on the one hand, fraught with great danger to the judicial institutions and on the other hand, demanding judicial statesmanship never before requisitioned in legal techniques. Roscoe Pound in his *Justice According to Law* mentions the embarrassment of the Judges created by the public expectation of more than they are well-fitted to do because of the failure of the legislatures to do the work of law-making which belongs to them in a representative democracy and he observed, "The heavy pressure upon the Courts today to do what should be the work of legislatures is a hindrance to judicial justice. Attempt
to control application of law by minute and detailed legislation is a mistake."

At the same time the theory of the psychological impotence of Judges to reach impersonal results, so frequently harped on by miscellaneous body of legislators elected for temporary periods but claiming to be the custodian of the Constitution as the representatives of the people, where even the minimum standards of education, training or discipline are not enjoined, is overrated. Democracy without judiciary is the first assault on democracy under the deluding doctrine of the unlimited supremacy of Parliament and Legislatures. There can be no Constitutional democracy without an effective and powerful judiciary.

Of the three modern types of justice, legislative justice is arbitrary, capricious and unequal and has been given up everywhere in the world; executive justice suffers from dilemma and disrespect because the instrument of justice itself is partisan. Judicial justice remains the only source which can be tapped for that stream of determination which can be comparatively nonpartisan, impartial, technical yet flexible enough to meet individual requirements of particular cases and particular conflicts.

In this situation two typical major conflicts in the world may be mentioned, one in America and the other in India. President F. D. Roosevelt in 1937, threatened the American Supreme Court because its decisions appeared to him to be in conflict with the new legislative policies of the Government specially the President’s New Deal Laws. The President in his controversial message to the House of Representatives on February 5, 1937 suggested a plan recommending reorganisation of the Bench of the Supreme Court which was criticised as the President’s attempt to “pack the Court”. The President accused the Supreme Court of “slowly operating as the Third House of the National legislatures.” Therefore, the American President proposed a plan and said: “By bringing into the Judicial system a continuing stream of new and younger blood, I hope, to make administration of all Federal justice speedier and therefore less costly; secondly to bring to the decision of
social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries.” All this happened in the year 1937 and created a great agitation. The President’s scheme did not ultimately succeed. India went through a similar experience on the eve of the Constitution. The proposal here was not to pack the Court but Prime Minister Nehru thought fit to utter a warning in the Constituent Assembly on September 10, 1949, to the Judges in the following terms:

“We honour our Judges and respect their independence, but I warn them, we will tolerate no legal quibbles on their part, they must not stand in our way......no law, no Judge, is going to come in our way in the abolition of the Zamindary system...... Ultimately......the legislature must be supreme, and must not be interfered by Courts of law in such measures of social reform.”

The Indian judiciary however was not frightened by these irate words and Parliament chose the facile way of amending the Constitution.

Mr. Justice Jackson in his Struggles for Judicial Supremacy—A study of the crisis in American power politics very pertinently observed, “Two kinds of power seem always in competition in our democracy; there is political power, which is the power of the voters and there is the economic power of property, the power of the owners. Conflicts between the two bring much grist to the judicial mill.” It is that grist which creates great friction. To some extent this friction is a wholesome discipline to avoid tyranny of powers. But beyond limits, such friction may stifle the Constitution. Both the judiciary and Parliament or the Legislature will have to take many lessons to learn the discipline of laws in their respective arenas to acquire the maturity to run and administer a modern democracy.

In refreshing contrast spoke the British Prime Minister Sir Winston Churchill in the House of Commons on the 23rd March, 1954 (Hansard Col. 1061) when he said:
"The principle of the complete independence of the judiciary from the executive is the foundation of many things in our island life. The British judiciary, with its tradition and record, is one of the greatest living assets of our race and people and the independence of the judiciary is a part of our message to the evergrowing world which is rising so swiftly around us." Sir Winston Churchill was making these observations when the independence of British Judges was threatened not by political pressure but by financial anxiety and the British Parliament on that speech unanimously voted the increase in judicial salary. Sir Alfred Denning in his *The Road to Justice* mentions this in the following terms:

"Their salaries had not been raised for over a hundred years and the increase in the cost of living made it difficult for them to maintain a way of life suited to the gravity of the duties they had to discharge. On this occasion Parliament unanimously voted them an increase in salary, raising it to £8,000 a year—making them the highest paid servants of the State, except the Prime Minister and the Chairman of one or two of the nationalised industries; such is the price which England readily pays so as to ensure that the Bench shall command the finest characters and the best legal brains that we can produce."

The lamentably mediaeval Indian attitude on this point may usefully take a lesson or two from these inspiring words to avert a growing crisis in the Indian Constitution.
Chapter Four

FEDERALISM UNDER THE INDIAN CONSTITUTION

An acute problem today concerns the nature of the constitutional structure of India. Does the Indian Constitution represent a Federalism or not? Some constitutional experts have described the Indian Constitution as “quasi-federal”. Others have used stronger words to say that it is only federal in appearance, but in essence and spirit it is unitary. Again the answer to these high constitutional complexities cannot be given in simple affirmative or negative or by any dogma on one side or the other. Again here the Indian Constitution cannot be said to be either federal or unitary but a mixture of its own. Discussion on the nature of Indian federalism is not a theoretical exercise in jurisprudence of constitutional law but has serious practical bearing on some of the major national and State problems in India, which it will be the endeavour of this lecture to bring out.

The very first Article of the Indian Constitution declares that India shall be a union of “States”. Therefore, “States” as such are constitutionally recognised units and not mere convenient administrative divisions. There is, however, no formal surrender of State Rights and no formal grant of constitutional rights by the Federation to the States. The Union is not a Union of enumerated powers, granted by the States, nor are the States in India creation of the Federation. Both the Union and the States spring simultaneously from the Indian Constitution framed by the Constituent Assembly and the Constitution of India contains the Constitution, both of the Union and of the States composing the Union.

The 11th part of the Indian Constitution, beginning from Articles 245 to 263 indicates a federal texture by providing
for (a) distribution of legislative power between the Union and the States (b) administrative relationship between the States, (c) disputes relating to waters involving different States and (d) Co-ordination between the States. The emphasis should be noticed that the residuary powers of legislation are with Parliament and not with the legislature of the States (Art. 248 of the Constitution). Parliament can invade the legislative field in the State List on the ground of expediency in the national interest subject of course to certain majorities mentioned in Art.249, and also during the operation of the proclamation of emergency under Art. 250. Similarly, Parliament has the right of way in legislation, for instance in case of (1) inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by the State Legislatures; (2) Parliament can legislate for two or more States by consent; and (3) in cases of inconsistency provided for in Article 254 of the Constitution. These features show the balance in favour of strengthening the Federal Union as against the States.

The Indian Constitution is impressed with three major loyalties. They all indicate that the structure was intended to be Federal or quasi-Federal. The first loyalty of the Indian Constitution is to the Government of India Act 1935 which provides not only most of the flesh and blood of the present Constitution, but also a good part of its spirit. Indeed the Constitution even copies textually totoitem verbis some of the provisions of the Government of India Act 1935. That Act created a new Federal Legislature and was directed to reform the then Provincial Government and to set up a new and novel relationship with what was then called the Princely States in India. The legacy for federalism, therefore, in the present Indian Constitution is drawn primarily from the Government of India Act 1935. The second loyalty is to the American Constitution. From that Constitution is drawn the inspiration for widespread judicial review of laws and governmental actions, fundamental rights guaranteed by the Constitution and such federal processes as inter-state trade and commerce. The American “Due Process” clause has been formally disclaimed but it survives under the nomenclature of “Reason-
able Restrictions.” The hand is the hand of Essau but the voice is the voice of Jacob. This American influence has also given a federal bias to the Indian Constitution. The third loyalty owed by the Indian Constitution is to the British Constitution. The judicial writs mentioned in the Indian Constitution are copies of old English writs, no doubt modified and adjusted to the context of India. The very names of these writs in the Indian Constitution carry with them the characteristics they had acquired in British constitutional history. Indian Parliament and State Legislatures draw their patterns from the British model. These three loyalties are not always reconcilable and are sometimes divergent and self-contradictory. The Colonial traditions of suspicion for local autonomy and decentralisation, the federal American tradition of distrust of a too powerful centre and the unitary tradition of the British Constitution have been dovetailed into the Indian Constitution to produce its peculiar federalism in constitutional law. There are other minor loyalties. The Indian Constitution draws upon many other constitutions in the world, for instance of Canada and Australia, the Irish Free State and specially its Directive Principles and the Weimar Constitution. The defects of federalism arising on this score are the defects of eclecticism in constitutional law which appear to ignore the fact that a Constitution embellished by the tessellated mosaic set by variegated marbles selected exotically is not necessarily strong for the traffic and tension it has to bear in the political, social and economic evolution of the nation whose Constitution it is.

It is noticeable that the Constitution of India does not use the word federation or federalism in any of its numerous Articles as a feature of the Indian Constitution. The omission to use the word federation or federalism should therefore be regarded as deliberate. The framers of the Constitution wanted to avoid the ticket or the label of federation or federalism for the Indian Constitution.

It is also noticeable that the Indian Constitution does not profess any particular type of political creed. Much is heard in the present age in India about “the socialistic pattern of society” and it has been said that socialism is a kind of
implicit goal of the Indian Constitution. The Indian Constitution however does not use the expression "socialism" or "socialistic pattern of society." Nor does it use the words capitalism or capitalistic structure of society or communism or communistic structure of society. The Indian Constitution writes or recognises no political creed and no "isms." That is a part of the wisdom of the Indian Constitution. Those who wish to use the Constitution for any particular political creed or faith may do well to remember this. Any doctrinaire or dogmatic approach over this vital issue may raise not only insoluble problems but also endanger the very Constitution itself. Many current events indicate this common danger.

Sir Ivor Jennings in his Some Characteristics of the Indian Constitution saw the ghosts of Sidney and Beatrice Webb in the Directive Principles of the Indian Constitution. He expressed the view that "the Constitution expresses Fabian socialism without the socialism for only the nationalisation of the means of production, distribution and exchange is missing; but nationalisation for the Fabians was a means to an end and not the end itself; the end is quite adequately expressed in the Constitution." This is really Prof. Jennings' constitutional hallucination. There is nothing in the Chapter on the Directive Principles of the State Policy which could not be taken or adopted in any modern State whether capitalistic or socialistic or communistic or Fabian. These Directive Principles may well be the universal features of any welfare State and service State.

On the problem of federalism, it has already been noticed in the Chapter on legislative power, that the distribution of legislative power has obviously weakened the States and strengthened the Union. But the most striking feature against federalism is the provision in Chapter II of Part XI of the Indian Constitution regulating the administrative relations between the States and the Union. This is against all principles of federation known in constitutional law. It is perhaps a legacy from the Government of India Act 1935, where it was necessary in that context to encourage provincial autonomy of that time, but which became quite irrelevant in the present context of the new Constitution. It has already
been noticed in the Chapter on Legislative Power that there is the provision in the Indian Constitution giving the right to the Union to confer its power on States in certain cases and similar rights in the States to entrust functions to the Union as in Articles 258 and 258A of the Constitution. How far a Union official or a State official can serve two masters under those provisions, specially when the masters are not in agreement, is one of the perplexing problems of Indian federalism and modern Indian Constitutional Law.

Federalism in the Indian Constitution has not come out unscathed in the matter of the division of financial powers. An essential and fundamental feature of a federal Constitution is to find out where the purse string lies and how the Constitution uses it. The taxing power for raising revenue is a mighty power under the Constitution. It can make or mar a federation. Scanning the distribution of legislative power in the VIIth Schedule of the Indian Constitution, the conclusion is irresistible that much larger taxing powers, both direct and indirect are possessed by the Union. Succession and Estate duties and some other taxes under Article 269 of the Constitution are collected by the Union, but assigned to the States. Again income taxes except on agricultural land under Article 270 of the Constitution are collected by the Union and distributed between the Union and the States. The Union has naturally the favourable position as a collector and distributor of taxes and as the donor of grants. Article 273 of the Constitution casts the envious duty on the Union to make specific grants payable to Assam, Bihar, Orissa and West Bengal in lieu of assignment of any share of the net profit in each year of export duties on jute and jute products, while Article 275 of the Constitution makes the Union the mother of grants and casts upon the Union a general duty to make grants in aid of the revenues of such States as Parliament may determine to be in need of assistance and different sums may be fixed for different States.

The basic principles of the Indian Constitution in these Articles appearing in Part XII of the Indian Constitution are definitely anti-federal. They create friction and resentment
between different States and between the States and the Union. Where States are put in the position of being suppli-
cants for favour of money grants from the federation their
autonomous position as federal units is jeopardised. The
Finance Commission, contemplated by Article 280 of the
Constitution, is a sorry compromise and has proved to be no
solution to the increasing problems of money faced by the
States in executing many plans within the States. Besides
the recommendation of the Finance Commission are at best
advisory and not compelling and they are only laid before
each House of Parliament. The successive Finance Commiss-
sions in India have been a great disappointment to many States.
The situation is critical in Article 282 of the Constitution
which permits the Union or a State to make any grant for
any public purpose even though that purpose is not one over
which Parliament or the Legislature of the State has any
power to make laws. Squandering of the proceeds for such
public purposes on matters outside the legal ambit of the
Union and the States strikes at the root of federation and
leads to partisanship and misuse of revenue and financial
resources to the detriment of true growth of federalism. It
makes control of such public expenditure economically and
legally almost impossible.

