By the same author:

*From Raj to Republic*

*Justice by Tribunals*
THE
CONSTITUTION OF INDIA
Studies in Perspective

by
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To
THE NATION
It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid inconvenience, but no further.

Parke, B.

Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting, to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.

Higgins, J.

After all, the Constitution, like a machine, is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs, today, nothing more than a set of honest men who will have the interest of the country before them.

Rajendra Prasad,
First President of India.
The Constitution of India epitomises my efforts, during my postgraduate class-work in the Calcutta University, towards understanding the nature, ambit and operations of the constitutional system under which we are living today. Piecing together as a secular construct the scribbled scraps used for class-work and glossing them over during many a discussion with my teachers, colleagues and students, I have tried to give the published work a reasonably up-to-date, authoritative, precise, pointed, comprehensive and yet a handy shape in the strain of a running discussion of the different provisions of the Constitution, although some of its parts have been cast in the form of commentaries.

In writing this book, I have primarily relied upon the text of the Constitution, as amended from time to time; select Supreme Court cases on the Constitution and my observation of political facts and trends in the country. Constituent Assembly debates; other historical and background materials; constitutional instruments, constitutional cases decided by the High Courts; and opinions of commentators on the Constitution and political writers have, however, been given due consideration; Constitutions of other countries, specially those of the U. K., U. S. A., U. S. S. R., Australia, Canada, Ireland and Japan, and leading cases and authoritative legal and political comments relating to them have also been taken into account, although comparative references to them have been assiduously avoided unless considered indispensable.

In this work I have taken the liberty of rearranging the provisions of the Constitution for the purpose of presenting an objective view of the wood without the trees obscuring the vision. This has also made me use certain new categories and expressions. For example, "Psephology and Pterology" is the title heading of Part Six of the work. The word "psephology", a derivative from the Greek psephos, meaning a pebble, is already gaining currency as the science of franchise and elections. And I have used the term "pterology", also a derivative from the Greek pteron, meaning a wing, as the science of parties, factions, interest groups, pressure units, and the like. Then, I have also refrained from deliberate frequent comments on the diverse socio-politico-economic implications of the constitutional provisions;
their interpretations by the courts, specially the Supreme Court; and constitutional operations and political events.

I have made an effort in all cases to state the law and the facts and draw reasonable inferences and hammer out tenable generalisations, although nothing may be found to have been excluded to such a degree as to make this work rank as a mere addition to the vast and growing literature on the Indian constitutional law. I have, however, an apprehension that these, as well as the manner and the speed of the final execution of this work, have tended somewhat to adversely affect its readability. For this I sincerely crave the indulgence of my kind readers and most cordially invite their specific suggestions for future improvements.

I take this opportunity to acknowledge my immense debt to my teachers, specially Dr. N. C. Roy, formerly Centenary Professor of Public Administration and Head of the Political Science Deptt., Calcutta University, and Dr. R. C. Ghosh who succeeded Dr. Roy as the Centenary Professor of Public Administration, my colleagues and my students for the kind patience with which they all have borne with me during numerous discussions on our constitutional and political system and also for their incisive queries which have kept me on constant alert. I am equally indebted to the members of my family, who suffer silently to see me accomplish a task like this.

I also record my deep sense of gratitude to the Calcutta University authorities, specially the Vice-Chancellor, Dr. S. N. Sen, the two Pro-Vice-Chancellors, Dr. P. K. Bose and Shri Arun Kumar Ray, and the Head of Political Science Deptt., Dr. S. K. Mukherjee, for ever encouraging me in their own ways to combine my class-work with other academic pursuits and for allowing me adequate opportunities for the purpose. I must also thank Shri Sripati Bhattacharjee of the World Press (P.) Ltd., and Shri Susanta Dasgupta, Librarian, Calcutta University Central Library, for having literally compelled me to come out in black and white with my views on our constitutional system. Then, there are many others who have helped me in numerous ways in bringing out this work and I am thankful to them all.

I need hardly asseverate, however, that all views expressed in this work, and all errors and omissions in it, are solely my responsibility.

Calcutta University, M. M. S.
June 1, 1975.
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      Bom. Bombay
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      J. & K. Jammu and Kashmir
      Ker. Kerala
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Bom. L. R. Bombay Law Reporter
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THE INDIAN DECLARATION OF INDEPENDENCE

The Objectives Resolution Unanimously Adopted by the
Constituent Assembly on Jan. 22, 1947

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

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

Wherein the said territories, whether with their present boundaries
or such others as may be determined by the Constituent Assembly and
thereafter according to the law of the Constitution, shall possess and
retain the status of autonomous units, together with residuary powers,
and exercise all powers and functions of government and administra-
tion, save and except such powers and functions as are vested in or
assigned to the Union, or as are inherent or implied in the Union or
resulting therefrom; and

Wherein all power and authority of the Sovereign Independent
India, its constituent parts and organs of government are derived
from the people; and

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

Wherein adequate safeguards shall be provided for minorities,
backward and tribal areas and depressed and other backward
classes; and

Whereby shall be maintained the integrity of the territory of the
Republic and its Sovereign rights on land, sea and air according to
justice and the law of civilised nations; and

This ancient land attain its rightful and honoured place in the
world and make its full and willing contribution to the promotion of
world peace and the welfare of mankind.

xxiii
PART ONE

CONCEPTION OF THE CONSTITUTION
CHAPTER 1

THE CONCEPT OF THE CONSTITUTION

To constitute means to establish, form, make, appoint, ordain or give being to; and it may not seem uncommon to contend that the state is the consequence of the constitution.\(^1\) Human history and everyday experience combine, however, to conclusively suggest that a state may be the consequence of a constitution, but the state neither in origin nor in existence nor in operation need necessarily depend on the constitution, unless, of course, any working arrangement of the state be deemed to be the constitution, which will then cause many a queer contradiction in the conception of the constitution itself.

MAN AND SOCIETY

For a tenable conception of the constitution the evident fact of social life may provide a convenient point of departure. It may, perhaps, be never known with precision how, when or why the social life of man began, but he is found to live with others of his kind in a frame of relations, which is decisively different from a mere gregis of any other species of living beings. Again, it may also be never known with certitude when and how man got separated from his ancestors, apes, but all anthropological and archaeological probes made thus far go to confirm that this erect biped’s specialisation of his fore-legs into a pair of new limbs, arms, was achieved simultaneously with his acquisition of brain power as a cognitive faculty, and that he has almost always been an external tool-building and tool-using creature. He also came to possess language as a vehicle for communicating ideas.\(^2\)

Obviously, individual personality and human society are concomitant. If man has his being in society, to suggest that some of his actions are self-regarding and others are other-

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regarding\(^3\) is not only to contribute to an archaic theory of individualism, but also to deny the objective fact of man-society inter-relatedness. Man's living in common with others of his kind implies of necessity that his every act will have an impact, however remote, indirect or imperceptible, on others as well\(^4\). The *homo sapien*, however, lives his life in common with numerous unlikes, both animate and inanimate. In the result, not only every act but every event also impinges, in one way or the other, on the intricate web of innumerable human relations, termed society, in which man has his being.

An act or event in any situation is like a small stone cast into placid lake waters, which, the moment it is cast into the water, causes ringlets of waves which, though deep and powerful first in the immediate area of hit, spill around until finally become invisible. Imagine then a vast turbulent ocean, which the society is, with innumerable stones of different sizes being incessantly cast into it from diverse directions with varying velocities. The resultant immediate or spill-over impact of a tiny stone getting flung into it in a fit of absent mindedness is most likely to pass off unnoticed. Nevertheless, the impact is there. Such is the society with its intricate web.

However small or large a human assemblage, the problem of visible or invisible immediate and spill-over impacts of any act or event is ever present. True, this a problem of human life as much as it is a problem of any other form of existence. But in application to man this problem assumes a peculiar dimension in the constant need for harmonising the dignity of the unit, the individual, with the unity of the aggregation, the society. This human dimension of the problem arises from the fact that man alone is possessed of infinite cognitive and linguistic faculties and the capabilities to devise and utilise tools external to his body. And it is this dimension that brings the public into being.

**THE PUBLIC AND POLITICS**

When the impact of an act or event on a frame of human relations gets perceived and recognised as being of sufficient moment to call for any concerted move to contain, continue, eliminate, extend or intensify the immediate or spill-over impact


or impacts of an act or event, the public may be said to be born. The process from perception on to any follow-on action, including the act or event, becomes a public affair as distinguished from a private one; as one of general or common concern instead of remaining the concern of units or individuals. It is, however, not that any affair is inherently public or private; of general or common nature distinct from the interest of units or individuals. It is the manner of approaching an affair that calls for an occasion for classification. Significantly, this classification also is a classification of convenience for the sake of comprehension, but it has also proved its practical utility. It has provided man with a convenient working proposition to guide him in his actions.

This process of perception, recognition and pursuant action is, however, all pervasive. It permeates every human formation, irrespective of its basis, genesis, time, place, object, structure or size, or units or individuals, though not entirely as a conscious process and not always in the same complex, explicit or subtle style, or on an elaborate scale. How complex or elaborate this process is in a particular segment depends on a variety of factors, including the time, place, area, technique, intensity or intricacy of the concerned web of relations, the growth of cognitive faculty and the development of tool-devising and tool-utilising capabilities. But, nevertheless, it is a continuum, because the public is the ever present being.

To achieve a desired objective, the public tends to secure for itself all the power\(^5\) that the concerned human formation may possibly muster up at any moment. Precisely, the omnipresent public seeks to become omnipotent. The public becomes political. The continuum of public process in a community of persons gains a distinct orientation, i.e., an objective purporting to be public in any human formation needs to be pursued with all the power of the formation. It is, so to say, the tendency of the public towards totalisation that transforms the continuum of public process into a political process, and the power put into the process becomes political power. Politics is then public process seeking to realise itself with the support of the entire

power at the disposal of the human unit or units concerned. Man is thus indeed a political being, as Aristotle said in his *Politics*, and the basis, genesis and existence of the state, which is a differentiated public entity for a specialised purpose, is to be traced to the continuum of thus oriented public process.

**THE STATE AND ITS OPERATIONS**

In looking at the state it is of interest to remember that the history of all existences is, at bottom, a history of evolution; and the history of all evolutions is essentially a history of the development of an entity from a homogeneous, multipurpose mass into differentiated, specialized, although inter-dependent, organs or units. As man moves on from one stage of evolution to another, the task of perceiving, recognising and pursuing follow-on actions in respect of an impact of any act or event on the totality of a community of persons becomes more continuous, complex and elaborate, thereby necessitating more established, specialised and organised responses.

In due course, this task becomes entrusted to, or assumed by, a specialised functional agency, and the community becomes identified with, more or less, a definite territory; and the state may be said to be born with the assertion of the community's claim to manage its affairs *exclusively*. The agency is then the government, which is but a group of persons purporting to exercise in corporate capacity all the powers of the state, and the community, including the agency, operating as a functional construct, with exclusive control over its affairs within the territory, constitutes the state. This state is, *ex hypothesi*, sovereign, because sovereignty refers to the primacy appertaining to the state to perform public functions in a community of persons.

Obviously, specialisation is at the bottom of civilization; and the state specialises in a tool of action, the law. The basis of the law may be said to be the human nature itself which generally tends, consciously or unconsciously, to express itself in a more or less consistent or orderly design. It is this fact

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6 On this view of the matter Political Science may be defined as the science of public affairs, and it must concentrate on the whole gamut of public affairs. Only thus conceived this discipline may find its legitimate functional mainland, public affair, and get out of its present institutional islet, the state.

of human articulation in uniformities, supplemented with the need and the desire to generalise and universalise the uniformities, that lies at the root of any scheme of imperative conduct norms which in all cases purport to sustain the essential dignity of human personality consistently with the factual necessity of human sociability. And the legal categories in a community constitute but one such scheme of imperative conduct norms which have the backing of all the power of the community to sustain their operations. The law is, thus, essentially an instrument of social power devised and placed in the care of the state. It is in this sense, then, that law may, in the ultimate analysis, be said to proclaim: "I will kill you to make you conform to my requirements".

With the march of time, as social relations become more specified, conscious, diversified, numerous, stratified and complex, state responses become more legal, liberal or democratic, specialised, multifarious, intensified and organised. Sovereignty comes to imply not only external exclusiveness, but also internal finality. Factual primacy turns into legal supremacy. The functions of the liberal legal state find theoretical expression in the institutional trio of the legislature, the executive and the judiciary, themselves subject to law, moving towards increasing participation by the people in their operations.

Eventually, however, this institutional trio founders on the rock of the realities of the industrial urban civilization, and a new functional test is devised to sustain the operations of the liberal legal state; and even a new dimension, administration, whether conceived as a function, or a structure, or both, is sought to be added to the traditional trio. The state is still a legal state, but it is, today, looked upon as a positive service entity, and law is now regarded as an instrument of social action and not merely as a tool of social control.

But nothing seems to have affected the fundamental nature of the state, because it has always remained public, or to be more technical, political. The entire fabric of the state functions is made of the same fibre, of the political substance. Although this fabric may differ in texture or design from one work-sector to another, whether intra-territorial or inter-territorial, and allow thereby, for the sake of a clearer and more convenient

comprehension of state operations, a reasonable basis for differently designating one work-sector from another, it is imperative to note, without a shadow of deep theoretical bias and superficial traditional or institutional illusions, that any visual sense of sectoral variety is really a mere effect of arranging the same fibre in different manners with reference to the nature of the relevant subject-matter.

The state, then, is a functional organisation (or, at best, association) of the people of a more or less definite territory with exclusive and final competence to manage their public affairs through the agency of government.

Although in its modern form the state may be said to have emerged only towards the end of the fifteenth century, in one form or another, public power, or more precisely, political power, *stricto sensu*, must be said to have existed throughout human history, albeit vested in or exercised by different persons or agencies at different times and places. Political power or political process is not tied to the apron-string of a particular form of political organisation, the state, because it is rooted in the very fact of man’s existence in common with others of his kind. It sings like Shelley’s *Cloud*: “I change, but never die.” Even to the Marxist the state does not vanish but withers away.¹ Its particular form as an instrument of class oppression melts away; the “government over persons is replaced by the administration of things”.²

THE STATE AND THE CONSTITUTION

The modern state is characterised by its instrument of action, the law. It is said to live in law, act through law,¹⁰ or, at least, to exercise all its powers subject to or in accordance with the law. Indeed, the state in entirety can never be conceived merely in terms of law, nor can any attempt to fully comprehend the innumerable assumptions underlying the conception of the legal state be very successful. Nonetheless, the conception of the legal state marks a turning point in the history of human institutions. Its greatest contribution lies in the fact that it seeks to chain the leviathan by substituting the objective, impersonal rule of laws for the subjective, personal government

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of men. And it is in this that the constitution of a country may really be said to be rooted.

The state as subject to the rule of law does not appear to have ever yielded all its implications to any analysis, but it seems that it implies that the persons in authority not only derive their powers from law, or are subject to law, or exercise their powers accordingly to law, but enjoy or exercise only limited powers under law. Fundamentally it requires a limitation of the powers of individuals or agencies exercising the authority of the state. Next, it involves some sort of separation of powers to avoid concentration of powers. Again, it imports a notion of equality, however inexplicable or imprecise this notion may be. Implicit in it are also the ideas of specifying the liberties and rights of individuals, providing for their participation in state operations, and defining the liabilities of the persons in authority.

When a community sets itself the task of identifying the fundamental norms governing the above principal and allied issues, it may be said to be on the path of forming a constitution. It is quite possible that in the course of its development to statehood, or its operations as the state, a community in a country may of necessity come to gather a conglomeration of working propositions which become invested with an aura of higher or basic norms for the governance of the country, though not even mainly forming a single code, or referable to a single document, but still regarded well settled and generally binding.

Once a justiciable core of such binding, basic norms becomes definitive and established in any manner in a country, the country, irrespective of the fact that even most of these norms do not constitute a single code or document, or that they are not wholly justiciable, the country must be said to have a constitution, albeit an unwritten one. In such a case the constitution can possibly be conceived only abstractly as a set of certain


12 A country in this context connotes a geographical entity, a more or less definite territory, recognised as a political fact and conveying to its inhabitants a sense of unity.

13 See below the discussion on “The Law and the Constitution”. Broadly, a norm is justiciable if it is cognisable as a law of the land by a court of the country, although the court itself may be a creature of the law of the land.
basic norms, justiciable or binding. If, however, the bulk of such binding, basic norms in a country, whether entirely justiciable or not, form a single code, or one single document, framed, or, more appropriately, enacted, at a historic moment in the life of the community, the country is said to have a written constitution. The constitution in this case may refer abstractly to the set of justiciable or binding basic norms contained in the document, or code, or concretely to the document, or the code, itself. In all cases, however, it may seem more desirable to look upon the constitution as a set of binding or justiciable basic norms for the governance of a country. In all cases, again, the constitution must have a justiciable area, referred to as the law of the constitution or constitutional law.

It is also to be noted that a constitution may be given to a country by the parent state at the time the latter concedes statehood to the former. Again, a country may become independent of its parent state in consequence of a revolution or an enactment, and may subsequently frame its own constitution. An established constitution in a country may also be bid goodbye to as a result of an internal coup or revolution, a war or a civil war, or an agreement or concensus, and eventually a new constitution may be formed. Besides, a constitution may remain in suspended animation because of what is commonly called martial law, or may become changed beyond recognition because of formal or informal methods of change. In effect, it seems reasonable to suggest that there is nothing sacrosanct or immutable about the constitution.

The constitution thus conceived presupposes the concepts of community, country, state, sovereignty and law. A country may be a sovereign state, but it may not have a constitution, although every sovereign state must of necessity possess some working arrangement for the exercise of its powers and functions. Besides, the word "constitution" is also used in relation to non-sovereign territorial or functional units, particularly the units of a federation. However, strictly speaking, the term "constitution" can be used only in the context of a sovereign state, including, of course, the units of a federal state. It should be obvious now that the state is not of necessity dependent on the constitution, but the constitution is always dependent on the state, although once the state comes to have a constitution, it must conform in its operations to the constitu-
tional requirements, because the constitution is an actualisation of the will of the sovereign. Although this does not mean that the constitution cannot be changed, it means that so long as it exists it must rule supreme.

The constitution may then be said to issue forth ultimately from the sovereign, and it may contain more or less, according to the needs of the community concerned, provided it contains the basic minimum for securing the operations of the state according to law. This basic minimum is, however, also a mobile concept, but in any case the constitution must contain certain rules, principles and practices which form the basis in a country for its operation within the frame of law as a sovereign state. And these rules, principles and practices are to be ascertained from at least six immediate sources.

Obviously, there is, first, the constitutional document, if any. Second, there are constitutional statutes passed, in conformity with the constitution, by the appropriate legislature to supplement the constitution. Third come constitutional or statutory instruments, i.e., orders, rules or regulations framed by the appropriate authorities to further supplement the constitution. Fourth, there are constitutional cases decided by competent courts while interpreting, declaring and applying the law of the constitution. Fifth come constitutional conventions, worked out and observed as binding by the persons concerned, for a smooth working of the constitution in tune with time. And last come authoritative constitutional commentaries by recognised jurists who analyse, collate, sift and elaborate the rules and principles of the constitution.

To these six may be added yet another; the relevant constitutional rules, principles and practices of foreign countries. This seventh source becomes of particular significance in the case of a country belonging to a broad legal system, such as the common law. Of these seven, the first four can, *stricto sensu*, be the sources of the law of the constitution. The sixth one is a mere secondary source, and the seventh can but be a tertiary source.

The Significance of Distinction Between Written and Unwritten Constitutions: On a closer scrutiny, however, the aforesaid distinction between written and unwritten constitutions
tends to display ambiguities. Both have got to be selective, skeletal. The constitution of a country provides a mere frame for the subsequent operations of the country as a sovereign state. Broadly speaking, it declares the aims and objectives of a political community, and concerns itself with the principal organs of government, rights and obligations of the members of the community, inter-relations between the state and the citizen, and the formalities for its own alteration. The specific matters which a constitution may contain can raise only a question of detail which varies from one country to another. The constitution “may contain more or less, according to the circumstances of the moment and the special problems being faced by the state while it is being drafted”.

Again, every constitution symbolises a phase in the development of a community, and epitomises the experiences, ideas, convictions, prejudices and predilections of its founders in particular and the generation of its founding in general. Besides, no constitution is wholly written, nor can a constitution be wholly law. Every constitution comprises non-documented, non-legal principles and practices, because once founded it has to be operated in tune with the changing needs and aspirations of the community concerned. Every constitution is, then, ultimately grounded in the conscience of the community, but in so far as it is law, it must be said to issue forth from the sovereign. But, whereas an unwritten constitution cannot emanate in the shape of a formal document, a written constitution can possibly emanate only in the form of a single enacted document.

From this fact of initial documentation flows, however, a fundamental distinction between the law of the constitution and the rest of the law of a country having a written constitution, which is of vital practical significance. In such a country, the justiciable core of the constitution must form part of the document initially framed as containing the constitution of the country. This justiciable part constitutes the fundamental law of the land to which the rest of the law of the country is subordinate, and, therefore, must conform, so long as the constitution remains unaltered. Constituent power, thus, gets differentiated from the ordinary law-making power; and the

15 Ibid.; p. 35.
the constitution, or constitutional law, in this case stands apart from and above the rest of the law of the land, although this should not lead to the inference that constitutional law thereby becomes more sacrosanct, or ceases to be part of the law of the land. But no such distinction, with their attendant implications, can possibly be said to exist in a country with an unwritten constitution.

In addition, in the scheme of a written constitution the panoply of sovereignty may not possibly, or need not really, get as amply expressed in relation to any single organ of the state as it can get, or needs to get, expressed under an unwritten constitution. A written constitution *per se* operates as a greater limiting factor on public authorities, although the degree of limitation may be variable. And this limitation becomes of great significance in the case of legislatures. "It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislation action."

**Other Classifications of Constitutions:** The late Lord Bryce classified constitutions also as moving or stationary, fluid or solid and flexible or rigid, of which the last classification has gained common currency. Dicey notwithstanding, the distinction between flexible and rigid constitutions may be said to be based exclusively on the formal procedure for changing the constitution. If a constitution is formally alterable in the manner of an ordinary enactment, it is said to be flexible: if, on the other hand, such an alteration requires a special procedure, the constitution is regarded rigid. The flexibility or rigidity of a constitution thus gets essentially related to the procedural formality of change and not the factual possibility of a change. But the formal procedural flexibility or rigidity may get modified as a result of a constitutional practice. In addition, there may be many subdivisions of rigidity depending on the complexity of the special procedure, or the fact that a constitution may declare a part of itself unalterable. A constitution may also blend both flexibility and rigidity in a suitable measure.

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In actual practice this classification may, however, suffer a complete breakdown. The constitution cannot possibly be static or mechanical. It has got to be not only dynamic but also organismic, if such an expression be permissible in this context. The constitution can, then, be said to be only Darwinian and not Newtonian, because it is meant to serve the real needs of a moving and growing community to which it relates.

If the formal or direct method of changing a constitution proves unhelpful to make it conform to the objective fact-situations confronting a community in the changed context of time, informal or indirect methods of change must get into action, if the constitution is to survive. In the result, the so-called rigid constitution of a country may become so substantially changed as to make its founding fathers turn in their graves. Yet it seems that the distinction between flexible and rigid constitutions is of significance not only because it reflects the attitude of a community towards the constitution or acts as a brake on frenzied responses to fleeting needs, but also because flexibility is inherent in an unwritten constitution and rigidity in a written one.

Constitutions are also spoken of as monarchical or republican, depending on whether the office of the head of state is heritable or not; as parliamentary or presidential, depending on whether the executive is directly responsible to the legislature or not; and as federal or unitary on the ground whether there is or not a division of power between two sets of government each technically operating coordinately with the other within its own sphere. All these, and many other, classifications of constitutions are not free from ambiguities, but significantly most of them are of both theoretical and practical interest. But the cardinal fact of greatest signification about constitution today is that every constitution is ostensibly founded on some sort of democratic assumptions. Constitutional government and democratic government, constitutionalism and democracy, have now become almost synonymous.

A DEFINITION OF THE CONSTITUTION

The constitution of a country, then, may be said to consist of those justiciable or binding rules, principles and practices which are considered fundamental in the governance of the
country. It is declaratory or prescriptive of certain ideas, facts, acts or institutions which provide the basic postulates for the subsequent operations of the country as a sovereign state in a democratic manner. But there is nothing sacrosanct about it. These postulates are but a group of working propositions which purport to be basic or fundamental only because they are founded in the experiences of, and convictions in, certain fundamentals of the community concerned, although, as some of these fundamental postulates are also legal norms, in certain cases some practical consequences of profound significance may follow.

These experiences and convictions have, however, to form and reform themselves in response to objective fact-situations. In the result, the constitution can never be an essay in eternity. Jefferson said: "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age wisdom more than human... Laws and institutions must go hand in hand with the progress of the human mind."

The constitution is, thus, a set of documented or non-documented justiciable or binding fundamental norms which constitute the national frame for securing the operations of the sovereign state in accordance with the law.

Only on this view of the matter an unwritten constitution also takes a definitive shape, and such diverse statements as that the constitution lays down the fundamental law of the land, or that the constitution is not merely law; or that the constitution is the cornerstone of the rule of law; or that the constitution is part of the law of the land; or that international law is part of the law of the land; or that constitutional law is public law; or that administrative law and constitutional law are twin sisters may possibly present an intelligibly harmonious pattern in any discussion relating to the constitution. And this also generally explains the nature, basis, genesis and scope of the constitution, although its implications in some specific directions require more detailed enquiry.

SOVEREIGNTY AND THE CONSTITUTION

The concept of sovereignty: The concept of sovereignty is highly tensile, and this tensility assumes enormous problematic proportions in the context of the historical emergence of the
king as the sovereign and the transformation of the sovereign as a person into sovereignty as an element of the state, and the diverse ends to which it has oftentimes been annealed to take the hue of individual thinking or occasional exigencies. In perspective, however, sovereignty is conceivable now only as a convenient working hypothesis for constructing and maintaining a scheme of justiciable imperative conduct norms, of the rule of law, in a community of persons with exclusive and final competence to manage its affairs through the agency of government. This community of persons is referable to as the state encompassing all public authorities in the country\(^\text{19}\), and sovereignty refers to the supremacy of the state in law to manage its affairs exclusively and finally.

This does not imply, however, that sovereignty in its diverse dimensions must always express itself merely in terms of law, or confine itself within the law; nor does it signify that the question whether a state is sovereign is a purely legal question. Sovereignty is, at bottom, the totality of public power crystallised into an attribute of the state. *Power* is thereby metamorphosed into *competence*. Public power becomes organised into public authority; but there always remains a reserve of power to over-ride, or even to overthrow, the authority. Sovereignty may, therefore, manifest itself in more numerous ways than can be compressed into strict legal categories, and its acquisition, extinction, existence or exercise may not unfrequently turn out to be entirely a question of fact, although from a recognition of such a primary fact flow of necessity several legal consequences.

*Sovereignty is, then, the supremacy of the state to manage its affairs exclusively and finally.*

It may be said, then, that sovereignty is rooted in a country's assertion of primacy in managing its own affairs. Secondly, its acquisition, extinction, existence or exercise in a country does not necessarily involve only legal issues. Thirdly, sovereignty is the *sine qua non* of statehood. Fourthly, it denotes the supreme competence of the state to give law to the people within its jurisdiction. Fifthly, sovereignty need not always express itself merely in terms of law. Sixthly, it implies independence of one state from another. Seventhly, it assumes the legal

\(^{19}\text{Cf. Art. 12, Constitution of India.}\)
equality of all the states. Eighthly, the notion of sovereign independence or equality is, however, not incompatible with the existence of any voluntary association of states. And lastly, sovereignty thus viewed need not necessarily cast aside its traditional characteristics of inalienability or indivisibility.

Location of Sovereignty: This view of sovereignty does, however, imply that the issues of actual location, or exercise of sovereignty in a country fall outside the ambit of a pure concept of sovereignty, although these issues may become particularly ticklish in a country having a written constitution of a federal type. Nonetheless, they are secondary issues arising out of the necessity to give concrete shape to an abstract conception; because abstract sovereignty can be concretely realised only through actual men and women in a community.

Sovereignty now must of necessity be always said to ultimately reside in the people or community. To say this is, however, no longer to subscribe only to the political doctrine of popular sovereignty, but to sustain a legal view now slowly, though steadily, gaining ground. But the logic of the situation also demands that the immediate expression of sovereignty in any particular case can only be traceable to a less nebulous human agency than the entire community of persons in a country. It is the necessity to indicate the immediate agency or agencies to give definite expressions to the sovereign power in defined directions on a more enduring basis that is the real founder of the constitution. And, perhaps, it is on this view of sovereignty alone that Austin may remain fairly intelligible even today.

The Constitution a Consequence of and a Limitation on Exercise of Sovereignty: Obviously, the constitution, in so far it lays down the basic justiciable norms in a country, must be said to flow from the sovereign of the country, whether it means ultimately an indeterminate people or immediately a determinate authority. And as the constitution is inconceivable without a justiciable nucleus, it can come into existence only in the exercise of sovereignty and continues in existence only as a

flat of the sovereign. In effect, therefore, when a country comes to have a constitution, it is not that the constitution comprehends sovereignty in entirety; it merely canalises the exercise of certain aspects of sovereignty in defined directions.

It implies, then, that so long as the constitution continues its existence, in respect of matters therein, sovereignty must be exercised in conformity with its provisions. This is because the sovereign ultimately remains indeterminate expressible, in particular cases, immediately only through determinate authorities, and an immediate authority cannot possibly violate the will of the ultimate sovereign of which the constitution is but an actualisation. The constitution thus operates as a definite limitation on the authorities exercising sovereignty in a country, and how technically refined or factually elaborate the limitation is raises a question only of detail to be ascertained with reference to the country concerned.

From such a view of the relation between sovereignty and the constitution, it follows, first, that the constitution is the flat of the ultimate sovereign. Its supremacy and sanctity are but the reflected glories of the supremacy and inviolability of the sovereign. Secondly, however plenary the powers of an authority invested with, and exercising sovereignty within the frame of a constitution, the authority must be subject to some limitations, even in the technical sense in which the British Parliament under an unwritten constitution is—that Parliament can exercise its sovereignty only through Acts.

In the case of a written constitution, these limitations become much more elaborate in application. In such a case each authority contemplated by the constitution can be said to derive its powers directly from the constitution, unless the constitution itself otherwise provides. Sovereignty in this case, as it were, radiates itself through the different organs of the state, but basically through the organ or authority that has the competence to alter the constitution itself in the prescribed manner. The proper question in this context is not who is sovereign (because the people are always the ultimate sovereign), but who exercises sovereignty for a particular purpose?

However, the question may be insistent: who is the sovereign in a state? The answer then may be formulated thus: The people, whether in law or in fact, must now always remain the ultimate sovereign, and the immediate sovereign is the autho-
The concept of the constitution is a matter that gives rise to a formal giving of the constitution, or if there is already a constitution, the authority competent to formally change the constitution. But, if the question, who is the sovereign, still persists because of the denial of the present distinction between the ultimate and the immediate sovereign, the answer may be reformulated: The sovereign is the authority legally competent to form the constitution of a country or to form an authority to enact the constitution, or the authority legally competent to change a given constitution, as the case may be. In any case, thus, a constitution, *ex hypothesi*, is meant to be a limitation on the public authorities in a state, but not on the state or sovereignty strictly construed.

Thirdly, however elaborate the provisions of a constitution, the exercise of sovereignty in plenitude cannot be contained within its four corners, and cases of revolutions and martial law apart, it is bound to look to such supplemental doctrines as that of immunity of instrumentality, sovereign immunity, political question, inherent or implied power, police power, eminent domain and act of state, to sustain its working. Therefore, in spite of all the ingenuity of the human wit deployed thus far for devising constitutions, it has not been possible to comprehend sovereignty in all its aspects within the constitutional frame; because it would then involve, in essence, comprehending public power in all its manifestations through eternity. Added to this is the stark fact from real life, that most of the actual work of government is carried on in silent secrecy, away into the privacy of the places where persons in authority may meet. The constitution must, therefore, always content itself with providing a very broad and general framework for securing the operations of the sovereign state in accordance with the law.

The Law and the Constitution

The Concept of Law: Laws in general denote the perceived or prescribed uniformities in the universe. In the context of the state, however, only such uniformities are referable to as laws that constitute the scheme of justiciable conduct norms in a community of persons. Justiciability of a law connotes its mere cognisability as law by a competent court and has no direct, immediate nexus with either enforceability of law, or
obedience to law. If a competent court in a country, though itself constituted by or under law and subject to law, recognises, or will recognise, a conduct norm as a law of the land, that conduct norm is law, even if it is not possible to enforce it.\textsuperscript{21} The question of obedience raises a much wider range of issues rooted in from psychology and sociology to politics and logistics.

From the point of view of the formal validity of law, the strict questions of enforceability and obedience run subsidiary to the primary question of cognisance, although from the point of view of the substantive value of law, the question of cognisability must give precedence to the questions of enforceability and obedience. But law is law not because it has substantive value, but only because it has formal validity, although, in the ultimate analysis, law ought to have both substantive value and formal validity.\textsuperscript{22} In effect, therefore, in any scheme of legal norms the factor of technical validity of law has no direct relevance to the factors of real value of law or actual enforcement of, or obedience to, law, although the latter factors also are constantly at work in a community through the minds of men concerned with the law and the institutions they have devised for formulating and operating the laws.

To say that a conduct norm is law because it is justiciable, that is, cognisable by a court as law, may, indeed, appear to provide a litmus test for the law\textsuperscript{23}; but is not a law, ultimately, what the judge says it is? This is a complex theoretical and practical question. But it seems implicit in the concept of the legal state. In the government of persons, Louis XIV could only say: \textit{L'etat, c'est moi}, the state, that is me; in the rule of law the judge really operates: \textit{La loi, c'est moi}, the law, that is me, even though he assiduously disowns it. A scrutiny of the assumptions underlying the conception and working of the legal state seems to suggest that the judge alone can finally say what a law is. True, if the legislature or the constitution making or amending authority feels inclined to differ with any declaration of law of the judge, it is competent to enact its own view of the matter, but then again the judge alone can have the

\textsuperscript{21} Cf. Art. 121, Constitution of India.
competence to say what is the real meaning of such an enactment.

To argue thus is not to be unduly cynical, sceptical or realist, but simply to submit that the concept of judicial review\textsuperscript{24} is indeed rooted in the very nature of the legal state; because the conception of the legal state assumes that the judge alone is competent to relate a law to a particular controverted fact-situation, and thereby authorises the judge not only to assess the fact-situation but also to state the law applicable to the situation. The point may be illustrated with reference to the trial by jury. The members of the jury are to form their own opinion about the facts of a case, but they must accept the view of the law given them by the judge. It is true that over quite an extensive area of state actions the law is applied to specific fact-situations not by judges, but the cardinal question in these situations also remains whether the judge will accept the view of the law as applied in this area. This, then, seems to be the price that society must pay for seeking to substitute the government of men by the rule of law.

Justiciability as a test of law becomes of vital significance in the wider context of the rule of law when specific rules of law have to be woven into a texture of a scheme of laws to construct and maintain the supremacy of law. But it does not imply that a particular law is not ascertainable otherwise than by reference to courts. Justiciability of law has, therefore, no direct relevance to the ultimate or immediate source of law also. Law must be said to flow ultimately from the sovereign and be given an authentic shape by the specified organs of the state entrusted with the function of formulating laws. But the immediate sources with reference to which rules and principles of laws may be ascertained are: (i) constitutional document, if any; (ii) statutes of legislative bodies; (iii) rules, orders or instruments framed by competent authorities within the term of a constitution or statute; (iv) customs of a community which have force of law; (v) cases decided by courts declaring rules and principles of law; and (vi) authoritative text books on law.

Every community which is a state or is part of a state has a scheme of such justiciable conduct norms which lay down

\textsuperscript{24} Judicial review in this context does not, however, include the power of the court to declare a statute void as a necessary corollary.
both the things to be done (or not to be done) and the mode of doing a thing. The law, therefore, is concerned both with substance and procedure, matter and manner. In so far as a law is concerned with matter or substance, it is substantive law; and in so far as it is concerned with the manner or procedure, it is adjective or procedural law. The distinction between substantive law and adjective or procedural law is expressed also by saying that the immediate object of law is the creation and maintenance of justiciable rights. Law defines a right and lays down the procedure for its protection. "It defines the right which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is 'Substantive Law.' So far as it provides a method of aiding and protecting, it is 'Adjective Law' or procedure".  

A classification of law is also made on the basis of the persons to whom the law relates or in respect of whom it creates rights and obligations. If a law relates to a public person, i.e., "the state, or the sovereign part of it, or a body or individual holding delegated authority under it",  

it is public law. Public law is further divided into constitutional law and administrative law, depending on whether it relates to the constitution or the administration of the state. If a law relates to a private person, i.e., "an individual or a collection of individuals however large, who or each one of whom, is of course a unit of the State, but in no sense represents it, even for a special purpose,"  

it is private law. Then there is also international law, or law of nations, which deals with international personalities of public or private persons.

Legal norms are also classified as mandatory, imperative or obligatory, and directory or permissive. The question of distinction between them may raise, however, some difficulty, and courts have affirmed that no universal rules can be laid down for distinguishing one from the other.  

But the distinction recognised and is of importance in consideration of the consequences it has on the act of an authority. If a legal rule is directory, a non-compliance with it does not invalidate the act

26 Ibid.; p. 127.
27 Loc. cit.
of an authority, if it is otherwise valid. But non-compliance with a mandatory norm strikes at the root of the validity of an act itself and the act cannot be sustained in law.

The Rule of Law and Democracy: The Vedic theme—“Law is the King of Kings, far more powerful than they”—apart, credit goes to Aristotle for having claimed that “the rule of law is preferable to that of any individual.” And nearer still, in the thirteenth century, Bracton accepted the general view of the mediaeval age that the world is governed by human or divine laws, and said that the King ought to be “subject of God and to the law, because the law makes him King.” Fortesque in the mid-fifteenth century contended that there could be no taxation without Parliamentary authorisation, and later, Coke proclaimed the superiority of the common law over King and Executive, which, because of the final victory of Parliament, eventually came to mean the superiority of the common law as modified by Parliamentary Acts.

Historically understood, the rule of law then means the rule of justiciable conduct norms as opposed to the rule of inscrutable individual caprice. The rule of law stands in direct contrast from the rule of men. It means that laws shall rule and not men, and even when men have of necessity to rule they purport to act by, under, through, or in accordance with the law. Thus conceived the rule of law essentially stands for the construction and maintenance of a scheme of justiciable conduct norms for securing public peace. But it does not, as Jennings says, imply “simply the existence of public order”; because public order may be established and maintained in numerous other ways, including the use of force, and the rule of law demands the establishment and maintenance of public order under a legal scheme, although eventually backed by force as an element of total public power. It is implicit in this demand that there shall be the constitution and the laws to secure the operations of the public authorities in a country in conformity

29 Aristotle: Politics, tr. B. Jowett; III, 16.
30 Bracton: De Legibis et Consuetudinibus Angliae; f. 5 b.
31 Fortesque: De Laudibus Legum Angliae; Chap. 18.
33 Jennings, Sir I.: The Law and the Constitution, op. cit.; p. 43.
with the law; and if this public order is to be endurable, it is also implicit in it that ultimately the law must embody the needs and aspirations of the concerned men and women.

Basic democratic or liberal assumptions seem to be implicit in the logic of the rule of law, although it may appear preferable to express them more explicitly. It is not a historical accident that the demand for the rule of law came to be associated with the demand for democracy or liberalism; it is a clear case of logical correlation implicit in the nature of the law itself. The proposition may be put as a catechism: Why have the rule of law in preference to the rule of men? In order that the ruling men may not substitute their own interests for the interests formulated into laws. What interest can be formulated into laws? Certainly the common interests of the community. How can these interests be embodied into laws? By making the law-makers perceive the interests of the community in the formulation of the law. Well, then, this is democracy. But, how? And here begins the unfolding of the democratic technique of government—associate the people with the government, then, let the people govern themselves. But nobody lives in tiny city states these days, and hence the representative government and the rule of law.

Besides the lack of awareness of the technique and possibilities of democratic devices, the persons who demanded the rule of law had had to work also under limitations of time, place, probabilities, and their own predilections and prejudices. And, therefore, when they ought to have stood for representative democracy under law, they simply chose to stand by the rule of law. Only on such a view of the matter can be attached any value to Kant’s distinction between the police state (Polizeistaat) and the legal state (Rechtsstaat).

Subsequently, the state as subject to the rule of law seems to have become a virtual synonym for the democratic or liberal state, and this tendency still has a firm grip over the minds of men. And, this, it is said, is primarily a result of Kant’s influence which found its classic expression in England in Dicey’s formulation of the rule of law as a leading characteristic of the British Constitution. For Dicey the rule of law “has three meanings” which are distinct though kindred:

\[34\text{See Dicey, A. V.: The Law of the Constitution, op. cit.}\]
"It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary powers..."

"It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts..."

"The 'rule of law', lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of the constitutional code, are not the sources, but the consequence of the rights of individuals, as defined and enforced by the courts."

The Dicean trinity—(i) supremacy of the law, (ii) equality before the law, and (iii) the Constitution as the result of the ordinary law of the land—has received accolade, attracted criticism and even undergone plastic surgery. But supported, supplemented, subtracted, modified, and interpreted or re-interpreted, it has demonstrated its capacity to survive as, at least, a very generalised minimum version of the assumptions of the rule of law. The rule of law must always mean supremacy of the law and the question how far it is consistent with wide discretionary powers under modern conditions, or how far law can cover the wide ranging functions of the state, leads to debates of details in which differences of opinion are inevitable. Again, equality before the law, with whatever limitations, qualifications or elucidations, must also provide an abiding assumption of the rule of law.

The Constitution a Result of the Law and a Cornerstone of the Rule of Law: So far as the issue of the Constitution as the result of the law of the land is concerned, it is of vital significance to bear in mind that no constitution is conceivable without law. The constitution always contains a legal core. True, "law and constitution cannot be separated", but the idea of constitution always presupposes the idea of law. Besides, implicit in this third conception of Dicey's rule of law are also the faith in the fundamental liberties of man and the claim for the independence of the judiciary. What Dicey said more with regard to this third aspect of the rule of law, or for

that matter of the first two aspects of it, in the context of the British Constitution is of less general and abiding interest than what his trinitarian formula indicated as the basic minimum for establishing and maintaining the rule of law in a country on a more or less permanent basis.

Explicitly, the position may be stated in a more generalised form. The rule of law is necessary to sustain the essential value of man’s personality consistently with his need for social existence, until, of course, law itself becomes unnecessary, or as a Marxist would say, law has made itself unnecessary by getting metamorphosed into habit. Any enduring scheme of the rule of law in a country requires the founding of a constitution which contains the basic norms for the governance of the country in tune with the needs and aspirations of the people.

The constitution presupposes the law or, as MacIver would say, the constitution is founded on the community’s legal code; because every constitutional edifice must always have a legal steel-frame which alone once erected in whatever manner may be said to endow a country with a constitution. But the constitution or the laws need not originate or exist in the form of enacted documents alone. Nor is it practicable, nor desirable, that they embrace within them the whole gamut of conduct norms in a country. What is essential, however, is that the constitution should provide the cornerstone of the rule of law in a country.

The legal rules of a constitution may be substantive and adjective (procedural or remedial) or mandatory and directory, just as any other legal rule in a country. But simply because a constitution purports to contain the basic norms for the governance of a country, the legal rules contained therein acquire an aura of sanctity, although in some cases certain practical consequences may also flow from this aura. Nevertheless, to maintain the rule of law constitutional law is to be treated as part of the law of the land, although differentiated in certain cases as fundamental law for practical reasons.

In any constitutional system, however, majesty of the law must be accepted as a valid proposition, in order to subject the public authorities to the law consistently with the sovereignty of the state. And as a corollary to this, every constitutional

scheme must also accept a degree of equality before the law among and between the persons in authority and the persons under the authorities. The constitution must also admit within its ambit a notion of some fundamental liberties of man, which, in turn, demands the existence of an independent body of persons to authoritatively pronounce upon the validity of the day-to-day exercise of these liberties. This, then, in very broad terms, is constitutional government, democratic government, or rule of law, call it by whatever name: a rose is a rose, is a rose.

It must, however, be conceded that the devil may quote scriptures. Laws may be tyrannical, and tyrannical laws may be applied tyrannically. The rule of law may then simply mean “law and order”, or more simply “public order”. But such a situation raises more fundamental questions of obedience to law, or value and dignity of human personality or of human civilization, and no justice can be done to them in this sketchy discussion. But one thing seems beyond reasonable doubt that unless the logic of the rule of law follows out on to its democratic, or constitutional, conclusions, the rule of law, whether as a national or supra-national concept, has no case for survival.

The Rule of Law as a Supra-National Concept: It may be noted that the expression “the Rule of Law” has already been enshrined in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, although its underlying assumptions may never become fully unfolded. This is because the rule of law is a means for making the needs and aspirations of a community govern the government the community. As needs and aspirations change, the rule of law is also sought to be adapted to new situations. Efforts will continue to be made to fill the rule of law with new and detailed meanings. The Declaration of Delhi, 1959, of the International Commission of Jurists, which is affiliated to the UNESCO, is an instance to the point. According to this Declaration the “Rule of Law” means:

(i) In relation to the Legislature that there are certain minimum standards or principles for the law, including those comprised in the Universal Declaration of Human Rights (1948) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), specially the freedom of
religion, assembly and association and the absence of *ex post facto* penal laws; and that there is also a right to representative and responsible government:

(ii) In relation to the Executive that a citizen should have a remedy against the wrong done him by the state or government; and particularly delegated legislation should be subject to judicial control:

(iii) In relation to the Criminal Process that a "fair trial" involves some specific elements as certainty of the criminal law, presumption of innocence, reasonable rules regarding arrest, under-trial detention, accusation and giving of notice; provisions for legal advice, public trial and right to appeal; and absence of cruel or unusual punishments:

(iv) In relation to the Judiciary and the Legal Profession that the judiciary shall be independent and there shall be proper grounds and procedure for removal of judges; and that the organised and autonomous legal profession shall have a responsibility for sustaining the rule of law.

In the constitutional systems of the world most of the principles of this Declaration are to be found in some form, but this Declaration is of profound significance for both what it commits and what it omits. It professes to be founded on "the supreme value of human personality", and within its terms the rule of law is now recognised as unequivocally standing for, *inter alia*, representative and responsible government. The other principles contained in it are fairly known and widely recognised, but it is of vital interest to note that it does not speak, in the Dicean vein, of the absence of wide discretionary powers of government as a condition for maintaining the rule of law. And this seems a very realistic approach in an age when the state has come to be looked upon essentially as a service entity.

**Constitutional Law and Administrative Law:** No constitution can ignore realities. The law of the constitution can no longer afford to remain merely a limiting factor on the existence of wide discretionary powers of the government, particularly its executive branch, when the state itself has been called upon to fulfil positive social obligations and the law has to retain its
effectiveness as an instrument of state action only by becoming an instrument of social action. Constitutional law is only a result of the conception of the legal state. It is of abiding interest, because conceptually the state seems to be destined to live as the legal state. Functionally the state has now been made to act as, what is called, the administrative state, or the service state. Consequently, to survive, constitutional law must also find a new orientation or seek for a new aide.

Already, in the constitutions of the socialist countries and of some of the new developing nations, a new orientation, i.e., constitutional law as an instrument of social change, is trying to actualise itself. And in the growing body of administrative law is to be found the new ally of constitutional law to maintain the rule of law in this era of the administrative state. If constitutional law provides the cornerstone of the edifice of the rule of law, administrative law is but a modern annexe to this grand edifice.

Both have the same objective, i.e., to secure the operations of the state according to law and thereby sustain the rule of law. Both are public law, because they both relate to the state which is public by nature. Both contain substantive and adjective or mandatory and directory legal norms, although in the case of administrative law one may not unreasonably feel inclined to characterise it as a sort of sublimated procedural law\(^\text{37}\) to limit its scope within manageable bounds. Perhaps, on such a view of the matter only Holland said: “The various organs of the Sovereign power are described by Constitutional Law at rest; but it is also necessary that they should be considered in motion, and that the manner of their activity should be prescribed in detail. The branch of law which does this is called Administrative Law.\(^\text{38}\)

This distinction is quite misleading, because, as Maitland found: “Constitutional Law deals with structure and with broader rules which regulate function, while the details of function are left to Administrative Law.” It means then that administrative law may be said to begin where constitutional law ends. Jennings, however, prefers to define administrative law according to its subject-matter: “Administrative law is


\(^{38}\text{Holland: Jurisprudence, 13th ed.; p. 374. Italics are mine.}\)
the law relating to the Administration. It determines the organisation, powers, and duties of administrative authorities.\textsuperscript{39} Constitutional law is, then, the law of the constitution and administrative law is the law of the administration, or more accurately, though rather pompously, public administration.

These definitions seem somewhat trite, but are, nevertheless, realistic. The distinction between these two branches of public law is essentially a matter of convenience. The government of a country and its administration are no two mutually exclusive affairs. They shade into each other, although a polarity exists between them. Their immediate sources are the same: constitutional document, if any, statutes, statutory instruments, case laws and authoritative textbooks; and as constitutional law books to constitutional conventions, administrative law looks to administrative practices.

CONVENTIONS AND THE CONSTITUTION

The Nature of Conventions: A country comes to have a constitution as and when a legal core of it becomes definitive and established. But the constitution has to be worked by men through time, and the initial legal core has never been found to be adequate. Not only that this legal core gets further supplemented with legal rules in the shape of constitutional statutes, constitutional or statutory instruments, and case laws, but the entire body of constitutional law gets, as it were, covered with, what have now come to be styled definitely as, constitutional conventions which, as Jennings says, “provide the flesh which clothes the dry bones of the law.”\textsuperscript{40}

Within the frame of law “there is room for the development of rules of practice.”\textsuperscript{41} To John Stuart Mill these rules were “the written maxims of the constitution”,\textsuperscript{42} and Sir William Anson preferred to call them “the custom of the constitution”.\textsuperscript{43} But the credit of having coined the expression “conventions of the constitution” goes to Dicey, although in his attitude towards the law and conventions of the constitution he had already been

\textsuperscript{39} Jennings, Sir I.: \textit{The Law and the Constitution}, op. cit.; p. 217.
\textsuperscript{40} Ibid.; p. 81.
\textsuperscript{41} Ibid.; p. 80.
anticipated earlier, notably by Freeman in his book *Growth of the English Constitution*, written in 1872. And this expression has now acquired common currency.

"Such conventions develop around most constitutions."44 "They must grow up at all times and in all places where the power of government are vested in different persons or bodies",45 because, as Burke said, the organs of the government are obliged to hold faith not only among themselves, but also with the community or sections of the community *inter se*,46 and law has its inherent limitations to regulate all aspects of the government of men in the face of the constant flux of objective fact-situations. Constitutional conventions develop, because constitutional law, or for that matter the law, has not been found adequate to meet all the requirements for the governance of a country.

Constitutional conventions grow, because they are necessary to fill in the gaps in constitutional law in a flexible manner to make the constitution work. It is not that some of the conventions in a country cannot be incorporated into law, but that the very nature of a legal frame for regulating the operations of the state is such that rules of practice must develop to fill in the interstices of this frame. This may be also because some conventions may be incapable of being formulated into legal rules, as also because it may be considered more dignified or convenient to leave certain matters to conventions. But even if it were decided at any time to convert all conventional rules of a constitution into its legal rules, it seems that these legal rules will soon come to gather around themselves numerous fresh conventional rules. And it is to these conventional rules that reference has to be made to ascertain the manner in which a constitution works in actual practice.

**How Conventions Get Established?** Persons operating the constitution of a country have to take decisions about its day-to-day working. "Those who take decisions create precedents which others tend to follow, and when they have been followed

46 Loc. cit.
long enough they acquire the sanctity and the respectability of age. They not only are followed but they have to be followed”.

Although a more recent legal frame may not immediately need conventions, it may be that even such a frame also may have one or more vital gaps left to be filled in the moment the frame is put into operation. Besides, the number of conventions gathering around a constitution may depend upon the political realities it may have to confront.

However, conventions grow out of practice and their existence is determined by precedents. But these precedents by themselves may not be adequate. Precedents relating to a particular practice may be numerous yet the practice may not become entrenched as a convention, and a convention based on precedents may fall into desuetude. Conventions are not like customs in law nor are their precedents like precedents of a court of law.

"Every act is a precedent but not every precedent creates a rule". Even a series of precedents may be departed from under a new condition with justification. Precedents by themselves, therefore, create nothing. They, at best, raise a strong presumption in favour of the existence of a convention. But a few points arise here. First, extant precedents may not conclusively prove anything, because they may themselves be amenable to classification into two, three or more almost conflicting categories. Besides, the persons concerned may try to explain away a precedent by trying to distinguish the fact-situation surrounding a precedent from a newly confronting fact-situation. Again, since most of governmental work is done silently and secretly, the number of precedents created and followed may not be ascertainable at any moment. And added to these is the fact that a person may tend to call an act against a convention, or "unconstitutional" as Chamberlain would have said, if he does not like the act for any reason. Nevertheless, precedents are useful in understanding the growth and establishment of a convention, although in a given situation they may not conclusively prove anything.

48 Ibid.; p. 5.
49 Ibid.; p. 6.
50 Ibid.; p. 7.
Secondly, their existence operates as a line of defence which prevents persons in authority from dealing with a convention in a cavalier manner, even if it causes inconveniences or hardships to them. Nobody likes to be told that his particular act has gone in conflict with a series of precedents relating to the same situation. But they can neither create nor sustain a convention unless the convention is generally referable to the necessity of working a constitution smoothly.

Thus, it seems that a convention may be said to have become established if its existence is fairly ascertainable, and in this precedents are helpful. Secondly, a convention, to have become established, must also be considered obligatory by the persons to whom it purports to apply, and thirdly, such a convention must always be generally referable to the necessity of smooth functioning of a constitution. In any case, however, a convention is to be distinguished from a mere usage or practice which is not essential for working a constitution.

**Law and Conventions:** Within the scheme of a constitution conventions constitute "a whole complex of rules, outside the law, nowhere inconsistent with it but nowhere recognised by it, which can be stated with almost as much precision as the rules of law"\(^{51}\). Conventions are not part of the law, and; therefore, although the distinctions between conventions and laws may not be as fundamental as Dicey thought, they are also not primarily technical, as Jennings says. From the points of view of obedience or importance to the working of a constitution, a convention may be of greater significance than a rule of law, particularly when such a rule is directory. But the very fact that a convention is not law raises certain vital issues.

In the first place, although a law may presuppose a convention, conventions in general presuppose law. It may be true that once founded on law, they may become the basis of law, but they cannot go against the law. Secondly, therefore, conventions cannot be repugnant to, or inconsistent with, the law. Thirdly, there is always an authority to decisively pronounce upon what a rule of law is, which may be a legislature or a court. Conventions have no scope for such an authorita-

tive, formal pronouncement on their existence. A rule of law is more precise and formal than a convention. Fourthly, if a law is alleged to have been broken, a court may conclusively decide upon the existence of such a breach, and may, if possible, direct its enforcement. But this conclusive decision on enforcement is not possible in the case of conventions. And fifthly, a law carries greater sanctity, not only in the sense that psychologically it tends to command greater obedience than a convention, but also in the vital sense that between a law and a convention, the former prevails over the latter. It is always of more practical importance to point out that a person in authority has broken a law than to suggest that he has broken a convention.

Although conventions are not laws, they are recognised by courts. The convention relating to the head of state in the exercise of his functions may be recognised by courts.\textsuperscript{52} Similarly, the convention relating to ministerial responsibility may form a basis for a constitutional decision by a court.\textsuperscript{53} Conventions are, as stated earlier, capable of being incorporated into law, but instead of incorporating a convention as a rule of law, a statute may merely recognise its existence. Such is the case of the Statute of Westminster, 1931, which recites in the Preamble conventions regarding the Commonwealth.

A convention is, then, a binding conduct norm considered basic in the working of a constitutional scheme in a country.

The Purpose of Conventions: First, conventions supply the gaps in the legal frame of a constitution to make it work in conformity with the intentions of those who constructed the legal frame. This becomes a case in point when, e.g., a constitutional document apparently may seem presidential, but a gap is left which if filled in by a convention, will make it parliamentary which its founders had actually intended it to be. This may also happen when it is not considered possible, proper or desirable to prescribe a matter as a legal norm, and, therefore, the matter is left to conventions. Secondly, a convention helps a constitution to grow without formal changes,


\textsuperscript{53} Liversidge v. Anderson, (1942) A.C. 206; Carlton Ltd. v. Commissioner, (1943) 2 All E.R. 560.
in a flexible manner, to meet the changing needs of a country, and thereby wears out to an extent the rigidities of law.

Thirdly, a constitution, when once formed, represents merely the national cooperation at the initial stage of its formation. But the nation must continuously work together for its own advancement. If, then, this sense of cooperation is to actively operate at all times, there must be some instrument to express it. Conventions are the instrumentalities representing at any moment in a nation’s history the degree of cooperation found in its life and also provide the means whereby this cooperation may be secured.

Fourthly, in so far as a constitution embodies the ideas and experiences of a people, it contains the ideas and experiences peculiar to the time of its formation. It embodies, so to say, the national consensus at the time of its founding. But this national consensus is a moving concept, and a constitution has, therefore, to be worked consistently with the constitutional ideas of the times of its actual operations. Conventions are the means of securing constant conformity between a constitution as initially framed and the constitutional ideas of the times of its actual working.

Constitutional conventions serve yet another purpose. They contribute to the growth of the habit of law abidingness. If a person conducts himself according to a norm which holds out no immediate threat of consequences which normally follow the breach of a law, he will psychologically be more inclined to obey laws. In brief, observance of a convention tends to incalcula a habit of law abidingness in general.

Obedience to Conventions and Sanction Behind Them: This directly brings in focus the issue of obedience to conventions. Dicey thought that conventions are obeyed because a breach of a convention will ultimately lead to a breach of law. In a limited sense this proposition may be true, but then it implies also that a person does not steal, not because he deems stealing reprehensible, but because there is a law forbidding this act. This view of obedience to conventions raises the fundamental issue of obedience to any imperative conduct norm. Besides, there are numerous conventions which if broken or departed from may not lead eventually to a breach of law. The fact seems to be that eventually the question of obedience
to conventions raises the broader issue of obedience in general; and obedience in general is a composite product of numerous factors, such as consent, indolence, acquiescence, habit of conformity, fear of public opinion or fear of adverse or unforeseen consequences. The question, therefore, why conventions are obeyed, has to be examined in a slightly wider perspective.

Conventions grow and exist because they are considered essential for working a constitution. They are obeyed also because of a realisation of the necessity of their existence, a realisation that they have utility. Secondly, a convention founded in the real needs of a community and considered essential for a constitution is in all probability likely to get transformed into a rule of law if it is violated time and again. Thirdly, man in general is conformist and he does not seem to relish breaches. This has a double action, on the actor as well as the spectator. The person contemplating a breach of a convention is likely to be confronted with a built-in psychological resistance to withhold him from committing a breach. He will also be confronted with an adverse public opinion against an actual breach.

Fourthly, breach of a convention is no monopoly of a particular person or group; and given the democratic assumptions of modern constitutionalism, a person or a group may at one time break a convention with impunity for an immediate gain, but when the wheel turns, the same breach may prove very costly. Again, frequent breaches of a convention will not only destroy the convention but will also have an unsettling effect on the constitution itself, and, for that matter, on the community concerned. Besides, conventions are obeyed also because of apprehensions about the possible consequences of a breach, not only in a narrow sense of legal consequences, but also in a wider sense of socio-political consequences.

It may be safely suggested that conventions are obeyed for diverse reasons but basically because:

(i) they are considered useful;
(ii) they are related to an ingrained, built-in human psychology of conformity; and
(iii) their breach may involve adverse consequences.

The sanction behind conventions then is the sanction of law, utility, and public opinion. In the first place, if a convention is not obeyed either the law around which it revolves will
not function properly, or will involve ultimately a breach of law. But whether such a law works or a law is broken or changed, a convention cannot outlive its utility. If it has ceased to be useful, it must suffer atrophy or assassination. And public opinion is the touch-stone to finally determine whether a broken convention involves a breach of faith or implies simply doing what was really due. For all practical purposes, therefore, public opinion is the ultimate sanction behind a convention, although this seems to be also the ultimate sanction behind any other imperative conduct norm in a democratic community.

THE CONSTITUTION OF INDIA

PART XXII

On the above view of the constitution, the Constitution of India may be said to denote those documented or non-documented justiciable or binding norms that are deemed fundamental now in the governance of sovereign independent India. On November 26, 1949, however, the people of India in their Constituent Assembly adopted, enacted and gave to themselves a Constitution, of which article 393 says:

“This Constitution may be called the Constitution of India.”

By virtue of article 394 of this Constitution, dealing with the commencement of the Constitution, article 394 itself and articles 5 to 9 relating to citizenship; article 60 concerning oath or affirmation by the President; article 366 on definitions; article 367 on interpretation; articles 379, 380, 388 and 391 detailing certain interim and transitional provisions; article 392 empowering the President to remove difficulties; and article 393 containing the short title of the Constitution came into force at once, i.e., on November 26, 1949, itself. Article 394 further reads, “the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January 1959, which day is referred to in this Constitution as the commencement of this Constitution.” However, articles 379, 380, 388 and 391 have now been omitted, and article 394 does not apply to Jammu and

54 Italics are mine.

The Constitution of India as enacted on November 26, 1949, thus commenced on January 26, 1950, celebrated in the country now as Republic Day. On and from that day the country became subject to the present Constitution, and, as article 395 laid down, "The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not the Abolition of Privy Council Jurisdiction Act, 1949," became repealed. This repeal did not, however, affect any law made or principles of law settled under the Act of 1935 or Orders issued under the 1947 Act, in so far as they were not contrary to any provision of the present Constitution, because article 372(1) provides for the continuance of the pre-Constitution laws even after the commencement of the Constitution.\(^5\)

In effect, whenever a reference is made to the Constitution of India it is the November 26, 1949, constitutional document, as amended from time to time, that comes to mind, although it is a document unintelligible now save in the context of the numerous constitutional cases, comments, Orders, statutes, instruments, principles and practices that have gathered and are still gathering around it. Concretely the Constitution of India means then the Constitution adopted and enacted by the Constituent Assembly on November 26, 1949, as subsequently amended from time to time, elucidated by courts and commentators, and supplemented by constitutional Orders, statutes, instruments, principles and conventions, although abstractly it must be said to refer to the totality of the documented or non-documented justiciable or non-justiciable rules, principles and practices which are deemed fundamental in the governance of the country.

CHAPTER 2

CONSTRUCTION OF THE CONSTITUTION

The Constitution of India is a legal document par excellence, and its proper appreciation involves an awareness of the various canons and presumptions which the courts apply in ascertaining its meaning. This is all the more indispensable since time has shown that the observation of Hughes in the context of the U.S. Constitution and the U.S. Supreme Court—"We have a Constitution, but the Constitution is what the Judges say"—seems to apply equally to our case. "The law declared by the Supreme Court shall be binding on all courts within the territory of India"¹, has, with us, come to imply the supreme competence of our Supreme Court to finally construe the real meaning of the Constitution.

CONSTRUCTION AND INTERPRETATION

The process of finding the meaning of a legal instrument is referred to as construction or interpretation of the instrument. In construing an instrument, the function of the court is said to be jus dicere, not jus dare—to declare law and not to make law, and article 141 of our Constitution subscribes to this declaratory theory of the function of the court. Articles 132 and 133 authorise the Supreme Court and article 228 empowers the High Courts to interpret the Constitution which does not use the term "construction".

However, sometimes a distinction is drawn between interpretation and construction. Cooley says:

"Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words, that is, the sense which their author used to convey. Construction, on the other hand, is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text; conclusions which are in the spirit, though not within the letter of the law".²

¹ Article 141, Constitution of India.
² Cooley: Constitutional Limitations; I, 97.
This distinction between interpretation as the "finding out the true sense of any form of words" and construction as the drawing of "conclusions which are in the spirit" of the law is, as Crawford observes, of mere academic interest, "since for most practical purposes it is sufficient to designate the whole process of ascertaining the legislative intent as either interpretation or construction". It is now the customary juridical and judicial practice to conceive the terms "interpretation" and "construction" identically as "the process by which the courts seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed."

PURPOSE OF CONSTRUCTION

The purpose, object or end of the construction of a legal document is said to be to interpret the document "according to the intent of them that made it." To this end "the intent" is said to be not any supposed intention but that which is to be gathered from the "express words or by reasonable and necessary implication."

Such a view of the court's function in construing a legal instrument is basically a product of the individualistic conception of justice coupled with the judicature's claim for independence and impartiality. But, as numerous judicial and juridical opinions go to conclusively suggest, in the name of giving effect to the real intent of the maker of a legal instrument, the judiciary never hesitates to substitute its own view, specially the view of him or them that become seized of construing a particular document, of what appears to it to be right. And this tendency is more marked in the case of constitutional documents.

Although an acceptable practical substitute for the current individualistic view, that interpretation or construction denotes the process of giving effect to the intent of the maker of a legal instrument, is yet to be successfully worked out, the necessity

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3 Crawford: Statutory Construction; p. 240.
7 See the author's Justice by Tribunals, Calcutta, 1972. Chap. I.
of finding out suitable societarian substitute for, or at least a supplement of, this, in the context of the modern need of harnessing the law as an instrument of social action and social change, is pressing. Judicial and juridical thinking now ought to find a generally cognisable concept for the fact of the actual intrusion of the whole gamut of inarticulate major premises that underlie numerous judicial decisions, and seek to objectify it to the utmost degree possible. This concept may, preferably, be referred to as the perspective of construction.

PERSPECTIVE OF CONSTRUCTION

The function of the judiciary is, after all, to administer justice, and justice is, indeed, inconceivable except in its social context. The plea for the recognition of the perspective of construction is essentially a plea for an explicit recognition of this social content, or more technically the societarian content, of justice. Social content of justice does not, however, mean social justice. Very broadly, it refers to justice viewed from social angle.

Perspective, as the dictionary says, means "the art or science of drawing objects on a surface, so as to give the picture the same appearance to the eye as the objects themselves." Perspective of construction denotes the art or science, preferably science, of interpreting legal instruments, whereby each judicial decision gets fitted into a consistent scheme of justice administered in a community of persons.

On this view of the matter, the quest for the perspective of construction is, at bottom, a claim for objectification of the element of consistency in the administration of justice according to law on the basis of, what Cardozo calls, social mores, rather than by precariously clinging to, what judges and jurists call, the doctrine of stare decisis. Instead of leaving it to his individual predilection or prejudice, it is the function of the perspective of construction to tell the judge why and how a particular rule of construction should be selected in preference to others for application to a particular fact-situation.

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8 See below the discussion on the Preamble for further details.
9 Chambers's Twentieth Century Dictionary.
The existence or the need of perspective of construction in this sense is no longer seriously contested. Expressions such as "reading words in their context"; "justice, equity and good conscience"; "reasonable care or prudence"; "public purpose, policy or morality"; "due process of law"; and "reasonable restriction" are profusely relied upon in all countries to improvise a perspective plane for interpreting legal instruments. What is noticeable in this regard is a complete absence of an integrated approach to the entire issue of perspective of construction which acquires added significance in the case of constitutional interpretation, because the constitution is the cornerstone of the edifice of the rule of law in a country.

The first task in this regard is the explicit recognition of the existence and use of the perspective of construction in all legal systems. And it seems that progress on this score has been steady, although slow. The second task, which is more problematic, is that of the identification of a firm perspective plane in the realm of the rule of law, in order that justice according to law may not degenerate into mere fire-side equity.

A universal perspective plane of equal validity under all legal systems is a distinct possibility, if it be readily recognised that the mores of the day determine the interpretation of a legal instrument, particularly a statute or a constitution. Nevertheless, in countries having no authoritative documents detailing these mores in somewhat specific terms difficulties are bound to be encountered in fixing the perspective plane. It is easier to devise the perspective of construction of the constitution and the laws in the context of a particular country with reference to the preamble to its constitution or other general theme or principles underlying or embodied therein. This task becomes still easier in a country like ours that has a constitutional code containing, *inter alia*, the principles which are "fundamental in the governance of the country."

Precisely, in our constitutional system the perspective of construction of the Constitution and the laws is to be fixed by the Directive Principles of State Policy, which bind the judges both by the imperative dictate of the objective needs of interpretation and the oath of their office. The judiciary, in interpreting the Constitution and the laws, should so frame its decisions as to fit them squarely into the scheme of the Directive
Principles, thereby imparting a consistent pattern to our system of justice according to law.

GENERAL PRINCIPLES OF CONSTRUCTION

Courts have evolved some canons and presumptions of construction of general application, although they are subject to modification according to the needs and circumstances of different fact-situations, including the kind of the document to be interpreted. As these general principles of construction are applicable also to the interpretation of the constitution, a brief reference to them is desirable.

THE PRIMARY RULE

The Rule of Literal Construction: The rule of literal construction means that words and phrases used in a legal instrument should be understood in their natural and ordinary sense and should be read in their recognised grammatical sequence. This rule is ostensibly based on the assumption that the language of a legal instrument is the mirror of the intention of the maker of the instrument, and it seems that the tremendous growth in the volume “of modern legislation has undoubtedly reinforced the claim of literal construction as the only safe rule.”

But the task of interpretation can hardly be said to arise in a situation where the language of a document is plain and admits of only one meaning, because it then must be enforced “however harsh or absurd or contrary to common sense the result may be.” Language also has its own limitations which become more accentuated in the case of statutes and constitutions. In effect, the rule of literal construction “has, in general, but prima facie preference,” and it seems to live on exceptions, maxims, presumptions and aids.

No Inference of Omission or Surplusage: It is a corollary to the rule of literal interpretation that, as Lord Mersey said, “It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.” Lord Loreburn, L.C., in Vickers v.

Evans, similarly said: "We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

The courts are very reluctant to supply omissions in a statute, and one clear instance of their such reluctance is to be found in their claim to interpret certain words as *ejusdem generis*. However, the courts always reserve to themselves the power to supply an omission, though in very exceptional cases, if there be a clear reason for so doing.

Again, it is a corollary to the rule of literal construction that an interpretation "which would leave without effect any part of the language of a statute will normally be rejected". It implies that each word used in a legal instrument must be given its due weight in ascertaining the intention of the author of the instrument. In certain cases, however, it is permissible to treat a word as a mere surplusage, but the courts take recourse to the principle of surplusage only as an instrument of last resort.

**General Words**: General words in a legal instrument are words of common use and in interpreting them, the first point to be remembered is that they are to be construed "*loquitur ut vulgus*, that is, according to the common understanding and acceptation of the terms", unless the context justifies to treat them as words of art or special signification.

Secondly, they are to be understood according to the subject-matter of the legal instrument. A general word used with reference to a particular trade or business is to be construed as having the meaning it conveys in the parlance of that trade or business.

Thirdly, a general word is to be understood, "as if we had to read it the day after it was passed." This time element is significant because words may change their meaning with time.

And lastly, since general words are more or less elastic,

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14 Maxwell: *The Interpretation of Statutes*, op. cit.: p. 36.
16 *The Fusilier* (1865), Br. & L. 34, *per* Dr. Lushington.
17 *Unwin v. Hanson*, (1891), 2 Q.B. 115.
care should be taken to so construe them as to be in accordance with the intention of the author of the legal instrument\textsuperscript{19}.

**Words of Art and Special Signification**: The natural and ordinary sense of a word or phrase means its literal and popular sense, but in certain cases departure from the plain and natural sense of a word is permissible in construing a statute. Such is the case with words which become terms of art because of usage, judicial decisions or precise statutory definition. Technical terms must be construed in the technical sense\textsuperscript{20}. Although the onus of proving that a word has been used as a term of art lies on the person who asserts this,\textsuperscript{21} a clear previous judicial pronouncement may obviate the onus in the case of a subsequent “statute which incorporates the same word ... in a similar context”\textsuperscript{22}. Secondly, the context\textsuperscript{23} in which a word has been used may plainly indicate that the word has been used in a special sense and then it must be construed accordingly.

Again, the literal meaning of a word or phrase is not adhered to if it leads either to a clear contradiction of the purpose of the statute or is palpably absurd\textsuperscript{24}. The absurdity must be evident and so great “as to convince the court that the intention would not have been to use them in their ordinary signification and to justify the court in putting on them some signification, which, though less proper, is one which the court thinks the words will bear”\textsuperscript{25}.

**The Literal Rule and Our Constitution**: Our superior courts generally insist on strict adherence to the rule of literal construction in interpreting the Constitution and the laws, primarily on the ground that our Constitution has been elaborately drawn up\textsuperscript{26}. Mukherjea, J., (as he then was) said:

\textsuperscript{19} Bacon: Maxims, 10; Bandworth Board v. United Telephone, (1884), 13 Q.B.D. 904.

\textsuperscript{20} Pugh v. Ashutosh, A.I.R. 1929, P.C. 68.

\textsuperscript{21} Inland Revenue Commissioner v. Gribble, (1913), 3 K.B. 212.

\textsuperscript{22} Barras v. Aberdeen Steam Co., (1933), A.C. 402.


\textsuperscript{25} River Wear Commissioners v. Adamson, (1877), 2 A.C. 743.

"In interpreting the provisions of our Constitution, we should go by the plain words used by the Constitution-makers".27 This positivist, or what Basu calls the "Government of India Act mentality",28 also finds support in article 367 of the Constitution, which makes the General Clauses Act, 1897, applicable to the interpretation of the Constitution, both as to the "general definitions" and "the general rules of construction."

But our courts have been aware of the necessity of departing from the liberal rule in the case of the Constitution, although there seems to be a greater scope for an increased awareness of this need. The Supreme Court has said:

"If two constructions are possible, then the Court must adopt that which will lead to the smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory."29

THE GOLDEN RULE

The so-called golden rule of construction is but a variant of the literal rule of construction to avoid manifest absurdity or repugnancy, and Parke, B., spoke of it thus: "It is a very useful rule, in the constructions of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."30"

Lord O'Hagan pointed out in the River Wear Commissioners Case,31 that although care must be taken that a hard case did not make a bad law, "we must also take care, that we do not attribute to Parliament intention of injustice so very flagrant without coercive necessity." And although the doctrine of absurdity cannot "be used to re-write the language

31 River Wear Commissioners v. Adamson, (1877), 2 A.C. 743.
in a way different from that in which it was ordinarily framed,”
the court may adopt the more reasonable of two constructions\(^\text{32}\),
the one which is “reinforced by the claims of good sense and
of justice\(^\text{33}\).”

**MAXIMS AND PRESUMPTIONS**

**Maxims**: There are quite a few maxims which the courts
frequently apply in interpreting legal instruments, including
statutes and constitutions. These maxims are ready-made
instruments to be drawn upon to supplement the primary rule
of literal construction.

*Generalia specialibus non derogant*: This maxim means
that, in the absence of a clear indication to the contrary, a
general provision is not to abrogate a special provision, and it
is based on the principle that the author of a document must
not be supposed to have contradicted himself. The case for an
application of this maxim may arise either between two enact-
ments, one of a particular and the other of a general nature,
or between two provisions of the same enactment, one general
and the other special.

In the case of a constitution, the maxim is applied to sus-
tain a particular provision against a general provision thereof
on the ground that the intention contained in the particular
provision is to be considered an exception to the intention
expressed in the general provision, even if that be in a negative
language\(^\text{34}\). The general provisions of a legal instrument, thus,
cannot control or repeal its special provisions which are deemed
to be in the nature of exceptions\(^\text{35}\).

*Expressio unius est exclusio alterius*: It means that the
express mention of a thing excludes things not mentioned and
is also stated as *expressum facit cessare tacitum*, i.e., an express
enactment necessarily silences any further implication\(^\text{36}\).

“Further, where a statute uses two words or expressions, one
of which generally excludes the other, the more general term

\(^{32}\) *Countess of Rothes v. Kirkaldy Waterworks*, (1882), 7 A.C. 694.
\(^{34}\) *Taylor v. Corporation*, (1876), 4 Ch.D. 410.
is taken in a sense excluding the less general one\(^{37}\).” And under our Constitution this maxim found an early major application in *In re Delhi Laws Act*, where it was said that the Legislature being expressly authorised to make laws could not delegate its powers except in accordance with any *express* provisions of the Constitution\(^{38}\).

For the application of this maxim, however, it must be clearly shown that the express and the tacit are not only incongruous, but also cannot reasonably be intended to co-exist\(^{39}\). The maxim does not apply to cases covered by the maxim of *abundans cantela non nocet*, nor does it operate to exclude any implied common law liabilities by the express mention of certain statutory liabilities\(^{40}\). Again, “the maxim ought not to be applied where its application, having regard to the subject-matter to which it is to be applied, leads to incongruity or injustice\(^{41}\).”

*Contemporanea expositio est fortissima in lege*: The best exposition of a legal instrument is that which it has received from contemporary authority or long usage, although usage is unavailing against an authoritative judicial exposition or an explicit statutory pronouncement\(^{42}\).

*Optima est legum interpres consuetudo*. *Contemporanea expositio est fortissima in lege*. A series of judicial pronouncements or a long established usage goes to change the plain meaning of a word or phrase used in a legal instrument. Lord Cottenham said:

“In all such cases you are to take into consideration, not merely the words of the Act of Parliament, but the decisions on them, which may be said to have been all but imported into the words of the Act\(^{43}\).”

The application of this maxim is not limited to cases relating to property or contractual rights, but, as Lord Buckmaster

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\(^{37}\) Maxwell: *The Interpretation of Statutes*, op. cit.; p. 293.


\(^{39}\) *Lowe v. Dorling*, (1906), 2 K.B. 772.

\(^{40}\) *Lunt v. L. & N. W. Rly.*, (1866), 1 Q.B. 277.

\(^{41}\) *Dean v. Wiesengrund*, (1955), 2 All E.R. 432.

\(^{42}\) Maxwell: *The Interpretation of Statutes*, op. cit.; p. 264.

\(^{43}\) *Earl of Waterford’s claim*, (1832) 6 Cl. & F. 133.
pointed out, also covers “decisions that affect the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected.”

*Ut res magis valeat quam pereat*: This maxim means that it is better for a thing to have effect than to be made void. It implies that if choice lies between two interpretations, “the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. A construction that would defeat the manifest object of a statute or a constitution should be avoided.

Further, if alternative constructions are equally open, “that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating, and that alternative is to be rejected which will introduce uncertainty, friction and confusion into the working of the system.” Construction should, then, aid the smooth working of a system contemplated by a legal instrument; and our Federal Court said:

“A constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat*.”

*Quando aliquid prohibetur et omen per quod devenitute ad illud*: This maxim implies that to fully effectuate the objective of a statute or a constitution, the instrument “must be so construed as to defeat all attempts to do, or avoid doing, in an

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indirect or circuitous manner that which it has prohibited or enjoined. It involves first, that the court, aware of the mischief rule, will not unduly narrow the net of an instrument to permit a person to escape its purview; and secondly, it will apply the instrument to the substance rather than the form of a transaction contrived to escape the net of law. It will thereby “brush away the cobweb varnish, and shew the transactions in their true light.” The doctrine of colourable legislation flows from this maxim.

Noscitur a sociis: This maxim says that if two or more words, which are susceptible of analogous meaning, are coupled together, they are understood to be used in their cognate sense. “They take, as it were, their colour from each other”. One application of this general principle is the ejusdem generis rule. However, the principle is to be used cautiously, because it “is always a treacherous one unless you know the societas to which the socii belong.”

Ejusdem generis: This maxim means that general words or phrases following particular or specific words must be deemed to be limited to the kind or class of the preceding particular or specific words. The maxim, however, does not apply when the particular words do not constitute a single genus, or category, or when there is a single particular word preceding a general expression of wider import. Again, the context or the object of an enactment may preclude a restricted meaning to such a general expression. Besides, general expressions followed by particular words are not to be limited by the particular words.

Some other maxims: In addition to the aforesaid major maxims, there are some other maxims also which the courts readily apply. To this group belong the maxims of abundans
cautela non nocet, i.e., there is no harm done by great caution; cuilibet licet renuntiare juri pro se introducere, i.e., an individual has the liberty to waive the advantage of a law meant for his benefit in his private capacity; privatorum conventio juri publio non derogat, i.e., there can be no waiver of a legal requirement imposed in the public interest; de minimis non curat lex, i.e., the law does not concern itself with trifles; and lex non cogit ad impossibilia, i.e., the law does not prescribe the performance of impossibilities.

Presumptions: The Courts have also laid down quite a few presumptions to supplement the literal construction rule and to make it respond to the real needs of the organised and growing social life. One such presumption is that the legislature does not intend to alter an existing law, including even international law, except when expressly provided to the contrary. This presumption leads to strict construction of statutes affecting common law, property or contractual rights, or individual status or privileges. This presumption also applies when a statute enlarges a common law right or creates a new right.

Similarly, penal statutes, expropriatory statutes, or statutes imposing pecuniary burden, or ousting the jurisdiction of courts are strictly construed.

Another significant presumption is that, unless expressly provided, no retrospective effect is to be given to an enactment. Besides, there are presumptions against extraterritoriality of legislation, the legislature’s making mistakes, and unconstitutionality of statutes.

THE CONTEXT RULE

"Statutory language is not read in isolation, but in its

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57 Secretary of State v. Bank of India, (1938), 65 I.A. 286.
59 Walsh v. Secretary of State, (1863), 10 H.L.C. 367.
60 Secretary of State v. Bank of India, (1938), 65 I.A. 286.
context⁶⁶." Although it is commonly believed that context becomes relevant only when the language of a legal instrument is ambiguous, the fact is that expressions take their meaning only from the context. Ambiguity of an expression, simply understood, means its susceptibility to more than one meaning. But even the plain meaning of an expression must yield to the meaning derived from the context, because the ostensible purpose of all construction is to effectuate the intention of those that made a legal instrument and the intention can be better effectuated by reading words in their context.

The context rule, thus, implies two things. In the first place, if an expression is ambiguous, the context of the expression must be explored to ascertain its real meaning. Secondly, the context must also be explored to give real effect to the intention of the makers of a legal instrument. The context of an expression is divided into two parts, or has two aspects: intrinsic, internal or statutory and extrinsic, external or extra-statutory. The principle that governs the use of the intrinsic or statutory aspect of the context is known as the unity or harmony rule and that governing the use of extrinsic or extra-statutory context is called the mischief rule or the rule of Heydon’s Case. And the elements that help the determination of the twin aspects of the context are designated as aids to construction.

The Unity Rule: This rule means that a legal instrument is a unity and it must be read as whole. "Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make them a consistent enactment of the whole instrument and every part of it⁶⁷."

It implies, in the first place, that the meaning of an expression in a statute is to be ascertained in the light of the language of the whole enactment. This has, again, five aspects: (i) same words are to be ordinarily given the same meaning unless the context otherwise warrants; (ii) analogous words are to be presumed to have distinct meanings unless the context indicates to the contrary; (iii) individual words in a section

⁶⁶ Maxwell: The Interpretation of Statutes, op. cit.; p. 47.
⁶⁷ Canadian Sugar Co. v. R., (1898), A.C. 735.
should be construed with reference to other words in the section; (iv) the meaning of a section may be controlled by other sections of the statute; and (v) the meaning of a section may be determined by the scheme of the enactment.

Secondly, the rule involves that, in interpreting a statute, its sections and sub-sections should be read as inter-dependent and repugnancy between them should be avoided. And lastly, it signifies that in case repugnancy or conflict between any two provisions of an enactment becomes unavoidable, effect should be given to both the provisions as far as is reasonably practicable. This rule has, however, a limitation, as stated in Warburton v. Loveland. “No rule of construction can require that when the words of one part of a statute convey a clear meaning..., it shall be necessary to introduce another part of a statute which speaks with less perspicuity and of which the words may be capable of such construction as by possibility to diminish the efficacy of the first part.”

The Principle of Harmonious Construction: In interpreting our Constitution, the Supreme Court has accepted the applicability of the unity rule and used the compendium expression, “the principle of harmonious construction,” to resolve a conflict or repugnancy between any two provisions of the Constitution or a statute. In applying the unity rule the Supreme Court has said that all parts of the Constitution have “equal sanctity.”

The case for an application of the principle of harmonious construction arises not by raising any unjustifiable disharmony or conflict nor by the existence of an apparent disharmony or conflict. The principle comes into play only when there is a real conflict or repugnancy between any two provisions of the Constitution; and in such a situation, the conflict is resolved by giving both the provisions the best possible effect. It is, however, usually found that harmony is effected by applying the maxim of generalia specialibus non derogant. Of the principle of harmonious construction Sarkar, J., said:

71 Warburton v. Loveland, (1820), 1 H. & B. 448.
"We are concerned with harmonising two conflicting provisions by giving both the best effect possible and that is not done by cutting the gordian knot by removing the conflicting part out of the statute."  

The Mischief Rule: In Heydon's Case it was resolved:  

"That for the sure and true interpretation of all statutes in general four things are to be discerned and considered: (1st) What was the common law before the making of the Act. (2nd) What was the mischief and defect for which the common law did not provide. (3rd) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. (4th) The true reasons of the remedy; and then the office of the Judges is always to make such a construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy according to the intent of the makers of the Act, and pro bono publico."  

Lindley, M. R., in 1898, said:  

"In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's Case to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."  

It seems that although the courts are unlikely to explicitly propound all the four elements of Heydon’s Case, “the mischief rule” has a sure foot-hold even to this day. It was applied in the well-known case of Smith v. Hughes, and is the basis for the use of extrinsic aids to construction. In India, Heydon’s case was cited with approval by Venkatarama Aiyar, J., in R. M. D. C. v. Union of India.

SPECIAL CANONS OF CONSTITUTIONAL CONSTRUCTION

A constitution is a legal instrument of a special kind; “it is a mechanism under which laws are to be made and not a mere Act which declares what the law is to be”. Its special

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74 Heydon's Case, 3 Co. Rep. 7a.  
75 Re Mayfair Property Co., (1898), 2 Ch. 20.  
76 Smith v. Hughes, (1960), 1 W.L.R. 830.  
78 Att.-G. for N.S.W. v Brewery Employees, (1908) C.L.R. 469.
status demands special rules for its construction, and the courts have worked out these rules, in order that the constitution may really serve as the cornerstone of the rule of law in a community of persons.

The Nature of the Constitution: In interpreting a constitutional document, it is not only necessary to remember that it is a document constituting a class by itself, but it may also be desirable to consider the nature or the scheme of the document. Thus the federal nature of a constitution may be relevant in construing the provisions of the constitution relating to governmental powers. The general scheme of a constitution may likewise be relevant in interpreting the constitution. Our Supreme Court has held that the operation of the Fugitive Offenders Act, 1880, was not saved by article 372 of the Constitution, because it was repugnant to the concept of India as a Sovereign Democratic Republic.

Spirit of the Constitution: Although the nature of a constitution is always relevant in interpreting its provisions, any supposed spirit of the constitution is not to sway the decisions of the courts. The court must gather the spirit of the constitution from the language used, although any "argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion". Kania, C.J., observed:

"The Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in express terms or by necessary implications, the general powers conferred upon the Legislature, Courts cannot declare a limitation upon the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the statute".

The Rule of Liberal Construction: Marshall, C. J., in broadly interpreting the federal powers in the U.S.A., said: "We

80 Tasmania v. Commonwealth, (1904), 1 C.L.R. 329.
must never forget, that it is a Constitution we are expounding”.

The Privy Council, in the context of the Canadian Constitution, similarly observed: “In interpreting a constitutional or organic statute, that construction most beneficial to the widest amplitude of its powers must be adopted”. It is now a well settled principle that a constitutional document is not to be construed in a narrow pedantic manner, but in the widest possible spirit of the maxim of *ut res magis voleat quam pereat*.

In the Indian context, in one of the earliest cases, *R. v. Burah*, arising under the Indian Councils Act, 1861, relating to the powers of the Indian Legislature set up under that Act, the Privy Council said:

“The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself”.

This liberal spirit of construction was followed in the cases of the Dominion Constitutions of Canada and Australia, and Gwyer, C.J., applied this rule in *In re C.P. and Berar Sales Taxation Act*, for interpreting the Seventh Schedule of the Government of India Act, 1935. He said:

“In interpreting a Constitution Act, a wide meaning should be given to the words which confer on the Legislature the power to legislate on certain topics, and within the ambit of the words the most sovereign powers must be understood to be given to the Legislature”.

The rule of liberal construction has the widest application when the issue of the vesting of powers in the Legislature is concerned. It assumes then that within the express or necessarily implied limitations to be gathered from the language of the Constitution, the Legislature has the plenary powers of

84 *McCulloch v. Maryland*, 1819 4 Wh. 316.
88 *R. v. Burah*, (1878) 5 I.A. 178, per Lord Selborne. Italics are mine.
89 *In re C. P. and Berar Sales Taxation Act*, (1939) F.C.R. 1.
legislation, and "it is not for a court to enlarge constructively the express conditions or restrictions contained in the grant of legislative power"\(^90\), because that would amount to an exercise of constituent and not judicial power.

Secondly, it assumes that the ambit of a particular power of the Legislature is to be determined with reference to the purpose for which the power has been given. Legislative power should be so interpreted as to best effectuate the purpose for which the Legislature has been invested with a power, and this is best illustrated in the interpretation of the "defence power".\(^91\)

Thirdly, it assumes that the words and phrases used to invest the Legislature with powers are not terms of any scientific or precise definition. They very generally and broadly simply mark "the outline of the powers"\(^92\). Hence, a strict construction of these words would amount to delimiting the ambit of an expression which the constitution itself has not defined or delimited. And lastly, it assumes that a general word investing powers must be construed to cover all fair and reasonable ancillary and subsidiary matters\(^93\), including the prevention of, or punishment for, any evasion of a law\(^94\).

However, the rule of liberal interpretation has certain limitations. In the first place, in liberally interpreting a constitution, the courts cannot exercise power in a manner as to write a new thing into the constitution. Secondly, the context of an expression, or the doctrine of harmonious construction, may preclude any liberal construction. Thirdly, legal terms must be given their legal meaning\(^95\). Fourthly, the doctrine of pith and substance may impede the operation of the liberal construction rule in relation to one legislative body as against another.\(^96\) Fifthly, the definition and interpretation clauses may also limit the application of this rule.\(^97\) And lastly, the nature of a constitution may bar the operation of the liberal construction rule.\(^98\)

\(^{91}\) Andrews v. Howell, (1941) 65 C.L.R. 255.
\(^{93}\) Navinendra v. C.I.T., (1955) 1 S.C.R. 829.
\(^{97}\) Arts. 366, 367, Constitution of India.
The Rule of Progressive (Flexible or Generic) Interpretation: The rule of progressive or flexible construction, or what Wynes calls generic interpretation, implies that the words of a constitution should be interpreted, as far as they are capable of, to cover all projections of a power which the march of time, at any stage of a community's life, may bring into being. This rule is now also commonly accepted in interpreting a constitution and Venkatarama Aiyar, J., observed:

"The principle of these decisions (decisions in the cases cited in support of progressive construction) is that when after the enactment of legislation new facts and situations arise which could not have been in its contemplation, the statutory provisions could properly be applied to them if the words thereof are in a broad sense capable of containing them. In that situation, 'it is not', as observed by Lord Wright in James v. Commonwealth of Australia, "that the meaning of the words changes, but changing circumstances illustrate and illuminate the full import of that meaning. The question then would be not what the framers understood by those words, but whether those words are broad enough to include the new facts".99

The Doctrine of Pith and substance: The doctrine of pith and substance means that if an express power substantially belongs to a legislative body, the body must also be said to be the repository of all reasonable and fair ancillary and subsidiary powers relating thereto, even if it involves an incidental encroachment on the domain of the powers of another body100. This doctrine is of particular significance in a federation, and the Privy Council enunciated it in interpreting sections 91 and 92 of the Canadian Constitution. In India, Gwyer, C.J., applied this doctrine101 to interpret section 100 of the Government of India Act, 1935, which the Privy Council, in Prafulla Mukherjee v. Bank of Commerce, approved. Lord Porter observed:

"As Sir Maurice Gwyer C. J. said in the Subramanyam Chattiar Case: 'it must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the

101 Subramanyam Chettiar v. Mutthuswami, (1940) F.C.R. 188.
Legislature enacting them may appear to have legislated in forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its 'pith and substance', or 'its time, nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or that".102

In examining the true nature and character of an enactment, the court has to look to the actual provisions of the statute and not the title or form thereof103. It must examine the instrument as a whole and the object, scope and nature of its provisions104; and the question of any encroachment on the domain of another legislative body has to be decided not by reference to the degree of encroachment. However, the extent of invasion may be of some relevance in determining the pith and substance of an impugned statute, although once it is found that the statute substantially belongs to the sphere of the power of the legislature that enacted it, the extent of invasion cannot be made a ground for invalidating the enactment105.

The rule of pith and substance is, thus, an offspring of the rules that a constitution must be liberally construed and that it must be read as a whole, and introduces a degree of flexibility in an otherwise rigid scheme of allocation of powers. It comes into play when the vires of a statute is on the anvil. To this end it operates not only when cases of conflict between the spheres of the powers of two legislative bodies arise, but also when the question arises whether an enactment at all falls within the ambit of the express powers of any legislative body.

The Doctrine of Colourable Legislation: The doctrine of colourable legislation is based on the principle that the Legislature cannot do indirectly what it is not competent to achieve directly, and it is designed to prevent by-passing a restriction or limitation on the powers of the Legislature, as that would in essence be a fraud on the instrument investing the Legislature with powers. Obviously, this doctrine is an extension of the rule of strict construction and can operate only in the case of a Legislature with limited powers.

When a constitution assigns powers to different legislative bodies, or invests a legislative body with specified powers, the requirement is that the legislative bodies must confine themselves within the four corners of the specified powers, and any transgression of the limits would always raise the question of the *vires* of a statute. Such a transgression may be patent or latent, i.e., it may be manifest, overt or direct, or it may be disguised, covert or indirect. The doctrine of colourable legislation, or fraud on the constitution, is applied to test the *vires* of a statute in the latter class of cases.\(^{106}\)

In order to determine the true nature and character, or the pith and substance, of an impugned statute, the court must tear asunder the cloak of the form or appearance of the statute and examine its substance. To this end the court takes into account the subject-matter of legislation, the object or purpose of legislation and the effect of legislation. The court may also find it necessary to examine all the documents, including any other relevant statute, to unravel the real character of the impugned statute.\(^{107}\)

Once the court finds that although apparently a Legislature has passed a statute purporting to act within the limits of its powers, in substance and reality it has transgressed the limits, albeit in a veiled and indirect manner, the statute must be struck down as *ultra vires*. It should also be noted that a taxing statute may also be challenged as being an apposite case of colourable legislation, e.g., that it is a mere cloak to confiscate the property subjected to taxation.\(^{108}\)

The doctrine of colourable legislation, or fraud on the constitution, thus, raises only the question of *vires* and has nothing to do with the motive of the Legislature. Besides, the fact of mere indirect or covert manner of doing a thing does not attract this doctrine unless it is also shown that the thing itself is outside the competence of the Legislature.

**Doctrine of Prospective Overruling:** The doctrine of prospective overruling is essentially a doctrine of American constitutional jurisprudence now accepted in India by Golak

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Nath v. State of Punjab.\textsuperscript{108a} It is said to be a modern doctrine suited to a fast moving society. But although fundamentally this doctrine is legislative in character, the courts disown any such intention on their part. In applying the doctrine of prospective overruling also the courts claim only to declare a law, but with a difference. In this case the court not only declares what a law is, but also fixes the point of time from which the law is to be deemed to be in operation.