On this vexed problem of federal division on financial
powers the Concurrent List III of the VIIth Schedule of the
Indian Constitution does not contain any specific entry about
tax except Item 44 relating to stamp duties with certain
exceptions and perhaps Item 47 which related to fees. The
provision for grants-in-aid to the States under Article 275 (1)
is regulated by Parliament by reason of the expression used
therein “as Parliament may determine to be in need of
assistance and different sums may be fixed for different
States”. Until such provision is made by Parliament the
powers conferred on Parliament are exercisable by the
President, by order, which again is subject to any provision
made by Parliament. It has also provided that after the
Finance Commission has been constituted no order shall be
made by the President except after considering the recom-
mandation of the Finance Commission. This is provided by
Article 271 (2) of the Constitution. The President’s power, therefore, under Article 275 (2) of the Constitution is an interim or secondary power and the real and final power is in Parliament. This problem becomes acute when Article 281 of the Constitution requires the President to place every recommendation of the Finance Commission before each House of Parliament. If the President acts on the advice of the Finance Commission only and disregards the advice of his Ministry, Parliament would be really in a powerless position in respect of the order of the President. If it be the intention that the President must always act on the advice of his Ministry which is binding on him then that will reduce the Finance Commission to a mere advisory body of the Ministry. This is the reason why Professor Alexandrowicz in his Constitutional Developments in India observed at page 201: “Constitutional lawyers who are not prepared to accept this general convention as an integral part of Indian constitutional law might consider Articles 270 and 280 as manifestation of the Presidential power in India, but they would have to admit that Article 281 does not go a long way to reconcile the powers of the President in respect of Federal finance with the requirement of responsible Government. Its wording does not suggest that it was meant to be a safeguard against a powerful President. It conveys the impression rather that the Constitution makers wanted to make sure that Parliament should be fully informed about the financial policy of the Ministry as embodied in a Presidential Order (income tax) to enable it to study in time the proposals of the Finance Commission in all cases in which it has to take legislative action, e.g., excise duties and grants-in-aid.”

But whether it is the President or Parliament, the complexity of the problem remains because of the constitutional provision that different sums may be fixed for different States. Now Parliament consists of varying and unequal number of representatives from different States. The State in most need may not get the necessary votes in the entire Parliament to have its demands accepted. Such a constitutional provision encourages lobbying for finance among different States and most unseemly struggle and competition between the States
in their respect. This is neither good for integration nor for a healthy growth of economic and financial plans in the different States. It has become a critical problem with many States. Refusal by Parliament or parsimoniousness on its part under Article 275 may cripple and ruin a State and its autonomy. Such a provision certainly is not congenial to federalism.

Constitutional lawyers have also criticised three special features of the Indian Constitution as detrimental to the principle of federalism. They are (1) single citizenship under Article 5 of the Constitution; (2) an All India Civil Service under Article 312 of the Constitution and (3) a unified judiciary. These features cut across the basic texture of federalism. But they can be justified on reasons of their own. As in constitutional jurisprudence sovereignty is said to be one and not divided between the Federation and the component units, so the unity of citizenship may not be regarded as basically contrary to the federal idea. After all, it is citizenship of one sovereign State, and if each State were to grant citizenship according to its own standards, then the situation is constitutionally indefensible, administratively confusing, and practically perplexing. That confusion exists in such Constitutions as the American Constitution on this point. Similarly a unified judiciary, administering both Federal and State laws ensures uniformity in legal structure and procedure and cannot be said to be intrinsically anti-federal in character. The statement however has its qualification because it is plain that in the matter of appointment and recognition of the judiciary, acute differences have arisen between the Centre and the States. Such differences have been not only detrimental to the judiciary and its independence but also harmful to the cause of both the Federation and the States. The same remarks apply in the case of the All India Civil Service with the same qualifications. But the problem however remains in such case of serving two masters who may and very often are in conflict with each other.

According to the view expressed by Professor Alexandrowicz: “India is supposed to have a quasi-federal Constitution
mainly because of the Articles 249, 352 to 360 and 371." The learned Professor realised the inadequacy of the word "quasi-federation." He is of the opinion that the word "quasi" hints at a deviation from a federal principle without defining the special position of a particular quasi-federation. In fact the view is expressed that quasi-federations are not really federations at all but "administrative federations." As I have indicated, it will be a wrong analysis of the different Articles of the Constitution to describe the Indian Constitution as an administrative federation only. My own view is that it is very much more for reasons which I have already indicated. I am prepared however to subscribe to the view of the learned Professor that "India is a case sui-generis."

The tendency towards centralisation and acquisition of larger powers by the Union is becoming more and more prominent with the passage of time. This creates an anti-federal climate. The reason for this anti-federal climate is over-assertion of local interests and passion for linguistic States, of which apart from the older instances, the recent example is the Punjab and the Maharashtra-Mysore controversy. Neither the State Re-organisation Commission nor the State Re-organisation Act has succeeded in removing this tendency. The Constituent Assembly accorded recognition to the principle of reorganisation of India on the basis of linguistic communities with separate political status, but succeeded for the time being in postponing the testing hours.

But this cause never lost its momentum and is now a permanent source of inspiration. In Article 29 (1) of the Fundamental Rights which expressly recognises the provision "any Section of the citizen residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have right to conserve the same." Is this constitutional "right to conserve" language, script or culture synonymous with the right to have a State for that purpose? That is the great constitutional question of the day. This may be read along with the provision of Article 30 (1) of the Fundamental Rights recognising the right of all minorities, whether based on religion or language, to esta-
blish and administer educational institutions of their choice. Again the question arises what is the scope and extent of this constitutional right to establish and administer educational institutions relating to language or religion? Does it mean a right to have a State for that purpose? Many will dispute this constitutional proposition. The cause has received further fillip by the provision of Article 3 (a) of the Constitution which provides "Parliament may by law 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." Although the States Reorganisation Commission indicated that the basis of reorganisation of States should be on the ground of a number of factors such as language, culture, historical association, financial or economic self-sufficiency and self determination of the people, yet the fact remains that the change in the federal map of India is predominantly influenced by linguistic factors, to which recently has been added the community factors such as in the Punjab and the demands of the Hill Tribes for separate States like the Naga land. Critics of these features fear Balkanisation of India. A considerable volume of responsible constitutional opinion is that such provisions as are to be found in Articles like 29 and 30 of the Constitution, are intended for the defence and protection of language, religion script or culture but are not intended to be used as spring-boards for claiming full-fledged States. At the same time denial of political status to large and powerful languages or communities or cultures is bound to create many tensions in the Constitution. A reasonable mean appears to be the only solution for the present prevailing crisis.

Another feature requires to be watched seriously. Independently of the constitutional rights of interference in the affairs of the different States, the Union has a considerable grip on the State Governors. A convention is growing that the Governors are generally not appointed to a State from among persons from that State. The result is that very often such Governors do not even speak the language of the State to which they are appointed nor can they enter into the
social or public life of the State and judge the problems by themselves. The reason for this unhealthy convention is to keep the Governors non-partisan and away from local pressures and interests. But its results have not been desirable. Another reason for such an unhealthy convention is the supposed integration between different States in India that was expected to follow by having the Governor of one State from a different State. Instead of integration it has led to the curious situation where the Governors from different States represent neither the people nor the States to which they are attached. They are so completely isolated and divorced from the context, that their very isolation makes them dependent on sources and contacts neither desirable nor effective for the public welfare of the State concerned. It is suggested that Governors should be appointed in a State from the members of that State and it is possible to find non-political and non-partisan persons without any material or prejudicial bias for the effective discharge of their responsible duties. The Union exercises its hold on the Governors for many reasons. In the first place, the Governor holds office during the pleasure of the President. In the second place, being in most cases ignorant of the essential problems of the States to which they are attached, its problems and its aspirations, they are completely dependent for advice and guidance on the local people who manage to gather round them and necessarily the reliance on the Ministers of the State is more complete than is good for them. As an agent of the Centre, the Union uses the Governors and in that respect this power is great in the discretionary field of the Governors with which they are left under the Constitution. It has already been noticed that where the State machinery fails, it is the Governor who acts as the medium for carrying out Emergency measures at the behests of the Union.

These are the current tensions in the federalism under the Indian Constitution. Forces both of centralisation and decentralisation are at work affecting the functioning of the federal system. Certain ideas have to be kept clear in constitutional jurisprudence as applied to the Indian context.
Some kind of federation is unavoidable in India with numerous communities, races, languages, religions and cultures. A completely unitary Government for such a State is impossible. Parliamentary form of Government depends for its efficacy on a well organised party system. The accepted theory today in constitutional law is that a two-party system is the best for Parliamentary institutions, the Government formed by the majority party and the Opposition formed by the rival party. In such a case the Government has its critics and those critics are not divided into too many groups so that opposition can be responsibly focused and the nation guided on the major points of differences. The single-party rule in Parliament is anti-federal because the party being one, its policy cannot be different for States and the Union. On the other hand fragmentation of Opposition into too many parties dissipates responsible Opposition, creates irresponsible rivalries and encourages undesirable party tactics either for dubious coalition which is never durable or for criticisms which are never constructive. India will have to evolve a party system of her own in order to give the Constitution a fair trial. It has become an acute problem in India. It is suggested that in the light of the two party system, there should be two parties in each State as well as two parties at the Centre. The parties at the Centre should be divided on the broad general principles of national interests where political faith would be more predominant than local interests. That will serve to co-ordinate schemes for national reconstruction and national integration. But the States should encourage a two party system on a different basis of development of the local interests of the States and for the solution of their individual and peculiar problems. From that point of view four parties are the maximum parties to give a fair and responsible trial to the Indian Constitution, two for the Union and the two for the States. That appears to be in the present context a solution, however tentative to keep the true federal principles alive. This will help to develop concrete programmes both at the Union and at the different States, and create a balance between the centrifugal and the centripetal forces at work in India, without tipping the balance in favour of the one or the other.
From this study it will be seen that events have belied Dr. Ambedkar's hopes. "States are as sovereign in their field which is left to them by the Constitution as the Centre in the field which is assigned to it." (Constituent Assembly Debates, Vol. 9, page 133.)

It is just possible that the fault for this is not a fault with the type of Indian Federalism. The fault may be a fault with the administration, as it has been said:

For forms of Government let fools contest,
That which is best administered is best.

Whether a Government is unitary or federal or quasi-federal much of the defects, although certainly not all, can be cured by due and proper administration. It is perhaps in that strain Sir Ivor Jennings concluded his study Some Characteristics of the Indian Constitution when he observed—"The Constituent Assembly has given India a machine which ought to work. It is based upon the experience of a people who, whatever their other defects may be, do know how to govern themselves. In due course India will probably find, as the Irish did very quickly, that it is the machine and the background of public opinion which matter. The frills and furbelows of a Constitution are as unnecessary as those of fashion. What is more, like those of fashion they cost money." A constitutional lawyer who wants a simple, spartan Constitution is perhaps as disloyal to his profession as a sari designer who insists on plain georgette. He must confess, though, that a Constitution works best when it discourages constitutional lawyers from breeding. Professor Jennings, although a constitutional lawyer himself, was always a little allergic to his profession; for it was he who said in that book "Litigation is one of the major industries in India." He should have known better because compared to Great Britain and the United States, the volume and variety of litigation in India with her manifold problems are incomparably less. There is a relevant consideration in this respect on the problem of federalism in India. Federalism demands a restrained and responsible use of the Constitution. An intemperate and irresponsible use of the Constitution breaks up the climate and texture of federalism. There are here anxious problems
in the Indian Constitution. Litigants on the slightest pretext invoke the Constitution and Governments and authorities not infrequently bypass the Constitution at the slightest inconvenience.

The Indian Federalism has one special new feature which is significantly its own. The Indian Constitution makes use of Commissions as a constitutional method of finding facts and solving tensions under the Indian Constitution. The Commissions recognised by the Constitution have interesting and varied functions and status, and have a practical bearing on Indian Federalism in action.

The Finance Commission has already been noticed. It is provided by the Article 280 of the Constitution. It is a quinquennial Commission. The First Finance Commission had to be set up within two years from the commencement of the Constitution. Thereafter it is provided that at the expiration of every fifth year or at such earlier time as the President considers necessary, a Finance Commission has to be constituted. Its primary function is to make recommendation to the President regarding (a) distribution between the Union and the States of the net proceeds of taxes which are to be or may be divided between them under Part XII, Chapter 1 of the Constitution and the allocation between the States of the respective shares of such proceeds, (b) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India, and (c) any other matter that the President may refer to the Commission in the interests of sound finance. The purpose of such Commission therefore is clear. It is a federal power and a federal commission. Its function is recommendatory and advisory in its nature. The recommendations of the Finance Commission ultimately find their destination under Article 281 of the Constitution in being “laid before each House of Parliament”. This is a method of resolving scramble over the proceeds of taxes between the Union and the States which are of frequent occurrence in a federal Constitution of this type. There is a large power in the President to refer any matter in “the interest of sound finance”. Sound finance is a vague expression and the Constitution recognises no
limitation with regard to the matter to be referred to the Commission by the President so long as it comes within the "interest of sound finance". The past Finance Commissions have been more or less of the same stereotyped character, with hardly any effective pronouncement or fiscal or economic principles to their credit. The other present defects in respect of Finance Commissions have been analysed in the earlier part of this lecture. But an intelligent and unconventional use can be made of such Federal Finance Commissions and they can be dynamic instruments for the solution of the many fiscal and financial problems of the Union and the States. Their real possibilities and resources have hardly been tapped as yet.