In Golak Nath's Case the Supreme Court held that the application of the doctrine of prospective overruling is not barred by the Constitution either expressly or by necessary implication. In deciding the case the Court applied this doctrine and laid down therein the following conditions for its application in this country:

(a) Only the Supreme Court can apply this doctrine.
(b) The doctrine can be invoked only with regard to matters under the Constitution.
(c) And the scope of the retroactive operation of a law declared by the Supreme Court by superseding its earlier decision or decisions is in the discretion of the Court to be determined in accordance with the justice of the cause or matter before it.

Mandatory and Directory Provisions: Although the principle is that all parts of a constitution have equal sanctity in the absence of any express provision to the contrary, the common distinction between mandatory and directory provisions of ordinary statutes also applies to constitutions. A legal provision is said to be mandatory when non-compliance with it renders an act null and void, but it is only directory when such a non-compliance does not invalidate the act\textsuperscript{109}.

In the State of U. P. v. Manbhodan Srivastava, the question for decision before the Supreme Court was whether non-compliance by the State Government with the requirement of article 320 (3) (c) of the Constitution to consult the State Public Service Commission rendered the dismissal of the respondent void. The Court held that article 320 (3) (s) was directory in nature, on the

\textsuperscript{109} Punjab Co-operative Bank v. I.T.O., A.I.R. 1940 P.C. 230
grounds that first, the Constitution did not “provide for the contingency as to what is to happen in the event of non-compliance”, and secondly, that to hold the act void would cause “serious general inconvenience, or injustice, to persons who have no control over those entrusted with the duty”111. The second test (laid down first by the Privy Council) of “serious general inconvenience, or injustice”, had already been applied earlier by our Federal Court in interpreting112 section 256 of the Government of India Act, 1935.

Amendment: No provision of a constitution gets obliterated by desuetude, and nothing can be omitted from or added to a constitution except through the prescribed procedure for amending the constitution113. An amendment is to be construed in the light of the amended provision, the evils sought to be remedied and the conditions under which it was made, and it is to be deemed as having become part of the constitution. Every endeavour should be made to construe it to harmonise with the other provisions of the constitution and failing which, it must prevail as the last expression of the sovereign will. On the same principle, in the case of a conflict between two amendments, the later in point of time must prevail.

AIDS TO CONSTRUCTION

Aids to construction are the factors whose function is to help the determination of the context of a legal instrument. They are aids to ascertain the context rather than elements of the context. Such aids are said to be intrinsic, internal or statutory when they are to be found in the legal instrument to be construed, they are said to be extrinsic, external or non-statutory when they are to be gleaned from outside the instrument.

INTRINSIC AIDS

Title: The title of an enactment, whether long or short, is now deemed a part of the Act and a legitimate aid in construing

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the Act, although the long title may have a greater usefulness; and the title is to be used for clarifying, and not controlling, the words of an enactment. However, our Constitution carries a short title, "Constitution of India", and it may not be of use in interpreting the Constitution, except, perhaps, for indicating the territorial extent of the operation of the Constitution.

Preamble: The preamble to a statute may also be legitimately relied upon to interpret the enacting part of the statute. Its value lies in illuminating the object and scope of the statute and not in controlling the meaning of the enacted part. In cases of any ambiguity of any enacted part of a statute, the preamble plays a significant role in providing a key to the mind of the author of the enactment. It must, however, yield to a clear plain meaning of an enacted part, although this may be the meaning read by the light of the preamble.

Headings: Headings and sub-headings prefixed to sections or sub-sections of an enactment are regarded as preambles to those sections or sub-sections. They, thus, cannot control the plain meaning of the sections, but are of assistance in construing doubtful expressions, particularly when a constitutional document is to be interpreted.

Marginal notes: Marginal notes are the side notes which purport to summarise the effects of the concerned sections of an enactment, and the general rule of statutory interpretation is that they are not be used as aids to construction, although there seems to be some relaxation in the case of public Acts. Das, A. C. J., said that the marginal notes in our Constitution are, unlike the marginal notes in Acts of the British Parliament, part of the Constitution as passed by the Constituent Assembly. "Such a note, prima facie, furnishes some clue as to being meaning and purpose of the Article".

118 Fletcher v. Birkenhead Corporation, (1907) 1 K. B. 205.
120 Romer v. Newcastle-upon-Tyne Corporation, (1940) 2 K.B. 204.
Punctuation: Not only punctuation, but also the manner in which an enactment has been printed, the indentation of the paragraphs and so on, are irrelevant in interpreting the enactment. This implies not only that a statute is to be read as though no punctuation marks were used, but also, where necessary, an absent punctuation mark may be read into an Act. This principle also applies to constitutions.

Provisos: A proviso is an exception to the main provision of an enactment, and is not meant to enlarge the main provisions. Its scope is to be determined with reference to the main provision, and it is to be generally so read as not to attribute to the Legislature an intention to take away with another hand what it purports to give with one. If a proviso is, however, directly repugnant to the main provision, it must have effect against the main provision. But as an aid to the construction of the main provision, proviso is of little value, except in so far as it may be of some guidance if the main provision is ambiguous.

Explanation: An explanation added to a main provision does not seek to exclude anything from the ambit of the main provision, but is meant to serve as a description. The main provision is, however, to take its meaning from its own language,

"but, when two interpretations are sought to be put upon a provision, that which fits the description which the Legislature has chosen to apply to it is...to be adopted, provided, of course, it is consistent with the language employed."

Saving clause: The purpose of a saving clause is to safeguard a right, which but for the saving, would be lost. A saving clause is usually to be found in a repealing statute.

122 Re Naranjan Singh, (1962) 1 Q.B. 211.
Non obstante clause: In investing a legislative body with specified powers, it may be provided that for a particular matter the limitations arising out of the specifications shall not apply. In such a case the "notwithstanding clause", or "non obstante clause", is prefixed to the particular matter to obviate the application of the limitations in regard to that matter.

Interpretation or definition clause: The interpretation or definition clause, like the one contained in article 366 or article 367 of our Constitution, is not intended to take away the ordinary connotation of the words of an enactment, but simply declares what is to be included within the meaning of the terms contained in the clause should circumstances justify that meaning. This proposition should be obvious from the expression "unless the context otherwise requires" of article 366 of our Constitution. If, however, the context does not require otherwise, the interpretation or definition clause must apply.

Schedules: Schedules appended at the end of an enactment are also part of the enactment. But as they usually contain matters of form or details or examples of the manner in which the provisions of the enactment are to be carried out, the general principle is that in cases of conflict between the enacting portion and a schedule the former should prevail. However, since in our Constitution some of the Schedules are as substantive as the enacting part of it, the Schedules must be construed as part of the Constitution on par with the enacting part.

EXTRINSIC AIDS

Historical setting: In interpreting a statute the court may rely on all external or historical facts which are necessary for the comprehension of the subject-matter. Jessel, M. R., observed:

"The court is not to be oblivious... of the history of law and legislation. Although the court is not at liberty to construe an Act of Parliament by the motive which influenced the Legislature, yet when the history of law and legislation tells the Court, and

131 Knightsbridge Estates v. Byrne, (1940) A.C. 613.
132 Deen v. Green, (1881) 8 P.D. 79.

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prior judgments tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means and not with a view to extending it to something that was not intended.\textsuperscript{134}

This rule of historical setting was applied in \textit{Bengal Immunity Case},\textsuperscript{135} and was also used in interpreting the effect of article 133 of our Constitution.\textsuperscript{136} However, the limit to this rule is that the court should not usurp the legislative function and add words which are not in the legal instrument.\textsuperscript{137}

\textit{Parliamentary history and Government publications relating to the enactment}: The general rule is that the debates in the Legislature; Government papers, such as a white paper; or Reports of Commissions or Committees, whether of the Legislature or of the Government, are not usually referred to for interpreting an enactment, if the meaning of an impugned expression in the enactment is plain and unambiguous.

However, if an expression in an enactment is ambiguous, legislative debates and Government publications and Reports of the Commissions and Committees relating to the enactment may be referred to as containing historical facts. The debates of the Constituent Assembly, particularly the Report of the Drafting Committee, have been deemed to be of relevance in determining the meaning of article 21 of the Constitution of India.\textsuperscript{138} It seems that these debates may also be used to ascertain, in cases of ambiguity, whether a particular meaning sought to be imputed to an expression in the Constitution was present in the minds of the makers of the Constitution.

\textit{Statement of Objects and Reasons}: The Statement of Object and Reasons is not commonly relied upon in interpreting an Act, but in the \textit{State of West Bengal v. Subodh Gopal}, Das, J. (as he then was), observed that the Statement could be of use in ascertaining the conditions under which the Act was

\textsuperscript{134} Holme v. Guy, (1877) 5 Ch. D. 901.
\textsuperscript{137} Magor & St. Mellons v. New Port Corp., (1951) 2 All E.R. 839.
Subba Rao, J., (as he then was), seems to have relied on the Statement of Objects and Reasons of the Constitution (Fourth Amendment) Act, 1955, in his judgment in Kochunni v. State of Madras, although he explicitly disowned any such reliance in Mudaliar v. S.D.C. Madras.

The question of interest, therefore, still remains whether the Statement of Objects and Reasons of a Constitution (Amendment) Act can be used as an extrinsic aid for construing the Act. It seems that such a Statement may be relied upon as a record of history of the Act and the mischief to be remedied by it, particularly because of the special nature of the Act.

International conventions: International conventions are not resorted to for the purpose of interpreting an enactment unless it contains ambiguities which may, with the help of these conventions, be clarified. In cases of ambiguity, "we can refer to the conventions to resolve ambiguities or obscurities of language in . . . the statute".

Judicial, conveyancing and administrative and commercial practices: Judicial and conveyancing practices always receive great regard by all courts of justice in interpreting a statute. Administrative practices and commercial usages may also be relevant on occasions.

Dictionaries and authoritative text-books: Although care must be exercised in the use of dictionaries and text-books, the former are of greater use in interpreting a legal instrument. Lord Coleridge said:

"I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of construction of law

142 Cf. Slaughter House Cases, (1872) 16 Wall 36, where the U.S. Supreme Court considered the 13th and 14th Amendments to the U.S.
Constitution in the light of the Statement of Objects and Reasons.
143 Salomon v. Commissioners, (1967) 2 Q.B. 116 per Diplock, L.J.
144 Re Holt's Settlement, (1968) 2 W.L.R. 653.
that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books".\textsuperscript{147}

With regard to authoritative text-books, Lord Goddard’s opinion deserves attention. He observed:

“This Court would never hesitate to disagree with a statement in a text-book, however authoritative or however long it had stood, if it thought right to do so . . . . It would be unfortunate if doubt had to be thrown on a statement which has appeared in a well-known text-book for a great number of years without being judicially doubted and after it had been acted on by justices and their clerks for many years”\textsuperscript{148}

\textit{Other enactments}: Statutes in \textit{pari materia} are admissible to interpret a legal instrument. A previous statute may be relevant in two ways. First, the course which legislation has followed may give an indication as to how the present enactment is to be construed\textsuperscript{149}; and, secondly, an expression in a present statute may be read by the light of a previous statute.\textsuperscript{150} In the context of our Constitution, it has been held, that it should be read in the light of the Government of India Act, 1935.

“Though that has undergone considerable change by way of repeal, modification and addition, it still remains the framework on which the present Constitution is built and . . . . the provisions of the Constitution must accordingly be read in the light of the provisions of the Government of India Act, 1935”\textsuperscript{151}

Furthermore, a latter legislation or a contemporary legislation may also throw some light on the meaning of an ambiguous expression in an enactment to be interpreted, but the principle in \textit{pari materia} applies decisively only in the case of earlier enactments.

\textit{Stare decisis}: Lord Morten observed:

“I have always understood that when this House clearly expresses a view upon the construction of an Act of Parliament and bases

\textsuperscript{147} R. v. Peters, (1886) 16 Q.B.D. 636.
\textsuperscript{148} Bastin v. Davies, (1950) 2 K.B. 636.
\textsuperscript{150} R. v. Loxdale, (1758) 1 Burr. 445.
its decision on that view, the Act must bear that construction unless and until Parliament alters the Act".\textsuperscript{152}

Previous decisions may, however, be safely applied only when the statutes concerned are \textit{in pari materia}, although in some exceptional cases, a departure may be made from this rule. Our Supreme Court is, however, unlike the House of Lords, not bound by its own previous decisions. It has the express powers to review its own judgments.

\textbf{Foreign judgments and doctrines}: Decisions of foreign courts with a similar legal system may be of some use in interpreting a legal instrument. Care should, however, be taken to avoid, as far as practicable, importation of foreign cases and doctrines in the interpretation of a constitutional document. Mukherjea, J. (as he then was) observed:

"In interpreting the provisions of our Constitution we should go by the plain words used by the Constitution-makers and the importing of an expression like 'police power', which is a term of variable and indefinite connotation in American law, can only make the task of interpretation more difficult".\textsuperscript{153}

\textsuperscript{152} \textit{Close v. Steel Co. of Wales}, (1962) A.C. 567.

CHAPTER 3

FEATURES OF THE INDIAN CONSTITUTION

The People of India gave to themselves a Constitution in the mid-twentieth century, and the conditions under which it was framed and the factors that worked for its making moulded it into a unique document of enduring interest. The Constitution of India was framed at an hour of the world history when constitutional ideas and institutions had long got crystallised. Ambedkar told the Constituent Assembly:

“One likes to ask whether there can be anything new in a constitution framed at this hour in the history of the world. More than one hundred years have rolled over when the first written constitution was drafted. It has been followed by many countries, reducing their constitutions to writing. What the scope of a constitution should be has long been settled. Similarly, what are the fundamentals of a constitution are recognised all over the world. Given these facts, all constitutions in their main provisions must look similar. The only new things, if there can be any, in a constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country”.

A CONSTITUTION DERIVED FROM DIVERSE SOURCES

The factors that went into the making of the Constitution of India include the statutes of the British Parliament relating to India, the enactments of the Indian Legislature, and case laws thereon; foreign Constitutions, especially the Constitutions of the U.K., the U.S.A., the U.S.S.R., Australia, Canada, Ireland and Japan, and cases relating to these Constitutions. The declarations of the French, American and Soviet peoples; declarations of the British Government on Indian affairs; the Reports of the British and Indian Committees and Commissions on Indian affairs; the Congress ideals, pledges and declarations; India’s own ancient, medieval and modern political ideas and institutions; the legacy of the long struggle for independence; the fact of having accomplished a political revolution without

a preceding socio-economic transformation; the training and background of the persons primarily responsible for framing the Constitution; the need to maintain a continuity; the under-developed condition of the country; the severe internal stresses and strains immediately before and after independence; the needs and aspirations of the common man; and the spirit of compromise that pervaded the Constituent Assembly.

The diverse factors that went into the making of the Constitution of India shaped it into an essentially elitistic, eclectic, legalistic, complex, compromise and assorted document. It would, however, be unjustified to suggest that the Constitution is an entirely borrowed document with no philosophy, or a running theme, of its own. It is true that the Constitution has drawn upon all available sources and represents national consensus at the time of its formulation, nevertheless, it embodies the political wisdom of its age and has been designed to serve the needs of the people.

A CONSTITUTION MARKING DEPARTURE FROM ANCIENT INDIAN TRADITION

The Indian Constitution marks a sharp departure from the ancient political tradition of the country and it seems to have not much regard for the Gandhian principles. The reason for this is, perhaps, to be found in the fact that the Constitution was framed to serve the needs of an essentially urban industrial civilization which the framers of the Constitution foresaw for the country. Ambedkar observed:

"The love of the intellectual Indian for the village community is, of course, infinite if not pathetic (laughter). It is largely due to the fulsome praise bestowed upon it by Metcalfe who described them as little republics having nearly everything that they want within themselves, and almost independent of any foreign relations. The existence of these village communities each of them forming a separate little state in itself has, according to Metcalfe, contributed more than any other cause to the preservation of the people of India, through all the revolutions and changes which they have suffered. . . . That they have survived through all vicissitudes may be a fact. But mere survival has no value. The question is on what plane they have survived. Surely, on a low, on a selfish level. I hold that these village republics have been the ruination of India. I am therefore surprised that those who
condemn provincialism and communalism should come forward as champions of the village".²

Indeed, the founding fathers could not in all probability afford to dream of Independent India as an island of idyllic felicity in the midst of the surging tide of the global urban industrial civilization. They aimed at a modern constitution for modern India. It is, however, to be noted that the Constitution does speak for fostering the Indian tradition of welfare politics, cooperative living and panchayati raj institutions, although mostly the genius of modern India peeps through its pages.

A MODERN CONSTITUTION

The Constitution of India is a mid-twentieth century version of the world constitutional ideas and institutions. It recognises the positive role of political institutions for socio-economic changes. The law of the Indian Constitution is essentially an instrument of social action and social change, rather than of mere social control. Nehru told the critics of the Objectives Resolution:

"The first task of the Assembly is to free India through a new Constitution, to feed the starving people and clothe the naked masses and then to give every Indian fullest opportunity to develop himself according to his capacity".³

The law of the Indian Constitution is not only exceptionally dynamic but it also openly admits within its fold administrative law to sustain its dynamism. The Constitution accepts the principles of executive legislation, justice by tribunals, delegation of powers, and co-operative federalism in explicit terms. It also declares the socio-economic objectives to be achieved by the Indian people.

A REVOLUTIONARY DOCUMENT

The Constitution of India is revolutionary in import, of course, revolutionary in the Indian tradition. It is revolutionary

not in the limited sense that it marks the culmination of a political revolution for independence, but also in a broader sense of containing the objectives and the means of achieving a socio-economic revolution in the country. The need of a socio-economic revolution was pointedly referred to by Nehru during the debate on the Objectives Revolution. He said,

“at present the greatest and most important question in India is how to solve the problem of the poor and the starving. Wherever we turn, we are confronted with this problem. If we cannot solve the problem soon, all our paper constitutions will become useless and purposeless”.  

The Indian political revolution was completed before the country could achieve a socio-economic revolution, and the Constitution had not only to epitomise the gains of the political revolution but also to devise the ways and means for bringing about a socio-economic revolution. The Directive Principles of State Policy contain both the end of socio-economic revolution as well as the means of achieving the revolution. It is in this sense that Granville Austin becomes intelligible when he calls the Indian Constitution “a social document”, though not quite accurately. For, otherwise every constitution is a social document, which made Pollock speak of Locke’s Second Treatise as “the most important contribution ever made to English Constitutional Law by an author who is not a lawyer by profession”. The Directives are, at bottom, a manifesto of the Indian people determined to achieve a socio-economic revolution in the country.

A SOCIETARIAN CONSTITUTION

The Constitution of India is essentially societarian, although it has adequate safeguards for individuals, as its constant objective is an open society based on justice, equality, liberty and fraternity. The Constitution, in a sense, seeks to provide a panacea for all socio-economic problems of the country, and it has a running theme of social control over private economic

interests and individual activities in the interests of the general public. There is also a pronounced bias for national unity and unified financial and economic management. The Constitution has, as it were, accepted the fundamental assumptions of a socialist society in all but name. In this sense, as well as in the sense that it is a revolutionary document, the Constitution of India has a basic affinity more with the constitution of a socialist country than with the constitutions of the liberal world.

**A LONG AND ELABORATE CONSTITUTION**

The Constitution of India is long, elaborate and detailed. Commenting on the size of the Constitution, Kamath said in the Constituent Assembly:

"The emblem and crest that we have selected for our Assembly is an elephant. It is perhaps in consonance with that that our Constitution too is the bulkiest that the world has ever produced."

The contributory factors for the elephantine bulk of the Constitution are many. The Constitution is federal and contains the details of the Governments of both the Union and the Units and has elaborate provisions regarding the distribution of powers between the Union and the States and the relations between them. The Constitution lays down a long list of justiciable rights and contains a scheme of Directive Principles. Numerous details of procedure and administration, including matters relating to Public Service Commissions and public servants, have also found place in the Constitution. A few conventions have also been written into law.

The Constitution had also to reckon with the immense diversities in the country and the peculiar problems the Constituent Assembly had to face. There was also the desirability of maintaining a continuity in view of the peaceful transfer of powers to Indian hands and protecting the minorities and the services in accordance with the pledges of the Congress and the British Government. Added to these was the anxiety of the fathers of the Constitution to provide constitutional solutions to almost all socio-economic and political problems of the country.

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But the length and details are by themselves no serious lacunae of the Constitution. There is, however, a legal consequence involved. The Supreme Court has held that in construing such an elaborate Constitution, “we should go by the plain words used by the Constitution-makers.”

A COMPLEX AND LEGALISTIC DOCUMENT

The Constitution is the most complex document of its kind and is remarkable for its legalism. Instead of being drawn into broad general principles of wide application, the Constitution has been worked out to run into minute and specific details like a statute. Panjab Rao Deshmukh said:

“A document dealing with a Constitution hardly uses so much of padding and verbiage. . . . All this verbiage reflects the mind of lawyers who have spent most of their lives in arguing and bandying words with each other in courts and does not reflect the spirit of a people, the fighting spirit of a people who have been through the fire and steel of the freedom struggle and who have solemnly assembled to infuse our Constitution with life and light.”

This has tended to make the Constitution not only what K. Maheshwari called “a lawyer’s paradise”, but also displays, what Jennings called, “a degree of rigidity” and “a distrust of governmental power”. It should, however, be noted that even the Constitution of the United states, which is a marvel of lucidity and brevity, has not generated litigation on a scale lesser than our Constitution. Public authorities in India have also never been found wanting powers for implementing socio-economic programmes, even though it has involved, on occasions, amendment of the Constitution.

THE CORNERSTONE OF THE RULE OF LAW

A legal document par excellence, the Constitution of India, indeed, provides the firm cornerstone of the rule of law in the country. The Constitution also stands for the rule of law

9 C.A.D., Vol. IX; p. 613.
in international sphere. True, by virtue of its article 372 pre-Constitution laws have been kept alive, but a law, whether pre-Constitution or post-Constitution, which is inconsistent with the Constitution cannot claim survival.

The Constitution seeks to achieve the rule of law in other ways also. It incorporates the doctrines of "equality before law" and "the equal protection of the laws"; proscribes self-incrimination and *ex post facto* criminal legislation; and has provisions for a scheme of constitutional rights, both substantive and remedial. The democratic foundations of the rule of law have also been accepted by the Constitution.

**A WRITTEN CONSTITUTION**

The Constitution of India is written. This implies the supremacy of the Constitution, a degree of limited government and some scope for the doctrine of *ultra vires*. Its greatest significance as a written document lies in the fact that within the four corners of a written federal Constitution, it seeks to give the maximum possible expression to the principle of Parliamentary sovereignty.

There are other elements of interest as well. The Constitution not only writes many conventions of parliamentary government into law, but also leaves a vital gap to be filled in by a convention, that the President shall generally abide by the advice of his Ministers, for the actualisation of parliamentary form of government. It also presents a singular example of legislation by reference while dealing with Parliamentary privileges.

**ROLE OF CONSTITUTIONAL CONVENTIONS AND INSTRUMENTS**

The Constitution writes quite a few conventions of the British parliamentary government into law. It, however, leaves not only a vital gap to be filled in by a convention—the President shall act on the advice of his Ministers—for the actualisation of parliamentary form of government, but also contemplates conventions to clothe the elaborate constitutional structures in other areas also, particularly with regard to the Governor and his Council of Ministers.
Although the Constitution of India is the most elaborately written document, it recognises the role of statutes, orders and rules to supplement its various provisions. In fact, in a matter like citizenship, the Constitution assumes unlimited scope for statutory regulation of the matter.

A GEM OF PREAMBLE

The Constitution has a gem of Preamble, a marvel of thought and expression, yet unsurpassed in value and beauty. One feels inclined to agree with Hidayatulla that our Preamble is something more than a mere preamble; and Barker, in quoting our Preamble in his Principles of Social and Political theory, said:

“It seemed to me, when I read it, to state in a brief and pithy form the argument of much of the book; and it may accordingly serve as a key-note”.

The Preamble lends a living philosophy and a running theme to an otherwise compromise document. It says that the people of India are the source of the Constitution which seeks to constitute India into a Sovereign, Democratic, Republic and to secure for Indians justice, equality, liberty and fraternity.

SOCIAL AND ECONOMIC JUSTICE

The Constitution aims at justice, social, economic and political. Although not a very precise term, justice is the key-note of the Constitution in both national and international affairs. Internally, it aims at a social order which includes and is higher than a socialist order. Internationally, it aims at peace, cooperation and harmony. Harmony in all, with all and of all is the objective of justice. The Constitution lays down specific steps to be taken by the country for achieving a just social order.

It appears from the discussions in the Constituent Assembly that the word “Justice” in the Preamble to the Consti-

\[12 \text{ Sajjan Singh v. State of Rajasthan, (1965) 1 S.C.R. 933.} \]

\[13 \text{ See Barker, Sir E.: Principles of Social and Political Theory, op. cit., Preface.} \]

tution read in the light of the Directive Principles, particularly the concept of right to work in article 41, was also meant to convey an idea of a socialistic type of society as the eventual objective of the Indian people.

**WELFARE OBJECTIVE**

It is the welfare of one and all that the Constitution aims at. What is currently known as the concept of welfare state pervades the entire body of the Constitution. It is to be found in the Preamble and the Directive Principles of State Policy and is also to be noticed in the provisions relating to the functions of the government under the Constitution. This welfare objective is in direct tradition of the Indian political and social thinking which aims at the weal of all in consonance with the well-being of the individual.\(^{15}\)

**COOPERATIVE TECHNIQUE**

For achieving socio-economic objectives of a welfare state and building a just social, economic and political order, the Constitution seeks to rely upon cooperative device. This cooperative technique has been emphasised in the word "Fraternity" in the Preamble and has been also incorporated in the federal structure of the Constitution. This cooperative philosophy is not confined to internal affairs but also extends to the international arena.

**DEMOCRACY**

Democracy has been conceived by the Constitution both as an objective and a method. The scheme of democracy contemplated by the Constitution is not limited merely to political democracy but also covers social and economic democracy. Political democracy is based on the five pillars of representative institutions, rotation in office, majority rule, universal adult suffrage and vigorous local self-governing units. Democracy in socio-economic areas is deemed to be essential for the success of political democracy, and the Constitution provides for specific measures to achieve socio-economic democracy.

\(^{15}\) सबै भवन्तु सुखिनः, सबै सन्तु निरामयः ।
सबै भद्रानि पशयन्तु, मा कष्टं हुःक्षमां भवेत् ॥
A SOVEREIGN REPUBLIC

The Constitution establishes India as a Sovereign Republic. Sovereignty, of course, includes independence and assumes co-existence in the international community, but it resolutely stands for the freedom of the people of India to decide all matters for themselves without any outside interference or control. Republicanism, though in a wider sense may be said to embrace even the fundamentals of democracy, including the rule of law, may preferably be confined in the context of the Preamble to indicate the fact that the office of the head of the Indian state is not hereditary.

A SECULAR STATE

The Constitution establishes a secular state in the country. There is no state religion. "The State does not owe loyalty to any particular religion as such; it is not irreligious or anti-religious; it gives equal freedom for all religions and holds that the religion of the citizen has nothing to do in the matter of socio-economic problems. That is the essential characteristic of secularism which is writ large in all the provisions of the Indian Constitution". 16

A BILL OF RIGHTS

In addition to other constitutional rights, the Constitution has also a long list of Fundamental Rights, including the Fundamental Right to directly move the Supreme Court in the case of an infringement of a Fundamental Right. Although these Rights carry with them specified restrictions, including the provision for preventive detention as a permanent constitutional measure, such an elaborate Bill of Rights with special remedies in a federal set-up is of great significance for the purpose of affording protection to individuals and minorities.

PROTECTION TO MINORITIES AND LANGUAGES

Besides the guarantees contained in Part III of the Constitution dealing with Fundamental Rights, the minorities have also been provided with other safeguards for their interests,

16 See Sharma, G. S. (ed.) ; Secularism : Its Implication for Law and Life in India, Delhi, 1969.
The whole of Part XVI of the Constitution has special provisions relating to certain classes and the Constitution also provides for certain reservations in public bodies and services for the minorities. However, their best safeguard seems to lie in the fact that the Constitution aims at building an integrated and just social order in which they find proper place.

DECLARATION OF SOCIAL POLICY

The Constitution contains the Directive Principles of State Policy which, though not justiciable, are "fundamental in the governance of the country." The Directives are not law. The law can never possibly encompass them. They are ideals for which the law has to work. The Directives, as it were, are not concerned with the validity of law but with its value, and they provide the rulers with guide-lines and the ruled with a yard-stick to make the political system work for a social order based on justice, equality, liberty and fraternity.

TERRITORIAL PROVISIONS

A significant feature of the Constitution is that it indicates not only the territorial extent of the country, but also the boundaries of individual States and Union Territories. Such a delineation has the force of constitutional law, and, therefore, the Constitution also contains the requirements of internal territorial adjustments. However, any territorial adjustment with a foreign state, which involves a cession of Indian territory to that state, needs an amendment of the Constitution.

SINGLE CITIZENSHIP

Citizenship of India entitles a person to certain rights and privileges. The Constitution has provided for single citizenship throughout the country and the Union Parliament is alone competent to legislate on matters relating to citizenship. The constitutional provisions in regard to citizenship have now been supplemented by the Citizenship Act, 1955, and Rules made thereunder. It should also be noted that an Indian citizen is also a Commonwealth citizen because of India's membership of the Commonwealth of Nations.
A UNIQUE BLEND OF GOVERNMENTAL PRINCIPLES

The Constitution of India presents a unique blend of principles in the field of government and administration. This is manifest in the scheme of federation in the Constitution and it is also to be noted in the concepts of Parliamentary sovereignty and judicial review. The form of government is also an admixture of parliamentary and presidential types. The principles of the rule of law and separation of powers also find place in our Constitution but in modified form.

FEDERALISM

It is now commonplace to say that the Indian Federation is a class by itself and it should only be noted here that the uniqueness of the Indian federal system arises out of its peculiar historical setting, the conditions of the country when the Constitution was framed, and the need for nation-building activities in a planned and speedy manner contemplated by the Constitution. But the scheme of federation in the Constitution is, in fact, also an expression of the global centripetal tendencies of federations, which have led to the emergence of the new concept of cooperative federalism.

SCHEME OF DIVISION OF POWERS

The Constitution of India provides for a detailed scheme for the distribution of powers between the Union and the States. It provides for three Lists of legislative matters—List I, the Union List; List II, the State List; and List III, the Concurrent List. Since these Lists have been drawn up very carefully and comprehensively, there is not much scope for the exercise of residuary powers which vest in the Union.

UNION-UNIT RELATIONS

The Constitution not only provides for a detailed scheme for the distribution powers between the Union and the Units, but also defines the relations between them. There are provisions relating to legislative relation and administrative relation. These relations have been supplemented with extra-constitutional devices like planning processes, consultations and conventions, and the over-all structure of relations have been so worked out as to secure cooperation between the Union and the Units, and
secure national unity without unduly constricting the autonomy of the Units.

**SEPARATION OF POWERS**

Although it is usually suggested that the Constitution of India has not accepted the doctrine of rigid separation of powers and parliamentary form of government envisaged by the Constitution is a sure indicator in the matter, a review of Supreme Court decisions would show that in some vital matters this doctrine has been basically accepted. For example, in cases of delegated legislation, judicial independence and certain Presidential powers the principle of separation of powers has been strictly applied, although it is always reasonable to feel that in our constitutional system in general the principle has a restricted application.

**PARLIAMENTARY SOVEREIGNTY**

The concept of Parliamentary sovereignty finds in our country the most extensive expression that is consistent with a written federal constitution providing for judicial review. There are various indices to support the sovereign status of the Indian Parliament. The privileges enjoyed by Parliament, the unlimited powers vested in it in relation to foreign countries, the extra-ordinary powers under Emergency Provisions and the power to amend the Constitution all go to suggest that the Indian Parliament is sovereign.

**PARLIAMENTARY FORM OF GOVERNMENT**

The Constitution provides for a President of the country, but the form of government contemplated by it is essentially parliamentary. This has been achieved by assuming and developing a convention to the effect that the President shall generally act on the advice of his Ministers and by expressly providing that the Council of Ministers headed by the Prime Minister shall be jointly responsible to the House of the People. The real power of governing the country vests in the Prime Minister and the Cabinet which is the inner core of the Council of Ministers. However, it seems that under exceptional circumstances the President may possibly be able to cast off the mantle of a constitutional head of the state and exercise real powers.
It is also to be noted that parliamentary form of government has also been provided for the States, and some Union Territories, with Governors and their Councils of Ministers headed by Chief Ministers, although a Governor appears to have a greater scope for the exercise of real powers than the President of India.

**BICAMERALISM**

The Indian Parliament consists of the President, the Council of States and the House of the People. Bicameralism at the Central level was accepted both in deference to the tradition of bicameralism in different political systems of the world as also to the local, historical, social, political and federal considerations. Bicameralism is also the general rule in the States, although there are a few exceptions and the Union Territories also have uni-cameral legislatures.

**NOVEL PRIVILEGE AND DETAILED PROCEDURAL REQUIREMENTS**

Except in matters expressly provided by the Constitution, by virtue of legislation by reference the Union Parliament and the State Legislatures enjoy privileges which the House of Commons enjoyed at the time of the commencement of the Constitution. This is a singular instance of investing a legislative body with such wide parliamentary privileges within the limits of a written constitution.

The Constitution, both in the case of the Union Parliament and the State Legislatures, has also laid down procedural details with regard to financial and other enactments. Although these details have been further supplemented by procedural rules framed by the legislative body concerned, no constitution in the world contains procedural details in these matters like our Constitution.

**SUFFRAGE AND ELECTIONS**

The Constitution of India introduces universal adult suffrage for persons who are Indian citizens and are not less than twenty-one years of age. To ensure fair elections, the Constitution has provided for an independent Election Commission to supervise elections to the Union Parliament, the State
Legislatures and the Offices of the President and the Vice-President.

**UNIFIED AND INDEPENDENT JUDICIARY**

Although a federation, the country has a unified scheme of judiciary. The Supreme Court is at the apex of the Indian judicial system and in a State the High Court constitutes the highest judicial forum. The Constitution guarantees independence of not only the Supreme Court and High Court Judges but also aims at judicial independence for the subordinate courts. The objective of the Constitution is to separate the judiciary from the executive at all levels of administration and to ensure that judges are subject only to law and are able to administer justice according to law independently, impartially, objectively and consistently.

**JUDICIAL REVIEW**

The Constitution has provided for judicial review not only in the narrow sense of controlling the executive and administrative authorities and declaring subordinate legislation void, but also in the fuller sense of pronouncing upon the constitutionality of any law whatever. The courts competent to pronounce upon the constitutionality of a law are the Supreme Court and the High Courts, and the record of their performance shows that they have been devoting themselves to this task in all earnestness, even at times, to the extent of giving an impression of overstepping the expectations of the Constitution.

**ADMINISTRATIVE LAW AND ALL-INDIA SERVICES**

Part of the administrative law of the land is to be found in the Constitution. This lends our constitutional law an added element of dynamism which it basically derives from its nature as an action-cum-change oriented legal scheme. Although, constitutional status for certain administrative details has on occasions tended to clog administrative speed, the appropriate legislative body is fully competent to deal with these matters by ordinary legislation.

The Constitution provides for independent Public Service Commissions for the Union and the States to ensure impartiality in the recruitment and efficiency in the working of public
servants. The Constitution also contemplates some All-India Services, such as I.A.S., and I.P.S., to ensure national unity, efficiency and integrity.

ELABORATE FINANCIAL PROVISIONS

The Constitution also contains elaborate financial provisions for both the Union and the Units. Proceeds of certain taxes have been separately allocated to the Union and the States whereas some others are shared by them. There are also provisions for Central grants-in-aid to the States. The Constitution also requires the quinquennial appointment of Finance Commissions by the President to report on the need for any adjustment in the financial allocations between the Union and the Units.

COMPTROLLER AND AUDITOR-GENERAL

For keeping a watch on the process of accounts and expenditure of the Union and State Governments and other public bodies, the Constitution provides for an independent Comptroller and Auditor-General of India. He is responsible for both public account and audit, and has his own separate establishment. He has under him Accountant-Generals posted in the States, and he also assists the Public Account Committee of the Indian Parliament in the performance of its functions.

EMERGENCY REQUIREMENTS

The Constitution of India has been so designed as to function equally effectively at all times, whether during peace or internal disturbances or external aggression. When a Proclamation of Emergency is declared by the President, the country virtually comes to have a unitary form of government. A Proclamation may also be issued by the President saying that constitutional government in a State has suffered a break-down and laying down necessary arrangements to run the Government of the State. Declaration of a Financial Emergency by the President is also permissible. These emergency provisions make the constitutional machinery of government capable of absorbing shocks of unusual nature.

VARIETY IN AMENDING PROCESS LEADING TO FLEXIBILITY

The Constitution presents a rare spectacle of different formal amending processes. Part of the Constitution may be
amended by Parliament in the manner of passing an ordinary statute; parts require a special majority in Parliament; and the remainder may be changed by a special majority in Parliament ratified by a specified number of State Legislatures. To these formal methods are to be added the informal methods of change by ordinary legislation by Parliament to supplement the Constitution, by conventions, and by decisions of the superior courts. All these modes of amendment lend a welcome degree of flexibility to our elaborately written federal Constitution.

INTERNATIONALISM

A significant feature of the Constitution is its recognition of the law of nations and the need for the international community to live in peace, harmony and cooperation. The word "Fraternity" in the Preamble aims at not only internal but also international brotherhood and cooperation. The Directives enjoin the state to also promote international peace and security; maintain just and honourable international relations; foster respect for international law; and encourage settlement of international disputes by arbitration.

Besides, in a sense, the Constitution outlaws aggressive wars. There is a subtle change in the wording of article 352 of the Constitution from that of section 102 of the Government of India Act, 1935, dealing with Proclamation of Emergency. Section 102 contained the word "war" but article 352 speaks of only "external aggression". This is a deliberate change of expression to convey a new attitude that the country now has towards war and peace. This internationalism is also in the ancient Indian tradition.17

It may be said in conclusion that even a casual glance at the above features of the Constitution of India is most likely to incline one to agree with what Ambedkar told the Constituent Assembly about our Constitution. He said:

"I feel that it is workable, it is flexible and strong enough to hold the country together both in peace-time and in war-time. Indeed, if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile".18

17 उदार चरितानां तु, वसुकृते कृतमयम्
18 C.A.D., Vol. VII ; p. 44.
CHAPTER 4

FEDERAL NATURE OF THE CONSTITUTION

Federalism was not unknown to the ancient and mediaeval east and west, but the credit for having caused its current currency ought to go to the United States. Conceived under the conditions of an age completely different from that of the present generation; founded on the ideas and experiences of that age, especially the predilections and prejudices of its founding fathers; born of peculiar local factors; and followed by the Constitutions of Canada (1867), Switzerland (1874) and Australia (1900), the Constitution of the U.S.A. (1787),\(^1\) as initially shaped, still claims to provide the federal model to the world, although it itself contains the word ‘Union’ instead of the word ‘Federation’. And this is in a world where all the older federations, including that of the U.S.A., have undergone almost a complete transformation in structural details and operational devices and technique in response to new social claims, economic conditions, technological advancements and international needs.

In India, in his Presidential address at the 1904 annual session of the Indian National Congress, Sir Cotton first visualised a “United States of India” with the status of a self-governing Colony under the aegis of the British Empire as the dim and distant goal of every Indian freedom-fighter. And the Gaekwad of Baroda told Viceroy Chelmsford in 1918 that “the future of India lay in federation.” The British official attitude towards Indian federation was, however, specifically stated in the \textit{Montford Report (1918)} as a sisterhood of autonomous States, comprising both British India and the Indian States, presided over by the Central Government as the eventual scheme of the Indian polity, although a 1911 despatch of Viceroy Hardinge had earlier recommended to the British Government to constitute autonomous Provinces under the Central Government. But the Government of India Act, 1919, gave only a semblance of Provincial autonomy.

\(^1\) The Constitution actually came into force in 1789.
By the end of the first quarter of the twentieth century almost all Indians were of the opinion that the future of India lay in a federation and the British also were not averse to this idea, although all, including the British, had their own separate pictures of the details of the federal set-up. The word "Federation" came to be used in a legal document for the first time in the Government of India Act, 1935. But the Federal Scheme under the Act was never put into effect until after Independence in 1947, although its Provincial Autonomy Scheme was given a trial.²

"INDIA, THAT IS BHARAT, SHALL BE A UNION OF STATES"

It seems that the word "Union" in the Indian context came to be used first in the Cripps proposals (1942) which spoke of an "Indian Union". The Cabinet Mission Plan (1946) continued to use the expression "Indian Union" and the Objectives Resolution of the Constituent Assembly, January 1947, used the word "Union" and not "Federation". And it is interesting that in all these cases the contemplated Indian federal set-up was to be more federal than even the U.S. federation. The Constitutional Draft of the Constitutional Adviser, B. N. Rau, however, contained the word "Federation", but the Drafting Committee substituted for it the word "Union" in the Draft Constitution. Explaining the significance of this substitution, Ambedkar, while moving the Draft Constitution on November 4, 1948, told the Constituent Assembly:

"It is true that South Africa which is a unitary State is described as a Union. But Canada which is a Federation is also called Union. Thus the description of India as a Union, though its constitution is federal, does no violence to usage. But what is important is that the use of the word 'Union' is deliberate. I do not know why the word 'Union' was used in the Canadian Constitution. But I can tell you why the Drafting Committee has used it. The Drafting Committee wanted to make it clear that though India was to be a federation, the federation was not the result of the agreement by the States to join in a federation, and that the federation not being the result of an agreement, no State has the right to secede from it. The federation is a Union because it is indestructible."³

² See the Author's From Raj to Republic, Calcutta, 1972, for further details.
³ C.A.D., Vol. VII ; p. 43.
The intention of the Drafting Committee in using the word "Union" is obvious. But the Committee missed the fact that the Constitution of the U.S.S.R. has the word "Union" and yet allows the Union Republics the right to secede. Besides, not only the Canadian Constitution but also the U.S. Constitution uses the word "Union" and Chief Justice Chase of the U.S. Supreme Court in this regard observed in *Texas v. White*:

"A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organised under a Government sanctioned and limited by a written constitution and established by the consent of the governed. It is the Union of such states, under a common constitution, which forms the distinct and greater political unit, which the Constitution designates as the United States, and makes of the people and the States which compose it one people and one country".4

Obviously, the mere use of the word "Union" to describe a federal constitution has no necessary adverse impact on the federal nature of the constitution. It raises a presumption in favour of its federal nature. When, therefore, article 1 of the Constitution of India declares that "India, that is Bharat, shall be a Union of States," it does not by itself detract from the federal nature of the Constitution. This issue was noted by Das J. (as he then was), although not in a happy phraseology. He observed:

"The Constitution itself says by Art. 1 that India is a Union of States and in interpreting the Constitution one must keep in view the essential structure of a federal or quasi-federal constitution ..."5

**THE CONCEPT OF THE FEDERATION**

**Meaning of the Word "Federation"**: The word "Federation" appears in the Swiss and Australian Constitutions, and in explaining its meaning, Lord Haldane observed in *Att.-G. of Australia v. Colonial Sugar*:

"In a loose sense, the word "federal" may be used ... to describe any arrangement under which self-contained States agree to delegate their

4 *Texas v. White*, (1869) 7 Wall. 700. Italics are mine.

powers to a common Government with a view to entirely new Constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions . . .

This natural and literal interpretation of the word “federation” implies, in the first place, that a federation is the result of an agreement; secondly, this agreement is to delegate powers; thirdly, the delegation of powers is to a common Government; fourthly, the delegation of powers is with a view to an entirely new Constitution; fifthly, the agreement is among self-contained States; and lastly, these States retain in the main their Constitutions. But none of these implications, which raise the two basic issues of the basis of federations and the mode of formation of federations, seems to stand a close scrutiny.

The Basis of Federations: Unless an agreement be taken to mean anything from, what Laski said, dumb consent to dull inertia, to say that agreement is the basis of federations is to subscribe either to the archaic contract theory of the origin of the state or to the international view of treaty making powers of a state. But the preamble to no living federal constitution nor any current strand of authoritative thinking acknowledges either of these two positions. In all cases a constitution can be said to have been derived from either the sovereign people of the country or the sovereign parent state. What is aimed at under a federal constitution is not the delegation of certain powers by “self-contained States to a common Government,” but the constitution of a sovereign state.

If a federal constitution, like that of the U.S.A., is a result of the will of the sovereign people, the people continue to be the ultimate sovereign under the constitution and immediate sovereignty is vested in duly constituted authorities; if, on the other hand, a federal constitution, like that of Canada, is a result of the will of the sovereign parent state, it is the people of the country concerned that become the repository of ultimate sovereignty under the constitution and the duly constituted authorities receive only immediate sovereignty. Technically,

the legal basis of a federal constitution, as much as of any other constitution, is the sovereign will of the people.

From a practical standpoint, the basis of a federation is what Dicey called, the desire for union and not unity.\(^7\) This desire may be generated by geographical, historical, economic, social and like conditions. Given the current social, economic, technological and international forces inevitably generating centripetal tendencies in all countries, to sustain the desire only for union what is needed is a firm federal social base for an enduring federal polity. And it seems that this federal social base is to be found more in the nature of racial, linguistic, cultural, or religious diversities in a country.\(^8\) It is desirable in our days to remember that a federal polity is a device best suited to a federal society where cultural, linguistic, racial or religious groupings almost coincide with the territorial divisions of the federation.

From this viewpoint India has a real advantage over the U.S.A. The evolution of the federal system in our country in the past conveys one consistent theme, that is, federation in India has always stood for cultural or linguistic autonomy and national and economic unity. In this respect the Indian scene looks more like the Soviet than the American scene. And the present working of our Constitution and other federal constitutions suggests that an autonomy based on culture or language is more likely to live vigorously than an autonomy based on historical or other like considerations.

**The Mode of Formation of Federations:** Again, to say that the federal process is merely a uniting process is not only to miss the essence of federalism, which lies in its being a method of constituting national and regional authorities with coordinate spheres of competence, but also to ignore the history of federalism after the First World War. Objectively, federalism is not a mere "tightening" technique but also a "loosening" device. It need not always be a step in the direction of unification, but may also be an achievement in the process of decentralisation or devolution.

\(^7\) See Dicey, A. V.: *Law of the Constitution*; p. 141.

\(^8\) Cf. Carnell, F. G.: *Federation and Economic Growth in Under-developed Countries*; pp. 49-63.
The mode of forming the Indian federation has been largely by devolution and not by unification, although the entry of the Indian States into the Union did involve an element of unifying process. The problem of the federal movement in this country was stated squarely by the Joint Parliamentary Committee on the 1935 Indian Reforms. The Committee said: “We are faced with the necessity of creating autonomous units and combining them into a federation by one and the same Act”. The Indian federal movement has been, as it were, a movement from the Centre to the regions, from the Union to the units, rather than from the units to the Union. But this has been a movement in response to the objective preconditions of federalism obtaining in the country. And simply because the Indian federation represents the culmination of the process of devolution, and not of unification, it does not, in principle, seem to be suffering from any congenital disability.

In fact, the federal Constitution of India is in the tradition of the age-old Indian phenomenon of unity in diversity on which Nehru had commented long ago in the following words:

“I think, the glory of India has been the way in which it has managed to keep two things going at the same time, that is, its infinite variety and at the same time its unity in that variety. Both have to be kept, because if we have only variety, then that means separation and going to pieces. If we seek to impose some kind of unity, that makes a living organism rather lifeless.”

**QUASI-FEDERATION**

In spite of its clear difficulties, the etymological meaning of the word “federation”, which Lord Haldane conceived as its plain and natural meaning, has not only found admirers but has also caused a degree of confusion. Wheare, for example, considers federation not only as a device for constituting general and regional governments which are “coordinate and independent”, but also sets in full swing a cult of quasi-federation.⁹ To conceive federation in the mid-twentieth century as consisting of not only technically coordinate but also structurally and operationally independent national and regional governments,

⁹ See Wheare, K. C.: Federal Government, London, 1953. See also his Modern Constitutions. Italics are mine.
indeed, highlights the influence of the U.S. constitutional structure and Lord Haldane's plain and natural conception of federation. But the more disconcerting aspect of this influence is its bye-product, the concept of quasi-federation.

The conception of federation is itself not definitely ascertainable, and a projection of the term "quasi-federation" on this already swinging plane will only accentuate the uncertainty about the federal concept. The federal concept is not a static point, it is a penumbra of vibration between the extremes of a unitary state and an association of states. Its legal, theoretical or practical utility lies in its indicating a situation in which a sovereign state builds a constitutional system in which within their respective coordinate spheres of competence, the national and regional governments are designed to pursue national and democratic objectives.

To try to hang the federal hat on the quasi peg is not only of no legal, theoretical or practical significance, but is also to display an utter disregard for the basic need for constituting a category for scientific discussions. Quasi indicates the region of doubt between two distinct categories and is never considered conducive to a scientific treatment of a subject. When the conception of federation is itself not determinate, a more indeterminate term like "quasi-federation" can have the only function of expressing the bias of the person using this term. Besides, the conception of quasi-federation completely fails to recognise federation as a process and the need for its adaptation in a developing country. It is only desirable then that the term "quasi-federation" should be completely discarded.

COOPERATIVE FEDERALISM

A more realistic approach to federations, old and new, is to be found in the concept of cooperative federation which bids good-by to the traditional concept of competitive federation as a dual polity, realistically recognises that federation in both a structure and a process, and takes into account not only the federal structure but also the federal working to determine what a federation really means. Federation as a structure refers to the institutions and instrumentalities laid out by the constitu-

10 See the Author's Justice by Tribunals, op. cit.; Chap. 1.
tion, and it has different designs, shapes and slants varying from one country to another. Federation as a process includes the operational pattern, devices and techniques actually obtaining in the relations between the national and regional governments, which display, as MacMahon says, 'many gradations of tempo and destination'.

The dominant trend in the recent working of federations is said to be decisively of centralisation, a not altogether happy expression. It is implicit in the needs of current social, economic, technological and international developments that all the national governments, whether federal or unitary, should function more vigorously and effectively. The cooperative federal technique is also a product of this phenomenon. It objectively states the position of federations, both old and new, in their actual working, and this, indeed, is an era of cooperative federalism.

The difference between the old and new federal constitutions is that whereas in the former cooperative federalism operates almost entirely as an extra-constitutional technique, in the latter a number of formal constitutional links for facilitating inter-governmental cooperation have also been forged. And by any standard of judgment this calls for a clear recognition of the bold and realistic attitude of the new federal constitutions, rather than provides an occasion for dubbing them as quasi-federal. This is all the more true in the case of developing countries, or in countries which believe in the decisive and effective role of the government in bringing about socio-economic changes.

A WORKING CONCEPTION OF FEDERATION

Common Assumptions of Federation: Obviously, it is not the use of the word "Union" or the word "Federation" that determines whether a country is a federation, nor is the basis or the mode of constituting a federation decisive in the matter. What, then, determines whether a country is a federation? Necessarily, first, the structure, and second, the function. An

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12 See Venkata Rangaiya, M.: Competitive and Cooperative Trends in Federalism; Chap. III.
examination of the structure of government in a country and its functioning should be decisive in concluding whether a country is federal. But *where to locate* the touchstone? What are the essentials of a federation?

*A Sovereign State*: A federation is a sovereign state as a single entity. It is not a mere association of sovereign states for specified purposes. Whatever the internal technical or constitutional quibblings, internationally the federal country as a unit claims and enjoys sovereignty. That is the international legal position and constitutions have not thus far anything to say against it, the Constitution of the U.S.S.R. notwithstanding.

*A Written Constitution*: It is said that a federation should have a written constitution. But in this age of written constitutions, a written constitution by itself is not enough. Although its existence is accepted as a necessary means of constituting a federal polity, technically it cannot be decisive.

*Supremacy of the Constitution*: It is also urged that in a federation the constitution is supreme. But, then, the constitution is supreme in any case, and it is this view of the matter that made Jennings say that the sovereignty of the British Parliament is the Constitution of Great Britain. A written federal constitution is, however, all the more meant to be supreme, because it constitutes authorities with defined powers. But, if by the supremacy of a written constitution be meant the sovereignty of the constitution, it is not in the least essential that the constitution in a federation should not only be written but also supreme. Its supremacy can only denote that *unless amended*, it must be observed. Supremacy of the constitution, thus, is not peculiar to federations.

*Dual Citizenship*: Citizenship of both the Centre and the circumference is also pointed out as a mark of federalism. It is true that only a federation can provide for dual citizenship, but two points are to be noted. First, internationally dual citizenship is useless, and internally, it is of very limited practical utility. Secondly, dual citizenship merely mirrors in an area the dual nature of the federal polity, and its absence or presence cannot be decisive in determining the federal nature of a polity.

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13 *See* Jennings, Sir I.: *The Law and the Constitution*, op. cit.
Dual Government: A unitary state has only a national government. An association of states has only the governments of the states. But a federal country has a national government as well as the governments of the regions. It is this structural aspect that is vital. A unitary state may have administrative divisions, but these divisions are subordinate to, mere delegates of, the national government. An association of states may have an organisational arrangement for the association but government in their case means the governments of the concerned states and the organisation at the associational level is in the capacity of an agent. In a federation the status of the governments of the regions is on par with that of the national government. Neither the national government is an agent of the regional governments nor are the governments of the regions agents of the national government, although provisions for inter-governmental delegation of powers may be permissible. A federation must have national and regional governments with status on par.

Division of Powers and Functions: This parity in status of the national and regional governments implies another essential condition. There must also be coordinate spheres of competence, including taxing powers, for both. It is not necessary that the spheres should be equal in size or weight, what is essential is that while acting within its sphere each government must be deemed to be enjoying as plenary powers as the other.

Dual Judiciary and Judicial Review: Dual judicial system, like dual citizenship, is not indispensable because in the working of the constitution, in the ultimate analysis, the words of the highest judicial forum is taken as the final judicial pronouncement whether in a unitary or a federal country. So far as judicial review is concerned, it is to be noted that to the extent of deciding upon the question of the ultra vires of an exercise of an administrative or executive power, or delegated legislation, judicial review is available everywhere. The power to declare legislative enactments ultra vires the constitution is found in some federal constitutions. But it should be obvious that, at least, as in the case of Switzerland, it need not extend to the enactments of the national legislature. Judicial review and federation are not inseparable concepts.
Federation as a Core Concept: It follows then that the question, what is federation, can reasonably be answered with reference to only its sovereign status, the dual governmental structure and coordinate spheres of their competence, and these three alone should be the final determinants whether a country is a federation. Nicholas accepts this position, and even Wheare realises the difficulty of defining federation on the basis of any other criterion, although he seems to add a rider by inserting the word “independent” in his definition. Wynes, however, conclusively observes:

"The chief characteristic of the federal system is the division of powers between the Federal and State Governments."

A Definition of Federation: Federation is, thus, a contrivance for constituting within the bounds of one sovereign state national and regional governments which are on par in status and have exclusive spheres of powers and functions. The people are placed, as it were, under dual jurisdiction—one national and the other regional. But the state is one single entity, only its government is dual and from that the state receives its federal character.

Federation is, then, a device for constituting and operating in a sovereign state national and regional governments with coordinate spheres of competence.

India and the Common and Core Federal Concepts: From the Indian angle the significant point to be noted is that even on the basis of the common assumptions of federation this country has (i) sovereignty, (ii) a written Constitution, (iii) supremacy of the Constitution, (iv) dual government, (v) division of powers and functions, (vi) and judicial review. India does not have dual citizenship and dual judiciary, although the principle of domicile is recognised as supplementing the law of citizenship and the Constitution provides for the creation of dual judiciary. One wonders whether only the absence of these

14 See Nicholas: Australian Constitution, Law Book Co. of Australia, 1952.
16 Wynes: Legislative and Executive Power in Australia, 1962; p. 3.
two should justify its exclusion from the rank of word federa-
tions. It is needless to say that federation as a core concept
certainly accepts without reservation the Indian claim to be
treated as a federation.

CONSTITUTIONAL SIGNIFICANCE OF FEDERALISM

Federation is a significant aspect of constitutionalism,
because basically both aim at consciously\(^{17}\) constituting public
authorities with agreed defined powers. A consensus with a
legal core on basic issues relating to the governance of a country
brings into being the constitution of the country, and when the
consensus includes an arrangement whereby two sets of authori-
ties—one national and the other regional—with coordinate
spheres of competence are set up to operate in a competitive
or cooperative spirit, the constitution becomes federal in nature.
There is thus a great degree of similarity between the objectives
of constitutionalism and federalism.

The Federal Polity and Constitutional Construction: It is
of primary interest to note that the nature of a constitution is
relevant in interpreting the provisions of the constitution. The
federal nature of a constitution is taken into account in con-
struing the constitution, particularly the provisions relating to
the division of powers between the national and regional govern-
ments; and the courts so interpret the constitution as to secure
a smooth working of two sets of coordinate authorities. This
is done because the purpose of construction is to best effectuate
the intention of the authors of a legal instrument, and the
authors of a federal constitution do intend the federal device
to work successfully, and without friction and contradiction.

\(^{17}\) Mill, J. S.: Representative Government, 1865; p. 4:

"Political Institutions are the work of man; owe their origin and their
whole existence to human will. Men did not wake up on a summer morning
and find them sprung up. Neither do they resemble trees, which, once
planted, 'are aye growing' while men 'are sleeping'. In every stage of
their existence they are made what they are by voluntary human agency."
However, this is not to suggest that the entire political process is conscious;
habits and unconscious play their part in varying proportions. What is
important to remember is that both federalism and constitutionalism
represent a more conscious choice."
Sovereignty and Federalism: A very significant constitutional aspect of federalism is related to the location of sovereignty in a federal polity. It is now being increasingly recognised that sovereignty even under a federal system is a national attribute, an attribute of the federal state, and this is the rather sole point of conceptual distinction between a federation and a confederation. The related issue of location of sovereignty is yet in a twilight zone. The best solution, which is now being generally adopted, is that sovereignty vests in the people as a whole, and in a more determinate form in the authority that has the competence of formally amending the constitution.

So far as the question of exercise of sovereign powers by the national and the regional governments is concerned, the scene is totally nebulous. It is usual for the courts to say that within the ambit of powers assigned to them by the constitution, each exercises sovereign power. This highlights the existing confusion of thought and expression in this matter. Why it should be necessary to say that the national and regional governments exercise sovereign authority within the limits set by the constitution, is not clear. Apparently, this statement is meant to express the idea that the regional governments are not the delegate of, nor subordinate to, the national government or vice versa.

But this need not flow from the proposition that each of them is sovereign within the limits of its authority, but may be traced to the primary fact that each of them has been so established by the constitution as to operate on the basis of legal equality in their respective spheres. When, say, two municipal corporations operate on a basis of legal equality within their statutory limits, one is not subordinate to but coordinate with the other. Yet none of them can be said to exercise sovereign power. The case of national and regional governments raises the question of the exercise of certain specified powers directly derived from the constitution and not of the exercise of sovereignty which is the exclusive preserve of the people.

No federal constitution, except the Swiss and Soviet Constitutions, speaks of sovereignty of the national or regional governments. If at all it speaks of sovereignty it is of the country, the nation, the federal state, or the people. Article 3 of the Swiss Constitution, however, reads: "The Cantons are
sovereign as far as their sovereignty is not limited by the Federal Constitution". Limited sovereignty in law is a contradiction in terms, and obviously the Cantons are sovereign only by courtesy. The fact is that the Swiss nation is sovereign and the world accepts the sovereignty of Switzerland and not of a Canton.

The position of the Union Republics in the U.S.S.R. is that of a Swiss Canton by virtue of article 15 of the Soviet Constitution. Such a Union has also the right to maintain limited army, establish foreign relations directly and even to secede from the Soviet Union. But article 3 of the Constitution lays down: "All power in the U.S.S.R. belongs to the working people of town and country . . . ." It should, again, seem then that the Union Republics have only powers not vested in the Union, but they are sovereign in no sense as sovereignty belongs to the people of the U.S.S.R. Besides, a unit of a federation cannot be sovereign also because only federal laws have national, or even extra-national, application.

Parliamentary Sovereignty and Federalism: A question may also arise, whether in our, or any other, federal set-up the principle of parliamentary sovereignty is compatible with the federal principle of coordinate regional and national authorities. In this regard, if it be accepted that the people of the concerned country are sovereign, whose will the constitution epitomises, the mere fact that the constitution contemplates coordinate regional and national legislative, executive and judicial authorities need not prove a logical bar to the operation of the principle of parliamentary sovereignty. Because in this case, the constitution may invest Parliament with constituent powers, as under our Constitution, to be exercised by itself or in conjunction with some other authority or authorities in the prescribed manner.

On this view of the matter the principle of parliamentary sovereignty is logically compatible with a federal polity, provided the constitution recognises the well-known distinction between legislative and constituent powers, and invests Parliament with constituent powers. The question whether Parliament under a particular federal constitution is sovereign may, then, be finally answered by an examination of the provisions of the constitution relating to constituent powers.
Supremacy of the Constitution: From the proposition, that in all federations sovereignty ultimately belongs to the people and is exercisable by them and constituted authorities exercise only specified powers, whether express or implied, emanates another notable constitutional aspect of federalism—the supremacy of the constitution as an expression of the will of the sovereign people. This supremacy, though inherent in any written constitution, assumes a distinct dimension in a federal constitution, because such a constitution contemplates coordinate competence of the national and regional governments.

The regional and the national governments derive their powers from the constitution and different formulas have been adopted for the assignment of powers to them. The one most in accord with the federal principle is said to be that which enumerates only the powers of the national government. The other is to enumerate the powers of both the federation and the units and to vest the powers not so enumerated in the units or the people. The third formula is to enumerate the powers of both the federation and the units and vest the residuary powers in the federation. There may also be other combinations of these three. But in all cases, even in the first, the national and regional governments derive their powers from the constitution, whether enumerated or not. This implies the supremacy of the constitutional document, because only by recognizing this supremacy can the legal logic of equality between the federal and the regional governments be consistently upheld.

Supremacy of the Constitution and the Courts: From the principle of the supremacy of the constitution in a federation is said to emerge the doctrine of ultra vires or the power of judicial review of the courts in a federation. Only a few pressing points in this regard may be noted in brief here, because it raises a vast number of complex questions. In the first place, the so-called supremacy of the constitution is not limited to only federal constitutions but also extends to any extant unitary written constitution also. It is indeed the supremacy of the written constitutional documents and not of the federal constitution. Secondly, whatever the situation, once an authority is said to have defined powers, the question of vires is inherent in the exercise of the powers and there is nothing peculiar about it in a federation.
Thirdly, the doctrine of *ultra vires* does not necessarily lead to the doctrine of judicial review of statutes, unless it is also assumed that the legislative prudence is less reliable because of its popular character than judicial wisdom because of its permanent nature. Although it may be argued that a written constitutional document itself implies an element of distrust of the powers of the public authorities, the judiciary itself is a part of the public authorities in a country. Judicial review of statutes is based on a distrust of non-judicial public powers in general, and adherence to the concept of competitive federalism in particular. And it is logically possible to consistently build and work a federal polity without providing for judicial review, at least, of the statutes passed by the national legislative authority.

**THE INDIAN FEDERATION : A VIEW**

Direct or indirect references to the Indian federation have been made above in appropriate cases to indicate its broad conformity with the general federal pre-requisites. But it seems desirable to take a total view of the Indian federal system, first, by pointing out some of its basic characteristics and, then, by presenting a final *critique*.

**CHARACTERISTICS OF THE INDIAN FEDERATION**

**Federal Constitution for a Federal Community**: The Constitution of India is based on the sovereign will of the people recognised by the Indian Independence Act, 1947, of the British Parliament. It is a federal Constitution for a federal community. It implies that the Constitution is not a result of any agreement among the units, but of the exercise of the sovereign will of the people; and each unit of the federation is more or less a homogeneous cultural group. This cultural homogeneity of a federating unit involves a distinct recognition of cultural and linguistic autonomy which provides in India a solid foundation for its federal polity.

**Federation a Consummation of Devolution**: The federal Constitution of India represents the culmination of the process of devolution and decentralisation set in motion by the Government of India Act, 1861, although in the case of the Indian
States, the federating process must also be conceived as the uniting process. It may, however, be pointed out that in the early days of the Company’s rule the three Presidencies of Fort William (Calcutta), Fort St. George (Madras), and Fort St. Davis (Bombay) were independent of each other and centralisation began only with the Regulating Act of 1773, which reached its zenith under the Act of 1858 which transferred the governance of the country from the Company to the Crown. In essence, therefore, centralising proclivity began in 1773, which reached the peak in 1858; and after three years, in 1861, devolutionary declivity was set in motion, which found its fulfilment in the federal system in 1950, when the present Constitution became fully operative.

Supremacy of the Written Constitution: The Indian federation has a written Constitution as its foundation. Both the Union and the States derive their powers directly from the Constitution. As the Constitution is elaborately written, there is little scope for the operation of the residuary powers of the Union or for constructively expanding the sphere of the Union’s competence. The doctrine of pith and substance is equally applicable to both the Union Legislative List and the State Legislative List. Consequently, without a formal amendment there is not much scope for expansion in the existing spheres of competence of the Union and State Governments.

The Constitution is also the supreme law of the land; the cornerstone of the rule of law in the country. No pre-Constitution law, or a custom having the force of law, can claim survival by virtue of article 372(2) of the Constitution if it is inconsistent with its provisions. This would have been the position even in the absence of article 13 of the Constitution, which expressly declares void any pre-Constitution law which is not in conformity with Fundamental Rights. Article 13 also applies to post-Constitution laws. In effect, any law, in the broadest sense of the term, which is inconsistent with the enacted part of the Constitution must be declared invalid. The superior courts in India have jealously guarded this supremacy of the Constitution. The Constitution, thus, reigns supreme, unless amended.

Single Citizenship: The Constitution introduces single
citizenship and there is no notion of State citizenship in the country, although the concepts of State domicile and residence are recognised. It is sometimes pointed out that the absence of dual citizenship is not helpful to federalism in India. The fact, however, is that citizenship even in the U.S.A. for international purposes means single citizenship as in the case of India, because in international parlance citizenship simply implies subjecthood of a sovereign state.

Internally in the United States, dual citizenship implies a State's claim to discriminate in favour of its own citizens. But it is found that the degree of discrimination obtaining in the U.S.A. between the citizens of one State and those of another is insignificant and, thus, the dual citizenship system in the U.S.A. is not of much practical utility. What practical results are obtained in India by supplementing the single citizenship system with the concepts of State domicile and residence are not much different from what consequences flow in this regard from the dual citizenship system in the U.S.A. And the same may be said about dual citizenship in Switzerland and the U.S.S.R.

Status of the Units of Federation: The Union of India consists of the States and Union Territories, but only the States are the members of the Union. A State in India is not a delegate of the Union nor is the Union a delegate of the States. Within their respective spheres each has plenary executive and legislative powers, subject to the provisions of the Constitution. This implies a coordinate capacity of both the Union and the States.

All the States, except the State of Jammu and Kashmir which has been given a special status, enjoy the same status as the equal members of the Union, although in area, population, economic development and other like matters there is a considerable variation from one State to another. There is, however, no theory of inherent equal rights of the States in India, and the doctrine of immunity of instrumentalities does not apply to them.

To all the States the Constitution of India uniformly applies, except the State of Jammu and Kashmir where the Constitution applies as adapted by the Constitution (Applica-
tion to Jammu and Kashmir) Order, 1954. The Constitution of India in Part VI also contains the Constitution of the States. The State of Jammu and Kashmir has, however, its own separate Constitution. But the form of government in all the States is the same, except for the fact that some State Legislatures are bicameral whereas others are uni-cameral and the chief executive of the State of Jammu and Kashmir is called the Sadar-i-Riyasat.

An element of State Governments should, however, be noticed. The Governor of a State is appointed for a fixed term by the President of India and holds office during the pleasure of the President. As the President acts on the advice of his Ministers, the appointment of Governors is controlled by the Central Cabinet. The Governor, thus, also becomes a Central representative in his State. But as he is a constitutional chief executive, his effective role does not begin unless there is party instability in his State or there is ideological divergence between the Central and the State Governments. The Governor plays a role as the Central representative, but this role is either meant for exceptional circumstances or as a cementing factor for national cohesion and cooperation.

So far as the Union Territories are concerned, they are Centrally administered areas with no autonomous status. The Constitution also contains in Part VIII provisions relating to their administration and Parliament has made laws providing for Legislature and Council of Ministers in some of these Territories. It may also be noted that Schedules V and VI of the Constitution lay down provisions for the administration of Scheduled and Tribal areas. These provisions imply, in effect, a diversity in the status, powers and functions, and organisation of the units comprised within the Union of India.

No State Right to Secede: A federation is usually conceived to be an indestructible union of the units, and to establish this both Switzerland and the U.S.A. had to successfully fight civil wars. It is not usual to accept even the principle of secession by agreement within the terms of a constitution, because the constitution is considered as also the birth certificate of a nation. When a people is born, a nation lives, it cannot allow itself to be dismembered.
There is, however, the Constitution of the U.S.S.R. which provides under article 17 that “The right freely to secede from the U.S.S.R. is reserved to every Union Republic”. What is significant in this regard is not secession as a practical possibility but the right to secede as a matter of principle. If it be accepted that a federation comes into existence as a result of agreement among the federating units which reserve to themselves all the powers excepting those expressly vested in the federation, a capacity to rescind the agreement seems to be inherent in this assumption, although it may be argued that such a capacity may not possibly extend to the destruction of the union.

If, on the other hand, it be assumed that a federal constitution is a result of the will of the sovereign people of the country as a nation, right to secession cannot be conceded to any territorial unit of the country. Our Constitution stands by the second principle, and in the result, the question of allowing the right to secede to a State does not arise. The Union is indestructible; it is a nation.

No Guarantee of the Unit’s Territorial Integrity: The Union Parliament may by law make any arrangement regarding the name, status and territory of a State or a Union Territory, including its representation in Parliament, within the terms of articles 2 to 4 of the Constitution. This feature of the Indian federation is said to militate against State autonomy. It is common to suggest that whereas the United States is an indestructible union of indestructible units, in India only the Union is indestructible.\(^\text{18}\)

The actual conditions under which Articles 2 to 4 were drafted and the purposes for which they have been employed thus far indicate that the powers of Parliament under these articles have been used only in the direction of creating new autonomous States. It is then not the nature and the extent of the Union Parliament’s powers under these articles that should be taken into account in deciding whether they are helpful to federalism in India, but their actual exercise should clinch the issue. Besides, whatever territorial adjustments relating to the units

may be made, federation under the Constitution must stand as the basic feature of government.

The Council of States as a Representative Body of Units: The Constitution provides for the representation of units *qua* units, whether States or Union Territories, in the Council of States which is the Second Chamber of the Union Parliament. The States are represented on the Council not on the principle of equal representation for each one of them as in the United States, but on the basis of population. The Council has also twelve distinguished Indians as members nominated by the President.

This unequal representation is said to be a departure from the strict federal principle of constituting the second chamber of a federation. The fact that the Council of States may also, by a resolution of two-thirds of its members present and voting, authorise the Union Parliament to legislate on any matter in the State List for the specified period, is further said to depart from the federal principle. It seems that unequal representation as well as special authorisation may be justified only on the ground that the framers of the Constitution placed a high premium on national interests over regional claims.

Special Scheme of Division of Legislative Powers: An interesting feature of Indian federation is its scheme of distribution of powers between the Union and the units. Schedule VII to the Constitution contains three Lists of legislative powers—the Union List, the State List and the Concurrent List—although some articles of the Constitution also provide for additional items on which the Union Parliament may exercise powers. These Lists have been drawn up with meticulous care to avoid overlapping and to make them exhaustive. This has at least two implications. In the first place, the residuary powers which the Constitution vests in the Union lose much of their practical significance, because a case for their application can arise only when a power claimed by the Union does not form an Entry in any of the three Lists. Secondly, as there is no “twilight zone” in the division of powers between the Union and the units, there is no scope for the courts to constructively enlarge either the Union’s powers or States’ autonomy.
On the basis of the Entries in the Lists, it is pointed out that the Indian federation has a very strong Central bias because most important items form part either of the Union or the Concurrent List. Two things are to be noticed in this regard. In the first place, technological, economic, social and international developments have radically changed the traditional assumptions about division of functions on the basis of matters of local or regional concern and matters of national concern. Significantly, the scale on which a service is to be rendered has now become much enlarged by inherent technological and economic necessities. Secondly, India has opted for a rapid, planned development. These factors imply that the national government in a federation must inevitably play increasing role in functions which previously could be considered as the functions of local or regional interest. Where the national government has not been directly invested with these powers, it has indirectly, through legal or extra-legal means, come to assume them.

**Division of Financial Resources**: The Lists make a clear demarcation between taxing and other powers of the Union and the units. There is thus no scope for taxation by a State in the exercise of its any other power. Again, a suggestion is made that the taxing powers of the Union relate to such important items as to drive one to the conclusion that the States in India occupy a subsidiary or secondary position. But it seems that this suggestion is based on an incorrect assessment of the basic relation between taxing powers and other powers.

The Constitution provides for an exhaustive division of taxing powers between the Union and the States. Some taxes are to be levied, collected and appropriated by the Union. Some are to be levied, collected and appropriated by the States. There are some taxes which are levied and collected by the Union but are assigned to the States, and some taxes are levied and collected by the Union but are shared by it with the States.

Besides, the Constitution has a provision for grants-in-aid to the States in certain cases. In recent years, these grants-in-aid are said to be used by the Union to even subvert State autonomy. Perhaps the enormous gap between the number of functions to be performed by the States and their revenue resources to meet the expenses for these functions lends
strength to this view, and there seems to be a scope for so working out the details of the financial relation between the Union and the States as to increase the share of the latter in some elastic Central taxes, and thereby considerably reduce their existing reliance on grants-in-aid.

Division of Powers and Parliamentary Primacy: The Constitution under articles 245 and 246 lays down the principles on which the respective legislative powers of the Union and the States are to be exercised and the presence of *non obstante* clause in the context of only the Union Parliament is considered indicative of Parliamentary predominance. But it seems that even assuming the widest operation of the *non obstante* clause, the States are left with a well-defined group of powers over which they exercise exclusive control.

It is again pointed out that the Union Parliament may legislate for State matters in numerous circumstances. Such a legislation is competent in national interest in pursuance of a resolution of the Council of States. Parliament may also legislate for State matters by consent of two or more States or in cases of Emergency. During Emergency, when a Proclamation of Emergency is issued under article 352 of the Constitution, the country is meant to function as a unitary system. When there is a breakdown of constitutional machinery in a State, under article 356 Parliament becomes invested with legislative matters only with regard to the State concerned. In addition, there may be a Proclamation of Financial Emergency under article 360, and Parliament becomes invested with powers to legislate with regard to any financial matter even if it concerns a State List.

The Union Parliament has also been invested under numerous articles of the Constitution with powers to legislate over matters of both regional as well as national concern, including the power to amend the Constitution in certain respects by ordinary legislation, not amounting to an amendment within the meaning of article 368. In addition, in the power of formally amending the Constitution, Parliament takes the lion's share. This Parliamentary primacy may be said to go against the federal principle. But since our Constitution accepts the doctrine of Parliamentary sovereignty within the frame of a
written federal Constitution, such a position of Parliament is a logical inevitability.

In such a situation reliance will have to be placed for successfully working the federal scheme in the country by laying a greater emphasis on federation as a process. This means that the federal community in the country will have to build and sustain a psychological climate to act both internally and externally on the working of Parliamentary sovereignty to make it conform to the requirements of our federal polity. And since democracy in the last analysis is government by opinion, this task should not prove in the least difficult for the country.

Judiciary and Judicial Review: The country does not have separate Union and State judiciary, although the Constitution empowers Parliament to set up courts with special jurisdiction over Union laws. This unified system of judiciary, however, does not militate against federalism in India. The judiciary in the country, particularly the Supreme Court and the High Courts with their constitutional guarantees, is well known for its impartiality and independence. This makes the Union and the States work strictly within their own spheres, serves as a constant reminder against any trespass on the sphere of another, and secures their compliance with the provisions of the Constitution.

The Supreme Court and the High Courts have been expressly authorised to declare a Union or a State enactment ultra vires, and they have exercised this power in the past very vigorously. The doctrine of pith and substance evolved by them have helped the States in many cases in the face of the non obstante clause used in article 246 in investing the Union Parliament with powers to make laws in regard to the Union List.

Demarcation of Executive Spheres and the Union's Power to Issue Directives and Secure Cooperation: The Constitution extends the executive powers of the Union to all matters in the Union List. Similarly, the States have executive powers in respect of the matters in the State List. So far as the Concurrent List is concerned, the States have exclusive power with regard to matters therein, unless Parliament may by law otherwise provide. This means a larger sphere of State execu-
tive power. For this reason as well as for want of distinct Union administrative machinery for most Union purposes, the Constitution has provisions relating to administrative relation between the Union and the States.

The Union executive has the power to issue directives to the States for certain purposes. Such a directive may be issued to secure compliance of State administration with the Union laws and the Union administration. Directives may also be issued for several other purposes, including the protection of the railways and the maintenance of the means of communication of national importance. The Constitution also provides the directives with a sanction. Article 365 lays down that the failure of a State to comply with a direction of the Union may be construed by the latter as an apposite case of constitutional breakdown in the State.

The powers to issue directives represent the movement of federalism from the competitive to the cooperative stage, and they are not meant to work against State autonomy. In the light of the constitutional provisions for delegation of executive powers by the Union to the States and vice versa the power of issuing directions can legitimately be construed only as a new institutional device of cooperative federalism. And on the same principle may be explained the organisation and working of the Zonal Councils and Inter-State Councils.

Impact of Some Union Functionaries, All-India Services and Central Police Force: The Union has also functionaries like the Comptroller and Auditor-General and the Election Commissioner who operate an all-India basis and the States have no control over their appointment, and it is said that this leads to a degree of centralisation. The fact, however, is that these independent authorities purport to act fairly and freely in relation to both the Union and the States. Although it is true that the respective functions they administer have a centralised institutional pattern, the purposes for which these functions are to be exercised partake more of the nature of a judicial function. In the ordinary sense of the term “control”, even the Union does not exercise control over their working.

The impact of All-India Services on State autonomy has not thus far been adverse because of the constant readiness of
the Central political leaders to attach considerable weight to the views of State political leaders in regard to the matters of control over the personnel of the All-India Services posted in the States. On the other hand, the members of these All-India Services have helped the promotion of a satisfactory all-India level of efficiency in State administration. An efficient State administration is always conducive to an enlarged and effective utilisation of State autonomy.

The existence and working of the Central Bureau of Investigation and the Central Reserve Police has also to face criticisms as being inimical to State autonomy. So far as the C.B.I. is concerned, its services have been appreciated in most cases and all shades of political opinion in the country claim for investigation by this body in cases of complaints of irregularities in State administration.

The C.R.P. has rather proved a prickly issue, particularly because it has to deal with certain exigencies caused by the activities of non-Congress political parties and groups. The Congress holding the Central reign in its hands, the other political parties, whether in power in a State or out of power, find a convenient ground for assailing the deployment of C.R.P. for peace keeping operations as seriously hampering State autonomy. It is only to be noted here that constitutionally the Central Government has the competence to create and maintain the C.R.P. The question of its deployment often hinges on subtle political balances and no definitive solution seems to be available for ready-made application in all situations.

Emergency Provisions and Federalism: The Constitution of India has been so devised as to work in normal times as a true federation. A casual glance over the Constitution may lead one, however, to conclude that even under these circumstances there is weightage in favour of the Centre, although as we said earlier this is due mainly to the general world trend of centralisation and cooperative federalism and the acceptance of the doctrine of Parliamentary sovereignty within the scheme of our written Constitution.

The Constitution has been deliberately cast in an elastic mould to behave as an India-rubber ball to bounce expansively
when internal and external conditions are conducive to individual liberty and free government, but it must discard this expansiveness when the existence of the nation is at stake because of internal disturbances or external aggression. When there is such a threat and the President issues a Proclamation of Emergency under article 352, the whole country becomes completely unitary in political set-up. The use of such a power by the President is meant to be made sparingly and it is acknowledged everywhere that wars cannot be fought in accordance with the sermon on the mount. Besides, past experiences of such Proclamations go to show that even when they are in force, federalism in practice is not completely suspended.

The taking over of the Government of a State under article 356 of the Constitution on the ground that there has been a breakdown of the constitutional machinery in the State is meant both to protect national territorial integrity as well as to secure a smooth working of the Constitution on cooperative basis. Similarly, Declaration of Financial Emergency, although having a serious impact on the financial autonomy of the States, is necessary to secure financial stability and viability in a developing country like ours, which has accepted the democratic process of development with social justice as its objective.

It should appear then that the Emergency Provisions of the Constitution, though apparently subversive of State rights, are really subversion of State rights in the interest of the States. Liberty and autonomy are concepts of peace and progress. When the very existence of the nation is at stake no principle of liberty or autonomy can be allowed to be set up as an impediment to an all-out effort to sustain national existence. The Constitution gets suspended in certain respects when Emergency Provisions come into play. But the objective in such situations is to make the Constitution fully operate as soon as possible.

**Constitutional Amendments and Federalism**: The process of formal or informal amendments of a federal constitution and the units' share in or control over this process is considered to have an important role in sustaining federalism. Under the Constitution of India, formal amending power vests in Parliament. But amendments relating to the extent of the Union executive power; the manner of Presidential election; powers
of the Supreme Court or the High Courts; legislative relation between the Union and the States; the Seventh Schedule listing the legislative items of the Union and the States; representation of the States in Parliament; and the formal method of amendment under article 368 must also be ratified by the Legislatures of one half of the States. It should appear, thus, that although the States' say in the formal amendment of the Constitution is not considerable, their vital interests have been shielded by the Constitution.

**Role of Some Extra-Constitutional Devices**: The role of some extra-constitutional devices in the working of the Indian federation may also be mentioned. One such device is the Indian Planning Commission. This body has responsibility for framing Five Year Plans for national development. The Plans finalised by the Commission are discussed and finally approved by the National Development Council which includes the State Chief Ministers. The Planning Commission is meant to promote uniform national policy and programmes. Another such body is the University Grants Commission. Certainly these bodies are unifying agents, but their basic purpose is to secure some uniformity rather than foster unity.

Then there are the elements of political parties and personal relations and contacts. These are double edged swords whose impact on the working of the Indian federation has too many subtler aspects to permit their scrutiny here. However, it should be noted that given the present centrifugal forces in India, the principle of cooperative federalism underlying our Constitution has in the past been put into operation only because of the existence of a strong national party. Its slight weakening for a brief spell only proved an open invitation to the centrifugal forces to strain the working of this cooperative principle to a breaking point. It seems that in the Indian context of diversity and regional and local allegiance one or two very powerful and organised national political parties are always a boon to the working of cooperative federalism in the country.

**A CRITIQUE**

It should be obvious now that the Indian polity is the latest model of cooperative federation. Wheare, however, suggests
that it is a quasi-federation.\textsuperscript{19} He also adds that India is "a unitary state with subsidiary federal features rather than a federal state with subsidiary unitary features".\textsuperscript{20} But Nicholas thinks that India has a federal Constitution.\textsuperscript{21} Alexandrowicz also combats the view that India is a quasi-federation and considers it sui generis.\textsuperscript{22} To Basu "the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is union or composite State of a novel type".\textsuperscript{23} Jennings feels that Indian federation has a "strong centralising tendency".\textsuperscript{24}

There seems to be, however, definitely no reason to class India as an example of quasi-federation because such a view fails to realise that the federal concept is not a static point. It is also not reasonable to treat the Indian federation as a class by itself unless it implies a recognition of the fact that structurally and operationally no two federations in the world are alike; each federation is, indeed, a class by itself. In that sense alone India may be considered a novel composite State, or a federation sui generis. Centralising tendency is a rather universal phenomenon inevitable in this age, and it is doubtful whether it is stronger in India than in other older federations.

It is true, as Ambedkar pointed out, that the Indian Constitution has not been cast into a tight mould of federalism but has been designed to possess the necessary flexibility to function as a unitary government in moments of Emergency.\textsuperscript{25} But there is hardly a federal constitution that does not through devious means by-pass the federal limitations during national emergency and war. The Indian federation accepts this situation directly and without any reservations. In normal times,

\textsuperscript{25} C.A.D., Vol. VII; p. 34.
as T. T. Krishnamachari observed, the units “enjoy substantial and significant powers of legislation and administration”.  

The fact is that the Constitution has been designed to operate on the principle that “in spite of federalism the national interest ought to be paramount”.  The Constitution provides “the means and methods” whereby “all basic matters which are essential to maintain the unity of the country may be secured under a federal system”.  The founders were, thus, concerned with preserving national unity by providing for a strong Central Government. But a look at the federations around the world would lead now to one single conclusion, that in all cases the national governments have enormously grown in power and prestige at the cost of regional governments. It is true that there has been an overall growth even in the functions of the regional governments because of the acceptance of the positive role of the state, but national governments have so grown up as to overshadow any growth of regional governments. 

Critics of the Indian federation often forget the fact that federalism is more “functional” than “institutional”. Institutionally, as long as the Constitution of India carves out the coordinate spheres of competence of the Union and the State Governments and the superior courts continue to exercise their power of judicial review, logically there is nothing seriously to speak against the Indian system, except that it has a strong centralising tendency or that it is a class by itself, propositions which have been effectively countered above. 

It should also be remembered that with its democratic objectives, institutions and processes, India in an open society. And yet it is a society wedded to an objective of a socio-economic revolution to carry the benefits of political freedom to the doors of its teeming millions. Necessarily, the constitutional instrumentalties and institutions of cooperative federalism are to be of a distinct nature so as to work for a revolution without

impairing democracy and open social system. "Revolution by Constitution", that is what the Constitution of India aims at.

Functionally, it has to be recognised that competitive federalism has already given way to cooperative federalism in almost all the federal countries.\(^{30}\) The Indian Constitution only recognises some of the informal links developed in the older federations of the world for securing inter-governmental cooperation, and has also added to it the requisite devices for rapid, planned and integrated development of the country, socially, economically and politically.

Besides, the actual working of the federal process in any country is determined to a large extent by the complexion of the society and the organisation of political parties. That Indian society is essentially federal and that the States have been carved out on this social base is undeniable. Although the existence of a single national party of real importance may be an apparent detractor from the federal principle, the inner nature of this party should debar such an apprehension. "From the time of the first civil disobedience campaign the internal history of the Congress was reconciliation of a multitude of social interests and different points of view". The Indian allegiance pattern should be a definite indicator of the fact that a monolithic political party organisation has no real possibility here, although occasionally a leader in a party may lend a greater semblance of unity to the party by his style, or objective conditions may cause this semblance of unity.

An objective and close observation of the Indian federal process will show that, although a person like Santhanam may feel that in its working the Indian Constitution is really unitary,\(^{31}\) the fact is that most governmental work in this country in carried on smoothly and regularly on the basis that the Union and the State Governments have their own exclusive spheres of competence. What get catapulted as examples of friction or are projected as instances of Central supremacy are only a fraction of the vast governmental activities being continuously


\(^{31}\) Santhanam, K.: Inter-Governmental Relation in India, Bombay, 1960; p. 70.
carried on in the country in accordance with the federal principle.

Besides, the future of the Indian federation seems secure because of the loyalty pattern, the social diversities and the centrifugal forces in the country. Even a cynical view of the present Indian scene should convince one of the endurance of the federal polity, because the Union and the States find in each other a convenient excuse for their own foibles.

This is, however, not meant to imply that there are not frictions nor that there is no scope for improvements in the existing system of Union-State relations. But two points should be clearly kept in mind. First, the Constitution evisages a federation, but it also aims at national unity and development. In this era of complex financial techniques, no federal country trusts the units with financial autonomy. The current system of grants-in-aid in the U.S.A. and the dominance of the Federal Government in financial and economic fields should conclusively prove that federalism now cannot be taken to include real financial autonomy. The national economy has got to function as a unit. Secondly, if India has to take rapid and planned developmental strides through public agencies, no leg-pulling or dragging of feet can be allowed to the State Governments.

What the States in India should have in full is cultural autonomy, which, though not a very determinate expression, is clearly understood. But no let-up in economic and nation building activities can be permissible in the name of State autonomy. In addition, the paramount need of national integration in the area of cultural autonomy will also have to be kept in mind. Instead of altering constitutional provisions, the better way is, first, to devise certain institutions and processes whereby the States may be made to participate more actively and effectively in decisions at the Union level impinging on State administration directly. There is already such a device in the form of National Development Council, although doubts have been expressed about its effective functioning. The remedy lies in revitalising it and others on similar lines may be worked out on party or governmental levels. Secondly, it should be

possible to allow the States a greater share in the Centrally collected taxes and reduce their dependence on Central grants.

In conceding these grounds it may not, however, be out of place to suggest that in the ultimate analysis the present Indian political system has to function effectively and, more or less, like a unity in major social and economic areas, both internally and internationally, in pursuit of securing a socialistic pattern of society. This is what history suggests, this is what the country needs, and this is what the people demand. The Constitution must be viewed in the light of this paramount proposition, and thus viewed the Indian federation is a model cooperative federation operating in a crucial era.

The Constitution of India contemplates an elastic cooperative federal polity based on the needs of enduring national unity and rapid and planned development for securing social, economic and political justice in a highly diversified community in a world of increased international contacts, tremendous continuing technological advancements, vast industrial and urban growth, and complex financial techniques. The Indian federation only explicitly avows much that is now implicit in the working of the old federal constitutions in the new context of the present age of crises.
CHAPTER 5

PHILOSOPHY OF THE CONSTITUTION

Philosophy is the science of knowing the being as being. It is an integrated approach to the totality of knowables. It is the wisdom of knowing the essence, and is, thus, truly an ocean churning process. Thus conceived, even a preliminary idea of the philosophy of a constitution would involve not only its study in depth from A to Z, but also an understanding of its setting in entirety. But this is, indeed, an enormous enterprise to be undertaken within the limits of the available space. Yet a proper appreciation of a constitution calls for prefacing its study with a note on its philosophy.

The philosophy of a constitution may, however, be given a restricted meaning. It may be taken to refer to those ideals for which the constitution stands, or more technically the policies on which the constitution has been founded. It is in this sense that the philosophy of the Constitution of India is being considered here. This Constitution has yet a special advantage to offer in this regard. It has a precious Preamble which in a pithy form states not merely the philosophy of the Constitution, but also contains the substance of the political philosophy of this age.

THE PREAMBLE TO THE INDIAN CONSTITUTION

The Preamble to the Constitution of India is the radiant sun that brilliantly illuminates the provisions of the Constitution. It is the result of the peerless workmanship of Pandit Jawaharlal Nehru and epitomises all that humanity holds high and dear. It is based on the Objectives Resolution\(^1\) moved by him on December 13, 1946, and adopted by the Constituent Assembly on January 23, 1947, and it appeared in its present form in the February 1948 Draft of the Constitution. "It is", indeed, as Thakurdas Bhargava said, "the most precious part of the Constitution. It is the soul of the Constitution. It is a key to the

\(^1\) See above for the text of the Objectives Resolution.

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Constitution. It is a proper yard-stick with which one can measure the worth of the Constitution . . . It is a superb prose poem, nay, it is perfection itself". And so it is:

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

JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and opportunity; and to promote among them all
FRATERNITY assuring the dignity of the individual and the unity of the Nation;

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

THE GENERAL NATURE AND LEGAL SIGNIFICANCE OF THE PREAMBLE

The preamble is an introduction to a legal instrument and is a part of it, although not a part of its operative provisions. It is a mere recitation or declaration, and not enactment. Its proper function is to state the facts which the authors of a legal document deem necessary for an understanding of the enacted part of the document. It may declare the source and timing of a document, the conditions obtaining at the time of framing the document, the object and purpose of the document, and the policy underlying the document. Its function is to declare certain facts and not to prescribe law.

The preamble is not law. It is a statement of facts considered necessary for understanding law. It is a "Key to open the minds of the makers of the Act, and the mischiefs which they intended to redress". It is not law, yet it is of legal significance as an aid to the construction of a statute or a constitution when the enacting part is ambiguous, although it is not open to a court to create or imagine an ambiguity in order to resort

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3 Stovel v. Lord Zouch, (1797) 1 Plowden 353, per Chief Justice Dyer.
to this aid of construction. The preamble, as it were, illumines the obscure. Our Supreme Court said:

"If any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the Preamble".4

This should not lead, however, to the conclusion that the court has no business to look to the preamble so long as the enacted part does not raise an ambiguity or a doubt, because it is a part of the legal document as much as the enacted part and the document must be read as a whole.5 The preamble cannot be lightly cast aside unless it comes in direct conflict with a clear and unambiguous enacted part. It is always a ready reckoner of legislative policy,6 and even a repealed preamble may be of some assistance in construing statutes in pari materia.

The function of a preamble is illuminative and not restrictive or expansive. In the result, when the language of an enacted part is clear and unambiguous, the terms of the preamble cannot restrict or enlarge its application. It is possible that an enacted provision may, in clear and unambiguous term, contain more or less than can be squarely fitted into the frame of the preamble. Then in that case, the terms of the enactment must prevail,7 even if against any supposed spirit of the preamble.8

Being merely a recitation of facts, a preamble cannot be a source of, and consequently a limitation on, any legal power or procedure. Thus, the U.S. Supreme Court observed:

"Although the Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power... Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those powers".9

It is to be also noted that the validity of any fact recited in a preamble cannot be contested in a court, because it does

not contain justiciable facts nor is it law.\textsuperscript{10} Though a preamble is, then, not justiciable, it can be amended in the manner provided for amending other parts of the legal instrument which it prefaces, unless the instrument expressly provides otherwise. Consequently, the Preamble to our Constitution may be amended by Parliament within the terms of article 368 of the Constitution. If a Bill to that effect be passed "in each House of Parliament by a majority of the total membership of that House and by a majority of not less than two-thirds of members of that House present and voting", the Preamble shall stand amended in accordance with the terms of the Bill after the President's assent to it, which cannot be withheld.

AN ANALYSIS OF THE PREAMBLE TO THE INDIAN CONSTITUTION

What applies to preambles in general also applies to the Preamble to the Constitution of India with the addition that its radiance and richness places its nature and significance in bold relief. The Preamble is, first, an invaluable introduction to the Constitution; and secondly, it is an excellent intrinsic aid to construction, both in areas of obscurity and in cases of ascertaining policies. Thirdly, it states that the people of India are the source of the Constitution, and fourthly, that the people adopted, enacted and gave the Constitution to themselves on November 26, 1949, through their Constituent Assembly. Fifthly, it declares the people's solemn resolve of two-fold objectives of constituting India into a Sovereign Democratic Republic and of securing to its citizens Justice, Equality and Liberty and promoting Fraternity among them all. And lastly, its rich theme runs through every provision of the Constitution. The enacted part of the Constitution is the Preamble writ large. And this makes it desirable that the contents of the Preamble should be closely viewed.