Then there is the Union Public Service Commission with their counterparts in the States as the State Public Service Commission. The Union and State Public Service Commissions are primarily charged with the appointment to the services of the Union and the States respectively and with the duty to assist States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required. These services Commissions shall be consulted (1) on all matters relating to the methods of recruitment to Civil Services and for Civil posts, (2) on the principles to be followed in making such appointments and in making promotions and transfers, (3) on all disciplinary matters, (4) on any claim for any cost incurred by a public servant in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty, and (5) on any claim for the award of pensions for injuries. In addition to these specific powers it is the duty of these Public Service Commission to advise also on any other matters that the President or the Governor may refer. Parliament or the State, as the case may be, has power to extend the functions of these Service Commissions. The Constitution casts a duty on these Commissions to present annual reports to the President or the Governor, as the case may be, and the President or the Governor is charged with the duty of explaining in a memorandum the cases where the advice of the Commissions was
not accepted and the reasons for such non-acceptance before Parliament or State Legislatures. (See Articles 315-23 of the Constitution). The recommendation of these Service Commissions also are advisory. The Constitution requires consultation with the authorities concerned in these Commissions but does not oblige them to accept the verdict of these Commissions. This has led to many public criticisms in India. The principle on which these Commissions work are to protect public servants, to control their disciplines and ensure uniformity of treatment, and standards of public servants. They are permanent Commissions and the Constitution intended them to be guardians of the rights, liberties and disciplines of the Civil Services in India.

A peculiar feature of the Indian federalism is the permanent Election Commission provided for under Article 324 of the Constitution. This is a federal Commission which is charged with the superintendence, direction and control of the preparation of the electoral rolls for and the conduct of all elections of Parliament and Legislatures of every State and all elections of the offices of the President and the Vice-President held under the Constitution. It is also charged with the duty of appointment of Election Tribunals for the decision of doubts and disputes arising out of or in connection with the election to Parliament and State Legislatures. This is a permanent Commission like the Public Service Commission and not a periodic Commission like the Finance Commission. This is again another attempt through the device of a Commission to settle Election disputes and doubts and to superintend, direct and control election throughout the country. As a Federal Commission it helps to achieve uniformity of standards in election and electoral matters.

Another type of Commission used in the Constitution is for the purpose of investigating the conditions of backward classes under Article 340 of the Constitution. This is not a permanent Commission. It empowers the President to appoint a Commission to investigate the conditions of socially and educationally backward classes in India and the difficulties under which they labour and to make recommendations for the steps to be taken by the Union or any State to remove
such difficulties and to improve their conditions. This Commission after the conclusion of their labour presents a report to the President setting the facts found by them and making their recommendations. The President in turn presents a report with a memorandum explaining the action taken thereon before each House of Parliament. This shows the responsibility that the Indian Constitution has taken to improve the conditions of the socially and educationally backward classes in India, and it is rightly a federal Commission because such classes are found distributed in every State in India.

In addition, there is a similar Commission provided for the Scheduled Castes and the Scheduled Tribes. The Scheduled Castes and the Scheduled Tribes are a special responsibility and concern of the federal power under the Constitution. Under Article 338 of the Constitution a Special Officer for the Scheduled Castes and Scheduled Tribes is to be appointed by the President to investigate all matters relating to their safeguards under the Constitution and to report to the President on the working of those safeguards at periodic intervals. These reports are laid before each House of Parliament. Over and above this provision the President is authorised under Article 339 of the Constitution at any time and he shall at the expiration of the ten years from the commencement of the Constitution appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States.

Proceeding with this analysis there is yet another type of federal Commission which is the Language Commission under the Indian Constitution. Language is a vexed constitutional problem and is a sensitive subject of delicate controversy in India. The Constitution proceeds cautiously to deal with this explosive problem. This Language Commission is not a permanent Commission. Under Article 344 of the Constitution the President is charged with the duty at the expiration of five years from the commencement of the Constitution and thereafter at the expiration of ten years from such commencement of constituting a Commission whose members are to represent different languages specified in the 8th Schedule.
This Language Commission's duty is to make recommendations to the President about (a) the progressive use of the Hindi language for the official purposes of the Union; (b) restrictions on the use of the English language for all or any of the Official purposes of the Union; (c) the language to be used for all or any of the purposes mentioned in Article 348; (d) the form of numerals to be used for any one or more specified purposes of the Union; and (e) any other matter that the President may refer to the Commission regarding the official language of the Union and the language for communication between the Union and a State or between one State and another. The Commission's recommendations are examined by a Committee which reports their examination to the President containing the Committee's opinion. The Language Commission clause in the Constitution has exhausted itself and it cannot be said that it has succeeded in solving the language controversy in India.

Apart from these regular Commissions the Constitution in its federal character has also made provisions for adjudication of disputes relating to waters, for co-ordination between States such as in Article 262 and Article 263 of the Constitution and for also appointment of authorities for carrying out the constitutional provisions for trade and commerce in India, in Article 307 of the Constitution. Another feature of Indian federalism in action, though not strictly arising out of the Constitution, may also be noticed because it may be said to support the federal principle. That is represented by the Zones and the Zonal Councils. By the States Reorganisation Act 1956, India is divided into five Zones and for each Zone there is a Zonal Council with a Union Minister as the chairman, nominated by the President, the Chief Minister of each State comprised in the zone, and two other ministers from each such State nominated by the Governor. The work of a Zonal Council is to advise the Union and State Governments concerned on matters of Common concern specially with regard to economic and social planning, border disputes linguistic minorities, interstate transport and some common problems of administration. The Zonal Council has its separate Secretariat and
even joint meetings of different Zonal Councils in matters of joint concern are provided for. These Zonal Councils help to build the federal climate. The other agencies strengthening Indian federalism are (1) the Planning Commission established in 1950, consisting of the Prime Minister, three other Union Ministers and three full time members, whose function is to assess the national resources, to make plans for their proper exploitation, to execute them, to consider claims of different States and allot resources, and to report progress; (2) the National Development Council composed of the Prime Minister, the Chief Ministers of the States and the members of the Planning Commission, with provision for inviting other ministers when matters with which they are concerned are involved.

In this study an attempt has been made to study the question of federalism under the Indian Constitution both from the conventional and unconventional points of view. In five specific areas problems of conflict are arising between the Federation and the States such as (1) language; (2) taxation and fiscal policy; (3) trade and commerce; (4) administration and (5) legislation. In all these spheres the struggle between the Union and the States is proceeding apace. In the sphere of language the conflict is between regional language on the one hand and the Union language of Hindi on the other. The associate status of the English language has added to the complexity on the subject. Language riots and suicides have disfigured the recent constitutional history of India on this point. In the area of taxation and fiscal policy States resent their dependence on the Union and on the method and manner of allocating proceeds of taxes and of giving grants-in-aid. In the trade and commerce area the constitutional position bristles with many problems of inter-State trade and commerce and of State taxation as impediments to the freedom of trade in India. In the sphere of administration, the Union administration and the State administration are very often at variance leading to lack of uniformity even in such national problems as food, housing and employment. In the sphere of legislation the administration of the three Lists has already been examined in this
study on the Chapter of Legislative power and Legislative Institutions. At the same time there are other fields where the constitutional problems are no less acute. The problem with regard to education, the very foundation of Indian democracy, poses many constitutional controversies. Education is primarily a State subject for legislation under Item xi of the State List. The result is that no uniform legislative policy about education is possible in the Indian Federation. There are still great divergences in the period curriculum and the courses as well as in the standards of education in schools, colleges and universities in the different States in India. This is not the only difficulty. The Union or the Federation has a very limited field for legislation in the area of education. Entries 63, 64, 65 and 66 of the Union List indicate the Union’s Legislative position namely that (r) institutions like Benaras Hindu University, Aligarh Muslim University and the Delhi University and any other institution declared by Parliament by law to be an institution of national importance; (2) institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance; (3) Union agencies and institutions for (a) professional, vocational or technical training including the training of Police Officers or (b) the promotion of special studies or research or (c) scientific technical assistance in the investigation or detection of crime and (4) co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions, come within the competence of Union’s Legislative Power. Entry 25 in the Concurrent List gives both the Union and the States power to legislate on subjects of vocational and technical training of labour. It is debatable how far in a matter of national concern like education there should be a difference between institutions of national importance and those which are not, which the Union List purports to do. To discriminate between Universities and place such Universities as Delhi, Benaras, Aligarh and other Universities in a special class is illogical. To separate scientific or technical education and research for the purpose of granting a divided power to the Union does not make either for uniformity of standards or
for the solidarity of Indian education. The Union Government is faced with these constitutional handicaps. The Constitution needs radical change in areas and policies of education.

In Indian Federalism the constitutional problem about religion presents many controversies, India being a land of many religions. The Constitution has adopted a policy which is called secular. The great merit of secular India under the Constitution has been largely befogged by the criticism that the Indian Constitution if not anti-religious is indifferent to religions. It must be clearly emphasised that the Constitution is not anti-religious. As a machinery for working political institutions, the Constitution naturally has to be neutral in a place where many religions are contending for recognition. Right to freedom of religion is a basic Fundamental Right guaranteed by the Indian Constitution. Articles 25 to 28 of the Indian Constitution constitute the charter of religious freedom. All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. No doubt this freedom is subject to considerations of public order, morality and health. This right to religious freedom can be regulated or restricted only in respect of economic, financial and political or other secular activities associated with religious practice. It is also qualified by a peculiar provision in Article 25(2) (b) of the Constitution read with Explanation II thereof that this right to religious freedom will not affect any existing law or prevent the State from making any law providing for social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. By explanation I of that Article the wearing and carrying of kirpans is deemed to be included in the profession of the Sikh religion. The curious feature of this provision is the inexplicable anxiety to provide for social welfare and reform or opening access to the public religious institutions of Hindus including Sikhs, Jains and the Buddhists. It is difficult to understand why the Constitution does not recognise the need for similar social welfare and reform or opening access to public religious institutions of many other religions and faith in India, like the Jews,
the Parsis, the Christians and the Muslims. The unhealthy results of this indifference to the need of social welfare and reform in respect of other religions is today manifested in legislations producing such curious results that for a Hindu bigamy is a crime or an offence but for a Muslim it is not so, although both are Indian citizens. Again, for instance, while Hindu succession has been controlled, the fragmentary division among Muslim heirs under Muslim succession leading to sub-infeudation remains unchanged. Secularism in India has meant a Hindu Code for the Hindus but that secularism has not brought the much needed Muslim Code in India. A part of this religious freedom under the Constitution includes freedom for every religious denomination to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in matters of religion, to own and acquire movable and immovable property and to administer such property in accordance with law. The doctrine of religious neutrality is further ensured by the constitutional provision in Article 27 that no person shall be compelled to pay any taxes the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Its implications are constitutionally confusing. Compulsion to pay taxes can come from the State or the Government and this provision therefore is primarily a limitation on the legislative power. But no “taxes” under the Constitution can conceivably be appropriated for such specific purpose as “the promotion or maintenance of any particular religion or religious denomination” as in Article 27. This is followed by the more controversial constitutional mandate in Article 28 that no religious instruction shall be provided in any educational institution maintained out of State funds. This provision has raised many far reaching controversies. It is an unfortunate provision. The result has been that in all Government schools and colleges there is no place for religious instruction of any kind and the students there complete their academic career without receiving any kind of religious instruction. Education has therefore in such schools and colleges been crippled morally and socially and the resulting evil effects in faithlessness and indiscipline have to-day
assumed alarming proportions. This neutrality could have been better maintained by saying that religious instruction will be given to students of such schools and colleges or educational institutions and arrangements should have been made that such instruction should be according to the faiths or religions of the students on the roll. Even if that means arrangements for religious instructions for different religions or faiths that should have been provided for. The alternative which is there in Article 28(1) of the Constitution is education without religion, which is really no education at all according to the ideals and traditions of education in India. The other sub-clauses 2 and 3 of Article 28 are not so offensive and they permit religious instruction to be imparted in such educational institutions which are administered by the State but which are established under any endowment or trust insisting on such instruction and avoids compulsion for any person attending any educational institutions recognised by the State or receiving aid out of the State funds to take part in any religious instruction that may be imparted or attend any religious worship that may be conducted there. On the whole the principle of religious freedom and religious neutrality as provided in the Constitution of India is a healthy and wholesome provision. Its defect is that it is lopsided.

These last two illustrations from education and religion are intended to signify their importance in Indian federalism under the Constitution. The federal approach to education and religion needs change, and with it the Constitution also needs to be changed on this point. No one suggests that there should be a State established religion or State controlled education in India. But that is very far from saying that as a matter of constitutional law and principle both education and religion should not receive the active and dynamic recognition that they deserve. Education is the foundation of Indian constitutio- nal democracy. A strong federal and central educational policy is needed to provide for that foundation. Article 45 of the Directive Principles of State Policy in the Constitution expressed the aspiration to provide within a period of ten years from the commencement of the Constitution, free and compulsory education for all children until they complete the
age of 14 years. That aspiration has not been fulfilled within the time mentioned in that Article. India is very far away from free and compulsory education for all children up to the age of 14 years. Similarly religion is a basic need for a democracy such as India which is still striving, to preserve and uphold the dignity and the spirit of the individual. The fact that India is the home of many religions, faiths and creeds makes it all the more essential that there should be a strong federal policy of uniform treatment and active recognition of all religions with toleration and not indifference. Education and religion have become most critical problems in the present Constitution of India.

The future of India and her Constitution will depend on how the nation evolves the principles and practice of federalism suited to India whose indispensable requisite has to be unity in diversity, integrity with variety, marked by the wisdom and experience of creating a harmony between the centrifugal and the centripetal forces within this sub-continent.
Chapter Five

THE SCOPE OF CONVENTION IN THE INDIAN CONSTITUTION

Conventions have a larger and a more significant scope in an unwritten Constitution than in a written Constitution. A written Constitution is necessarily rigid and an unwritten Constitution naturally flexible. The more detailed a Constitution is in writing, the more it restricts the scope for conventions. A detailed written Constitution is a deterrent for conventions. The reason for this is not far to seek. Conventions and their impact are by their nature unpredictable. Their origin and growth are very often imperceptible. Therefore in a detailed written Constitution the conflict between conventions and the Constitution becomes a practical problem. The Indian Constitution is the largest Constitution in the world. It is more detailed than any other Constitution. The interesting constitutional problem arising in India is, whether there is any scope, and if so what, for conventions to grow in the Indian Constitution. Enthusiasts for conventions rightly argue that the Constitution of a country can never be so wholly written out in all its details as to completely exclude the growth and operation of conventions.

Professor Alan Gledhill in his The Republic of India has raised certain pertinent questions for instance, whether in the provision for the impeachment of the President for violation of the Constitution, the express word “Constitution” in Article 61 is confined to its text or does it also cover the “conventions.” The learned Professor even qualifies his thesis that the President cannot act in his discretion by the observation at p. 134 of this book: “There are two kinds of exceptions, the first based on the construction of some of the provisions
of the Constitution, the second on conventions.” His ultimate conclusion appears at page 136 of his book in these terms: “Thus some of the most essential constitutional rules have been finally left to conventions. If so, the provisions in the body of the Constitution such as Articles 53(2), 74(1) and 75(2) have to be read together with these conventions. By themselves these provisions are, in Sir Alladi Krishnaswami Ayer’s words, merely euphemism.” Some more interesting observations are made by the learned Professor at page 140 where he says: “Thus we may conclude that the binding force for the advice of the ministry cannot be based on a joint construction of Articles 73, 74 and 78 of the Constitution and that the Government of India Act 1935 does not provide a background for such construction. Parliamentary and Cabinet Government in India in its entirety is inconceivable without conventional rules outside the body of the Constitution.”

This last observation appears to be almost begging the question. In the first place, the whole controversy is whether the aid and advice of the ministers can be construed as binding on the President in all circumstances. In the first chapter of these lectures an attempt has been made to show that such aid and advice are not binding in every case. That normally they can be binding may be the result of conventions, but no conventions can be allowed to grow which override the express provisions of the Constitution. It may equally be argued that in the particular multi-lingual, multi-racial and multi-religious context of India, the conventions should be the other way about working more in favour of Presidential freedom than of ministerial authority with majority party rule.

A survey of the Indian Constitution is essential to find out the probable scope for conventions. There are some areas in the Indian Constitution where there is no scope for conventions; while there are other areas where conventions may grow, and where a good deal of constitutional statesmanship is necessary to watch and guide the growth and development of conventions.
The Preamble of the Constitution of India makes the people of India sovereign. The people of India are the supreme sovereign of India. Conventions may grow to establish such sovereignty and to make it more effective and real. The next sovereign in Indian Constitutional law is the Constitution itself. Parliament and State Legislatures have to work under these two sovereigns, the people and the Constitution. Conventions, therefore, both of Parliament and State Legislatures, have to subserve the people as the political sovereign and the Constitution as the legal sovereign. The Indian Constitution is a Constitution of a democratic republic. Conventions therefore both of the republic and of democracy can grow subject to the Constitution, specially in the light of the four expressed objectives of the Constitution to secure (1) justice, (2) liberty, (3) equality and (4) fraternity.

Part I of the Constitution dealing with the Union and its territory and containing Articles 1-4 has no scope to allow conventions to grow. Part II dealing with citizenship and containing Articles 5-11 similarly have no scope of permitting any conventions. Part III dealing with Fundamental Rights and containing Articles 12-35, it is submitted, does not permit the growth of any conventions either to increase or to reduce the nature and scope of such Fundamental Rights.

Part IV of the Constitution dealing with the Directive Principles of State Policy containing Articles 36-51 may allow conventions to grow to operate upon the States to help them to achieve the non-justiciable aspirations mentioned there.

Part V of Chapter I of the Indian Constitution, consisting of Articles 52-77, dealing with the Union executive, offers a limited scope for the growth of conventions. There is no scope for conventions about the method and the manner of electing the President or the Vice-President. Nor is there scope for conventions with regard to the impeachment of the President. Although the term of the office of the President is fixed for five years under Article 56 of the Constitution, yet his re-election under Article 57 does not provide the number of occasions he can be so re-elected. There is scope
for the growth of conventions that a President should not seek re-election beyond the second term.

On Articles 74 and 75 of the Constitution there is a good deal of scope for the growth of many healthy conventions. Subject to the specific provisions of the Constitution, the possibility and scope for such conventions have already been mentioned by Professor Alan Gledhill, quoted above. The entire "aid and advice" clause in Article 74 of the Constitution is a source from which many conventions can spring especially on the appointment of the Prime Minister and other Ministers under Article 75. For instance in appointing the Prime Minister, the President should follow the conventions that (1) the leader of the majority party should always be appointed except in the case of a coalition or other national government when other considerations may guide the convention, and that (2) although the Ministers are appointed on the advice of the Prime Minister and by the President, both the Prime Minister and the President should follow the convention of reflecting in the Council of Ministers not only the ability but also the representative harmony of divergent interests which are relegated to the care of the Constitution, subject to such considerations of team work as will enable the Council to act as a united body for all practical purposes. So again the constitutional provisions that the Ministers shall hold office during the pleasure of the President must develop the convention that such pleasure should follow the conventions that so long as the Minister enjoys the confidence of his Prime Minister or his Council of Ministers or the party to which he belongs, and subject to any disability or disqualification under the Constitutional laws made therein, he should continue as such Minister, subject, of course, to the individual Minister’s willingness to continue.

The next field for conventions to grow is under Article 78 of the Constitution. Conventions should develop on such questions as (a) what does the President do when he receives a communication from the Prime Minister under Article 78(a); and (b) how the notes and notices should be made and what kind of consultation is to take place. Similarly under Article 78(b) conventions should grow as regards
how the President should initiate and act, to call for information and on what matters: and from what source. The President’s valuable right to information must be properly and effectively secured by conventions to make it serve the purpose for which the Constitution clothes the President with such power. Again under Article 78(c) conventions should grow to supply the President with the information that one Minister’s decision may not have the backing of the Council of Ministers.

A fruitful field for healthy conventions arises in the President’s power to prorogue and dissolve the House. Under Article 85(2) of the Constitution, conventions for proroguing the House or dissolving the House, the occasions for doing so and the method and manner of doing so should be the subject-matter of conventions. The Presidential right to address Parliament or to send messages to Parliament under Article 86 and 87 should be developed by conventions. The Constitution recognises such right in the President. But what the conventions can do is to build up the method, manner and the occasion for the exercise of such right.

Again in the field of powers, privileges and immunities of Parliament and its members under Article 105 of the Constitution conventions can grow for a healthy and a harmonious working of the parliamentary institution. On the legislative procedure, in areas covered by Articles 107 to 122, there is a large scope for the growth of conventions. For instance, the President’s right and procedure to assent to bills, and his right to veto or send a bill back for reconsideration, represent some of the areas where conventions are both necessary and useful. There is a general impression among constitutional lawyers in India that all the conventions of British Parliament are available in India. This is based more on an imaginative idea of Article 105(3) of the Constitution than on any real substantial ground. That clause of the Article relates only to “powers, privileges and immunities.” But they do not exhaust the conventions or the areas in which conventions can grow under the Indian Constitution. No doubt, where “the powers, privileges and immunities” are inconsistent with the text and spirit of the Indian Constitution, they can-
not prevail nor can any such inconsistent conventions be allowed to grow. Besides Indian Parliament and State Legislatures may have to face many situations not covered by any conventions of the British Constitution.

The whole procedure of the President's relationship with the State Governors, subject of course to the specific terms of the Constitution, offers a rich field for the growth of conventions. The Constitution provides that the President shall appoint the Governor and the Governor shall hold office during the pleasure of the President. But conventions can grow as to how these appointments should be made, and how far the Governor of the State and its Chief Minister as the voice of the ruling political party should adjust their relationship and how the voice of the Governor or the Chief Minister should be expressed and the method and manner of the President ultimately coming to a conclusion. Conventions are necessary to help the President to make provisions under Article 160 of the Constitution for discharge of the functions of the Governor in any contingency. The remarks about conventions between the President and the Council of Ministers at the Centre apply equally to the relationship between the Governor and his Council of Ministers in the State, where conventions can grow to help to work the Constitution in letter and spirit. In particular on this point conventions are necessary for guiding and regulating the exercise of the express discretion which has been given to the Governor under Article 163 of the Constitution. Equally again the remarks about conventions in the Centre in the field of Parliament and its procedure apply equally to the States on the subject of the State Legislatures and their procedure and particularly to the question of proroguing and dissolving the State Legislatures, assenting to bills, reserving bills for consideration of the President, Governor's right to address or send messages to the State Legislatures, and the "power, privileges and immunities" of State Legislatures and their members. These areas in the States are covered by Articles 155, 156, 160, 163-164, 174-176, 194, and 196-212. Finally in the State there is scope for conventions to grow in respect of the legislative power of the Governor under Article 213(x) specially under the
proviso thereof for receiving and implementing instructions from the President in promulgating ordinances.

In plotting out areas under the Indian Constitution where conventions can grow, it will, therefore, be seen that the procedure for the President and the Governor to exercise their powers, the Cabinet or the Council of Ministers, Parliament and State Legislatures, their summoning, dissolution and prorogation are appropriate sources of desirable and necessary conventions.

Dicey was the pioneer in focusing attention of constitutional lawyers upon "conventions." Conventions are often regarded as a source of constitutional law. Dicey himself described it as a kind of an obligation derived from custom, agreement and experiment. Therefore, according to Dicey, the rules for the exercise of the royal prerogative by the King's Ministers and those governing the relation between the two Houses of the British Parliament were based on custom or expediency rather than on any formal agreement. In the present time these conventional rules have a wider scope and regulate the relationship between various member States of the Commonwealth, which are in a sense based on conventions formulated at Commonwealth Conference and subsequently adopted by the various Governments.

The complexity of modern government, in one sense has limited older conventions, but at the same time in another sense has enlarged the scope and ambit of many other conventions. Powers of the executive no doubt are exercised in the name of the Head of the State, be it the President or the Governor, but many conventions entrust them to the ministry. In some modern statutes a tendency is recognised which acknowledges these conventions and confirm legal powers on individual ministries or governments as such. When Dicey in the last century was expounding his classic theory of conventions as "rules for determining the mode in which the discretionary powers of the Crown or of ministers as servants of the Crown ought to be exercised," he could hardly have been contemplating the tremendous change which the two World Wars of the 20th century were soon to introduce. But on one point Dicey
was prophetic and that was when he was defining the object of conventions as “intended to secure the ultimate supremacy of the electorate as the true political sovereign of the States.” That is why I suggested at the beginning that it is the people of India who are sovereign under the Indian Constitution and the next sovereign is the written Constitution. Conventions should act as the bridge between these two. Convention is the equation between the politically sovereign people and the legally sovereign Constitution. Dicey was preoccupied however with that area of conventions which deal with the regulation of the use of prerogative, which in his time was the centre of constitutional focus.

Although choice of the Prime Minister is commanded by the Constitution to be made by the President, the existence of conventions cannot be denied and the President’s range of choice is limited by such convention as the support of the party or coalition which might be expected to command a majority in Parliament. In recent times there was an acute political and legal controversy to find out how far the Indian Constitution or any convention should insist that the Prime Minister should be an elected member of the House of the People (Lok Sabha) and not a member of the upper House, the Council of States (Rajya Sabha). Although Article 105(3) of the Indian Constitution expressly proclaims that the privileges of the British House of Commons shall be the privileges of the members of each House of Parliament, yet it is not remembered that it is the privilege of the British House of Commons to have the Prime Minister from among its own members and not from the upper House. The spirit of the Constitution, even if not its letter requires that the Prime Minister of India should be an elected member of the House of the People (Lok Sabha). In a Parliamentary democracy with Presidential control, the authority of the office of the Prime Minister is more consistent with his membership of the House of the People. The Constitution has also some very clear pointers to that conclusion. Article 75(3) in clear language expressly says: “The Council of Ministers shall be collectively responsible to the House of the People,” and not to the Council of States (Rajya Sabha). When Article
74(1) makes the Prime Minister the "Head" of the Council of Ministers, then his express constitutional collective responsibility to the House of the People posits that he is an elected member of that House and not of the Council of States. In plain logic the "Head" cannot and should not be responsible to a House of which he is not even a member. Therefore, the fact that a Minister can be a member of "either" House of Parliament" under Article 75(5) cannot be stretched, under the cover of collective ministerial responsibility, to the House of the People. The case of the Prime Minister being a member of the Council of States, just as Article 74(5), it is submitted, cannot be applied to cover a fact that under it all the Ministers can be members of the Council of States and none from the House of the People. The larger constitutional consideration on this point is that the House of the People is more "directly" the voice of the people of India than the Council of States. It is therefore in the fitness of real democratic principles and conventions that the Prime Minister should represent that voice and come from the House of the People. Article 81(1) (a) of the Constitution in expressing the composition of the House of the People makes it clearly dependent on "members directly elected by the voters in the States." By contrast the Council of States under Article 80 read with the fourth schedule of the Constitution makes the composition of Council of States as consisting of nominated members and representatives of the different States elected not directly by the voters but by the elected members of the Legislative Assemblies of the States according to proportional representation with single transferable vote. In the interest and tradition of Parliamentary democracy it is undesirable that the Prime Minister should not be a member of the House of the People elected directly by the voters. The fact that the legislative authority of the House of the People is greater than that of the Council of States in respect of Money Bills and other financial bills under Articles 109 to 117 of the Constitution also makes it desirable that the Prime Minister should be from the House of the People whose leader of the majority party he should be in that House. The Constitution implies it and the convention demands it that the Prime Minister of India should be a member of the "House of the
CONVENTIONS

People” (Lok Sabha) and he and none else should be the leader of that House. That is the true meaning and effect of this aspect of Parliamentary democracy in India.