THE PEOPLE OF INDIA

The Constitution of India flows from the sovereign people of India in their corporate capacity. It implies, first, that the people of India are not mere an aggregation or a collectivity

but a nation with corporate capacity. That India is a nation, the Preamble also emphasises when it speaks of the unity of the nation in the context of promoting fraternity among the people of India. It is a nation with one will, one voice and corporate capacity\(^{11}\); and Ambedkar said:

"I say that this Preamble embodies what is the desire of every member of the House, that this Constitution should have its root, its authority, its sovereignty from the people. That it has".\(^{12}\)

Secondly, it means that sovereignty belongs to and is exercisable by the people as people and there is no room for Crown, Princes or any other rank.\(^{13}\) This is no mere principle of popular, political or ultimate sovereignty, but is a juristic concept which invests every Indian with the public capacity of citizenship and provides him, in the system of universal adult suffrage, with a permanent means of exercising sovereignty. Patanjali Sastri, J. said in \textit{A. K. Gopalan v. State of Madras}:

"There can be no doubt that the people of India have, in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal ...".\(^{14}\) In the \textit{Union of India v. Madangopal} this proposition was again affirmed: "Our Constitution, as appears from the Preamble, derives its authority from the people of India ...".\(^{15}\)

Thirdly, it implies that the people of India, as a body, were deemed to be present within the Assembly Chamber for framing the Constitution. Burke once said of the British Parliament:

"Parliament is omnipotent because Parliament is deemed to be the people. Parliament is not a body with delegated or limited authority. The whole fullness of popular power dwells in it. The whole nation is supposed to be present within its walls. Its will is law; or as Dante says in a famous line, its will is power." Bryce also voiced the same sentiment. The Constituent Assembly of India had this status when the Constitution was adopted and enacted. Kamath observed in this regard:

\(^{11}\) See below chapter 8 for further elucidation.
"Here we are not individuals. Here we are all the people of India. . . . All that we have done here in this Assembly has been in the name of and on behalf of the people of India".16

Yet it is the representative character of the Constituent Assembly that is often questioned. It is pointed out that a Constituent Assembly indirectly elected by the Provincial Legislative Assemblies based on a narrow franchise of 14 per cent of the people can be anything but a truly representative body of the people. The Cabinet Mission, however, suggested this scheme for constituting the Constituent Assembly on the ground that a direct election based on universal adult suffrage would inordinately delay transfer of power to Indian hands, and this position is irrefutable.

Secondly, it was generally felt that because of the existence of well-knit all-India political parties the election results in any event were most likely to be the same. But some critics then say that the Constitution could have been subjected to the people's verdict by a referendum. This argument not only misses the cardinal point that this course would have involved a technical departure from the status of the Constituent Assembly, but also ignores the fact that the Constitution would have received the seal of approval at a referendum in any event, as the result of the subsequent elections to Parliament and the State Legislatures showed. In effect, a fresh elections on the basis of universal adult suffrage in those days would have been a political myopia and a referendum a legal nonsense and a political farce.

Besides, Santhanam noted the truth of the matter and said: "There was hardly any shade of opinion not represented in the Assembly".17 And unless our visions are beclouded by ideological smoke-screen, partisan prejudices or polemical zeal, let us picture to our minds the galaxy of illustrious Indians bedecking the gallaries of the Constituent Assembly and confess to ourselves that indeed a more representative Indian body cannot be even imagined for framing India's Constitution then, or even now.

17 Quoted by Granville Austin: The Indian Constitution: Cornerstone of a Nation, op. cit.; p. 13.
SOLEMN RESOLUTION

The Preamble recites the solemn resolution of the people and makes no reference to God. That this was deliberate is clear from the fact that an amendment moved by Kamath, to insert the words "In the name of God" in the Preamble, was put to vote and was lost by 41 to 68. This vote was essentially a vote for constituting India into a secular state. The Preamble aims at securing freedom not only of thought and expression but also of belief, faith and worship. The Fundamental Rights specifically guarantee religious rights, and the country has no state religion.

SOVEREIGN DEMOCRATIC REPUBLIC

Sovereign: The word "Sovereign" in the Preamble appears as an epithet of the noun "Republic" and conveys three ideas. First, the Republic of India as a single entity is sovereign. One country, one nation, one will, one voice and one state, this is the first idea the expression Sovereign Republic seeks to emphasise. Ambedkar said:

"Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people living under a single imperium derived from a single source". 18

Secondly, the word "Sovereign" refers to the sovereign capacity of the Republic of India. India possesses sovereignty. 19 She has independent and equal status with the other members of the international community and has supreme legal competence to give law to the country. Thirdly, it seeks to stress the fact of exclusive and final control of the Republic of India over its own affairs. On more precisely, it emphasises the fact of sovereignty.

Commonwealth Membership and Sovereignty of India: It is to be noted that although India became a Sovereign Republic, she decided to remain in the Commonwealth of Nations; she decided to tread the Canadian and Australian path rather than follow the suit of the United States and Ireland. But this

18 C.A.D., Vol. VII; p. 43.
19 See Chapter 1 above for a general discussion on the concept of sovereignty.
decision was a free decision, as free as any international decision then or now can possibly be, and it should not be taken to cast a shadow on the sovereign status of India. Besides, Nehru pointed out:

“Our association with the Commonwealth is remarkable in that it does not bind us down in any way whatsoever... It has given certain advantages without our having to accept any liabilities in return... Our membership of the United Nations is a far greater limitation than our association with the Commonwealth of Nations.

This historic decision was declared on April 27, 1949, in the official statement of the Commonwealth Prime Ministers’ Conference, which was attended by Nehru as the Prime Minister of India, in the following words:

“The Governments of the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon whose countries are united as Members of the British Commonwealth of Nations and owe a common allegiance to the Crown, which is also the symbol of their free association, have considered the impending constitutional changes in India.

The Government of India have informed the other Governments of the Commonwealth of the intention of the Indian people that under the new Constitution which is about to be adopted India shall become a sovereign independent Republic. The Government of India have, however, declared and affirmed India’s desire to continue her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth.

The Governments of the other countries of the Commonwealth, the basis of whose membership of the Commonwealth is not hereby changed, accept and recognise India’s continuing membership in accordance with the terms of this Declaration.

Accordingly, the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon hereby declare that they remain united as free and equal members of the Commonwealth of Nations, freely cooperating in the pursuit of peace, liberty and progress.”

This Declaration was ratified by the Constituent Assembly on May 17, 1949, and India still continues to be a member of the Commonwealth of Nations. The Declaration, it should be observed, is itself revelatory of the fact that the Commonwealth is a free association of sovereign nations and the King is a symbol of this free association with no functions. This should
not be considered derogatory either of sovereign or republican status of India. Rather, the Commonwealth may more rationally be viewed as a sincere effort in the direction of securing international brotherhood, cooperation and harmony implicit in the ideas of fraternity and justice enshrined by the Preamble. Besides, the Declaration is in the nature of an executive agreement, a joint communique, stating both the fact of India's acceptance of the membership of the Commonwealth and the recognition by the other Commonwealth members, including Great Britain, of India's status as a "Sovereign Democratic Republic". Further, the declaration is an extra-legal instrument with no place in the Constitution of India.

In this context another historical fact may also be noted to dispel any misunderstanding of India's sovereign status. The Objectives Resolution spoke of India as an "Independent Sovereign Republic", but in the Preamble the Drafting Committee changed this expression to "Sovereign Democratic Republic". The Objectives Resolution had the word "Independent" as a word of emphasis, which was indicative of the national mood then. In more sober moments it was thought desirable to put emphasis on democracy and the word "Independent" was dropped in favour of the word "Democratic". This should not thus lead to an unwarranted conclusion that it implied a compromise of India's independent or sovereign status.20

**Democratic**: The word "democratic" is another adjective aiming at comprehensive democracy, political, economic and social, in India, because, as Tagore felt, "democracy in the political sphere has really no meaning unless it is accompanied by democracy in the social, economic, and the spiritual spheres".21 It is this full democracy, a democratic way of life, that the Preamble has in view.

As a political democracy India has responsible, representative government at national and State levels. It is a democracy based on universal adult suffrage, rotation in office and decision by a majority vote. The Constitution does not provide for direct democratic devices. But a representative democratic ex-

20 See Ambedkar's *Introductory Note* on the Draft Constitution, February 21, 1948, to the President of the Constituent Assembly.
perment on a scale and in a manner under peculiar Indian conditions contemplated by it is unprecedented in human history. This is the boldest step ever taken by a community in the constitutional history of the world. Besides, direct democratic devices may not possibly fit into a frame of Parliamentary sovereignty which India has.

Political democracy must provide for economic democracy if it is to be real democracy. The Directive Principles of State Policy specifically aim at economic democracy and a scanning of the various Entries in the three Lists of the Seventh Schedule also confirms the objective of economic democracy in the country. Ambedkar said: “The Constitution also wishes to lay down an ideal before those who would be forming the government. That ideal is economic democracy”. Nehru at a later stage had an occasion to again emphasise this point. He said:

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

But even political and economic democracy, particularly in a country like ours, may not lead far without social democracy. Political democracy must be based on the solid foundation of social democracy. It is, indeed, an idle hope to think of building “a political miracle of freedom upon the quicksand of social slavery”. Ambedkar pleaded the issue forcefully and said:

“We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it also social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life”.

Democracy, as enshrined in the Preamble, both as an ideal and a process, would in its plenitude, denote then the degree of the people’s institutional, physical and mental participation as free conscious agents in making a decision or taking an action of their concern. In his *India of My Dreams* Gandhiji aimed at

"an India, in which the poorest shall feel that it is their country in whose making they have an effective voice".\(^{26}\)

**Republic**: Etymologically, Republic, a derivative from the Latin words *res* and *publica*, meaning public things, has both wide and narrow connotations. The Objectives Resolution conceived it widely to include democracy, and Nehru said:

"Obviously, we are aiming at democracy and nothing less than democracy... We stand for democracy... The House will notice that in this Resolution, although we have not used the word ‘democratic’, because we thought it obvious that the word ‘Republic’ contains the meaning of that word and we did not want to use unnecessary words and redundant words, but we have done something more than using the word. We have given the content of democracy in this Resolution and not only content of democracy but the content, if I may say so, of economic democracy in this Resolution".\(^{27}\)

In the widest sense a Republic refers to a state in which the supreme power resides in the body of the people.\(^{28}\) This means that people’s sovereignty, representative government and democracy all come within the ambit of Republic. India satisfies even this widest meaning of Republic, except that it does not subscribe to the idea of direct democracy, because this ill suits the doctrine of Parliamentary sovereignty.

In a narrow sense a Republic is a state that has a head of the state who does not claim his office by heredity. More specifically, a Republic has an elected head of the state. In India, not only the office of the head of the state, the President of India, is not hereditary but also it is to be filled in by election. It seems that in the Preamble the word “Republic” has been


\(^{28}\) *Chisholm v. Georgia*, (1792) 2 Dall. 419. See also *New English Dictionary*, Oxford.
used in this narrow sense to distinguish it from monarchy and to stress the fact that although all Republics are expected to be democracies all democracies need not be Republics.

**JUSTICE, SOCIAL, ECONOMIC AND POLITICAL**

Justice is a multi-dimensional concept of no definite connotation, and it is more commonly used than is readily defined. It may mean anything from justice according to law to righteousness and truth. It is obvious, however, that the Constitution uses the word “Justice” in its widest possible sense, and thereby the fathers of the Constitution sought to supply the centrepiece to the French revolutionary ideals of *égalité, liberté, fraternité*. And justice in the Preamble thus truly becomes “a square number”, or it is, as Plato would have said, a principle of harmony permeating the universe in general and social and individual lives in particular.

Thus conceived, justice does not seem “to be roughly synonymous with morality”, or as Hegel would have said, with “social ethics” only but also just out as a concept of social engineering, as Pound would have said. Justice is as much a concept of ethical standard as it is of social application. Jurists have spoken of it as *distributive* and *corrective*, and it thus encompasses the entire life of a community.\(^{29}\)

Justice is an all pervasive principle, of which three dominant aspects—social, economic and political—have been indicated in the Preamble. The words “social”, “economic” and “political” are not meant to be the words of limitation but of indication, and the Constitution of India aims at the realisation of justice in plenitude, whose theme begins with the Preamble, is carried on through the Fundamental Rights to the Directive Principles, and penetrates every provision of the Constitution.

**Social Justice**: If justice is hard to define, social justice is harder to define. It is a vague and indeterminate expression eluding a clear-cut definition for constant and ready use under all situations.\(^{30}\) This uncertainty about the notion of social

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\(^{29}\) See Barker, Sir E.: *Plato and his Predecessors*; Salmond, *Jurisprudence*; Hegel, *Philosophy of Right* and Pound *The Philosophy of Law.*

\(^{30}\) *Muir Mills Co. Ltd. v. Suti Mills Mazdoor Union*, (1935), S.C.R. 991, per Bhagwati J.
justice gets further complicated because it is generally taken to include all that comes under economic justice. Allen had this indeterminate aspect of the concept of social justice in mind when he said:

"...we hear much today of 'social justice'. I am not sure that those who use the term most glibly know very clearly what they mean by it. Some mean distribution or 're-distribution' of wealth; some interpret it as 'equality of opportunity'—a misleading term, since opportunity can never be equal among human beings who have unequal capacities to grasp it; many, I suspect, mean simply that it is unjust that anybody should be more fortunate than themselves; and the more intelligent mean that it is just—I would rather say benevolent—that every effort should be made at least to mitigate the asperities of natural human inequality and that no obstacle should be offered, but rather help afforded, to practicable opportunities of self-improvement".31

It seems that in this indeterminate situation there may be some scope for a subjective approach to the concept of social justice by public authorities, particularly the judges. But judges ought to remember that justice according to law is to be made objective to the maximum possible degree. And on an objective view of the matter there may possibly be two approaches to the concept of social justice—one inclusive and the other exclusive. The inclusive approach conceives social justice to include economic justice and broadly stands for all that the welfare state claims as its goal. This is a simple approach devoid of theoretical or practical complications, and our Supreme Court seems inclined to take this view of social justice. The Court, in Crown Aluminium Works v. Workmen, observed:

"There can be no doubt that in fixing wage structures in different industries, industrial adjudication attempts, gradually and by stages though it may be, to obtain the principle objective of a welfare state, to secure 'to all citizens justice, social and economic'. To the attainment of this ideal the Indian Constitution has given a place of pride and that is the basis of the new guiding principles of social welfare and common good to which we have just referred".31a

The Second approach, the exclusive approach, is of a complex nature and raises many more theoretical and practical issues than can be even mentioned here. It is based on the

assumption of the 'social process' as a voluntary process, as commonly understood by liberal thinkers. Promotion of social justice in this sense involves not only pursuing certain social welfare measures but also cultivating and fostering among the members of a society a sense of social justice.

Take, for example, the race or caste formation. In achieving the objective of social justice in its real sense the state will have, according to this approach, not only to outlaw race or caste as a ground for discrimination in public affairs, but also to actively assist in the building and maintaining a particular individual or social psychology which will not, even for a fraction of a moment, have any reservation for any prejudice on the ground of race or caste. This means that the state cannot remain contented only with creating and maintaining external conduct categories, whether legal or others, but has also to penetrate deep into the recesses of human mind which imbibes or generates these categories.

This view of social justice implies a complete breakdown of the liberal distinction between a social process as a voluntary process and the political process as a compulsory process, and this social justice can possibly be secured only in the Platonic way or the Marxist way. In the Platonic Republic the philosophers are to be the governors or the governors are to acquire the spirit of philosophy. In the Marxist state the dictator proletariat has not only to work for the millennium of material plenty but also for the transformation of the laws into habit. Precisely, social justice thus conceived assumes a degree of, so to say, "communistic" or "socialistic" justice.

The liberal thinker in this case may, however, take the position that social justice implies justice in social matters and the function of the state is to so promote economic and political measures as to make them by themselves help the creation and maintenance of social conditions under which the society does not discriminate between one member and another in social matters. He may also concede that by promoting educational and cultural activities, the state may work for a more reasonable attitude towards social relations, but the question remains that in this case social matters become limited to such matters as family relations, friendly ties and educational and cultural
activities. Not that economic activities do not impinge on these
directly or indirectly but they are kept as a distinct category.

No matter what position a liberal thinker takes, such a view
of social justice clearly puts him on the defensive. The purpose
of making a distinction between the inclusive approach and the exclusive approach is to emphasise that although generally the
objectives of the welfare state and the socialist state may be said
to be the same, their approaches to those objectives have sharply
defined distinctions. And in a country like ours this distinction
needs constantly to be kept in mind by both the people and the
public authorities.\footnote{See below Chap. 6 also.}

**Economic Justice:** Economic justice obviously implies
justice in economic matters. It has been interpreted to include
economic activities in general and ownership and distribution
of income, and wage-structure and pricing policies in parti-
cular. The Directive Principles of State Policy clearly speak
of these particular matters and even aim at securing for the
citizens the right to work, public assistance and adequate means
of livelihood. Generally, economic justice, thus, means that
there will be no discrimination between two persons from the
point of view of economic value except on the grounds that are
related to the promotion of common weal. However, as noted
earlier, the general tendency of our courts is to look upon
economic justice and social justice as inseparable twins.

But, it seems that, however closely social and economic
justice may be inter-related, they represent two distinct streams.
At best they are like the confluence of the Ganga and the
Jamuna, where the two rivers meet within the bounds of the
same banks, but they flow without the white waters of the
former mingling with the blue waters of the latter.

**Political justice:** Political justice refers to the recognition
of equal capacity of all citizens in political matters and stands
against any arbitrary distinction between any two citizens in
the political sphere. The Constitution ensures political justice
by introducing universal adult suffrage and by equally opening
all the elected offices to all the citizens. The political rights of
the citizens are also supported by certain basic liberties, such as those guaranteed by articles 19 and 21, for the actualisation of political rights. The rule of law and justice according to law are also to be considered as aspects of political justice which the Constitution aims at.

LIBERTY

Liberty, the life-breath of all hitherto revolutions, aims at not only liberty from arbitrary restraint, but also at the securing of those conditions which are essential for the fullest development of human personality. "Liberty", said Laski, "is the eager maintenance of those conditions without which man cannot be at his best". Further, liberty has in view not only the external situations in which man seeks to realise himself but also the internal mental, moral and spiritual aspects of his personality.

The Preamble to the Constitution of India aims at liberty of thought, expression, belief, faith and worship. It has, thus, primarily the subjective aspect of liberty in view. It says, as it were, that there is no liberty where mind is not free. The fundamental rights, however, guarantee both physical and mental freedoms. There is article 21 ensuring physical personal liberty and there is article 19 securing those seven freedoms which have come to be regarded as inherent in human personality.

Liberty also implies equality. Liberty of one has to be fitted into a scheme of the liberties of all, in order that the growth or expression of one may not have a stultifying impact on others. It means then that social and economic relations will have to be so ordered in a community as, first, to provide each with adequate opportunity for growth, and secondly, to prevent anybody's growth to overshadow, or to be an impediment to, another's progress, well-being and happiness.

EQUALITY

If justice may be said to be an exercise in harmony, equality is an essay on proportionality. It is not identity nor is it uniformity. It implies, first, the existence of a basic minimum for all in social, economic and political matters, and then provision for equal opportunities for the development of one and
all for the realisation of their best selves. The Preamble speaks of equality of status and opportunity. Status in this context, it seems, is not limited to only legal status as expressed by such phrases as "equality before law" or "the equal protection of the laws", as laid down in article 14 of the Constitution, but covers a basic minimum standard in all social, economic and political spheres.

Similarly, equality of opportunity is not limited to public offices or public matters but is also intended to cover opportunities in other social, economic and political matters. Not only that article 16 guarantees equality of opportunity in employment under the state but article 15 throws open public places to all citizens and article 17 abolishes untouchability. Equality of opportunity, thus, becomes not only an absence of adverse discrimination but also provision of adequate facilities to a citizen for his self-realisation. The concept of equality in the Preamble thus echoes the sentiments of the French National Assembly expressed in the Declaration of the Rights of Man and Citizens, 1789:

"Men are born and remain free and equal in rights. Social distinctions can be based only upon public utilities."

**FRATERNITY**

The word "fraternity" means brotherhood. It is a feeling of oneness; oneness of existence, purpose and action. Ambedkar said:

"Fraternity means a sense of common brotherhood of all Indians... It is the principle which gives unity and solidarity to social life... Without fraternity equality and liberty will be no deeper than coats of paints... These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity".33

The Preamble aims at promoting fraternity among the people of India, "assuring the dignity of the individual and the

unity of the Nation”. This, apparently, may lead one to think as if individual dignity and national unity may at times be working in opposite directions. But dignity of the individual implies “a sense of personality in each and of respect for personality in all”. Individual dignity is, thus, the individual’s sense of self-respect as well as his respect for other selves. National unity is a concept of integration and solidarity; a community concept; a feeling of unity. Thus individual dignity and national unity are composite products. Ambedkar, pointed out that “fraternity can be a fact only when there is a nation”.

Fraternity also conveys an idea of living a common life of freedom, equality, justice and cooperation not only in national but also international sphere. The concept of fraternity in the Preamble has, therefore, also an international aspect. This international aspect of fraternity has been emphasised by the Directive Principles, article 51 of which enjoins the state to promote international peace and security; maintain just and honourable relations between nations; foster respect for international law; and encourage settlement of international disputes by arbitration.

In the context of the Universal Declaration of Human Rights of the United Nations, fraternity is now to be deemed as not a national or international, but a universal concept based on the consciousness of human unity, need for cooperative effort for furthering the common cause of mankind and respect for the individual personality of all human beings. Article 1 of the Declaration says:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Thus viewed the Preamble to the Constitution of India is not only the philosophy of the Constitution, but is the political philosophy of this age, nay, it is philosophy itself. The Preamble is a marvel of thought and expression destined to go down in human history as an epitom of the ideals and aspirations of the present generation. Such is its universality.

CHAPTER 6

PERSPECTIVE OF THE CONSTITUTION

The Preamble to the Constitution of India contains the fundamentals on which the Constitution has been founded, but it is the Directive Principles of State Policy in Part IV of the Constitution that lay down the fundamentals in accordance with which the Constitution is to be operated. The Preamble, so to say, embodies the organisational philosophy of the Constitution and the Directives determine its operational perspective. It is the more so because the Preamble is more abstract and general and the Directives are more concrete and specific. What the Preamble propounds is the philosophy of the Constitution; what the Directives provide is the perspective of the Constitution.¹

THE DIRECTIVE PRINCIPLES IN RETROSPECT

The Second World War (1914-1919) and the Soviet Revolution (1917) sharply focussed the need for the definitive declaration of the socio-economic objectives of a political community. In 1919, the Weimer Constitution of Germany first came to reflect this need, and then followed in the wake of it the Constitutions of Austria (1929), Republican Spain (1931) and Soviet Russia (1936), although the last one had its own distinct theoretical orientation because of its Marxist-Leninist foundations. Soon after came the Irish Constitution of 1937, which lent a new dimension to this trend by making a distinction between justiciable private rights and non-justiciable public policies, or more precisely, social rights. Significantly, international documents like the Constitution of the I.L.O., the Atlantic Charter and the U.N. Charter also conveyed this new outlook.

These new social rights were aimed at anchoring “the human rights of the welfare state in the Constitution.”² On

¹ See above Chap. 2 for a further discussion on the Perspective of Construction. Note also the tendency of this reasoning to converge with the principles of perspective planning in economics.

the one hand, they imposed a distinct positive obligation on the state to work for a social order in which they may actualise themselves and, on the other, they asserted the clear competence of the state to interfere with private rights, particularly property and economic rights, and control private enterprise for the realisation of the new social order. Constitutions then became revolutionary in content. Constitutional theory followed constitutional practice and it came to be recognised that it is "desirable to formulate the agreed objectives in legal instruments of a constitutional character", in order that constitutions do not remain contented with only promising liberty, but also pledge themselves to work for providing "a modicum of bread" to the masses, aye, bread and butter at that.

In India, the Nehru Report (1928) spoke, among other things, of enacting suitable measures for living wage for every worker and social assistance to the old, infirm and unemployed. The Congress Declaration of Fundamental Rights (1931) specifically declared that "in order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions." It was, however, in the constitutional proposals of the Sapru Committee (1944-45) that a scheme for justiciable and non-justiciable rights on the Irish model came to be embodied for the first time.

When the Constituent Assembly was at work, B. N. Rau, the Constitutional Adviser, in a pamphlet issued for the use of Assembly members, drawing the members' attention to Lauterpacht's distinction between justiciable and non-justiciable rights in his International Bill of Rights (1945), wrote:

"There are certain rights which require positive action by the State and which can be guaranteed only so far as such action is practicable, while others merely require that the State shall abstain from prejudicial action. . . . It is obvious that rights of the first type are not normally either capable of, or suitable for, enforcement by legal action, while those of the second type may be so enforced."

But the idea of including non-justiciable rights in the Constitution did not initially find favour with the Subcommittee on Fundamental Rights. At its first meeting on

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February 27, 1947, Krishnaswami Ayyar, Munshi, Masani and Ambedkar spoke at length against this idea, and there was also a general feeling against giving constitutional expression to “mere precepts”. But working in the light of the then socio-economic conditions in the country and the needs and aspirations of the people, the Sub-Committee gradually came to realise the inevitability of the inclusion of non-justiciiable rights, as Krishnaswami Ayyar put in a note on March 18, 1947, “merely intended as a guide and directing objectives to State policy.” The Sub-Committee then finalised a scheme of such non-justiciiable rights.

The Constitutional Draft of the Constitutional Adviser placed these non-justiciiable rights as Chapter 3 of Part III of the Draft, which dealt with Fundamental Rights, Chapter 1 being general and Chapter 2 being concerned with justiciiable rights. But finally they appeared as Part IV of the February 1948 Draft Constitution, and the Advisory Committee on Fundamental Rights commended them to the Assembly in the following words:

“We have come to the conclusion that in addition to these fundamental rights the Constitution should include certain directives of State policy which, though not cognisable in any court of law, should be regarded as fundamental in the governance of the country.”

On the floor of the Assembly the Directive Principles were met with an extremely mixed reception. T. T. Krishnamachari characterised them as a veritable dustbin of sentiments. K. T. Shah, who had already characterised them earlier as “a needless fraud”, “an excellent window dressing without any stock behind it”, added in the Assembly that they were like “a cheque on a bank payable when able, only when the resources of the bank permit”. However, there was a general feeling that the Indian people must be given by the Constitution something more than mere political democracy, and as in the face of the economic beliefs and group characteristics of the Assembly members it was not possible to implement any revolutionary

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4 C.A.D., Vol. VII; p. 582.
socialist scheme, the Directives laid out a programme for guiding the future governance of the country.

Quite a few amendments were moved, of which some were accepted. Of abiding interest are the two which were rejected: the one was to substitute the word "Fundamental" for the word "Directive", and the other was to place them immediately after the Preamble, in order that they may acquire a "greater sanctity". To the first of these two, Ambedkar replied that omission of the word "Directive" would take away the basic character of the Directive Principles because they were meant to be Directives emanating from the Assembly and addressed to the future executives and the legislatures.

So far as the placing of the Directives immediately after the Preamble was concerned, it was thought that instead of making them appear more in the nature of the Preamble, it was more appropriate to make them look like rights. They were placed after Part III of the Constitution dealing with Fundamental Rights because it was felt that the rights and benefits contemplated by the Directives were not only more positive in content but also assumed a more developed and higher social order. It was, perhaps, also considered that being Directives to the state for the future governance of the country, it was better to place them immediately before Part V of the Constitution with which begin the constitutional provisions relating to government. The Directives, on the one hand represent a stage of national development higher than the one under which the Fundamental Rights can be realised, and, on the other, they are instructions directly aimed at making public authorities work for the realisation of specified positive ends.

**AMBIT AND CLASSIFICATION OF THE DIRECTIVE PRINCIPLES**

**Ambit:** The Directives, which run from article 36 to article 51 of the Constitution, embrace within their ambit diverse issues, but basically those of economic and social nature. But most of the matters are rather economic. General well-being, including the welfare of children and other weaker sections of

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the society and educational and health programmes are social elements; whereas control of economy and provision for reasonable income and wages, including the right to work are the economic contents of the Directives. Panchayati raj, separation of the executive from the judiciary and promotion of international peace are political issues covered by the Directives. Then there is the legal strand of a uniform civil code for the country and promotion of respect for international law and settlement of international disputes by arbitration. The Directives also enjoin the state to protect ancient historical monuments.

Directives Contained in Other Parts of the Constitution: Besides the Directive Principles laid down in Part IV of the Constitution, there are other directives contained in it, and these are also in character and purpose same as the Directives contained in Part IV. Technically speaking, they, however, differ from the Directives in Part IV in the sense that the latter are declared by article 38 to be fundamental in the governance of the country, but this does not seem to make any practical difference.

Of these other directives, first, is article 350A which enjoins the state to provide adequate opportunities for instruction at the primary stage to the children of the linguistic minorities in their mother-tongue. Secondly, article 351 directs the Union to so promote the spread of Hindi and develop it as to make it serve as a medium of expression of all the elements of the composite Indian culture. And thirdly, article 335 enjoins the state to take into account the claims of the Scheduled Castes and the Scheduled Tribes in making appointments to posts under the Union or the States, in so far as they are not inconsistent with the maintenance of administrative efficiency.

Classification: The Constitution itself does not classify the Directives. However, some possible classifications may be attempted. A simple classification may be to treat the first three articles, articles 36 to 38, as general, and articles 39 to 51 as specific because each one of these deals with particular matters. The specific group of articles may again be divided into social, economic, political, legal and miscellaneous depending on the nature of their contents. But it seems that with the exception
of a few articles, either an article contains two or more of the above types of matters or the contents of one group of matters have been put under widely scattered articles. The Directives may also be classed as fundamental, i.e., those covered by Part IV, and others, i.e., those found in other parts of the Constitution. On the whole, from the practical standpoint it may seem more desirable to treat each article of the Directives as a class by itself.

THE NATURE AND OBJECT OF THE DIRECTIVES

Nature: Nailed to the door-post of the provisions relating to government are the Directive Principles of State Policy which, as article 37 declares, though not enforceable in a court of law are meant to be fundamental in the governance of the country, and impose a duty on the state to apply them in making laws. They are as basic in the area of state policy as Fundamental Rights are basic in the area of individual rights.

The Directive Principles, as it were, are the high embankments to train the flow of the state policies and activities. They are meant to give a direction and stability to national policy. They, an Kania C. J. said, represent not the "temporary will of a majority in the Legislature but the deliberate wisdom of a nation, exercised while settling the paramount and permanent law of the country".9 The Directives are intended to impart constancy and continuity in the state policies objectively and independently of the vicissitudes of the fortunes of the political parties. Therefore, whoever is in office the Directives stand as the loadstar to lead him on in pursuit of the national policy as embodied in them.10

The Directives, though fundamental in the governance of the country, are not justiciable. They embody neither a rule of law nor a justiciable fact. They do not confer powers, nor are they limitations on powers otherwise derived from the Constitution or the laws. They are principles to be pursued in the governance of the country, and they are fundamental principles at that. They emanated from the sovereign people through their Constituent Assembly, and are in the nature of


The Directives are to be treated as instructions by the sovereign to the “governors” to so design their activities as to give effect to the Principles laid down therein. Ambedkar told the Assembly:

“The Directive Principles are like the Instruments of Instructions which were issued to the Governor-General and the Governors of colonies, and to those of India by the British Government under the 1935 Government of India Act. What is called ‘Directive Principles’ is merely another name for the Instruments of Instructions. The only difference is that they are instructions to the legislature and executive. Whoever captures power will not be free to do what he likes with it. In the exercise of it he will have to respect these Instruments of Instructions which are called Directive Principles. He cannot ignore them.”

**Some Criticisms of the Directives:** Critics, however, concentrate on the non-justiciable nature of the Directives, and like Wheare go to the first principles to point out that a constitution should not contain non-legal principles. This is indeed the height of confusion to constrict constitutions only to laws. Again, Wheare characterises the Directives as “Moral homily” or “political manifesto”. But is not a constitution itself a moral sermon or a political manifesto, albeit in legal terminology? So far as sanctions are concerned, is it true to say that all laws are equally enforceable? Besides, No law depends ultimately on the state alone for enforcement.

Jennings also felt that the Directives are “holy parchment” and added that in them stalk the ghosts of Sydney and Beatrice Webb. He doubted if they, containing nineteenth century ideas of Fabian socialism, could adequately meet the needs of twentieth century India. But the Directives are now no mere “pious wishes”. They are practical propositions, a practitioner’s

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13 See Wheare, K. C., *Modern Constitutions*, op. cit.
guide-book in the spheres of politics, law and administration. The ideas contained in them are not only Fabian, but also essentially general and local. Besides, they may be amended to suit the changed needs of time.

**Objective:** The Directives represent the minimum national consensus on basic socio-economic objectives at the time of framing the Constitution. They are, so to say, the rock-bottom standard of the socio-economic development which the state is obliged to secure and maintain. To this end article 38 enjoins as follows:

The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life.

According to the requirement of this article the state has the obligation to work for securing and protecting a social order based on social, economic and political justice. This just social order is, theoretically, the order which all states aim at without reference to the form of government or ideological attachment. The difference between various political systems arises out of the methods through which this just social order is sought to be secured. Under the scheme of the Indian Constitution this order is to be secured through a democratic process and in an open society by regulating property, wealth and income. This becomes obvious if the particular articles of the Directives are read with article 19(1)(f) and article 31 relating to the Fundamental Right to property.

This implies that the Constitution of India aims at what is commonly referred to as the welfare state, because basically no variety of socialism subscribes to the doctrine of fundamental right to property which our Constitution accepts. True, article 41 requires the state to secure, among others, the *right to work*, a distinctly socialist concept. But so long as the Fundamental Right to property remains a part of the Constitution, the spirit of the Constitution would demand of the state to work, at best, for the realisation of *socialistic*, or *socialistic pattern of*, society and not a *socialist* society which can be the objective only after the Fundamental Right to property has been eased out of the
Constitution. In effect, so long as the Constitution stands as it is now with its Fundamental Right to property, the Directives can be said to enjoin the state to secure the welfare state system or the socialistic pattern of society only, and a distinct understanding of this objective of the Directives is essential for successfully implementing them.

JUSTICIABILITY OF AND SANCTION BEHIND THE DIRECTIVES

Justiciability of the Directives: Article 37 specifically states that the provisions contained in Part IV dealing with the Directive Principles “shall not be enforceable by any court, but the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principle in making laws”. Obviously, the Directives become non-justiciable, i.e., the courts are not to treat them as laws nor are they to enforce them as laws. As the Directives are also not a statement of facts which can be adjudicated upon, the validity of any matter contained therein cannot also be questioned in a court of law. The Directives are neither the source of sustantive powers nor can they act as restriction on powers, and no law can be declared invalid because of mere inconsistency with them. The Directives do not ipso facto operate as law, but need legislation to implement them.

Sanction behind the Directives: Article 37 clearly makes the Directives unenforceable in courts. It implies that a violation of a Directive has no remedy in the law courts. Secondly, the state cannot be compelled by a legal process to implement any Directive Principle. But this does not imply that these are mere pious declarations. Ambedkar pointed out:

“Surely it is not the intention to introduce in this Part these principles as mere pious declarations. It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip-service to these principles but they should be made the basis of all legislative and executive action that they may be taking hereafter in the matter of the governance of the country.”

In a sense the Directives are also a “must”, and they have been couched in such words, although courts cannot enforce them. But let it, first, be remembered that courts cannot enforce all laws. For example, the courts cannot enforce article 121 imposing restrictions on discussions in Parliament. Again, a distinction is drawn between mandatory and directory legal provisions. Besides, as in article 163(3) enforcement may be expressly excluded from the jurisdiction of the courts or there may be such an exclusion also by implication as in article 164(1). But the most vital point is that laws are obeyed not because courts enforce them but because they are rooted in the multiple factors generating and sustaining obedience to categorical conduct norms. The Directives cannot be enforced in law courts, but the “people's court” will always demand their meticulous observance. Public opinion in the country in general and the climate at the time of elections in particular will always exact compliance from public functionaries. Besides, the very fact that they are part of the Constitution makes them binding in nature. Ambedkar observed:

“If it is said that the Directive Principles have no legal force behind them, I am prepared to admit it. But I am not prepared to admit that they have no sort of binding force at all. Nor am I prepared to concede that they are useless because they have no binding force in law. [A person in power] may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time”.

Another member of the Constituent Assembly said in this context:

“There is no use being carried away by sentiments. We must be practical. ... It is not a Court that can enforce these provisions or rights. It is the public opinion and the strength of public opinion that is behind the demand that can enforce these provisions”.

CONSTITUTIONAL AND LEGAL SIGNIFICANCE
OF THE DIRECTIVES

Constitutional Significance: No constitution after the First World War can possibly shirk the responsibility to feed, clothe

and shelter the millions for whom it is made. Older constitutions could remain contented with certain political and legal liberties.

"Liberties the constitutions could and did promise, but not bread and the modicum of economic security the little man yearns for. To him it is plain and unadorned truth that the political decisions which are vital for the well-being of all no longer occur within the frame of the constitution. The social forces move and battle extra-constitutionally, because the constitutions did not even attempt the required solutions."^{19}

The greatest significance of the Directives lies in the fact that they supply this gap in the older constitutional theory. They aim at revolution through constitution and specially state the objectives of a political community and the means for realising those objectives. They transform the nature of constitutional law from static negative don’ts to dynamic positive do’s. It is not their justiciability that matters but the fact that they aim at higher social and economic benefits for the millions. They seek to achieve social and economic liberties through political liberties.

Again, although the Directives are not law, the state has the obligation, though not enforceable in a court of law but definitely answerable at hustings, to apply them in making laws. The state makes laws primarily through its legislative organ but then laws have to be applied to specific fact-situations and administrators and judges in applying them often make or unmake much of the law emanating from the legislative wing. Law making takes place at numerous levels and it is the duty of all concerned public functionaries, a duty which has even a legal sanction in their oath of allegiance to the Constitution, to apply the Directives in their day-to-day working.

A public functionary before making a decision or taking an action has the obligation to question himself whether his proposed action or decision will be in furtherance of the Directive Principles. The Directives may, thus, be treated as objective categorical imperatives operating on the subjective

^{19} Lowenstein, 'Reflections on the Value of Constitutions in our Revolutionary Age' in Constitutions and Constitutional Trends Since World War II, 1951; p. 191.
conscience of public authorities. Precisely, they determine the perspective for all public deeds and decisions in our constitutional system. This perspective is that the age of laissez faire has ended and the state must work for positive results.

**Legal Significance:** The Directives are not law, yet they are of legal significance in numerous ways. In the first place, the Directives may be looked into just like the Preamble when a doubt or ambiguity arises regarding a justiciable provision of the Constitution or any other enactment. The Directives may perform this illuminative function more effectively because they are more detailed and specific. Secondly, the Directives may be looked into as a statement of the fundamental policy underlying the Constitution, or a statute, because the court may always presume that the Legislature making the statute had the awareness of the duty to act in furtherance of the objectives of the Directives.

Thirdly, the Directives form a part of the Constitution, a more defined part than the Preamble. Whenever, therefore, the court has to take the *scheme* of the Constitution into account in construing the Constitution or the laws, reference to the Directives may be legitimate. Fourthly, when a question arises whether a restriction is "reasonable" on a Fundamental Right within the meaning of article 19(2)-(6) of the Constitution, in determining "reasonableness" the Court may look to the Directives. The Supreme Court has in the past relied upon the Directives to determine the reasonableness of numerous statutes made to implement the Directive Principles.20

Fifthly, negatively speaking a restriction offending against Directive Principles may be deemed to be unreasonable. Directives may thus operate indirectly as law. Gledhill observes:

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

Sixthly, not only the reasonableness of the restrictions under article 19, but also the reasonableness of classification for

the purposes of article 14 of the Constitution may be determined with reference to the Directives.\textsuperscript{21} Seventhly, in determining any reasonableness the judge instead of being guided by his subjective philosophy may look upon the objective standards of the Directives.

Eighthly, when a question arises as to whether a matter is for the public benefit or in public interest, a reference to the Directives is relevant. Mahajan and Das JJ. observed in the \textit{State of Bihar v. Kameswar Singh}:

\textquote{We must regard as public purpose all that will be calculated to promote welfare of the people as envisaged in the Directive Principles of State Policy}.\textsuperscript{22}

Ninthly, in construing a statute the court may presume that the Legislature had the \textit{intention} of acting for implementing the Directive Principles and, therefore, the statute should be so interpreted, in so far as it is consistent with its express language, as to give effect to this \textit{intention} of the Legislature. Tenthly, in making a decision the court cannot ignore the Directives as non-existent or surplusage. It must, in consonance with the Irish constitutional principle, always take into consideration the general tendency of the Directive Principles.

Eleventhly, the Directives being couched in a very general phraseology, an effort at harmonious interpretation of the Constitution should be made to give the widest possible scope for their operation \textit{vis-a-vis} the justiciable part of the Constitution. In fact is should be possible for the courts to act in total furtherance of the Directive Principles without in any way raising a question of a conflict between the Directive Principles and the justiciable provisions of the Constitution. And lastly, the new article 31C now adds a new legal significance to article 39 by making laws made to implement its clauses (b) and (c) immune from the purview of articles 14, 19 and 31.

**DIRECTIVE PRINCIPLES \textit{VIS-A-VIS} FUNDAMENTAL RIGHTS**

The Directive Principles of State Policy embodied in Part IV of the Constitution and the Fundamental Rights contained


\textsuperscript{22} \textit{State of Bihar v. Kameswar Singh}, op. cit.
in Part III thereof are both equally part of the Constitution. They are both equally meant to be fundamental in their respective spheres. The Directives Principles are fundamental in the governance of the country, and the Fundamental Rights are basic in the field of individual rights. They are both in the imperative mood, although the modes of their enforcement are distinct. And they both have the same amending process. Yet in nature, purpose and application they present a study in contrast.

The Directive Principles are principles in contrast from the Fundamental Rights which are rights. In the result, the former are more general and the latter are specific. The former do not clothe a person with any definite power, the latter invest a person or an individual with defined capacity. Since the former are not a source of power, they cannot be a limitation on power; but the latter are meant to bit and bridle the public authorities in the country.

The Directive Principles are not law, whereas the Fundamental Rights are part of the law of the land, and a fundamental part at that. Being non-legal, the Directive Principles are not self-executory. They need to be transformed into laws for their implementation, although even without such legislation they may operate effectively in certain executive and administrative areas where legislation is not a precondition for the exercise of a power. Fundamental Rights, on the other hand, are self-executory, although they may be supplemented by further legislation and in certain cases, for example, in those of articles 17 and 23, without further legislation they may be practically of only directory or declaratory significance.

The Directive Principles are onward-looking, the Fundamental Rights are inward-looking. The former look to the future for moulding the future. The latter look to the present as tethered to the present. The former are dynamic; they are revolutionary. The latter are static; they are conservative. The former represent the realisable opportunities of the haves-nots, the latter embody the realisable capacities of the haves. The former are societarian, socialistic; the latter are personal, individualistic.

The Directive Principles, not being law, are not justiciable, nor are they justiciable facts. Their enforcement has been spe-
cifically excluded from the jurisdiction of the courts, although they are recognised by the courts and have legal significance. But Fundamental Rights are law, and hence justiciable and enforceable in the court of law. An alleged infringement of the former is a "breach of faith", but that of the latter implies a "breach of law". In effect, the remedy for the former is not readily available in a formal proceeding. The remedy lies in the "court of the people" at the time of elections. In the latter case, the courts are competent to provide instant relief although in certain cases, for example, in the case of articles 17 and 23, without further legislation the court may be helpless to provide any remedy.

Significantly, however, the remedy for a breach of Directive Principles may be of a positive nature, i.e., the state may be obliged to do an act; the remedy for a breach of Fundamental Rights can be only negative, i.e., the state can only be restrained from doing an act, except, perhaps, in a limited field covered by the writ of mandamus. This is because the former are do's; they cast a positive obligation on the state; the latter are don'ts; they only require the state to refrain from doing certain acts. The former are positive and the latter are negative in nature.

**Fundamental Rights Versus Directive Principles in the Law Court**: Fundamental Rights being law, and for that matter fundamental law, claim precedence over the Directive Principles, as also the laws made in pursuance thereof, in the court of law, although the former are willing to subsist with the latter in so far as the courts deem it consistent within the terms of the Constitution. In an early case, *State of Madras v. Champakam*, before the Supreme Court, Das J. (as he then was), speaking for the unanimous Court, observed:²³

> "The Directive Principles of State Policy which by Article 37 are expressly made unenforceable by a Court cannot override the provisions found in Part III, which, notwithstanding other provisions, are expressly made enforceable by writs, orders or directions under article 32. The chapter on Fundamental Rights are sacrosanct and not liable to be abridged by any legislative or executive act or order except to the extent provided in the particular article in Part III. The Directive Principles of State Policy have to conform to and run subsidiary to the chapter on Fundamental

*Rights.* In our opinion, that is the correct way in which the provisions in Part III and Part IV have to be understood”.

It is submitted that the “opinion” of the Supreme Court not only missed the cardinal consideration of the perspective of the Constitution but also did not take into full account the basic principle of harmonious construction. Obviously, the Court’s reasoning is completely confined to Part III of the Constitution, of which article 13 declares that any law inconsistent with this Part III shall, to the extent of inconsistency, be void. And the Court felt that such a law included even a law purporting to have been made in pursuance of the Directive Principles. But had the Court taken into account the generic nature of the Directives, generic to the extent that T. T. Krishnamachari told the Constituent Assembly that in them anybody could ride his hobbyhorse, the Court would not have found it impossible to reconcile by harmonious construction the Directive Principles with Fundamental Rights. The importation of the very concept of a conflict between Parts III and Part IV is in violation of the rule of harmonious construction, because principles of the Constitution can never be in conflict with a provision of the Constitution.

Besides, if the sanctity of Part III is derived from the fact that they cannot be touched except by an amendment to the Constitution, the same principle applies to Part IV. The state can legislate only to effectuate Part IV, as it can legislate, say, for giving effect to article 17 of Part III abolishing untouchability. Neither Part III nor Part IV can be abridged without an amendment to the Constitution. And to say that *principles* are less “sacrosanct” than *provisions* of the Constitution, seems rather unctuous.

And so far as the Court’s reference to article 37 providing for the express exclusion of enforcement of the Directives by a court is concerned, may it not be suggested that this implies that the state cannot be compelled by the courts to implement the Directives, and not that they can prevent the state from implementing the Directives. Logic suggests, if the court cannot demand action, they cannot also command inaction.

In a later case, *State of Bihar v. Kameswar Singh*, the Court felt the necessity of a change in its outlook, and Das J. (as he then was) himself on that occasion said:
"In the light of the new outlook, what I ask is the purpose of the State in adopting measures for the acquisition of Zamindaries and the interests of intermediaries. Surely it is to subserve the common good by bringing the land which feeds and sustains the community and also produces wealth by its forest, mineral and other resources, under State ownership and control. This State ownership and control over land is a necessary preliminary step towards the implementation of the Directive Principle of State Policy and it cannot but be public purpose".24

In a still later case, Hanif Quareshi v. State of Bihar, the Supreme Court stated its attitude more explicitly as follows:

"A harmonious interpretation has to be placed on the Constitution and so interpreted that it means the State should certainly implement the Directive Principles but it must do so in such a way that its laws do not take away or abridge the Fundamental Rights, for otherwise the protecting provisions of chapter III will be a mere rope of sand".25

Hanif Quareshi’s Case is significant, because the Supreme Court clearly realised the need for applying the rule of harmonious construction in the context of Parts III and IV of the Constitution and also recognised the state’s duty to implement the Directive Principles. But did it add the rider because of its apprehensions that if fully implemented, the Directive Principles are likely to trounce the Fundamental Rights in the dust of the dead past? Be it as it may, the position of the courts on this issue seem to be precisely this: Part III and Part IV of the Constitution can now operate together side by side in so far as the courts do not view them confronting each other. If the courts find them in confrontation and conclude that there is a conflict between their operations, the courts must say that the foul has been committed by Part IV. Part III thus retains its precedence over Part IV in law courts.