There is a convention in the British Constitution that the sovereign consults the leader of the Opposition when a government tenders its resignation on defeat in the House of Commons to ensure the impartial position in politics which a constitutional monarch or Head of the State should occupy. This convention may well be adopted, with or without modification in India when the parties are better organised.

On the question of dissolution of Parliament the convention is well recognised that the Head of the State accepts the advice of the Prime Minister, because the alternative will be dismissal of the Prime Minister and his ministerial colleagues which will create a deadlock in the Constitution. Equally again there will be no justification for dismissal of a ministry, against its will, which commands the majority in Parliament, unless of course it is on the ground that the majority no longer reflected the will of the electorate, on which again a guarded convention can grow. The dissolution is the standard means of testing this question. Here convention follows expediency as nearly as possible.

Conventions about ministerial responsibility have a significance of their own. For the constitutional lawyer and the statesman ministerial responsibility has two distinct meanings, one of which can be called strictly legal and the other purely conventional. We can leave aside the legal aspect of ministerial responsibility for the purposes of this lecture. The conventional aspect of ministerial responsibility is impressed with the idea of operating the machinery of government on constitutional lines, influencing the ministers in their conduct of affairs and their relationship with Parliament. On the basis of this has sprung the principle of collective responsibility which has been constitutionally recognised in writing in Article 75(3) of the Constitution and reinforced by the power given to the President under Article 78(c) to require consideration of an individual minister’s decision by the whole
Council of Ministers. But then the Indian Constitution does not mark the limits and content of such collective responsibility.

The collective responsibility enjoined under Article 75(3) of the Constitution also offers scope for the growth of conventions. Here on this point the constitutional developments in India have in many cases been detrimental to collective responsibility. Collective responsibility of the Council of Ministers is the basic foundation of a democracy whose main source is Parliament and State Legislatures. The proverbial constitutional question is always present namely, whether the ministry should resign whenever there is an adverse vote against it in the House of People, or whether it is at liberty to guard against any accidental defeat on a particular measure on the ground of "a snap vote" on an issue not vital. If such a distinction is attempted, as may be necessary for practical reasons, the question often arises what is a vital issue and who is to regard it as vital, the ministry or the President.

It is submitted that collective responsibility does not mean that every individual Cabinet Ministers must take an active part in the formulation of each policy or that his presence in the Cabinet is essential whenever any decision is being taken by the Cabinet. The British convention on this point is that his obligation may be passive rather than active, specially when the decision does not relate to matters falling within his own portfolio of administrative responsibility. No doubt he must keep himself aware of what the proposal is and must have a reasonable opportunity of voicing his doubts and objections if any. The size of a modern Cabinet or Council of Ministers makes such a convention necessary. At the same time the nature of this collective responsibility must be clearly understood. It certainly means that a Cabinet Minister must vote with the Government in Parliament and if required be prepared to defend the policy. The convention should grow that neither in Parliament nor outside can a Minister be heard to say that he is in disagreement with the Cabinet decision or that a decision of a colleague was taken without reference to the Cabinet or Council as such.
Here the question of constitutional complexity is whether by expressly stating in Article 75(3) that "the Council of Ministers shall be collectively responsible to the House of the People," it was the intention of the Indian Constitution to do away with the individual responsibility of the Minister concerned? Here there is scope for some convention. Each Minister in his own sphere must bear the burden of speaking and acting for the Government. Although there is no constitutional provision on this particular point in express term, yet this is a convention which has to be encouraged, developed and guided. Conventions developing the practice of prior inter-departmental consultations before an individual Minister makes an announcement in the House on the decision of the policy of the Government should prevent departmental isolation. Naturally a Minister must know and appreciate that he will in the last analysis have to depend on the support of his Cabinet or Council of colleagues if political criticism becomes sharp and therefore convention requires that he must temper his decision in the light of that consideration.

Another interesting field of convention is opening up in the Indian context. India is a land of numbers. Cabinet Ministers were large in number to begin with. But they have increased and are still increasing in number. There are also different classes of Ministers. Ministers seem to be developing a caste-system of their own. There are no doubt the Prime Minister and the senior Ministers. But what about other Ministers and specially the Ministers who have no seat in the Cabinet though they may be invited to attend when matters affecting their departments are considered? Then there are the Ministers of State. Finally there are the Deputy Ministers. The question is, are these other Ministers or Ministers for State or Deputy Ministers a part of the "Council of Ministers" within the meaning of that expression in Article 75(3) of the Constitution. There is scope for the growth of conventions with regard to these Ministers who are not part of the Cabinet. Technically speaking there is no "Cabinet" but "Council of Ministers" in the Indian Constitution. A constitutional question arises here. If the Constitution requires a "Council of Ministers," can you appoint a Minister,
and keep him out of the "Council." Nothing but a convention can solve this problem.

Analogous to this field of convention is the rule of anonymity in the civil service. This convention is based on the healthy rule that criticism in Parliament of a government department and its working must be answered by the Minister responsible for the department. The Minister must assume by convention the responsibility and not pass it on to the departmental officer who cannot answer the criticism either in public or from the floor of the House. No Minister should be allowed to shield himself by blaming his official. This is a convention which is yet to grow in India. There is still a dangerous tendency to make a scapegoat of the officer and secure a safe berth for the Minister himself. This has seriously demoralised the Indian administration.

The entire field of Parliament, its privileges and procedure are a rich source of convention. No doubt the express provisions of the Constitution whenever available must rule the situation. Then again there are certain statutes like the Representation of the People Act which may be relevant for consideration. But even then apart from the Constitution's express provisions and the relevant statutes on the point, a large field remains unexplored by the Constitution and the statutes and must necessarily be covered by conventions.

A fertile field for conventions is growing in the area of rules and practices which influence and govern, relations between the members of the Commonwealth and between such members and foreign States. In this field conventions may grow either by express agreement or by tacit consensus usually reached at periodic meetings of Commonwealth Conferences.

Conventions in constitutional law are not mere ornaments to be worn on special occasions, or mere polite rules of good behaviour. There is an element of sanction behind the convention. No doubt the narrow view of the distinction between law and convention is that law is limited to those rules which are applied and enforced by the Courts and conventions only thrive on the good sense of the people and the institutions to which they relate. Here again Dicey did
pioneering work and he expresses in his famous book *The Law of the Constitution*, 3rd Edition, Chapter III, that the reason why conventions are observed is that a breach can ultimately bring the offender into conflict with the Courts and the law of the land. Later constitutional jurists have criticised the view that a breach of convention ultimately results in a breach of the law and that the emphasis upon the Court is misplaced because much of modern law is to be found in administrative rules, bye-laws and regulations enforced by administrative authorities. It is submitted that making full allowance for these two criticisms the basic proposition of Dicey still remains good on the point of sanction behind convention. His classical exposition explaining how disregard of the conventions by which ministerial responsibility to Parliament is maintained will lead to the breach of the law cannot be disputed. Dicey was also aware of the political sanction that might operate on a breach of convention. The refusal of a defeated ministry to resign, though ultimately could lead to illegal administrative action which Parliament would refuse to sanction or condone, yet it would have a more immediate wider reaction on the political field. The final reason for observance of the convention lies in a smooth and harmonious working of the Constitution without jolts and knocks. The existence of the convention is therefore justified by the need for rules to supplement the legal framework of the Constitution. Conventions provide the content of the rules and practices for the guidance of those who actually run the political institutions and the machinery of government. The claim of convention to be considered as part of constitutional law depends on the regularity with which they are followed in practice, and it is a part of constitutional law to investigate and consider the consequences of disregarding them. These consequences are not only, in the case of Ministers, loss of office or reputation, but also parliamentary and public censure. In addition to such sanctions, the justification for convention lies in the desire to maintain the government. This is clearly discernible behind many of the conventions such as, in the sphere of ministerial conduct the government whose policy has failed to command the support of Parliament must through its Prime Minister tender
its resignation or seek to reverse the opinion of Parliament by advising its dissolution and so appeal to the electorate to renew their confidence in the government. Again, in the parliamentary sphere, there is the dominance of the House of the People (Lok Sabha) in respect of financial provisions for Money Bills. The relative conventions in this respect are directed to take the course which ensures that the will of the electorate shall prevail as an indispensable part of responsible government in a democracy. Convention demands that the different organs of the government, the executive, legislative and judicial, should mutually respect and regard the arena and functions of each. The actual words of the Constitution can teach prohibition and separation in this respect but it is convention alone that can teach co-operation between them. That convention of co-operation between the different organs of the government is sorely needed in India to-day to give life and vitality to her Constitution and to make it creatively dynamic and purposeful, and make the administration truly responsible.

No discussion on convention is complete without due emphasis on its significance in maintaining the forms of democratic and legislative institutions and their processes. Forms are often neglected in the mistaken belief that it is the substance that matters. It is necessary to explode the myth of the proverbial distinction between the form and the substance. Both in law and philosophy it is not always easy to demarcate the line which separates the form from the substance. In reality they blend inseparably. No doubt in theory substance is more important than form, but in practice the substance does not exist in vacuo and has to have a container. Without attention to the container the substance cannot be effectively used. If Parliament and Legislatures, parties in Government and Opposition and if courts and judicial processes are to function effectively then a scrupulous regard to the forms of these institutions and the rules for their working has to be ensured. If Parliament and Legislatures adopt a conduct which makes the formal functions of these institutions impossible, then the very machinery of democracy fails and with the failure of the forms of democracy its substance disappears.
Convention is the necessary hyphen between form and substance in constitutional law.

Parliament and Legislatures can work only on the basis of debates, speeches and persuasion by words. If their proceedings are paralysed and disturbed by a course of conduct which makes such debates speeches or persuasion impossible, then not only constitutional jurisprudence but also democracy is in danger. Parliament and Legislatures can certainly become the platform of deep emotions and violent passions, but they have to be restrained and disciplined to express themselves in democratic rules and procedures. Violent disturbances of parliamentary and legislative procedures on the floor of the Houses and in particular their frequent recurrence including such deplorable conduct as to prevent the Governor as the Head of a State from completing the Address to the Legislature, followed even by Court proceedings as in West Bengal emphasises the need for caution in India and the importance of observance of discipline in this vital respect. Frequent failures in quorum in attendance have also been not a creditable feature in Indian Parliamentary and Legislative life. The continuous recourse to enforcement of privileges against boisterous and unparliamentary members is not congenial to Parliamentary life under the Constitution. A greater earnestness and restraint and responsibility are necessary to preserve the forms of legislative institutions in a democracy. It is in this field that healthy conventions should grow to ensure that parliamentary and legislative forms and procedures are not dishonoured or disregarded. Naturally no Constitution can provide for good and responsible behaviour. It is only convention which can make that possible. But these conventions are the very soul and spirit of law, life and democracy under the Constitution.
Chapter Six

THE RULE OF LAW UNDER THE INDIAN CONSTITUTION

The Rule of Law is a high tenet of constitutional jurisprudence. It is the very soul of constitutional law. The misfortune is that the usual discussions on the rule of law are frequently superficial and concerned with generalities, more sentimental than legal. The stake of a State and society in the rule of law is serious and great.

The present American doctrine that constitutional government is not a government of men but a government of laws is in essence a variant of this ancient principle of the Rule of Law as applied to constitutional jurisprudence. Even Bracton in the first half of the 13th century gave expression to the view that the rulers themselves were subject to the law of the land. Blackstone's commentaries carry almost an implicit assumption in favour of the rule of law. It was however left to Dicey to propound the practical effect and give concrete expression to such rule of law and bring it down from the clouds of jurisprudence.

According to Dicey there are three meanings to the rule of law. He observes: "It means in the first place the absolute supremacy or pre-dominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government. A man may be punished for a breach of law, but he can be punished for nothing else." (Dicey's Law of the Constitution, page 202). This is the first meaning of the rule of law according to Dicey. It ensures that no man is punishable in body or goods except for a definite breach of law established in the ordinary legal manner before the ordinary courts of the land. It
ensures the supremacy of Law and the supremacy of legal procedure. This is the first content of the rule of law. The second meaning for the rule of law according to Dicey is "equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts." (Dicey, page 202-3.) Its practical effect is that no man is above the law. The still more practical effect is that officials and administrations like the private citizen are under the duty to obey the same law. In ordinary parlance this juristic concept of law is often loosely described by saying that law is no respecter of persons, privileges and positions. On that point Dicey naturally criticised the systems of administrative law (Droit Administratif) and administrative courts to judge disputes between officials and citizens, such as prevails in France. Much of Dicey's criticism of administrative law may appear unsound retrospectively, but his emphasis on equality before the law served to stress the fundamental liberties of the citizens and their basic rights to life, liberty, property and expression. The third meaning that Dicey gave to the rule of law is that "with us (England) the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts, that, in short, the principles of private law have with us (England) been by the action of the courts and Parliament." Thus the Constitution is the result of the ordinary law of the land. (Dicey, page 203.) Here Dicey emphasises that the legal right of a British subject in the United Kingdom, such as his freedom of person, action and speech, are secured not by "guaranteed" rights in a formal constitutional code but by the operation of the ordinary remedies of private law available against those who unlawfully interfere with his liberty of action, whether they be private citizens or officials. Free access to the courts of justice and a remedy for every wrong (Ubi jus iibi remedium) are the direct practical results flowing from this meaning of the rule of law. Its great advantage is that under this rule of law, law is never static, but always seeking new horizons with the progress and change in human society. Rule of law so understood is dynamic enough to meet new challenges.
The Indian Constitution embodies and enshrines some of the basic principles of the rule of law. The Chapter on Fundamental Rights guarantees the crystallised principles of the rule of law. Equality before the law or equal protection of the laws, which is a basic doctrine of the rule of law is provided in Article 14 of the Constitution. Discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them is prohibited by Article 15 to ensure a common rule of law for all citizens. The basic freedom of speech and expression, of peaceful assembly, of associations or unions, of free movement, of residence and settlement, of acquisition, holding and disposal of property and of practice of any profession, occupation or trade or business are guaranteed by the celebrated Article 19 of the Constitution. That provision is also an acknowledgement of the rule of law, no doubt subject to reasonable restrictions as contemplated and within the limits of the Constitution. Similarly other tenets of the rule of law such as protection from ex post facto laws, double jeopardy and self incrimination are guaranteed by Article 20 of the Constitution. Life and personal liberty are guaranteed by providing that no person shall be deprived of the same except according to the procedure established by law (Art. 21). Protection against arrest and detention within limits, a foundation of the rule of law, is provided in Article 22 of the Constitution. Right to religious freedom is also a part of the rule of law and is guaranteed by Articles 25 to 28 of the Constitution. Similarly constitutional guarantee of the right to property subject to limitations is provided in Articles 31 and 31(A) of the Constitution. Another basic doctrine of the rule of law guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of Fundamental Rights (Art. 32).

Although these rules are formally embodied in constitutional provisions it is submitted that they form part of the rule of law. Dicey's third meaning that the British Constitution is a result of the rule of law does not make any difference. When Dicey was writing, most of the British Constitution was largely unwritten and the rule of law in the United Kingdom can certainly be said to be part of the un-
written Constitution of Great Britain. Whether the Constitution is the result of the rule of law or the rule of law is the result of the Constitution, may be a relevant question on legal history and legal evolution, but its effect is the same so far as operation of the rule of law is concerned. Constitutionally guaranteed rule of law in the modern context is just as effective, as a rule of law under the ordinary law or the common law of the land, and perhaps more effective at least in the theoretical sense. The recognition of these principles of the rule of law in the present Indian Constitution can also be said to be the result of legal history in India. Much of the present constitutional provisions embody the rules of law directly borrowed from the prevailing and pre-existing rule of law prior to the Constitution of India. For instance, the principle and the procedure for Habeas Corpus, proceedings in the nature of Mandamus both under section 45 of the Specific Relief Act and under the Charter and Letters Patent of the Chartered High Courts in India were parts of the rule of law in India, long before the present Constitution.

While the basic concepts of Fundamental Rights recognise and represent the integral part of the rule of law in India under the Constitution, its Directive Principles do not form part of the rule of law because they are not enforceable by any court. Another part of the rule of law which is recognised by the Indian Constitution is that no tax shall be levied or calculated except by authority of law under Article 265 of the Constitution. That law can always be tested in the courts subject however to certain constitutional and statutory exceptions. The pre-Constitution restriction on the exercise of original jurisdiction by any High Court in respect of any matter concerning revenue or concerning any act ordered or done in the collection thereof has now been removed by the proviso of Article 225 of the Constitution thus throwing open the rule of law and access to courts in revenue matters. Similarly freedom of trade, commerce and intercourse throughout India is a part of the rule of law under Article 301 of the Constitution and restriction thereupon can only be imposed by the necessity of “public interest,” but that
can only be done by Parliament by law, and that law can also be tested in the courts.

Growing complexity of modern States and their methods and techniques of government and administration are the cause of the present twilight of the rule of law. No country in the world has escaped from this decline of the rule of law. India is no exception. While a citizen is subject to the ordinary laws he may also be subject to special laws affecting particular calling and enforced by special tribunals. The Armed Forces are subject to the military law in addition to the ordinary laws of the land and offences against military law are triable by Court-martial. The Constitution of India recognises this exception to the rule of law. See Article 136(2) of the Constitution and Article 227(4) of the Constitution. For discipline, speed and efficiency this infraction of the rule of law is essential. Many special tribunals and special courts outside the ordinary or constitutional laws of the country have grown up in India such as tax tribunals, company tribunals, industrial tribunals and other special courts for the special crimes and offences which are being created by new laws and by new statutes. In addition there are many domestic tribunals operating in professional bodies of law, medicine, Chartered Accountants and others where they have their own special forum to administer their special rules, ethics and conduct, with disciplinary powers to control the rights of members and to admit or expel them.

Traditional rule of law in traditional jurisprudence has always condemned discretionary authority in Government Departments or public offices. That was the view of Dicey and that was the current thinking of that time. But the primary functions of the State then were preservation of the law and order, conduct of foreign relations and tax collection. The picture has changed today. With the change in the political concept of the State there is a shift in the Rule of Law. The State now is a welfare and service State. The modern State in its modern mission of service necessarily regulates national life in diverse ways and in spheres which were formerly regarded as outside the pale of the activities of the State. The result is that discretionary authority in every
sphere has become inevitable. For instance, laws today are common providing for State acquisition of private property such as are contemplated in Articles 31 and 31(A) of the Constitution. In many spheres of statutory legislation a vast body of administrative law is growing up where administrative tribunals or administrative officers have to perform judicial and quasi-judicial duties, which in a by-gone age used to be performed by the ordinary courts of the land under the ordinary laws of the land. Many judicial issues affecting private rights are today decided not by courts of law but by administrative tribunals, Government Departments, or even by Ministers. From that flow many immunities from ordinary laws and procedure and public bodies and officers enjoy many privileges given by statute which immunities and privileges are not available for redress of wrongs committed by private citizens.

The rule of law in Indian jurisprudence and specially its constitutional jurisprudence ensures however that the Government of India or of the State is not in any privileged position in the sense that it may sue or be sued subject to any provision which may be made by statute. There is no immunity of the State or the Government from that point of view from the rule of law. See Article 300 of the Constitution. No doubt there are limitations of form and substance on such liability. Naturally there are certain protections given by the Constitution to the President and the Governors as for instance in Articles 361 and 362 of the Constitution. Again there is a bar to the interference by the courts of law with regard to any dispute relating to certain treaties, agreements, covenants, engagements, sanad or other similar instrument as provided in Article 363 of the Constitution. Rule of law also does not operate in certain other areas, such as in Article 74(2) of the Constitution barring courts from enquiring what advice was tendered by Ministers to the President or as in Article 105(2) of the Constitution with respect to the powers, privileges and immunities of Parliament and its members. There is a bar against courts from enquiring into proceedings of Parliament on the ground of irregularities of procedure under Article 122 of the Constitution. Similar bar on the rule of
law and the ordinary courts appears in the Constitution of the States such as in Articles 163(3), 194, 212, and 227(4) of the Constitution.

The rule of law and the ordinary courts are excluded and qualified in electoral matters under Article 329 of the Constitution with regard to (a) the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purporting to be made under Articles 327 or 328 of the Constitution, which cannot be called in question in any court, and (b) no election to either House of Parliament or to the Houses or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature. In Emergency the rule of law is affected. There can be suspension of the provisions of Article 19 during emergency and suspension of the enforcement of the Fundamental Rights conferred by Part III of the Constitution, which includes bar on the right to constitutional remedies such as is provided in Article 32 of the Constitution.

It is said that eternal vigilance is the price of liberty. This vigilance is a part of the rule of law and the ordinary functions of the courts of the land. They are charged with natural vigilance in a constitutional democracy. They expect that subjects and citizens of a democracy would be vigilant not only to protect their private rights but also to protect public rights and liberties. Laws and courts are the natural custodians to express such vigilance. Rule of law is infringed by secret vigilance which have not the publicity and the openness of public laws and the courts of the land. Secrecy defeats democracy and the public administration of private and public laws. Its next step is prying and secret espionage followed by secret police and underground informers.

Mr. P. B. Gajendragadkar, a former Chief Justice of India, has expressed certain views in his lectures before the Servants of the People Society, recently published as a book under the
title *Law, Liberty and Social Justice*. He has expressed there
his views, specially at page 144 of that book, on the recent
experiments with the institution of the Vigilance Com-
misson and the prospective Ombudsman. The learned Chief
Justice said this: "It is however doubtful if the Vigilance
Commission as it has been constituted at present, the limita-
tion under which it has to function and the narrow sphere
of its jurisdiction would make it half as effective as it is
expected to be." But what the learned Chief Justice proposes
as an alternative seems worse. He goes on to say: "I would
therefore earnestly request political thinkers and public wor-
ders to address themselves to the question as to whether it
would not be desirable to evolve an institution like the
Ombudsman in our country. I realise that India is a very
big country and the institution of an Ombudsman cannot be
copied blindly from the Scandinavian country where it has
worked satisfactorily. Instead of Ombudsman you may have
a Commission and its jurisdiction, functions and powers may
have to be carefully determined in the light of the relevant
constitutional provisions. But unless we evolve an institution
like Ombudsman and give that institution a very high con-
stitutional status by amending the Constitution, the problem
will not be effectively tackled."

The International Commission of Jurists set up a Com-
mmittee (Committee III) to discuss the need for an Ombuds-
man in the Asian and Pacific regions. Their proposals are that
there should be an Ombudsman with powers declared and
defined by an Act constituting the office, but his powers of
investigation should not extend to Head of State and Judges
or to matters of discipline in the armed forces. It is even sug-
gested by this Committee that the Ombudsman should deal
not only with the complaints by any aggrieved person but also
take up any matter or his own initiative. In other words, this
Ombudsman will be both an accusatorial and inquisitorial
institution, a combination unprecedented in a democracy with
traditions of independent judiciary.

Presumably inspired by these suggestions, the recent pro-
posal of the Administrative Reforms Commission is for the
creation of a Central and States Ombudsman, the Indian edi-
tion of the names being "Lok Pal" and "Lok Ayukt." Their appointment, status and tenure proposed are to approximate to the conditions of service of the Supreme Court and High Court Judges. These Ombudsmen will be new constitutional institutions to be set up by amendment of the Constitution. The names "Lok Pal" and "Lok Ayukt" are not only flamboyant but also dangerously pretentious, much too reminiscent of the "benevolent despots." Such Ombudsman is not quite a Supreme Court or a High Court Judge. He has only the pretensions of that office's conditions of service. By reason of his proposed method of appointment, status and tenure, he cannot be responsible to Parliament or State Legislatures, and he is expected to be a watch-dog of erring ministers and officials. Secondly, one "Lok Pal" for the entire sub-continent of India, will necessarily be a captive of unmanageably numerous files and dossiers, and inescapably dependent on a whole miscellaneous army of subordinates and self-proliferating secretariat. Fourteen States of India with their fourteen States Ombudsmen with their numerous respective subordinates and staff of filing and noting clerks will be a formidable array of administration, expensive, dilatory, and hidebound by red tape, redder than that orthodox colour of the same brand in traditional administrative offices. The whole idea is impractical and is bound to fail to achieve the purpose. Thirdly, it is not only impractical, it is also against the whole tenor and set-up of the present Indian Constitution and will involve undesirable re-adjustment of existing constitutional values in relation to Parliament, State Legislatures and Judges of the Supreme Court and the High Court. This Ombudsman will, in time, be the Super-Parliament, the Super-Legislature, the Super-Minister, and in the name of Indian democracy God forbid, the Super-Judge. He will pave the road to dictatorship in India, a reign of espionage under the cover of bureaucratic tyranny, and a grievance-oriented State constitutionally encouraging a society of grumblers and critics. It is expected that the authorities will think twice and reflect wisely before taking such a disastrous step of demoralising the whole administration and plunging the State into administrative chaos and confusion from which it will be difficult to emerge.
The British administrative wisdom in this respect is worth recalling. In Scandinavia, the original nordic home of the Ombudsman, there appears no comparable responsibility of ministers to Parliament, whereas in India and Great Britain, Ministers are constitutionally responsible to Parliament and there is the constitutionally and conventionally recognised right of members of Parliament to ask ministers questions and call for redress and remedy of grievances and injustice done to individual citizens or other interests in society. Therefore Great Britain resisted the introduction of an Ombudsman and had in his place only a Parliamentary Commissioner who was merely to supplement the task of the member of Parliament. That is why, the British White Paper on this point utters the caution in the following terms:

“In Britain, Parliament is the place for ventilating the grievances of the citizens,—by history, tradition, and past and present practice. We do not want to create any new institution which would erode the functions of members of Parliament. We shall give members of Parliament a better instrument which they can use in this respect.”

Therefore the British Commissioner is only a servant of the House of Commons and able to act only at the instance of the members of Parliament, to whom the individual citizens must first make their complaints. One only hopes that Indian statesmanship will see the wisdom of these words of caution before creating this new institution in pursuit of a Scandinavian model, irrelevant and detrimental to the principles enshrined in the Indian Constitution.