Directive Principles Versus Fundamental Rights in the "People’s Court" : The Directive Principles lose the bout with the Fundamental Rights in law courts, but the law courts are not the “court” of final resort for the final contest. There is the “high court of Parliament” as also the “supreme court of the

people”. The issue between the Directive Principles and the Fundamental Rights must be settled in this “high court”, subject to appeal to this “supreme court”. And it is precisely on such a view of the matter that Nehru, in moving the Constitution (Fourth Amendment) Act, 1955, told Parliament that in the last resort in the case of a conflict between a Directive Principle and a Fundamental Right, the former must prevail over the latter.

It was in pursuance of this view of the matter that the First, Second and Fourth Amendments to the Constitution were made, and again it is only on this view of the matter that the Constitution (Twenty-fifth Amendment) Act has now been passed. And the casual suggestion that the President may withhold his assent from a Bill running counter to the Directive Principles may also be brushed aside in the light of the Constitution (Twenty-fourth Amendment) Act which, inter-alia, makes it obligatory on the President to give his assent to an amendment made in pursuance of article 368 of the Constitution.

To conclude, in the nature of things, in the High Courts and the Supreme Court the Directive Principles may still be said to run subsidiary to the Fundamental Rights. But, then, in sovereign Parliament, and ultimately in the sovereign “people’s court”, the Directive Principles are meant to rule supreme, in order that the Constitution may live its full life through ages like a banyan tree. In the High Courts and the Supreme Court still the Directive Principles are being made to conform to and run subsidiary to Fundamental Rights, but in the “high court of Parliament” and the “supreme court of the people”, the Directive Principles are now increasingly exacting conformity and subservience from the Fundamental Rights. And this is in consonance with the spirit of the Constitution and is also in the interests of the community as a whole.

IMPLEMENTATION OF THE DIRECTIVE PRINCIPLES

National efforts are continually afoot to implement the Directives in all directions. It is the welfare of the people that article 38 enjoins the state to advance by securing and protecting a social order passed on social, economic and political justice of which the Preamble also speaks. Conceptually this is the objective of the welfare state, a not very precise expression.
However, it has now been explicitly recognised that what article 38 aims at best may be said to be not socialism but, what the Congress under the lead of Nehru called, a socialistic pattern of society. Nehru observed:

"Socialism to some people means two things: Distribution which means cutting off the pockets of the people who have too much money and nationalisation. Both these are desirable objectives, but neither is by itself socialism.

Any attempt to distribute by affecting the productive machinery is utterly wrong; to do so would be to weaken ourselves. The basis of socialism is greater wealth; there cannot be any socialism of poverty. Therefore, the process of equalisation has to be phased.

Secondly, there is the question of nationalisation. I think it is dangerous merely to nationalise something without being prepared to work it properly. To nationalise we have to select things. My idea of socialism is that every individual in the State should have equal opportunity for progress."

The Five Year Plans reflect this ideological stance of the socialistic pattern of society as embodying organised collective and socialistic efforts of the state through the democratic process. The Second Five Year Plan explained the position in the following terms:

"Essentially this means that the basic criterion for determining the lines of advance must not be private profit but social gain, and that the pattern of development and the structure of socio-economic relations should be so planned that they result not only in appreciable increase in national income and employment, but also in greater equality in incomes and wealth. Major decisions regarding production, consumption and investment—in fact all socio-economic relationships—must be made by agencies informed by social purposes."26

The Third Five Year Plan, however, went a step further and boldly spoke of socialism in no uncertain terms, and not merely of a socialistic pattern of society. Although it should appear that within the frame of article 38 the national objective of socialistic pattern of society, and not socialism, still stands, the following stand taken by the Third Five Year Plan is noteworthy:

26 Second Five Year Plan; p. 22.
“Progress towards socialism can be along a number of directions, each enhancing the value of others. Above all, a socialist economy must be efficient, progressive in its approach to science and technology, and capable of growing steadily to a level at which the well being of the mass of the population can be secured. In the second place, a socialist economy should ensure equality of opportunity to every citizen. In the third place, through the public policies it pursues, a socialist economy must not only reduce economic and social disparities which already exist, but must also ensure that rapid expansion of the economy is achieved without concentration of economic power and growth of monopoly. Finally, a society developing on the basis of democracy and socialism is bound to place the greatest stress on social values and incentives and developing a sense of common interest and obligations among all sections of the community.”  

Having clarified its theoretical stand, the state has made and is consistently making executive, legislative and judicial efforts for implementing the Directive Principles in all spheres. However, the Directives are not self-executing like the Fundamental Rights and need legislation. But it is not true to say that they can be implemented only through legislation. They can operate in all public affairs where legislation as a precondition for their exercise is not necessary. Besides, implementation of a law involves ample scope for executive and administrative discretion where Directives may play an effective role. But two points are worth noting. First, a Directive cannot run counter to a law, although it should be possible on liberal construction to reconcile the two. Secondly, it is also possible that implementation of one Directive may clash with another Directive and in this case also conflict is to be avoided as far as practicable on the principle of harmonious interpretation.

Although it should be noted that the idea of justice, social, economic and political, is yet to inform all the institutions of national life and sometimes the three organs of the state seem to be acting at cross purposes, the general tendency is towards an increasing acceptance of the principles laid down by the Directives. The undernoted analysis of the Directive Principles, which are of particular import, contained in articles 39 to 51 will conclusively confirm this tendency.

27 Third Five-year Plan; pp. 9-10.
Article 39. The State shall, in particular, direct its policy towards securing—

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

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

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

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

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 39, which is basically economic in content, aims at a harmonious ordering of the forces of production for securing the common good. In the first place, it enjoins regulation of the ownership and control of the means of production. Secondly, it directs attention to the concentration of wealth and distribution of income, and thirdly, it desires the protection of workers, women and children in respect of their economic activities. The state has consistently followed a policy of nationalisation, prevention of concentration of wealth, re-distribution of income, amelioration in the working conditions in fields and factories, provision of increased employment opportunities and prevention of child labour. Recently, a new article 31C has been added to the Constitution laying down that any enactment passed for implementing article 39(b) (c) shall not be invalid even if it contravenes articles 14, 19 and 31, and courts have no jurisdiction to determine whether such an enactment furthers the policy of article 39(b) (c).

Numerous enactments have been passed by the Union Parliament and the State Legislatures, and all administrative efforts have been made to implement them, although not always with commendable success. The courts have been generally helpful, although some of the recent Supreme Court decisions do not have a happy story to tell. For example, in the State of Bihar v. Kameswar Singh, which arose out of the abolition of
Zamindary in Bihar, Mahajan J. quoted clause (c) of this article, and upholding the validity of the impugned statute observed:\textsuperscript{30}

"Now it is obvious that concentration of big blocks of land in the hands of a few individuals is contrary to the principle on which the Constitution of India is based. The purpose of the acquisition contemplated by the impugned Act, therefore, is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals, and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible".

Article 40. The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

The object of this article is to promote panchayati raj institutions in rural India. This is one element of ancient political institutions which the Constitution recognises and seeks to promote. Suitable legislative and administrative measures have been adopted by the State Governments to promote panchayati raj, because local self-government is a State subject. Although there is much to be achieved in the working of panchayats, particularly in their exercise of certain judicial powers, attempts are being made constantly to form panchayati raj institutions and invest them with increasing powers.

Article 41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education, and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 41 directs the state to provide the right to work, education and public assistance for unemployed, old, sick, and disabled persons, and in other cases of undeserved want. These rights are to be secured within the limits of the economic development of the country by further legislation and do not confer upon citizens any immediate claim to benefit. The state has thus far been able to make only a selective approach to the problem of public assistance, and all other matters covered by this article.

yet look as distant goals to be achieved. This article was referred to in Jugal Kishore v. Labour Commissioner for upholding section 26(2) of the Bihar Shops and Establishments Act, 1952.\textsuperscript{31}

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

Article 42 concerns the working conditions in factories and farms, including maternity benefit for women. What is aimed at is just and humane working conditions and not merely health or public safety measures. This article is very wide to include the entire range of employer and employee relations. But it seems that basically, it seeks to lessen health and work hazards of workers and the state has been consistently trying to promote better working conditions, including provision of suitable sanitary dwellings, enforcement of health measures and provision of medical aid.

**Article 43.** The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

This article is a continuation and elucidation of article 42 and specifically directs the state to ensure all workers a decent standard of life, full enjoyment of cultural and leisure opportunities, and full employment, including promotion of cottage industries in rural areas on individual or cooperative basis. This article was relied upon in Flashlight Co. v. Labour Court\textsuperscript{32} to prevent unfair labour practice. In Bijay Cotton Mills. v. State of Ajmer this article was cited to sustain minimum wages under the Minimum Wages Act.\textsuperscript{33} The most significant requirement of the article is the ensuring of living wage.

The concept of living wage was discussed in Express Newspapers v. India.\textsuperscript{34} It was stated there that the minimum

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\textsuperscript{31} Jugal Kishore v. Labour Commissioner, A.I.R. 1950 Pat. 442.
\textsuperscript{32} Flashlight Co. v. Labour Court, A.I.R. 1962 All. 497.
\textsuperscript{34} Express Newspapers v. India, A.I.R. 1958 S.C. 578.
wage is the rock-bottom level of wage to cover the bare physical needs of the working people and their families and it is such a level where the capacity of the industry to pay is not at all relevant. A fair wage is something above the minimum wage and is to be determined with reference to the industry's capacity to pay. A living wage is an ideal to be achieved to provide the worker with a decent and full living. This is also to be fixed with reference to the paying capacity of the industry, although the concept of living wage, like that of minimum wage and fair wage, is incapable of precise definition. The Supreme Court is of opinion that the country lags far behind in achieving the ideal of living wage.

It may, however, be pointed out that although the capacity to pay is a valid criterion in determining a fair or living wage, any distinction between the public and private character of the employer for the purpose will be inconsistent with the provisions of article 43 read with article 39.

Article 44. The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

A uniform civil code for all Indians was considered desirable to promote equality among the citizens and also to further national integration, solidarity and unity. Although, oddly, some objections were raised in the Constituent Assembly against this article, it was pointed out that in many areas of civil activities, for example contracts, suits and liabilities in general, uniform laws prevail throughout the country. What was lacking concerned family relations and succession. The state has made efforts for codifying Hindu law, but it has not yet been possible to evolve a common civil code for all communities in the country.

Article 45. The State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Free, compulsory education for children up to the age of fourteen years is the objective of this article. It was expected

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that it should be possible to introduce within a decade from the commencement of the Constitution this scheme of free, compulsory education for all children in the country. Some State Governments have passed laws providing for free, compulsory primary, or even junior secondary or secondary education. But even universal free primary education on all-India basis is yet a goal and not a reality. And in Joseph v. State, it was held that article 45 did not put the State Government under any legal obligation to provide free education.\(^{37}\)

In this connection, the Kerala Education Bill deserves attention. The State Government therein provided that no fees were to be charged by any educational institutions giving primary education. It was not, however, provided that any loss arising out of the non-charging of fees would be reimbursed by the Government. The Supreme Court held that in the absence of such a provision the Bill could not be upheld as furthering the objective of article 45, because it contravened the right of the minorities under article 30(1).\(^{38}\)

**Article 46.** The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Article 46 directs the state to especially promote the educational and economic interests of the weaker sections of the society, particularly the Scheduled Castes and Scheduled Tribes. The state is also to protect them against social injustice and exploitation in any manner. The promotion of the objective of this article does not, however, justify any infringement of a Fundamental Right. One such case of infringement arising out of a State’s effort to build a Harijan colony attracted article 15 of the Fundamental Rights\(^{39}\) and the article had to be amended to provide for special treatment of socially and educationally backward classes and the Scheduled Castes and Scheduled Tribes.

**Article 47.** The State shall regard the raising of the level of nutrition and the standard of living and the improvement of public health as among


its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

The state is required under Article 47 to raise the level of nutrition and living standard of the people and work for the improvement of public health. It is also the duty of the state to make all efforts to prohibit the consumption of intoxicating drinks and injurious drugs, except for medicinal purposes. Public health measures have been pursued by the state but although some efforts were made in the past to introduce prohibition of intoxicating drinks, the trend has now been reversed.

So far as the courts are concerned, the Federal Court independently of this article had held in Bhola Prasad v. R.\(^{40}\) that the power to legislate for intoxicating liquor included the power to regulate or prohibit use of or trade in intoxicating liquor. In State of Bombay v. F. N. Babar,\(^{41}\) the Supreme Court referred to article 47 and concluded that this article also justified the inclusion of methylated spirit in the definition of "liquor" under the Bombay Prohibition Act, 1949.

Again, it is to be noted that dangerous drugs demand regulation of their trade, even including prohibition of trading in them, and in interpreting article 19(1)(f) and (g), it has been held that such a regulation or prohibition is a reasonable restriction within the meaning of article 19. In one group of cases, notably in Cooverjee v. Excise Commissioner,\(^{42}\) the Supreme Court upheld prohibition of trade in, or possession of, liquor on the ground that by the dangerous nature of the thing itself such prohibition was justified. In another group of cases, viz., Ghaio Mall v. State of Delhi\(^{43}\) and Balbir Singh v. State,\(^{44}\) prohibition was justified with reference to article 47.

Article 48. The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

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\(^{40}\) Bhola Prasad v. R., (1942) F.C.R. 17.
Article 48 directs the state to make efforts for organising agriculture and animal husbandry on scientific and modern lines and to take steps for preserving and improving the breeds of cows and calves and other milch and draught cattle and prohibit their slaughter. In Hanif Quareshi v. State of Bihar\(^{45}\), the validity of certain laws preventing slaughter of cows and calves was challenged, but the Supreme Court held that there was no conflict between different parts of article 48 and the laws in question were actuated by the desire to give effect to the purpose of article 48 and did not violate either article 14 or article 19(1)(f) and (g) of the Fundamental Rights. However, in regard to old, decrepit and unfit cattle, Das C.J. observed in the same case as follows:

"When the country cannot spend more than Rs. 5 per capita per annum on the education of the people, it seems to be somewhat illogical and extravagant, bordering on incongruity, to frame a scheme for establishment of Gosadana for preserving useless cattle at cost of Rs. 19 or Rs. 18 per head per annum . . . ."

Article 49. It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

Article 49 aims at preserving places or objects of artistic or historic interest. It directs the state to take necessary measures against exportation, spoliation, destruction, disfigurement, removal or disposal of any such object declared to be of national interest under any law made by Parliament. Many State Governments have passed laws for the protection of objects and places of historic and artistic value, and the courts have upheld them with reference to this article.\(^{46}\)

Article 50. The State shall take steps to separate the judiciary from the executive in the public service of the state.

Article 40 aims at securing the independence and impartiality of the judiciary. As originally drafted this article contained a time limit of three years within which the judiciary was to be


\(^{46}\) See, for example, Indramani v. Natu, (1963) 1 S.C.R. 721.
separated from the executive. But this time limit was omitted from its final form. The state has been making efforts to implement this directive, although it has been held, in Ratnakar v. Arakhita\textsuperscript{47}, that an executive direction for this purpose cannot override the Cr. P.C.

This article does not, however, imply a total ban on any exercise of judicial power by an executive authority. Articles 136 and 227 accept the role of tribunals in administering justice in Guardial Singh v. Punjab,\textsuperscript{48} it was held that the adjudicative power of a gram panchayat under the Punjab Gram Panchayat Act did not run counter to the direction of article 50. But in a more recent case, Jai Singh v. Gram Panchayat,\textsuperscript{49} the Court felt that in organising village panchayats, care should be taken to keep their judicial wing separate from their other wings.

**Article 51.** The State shall endeavour to—

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

Whereas articles 33 to 50 of the Directive Principles deal with the internal operations of the state, article 51 directs its attention to the state’s activities in international sphere. Article 51 enjoins the state to endeavour for promoting international peace and security; maintaining just and honourable international relations; fostering respect for international law and treaty obligations in relations between nations; and encouraging settlement of international disputes by arbitration.

From the constitutional point of view this article is of significance in so far as the courts are to so construe the Constitution or the laws as not to imply a violation of any established rule of international law, but if a national law clearly and plainly runs counter to a rule of international law, the national court must uphold the national law. Thus in Biswambhar Singh v. State of Orissa,\textsuperscript{50} it was held that the Constitution has not

\textsuperscript{47} Ratnakar v. Arakhita, A.I.R. 1965 Ori. 135.
\textsuperscript{48} Gurdial Singh v. Punjab, A.I.R. 1957 Punj. 149.
\textsuperscript{50} Bishwambhar Singh v. State of Orissa, A.I.R. 1957 Ori. 247.
adopted any of the provisions of the Declaration of Human Rights without modification, and, therefore, article 17(2) of the Declaration could not be invoked to invalidate an acquisition in accordance with article 31(2) of the Constitution.

UTILITY OF THE DIRECTIVE PRINCIPLES

Obviously, the Directive Principles of State Policy contained in Part IV of the Constitution, though not enforceable in a court of law, are no mere surplusage. They are an integral part of the Constitution and are of great theoretical and practical value. They signify the end of an age, the age of laissez faire, and harbinger the dawn of an era, the era of social welfare. They are as much the last post as the welcome song; and yet they are also, as Wordsworth would have said, ode to duty, a recitation of the positive obligations cast on the state in the era of social welfare.

Even as a mere embodiment of certain ideals for which the politically organised community should work, the Directive Principle are of great significance. They are of as much significance in the life of a political community as such abstract concepts as “truth”, “goodness” and “righteousness” may have in life in general. An individual, or any assemblage of individuals, must have certain ideals to work for and principles to serve as guidelines for day-to-day activities.

In constitutional theory, the Directives represent great innovations. In the first place, no constitution can now afford to be mere general political and legal propositions. It must also have specific economic and social contents. The explicit declaration of socio-economic objectives by the Directives implies the conception of the state as a service entity. Secondly, they lend dynamism to an otherwise static frame which the constitution is usually said to be. Thirdly, and most significantly, they seek to achieve a revolution through constitutional means. Constitutional revolution, so to say, is the aim of the Directive Principles. Cft. Granville Austin: The Constitution of India; Cornerstone of a Nation, op. cit.; pp. 50-52, where he considers the Directives to be “aimed at furthering the goals of the social revolution,” or fostering “the revolution by establishing the conditions necessary for its achievement.”

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51 Cft. Granville Austin: The Constitution of India; Cornerstone of a Nation, op. cit.; pp. 50-52, where he considers the Directives to be “aimed at furthering the goals of the social revolution,” or fostering “the revolution by establishing the conditions necessary for its achievement.”
Constitution and making and applying laws. And, though not laws, they are of no mean legal or constitutional significance.

Detailed references have already been made to the constitutional and legal utility of the Directives. A clear conclusion emerges therefrom that all public actions must be pursued in the furtherance of the Directives, and they being very broadly phrased, there is no scope for any real conflict between them and other legal provisions of the Constitution, or the laws. In this sense the legal provisions of the Constitution, and the laws, are meant to subserve the Directives and not to subvert them. The former in the ultimate analysis must run subsidiary to the latter, although in the courts of law this relationship between them may be apparently reversed.

Directly or indirectly the Directive Principles have been at work in all spheres of state activities as much as the Fundamental Rights or other enacted provisions of the Constitution are at work, and the real value of the Directives can be realised, as Ambedkar said, only if one were to visualise the time when the forces of the right were to ride to power in the country. These powers cannot with impunity batter the rampart that the Directives have built around the progressive forces.

"Every Government shall be on the anvil, both in its daily affairs and also at the end of a certain period when the voters and the electorate will be given an opportunity to assess the work done by the Government".52

The Directives, on the one hand, indicate the horizon of the people’s expectations, and, on the other, serve as the sign-posts in the march of the community, particularly the public authorities, towards that horizon. The Directives are thus not “being”, rather they are always “becoming”, and their realisation demands the proud day in the life of the community when every public functionary and every private individual questions himself before making a decision or taking an action, "am I working for the furtherance of the Directive Principles"? But even then they may never be fully realised, because the human horizon is always expanding and so must recede the horizon of the Directive Principles. And yet, they are the touchstone of public honesty, honesty of the public authorities and of the citizens.

Or, so to say, the public must sit and deliberate under the canopy of the Directives for the salvation of the nation, as did Budha sit and meditate under the Bodhi Briksha for the Nirvan of humanity.

Thus, an integrated approach to historical, social, economic, political and legal thinking and a harmonious view of the Constitution and the laws lead to the inevitable conclusion that the legal provisions of the Constitution of India are to be read in the light shed by the Preamble and they are to be operated in the perspective determined by the Directives, in order "to promote the welfare of the people by securing and protecting as effectively as (the state) may a social order in which justice, social, economic and political shall inform all the institutions of national life."  

33 Art. 38. Italics are mine. One is then left wondering what else socialism may really aim at, except to abolish also private property. But the abolition of property is not an end, but a mere means to secure justice, social, economic and political. And on this view of the matter, the founding fathers might as well have substituted for the phrase "a social order" the expression "a socialistic order", without any violence to the spirit of the Constitution. Could one not then legitimately hope for an amendment of article 38 which will substitute the word "socialistic" for the present word "social" to make patent what is latent in the Constitution?
PART TWO

THE LAND AND THE PEOPLE
CHAPTER 7

INDIA THAT IS DHARAT

History bears conclusive testimony that this vast, ancient land of Bharat or Bharatvarsha, which came to be christened as India by the Europeans and Hindustan by the Mussalmans, has had changing land boundaries through centuries. What the British Empire-builders finally delineated as India, as stated in the Government of India Act, 1935, comprising British India and the Princely States, merely represented a diminutive semblance of what Bharat had been during any previous period of her history.

Even the India of the British now nestles three separate states of India, Pakistan and Bangladesh and has come to be conveniently referred to as the Indian sub-continent. Besides, at the southern foot of the Himalayas are the three mountain kingdoms of Nepal, Bhutan and Sikkim with varying degrees of nexus with India, and together with the sub-continent in the centre, Afghanistan in the west, Burma in the east and the two island states of Sri Lanka and Maldive in the south constitute the congeries of the countries referred to as South Asia in international parlance. Today, India, as shown in the map below, is the core, the kernel of this South Asia, and territorially it is what our Constitution says it is and what appertains to it under any competent national declaration or international law.

CONSTITUTIONAL NAME OF THE COUNTRY

India, that is Bharat, is the present constitutional name of the country, and this compromise name is the result of a deliberate decision of the Constituent Assembly in the light of the historical setting, international convenience and national mood. The Constitutional Draft worked out by the Constitutional Adviser and the Draft Constitution prepared by the Drafting Committee referred to the country as India. In the Constituent Assembly numerous amendments were moved to change the
States: Andhra Pradesh; Assam; Bihar; Gujarat; Himachal Pradesh; Jammu and Kashmir; Kerala; Madhya Pradesh; Maharashtra; Meghalaya; Mysore; Nagaland; Orissa; Punjab; Rajasthan; Tamil Nadu; Tripura; Uttar Pradesh and West Bengal.

Union Territories: Delhi; Chandigarh; Arunachal Pradesh; the Andaman and Nicobar Islands; Laccadive, Minicoy and Aminidive Islands; Mizoram; Pondicherry; Goa, Daman and Diu; and Dadra and Nagar Haveli.
name, but the Chairman of the Drafting Committee, Ambedkar, considered any change unnecessary and observed:

"India has been known as India throughout history and throughout all these past years. As a member of the U. N. the name of the country is India and all agreements are signed as such".1

There was, however, a general feeling that the matter could not thus be finally sealed and on November 17, 1948, the debate on this issue had to be postponed for a long time in the quest of a consensus, but to no avail. On September 17, 1949, exactly after a year, Ambedkar himself came out with the present compromise formula. The name, India, that is Bharat, was finally adopted and was incorporated in article 1(1) of the Constitution as a Union of States, but this was only after the Constituent Assembly rejected by 51 to 38 votes an amendment of Kamath, Govind Das and others to name the country as "Bharat, or in the English language, India".2

INDIA, THAT IS BHARAT, IS A UNION OF STATES

Article 1(1) of the Constitution declares: "India, that is Bharat, shall be a Union of States." As discussed above the choice of the word "Union" to indicate the federal set-up in India was also deliberate and, according to the Drafting Committee it was meant to signify, first, that the Union is not the result of an agreement among the States, and secondly, that the Union is indestructible and no State has the right to secede,3 nay, even a claim for secession is a culpable offence in the country after the Constitution (Sixteenth Amendment) Act, 1963. The Sovereign Democratic Republic of India, though a Union of States, is one indestructible entity.

THE TERRITORY OF INDIA

 Territory is an essential element of the state. Its significance lies in the fact that it constitutes the spatial configuration, or, as it were, the physical profile, of the state. The state exercises jurisdiction only within the limits of its territory, although such an exercise may have extra-territorial implications.

1 C.A.D., Vol. VII; p. 422.
3 See above Chap. 4.
Constitutionally speaking, in accordance with article 1(3) the territory of the Union of India comprises (a) the territories of the States; (b) the Union Territories; and (c) such other territories as may be acquired. Technically, the territory of India also includes all other soil, sub-soil, water or air appurtenances accruing to India under any competent national declaration or international law.

Territorial appurtenances under international law and competent national declaration comprise territorial waters, including subjacent waters, soil and sub-soil and anything of value thereunder or any product thereof; continental shelf and all things of value underlying therein; adjoining islands, bays and the like; and air-space to the extent the state is capable of effectively controlling.

Clause (3) of article 1, however, only defines what constitutes the territory of India, but the Constitution does not precisely delineate the boundary of Indian territory. Although this boundary may be ascertained with reference to the Entries in the First Schedule, the Government of India Act, 1935, the Indian Independence Act, 1947, or other relevant enactments, the courts in India are bound to accept what the Government of India declares to be the boundary of India, except, of course, when such a declaration clearly violates article 1 or Schedule 1 of the Constitution.

The States and Their Territories: Although the territory of India comprises State territories, Union Territories and acquired territories, only the States are the members of the Union by virtue of article 1(1). They are not the delegates of the Union nor is the Union their delegate. Each one of these stands by its own right directly derived from the Constitution and hence the declaration that India in a Union of States. India is not a unitary State.

As initially promulgated in 1950, the Constitution provided for four categories of States: Part A States, comprising the former Governors’ Provinces in British India; Part B states, consisting of Princely States or States-Unions with status an-

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*Shiv Kumar Sharma v. Union of India, A.I.R. 1969 Delhi 64.*

*See Section 57(10), the Evidence Act.*
alogous to that of Part A States; Part C States, consisting of the former Chief Commissioners’ Provinces and the Princely States or States-Unions given the status of the Chief Commissioners’ Provinces; and Part D, having the Andaman and Nicobar Islands. After the passing of the States Reorganisation Act, 1956, which redrew the map of India basically on linguistic lines, the Constitution (Seventh Amendment) Act, 1956, provided for only one category of States, and Part C and D States were redesignated as Union Territories. Table 1 below gives a comparative view of the units of the Union at the commencement of the Constitution and those after the Constitution (Seventh Amendment) Act.

In effect, all the States in India are now equal in status and the Constitution of India equally applies to them all, although a State like Jammu and Kashmir may enjoy special privileges within the terms of the Constitution. The member States, which now number twenty, alphabetically, are: Andhra Pradesh, Assam, Bihar, Gujarat, Himachal Pradesh, Jammu and Kashmir, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mysore, Nagaland, Orissa, Punjab, Rajasthan, Tamil Nadu, Tripura, Uttar Pradesh and West Bengal.

The names of the States and the extent of their territories have been specified in Schedule I of the Constitution. Clause (2) of article 1 invests the States with direct and proximate jurisdiction over their respective territories as specified in the First Schedule, including any river, or part of a river, flowing within the bounds of its jurisdiction. A littoral State has jurisdiction over the contiguous territorial waters also. But under article 297 all lands and things of value “underlying the ocean within the territorial waters or the continental shelf of India” vest in the Union and are held for its purpose; and logistics places the air space also under the jurisdiction of the Union. It is also to be noted that the administration of the Scheduled and Tribal Areas falling within the territorial limits of the States is governed by Part X and Schedules V and VI of the Constitution under which these areas enjoy special status.

5a There is a firm proposal to change the name of Mysore to Karnataka.

<table>
<thead>
<tr>
<th>Population</th>
<th>Area in sq. miles</th>
<th>Name of the Unit</th>
<th>Population</th>
<th>Area in sq. miles</th>
<th>Name of the Unit</th>
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</table>
The Nature of the States' and the Union's Territorial Jurisdictions: The direct and proximate jurisdiction of the States over their specified territories does not, however, convey any notion of primacy of the States' jurisdiction over their respective territories vis-a-vis the jurisdiction of the Union over these territories, nor does it import any element of proprietary right of a State in its territory, except in so far as the Constitution provides to that effect. It does not also involve an identity among the States inter se in the matters with respect to which they exercise jurisdiction within their respective territories. It implies, first, that the States derive their territorial jurisdiction from the same source, the Constitution, from which the Union also derives its jurisdiction, and secondly, the States inter se enjoy equal status with respect to territorial jurisdiction.

Territory, stricto sensu, is an element of the state and the state in our constitutional context connotes the entity that has come into existence in pursuance of the solemn resolve of the people of India "to constitute India into a Sovereign Democratic Republic." That entity is the Republic of India, that is Bharat, and the territory of India is an element of the state of India or Bharat. It is in this sense that the opening words of clause (3) of article 1—"The Territory of India (and not the Union or Union of India) shall comprise"—seems to gain a meaningful construction.

Union Territories: The States are the members of the Union, but the Union Territories are not. They are territories directly under the Union's control and are governed by the President in accordance with the provisions of Part VIII of the Constitution and any law made by Parliament in this behalf. But this does not imply that the Central Government gains direct jurisdiction over these territories. As the General Clauses Act says that the Government of a State in relation to a Union Territory means the President of India, the President seems to occupy the position in relation to a Union Territory analogous to that of the Governor of a State.

The Union Territories, though Centrally administered within the terms of Part VIII of the Constitution, thus do not cease

7 See Art. 296.
to be States for all purposes and get merged with the Central Government.\textsuperscript{8a} They have their own constitutional status, though not as full members of the Union, and their names and territories have been specified in the First Schedule of the Constitution. The Union Territories at present are: Delhi; Chandigarh; Arunachal Pradesh; the Andaman and Nicobar Islands; the Laccadive, Minicoy and Amindive Islands; Mizoram; Pondicherry; Goa, Daman and Diu; and Dadra and Nagar Haveli.

Territorial Acquisitions: According to article 1(3)(c) the territory of India also includes “such other territories as may be acquired.” This provision implies an automatic absorption of an acquired territory as a part of the territory of India. It does not either speak of the power to acquire territory nor does it define acquisition or mode of acquisition. In \textit{In re Berubari Union} it was stated that the power to acquire territory is inherent in the sovereign capacity of a state and India being a sovereign state possesses this power, although no express provision to this effect has been made by the Constitution.

As article 1(3)(c) uses the word “acquired”, obviously it has in view modes of acquisition of territory recognised in international law. Therefore, cession, annexation, prescription, accretion, conquest, and subjugation may provide the means of acquiring territory by India.\textsuperscript{9} The question whether a particular territory is a territory acquired by the Union for the purpose of this article is to be determined by the courts in accordance with the declaration of the Government of India on this point.\textsuperscript{10}

Government of Acquired Territory: The moment a territory is acquired by India, by virtue of article 366 (30), which defines a Union Territory to include also an acquired territory, it becomes a Union Territory. It is to be governed in the manner laid down by Part VIII of the Constitution, i.e., by the President through an administrator appointed by him. This constitutional provision, however, applies only when the act of acquisition has


\textsuperscript{10} Ibid.
been completed. Until such acquisition, any territory which may be under the control of the Government of India is subject to the provisions of Foreign Jurisdiction Act, 1947, and article 260 of the Constitution.  

**Effect of Acquisition on the Inhabitants of the Acquired Territory**: The inhabitants of a territory which becomes an acquired territory within the meaning of article 1(3) (c) become full citizens of India and are, therefore, entitled to all rights and privileges appertaining to an Indian citizen. However, so far as their any right accruing under the laws prevailing in the territory before acquisition is concerned, its continuance after acquisition depends upon the attitude of the acquiring state. It is a well-settled principle that acquisition of territory is an act of state and it is within the sovereign competence of the acquiring state to accept or not to accept any right or obligation accruing under any law prevailing in an acquired territory before acquisition. although the acceptance need not be a formal act. But the onus of proving that the acquiring state has recognised a previous right lies on the person who claims the right.  

**Absorption of Acquired Territory**: An acquired territory automatically becomes absorbed in the territory of India as a Union Territory. But it is open to the Union to admit an acquired territory into the Union as a State or to let it continue as a Union Territory with appropriate entries in Schedule I of the Constitution. Again, the Union may establish such an acquired territory into a State or may form it into a State in any of the modes provided in article 3(a). An acquired territory as a single entity may not be allowed to have its existence and may be merged with one or more existing or proposed units of the Union.  

**CESSION OF TERRITORY**  
Cession of territory refers to a voluntary transfer of any territory by one state to another and it is sometimes extended to

14 *Secretary of State v. Bai Rajbai*, 42 I.A. 229.
cover even annexation which means cession by a non-sovereign entity or an acquisition in accordance with the desires of the inhabitants of a territory. Cession, however, involves actual transfer of sovereignty and not mere agreement for such a transfer.  

The Constitution of India speaks nowhere about cession of territory by India to a foreign country, but the question came before the Supreme Court in *In re Berubari Union*. This case arose out of an agreement between the Government of India and the Government of Pakistan, popularly known as Nehru-Liaquat Ali agreement, which provided for exchange of certain enclaves between India and Pakistan situated in West Bengal and East Bengal (now Bangladesh).

The Supreme Court held that the Constitution did not provide for cession of territory to a foreign country. The power to cede territory to another state is, however, inherent in the sovereign capacity of India, and it is a power outside the provisions of the Constitution. India could, therefore, transfer a part of its territory to a foreign country.

An argument to prevent cession based on the Preamble to the effect, that such a cession could not take place, was rejected by the Court on the ground that as the Preamble was not a source of power, it could not consequently be a limitation on power which India possessed inherently or within the terms of the enacted part of the Constitution.

It was urged by the Union that the implementation of the agreement involved merely a change in the boundaries prescribed by the Radcliffe Award and did not involve any cession of territory. Alternatively, it was argued that even if it involved a cession of territory, the Union Parliament was competent to implement the agreement within the terms of article 253 of the Constitution which invested Parliament with “power to make any law for the whole as any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at international conference, association or other body”. Lastly, it was urged that Parliament has competence to make any territorial adjust-

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ment affecting the territory of a State or of a Union Territory within the terms of articles 1 to 4.

The Supreme Court rejected all these pleas. The Court held that the transfer of Berubari, an Indian enclave situated in the then East Bengal, involved a cession of Indian territory. It was also said that the provision of article 253 had overriding effect only on the provisions of Chapter 1 of Part XI of the Constitution dealing with legislative relations and had no application to the issue in question. The Court also examined at length the provisions of articles 1 to 4 and came to the conclusion that these articles come into play only when internal territorial adjustments are made and do not cover the case of transfer of territory to a foreign state. Therefore, Berubari and other Indian enclaves situated in the then East Bengal could be transferred to Pakistan only by effecting an amendment within the terms of article 368 of the Constitution.

It was observed that such an amendment could be made to article 1, 2, or 3 providing for a standing provision for any territorial cession to a foreign state, or the First Schedule could be suitably amended to exclude the areas proposed to be transferred to Pakistan. Accordingly, the Constitution (Ninth Amendment) Act, 1960, was passed to amend the First Schedule of the Constitution and no standing provision was made in the Constitution for ceding any Indian territory to a foreign country. The legal position, therefore, still is that any future cession of Indian territory would involve a fresh amendment of the Constitution within the terms of article 368.

This legal position was affirmed by the Supreme Court in *Ram Kishore v. Union of India*, in which an attempt was made to prevent the implementation of the Constitution (Ninth Amendment) Act. The Court said that the opinion in the *Berubari Case*, though based on a misconceived incidental reasoning, was founded:

"Primarily on the view that the power to cede a part of the national territory and the power to acquire additional territory were the inherent attributes of sovereignty; and if any part of the national territory was intended to be ceded, a law relating to Art. 3 above would not be enough unless appropriate action was taken by the Indian Parliament under Art. 368".
There is, however, a distinction between cession of territory and the settlement of a dispute relating to the actual location of the boundaries of India vis-a-vis a neighbouring state. This issue came before the Supreme Court in *M. I. Patel v. Union of India*. This case arose out of a move to prevent the implementation of the award of an international tribunal, known as the Kutch Tribunal, which had been constituted to determine the boundary between India and Pakistan in the Runn of Kutch. The Court held that an agreement to refer a dispute to a body regarding boundary involves the ascertaining of the actual line of boundary between neighbouring states. By its very nature, such an agreement implies that the purpose of such a reference is to fix a permanent boundary between the states concerned. The settlement of a boundary dispute cannot be construed as a case of cession.

"It contemplates a line of demarcation on the surface of the earth. It only seeks to produce a line, a suitable boundary, and it is fixed. The case is one in which the contending State is *ex facie* uncertain of its own rights and therefore, consents to the appointment of an arbitral machinery. Such a case is plainly distinguishable from a case of cession of territory."\(^{16}\)

The Court held that the dispute regarding a portion of the Runn of Kutch was a boundary dispute and did not involve any cession of Indian territory. Therefore, the award of the arbitration tribunal could be implemented without amending the Constitution. It is obvious that the very purpose of making a distinction between *cession of territory* and *settlement of boundary* was to sustain the view expressed by the Supreme Court, in *Berubari Case* and *Ram Kishore's Case*, that the cession of Indian territory requires an amendment of the Constitution within the meaning of article 368.

The cumulative effect of all these three cases is that in any case involving cession of Indian territory to a foreign country, the principle of law laid down in *In re Berubari Union* applies, notwithstanding certain contentions to the contrary by some jurists.\(^{17}\) Whenever, therefore, any part of the Indian territory


\(^{17}\) See for example, Seervai, H. M. *Constitutional Law of India*, Bombay, 1968 pp. 120, 121.
is proposed to be transferred to a foreign country, the Constitution must be amended under article 368 to effectuate the transfer. And it seems that this view of law is not in derogation of any national interest or any general principle of law.

However, an anomaly in this regard may be noted. Under an agreement between the Government of India and the Government of Bhutan certain portions of Assam were transferred to Bhutan and effect was given to this transfer by the Assam (Alteration of Boundaries) Act, 1951, passed by Parliament purporting to be within the terms of article 3 of the Constitution. Strictly speaking, this Act is now *ultra vires*. But the fact is that it involves a situation which arose before the *Berubari Case* and the validity of this Act has not been thus far questioned in a court. It, therefore, should not cast any doubt on the effectiveness of the statement of law in regard to cession in the aforesaid three cases.

In parenthesis, it may also be noted that the consent of the inhabitants of any territory affected by a proposed cession is not necessary under the Constitution. And although an Indian citizen of a ceded territory may possibly opt to remain in India by coming over to India from the affected territory, he cannot claim from the state any compensation for loss of his property because of article 31 of the Constitution, which makes the state liable to pay compensation only in cases involving acquisition or requisition of property. However, the state may make *ex gratia* payments.

**ADMISSION OR ESTABLISHMENT OF NEW STATES AND INTERNAL TERRITORIAL ADJUSTMENTS**

**Admission or Establishment of New States**: Article 2 of the Constitution provides: "Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit." This article comes into play in a case involving either the admission of a new State or the establishment of a new State.

The word "admit" in this article refers to the admission of an "organised political community which might be called a

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18 Cf. however, the *obiter* in *Sudhangshu v. Union of India*, (1968) C.W.N. 349.
State even before such an admission". Thus a newly acquired territory which would otherwise have automatically become a part of the territory of India with the status of a Union Territory may be admitted into the Union as new State. The word "establish", on the other hand, covers the case of a State which is carved out of the existing territory of India at any time, and some of the modes in which such a new State may be established are provided for in article 3(a).

The admission or the establishment of a new State under this article can be made only by the Union Parliament in pursuance of a law passed by it providing for the admission or establishment of a new State and including matters contained in article 4(1). Although in admitting or establishing a new State the power of the Union Parliament partakes of the nature of a constituent power, article 4(2) lays down that no law made for this purpose "shall be deemed to be an amendment of this Constitution for the purposes of article 368."

**Terms, Conditions and Status of a New State:** Parliament is competent to lay down any terms or conditions for the establishment or admission of a new State, and a newly admitted or established State is to be subject to those terms and conditions. Although in status such a new State, presumably, will be equal among the States inter se, the actual extent and nature of its powers relating to its own territory and its relation with the Union will be determined by the terms and conditions laid down by the Union Parliament.

**Formation of New States and Alteration of Areas. Boundaries or Names of Existing States:** Following on the heels of article 2 is article 3 of the Constitution, which interpreted in the light of section 3(15)(b) of the General Clauses Act and the Constitution (Eighteenth Amendment) Act, 1956, empowers Parliament to work out by law any territorial permutation or combination affecting the area, boundary or name of a State or a Union Territory. This article says:

Parliament may by law—

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

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

Explanation I.—In this article, in clauses (a) to (e), "States" includes a Union territory, but in the proviso, "State" does not include a Union territory.

Explanation II.—The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory.

**Internal Territorial Adjustments:** It is now well-settled that article 3 concerns itself only with internal territorial adjustments and it covers both the States and the Union Territories as is obvious from Explanation I of this article. Whereas article 2 provides for the admission or establishment of a new State, article 3(a) lays down some of the modes in which a new State may be established. This article further provides for diminishing or increasing the area of a State and alteration of its boundaries either for forming a new separate State or for joining to other existing or new States. This article also applies when the name of a State is to be changed.

The Constitution, thus, accepts the idea of mobile State boundaries and its provisions in this regard appear to have been based on the Constitution of Weimer Germany. But our Constitution goes a step further by not requiring even the consent of the affected population. Although under article 3, the Union Parliament may make any territorial arrangements affecting any State or Union Territory, it is not open to it to completely destroy the State system in India reducing the country thereby to a unitary state.

**Formation of New States:** Under article 3 a new State may be formed in three ways. First, this can be done by separating
any territory from an existing State as was done when the former Madras State was divided into two States of Tamil Nadu and Andhra Pradesh, Bombay was divided into Maharashtra and Gujarat and East Punjab was bifurcated into the Punjab and Haryana; secondly, by uniting two or more States or parts of States; and thirdly, by uniting any territory to a State or a part of any State.

**Formation by Separation** : The Constitution does not guarantee any State in India a right to existence. The Constitution authorises Parliament not only to take out any part of a State’s territory, but also to parcel out the entire territory of a State either for forming new separate States or for joining to other existing or new States in such a manner as to lead to the complete extinguishment of the State, as happened in the case of Hyderabad.

**Formation by Uniting Two or More States or Parts Thereof** : This article also provides for uniting two or more States into a new State. It has been held that such a union must be a complete fusion and not a union only in some matters and separate existence in other matters.\(^{10}\) A new State may also be formed by welding together parts of two or more States and this process of union must also be a complete union in all matters.

**Formation by Uniting any Territory to a State** : A new State may be brought into existence not only by the separation of a territory from a State or by uniting two or more of them but also by uniting any territory to any part of a State. This implies that in forming a new State parts of one or more States may be taken out and to them may be joined any other territory to form a new State.

**Increasing or Diminishing Areas of States** : Parliament may provide for any increase in or diminution of the area of a State. Thus a part of a State may be transferred to another State or a State may have its areas increased by the merger of a new territory acquired by the Union. It should, however, be clearly noted that after the *Berubari Case*, diminution of a State’s

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\(^{10}\) *H. C. Sengupta v. Speaker*, (1956) 60 C.W.M. 555.
territory in this context does not now cover the case of transfer of any Indian territory to a foreign State, although there is in existence the Assam (Alteration of Boundaries) Act, 1951, ceding a strip of Assam to Bhutan.

Alternation in the Boundaries or the Name of a State: Parliament is also competent to enact a change in the boundaries of a State. But this change in the boundary of a State does not now cover a case of cession to a foreign country because of the opinion in the Berubari Case, although the Assam (Alteration of Boundaries) Act did effect such a cession before the Berubari Case. Under this article the name of a State may also be changed. For example, the State of East Punjab was subsequently named only as the Punjab and Madras has now been rechristened Tamil Nadu, although these have been done on the request of the States concerned.

Procedure for Implementing Changes under Article 3: Any formation of a new State, any increase in or diminution of the area of a State, or any change in the boundaries or the name of a State under Article 3 can be made by Parliament only by passing an Act and this Act must also contain necessary provisions as contemplated by Article 4 of the Constitution.

However, before a Bill for any purpose under Article 3 is moved in Parliament it requires the previous recommendation of the President. The requirement of recommendation loses its teeth in view of the provision of article 225 waiving, inter alia, the need for such a recommendation, provided the Bill as finally passed receives the assent of the President. The Constitution also requires such a Bill to be referred to the Legislatures of the concerned States for their opinion. But by virtue of Explanation I of article 3, such a reference is not necessary in the case of a Union Territory. The reference is to be made by the President for giving opinion within a period to be specified by him in the reference or any other period extended by him, and the Bill can be introduced only after the expiry of the period. The form of reference of the States Reorganisation Bill, 1956, may be noted in this context. It read:

"WHEREAS the Government of India, after considering the Report of the States Reorganisation Commission and consulting the State Govern-
ments and the parties and interests concerned, propose that a Bill to
provide for the reorganisation of the States of India and for matters
connected therewith should be introduced in Parliament as early as
practicable;

AND WHEREAS the proposal contained in the Bill affects, inter alia,
the area, boundaries or name of each of the following States, namely,
Andhra Pradesh, Bombay, Madhya Pradesh, Madras, Punjab, Hyderabad,
Madhya Bharat, Mysore, Patiala and East Punjab States Union, Rajasthan,
Saurashtra and Travancore Cochin;

NOW THEREFORE, in pursuance of proviso to Article 3 of the
Constitution of India, I hereby refer the Bill to the Legislature of each
of the aforesaid States for expressing its views thereon within a period
of one month from the date of its reference."

The views expressed by a State Legislature are, however,
not binding on Parliament, and if a State fails to give its views
within the specified or extended period it does not have the effect
of precluding Parliament from proceeding with the matter.
Besides, once a Bill has been referred to a State Legislature
and its views have been obtained, or the specified or the extended
period for expressing its views has expired, Parliament may
amend the Bill as it pleases and no second reference relating
to the amendment is necessary.20 A State Legislature cannot
also subsequently change its previously expressed view.

Effect of Internal Territorial Adjustments on the Concerned
Inhabitants: Any internal territorial adjustments made by
Parliament does not raise the question of an exercise of act of
state. In effect, rights and obligations of the persons affected
by any such adjustment remain unaffected. Besides, when a
part of a State is transferred to another State, the State law
prevailing in the transferred part continues to be in force so
long as they are not expressly altered again.

Necessary Incidental and Consequential Changes Arising out
of Articles 2 and 3: By virtue of article 4 any law passed
by Parliament under article 2, providing for the admission or
establishment of a new State, or an Act passed by it under
article 3, relating to the formation of a new State or affecting
the area, boundaries and name of a State, must also provide

for necessary supplemental, incidental, and consequential matters for implementing the law. Such matters are to be those that "Parliament may deem necessary" and include the amendment of the First and Fourth Schedules and representation in Parliament and in the Legislature, or the Legislatures, of a State, or the States, concerned.