I must enter my entire dissent to these proposals and suggestions. Indian legal and political thinking has been very imitative, lacking in originality and basic ideas. It is bedevilled with imitation. We think too lightly about novelties in law. Ombudsman and Commissions are the new fashions of legal thinking. Anything wrong anywhere, create a new office or set up a Commission, as though it is universal legal anodyne. It is time to say that they are serious infractions on the rule of law. Commissions are unavoidable sometimes in matters of State-wide or nation-wide public impor-
tance. But Commissions are not the ordinary rule of law but exceptions to it. Exceptions in exceptional circumstances should not provide materials for ordinary constitutional norms or permanent constitutional impositions. But where individual rights and wrongs are involved of persons, be they public officers or private citizens, I shall insist on the full and free operation of the rule of law and access to the ordinary courts of the land. By all means remove by legislation procedural defects in this respect, but I will not subscribe to the creation of competing institutions to compete with the courts and ordinary laws by which all should be governed. I have no doubt that an institution like an Ombudsman will be an excuse for tyranny and maladministration. An Ombudsman is contrary to the basic letter and basic spirit of the Indian Constitution and unless one is prepared to throw the whole Indian Constitution, lock, stock and barrel, overboard, an Ombudsman cannot fit into the Indian Constitution. It will denigrate the Constitution. It will denigrate the judiciary. It will denigrate Parliament and the State Legislatures. Soon after the Ombudsman, we will have to have an Ombudsman for the Ombudsman. The Ombudsman in India will be a new “star-chamber” with a different Indian instead of a nordic name.

There are to-day on the Indian scene, not by the Constitution, but by legal and administrative fiat, two special authorities worth noticing. One is the Vigilance Commission with the Vigilance Commissioner and the other the Commissioner of Public Grievances. If the numerous Government and administrative departments with still more numerous officers cannot exercise vigilance and discover public and private grievances, is it being seriously suggested, that one Vigilance Commissioner or more, or a Commissioner of Public Grievances will do the miracle? What guarantee is there that they will not go the way that the myriad departments and numerous officers have gone? I see no hope in these legal fancies and proliferations. Vigilance and sensitiveness to grievances have to be spontaneous and self-springing and not imposed. That is the way to improve government and administration. The point here to emphasise is that with the pro-
Rule of Law

Rajeev Bhatia

The concept of an independent and impartial judiciary is often associated with the rule of law. In a constitutional democracy, the rule of law is a fundamental principle that ensures the protection of individual rights and freedoms. It is based on the idea that laws should be applied consistently and equally to all individuals, regardless of their status or position. This principle is crucial in ensuring that no one is above the law and that justice is administered fairly and impartially. The rule of law is often seen as a cornerstone of democracy, as it provides a framework for the protection of fundamental rights and freedoms. It is also an important tool for promoting stability and economic growth, as it provides a predictable and consistent legal environment for businesses and investors. The rule of law is a complex and multifaceted concept, and its implementation is often hindered by various factors such as corruption, political interference, and weak institutional capacities. Nevertheless, the importance of the rule of law cannot be overstated, as it is essential for creating a society that is just, equitable, and sustainable.
Preventive detention however as a permanent feature of the Constitution itself and as a regular feature of the constitutional paraphernalia requires re-consideration.

Freedom of mind and conscience are guaranteed by such freedoms as freedom of speech, freedom of religion, freedom of organisation, freedom of movement, freedom of associations, freedom of practice, profession, trade or business, freedom to form peaceable assembly and freedom to hold and dispose of properties. As already indicated many of these freedoms are subjects of Article 19, Article 25 and Article 31 of the Constitution. These freedoms are fundamental freedoms to enable a man to develop his personality to the fullest extent.

The rule of law, however, in the great sphere of justice between man and man and between man and State has acquired new significance and new dimensions in modern jurisprudence. The rule of law in favour of freedom of contract and freedom of property and their sanctity have now been saddled with increasing social responsibilities, a product of growing social consciousness. The Judges of the last century were over-awed by the sanctity of private contract and unqualified private rights of property. That is the rule of law to which they were born, in which they were trained and which they were supposed to administer. Rights of the individual were the dominant note of that rule of law. A change in the shift and emphasis is now apparent. The duties, rights, obligations, and responsibilities of property and contract have gained recognition in this sphere of the rule of law. It is reflected in the Constitution of India. Freedom of property rights is subject to the control of reasonable restriction in the interests of the general public as in Article 19 of the Constitution. The property right is also liable to compulsory acquisition of property, subject no doubt to compensation, whose quantum cannot be questioned in any court as in Article 31 of the Constitution. Sanctity of private contracts has yielded place to the rights of collective bargaining specially in the jurisprudence of Labour Law and under many special statutes for instance the Industrial Disputes Act. The contracts
by the State have also to be under special forms to make the State liable in case of breach.

Many new Tribunals and growing administrative law are competing with the ordinary courts of the land and with the ordinary laws in dispensing a good part of justice in the State. To that extent the ordinary rule of law has been infringed. But the rule of law which insists on independent decision is still a factor in the new jurisprudence of this new age. If it is vital for the ordinary courts that they should be independent of the executive it is more vital for the tribunals which are growing up to administer substantial and crucial justice in significant fields of rights between man and man and between man and the State, that these tribunals should be independent of the executive. One way of achieving this independence for these tribunals is by granting at least a right of appeal on a point of law to a superior court of the land in the ordinary hierarchy of the courts under the ordinary laws. For in that event the law which the tribunals will apply will be the law laid down by the superior courts and not by the executive. Instances of this recognition of the rule of law are to be found in reference to High Courts in such cases for instance under the Income Tax Act, the Sales Tax Act, the Workmans’ Compensation Act and from the Rent Courts. The overall jurisdiction of the Supreme Court and the High Courts, by way of writs, revision, superintendence and appeals under the Indian Constitution still protect in a large measure the rule of law in India and lead to the unity and uniformity of standards among tribunals operating in the different spheres of law and administration in the country.

The rule of law really is an antidote to power and its abuse. It has been well said: “All power corrupts. Absolute power corrupts absolutely.” The official or the executive who today possesses the power does not realise when he is exceeding his limits. Lord Denning in his Hamlyn Lectures _Freedom under the Law_ described it as insidious and so insidious that the official or the executive often believes that he is acting for the public good when in fact he is only asserting his unjustified and brief authority. Lord Denning said
there (cf. page 100): "The Jack-in-office never realises that he is being a little tyrant." The most important task of the Court and the rule of law is that the powers of the executive are properly used, honestly and reasonably for the purposes authorised by Parliament and Legislatures and not for any other consideration. Lord Denning posed this problem, in the following terms at page 103 of his Hamlyn Lectures:

"The problem before us today is not so clear cut. It is more subtle, as is to be expected in a more complex society, but it is in principle the same, and it must be solved by the courts and not by civil war. For today the executive have great powers over the lives and property of every one of us. No one will dispute that the powers exist, for Parliament has granted them, but the question is what remedy the courts provide if they are misused or abused."

This is the greatest challenge to the rule of law in the modern age. In the realm of the rule of law, the exercise of these executive powers, is the frequent and recurring source of irritation and protest, specially when these powers relate to search, seizure, and entry. They produce direct conflict between the rights of man and the rights of the State. Many new powers of search and entry are today recognised in modern statutes. Enforcement officers from the Income Tax Department, Customs Department, Excise Department, Food Department and many other Government executive agencies are today clothed with the right to enter shop and residential premises to inspect goods and call upon the shopkeeper and the householder to produce his goods and papers. Factory Inspectors, Sanitary Inspectors, Town Planning or Municipal officers and a whole host of miscellaneous officers of the Government may enter all kinds of premises for various purposes. It is said that the officials of the Ministry of Supply of England may enter an Englishman's house, no longer a castle, in order to see if he is doing research into atomic energy and the officials of the Agricultural Committee, can enter an Englishman's land to see if he is farming it properly. Many Parliamentary and State Statutes in India bear testimony to these powers. Many of these powers
conferred on such officers are much greater than those conferred on the ordinary police, with which the rule of law was so long familiar. In some cases it is not necessary for these officers, as it is for the police, to get a search warrant even from the Magistrate, nor even is it necessary for them to show to anybody else outside themselves, that they have reasonable grounds for thinking that an offence has been committed or the law which they are asked to administer has been violated. All that they need to be armed with is a duly authenticated power from an official of their own department.

No one for a moment disputes the policy whether such powers should be at all granted or not. That is a matter for Parliament and Legislatures to decide. What the rule of law insists is that these powers and their mechanism must be exercised genuinely for the purposes conferred by Parliament and the Legislatures and if they are exercised in a way which is unreasonable, beyond the purpose and beyond the limits of the statutes, then the Courts and the processes of law should be able to effectively interfere. It does not mean that the courts will interfere or the rule of law will insist on interference, if the public authority or the government department or the executive, exercises its powers genuinely in the public interest and for the purposes of the statute which it administers. Again as Lord Denning said, “It is not the use of the powers, but the misuse of them,” which has to be protected and defended by the rule of law in modern jurisprudence.

The rule of law is faced with a very peculiar situation in this respect. While it is possible to make the rule of law effective against the misuse or the abuse of power, it has remained a passive spectator in instances of non-use of legitimate powers. Very often a public authority has power to issue a licence but equally often that authority delays indefinitely consideration of application for such licence. The question arises whether in such a case the aggrieved person has a remedy. What is the legal position where a man’s house leaks because he needs a licence to do the repairs, but
the legal authority puts off issuing the licence indefinitely while water gets in and damages his goods. Similarly some one may have urgent work or business abroad and the Treasury may delay consideration of his application for necessary currency with the result that the man loses the business or the work. Lord Denning points out that unlike Droit Administratif in France on this point of non-user of power there is no corresponding principle in English Law to deal with such cases of non-use of powers. To some extent writs such as mandamus are of help in this respect as part of the rule of law.

Lord Denning in his Hamlyn Lectures on *Freedom under the Law* summarises the position of the rule of law, at pages 125-26, in these terms:

"The chief point which emerges is that we have not yet settled the principles upon which to control the new powers of the executive. No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us, what is the remedy? Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions, and actions for negligence: and, in judicial matters, by compulsory powers to order a case stated. This is not a task for Parliament. Our representatives there cannot control the day to day activities of the many who administer the manifold activities of the State: nor can they award damages to those who are injured by any abuses. The courts must do this. Of all the great tasks that lie ahead, this is the greatest. Properly exercised the new powers of the executive lead to the Welfare State; but abused they lead to the totalitarian State."
The rule of law in order to be truly effective must therefore be operated not only in the fields of substance but also in the fields of procedure. The ultimate efficacy of the rule of law, lies in having free access to the courts not only for the redress of traditional wrongs and breaches of law, but also in respect of excessive illegal and unauthorised use or non-use of the diverse powers that the new legislations and statutes of modern Welfare States are creating. “Justice according to Law” is sometimes used as a doctrine to justify application of unrestricted powers outside the pale of the rule of law, the ordinary courts and the processes of law. Roscoe Pound chose for his subject of the Green Foundation Lectures this theme, “Justice According to Law.” He mentions four characteristic threats to the rule of law. The most serious tendency is to decide without a hearing, or without hearing the necessary parties or by a mere appearance of a hearing; the results having been predetermined. That is the first threat. The second threat is a closely related tendency to make determination on the basis of consultation with witnesses in private or of reports not divulged and which the affected parties had no opportunity to refute or explain. The third threat is to make such determination without a basis of dependable evidence of rational probative force. The fourth and the last threat is the widespread tendency to set up and give effect to policies beyond or even at variance with the statutes or the general law governing the action of the administrative agencies exercising these powers.

In discussing the doctrine of “Justice According to Law” Roscoe Pound analysed the advantages and disadvantages of legislative justice, administrative or executive justice and judicial justice. According to him legislative justice became obsolete both in England and the United States by the end of the 19th century. The record and history of legislative justice, points out Roscoe Pound indicates “the bad features of justice without law.” He goes on to say that legislative justice is uncertain and unequal and capricious with such examples as bills of attainder, bills of pains and penalties, legislative lynchings. Legislative justice also shows the influence of personal solicitation, lobbying and even corruption
far beyond even bitterest attacks on courts by the bitterest enemies of the judicial system. Finally Roscoe Pound points out that legislative justice is disfigured everywhere by party politics partisanship and by a practice of participation in argument and decision by many who have not heard all or even a substantial part of the evidence and who are not trained to weigh arguments for and against a controversy. Its only advantage, temporary though it is, is that it is more responsive to the popular will than judicial justice, which is criticised as too logistic to be realistic and responsive. But the very facility of legislative justice as being readily responsive shows the danger and influence of what Roscoe Pound describes as "the mob mind" as determinants of the basic structures of society, law and behaviour.

Pound explains in his Lectures on "Justice According to Law" the four checks upon judicial justice which tilt the balance in favour of judicial justice. The first is that the Judge from his very training is impelled to conform his action to certain known or rational principles or standards. The second is that every decision in the course of judicial justice is subject to criticism by a trained profession, to whose opinion the Judge himself as a member of the profession, is keenly sensitive. The third is that every decision and the case on which it is based, the claims of the parties, the evidence, and the findings of fact, appear in public records duly authenticated and proved. The fourth and the last is that the decision of Judges is reviewable in a hierarchy of appeals revision and superintendence so that individual prejudices, preconceptions and eccentricities of individual decisions get ironed out in process. There is thus less scope for judicial justice to be swayed by the passing excitement and the clamour of the hour and the day. Roscoe Pound finally came to the following conclusion in those Green Foundation Lectures:

"The real foe of absolutism is law. It presupposes a life measured by reason, a legal order measured by reason, and a judicial process carried on by applying a reasoned technique to experience developed by reason and reason tested by experience."
In truth that is the mission of the rule of law. The most insidious threat to the rule of law, as I conceive it, is the growing assumption that law can be something separate and apart from justice. There is a growing school of thought which criticises the view that there can be no absolute justice, but justice must take its cue wholly from law that happens to be made by the ruler or the Government, that law is only a serving maid for a particular State and the particular political creed or philosophy that it stands for. The original sinners in this respect were perhaps Austin and Hobbes. But their modern descendants are more eloquent and vociferous. That is why perhaps a recent Archbishop of Canterbury told the lawyers of the Inns of Court in England with almost delicate and trenchant irony,

"I cannot say that I know much about the law, having been far more interested in justice. The real core of the problem is that there can be no law without justice and no justice without law. That is the dimension within which the rule of law functions. Both Goodhart and Lord Denning have recently taken pains to explain that the ultimate foundation of all law and justice is morality. Lord Denning in his The Road to Justice pricked the growing bubble that Acts of Parliament are the panacea of all wrongs, private and public, when he said 'Some lawyer thinks that the sovereign remedy for all ills is an Act of Parliament. They assume that Parliament knows everything and can do everything. But Parliament is made up of men as we are, who have not the time or the capacity to guard all the points at which freedom is threatened'."