Article 4(1) of the Constitution says:

Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

Of greater interest is, however, clause (2) of this article, which declares:

No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

The effect of clause (2) of article 4 is to take out of the operation of article 368 any law made by Parliament under articles 2, 3 and 4(1). Consequently, not only Parliament gets additional authority in the nature of constituent powers under articles 2, 3 and 4(1), but the Constitution also under article 4(2) acquires a new flexible mode of its change.
CHAPTER 8

WE THE PEOPLE OF INDIA

We, the people of India, are a nation, and the Preamble to the Constitution of India assumes it. True, we present a panorama of diversity—diversity of race, religion, culture, language, food and dress. Yet there is a fundamental unity underlying these diversities. There is unity in attitude towards life, religion and culture; unity of a common past, present purposes and actions; and a unity of future aspirations. And, above all, there is the unity of the feeling of oneness as Indians. It is this unity that symbolises the Indian nation, because, as Renan said, a nation is, indeed, a soul, a spiritual principle. We are a nation, because we feel we are a nation. Even M. A. Jinnah, when he was an ardent Indian nationalist in his early days, observed as follows in his speech in the Indian Legislative Assembly¹:

"India is not a nation, we are told. We were a people when the great war was going on and an appeal was made to India for blood and money. We were a people when we were asked to be a signatory to the peace treaty in France. We are a nation when we become a member of the League of Nations to which we made our substantial contribution. We are a nation or a people for the purpose of sending our representatives to the Imperial Conference. We are your partners, but we are not a nation. We are not a people nor a nation when we ask you for a substantial advance towards the establishment of responsible Government and Parliamentary institutions in our country".

And yet the country was partitioned into two separate states of India and Pakistan, because a section of the then Indian people decided to set up a separate homeland. Again, Pakistan has been cut into two, Pakistan and Bangladesh, because the latter ceased to feel one with the former. However, from the Indian point of view the most significant feature of the country is that in spite of all these separations, the country is still essentially, what Tagore said, a great confluence of

humanity, and the founding fathers were keenly aware of this aspect.

It is true that the Constitution the founding fathers framed considers India as a nation, but it also does not lose sight of the realities of the situation, which demand a sympathetic understanding of the problems and prospects of the scores of smaller social, linguistic, religious, cultural, caste and racial formations embedded in the Indian national life. To achieve an emotional integration, which is the basis of a nation in the ultimate analysis, it is always imperative to allay the fears and suspicions of particularly smaller, compact social, religious, linguistic or racial formations.

A spirit of understanding and compromise on the part of all can alone lay the lasting foundations of the unity of the Indian nation and the evolution of an integrated, composite Indian culture, without obliterating the panoramic diversities of the Indian life. And it is in this spirit that the Constitution approaches the major issues relating to the minorities in India's national life.

MINORITIES

The Constitution does not define “minorities”, but uses this expression in articles 29 and 30 which deal with cultural and educational rights, and again, in articles 350A and 350B which concern linguistic minorities. There are, however, numerous other provisions relating to minorities, variously referred to groups, classes, castes, tribes, sects, denominations, sections or communities. And it is now generally recognised that a minority group may be based on any intelligible differentia and it refers to a group which is smaller than the majority group. This proportion is, however, to be calculated not with reference to the country as a whole nor to a particular locality, but to the entire immediate area of the impact of the subject-matter in dispute.2

The country has minority groups based on all sorts of criteria. For example, religion is as much a basis for determining minority as, say, caste or race. And significantly, the Constitution gives direct or indirect recognition to all conceivable criteria for demarcating a minority group. But the purpose of this

recognition is not to present a fragmented view of the Indian national life, but to so fit the minorities into the integrated composite national culture as to preserve the national unity without sacrificing the diversities of minority formations.

CONSTITUTIONAL PROTECTION TO MINORITIES
Commenting on the Indian Constitution, Jennings observed:

"Indeed the most complete disregard of minority claims is one of the most remarkable features of Indian federalism. The existence of competing claims on religious and ethnic grounds was one of the reasons given for the refusal of Indian independence before 1940. By reaction the Congress politicians, who were above all nationalists, tended to minimise the importance of minority interests and emotions."

But even a cursory glance at the provisions of the Constitution of India suggests that the founding fathers took into account all the factors in evolving a scheme for the protection of minorities, in order that they may find their rightful place in the national life and to help them get assimilated into the great national cultural stream without loss of their individual identities. This national objective was pointed out by Patel as follows:

"In the long run, it would be in the interest of all to forget that there is anything like majority or minority in this country and (to realise) that in India there is only one community."

It was felt on all sides that considering the Indian conditions some guarantees and reservations for minority communities were unavoidable to instil confidence in them as also to progressively lead them on to complete fusion in the life of the nation. The recommendations of the Advisory Committee of the Constituent Assembly on Fundamental Rights and Minorities were inspired by a complete understanding of the feelings and psychology of the minorities and full realisation of the needs of the country. The recommendations represent the national consensus on the problem of minorities. Frank Anthony, supporting the recommendations, said:

3Jennings, Sir I.: Some Characteristics of Indian Constitution, op. cit.; p. 64.

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They represent no imposed decisions; they represent decisions which have been arrived at as a result of friendly understanding, compromise and unanimous agreement.\(^4\)

The principles formulated by the Constituent Assembly in regard to the unique problem of the minorities in India may be summed up as follows:

(i) The ultimate national objective is the achievement of an integrated, composite Indian culture obliterating the majority and minority feelings. Precisely, the country must seek to realise genuine fraternity among the people in India assuring the dignity of the individual and the unity of the nation.

(ii) Meanwhile, the country must provide for certain safeguards for the minorities consistently with the objective of national integration and protection of minority interests.

(iii) There should be certain permanent guarantees of a general nature which would apply to all alike, and thereby also protect the minorities.

(iv) There should be certain protections specifically meant for certain minority groups, particularly the Scheduled Castes and the Scheduled Tribes.

(v) The system of separate electorates should be abolished as being inimical to emotional integration, but reservation of seats for, or special representation of, certain minority communities, including Schedule Castes and Scheduled Tribes, should be allowed for a specified period.

(vi) Certain reservations in public services should be made for the minority communities, specially the Scheduled Castes and the Scheduled Tribes.

(vii) Special opportunities should be provided to the members of the Scheduled Castes and the Scheduled Tribes, including other backward classes, in cultural, social, educational and economic matters, in order that they may secure their rightful place in the composite Indian culture.

\(^{1}\) C.A.D., Vol. VIII; p. 327.
SAFEGUARDS OF PERMANENT NATURE

The Constitution provides for numerous safeguards of a permanent nature, which either because of their prohibition of discrimination between one citizen and another, or direct application to certain minority groups, protect the interests of the minorities.

General Guarantees: The right to equality under article 14; prohibition of discrimination in article 15 by the state against any citizen with regard to any matter in general, and in article 16 with regard to appointment to public offices; and the right to freedom under articles 19 to 22 apply to all citizens. The same is the case with articles 31, 31A, 31B, 31C and 32. At the top of these are the general right to elect or be elected to public offices of the state.

Religious Freedom: Articles 25 to 28 guarantee religious freedom to every individual, and thereby protect the religious rights of minorities also.

Special Educational and Cultural Guarantees: Under article 29(1) a cultural or linguistic minority has the right to preserve its language, script and culture.

Prohibition of Discrimination in Educational Institutions: Again, article 29(2) prohibits discrimination in respect of admission into educational institutions owned or aided by the state. Even an indirect discrimination is forbidden.5

Right to Establish Educational Institutions: All minorities, whether based on religion or language, have the right to establish or administer educational institutions of their choice within the terms of article 30(1). This implies the right of every community not only to establish its own educational institutions but also to impart education to its children in its own language. Even Hindi as the national language cannot claim to replace the right of a community to its own language.6 Even the introduction of compulsory primary education must safeguard the linguistic interests of the minorities.7

6 Ibid.
No Discrimination in Recognition to Educational Institutions: An effective exercise of the right to establish educational institutions under article 30(1) also implies the right to recognition by the state. And the state, without making adequate financial provisions, cannot require the non-acceptance of fees as a precondition for the recognition of the educational institution.

No Discrimination in State Aid to Educational Institutions: The State cannot discriminate on the basis of religion or language in granting aid to educational institutions because of article 30(2) of the Constitution.

Facilities for Instruction in Mother-tongue: Article 350A directs the state to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to minority linguistic groups, and the President has the power to issue necessary directions in this behalf.

Special Officer for Linguistic Minorities: Under article 350B, the President is empowered to appoint a Special Officer for linguistic minorities to investigate all matters relating to the safeguards provided for linguistic minorities and submit his report to the President who, is turn, sends the report to Parliament, and also transmits its copies to the States concerned.

SPECIAL PERMANENT OR TEMPORARY GUARANTEES TO CERTAIN CLASSES

Special Guarantees to Backward Classes in General: The Constitution has made adequate provisions for the amelioration of the conditions and advancement of all backward classes in general, although it does not define "backward classes".

i. Article 340 requires the appointment of a "Commission to investigate the conditions of backward classes". Such a Commission was appointed in 1953 under the chairmanship of Kaka Saheb Kalelkar (a) to determine the tests by which any particular class or group of persons can be categorised as "backward"; (b) to prepare a list of such backward communities for the whole country; (c) to examine the difficulties of backward

8 Ibid.
classes; and (d) to suggest measures for their improvement.

The Commission submitted its report in 1955, but thus far no suitable test for determining a backward class has been evolved for general application. However, the Supreme Court for the purpose of article 15(4) has held that the simple test to determine whether a group of persons is to be classed as backward is whether it is as a class "socially and educationally" worse off than the rest of the citizens. Once this test is satisfied the persons as a class may claim protection as a backward class, whether they belong to the Scheduled Castes or not.

ii. The prohibition of discrimination under article 15 does not prevent the state from making any special provision for the advancement of socially and educationally backward classes in general and Scheduled Castes or Scheduled Tribes in particular.

iii. The guarantee of equality of opportunity under article 16 does not apply when the state makes any provision for the reservation of posts or appointments in favour of any inadequately represented backward class.

iv. The prohibition of discrimination under article 29(2) does not preclude the state from making special provisions for the advancement of backward classes, including the Scheduled Castes and the Scheduled Tribes.

v. At the top of these all, article 45 enjoins the state to promote "with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes," and protect them from all forms of exploitation and social injustice.

vi. Article 164(1) provides for "a Minister-in-charge of tribal welfare, who may, in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work". Although the Constitution requires the appointment of such a Minister only in the States of Bihar, Orissa and Madhya Pradesh, such

Ministers have, in fact, been appointed for the backward classes in all the States.

Special Protection to Scheduled Castes and Scheduled Tribes: Substantial sections of the backward classes because of their patent backwardness have been categorised as Scheduled Castes and Scheduled Tribes. The Constitution provides no definition for Scheduled Castes and Scheduled Tribes, but it empowers the President under article 341 and 342 to draw up a list of such Castes and Tribes in consultation with the Governor of each State, subject to revision by Parliament. Presidential Orders specifying Scheduled Castes and Tribes in different States in India were issued, which have now been amended by the Scheduled Castes and Scheduled Tribes, Orders (Amendment) Act, 1956. Of the total population of 54,79,49,809 of the country, 7.99 crores, i.e., about 14.68%, are Scheduled Caste and 3.79 crores, i.e., about 6.93%, are Scheduled Tribe people. The Constitution makes numerous provisions for the special protection of the interests of these Scheduled Caste and Scheduled Tribe people.

i. The general bar on discrimination by the state under article 15 or by any person in regard to public places does not prohibit the state from making any special provision for the advancement of the Scheduled Castes and Scheduled Tribes.

ii. Scheduled Castes and Scheduled Tribes being part of “backward classes” within the meaning of article 16 are entitled to reservation of appointments or posts by the state.

iii. Article 17 abolishes untouchability and forbids its practice in any form. It also makes the enforcement of any disability arising out of untouchability an offence punishable in accordance with law.

iv. The Constitution provides for reservation of seats for the Scheduled Castes and Scheduled Tribes in the House of the People and the Legislatures of the States. These reservations were initially guaranteed under article 334(a) for only ten years from the commencement of the Constitution. Subsequently, the period was extended to twenty years, and now it stands at thirty
years, with likelihood of further extension. The reservations are made on the following principles:

(a) Article 330 requires seats to be reserved in the House of the People for the Scheduled Castes; the Scheduled Tribes, except the Scheduled Tribes in the Tribal Areas of Assam; and the Scheduled Tribes in the autonomous districts of Assam. The number of seats reserved in any State on Union Territory is to be, as nearly as possible, in the ratio of the population of the Scheduled Castes, the Scheduled Tribes, or autonomous districts to the total population of the State or Union Territory.

(b) Article 332 provides for the reservation of seats for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam, in the Legislative Assembly of every State. Seats for autonomous districts in the Legislative Assembly of Assam are also to be reserved. In this case also the number of reserved seats is to be in the ratio of the population of the Scheduled Castes, the Scheduled Tribes or the autonomous districts to the total population of the State concerned.

v. The proviso to article 164(1) lays down that in the States of Bihar, Madhya Pradesh and Orissa, "there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work." In practice, however, all the States have welfare departments.

vi. Article 335 requires the claims of the members of the Scheduled Castes and Scheduled Tribes to be taken into consideration, consistently with the maintenance of administrative efficiency, in the making of appointment to services and posts in connection with the affairs of the state.

vii. Article 338 empowers the President to appoint a special Officer for the Scheduled Castes and Scheduled Tribes. This Officer now bears the designation of Scheduled Caste Commissioner and has a number of Assistant Regional Commissioners under him.
It is the duty of the Commissioner "to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament".

viii. The President may, under article 339(1), "at any time and shall, at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of Scheduled Tribes in the States." The order of the President is also to "define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions as the President may consider necessary or desirable".

ix. Article 339(2) extends the executive power of the Union "to the giving of directions to a State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State". To facilitate the operations of Union Government in this regard two Central Advisory Boards—one for the Scheduled Castes and the other for the Scheduled Tribes—have been constituted.

x. Article 224, read with the Fifth and Sixth Schedules of the Constitution, provides for a special administrative set-up for Scheduled and Tribal areas in the States.

xi. The first proviso to article 275(1) requires that "there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purposes of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State".
xii. Above all these are the benefits of the special care under article 46 that the state is to take of the educational and the economic interests of the Scheduled Castes and the Scheduled Tribes and to protect them from social injustice and all forms of exploitation.

Special Provisions for the Anglo-Indian Community: The Constitution gave certain particular protections of an interim nature to the members of the Anglo-Indian Community in view of their peculiar position in the Indian society, of which some are still continuing. Article 366(2) says:

"An Anglo-Indian means a person whose father or any of whose male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only."

The following are the special guarantees of the Anglo-Indian community:

i. The Constitution provides for special representation of the Anglo-Indian community in the House of the People and the Legislatures of the States as noted below. Initially article 334 permitted reservation for ten years. This period was, however, extended later to twenty years and it is now thirty years, with every likelihood of its being extended further.

(a) Article 331 empowers the President to nominate not more than two members of the Anglo-Indian community to the House of the People, if in his opinion the community is not adequately represented in the House.

(b) Again, if the Governor of a State is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein, he may nominate such number of members of the community to the Assembly as he considers appropriate.

ii. Clause (3) of article 338 lays down that the Special Officer appointed under this article for the Scheduled
Castes and Tribes shall also be responsible for all matters with respect to which he holds charge in regard to those Castes and Tribes.

iii. Under article 336, for an initial period of ten years from the commencement of the Constitution, the Anglo-Indian community was allowed to enjoy the then existing reservation for their members in the Railway, Customs and Telegraph services of the Union.

iv. Similarly and for the same period, article 337 allowed them the then existing system of education and educational grants.

A close view of the nature and working of the special safeguards for the minorities is, however, more likely to convince an observer of the Indian scene that these safeguards designed as utilitarian tools are now being used as powerful handles, and they seem to betray a tendency to perpetuate themselves for ulterior purposes.

The real value of these safeguards lies in so far as they are able effectively to accelerate the achievement of a composite Indian culture. But primarily because of the want of real breakthroughs on socio-economic frontiers, but partially also because of the extraneous motivations of playing up minority problems, the national objective of an integrated composite Indian culture appears to be not a distinct possibility in the immediate future, unless the nation puts in its supreme effort on all economic, social and political fronts in unison. The minority problem must be viewed as the task of achieving true fraternity among the Indian people.
CHAPTER 9

LANGUAGE IN NATIONAL LIFE

The language element in the Indian national life is, indeed, unique. It is unique not because of the polyglot character of the Indian people, but because of the peculiar twist to the problem received from the English exercise in classical imperialism in India for nearly three and a half centuries, which effectively chocked, unlike the Russian language in the U.S.S.R., any of the major Indian languages from occupying a place of predominance in the country.

In fact, in those days because of its late association with the ways of the British and the outside world, Hindi, the language of the largest region of the country, could not even claim the minimum of respectable literary and social status that some other Indian languages, for example, Bengali and Tamil, had been able to achieve in their respective smaller regions.

Looking at the Indian linguistic scene one is most likely to be struck with its diversity. There are nearly a thousand languages, including dialects and some sixty-eight odd non-Indian languages, spoken by the millions inhabiting this vast land, and pessimists and optimists alike comment that in this country language changes after every five-mile zone. Even according to the Linguistic Survey of India, there are 179 languages and 544 dialects in the country.

In the midst of these diversities, however, there are certain significant fundamental unities. In the first place, of these hundreds of languages, including the dialects and non-Indian languages, about a dozen stand out as major or principal languages. Secondly, these principal languages are spoken by persons almost forming compact territorial units of the country. Thirdly, apart from the non-Indian languages, or languages basically derived from them, all Indian languages are rooted in Sanskrit.

Fourthly, the philologists notwithstanding, if one were to travel in the country from Delhi onwards to the east and then move to the south through Bengal and Orissa, one is most likely
to be impressed with the fundamental unity underlying all the Indian languages both in words and scripts. Border areas of the States present a pleasing confluence and a heart-warming scene of this fundamental Indian linguistic unity. And fifthly, the Congress, which itself was a great unifying and nationalising force, stood for a national language, although this was quite at a late hour of its career, and it still maintains its traditional stance.

The Congress, under the lead of Gandhiji, brought to the fore the issue of a national language, and nationalist India generally veered round the view that a broad-based, simplified Hindi in Devnagari script, or as Gandhiji called it Hindustani, should eventually be the *lingua franca* in India.\(^1\) And there was a broad consensus on this issue when the Constituent Assembly first met on December 6, 1946. Yet it is only symbolic of the national dilemma that the Objectives Resolution moved by Nehru on December 13, 1946, and his accompanying speech were in both Hindi and English. It is also only indicative of the complexity of the problem that the decision on the vital language issue had to be deferred until towards the end of the constitution-making process.

Later, when the Constituent Assembly actually came to grips with the language problem, the President of the Assembly, Rajendra Prasad, felt obliged to administer an unusual note of caution to the members of the Assembly:

"There is no other item in the whole Constitution which will be required to be implemented from day to day, from hour to hour, I might say, from minute to minute in actual practice ... The decisions of the House should be acceptable to the country as a whole. Even if we succeed to get a particular proposition passed by a majority, if it does not meet with the approval of any considerable section of the people in the country either in the north or in the south, the implementation of the Constitution will become a most difficult problem".\(^2\)

And during the debates on the language issue, speeches were made on the floor of the Assembly itself that generated more heat than light, and at times it seemed that even the domi-

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\(^2\) C.A.D., Vol. IX; p. 1312.
nant spirit of compromise and consensus underlying the entire constitution-making process would get completely evaporated on this lone issue. But happily for the country, the Munshi- Ayyangar draft formula was evolved, and Ayyangar commended the draft to the Assembly in the following words:

"The draft is the result of a great deal of thought, a great deal of discussion. It is also a compromise between opinions which were not easily reconcilable. It is a compromise in respect of which very greatly cherished views and interests have been sacrificed for the purpose of achieving this draft in a form that will be acceptable to the whole House. . . (Therefore), the scheme of the Chapter should be looked upon as a whole. It is an integrated whole; if you touch one part of it, the other things fall to pieces".3

Speaking in support of the Munshi-Ayyangar draft, Frank Anthony observed: "I accept the premise that if India is to achieve real unity, a real sense of Indian nationality, then we must have a national language . . . That should be Hindi".4 Nehru felt that the draft was commendable not because it was perfect, but because it had succeeded in giving some integrated shape to the issue on the anvil, and added: "However good and important English may be, we cannot tolerate that there should be an English knowing elite and a large mass of our people not knowing English".5 And this draft, though an essentially compromise document, a compromise document even to the point of the great sacrifice "of long cherished views and interests", was finally able to secure consensus in the Assembly and was given constitutional recognition as Part XVII of the Constitution. Commenting on the significance of this event, Shyama Prasad Mukherjee observed:

"Let us, therefore, at the very outset realise that we have been able to achieve something which our ancestors did not achieve . . . The House is making a real contribution to the national unity of India of which we and those who come after us may legitimately be proud . . . National unity must be achieved by allowing those elements in the national life of the country which are today vital to function, and function with dignity.

5 Ibid.: p. 1409.
harmony and in self-respect ... Unity in diversity is India's keynote and must be achieved by a process of understanding and consent."

Rajendra Prasad, immediately after the adoption of Part XVII of the Constitution dealing with languages, expressed only the national feeling on the happy ending of a highly sensitive problem. He said:

I think we have adopted a charoper for our Constitution which will have very far-reaching consequences in building up the country as a whole. Never before in our history did we have one language recognised as the language of rule and administration in the country as a whole ... We have now achieved political unification of the country; we are now going to forge another link which will bind us all together from one end to the other ... Our Constitution so far has evoked many controversies, and raised many questions which had very deep differences; but we have somehow or other managed to get over them all. This was one of the biggest gulfs which might have separated us ... This language which we will use in the Centre will tend to bring us together, nearer and nearer. The English language brought us together. An Indian language in its place is bound to bring us closer together, in particular because our traditions are the same ... If we did not accept this formula, the result would have been either a large number of languages to be used for the country as a whole, or separation of Provinces which did not like to submit or accept any particular language under pressure. We have done the wisest thing possible ... and I hope posterity will bless us for this."

And again, referring to the momentous language decision, he, in his concluding speech before the Assembly, said:

"I look upon this as a decision of very great importance when we consider that in a small country like Switzerland they have no less than three official languages ... It shows a spirit of accommodation and a determination to organise the country as one nation that those whose language is not Hindi have voluntarily accepted it as the official language. There is no question of imposition now ... It is the duty of the country as a whole now, and especially of those whose language is Hindi, to so shape and develop it as to make it the language in which the composite culture of India can find its expression adequately and nobly."*

CONSTITUTIONAL PROVISIONS REGARDING LANGUAGES

Part XVII of the Constitution carries the heading "Official Language", but in fact, it seeks to provide for a much wider

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objective. In addition to articles 343 to 351 of this Part, constitutional provisions on languages are also to be found in article 120, dealing with language to be used in Parliament; article 210, concerning language to be used in the Legislatures; and articles 29 and 30, relating to cultural and educational rights.

OFFICIAL LANGUAGES

Language of the Union: Chapter 1 of Part XVII deals with the language of the Union. Article 343(1) of this Chapter thus runs:

"The official language of the Union shall be Hindi in Devnagari script. The form of numerals to be used for official purposes of the Union shall be the international form of Indian numerals."

This article further provides that for a period of fifteen years from the commencement of the Constitution English is to continue in use "for all the official purposes of the Union for which it was being used immediately before such commencement". The President, however, may authorise by order, even during this period of fifteen years, the use of Hindi in addition to English and of the Devanagari form of numerals in addition to the international form of Indian numerals for any official purpose of the Union. Again, Clause (3) of this article authorises Parliament to provide by law for use, after the aforesaid period of fifteen years, of the English language and the Devanagari form of numerals for any purpose laid down in such a law.

Language to be Used in Parliament: Note may also be taken of article 120 which deals with language to be used in Parliament. In accordance with clause (1) of this article, "Notwithstanding anything in Part XVII, but subject to article 348, all business in Parliament shall be transacted in Hindi or in English". But after the expiry of fifteen years from the commencement of the Constitution, the expression "or in English" is to be deemed to have been omitted from this clause (1), unless Parliament by law otherwise provides. However, the Chairman of the Council of States or the Speaker of the House of the People or persons acting as such, as the case may be, may permit any member who cannot adequately express
himself in Hindi, or in English, to address the House in his mother-tongue.

**Language Commission:** Article 344 requires the President to appoint a Commission at the expiry of five years from the commencement of the Constitution and again after ten years from such commencement. The Commission is to consist of a chairman and other members representing the different languages specified in the Eighth Schedule. The duty of the Commission is to make recommendations to the President for the progressive use of Hindi for all official purposes of the Union; restriction on the use of English for any Union official purpose; language to be used in the Supreme Court and texts of the Union and the State laws; the form of numerals to be used for any Union official purpose; and any other matter referred to it by the President regarding the official language of the Union and the language for communication between the Union and a State or between one State and another and their use.

In making its recommendations, the Commission is required to "have due regard to the industrial, cultural, and scientific advancement of India and the just claims and the interests of the persons belonging to the non-Hindi speaking areas in regard to the public services. "The recommendations of the Commission are to be examined by a Joint Parliamentary Committee consisting of twenty members from the House of the People and ten from the Council of States, elected in accordance with the system of proportional representation by means of the single transferable vote." The Committee is to submit its report to the President and the President may, after considering the report of the Committee, "issue directions in accordance with the whole on any part of that report".

**The First Official Language Commission:** In accordance with article 344, the first Official Language Commission was appointed in 1955 under the chairmanship of B. G. Kher. The Commission submitted its Report in 1956 in which it stated the language problem in the following terms:

"We have surveyed the Indian linguistic scene and seen how we have current, in different and more or less distinct and compact parts of the country, a dozen great regional languages, several of them spoken by
as large a number as, or even a larger number of people than, the speakers of some of the advanced languages of the West. While there is this multiplicity and variety of forms of speech, there is a large measure of similarity and affinity amongst all these languages. This kinship amongst the Indian languages is only a reflection of the fundamental bedrock of a common cultural inheritance which underlies the apparent variety amongst the linguistic and cultural groups of the Indian community... Normally, languages develop in response to the requirements of communication and intercourse felt by societies which speak those languages. Now with the attainment of independence, the problem that presents itself to us is to devise a linguistic medium which obviously need to subserve the political unity of the country, and, in the words of Article 351 of the Constitution, as a medium of expression for all the elements of the composite culture of India. The problem has also another aspect, viz., that of developing the different regional languages and also Hindi, as the Union Language, so as to make them adequate vehicles of thought and expression in their appropriate spheres on the eventual displacement of the English language. This, in short, is the language problem of India.9

Highlighting the uniqueness of the complex Indian linguistic scene, the Commission further observed:

"The difficulty and complexity of the language problem that the country has to tackle are manifest. We seek to find a medium of expression for the strong elements of identity in the cultural life of the country and as a linguistic counterpart of the political unity which the country has rediscovered after many centuries. In doing so, we seek to replace a working system based on the English language, which, albeit foreign to the people, is one of the world's richest and most widely spoken languages and has many general merits to recommend it. The languages we can replace English by are at present insufficiently developed for the multifarious occasions of official and non-official intercourse, that arise in a modern community. Several of these dozen or so languages are, however, spoken by numbers in far excess of many current European languages claiming to be advanced means of communication and are thus, in point of the number of people who speak, entitled to a high place in the world's roll of languages. Hindi has been chosen as the Union Language on the principal, and we think sufficient, ground that amongst the regional languages it is spoken by the largest number of people in the country... Some of the different elements in the Indian problem have been severally and individually met and tackled successfully elsewhere in the world; but for the successful tackling of a complex situation wherein all these difficulties are compacted, there is no precedent to our knowledge. We believe, however, that a successful solution can be achieved and we feel confident that, given good sense and an appropriate perspective, it would be done.9a

The Report of the Commission was placed before Parliament in 1957 and it was examined by a Joint Parliamentary Committee. The Committee, after considering the Report, made the following observations:

i. The Constitution of India contains a scheme of official language, which is an integrated whole and is flexible enough to admit of appropriate adjustments.

ii. The regional languages are rapidly replacing the English language as a medium of instruction and the official work in the States. This makes the use of an Indian language for the purposes of the Union a matter of practical necessity. However, there need be no rigid date-line for the change-over from English to an Indian language and the process should be a natural transition effected over a period smoothly and without undue inconvenience.

iii. Till 1965, English should be the principal official language and Hindi the subsidiary official language; and after 1965, when Hindi becomes the principal official language, English should continue as the subsidiary official language.

iv. No restriction should be placed on the present use of English for the official purposes of the Union and provisions should be made under a law passed by Parliament within the terms of article 343(3) for the continued use of English even after 1965 for the purposes specified in the law.

v. Article 351 is of vital significance in that it enjoins the development of Hindi to serve as a medium of expression for all elements of the composite culture of India, and every encouragement should be given to the use of easy and simple diction.

Implementation of the Commission’s Recommendations: To implement some major recommendations of the first Official Language Commission the President issued an Order on April 27, 1960. The Order provided for the constitution of a standing Official Language Commission primarily for evolving technical Hindi terminology. This standing Commission was constituted
in 1961 and has since been functioning in the country. The Order also made the following provisions:

i. English shall continue to be the medium of examination for all recruitments through the Union Public Service Commission; and after some time Hindi may be introduced as an alternative medium, the examinee having the option to choose either Hindi or English.

ii. Parliamentary legislation may continue to be in English but an authorised Hindi translation in each case should be provided. To this end the Ministry of Law, Government of India, was directed to take suitable steps, including necessary legislation.

iii. Where a State Legislature passes a law in a language other than Hindi, a Hindi translation may be published besides its English translation in accordance with article 348(3).

iv. When time comes for the change-over, Hindi shall be the language of the Supreme Court.

v. Again, when such time for change-over comes, Hindi shall ordinarily be the language of judgments, decrees or orders of the High Courts in all regions. However, by appropriate legislation, use of a regional language other than Hindi may be allowed in a High Court with the previous consent of the President.

Official Languages Act: In pursuance of the Report of the first Official Language Commission and in the exercise of its powers under article 348(3), Parliament passed the Official Languages Act, 1963, which, inter alia, provides for the continuance of English in addition to Hindi for the official purposes of the Union even beyond the initial period of fifteen years from the commencement of the Constitution. Section 3 of this Act is as follows:

"Notwithstanding the expiration of the period of fifteen years from the commencement of the Constitution, the English language may, as from the appointed day, continue to be used, in addition to Hindi—(a) for all the official purposes of the Union for which it was being used immediately before that day and (b) for the transaction of business in Parliament".

Section 4 of the Act requires the appointment of a Committee on Official Language after ten years from January 26,
1965, consisting of thirty M.Ps, of whom twenty are to be from
the House of the People and the rest from the Council of States.
The Committee is to review the use of Hindi for official purposes
and make its recommendations to the President. The President
is required to place the report of the Committee before both the
Houses of Parliament and is also to send its copies to all the
State Governments. After considering the views, if any, ex-
pressed by the State Governments, he is to "issue directions in
accordance with the whole or any part of that report."

Section 5 says that from the appointed day a Hindi transla-
tion of any Central Act, Ordinance or subordinate legislation
published in the Official Gazette under the authority of the
President shall be deemed to be the authoritative Hindi text
thereof. This section also requires that from the appointed day
every Bill in English to be introduced in Parliament shall be
accompanied by a Hindi translation thereof, in the prescribed
manner.

Section 6 requires that in case a State Legislature prescribes
any language other than Hindi for use in State Acts, Ordinances,
rules and regulations, in addition to English translations thereof,
as required under article 348(3), Hindi translations are to be
published from the appointed day in the Official Gazette under
the authority of the Governor. Such a Hindi translation is to
be deemed as the authoritative text of the State law.

Section 7 provides for the optional use of Hindi or other
official language in judgments or decrees of High Courts from
the appointed day. For this purpose, the Governor of a State,
with the previous consent of the President, is to authorise the
use of Hindi or other official language by the High Court of
the State, subject to the requirement that an English transla-
tion of the judgment or decree is to be accompanied under the
authority of the High Court. This section is to be read with
article 348 of the Constitution dealing with the language to be
used in the Supreme Court and the High Courts.

Regional Languages: Chapter II of Part XVII concen-
trates on regional languages for official use in the States.
Article 345 provides for the continued use of English for any
official purpose of a State for which it was being used at the
time of the commencement of the Constitution. A State Legis-
lature is, however, competent to adopt by law one or more languages used in the State or Hindi as the official language or languages of the State for any purpose.

The President is empowered under article 347 to direct a State to also recognise a language spoken in the State for the whole of the state or a part thereof for specified purposes, if he is satisfied that a substantial portion of the population of the State speaking that language desires its official use.

The regional and Indian languages recognised by the Constitution are, however, those that have been listed in the Eighth Schedule, and they include all the major regional languages of the country. These languages are: Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Malayalam, Marathi, Oriya, Punjabi, Sanskrit, Sindhi, Tamil, Telugu and Urdu.

Language to be used in the State Legislatures: Article 210(1) says that the business of a State Legislature “shall be transacted in the official language or languages of the State or in Hindi or in English”. But unless the State Legislature provides otherwise, the expression “or in English” shall be deemed to have been omitted from clause (1) after fifteen years from the commencement of the Constitution. Besides, the presiding officer of a Legislative Assembly or Legislative Council may allow a member, who cannot express himself adequately in any of the official languages of the State, to speak in his own mother-tongue.

Official Language for Inter-Governmental Communication: Article 346 requires that the official language for the time being authorised for use in the Union shall be the official language for communication between the Union and the States and the States inter se. However, two or more States are competent to agree to use Hindi as the official language of communication between themselves.

Language of the Supreme Court, the High Courts, and of Laws: Chapter III of Part XVII deals with language to be used in the Supreme Court and the High Courts and the language of Bills, Acts, Ordinances, rules and regulations of the Union and the States. Article 348 requires that unless Parliament by law otherwise provides, the language of all the proceedings
before the Supreme Court or a High Court shall be the English language. However, with the previous consent of the President, the Governor of a State may authorise the use of Hindi, or any other official language of the State where the principal seat of the High Court is located, in any proceedings in the High Court concerned. This authorisation cannot, however, apply to any judgment, decree or order of the High Court.

Article 348 further requires that the authoritative text of any Bill, Act, Ordinance, rule or regulation of the Union or a State Government shall be in English until Parliament by law provides otherwise. Should, however, the Legislature of a State prescribe, which it is competent to do, any language other than the English language for the purpose of making any law in the State, “a translation of the same in the English language published under the authority of the Governor of the State in the Official Gazette of the State shall be deemed to be the authoritative text thereof in the English language under this article”.

MEDIUM OF INSTRUCTION

The Constitution does not speak specifically anything about the medium of instruction, except in the case of linguistic minorities. However, certain general inferences, based on the provisions of the Constitution indirectly impinging on this issue and the decisions of the Supreme Court in this regard, may be drawn. It was held by the Supreme Court, in *Gujarat University v. K. R. Mukholkar,* that medium of instruction is implicit in the Entries relating to education in the Union List and the State List. In the Union List, three Entries are to be found from 63 to 65, and in the State List there is the Entry 11, relating to education. The Court held that Entry 66, List I, provides for “co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions”. It was held that this power of Parliament to coordinate and determine standards in institutions of higher education included the power of Parliament to legislate for the medium of instruction in such institutions.

As the powers exercisable in List II are subject to the exercise of powers under List I, Union Parliament has the power

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to determine the medium of instruction in higher educational institutions and a State Legislature is presumably not competent to compulsorily prescribe a regional language as the *only* medium of instruction in higher educational institutions.

But as neither the Constitution nor the Supreme Court in the *Gujarat University Case* does define the expression "institutions of higher education", the most that can be inferred in this regard is that if a State Government or a university were to prescribe any regional language as the *sole* medium of instruction and examination at the university stage, which must be taken to include both graduate and post-graduate courses, the decision in the *Gujarat University Case* would be attracted for invalidating this action.

But it seems that a State Government or a university may opt for a regional language, provided it allows option to write answer scripts at least in English or in Hindi, both of which enjoy national status. It also appears that in the higher educational institutions in a State it may be provided that instruction shall be given in the regional language of the State but the examinees may exercise the option of writing answer scripts in at least English or Hindi. So far as the medium of instruction in the primary schools is concerned, the picture is well-defined, because the state is expected to provide education in the mother-tongue of the people. The same principles would in all probability apply to the secondary or higher secondary education. But in all cases care should be taken not to infringe the rights of a linguistic or cultural minority under articles 29 and 30.

**SPECIAL DIRECTIVES ON LANGUAGE**

The Constitution in Chapter III of Part XVII lays down some special Directives in regard to languages, which are in the nature of the Directive Principles contained in Part IV thereof. Article 350 enjoins that every "person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be".

Article 350A directs the state to make efforts "to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic
minority groups”, and the President may issue any direction to a State for this purpose. And article 350B enjoins the appointment of a Special Officer for linguistic minorities. It is the duty of this Officer “to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and to report to the President upon those matters” at specified intervals, and the President is to cause the report to be placed before Parliament and also send copies thereof to the States concerned.

**Development of Hindi:** Article 351, as the Joint Parliamentary Committee on official language said in 1957, is of prime importance. It casts a duty upon the Union “to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable for its vocabulary, primarily on Sanskrit and secondarily on other languages”.

**PROTECTION TO LINGUISTIC MINORITIES**

Article 29 says that any section of Indian citizens having “a distinct language, script and culture of its own shall have the right to conserve them.” This article also prohibits denial of admission to a state-owned or a state-aided educational institution, *inter alia*, only on the ground of language. Again, article 30 gives all minorities, whether based on religion or language, the right to establish and administer educational institutions of their own choice. This article also forbids the state, in granting aid to educational institutions, to discriminate “against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.”

Besides, article 120 in regard to Parliament and article 210 in regard to State Legislatures authorise a member of any House to speak in the House in his mother-tongue with the permission of the presiding officer of the House, if the member cannot adequately express himself in any of the prescribed languages.
Then article 350A enjoins the state to make endeavours to provide instruction at the primary stage of education to all children of linguistic minority groups in their respective mother-tongues, and article 350B directs the appointment of a Special Officer for linguistic minorities.

**GENERAL OBSERVATIONS**

The complexities of language problem in the country have yet not been neatly sorted out and consistently woven into a harmonious national pattern. But two points seem to be firmly established. In the first place, the major regional languages are to replace English for all purposes within their respective areas. Secondly, Hindi must be so developed as to replace English in India’s national and international life.

With this end in view and also to accommodate the feelings of all sections of Indians, the Ministry of Education, Government of India, has evolved the three-language formula which involves the learning of Hindi, English, and one more Indian language whether as mother-tongue or otherwise. It seems that although the future of the country in linguistic field lies in accepting this three-language formula or a suitable variation of it, a serious, concerted national effort to implement this formula or to evolve its appropriate variation for implementation is still to be made.

Yet the nation needs Hindi as the national language to serve its needs as effectively as English is serving at present, specially in view of the fact that regional languages are rapidly replacing English at State level. It is the duty of the Union and the responsibility of all, particularly of those who claim Hindi as their mother-tongue, to develop and spread Hindi without injuring the susceptibilities of the non-Hindi areas.

This can be done by providing adequate mobility throughout the country, by increased job-opportunities and overall improvement in the national economy. But to a great extent it is also a question as to how far the Hindi-speaking areas contribute to the national well-being on all fronts, in order to raise Hindi in national and international esteem. The richness of Hindi resulting from the valuable contributions of all, particularly of the Hindi-speaking people, would go a long way to accord her the rightful place at the earliest opportunity.
CHAPTER 10

NATIONALITY CITIZENSHIP AND DOMICILE

India is a nation as much as the U.S.A., the U.S.S.R., Switzerland or China is. A nation thus conceived is a country that is a state, or, at best, seeks to be a state. Basically it is a concept of one country one nation and one state, and it is commonly recognised as such. As internationally understood, a nation means only a state. A national of a state is the person who owes allegiance to the state and over whom the state exercises jurisdiction, at least, in a few matters as a person, irrespective of his place of residence for the time being.

NATIONALITY

The nationality of a person merely denotes his allegiance to a particular state, his status as a subject of that state. Nationality is, thus, subjechthood of a state, and there may be cases of double nationality or no nationality at all. This is because although nationality is a concept of international signification, all issues relating to nationality are governed by municipal laws. The cases of double nationality, or no nationality, arise out of the conflicting legal provisions governing the nationality issues in different countries.

Under Marxist influence, however, sometimes nationality is taken to be not a political but a cultural concept fortified by common experience, religion, race or language. But it seems that this view of nationality has a practical significance only when a country seeks to combine cultural autonomy for its regions with centralised economic policies and planning. And even in this case, it may be more appropriate to express the position explicitly by saying that the country has "cultural autonomy" for the regions than by giving a new meaning to the word "nationality" and referring to a cultural grouping as nationality.

It is more precise and practical to confine the use of the word "nationality" to denote mere subjechthood of a state for political purposes, whether national or international. On the
one hand, internally the concept of nationality seeks to distinguish between the nationals and aliens at any time living within the territorial limits of a state, and, on the other, it carries through the person of a national the jurisdiction of a state beyond its territorial limits. It is not, however, that a state has jurisdiction over its nationals outside its territorial limits in all matters. Thus, any person, whether a national or a foreigner, residing within the territorial limits of a state is subject to the state's criminal jurisdiction.

CITIZENSHIP

If nationality denotes mere subjecthood of a state without reference to the nature and extent of the rights and privileges enjoyed by a person in the state, citizenship is a term used to connote the public capacity of an individual as a member of the state. It denotes the rights and privileges he enjoys as such a member. Nationality may be an attribute of any person, whether natural or artificial. But citizenship is essentially an attribute of an individual and is determined on the principle of *jus soli*, law of place of birth, or *jus sanguinis*, law of blood relationship, or any combination of these twin principles.

In effect, all citizens must be nationals, but all nationals may not be citizens. To be a citizen, a person must be an individual first and then he must also be draped with certain right and privileges arising out of his membership of a state. Thus, in the *State Trading Corporation v. Commercial Tax Officer*,¹ the Supreme Court said:

"Nationality has reference to the jural relationship which may arise for consideration under international law. On the other hand, citizenship has reference to the jural relationship under municipal laws. In other words, nationality determines the civil rights of a person, natural or artificial, particularly with reference to international law, whereas citizenship is intimately connected with civil rights under municipal law. Hence, all citizens are nationals of a particular State; but all nationals may not be citizens of the State. In other words, citizens are those persons who have full political rights as distinguished from nationals who may not enjoy full political rights and are still domiciled in this country".

DOMICILE

As nationality and citizenship are concepts of political connotation, domicile has civil connotation. The first two determine a person’s political rights, whereas the latter one determines a person’s personal rights. The question of domicile is fundamentally a question of the permanent home of a person to determine his civil status and has no reference to his nationality or citizenship. And as every person must have a civil status, irrespective of the fact whether he has a political status, every person must also have a domicile and a single domicile. Thus a person may not have nationality, he may not have citizenship, but he must at all times and under all circumstances be deemed to have a domicile which can be lost only be acquiring a new domicile. Domicile like nationality, but unlike citizenship, is an attribute of both natural and artificial persons.

A person may have domicile of birth, domicile of choice, or domicile by operation of law. As soon as a person is born he acquires the domicile of his father if he is legitimate and is not born posthumous, of his mother if he is illegitimate or is born posthumous, and of the place where found if he is a foundling. On achieving majority, such a person may change his domicile and acquire a domicile of choice.

In determining the domicile of choice, it is imperative to remember that domicile is not synonymous with mere residence.

Domicile is, however, not synonymous with mere residence. It refers to the permanent home of a person, whether natural or artificial, and has a definite legal meaning. As Wharton says, in his Law Lexicon, two elements must be present to constitute domicile: first, fact of residence, and second, the intention of the person to make the place his home. Animo et facto must be combined to determine a person’s domicile.

The mere fact of ordinary residence is not enough to determine domicile by itself. Similarly, mere intention to set up a permanent home cannot clinch the issue of domicile without the fact of residence. It should, however, be noted that in deter-

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2 Udny v. Udny, (1869) 1 L.R. Ch. Div. 441.
mining the domicile of a person, it always turns out to be a live question of fact whether a man intended to make his residence a permanent home, and it has been held that no thread in the actions or circumstances of a man's life may be ignored in ascertaining his intention of setting up a permanent home at the place in question.  

The following principles relating to domicile may be noted. First, every person must have a domicile which is determined both by the factum of residence and the animus of setting up a permanent home. Secondly, a person cannot have two domiciles at the same time. Thirdly, domicile may change without a corresponding change in nationality or citizenship. Fourthly, no dependent can acquire a domicile of his choice by his own act. Fifthly, there is a presumption against a change of domicile. And Sixthly, the question of domicile is determined with reference to the lex fori, i.e., the law of the land in which the court deciding the question of domicile is situated.

CITIZENSHIP, NATIONALITY AND DOMICILE UNDER THE CONSTITUTION OF INDIA

Citizenship: Before independence, the question of Indian citizenship or nationality did not pose a problem, because all Indians were British subjects governed by the British Nationality Acts passed by the British Parliament. But when the Constituent Assembly took up the task of defining Indian citizenship and evolving a legal scheme for all matters in this behalf, it found the problem so complex that Ambedkar had to confess: “I do not know how many drafts were prepared and how many were destroyed as being inadequate to cover all cases which it was thought necessary and desirable to cover.”

The problem had become complicated because of the migration of Indians to other British colonies and also because of the partition of India. It took the Assembly almost two years to settle even the preliminary question of who were to be the citizens of India at the commencement of the Constitution; and after settling this issue, the Constitution left all other matters relating to citizenship to the legislative competence of Parlia-

6 Casdagli v. Casdagli, (1918) L.R. 89.
7 C.A.D., Vol. IX; p. 347.
ment. And that, too, was, in all probability, by following a suggestion made in a Calcutta law journal, the Calcutta Weekly Notes, which wrote:

"It would, in our opinion, therefore, be better to specify who would be the citizens of the Indian Union at the date when the Constitution comes into force as in the Constitution of the Irish Free State and leave the law regarding nationality to be provided for by legislation by the Indian Union in accordance with the accepted principles of private international law".9

The Constitution of India, unlike some other federal constitutions, provides for a single citizenship, and it deals with citizenship only at the time of the commencement of the Constitution. It only defines who are the persons to be deemed as Indian citizens immediately after the Constitution became effective. And, therefore, the provisions of the Constitution relating to citizenship are of a very limited nature, all other matters relating to citizenship now being covered by the Citizenship Act, 1955.

Citizenship of Juristic Persons: When the Constitution came into force, there was some controversy as to whether citizenship could be attributed to a juristic person as distinct from individuals. But when the existing Citizenship Act, 1955, was passed the matter was set at rest by declaring for the purpose of the Act: "'person' does not include any company or association or body of individuals, whether incorporated or not".10 Consequently only individuals can be the citizens of India. This proposition has been affirmed by the Supreme Court in State Trading Corporation v. Commercial Tax Officer.11

Nationality: The Constitution does not speak of "nationality" as distinguished from or synonymous with "citizenship". But as pointed out above, in the State Trading Corporation v. State of Bombay, the Supreme Court has accepted a distinction

8 Arts. 5-11, Constitution of India.
10 Sec. 2(f), Indian Citizenship Act, 1955.
between "nationality" and "citizenship" under the Indian constitutional system. It was laid down therein that any person, whether natural or artificial, could be a national of India, but only individuals are entitled to Indian citizenship.

Secondly, nationality has reference to international law, although it may be of use in municipal law also. But citizenship is exclusively a matter of municipal law. Thirdly, the term "nationality" is of wider connotation than the word "citizenship". Fourthly, all citizens must be nationals, but all nationals may not be citizens. And fifthly, nationality is related to civil capacity but citizenship is based exclusively on political capacity.

**Domicile or Residence**: Similarly, courts in India have recognised a distinction between nationality and citizenship on the one hand and domicile on the other. That the Constitution also accepts this distinction is evident from the provisions of article 5 thereof, which makes acquisition of citizenship dependent, *inter alia*, on domicile.