That is why the Indian Constitution enshrines the aspiration of the people that the major disputes and controversy in the nation and the society must accept the discipline of the courts and the rule of law. The stake is too great. It is nothing less than the future of human civilisation. The dangers are great because these threats to the rule of law often come under the cover of law and are in many instances, unseen and insidious.
APPENDIX

A NEW PROBLEM IN CONSTITUTIONAL AMENDMENT IN
I. C. GOLAK NATH vs. STATE OF PUNJAB

In the Chapter on Legislative Power and Legislative Institutions the problem of constitutional amendment has already been discussed in this book. What was anticipated there has come true. When these lectures were delivered the Supreme Court decision in I. C. Golak Nath vs. State of Punjab (Writ Petition 153 of 1966) had not come. The Supreme Court delivered the judgement in that case on 27th February, 1967. This decision has raised a critical problem of constitutional amendment. Hence this short appendix on the point is being added.

The basic premise of this decision is that Parliament’s power to amend the Constitution is included in the general legislative power. In the light of this basic premise “law” in Article 13(2) of the Constitution has been held to include an amendment of the Constitution. In elaboration of this view the Supreme Court in its majority judgment has discussed not only such legislative powers as are expressly mentioned in Articles 245, 246 and 248 of the Constitution, but has also scrutinised and commented on Articles 2, 3 and 4 of the Constitution and has adopted by that logic the grammarian construction, so frequently followed in ordinary statutory interpretation, that whatever is not expressly said is impliedly excluded. The majority of the Supreme Court came to the conclusion that Article 368 of the Constitution related only to procedure. The general conclusion arrived at by the majority decision is that amendment cannot be made in the basic structure of the Constitution, but can only provide such addi-
tions or alterations as are within the framework of the given Constitution.

The majority decision of the Supreme Court appears to be founded on the theory and philosophy that fundamental rights are something transcendental to the Constitution. While criticising the previous decision of the Supreme Court in Shankari Prosad vs. Union of India, A.I.R. 1951 SC 458 = 1952 SCR 89, Chief Justice Subba Rao expressed surprise at the unreasonableness of that decision on the ground that "while a single fundamental right cannot be abridged or taken away by the entire Parliament unanimously voting to that effect only a 2/3rd majority can do away with all the fundamental rights." If the Constitution has said so, is it for the Supreme Court to enter into the question of its unreasonableness?

The minority judgment and specially the dissenting judgment of Wanchoo, J. held that Shankari Prosad and Sajjan Singh Cases, already discussed in these Lectures, took the correct view of the scope and extent of the amending power under the Constitution. If Parliament does not have the power to legislate on the subject enumerated in List III of the 7th Schedule, it would never be competent to amend the Constitution so as to transfer any of the subjects of the State List to the Union List or the Concurrent List except of course in emergency. Wanchoo, J. criticised the premise of the majority view that the power of amendment was to be found in the residuary power of law making possessed by Parliament under Article 248 of the Constitution, by pointing out that originally the intention of the Constitution makers was to place the residuary power in the State legislatures and if that had been carried out in the Constitution, it would have been impossible to argue that such residuary power of the State included the power to amend the Constitution.

This decision of the Supreme Court is open to serious criticism. In the first place the constitutional dust storm whether "law" in Article 13(2) of the Constitution includes the law of constitutional amendment prevented a sensible, reasonable and appropriate interpretation of Article 368 of the
Constitution, which was crucial to the problem. Article 368 of the Constitution no doubt in its marginal note describes it as the procedure for the amendment of the Constitution. But a Constitution is not to be expounded solely on the yardstick of marginal notes. Article 368 of the Constitution has inherent proofs within itself to show that it is not merely a procedure but also a charter for the amendment of the Constitution. It uses such language and expression as (1) “The Constitution shall stand amended in accordance with the terms of the Bill,” (2) “Provided that if such amendment seeks any change,” and (3) “The amendment shall also require to be ratified.” All these three expressions mean that Article 368 of the Constitution is both a procedure and a power for amendment. If the majority judgment is correct in its principle about expressed and implied construction of the Constitution then it is proper to hold that no Constitution would conceivably indulge in the useless step of prescribing an elaborate and detailed procedure to amend the Constitution when the power to amend was absent. In that context the power to amend must necessarily be implied. It is submitted that it is not even necessary to imply because the power to amend the Constitution is expressly given by the three expressions quoted above. In the second place, the proposition advanced in the majority judgment that a Constituent Assembly can be called by Parliament, for instance, as suggested by Hidayatullah, J. is still more difficult to accept. What legal or constitutional right has Parliament to call a Constituent Assembly? The Constitution of India contains no provision authorising or empowering Parliament to call a Constituent Assembly, under any circumstances, or any terms. Parliament is itself a creature of the Constitution. If the Constitution does not provide for a Constituent Assembly, it is the people of India who alone can give themselves any Constitution. It is all the more so if the majority judgment is right that the Constitution itself does not provide for its amendment. Such a proposition is self-contradictory on the very thesis of the majority judgment. The pages of world history of constitutional experiments show that in such a context the people call popular and representative conventions for framing a Constitution on such basis of representation and composition as the Convention
decides. This is an extra constitutional method, short of revolution, of framing or amending a Constitution, belonging to the region of politics and not of constitutional law. Thirdly, in the Indian Constitution the attempted distinction between its "basic structures" and "additions or alterations within that structure" as made by the majority judgment is also open to obvious objection. Here again Article 368 of the Constitution is a guide. The first paragraph of Article 368 includes all amendments. The second paragraph makes exceptions for five different classes of amendments mentioned in sub-paragraphs (a), (b), (c), (d) and (e) under the proviso as requiring ratification of State legislatures. No other distinction on the score of basic and non-basic provisions of the Constitution appears therefore to be at all justified. Lastly, rights made "fundamental" by the Constitution are not, by that adjective, made transcendental or by that fact alone beyond the reach of the Constitution. Fundamental right is a gift of the Constitution. What the Constitution has given the Constitution can take away, no doubt by constitutional means and no doubt by making constitutional provisions for the same. The word "fundamental" *ipso facto* does not mean constitutionally unalterable. A Constitution which cannot be constitutionally amended is an invitation to revolution. An interpretation of the Constitution which makes constitutional amendment impossible should be resorted to only as the very last resort when all other interpretations fail unequivocally which was not so in this case. A Constitution that can be too easily amended makes for uncertainty and insecurity. In between the two extremes of an unalterable Constitution and an easily alterable Constitution, Article 368 of the Indian Constitution attempted to take the middle course of making amendment of the Constitution neither too easy nor impossible. It has its defects which have been noticed already in these lectures and by all means remove these defects but it is submitted that it has not the defect of not possessing the power to amend. From that point of view the idea of a body of sacrosanct fundamental rights is disruptive of the Constitution. There is no theory of natural right or divine right expressly or impliedly written in the Constitution of India. The provision relating to preventive detention and imposition
of restriction on fundamental rights are patent proofs that such fundamental rights under the Indian Constitution were intended to be neither permanent nor unamendable.

The Supreme Court decision has also raised another problem by its pronouncement on the binding character of its own decision and by its enunciation of the doctrine of prospective overruling of its previous precedents. Two criticisms of the doctrine enunciated by the Supreme Court on this point are obvious.

First, if past precedents of the Supreme Court on interpretation of the Indian Constitution and specially on questions of fundamental rights and constitutional amendments are to be overruled by its subsequent decisions, then one thing must be clear and that is that there must be a substantial majority if not an unanimous subsequent decision to overrule a previous precedent. In Golak Nath's case, for instance, what happened was extraordinary. Eleven Judges of the Supreme Court formed the Bench to decide that case. The majority was composed of six judges consisting of Subba Rao, C.J., Hidayatullah, Shah, Sikri, Shelat and Vaidyalingam, J. J. The minority was composed of Five Judges consisting of Wanchoo, J. (now C.J.), Ramaswami, Bachawat, Mitter and Bhargava, J. J. who dissented from the majority. The result is that by one vote, that is, 6 against 5, such an important constitutional problem was decided by the Supreme Court holding that the Constitution is unamendable for all practical purposes and that previous precedents can be overruled. The Constitution of a country should not be made to depend on such a chance solitary vote. If Article 368 of the Constitution provides for such majority as 2/3rd of the House present and voting and ratification by one-half of the States in India, then there is no obvious reason why one Judge alone of the Supreme Court should have the freedom to upset the Constitution so vitally. It is suggested that if previous precedents on constitutional law, are to be overruled by subsequent decisions then such overruling must be done either by the unanimous decision or at least by a 3/4th majority of the Bench of the Supreme Court deciding the question. I would suggest that all the Judges of the Supreme Court should be on the
Bench deciding such a question, unanimously or by three-fourth majority.

The second criticism is that the Indian Supreme Court should not have invoked the American theory of prospective overruling based on such American Supreme Court decisions as Linkletter vs. Walker, 381 U.S. 618, Wolf vs. Colorado 338 U.S. 25, and Mapp vs. Ohio, 367 U.S. 643. Chief Justice Subba Rao appears to deduce from this American theory that if a Court can overrule its earlier decision there is no reason why it should not restrict its ruling to the future. He came to the conclusion that the doctrine of prospective overruling was a modern doctrine suitable to a fast moving society, to correct future errors without disturbing past transactions. Subba Rao, C. J. attempted to lay down three norms on this point of prospective overruling namely, (1) the doctrine should be invoked only in matters arising under the Constitution, (2) it could be applied only in the highest Court, that is the Supreme Court, and (3) the scope of retroactive operation of the law declared by the Supreme Court superseding its earlier decision should be left to the discretion of the Supreme Court to be moulded according to the justice of the cause or matters before it. The net result was that the Supreme Court held that the impugned Amendment Acts were valid in spite of the fact that Parliament did not have the power to enact them. The majority view was that these Acts clearly violated the fundamental rights and in future, operation of these laws was bound to result in continued violation of the fundamental rights, but nevertheless the curious consequence is that the past remains good and the future will be bad. But these American cases arose on the interpretation of the “due process” clause in the American Constitution which is conspicuously absent from the Indian Constitution. The drafting history of the Indian Constitution shows that “due process” was deliberately eschewed. But if the law declared by the Supreme Court that these Acts were valid in spite of the fact that they violated the fundamental rights of the citizens, then is not such law under Article 141 in derogation of Article 13(2) of the Constitution of India? Wanchoo, J. in his minority judgment in this case protested that this
doctrine of prospective ruling would (1) create economic chaos and (2) be difficult if not impossible to apply where the law infringed a fundamental right. It is submitted that the Supreme Court interpreting the Indian Constitution is judicially confined to say whether the impugned act or statute is in breach of the Constitution and to hold either that it is constitutional or unconstitutional. It travels beyond its jurisdiction and judicial function when it attempts to say that past unconstitutional acts are good but the same acts in future will be bad under the cover of prospective overruling of its past precedents. This itself is unconstitutional.

The doctrine of prospective overruling of constitutional precedents has many dangers in the context of the Indian Constitution. The three norms suggested by Subba Rao, C.J. may first be examined. His first norm is to confine this doctrine to constitutional problems. What is the logic or the rationale behind this theory to confine prospective overruling to constitutional precedents and not extend it to non-constitutional precedents? One reason is that non-constitutional decisions can be corrected by statutes but constitutional precedents, unless the Supreme Court is in a position to overrule them, can only be corrected by the more difficult process of amendment of the Constitution, which according to the majority judgment is absent from the Indian Constitution. The inarticulate assumption is that the Supreme Court is the only Constitution-amending institution in India. If the basic decision of the Supreme Court that Article 368 is only procedure but not the power of amendment is wrong, then a good deal of the reason to confine the doctrine of prospective overruling of past constitutional precedents falls to the ground. Again logically if correction of error or injustice is the real reason for prospective overruling of past decisions, then let injustice whether of constitutional or other law be corrected without making a distinction between constitutional and non-constitutional precedents.

His second norm is to confine this doctrine to the Supreme Court. The reason behind this limitation is that because there is no higher judicial forum to correct the Supreme Court, the Supreme Court must have the freedom
to correct its own erroneous decisions. There is a good deal to be said in favour of this limitation. But in many of the State High Courts there are rules by which past Division Bench decisions can be over-ruled by Special Bench or Full Bench decisions of these High Courts. High Courts in India decide many important points of law constitutional and non-constitutional, which never to go the Supreme Court for any final pronouncement. Who is then going to correct such injustices?

His third norm to leave the retroactive operation of such overruling to the discretion of the Supreme Court is, it is submitted, on the reasons already indicated, unconstitutional. No power or discretion can be reserved to the Supreme Court to say that what is unconstitutional, is good for the past and only bad for the future.