One point, however, needs careful attention here. This country has a single citizenship, namely, citizenship of the Indian Union. But this does not imply that a person having domicile in the country can be said to have domicile only of the Indian Union, because domicile does not necessarily refer to the whole of the country. In India, therefore, there may be the domicile of a State. This implies that although Parliament alone is competent to legislate on matters relating to citizenship, a State Legislature has the power to legislate with regard to domicile. In *D. P. Joshi v. State of M.B.*, Venkatarama Ayyar J., delivering the majority judgment, said:

"It was argued that under the Constitution there can be only a single citizenship for the whole of India, and that it would run counter to that notion to hold that the State could make laws based on domicile. But citizenship and domicile represent two different conceptions. Citizenship has a reference to the political status of a person, and the domicile to his civil rights. A classic statement of the law on this subject is that of Lord Westbury in *Udny v. Udny*. Under the Constitution article 5, which defines citizenship, itself proceeds on the basis that it is different from domicile, because under that article domicile is not by itself sufficient to confer on a person the status of a citizen of this country."

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It is on this view of the law relating to domicile in India that the discrimination by the States on the ground of domicile in respect of certain facilities, particularly admission to technical and professional educational institutions and grant of loans and other pecuniary assistance by the States, can be upheld as not running counter to article 15 of the Constitution, because article 15 does not contain domicile, or residence, as a ground prohibiting discrimination under that article.

Although domicile, or residence, may be a ground for conferring preferential benefits on a person domiciled or resident in a State for the purposes of article 15, neither domicile nor residence can be a ground for discrimination in matters of public employment under article 16 which expressly forbids discrimination, inter alia, on the ground of residence only. This prohibition in all probability covers the case of discrimination on the ground of domicile also for the purpose of article 16, because domicile always implies the element of residence.

However, article 16 lays down that Parliament may by law provide residence in a State or a Union Territory as a condition for appointment to public posts under the State or the Union Territory. And Parliament accordingly passed the Public Employment (Requirement of Residence) Act, 1957, which permits discrimination by a State or a Union Territory in giving public employment in favour of its own residents. This position is sought to be justified on the ground that the "sons of the soil” should have a preference in respect of all employment, including public employment. However, it is doubtful, whether under this Act domicile as distinct from residence may be made a ground of discrimination without violating article 14 of the Constitution.

CITIZENSHIP AT THE COMMENCEMENT OF THE CONSTITUTION

Part II of the Constitution deals with the law relating to citizenship in India. But neither the Constitution nor the existing Citizenship Act, 1955, defines the word "citizen”. The Constitution only lays down who became the citizens of India immediately after the commencement of the Constitution, and the Citizenship Act provides, inter alia, who may be the citizens of India. Article 5 of Part II contains the general principles
to determine who became the citizens of India at the time of the commencement of the Constitution, and articles 6 to 9 of this Part run as particular provisions to the general principles of article 5 which reads:

“At the commencement of the Constitution, every person who has his domicile in the territory of India and

(a) who was born in the territory of India, or
(b) either of whose parents was born in the territory of India, or
(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

Domicile in the territory of India is an essential condition for a person to be treated as a citizen under article 5. But domicile by itself is not enough to confer citizenship under this article. In addition to his domicile in India, the person concerned must also be one who was born in India or either of whose parents was born in India, or who was ordinarily resident in India for not less than five years immediately before the commencement of the Constitution. India in this context refers to the territory of India as defined in article 1 of the Constitution, and domicile means domicile as ordinarily understood in municipal or international law.

Articles 6 and 7 deal with the citizenship rights of persons who migrated to India from Pakistan or vice versa as a result of the partition of the country. These articles were designed to meet an unprecedented situation. Mahajan C. J., in Central Bank v. Rajnarain,13 spoke of this situation as follows:

“The partition of India and the events that followed in its wake in both Pakistan and India were unprecedented and it is difficult to cite any historical precedent for the situation that arose. Minds of people affected by this partition and who were living in those parts were completely unhinged and unbalanced and there was hardly any occasion to form intentions requisite for acquiring domicile in one place or another. People vacillated and altered their programmes from day to day as events happened. They went backward and forward; families were sent from one place to another for the sake of safety. Most of those displaced from West Pakistan had no permanent homes in India where they could go and take up abode. They overnight became refugees, living in camps in

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Pakistan or India. No one, as a matter of fact, at the moment thought that when he was leaving Pakistan for India or vice versa that he was for ever abandoning the place of his ancestors.

To begin with article 6, it reads:

"Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if—

(a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935, (as originally enacted) and

(b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government.

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application."

Article 6 has overriding effect on the provisions of article 5, and it has been designed to cover the cases of persons who migrated from Pakistan to India before the commencement of the Constitution. The expression "has migrated to the territory of India" means that the migration must have been a completed act when the Constitution became effective. Migration has, however, both a wide and a narrow connotation. Widely conceived it means simply coming over from one place to another. But in a narrow sense it means coming over from one place to another "with the intention of residing permanently in the latter place". And article 6 uses the word "migrated" in the narrow sense of coming over to India from Pakistan with a view to making India a permanent home.\(^\text{14}\)

To be treated as a citizen of India within the terms of article 6, in the first place, a person or either of his parents

\(^{14}\text{Shanno Devi v. Mangal Sain, (1961) 1 S.C.R. 576.}\)
or any of his grand-parents must have been born in India as defined by section 311(1) of the Government of India Act, 1935, as originally enacted. This section defined India to mean "British India together with all territories of any Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, tribal areas, and any other territories which His Majesty in Council may from time to time, after ascertaining the views of the Federal Government and the Federal Legislature, declare to be part of India". Further, "British India" means all the territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces".

Secondly, a person must also have either migrated to India before July 19, 1948, and since then been ordinarily resident in India when the Constitution became effective. Or if he migrated to India on or after July 19, 1948, he must have got registered before the commencement of the Constitution as an Indian citizen by making an application in the prescribed form and manner before an officer appointed by the Government of India for the purpose. However, no person could be registered as an Indian citizen unless he had been ordinarily resident in India for at least six months before his making an application for registration. This means that as the Constitution came into force on January 26, 1950, a person to claim registration under article 6 must have migrated to India before July 26, 1949. This left a gap in the case of the persons who migrated to India after July 26, 1949, which has since been plugged by the Citizenship Act, 1955.

Article 7 deals with the right of citizenship of certain migrants from India to Pakistan and this article overrides the provisions of articles 5 and 6. Article 7 reads:

"Notwithstanding anything in articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India.

Provided that nothing in this article shall apply to a person who, having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued under the authority of any law and every such person shall for the purpose of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948".
Article 7 operates to divest a person of Indian citizenship because of his having migrated to Pakistan between March 1, 1947, and November 26, 1949.\(^{15}\) The cases of persons migrating to Pakistan after the coming into force of article 7 are outside the scope of this article. They are covered by article 9 read with section 9 of the Citizenship Act, 1955, which divests a person of Indian citizenship because of his having acquired any foreign citizenship.\(^{16}\) The word “migrated” in article 7, like the same word in article 6, has been used in a narrow sense to denote migration from India to Pakistan with the intention of making Pakistan a permanent home, and brevity of residence in Pakistan\(^{17}\) or non-acquisition of any property in Pakistan is not material to the issue.\(^{18}\)

This means that departure from India to Pakistan by opting for service under the Government of Pakistan constituted migration.\(^{19}\) Similarly, when a wife migrated to Pakistan, retaining her Indian domicile through her husband who continued to be an Indian citizen, she must be deemed to have been divested of her Indian citizenship unless she can prove that the migration was for some temporary purpose only,\(^{20}\) because the wife is to be deemed as capable of exercising her free will. The case of a minor migrating to Pakistan independently of his parents may, however, present some difficulty, because a minor cannot possibly be held to be capable of exercising his own free will. The court may, reasonably treat such a case as a question of fact and decide whether the minor was capable of forming independent judgment.\(^{21}\)

If, however, a person migrated to Pakistan within the meaning of article 7, his minor children must also be deemed to have been divested of their Indian citizenship.\(^{22}\) Similarly, when a widow migrated to Pakistan her minor children must also be deemed to have lost their Indian citizenship. On the

\(^{17}\) State v. Abul Hamid, A.I.R. 1958 Punj. 86.
\(^{18}\) Nisar v. Union of India, A.I.R. 1958 Raj. 65.
\(^{19}\) Aslam v. Fazal, A.I.R. 1959 All. 79.
\(^{21}\) Ibid.
same principle, the wife of a person migrating to Pakistan must be deemed to have lost her Indian citizenship, unless she is conclusively able to prove that she decided to leave her husband and retain her Indian citizenship even after her husband migrated to Pakistan.

As is clear from the proviso to article 7, no person is deemed to have lost his Indian citizenship under article 7 if he returned to India under a permit for settlement or permanent return issued under a valid law. The case of such a returnee is to be deemed to be a case of a person who migrated to India from Pakistan after July 19, 1948, within the terms of article 6 of the Constitution. But the permit must be a valid permit and not one which is invalid or has been revoked. The Influx from Pakistan (Control) Act, 1949, then provided for the issue of such permits, which was repealed in 1952.

Article 8 says:

"Notwithstanding anything in article 5, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India".

Article 8 deals with the right of citizenship of certain persons of Indian origin residing outside India. Unlike articles 5, 6 and 7, article 8 is meant to apply to cases falling within its ambit at any time, "whether before or after the commencement of this Constitution," and it covers persons of Indian origin in "any country outside India as so defined", i.e., as defined by the Government of India Act, 1935, as originally enacted. This article, therefore, does not apply to a person resident in Pakistan, because "India as so defined" means India as defined under the said 1935 Act, which includes Pakistan. Again, the expression "any country outside India" means not the same

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thing as does the expression "foreign State" in article 9. The former has a wider connotation to cover any country outside the bounds of pre-Independence India. Consequently, a Commonwealth country, or a colony, which is not a foreign state, is covered by article 8.

To qualify himself for citizenship under article 8, a person must satisfy the following conditions:

i. He or either of his parents or any of his grand-parents must have been born in India as defined by the Government of India Act, 1935, as originally enacted.

ii. He must be an ordinary resident of a country outside the limits of India as defined in the said 1935 Act.

iii. And he must get himself registered at any time in the prescribed manner as an Indian citizen by the diplomatic or consular representative of India in his country of residence.

Article 9 deals with the loss of Indian citizenship of a person who voluntarily acquires citizenship of any foreign State, even though he is or may be deemed to be a citizen of India under article 5, 6 or 8. Article 9 lays down:

"No person shall be a citizen of India by virtue of article 5, or be deemed to be a citizen of India by virtue of article 6 or article 8, if he has voluntarily acquired the citizenship of any foreign State."

The fact of having voluntarily acquired foreign citizenship disentitles a person to claim Indian citizenship under article 5, 6 or 8. Acquisition of foreign citizenship must be complete within the terms of the law of the country whose citizenship the person concerned has acquired. This article 9 applies to the cases of persons who acquired foreign citizenship before their claim to be Indian citizens under article 5, 6 or 8 became effective. Article 9 is, however, to be read with section 9 of the present Citizenship Act, 1935, which covers other cases of loss of Indian citizenship because of acquisition of foreign citizenship.

Note may also be taken of the meaning of the expression "foreign State" for the purposes of article 9. Article 367(3) says:

"For the purposes of this Constitution 'foreign State' means any State other than India."
Provided that, subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order."

In pursuance of the power under clause (3) of this article the President issued the Constitution (Declaration as to Foreign States) Order, 1950. The effect of this Order is that the countries mentioned in the Order, which include Pakistan, are not foreign states for any purpose under the Constitution wherever the expression "foreign State" is found therein. Obviously, therefore, article 9 is not applicable to the acquisition of Pakistan's citizenship or the citizenship of any other country specified in the aforesaid Order of 1950.

Article 10 provides for the continuance of the Indian citizenship of any person who acquires citizenship under article 5, 6, 7 or 8. But this continued enjoyment of Indian citizenship under article 10 is subject to the provisions of any law that Parliament may make in this behalf. Article 10 provides:

"Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen."

Then article 11 says:

"Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship".

THE CITIZENSHIP ACT, 1955

In accordance with article 11, Parliament passed the Citizenship Act, 1955, to provide for acquisition and termination of citizenship. This Act also provides for Commonwealth citizenship. Section 2 of the Act is interpretation clause, and the following definitions in clause (1) of this section are significant:

"(e) 'minor' means a person who has not attained the age of eighteen years;
(f) 'person' does not include any company or association or body of individuals, whether incorporated or not."

Further clause (2) of this section 2 says that a person born aboard an aircraft or a ship of a country shall be deemed to
have been born in that country; and clause (4) says that a person of full age is a person who is not minor, and he is of full capacity if he is not of unsound mind.

The Citizenship Act consists of 19 sections, of which sections 3 to 11 dealing with acquisition and termination of citizenship, Commonwealth citizenship and conferment of rights of citizenship on citizens of certain countries have been reproduced below without comment. The provisions of these sections are self-explanatory, and they highlight the liberal nature of the Act.

The Act has also three Schedules. The First Schedule enumerates the Commonwealth countries as United Kingdom, Canada, Australia, New Zealand, South Africa, Pakistan, Ceylon, Rhodesia and Nyasaland, Ghana, Malaysia, Singapore and Ireland. The Second Schedule contains the form of oath of allegiance to be taken in the specified cases, and the Third Schedule lays down the qualification for naturalisation. Rules, known as the Citizenship Rules, 1956, have also been framed to supplement the Citizenship Act.

**ACQUISITION OF CITIZENSHIP**

**Citizenship by Birth:**

3 (1) Except as provided in sub-section (2) of this section, every person born in India on or after the 26th January, 1950, shall be a citizen of India by birth.

(2) A person shall not be such a citizen by virtue of this section if at the time of his birth—

(a) his father possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and is not a citizen of India; or

(b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy.

**Citizenship by Descent:**

4 (1) A person born outside India on or after the 26th January, 1950, shall be a citizen of India by descent if his father is a citizen of India at the time of his birth:

Provided that if the father of such a person was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless—

(a) his birth is registered at an Indian consulate within one year of its occurrence or the commencement of this Act, whichever
is later, or with the permission of the Central Government, after the expiry of the said period; or

(b) his father is, at the time of his birth, in service under a Government of India.

(2) If the Central Government so directs, a birth shall be deemed for the purposes of this section to have been registered with its permission, notwithstanding that its permission was not obtained before the registration.

(3) For the purposes of the proviso to sub-section (1) any male person born outside undivided India who was, or was deemed to be, a citizen of India at the commencement of the Constitution will be deemed to be a citizen of India by descent only.

Citizenship by Registration:

5 (1) Subject to the provisions of this section and such conditions and restrictions as may be prescribed, the prescribed authority may, on application made in this behalf, register as a citizen of India any person who is not already such citizen by virtue of the Constitution or by virtue of any of the other provisions of this Act and belongs to any of the following categories:

(a) persons of Indian origin who are ordinarily resident in India and have been so resident for six months immediately before making an application for registration;

(b) persons of Indian origin who are ordinarily resident in any country or place outside undivided India;

(c) women who are, or have been, married to citizens of India;

(d) minor children of persons who are citizens of India; and

(e) persons of full age and capacity who are citizens of a country specified in the First Schedule.

Provided that in prescribing the conditions and restrictions subject to which persons of any such country may be registered as citizens of India under this clause, the Central Government shall have due regard to the conditions subject to which citizens of India may, by law or practice of that country, become citizens of that country by registration.

Explanation—For the purposes of this sub-section, a person shall be deemed to be of Indian origin if he, or either of his parents, or any of his grand-parents, was born in undivided India.

(2) No person being of full age shall be registered as a citizen of India under sub-section (1) until he has taken the oath of allegiance in the form specified in the Second Schedule.

(3) No person who has renounced, or has been deprived of, his Indian citizenship, or whose Indian citizenship has terminated, under this Act shall be registered as a citizen of India under sub-section (1) except by order of the Central Government.

(4) The Central Government may, if satisfied that there are special circumstances justifying such registration, cause any minor to be registered as a citizen of India.
(5) A person registered under this section shall be a citizen of India by registration as from the date on which he is so registered; and a person registered under the provisions of clause (b)(ii) of article 6 or article 8 of the Constitution shall be deemed to be a citizen of India by registration as from the commencement of the Constitution or the date on which he was so registered, whichever may be later.

Citizenship by Naturalisation:

6 (1) Where an application is made in the prescribed manner by any person of full age and capacity who is not a citizen of a country specified in the First Schedule for the grant of a certificate of naturalisation to him, the Central Government may, if satisfied that the applicant is qualified for naturalisation under the provisions of the Third Schedule, grant to him a certificate of naturalisation.

Provided that, if in the opinion of the Central Government, the applicant is a person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive all or any of the conditions specified in the Third Schedule.

(2) The person to whom a certificate of naturalisation is granted under sub-section (1) shall, on taking the oath of allegiance in the form specified in the Second Schedule, be a citizen of India by naturalisation as from the date on which that certificate is granted.

Citizenship by Incorporation of Territory:

7. If any territory becomes a part of India, the Central Government may, by order notified in the Official Gazette, specify the persons who shall be citizens of India by reason of their connection with that territory; and those persons shall be citizens of India as from the date to be specified in the order.

TERMINATION OF CITIZENSHIP

Renunciation of Citizenship:

8 (1) If any citizen of India of full age and capacity, who is also a citizen or national of another country, makes in the prescribed manner a declaration renouncing his Indian citizenship, the declaration shall be registered by the prescribed authority; and upon such registration, that person shall cease to be a citizen of India.

Provided that if any such declaration is made during any war in which India may be engaged, registration thereof shall be withheld until the Central Government otherwise directs.

(2) Where a male person ceases to be a citizen of India under sub-section (1), every minor child of that person shall thereupon cease to be a citizen of India.

Provided that any such child may, within one year after attaining full age, make a declaration that he wishes to resume Indian citizenship and shall thereupon again become a citizen of India.
(3) For the purposes of this section, any woman who is, or has been, married shall be deemed to be of full age.

**Termination of Citizenship:**

9 (1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires or have at any time between the 26th January, 1950, and the commencement of this Act, voluntarily acquired the citizenship of another country, shall upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India.

Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf.

**Deprivation of Citizenship:**

10 (1) A citizen of India who is such by naturalisation or by virtue only of clause (c) of article 5 of the Constitution or by registration otherwise than under clause (b) (ii) of article 6 of the Constitution or clause (a) of sub-section (1) of section 5 of this Act shall cease to be a citizen, if he is deprived of that citizenship by an order of the Central Government under this section.

(2) Subject to the provisions of this section, the Central Government may, by order, deprive any such citizen of Indian citizenship, if it is satisfied that—

(a) the registration or certificate of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact; or

(b) that citizen has shown himself by act or speech to be disloyal or disaffected towards the Constitution of India as by law established; or

(c) that citizen has during any war in which India may be engaged, unlawfully traded or communicated with an enemy or been engaged in, or associated with, any business that was to his knowledge carried on in such manner as to assist an enemy in that war; or

(d) that citizen has, within five years after registration or naturalisation, been sentenced in any country to imprisonment for a term of not less than two years; or

(e) that citizen has been ordinarily resident out of India for a continuous period of seven years, and during that period, has neither been at any time a student of any educational institution in a country outside India or in the service of a Government
in India or of an international organisation of which India is a member, nor registered annually in the prescribed manner at any Indian consulate his intention to retain his citizenship of India.

(3) The Central Government shall not deprive a person of citizenship under this section unless it is satisfied that it is not conducive to the public good that that person should continue to be a citizen of India.

(4) Before making an order under this section, the Central Government shall give the person against whom the order is proposed to be made notice in writing informing him of the ground on which it is proposed to be made and, if the order is proposed to be made on any of the grounds specified in sub-section (2) other than clause (e) thereof, his right, upon making application therefor in the prescribed manner, to have his case referred to a committee of inquiry under this section.

(5) If the order is proposed to be made against a person on any of the grounds specified in sub-section (2) other than clause (e) thereof and that person so applies in the prescribed manner, the Central Government shall, and in any other case it may, refer the case to a Committee of Inquiry consisting of a chairman (being a person who has for at least ten years held a judicial office) and two other members appointed by the Central Government in this behalf.

(6) The Committee of Inquiry shall, on such reference, hold the inquiry in such manner as may be prescribed and submit its report to the Central Government; and the Central Government shall ordinarily be guided by such report in making an order under this section.

SUPPLEMENTAL

Commonwealth Citizenship:

11. Every person who is a citizen of a Commonwealth country specified in the First Schedule shall, by virtue of that citizenship, have the status of a Commonwealth citizen in India.

Power to Confer Rights of Indian Citizen on Citizens of Certain Countries:

12 (1) The Central Government may, by order notified in the Official Gazette, make provisions on a basis of reciprocity for the conferment of all or any of the rights of a citizen of India on the citizens of any country specified in the First Schedule.

(2) Any order made under sub-section (1) shall have effect notwithstanding anything inconsistent therewith contained in any law other than the Constitution of India or this Act.
PART THREE

RIGHTS AND REMEDIES
CHAPTER 11

RIGHTS OF MAN AND CITIZENS

Generally conceived, rights connote capacities to exercise faculties. They are, thus, facultitive and formal and become factual and concrete only after their due exercise. More specifically, a right refers to the capacity of a person to do or not to do a thing or demand of others the doing or not doing of a thing. And a right is legal only in so far as it purports to be justiciable.

Strictly construed, a legal right denotes the competence of a person to exercise a faculty. The person to whom a right accrues is deemed to be the subject of right and the thing with respect to which a right accrues is considered to be the object of right. Nevertheless, a right in law also is essentially notional.

The operative concept of a legal right in a community of persons involves three elements. There is, first, the person in whom a right inheres, referred to as the subject of right or the person of inherence. Secondly, there is the thing in respect of which a right inheres, referred to as the subject-matter or the object of right; and third, the person (persons) of incidence or obligation.

“Person” in this context means a natural, or an artificial or juristic or legal person, i.e., an individual human being, or an office or association,1 whether incorporated or not. When a person is capable of rights and obligations, he is known as a normal person; but when he is deemed incapacitated for these purposes, he is regarded as an abnormal person. Again, he is referred to as a public person when he acts as, or as part of, or on behalf of, the state, but otherwise he is considered to be a private person.

So far as “thing” is concerned, it may be animate or inanimate, corporeal or incorporeal, tangible or intangible, goods or services, or present or future. In short, anything in respect of

1 An office or association composed of a single individual is known as corporation sole.
which a right may possibly exist or arise is a thing for the purpose of a scheme of rights.²

Technically, in any scheme of legal rights, the subject of right or the person of inherence is the Caesar within the sphere of his rights. But he is the monarch of all he surveys only within the limits of his rights. By definition an absolute right is a contradiction in terms, because a right is conceivable only within its orbit. Rights can exist then only as limited rights, because, apart from other factors, existence itself implies a degree of limitation.

However, any obligation in relation to these rights rests exclusively with the person or persons of incidence. The proposition, that right implies duty, is looked upon in law as a statement of the position that every right of a person of inherence casts a corresponding obligation on the person or persons of incidence. The obligation is not to infringe the orbit of the concerned right.

And to sustain a scheme of rights any infraction of a right must have a remedy. Remedy must follow infringement with almost mechanical precision. For, otherwise a scheme of rights would be a mere rope of sand. Consequently, as rights must have restrictions, they must have remedies, too.

Rights thus conceived constitute the inherent properties of a legal personality. They are no mere external appendages, although they are capable of being vested, divested and transferred. The facts whereby rights are invested in a person are known as investitive facts; those whereby they are divested of a person are known as divestitive facts; and those whereby they are transferred from one person to another are known as translative facts.

Historically speaking, the widest conceivable formulation of a scheme of rights in a community of persons is to be found in the statement that a person is free to do everything, provided he infringes not the freedoms of others. Legally expressed, it means that a person is competent to do all that is not specifically interdicted by any law.

² Roughly, a scheme of rights may be expressed as $P-O+S$, where $P$ stands for the persons of incidence, $O$ for the object of right, $S$ for the person of inherence, minus sign for incidence and plus sign for inherence.
But this view of rights is rooted in a *laissez faire* concept of society and a negative attitude towards law. Besides, this view never proved to be a sound working proposition, because law always sought to supply the contents of a right it sustained in a community. As social life became more complex and intense, the very conception of social life and the attitude towards law got changed. Law came to be regarded as an instrument of social action, and consequently it sought to define rights in all directions.

Now is an age of legally defined rights, and in this sense a right may be said to be a creature of law. The conception of the rule of law and the conception of the rights of man and citizens are but the two sides of the same medal. This is, however, an age of not only legally defined rights, but also an age of rights defined by enacted laws.

The history of enacted laws and the history of Bills of Rights have the same origin, namely, the human quest for certainty in his surroundings. It is true that the sum total of the rights in a society also reflects the scheme of social values and the stage of national development, in origin and evolution enacted laws and Bills of Rights have the same story to tell, because the purpose of all law is to create and maintain a scheme of rights.

**CLASSIFICATION OF RIGHTS**

There are many criteria for categorising rights. For example, rights may be classified according to the subject of right or the person of inherence. If the person of inherence is an individual his rights are referred to as individual rights; if the person is juristic or corporate, his rights may be referred to as corporate rights. Similarly, rights of private persons are private rights and rights of public persons are public rights. Again, when persons are normal, they have normal rights; when abnormal, they are said to have abnormal rights.

Rights are classified also on the basis of object or subject-matter of rights. Thus, there may be property rights, i.e., the right relating to property, or right to education or religious freedom. Again, rights may be subjective rights or objective rights depending on whether the object of right is subjective or objective. Thus right to freedom of religion is subjective and
the right to property is objective. Rights are also referred to as civil rights and political rights in consideration of their subject-matter.

Rights may also be classified according to the person of incidence or obligation. Rights classified on this criterion are put into the grand division of rights in rem and rights in personam. A right in rem is capable of exercise over the object of right without reference to any determinate person. A right in rem may also be called a right of indeterminate incidence. A right in personam, on the other hand, is a right available against definite person or persons, and it may, therefore, also be referred to as a right of determinate incidence.

Another great division of rights arises out of the conception of the orbit of a right and its infringement. There are certain rights which are conceived to exist for their own sake. These are referred to as primary, substantive or antecedent rights. Then there are other rights which exist to operate only when such a primary, substantive or antecedent right is infringed. These latter are referred to as restitutory, procedural or remedial rights.

Rights may again be classified on the basis of the type of law creating them. For example, there may be constitutional rights, statutory rights, common law rights, or customary rights. Again, depending upon the nature of law, that is, whether it is fundamental or organic, or the importance attached to them, certain rights may be designated as fundamental rights.

FUNDAMENTAL RIGHTS

The question as to why certain rights are considered fundamental is, however, not so simple to answer as it may appear from what has been said above. This is the more so in the case of the Constitution of India; because if it be said that rights are fundamental because they arise out of the fundamental law of the land which the Constitution lays down, then the other constitutional rights outside Part III of the Constitution may also claim to be regarded as fundamental. If, again, it be said that the rights contained in Part III are more important than the rights contained in other parts of the Constitution, one is left wondering whether the right contained in, say, article 16 relating to prohibition of discrimination in public employment
can be said to be more important than the right to vote laid down by article 325 of the Constitution.

Rights are said to be fundamental also because they are traced back to the conception of natural rights which denote a scheme of transcendental rights standing above the rights actually obtaining in different political communities. In some of the Supreme Court decisions fundamental rights have been spoken of as transcendental rights. But, as Ambedkar pointed out, the fundamental rights in Part III are mere creatures of the Constitution.

Besides, a few other closely interlinked reasons are also suggested for treating the rights in Part III as fundamental. It is said that these rights are more sacred and valued than other rights. They are natural and basic, it is said again, because they are grounded in human nature. It is also pointed out that these rights are fundamental because they are inherent in the existence of man as a human being. Reference is also made to history and said that the rights are historically determined without which man cannot expect to be at his best. It is also said that they reflect the scale of value of the community concerned.

Patanjali Sastri J. (as he then was) suggested in Gopalan’s Case\(^2a\) that rights in Part III are fundamental because the people as the ultimate sovereign have retained them for themselves. It is also pointed out that fundamental rights are fundamental because they are withdrawn from the jurisdiction of the executive and the legislature; they are withdrawn from the vicissitudes of political fortunes.

But none of the above arguments seems to hold much water. A plausible explanation for calling certain rights fundamental may be that a community on the basis of its experience attaches greater significance to certain rights and designates them as fundamental. The significance of the rights contained in Part III is that the founding farthers conceived them to be of greater value than other constitutional or legal rights.

Another possible explanation for treating these rights as fundamental in the context of our Constitution may be that the rights which have been referred to as fundamental rights also

carry a special remedy in article 32 of the Constitution. It is the right to directly approach the highest judicial forum in the country, the Supreme Court, in the case of an infringement of any right in Part III of the Constitution.

FUNDAMENTAL RIGHTS AND BILL OF RIGHTS

Be it as it may, in the constitutional history of mankind, political communities have always attached greater value and sanctity to certain rights and have devised various methods to secure their protection. One such method has been to define certain rights and enumerate them in an authentic document. An early example of this is provided by the 1215 Magna Carta of King John. Then came the 1628 Petition of Rights and the 1698 Bill of Rights.

But it is the Constitution of U.S.A. that marked a turning point in the history of the Bill of Rights, although it is the Constitution of the First French Republic that first specifically spoke of fundamental rights. Subsequent constitutions then followed the suit. Today almost all written constitutions of any significance enshrine a Bill of Rights and we now also have a Universal Declaration of Human Rights.

A BILL OF FUNDAMENTAL RIGHTS IN INDIA

In India, the Swaraj Bill of 1895, master-minded by Tilak, claimed for Indians certain basic human rights. The Indian National Congress at its 1918 Bombay session demanded a "declaration of the rights of the people of India as British citizens." The Commonwealth of India Bill (1925) embodied a specific declaration of rights, and the Nehru Committee (1928) asserted that

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

But so far as the official British position in relation to a Bill of Fundamental Rights for India is concerned, it is to be noted that neither the Montagu-Chelmsford Report, 1918, nor the Simon Commission Report, 1929, favoured such an idea. And although the Congress again at its 1931 Karachi session
firmly stood for a Bill of Rights and the issue was thoroughly probed during the Round Table Conferences, and at the Second Round Table Conference, 1931, Ramsay MacDonald expressed himself in favour of a Bill of Rights, the Joint Parliamentary Committee on 1935 Reforms did not come out in favour of a Bill of Rights as a part of the Government of India Act, 1935.

However, as early as 1813, the second Charter Act granted the perfect freedom to the natives in the exercise of their religions. The Charter Act of 1833 forbade discrimination of any Indian in respect of his employment under the Company "by reason only of his religion, place of birth, descent, colour or any of these". The 1858 declaration of Queen Victoria spoke more expansively "that all shall alike enjoy the equal and impartial protection of the law."

In subsequent enactments of the British Parliament relating to India, including the Government of India Act 1935, certain rights, some of which are now embodied in Part III of the Constitution, came to be recognised, although not in the form of a Bill of Rights. And significantly, the courts in India also spoke as if the people of India possessed certain inalienable, inherent rights even though the Government of India Act, 1935, did not have a specific Bill of Rights. For example, in 

Sitaio Jholia v. Emperor, Niyogi J. of the Nagpur High Court observed:

"The rights of personal freedom, protection of one's life and limb, and of one's good name, are as well recognised (though nowhere defined) in India as in England. The right of self-defence, for instance, afforded by the Indian Penal Code enables one to repel unlawful force by force. That is primarily a natural right. On the same principle, a person who is threatened with legal proceedings which are calculated to affect his person or property has an absolute right to be heard in his defence. It is a right which is implied by natural justice."

From the Indian side it was always asserted that a Bill of Rights was a proper solution to the minority problem in India and the Sapru Committee Proposals of 1945 spoke of the rights divided into two parts—justiciable and non-justiciable. From the British side it was the Cabinet Mission that for the first time conceded the Indian demand for a Bill of Rights. Its proposals of 1946 relating to the Constituent Assembly for framing the Indian Constitution also continued suggestions for

a Bill of Rights, and they included a recommendation for the constitution of an Advisory Committee on Fundamental Rights and Minorities.

The Sub-Committee on Fundamental Rights held its first sitting on February 27, 1947. It completed its draft report on April 3, 1947, and submitted its final report to the chairman of the Advisory Committee on April 16, 1947. Three days later the draft clauses were examined by the Sub-Committee on Minorities which reported to the chairman of the Advisory Committee from the point of view of the minorities. The Advisory Committee deliberated on the recommendations of the two Sub-Committees and incorporated them in its Interim Report to the Constituent Assembly on April 23, 1947.

The Assembly discussed in April, May and August 1947 the Interim Report of the Advisory Committee on Fundamental Rights and adopted it with certain modifications. Then came out the Constitutional Draft of the Constitutional Adviser, B. N. Rau, incorporating the rights as recommended by the Advisory Committee. The Drafting Committee finally prepared a list of rights as fundamental rights and incorporated them in the February 1948 Draft Constitution which was presented before the Constituent Assembly on November 4, 1948. The Constituent Assembly discussed at length the Bill of Fundamental Rights and finally adopted it as Part III of the Constitution in a form which gives India the longest and the most elaborate Bill of Rights.

CHARACTERISTICS OF THE RIGHTS IN PART THREE OF THE CONSTITUTION

The rights embodied in Part III of the Constitution of India as Fundamental Rights mark a departure from the British notion of constitutional rights, but are in line with the current trend of world constitutions. And although most of the rights contained in this Part are to be found in any other modern written constitution, some of them, particularly those in article 17 relating to untouchability and in articles 29 and 30 concerning cultural and educational minorities, are answers to the peculiar Indian conditions.

Essentially, these rights confer capacities on the people, but they constitute restrictions on the state as well. The purpose
of their being given a place of pride in the Constitution seems to be to symbolise the dawn of a new era in national life. Sapru J., in Motilal v. Uttar Pradesh, observed:

"The object of the Fundamental Rights....was not merely to provide security to and equality of citizenship of the people living in this land and thereby helping the process of nation-building, but also, and not less importantly, to provide certain standards of conduct, citizenship, justice and fair play.... The object behind them was that they should sink deeply into the soul of the nation and they had, therefore, to offer more than dry paragraphs."⁴

No Natural Right Concept: But although historically and conceptually having an affinity with natural right theories and even expansively referred to by the Supreme Court, in Subodh Gopal's Case,⁵ at least in the context of article 19(1), as "those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country", there is nothing natural, inherent or immutable about the rights in Part III of the Constitution. They are the gift⁶ of the Constitution. They are, at best, a necessary consequence of the high ideals of justice, equality, liberty and fraternity enshrined in the Preamble,⁷ and there is little reason to refer to them ceremoniously as "sacrosanct", "transcendental" or the like.

Special Group of Legal Rights: These Fundamental Rights contain the conditions which the founding fathers considered essential for a free society contemplated by the Constitution. They represent their scale of value regarding human life. They are first and foremost legal rights distinguished from the ordinary legal right, because their hall-mark is paramountcy to state made laws. They are but a special group of constitutional rights characterised only by a special guarantee in the case of an alleged transgression of any one of them. What is necessary to treat a right as a Fundamental Right is only to trace it to Part III of the Constitution.

All Rights of Equal Value: All rights contained in Part III of the Constitution are of equal value. However, in interpreting and implementing them it has to be kept in mind that some of them are of general, whereas some others are of special nature. Again, almost all of them are self-executory, but a few, say, articles 17 and 23, need further legislation to effectuate them.

Persons of Inheritance: All rights do not equally accrue to all persons in the country. Some rights are available to all persons, natural or artificial, citizen or non-citizen. Some others are available only to natural persons, whether citizen or not. Again, some are available only to citizens. It is also to be pointed out that some of the rights are available to a person individually, whereas some others accrue to him as a member of a community or group.

Persons of Incidence: Most of the rights in Part III are aimed against the state. But a right, for example, the one in article 15(2), is available against both the state and any other person. But in the case of the enforcement of these rights against an individual infractor, it seems that unless there is a specific legislation to that effect, for example, the one under article 17 relating to untouchability, it may not be possible to seek a redress against such an infractor under article 327a, although on principle there should be no objection to giving relief under this article.

An Elaborate but Not Exhaustive Scheme of Rights: Part III of the Constitution provides for a most elaborate scheme of rights. But the rights contained therein are neither meant to be exhaustive nor are they to abrogate all other legal rights. They are just a group of rights, albeit a fundamental group in the sense that any other legal right, which is also not a constitutional right, must yield to the requirements of these Fundamental Rights.

Other Constitutional and Ordinary Legal Rights as Supplement to Fundamental Rights: Other constitutional rights operate side by side the Fundamental Rights. Some ordinary

legal right also supplement the Fundamental Rights. For example, the fundamental guarantee against double jeopardy in article 20 is to be read with the similar guarantee of the Cr.P.C.

Legislation for Implementing Some Fundamental Rights: As all the Fundamental Rights are not self-executory, additional legislation has been found necessary to implement some of them. For example, article 17 dealing with untouchability and article 23 relating to prohibition of exploitation have been supplemented with Parliamentary laws to make them work effectively.

Waiver: The Fundamental Rights, being grounded in public policy and social needs, cannot be contracted out, nor can they be waived. Although some doubts as to the principle of waiver may exist in regard to an article like 20(3) relating to the doctrine of self-incrimination, the fairly established principle is that Fundamental Rights cannot be waived.\(^7\)B.

Some Other General Principles of Law: Like the doctrine of waiver, the doctrines of acquiescence and estoppel do not also apply to Fundamental Rights which do not get lost for their mere non-exercise. However, the doctrines of res judicata and res sub-judice apply in the context of articles 32 and 226.

It seems also that undue delay in seeking remedy may cause loss of Fundamental Rights, and the law of limitation may also be made applicable to them. The doctrine of prospective overruling also applies to them.

Restrictions: Although Fundamental Rights cannot be waived, they are subject to restrictions and limitations. Mukherjea J. (as he then was) said in Gopalan's Case\(^8\):

"There cannot be any such thing as absolute or uncontrolled liberty, wholly freed from restraint, for that would lead to anarchy and disorder.... Ordinarily, every man has the liberty to order his life as he pleases.... and to do any....thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers".

**Article 19 is an Apt Example**: Unlimited liberty of each is the licence for all. The significance of the Indian Constitution is that it provides for certain restrictions, exceptions or limita-


tions as a part of an article laying down rights. A typical example of this proposition is provided by article 19 which by its clause (1) confers rights and by clauses (2) to (6) prescribes limitations.\textsuperscript{8a}

\textit{Rights Fundamental and Not Restrictions:} It has, however, been said that it is a right which is fundamental and not the restriction. Bose J., in \textit{Ram Singh v. State of Delhi}\textsuperscript{9}, observed:

"I do not doubt the right of Parliament and the Executive to place restrictions upon a man's freedom. I fully agree that the Fundamental Rights conferred by the Constitution are not absolute. They are limited. In some cases the limitations are imposed by the Constitution itself. In others, Parliament has been given the power to impose the restrictions and in doing so to confer authority on the Executive to carry its purpose into effect. But in every case it is \textit{the rights which are fundamental, not the limitations}; and it is the duty of this Court and of all Courts in the land to guard and defend these rights jealously".

In actual application, however, this distinction between rights as fundamental and limitations on them as not fundamental seems to be of little relevance, because the limitations in each case define the actual orbit of a right. Besides, a right, like the one in article 19(1)(b) relating to the right to assembly, may itself be impregnated with a limiting or restrictive word or phrase. The right to assembly under this article is confined to "the right to assemble \textit{peaceably and without arms}".

In any case, the purpose of a restriction on a right can only be to serve the rights and not to subvert it. In this sense a right may be said to be the \textit{centre} and the restriction the \textit{circumference} of the realm of the right. And the question of balancing individual liberty with social control raises numerous complex issues on some of which the Constitution concentrates in pretty detail. It is desirable to trace the restrictions in the different parts of the Constitution and collate them together to indicate a total picture of their nature and extent.

\textbf{LIMITATIONS ON FUNDAMENTAL RIGHTS}

The rights contained in Part III of the Constitution are subject to numerous limitations. These limitations arise out of

\textsuperscript{8a} See also Chapter 14 below.
their existence and operation as part of the constitutional and legal scheme being worked in the country. When it is said that the fundamental rights are subject to limitations, these limitations do not, however, include, strictly from a legal angle, limitations arising out of socio-economic and political facts. Thus a citizen who has the freedom of movement under article 19(1)(d) may not have the economic means to exercise this right, or again a citizen whose freedom of expression has been infringed under article 19(1)(a) may be economically too weak to pursue the legal remedy provided by article 32 or 226. The limitations referred to here are strictly confined to those that raise legal implications.

In the first place, a right defined is itself a right limited. This is the more so because unlike the Constitution of the U.S.A., there is no concept of residuary rights vested in the people. But even the concept of residuary rights vesting in people cannot obliterate the logic of the proposition arising out of the fact that to define itself means to delimit.

Besides, almost each of the rights contained in Part III carry restrictions and exceptions. For example, article 14 relating to right to equality permits reasonable classification. Article 19 defines rights by its clause (1). But its clauses (2) to (6) specify the restrictions to be imposed on these rights. Again, a right like the right to assembly embodied in article 19(1)(b), which says that a citizen shall have the right to assemble peaceably and without arms, may within the frame of its definition contain restrictive elements.

The rights guaranteed by one article of Part III may become restricted because of its conflict with a right guaranteed by another article thereof. Or again, two rights contained in the same article may have restrictive impact on each other. Besides, the rights in Part III of the Constitution have to be construed in the light of the rights and provisions in other parts of the Constitution, and a right of one person can operate only consistently with his other rights or the same right or other rights of other persons.

The fundamental rights may also be given a restricted meaning by the judiciary in interpreting them in the context of specific cases, although, the court may also construe them liberally.
The fundamental rights are for the most part self-executing. But an article like 17 or 23 needs necessary legislative support to be effective. If Parliament does not enact laws for the purpose, these articles are bound to remain mere pious declarations, although Parliament has been very conscientious in passing laws in this regard. Again, an article like 18 may just be in the nature of a declaration without any scope for practical application.

Parliament has the power under article 33 to restrict or abrogate by law the rights conferred by Part III in their application to the armed forces or forces charged with the maintenance of public order, in order to maintain discipline among them and ensure proper discharge of their duties.

Then, under article 34, when martial law comes into force in any area, Parliament may by law indemnify any person in the employment of the Union or a State for having violated any fundamental right in the course of his official work in the area.

Again, when the state exercises its power under article 309 to frame rules to govern the service conditions of its employees, the rules framed may impinge on the exercise of a fundamental right of a public servant. For example, the right to association under article 19(1)(c) of an Indian citizen may get modified in application to public servants when it comes to their forming trade unions.

When a Proclamation of Emergency is declared under article 352, fundamental rights guaranteed by article 19 become automatically suspended by virtue of article 358. When such a Proclamation is in force, the President may also by an order declare that the right to move any court for the enforcement of any right or rights in Part III mentioned in the order, shall remain suspended for a period specified therein.

Difficulty may also be faced in enforcing a fundamental right against a judicial action. Such a difficulty may be of two types. In the first place, it may not always be possible to conceive judiciary as a part of the state as defined by article 12, and secondly, the Supreme Court can always take a view of a fundamental right as it may please to choose.

Effective exercise of the fundamental rights may also be impeded because a law inconsistent with any fundamental right continues to be operative until declared unconstitutional
by a competent court. The operation of such a law restricts a fundamental right while it operates, and in certain cases it may so operate as to make a claim for remedy in respect of any past act nugatory even after it has been declared unconstitutional by a court.

The doctrines of waiver, acquiescence, delay, limitation, estoppel, res judicata and res sub-judice may also apply in certain circumstances to restrict the exercise of a fundamental right. A doctrine like the doctrine of prospective overruling may also affect the operations of fundamental rights.

Added to these is the amending power contained in article 368 of the Constitution, and any fundamental right may be completely taken away or abridged in accordance with this article. But in this case, it ought to be remembered, that no provision of the Constitution is unamendable.

THE SCHEME OF PART THREE OF THE CONSTITUTION AND CLASSIFICATION OF FUNDAMENTAL RIGHTS

Part III of the Constitution is a part of the Constitution like its any other part, and in interpreting its provisions vis-a-vis the other parts of the Constitution, it has no claim to any primacy. Similarly, the rights contained in Part III are of equal legal significance. This part embraces articles 12 to 35 of the Constitution arranged under eight heads: (i) General, articles 12 and 13; (ii) Right to Equality, articles 14 to 18; (iii) Right to Freedom, articles 19 to 22; (iv) Right against Exploitation, articles 23 and 24; (v) Right to Freedom of Religion, articles 25 to 28; (vi) Right to Property, articles 31, 31A, 31B and 31C; and (vii) Right to Constitutional Remedies, articles 32 to 35.

In classifying the rights embodied in Part III, many criteria may be adopted. For example, they may be grouped as subjective and objective rights. Again, they may be grouped as rights available to citizens and rights available to all persons. In this case further sub-divisions are possible. For example, rights available to citizens or persons as individuals or those available to them as members of a community or group. Again, rights available to persons may be sub-divided into rights available to only natural persons or rights available to both natural and juristic persons. Besides, the fundamental right may be
classified as rights available against the state only and the rights available against the state as well as any other person.

Again, the rights in Part III may be divided into antecedent or substantive rights, comprising article 14 to 31C, and remedial or procedural right, laid down by article 32. However, this Part itself makes its own classification of rights as follows: Right to Equality, articles 14 to 18; Right to Freedom, articles 19 to 22; Rights against Exploitation, articles 23 and 24; Right to Freedom of Religion, articles 25 to 28; Cultural and Educational Rights, articles 29 and 30; Right to Property, articles 31, 31A, 32B, 31C; and Right to Constitutional Remedies, articles 32 to 35.

And it is this classification which has been adopted in the discussion below in view of the fact that, broadly speaking, each of these aforesaid categories begins with a general article to be followed by articles of special nature within the same group. Any re-arrangement of the articles within the same category or between two or more categories is likely to raise complex questions of construction, because the principle is that a general provision cannot override a special provision and two general provisions or special provisions must be given harmonious interpretation.

GENERAL: ARTICLES 12 AND 13

The first two articles, article 12 and article 13, of Part III of the Constitution dealing with fundamental rights, do not create any rights. They simply contain definitions and declarations; definition of the state and definition of law, and the declaration that a law inconsistent with Part III of the Constitution shall be void to the extent of inconsistency. The definition of "the state" in article 12 and the definition of "law" in article 13 are meant to be widely construed as on them hinges the actual operation of Part III of the Constitution, because the rights contained therein are for the most part rights guaranteed against state action.

DEFINITION OF THE STATE: ARTICLE 12

Article 12 reads:

"In this Part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the
Legislature of each of the States and all local or other authorities within
the territory of India or under the control of the Government of India”.

This inclusive definition of the state provides what may properly be called an enumerative approach to definition by indi-
cating some of the agencies or authorities acting on behalf
of the state, and does not seek to lay down an exhaustive and
constitutional definition of the state as an association or organi-
sation. And as analysed by the Supreme Court in K. S. Ram-
murthy v. Chief Commissioner, Pondicherry,10 article 12 would
run as follows:

“In this Part, unless the context otherwise requires, ‘the State’ includes
(i) the Government and Parliament of India; (ii) the Government and
the Legislature of each State; and (iii) (a) all local or other authorities
within the territory of India, (b) all local or other authorities under the
control of the Government of India.”

of India, according to the General Clauses Act, means the
President of India, and under the Constitution all the executive
powers of the Union of India vest in him and are exercisable
by him either directly or through officers subordinate to him.
Consequently, the expression “the Government and Parliament
of India” means the the executive and legislative branches of
the Union.

The Government and the Legislature of Each State: On
the same principle and in accordance with the provisions of the
General Clauses Act and the Constitution, the expression “the
Government and the Legislature of each State” denotes the
executive and the legislative branches of the State Government
concerned.

Local or Other Authorities within the Territory of India:
Broadly, an authority may be said to denote a person, whether
natural or juristic, with competence to prescribe norms or direct
acts or forbearances and secure compliance therewith. A local
authority is an agency of local self-government, including a
panchayati raj institution, and broadly speaking, it denotes

10 K. S. Ramamurthy v. Chief Commissioner, Pondicherry, A.I.R. 1963
S.C. 1464.
"A municipal Committee, District Board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of local fund".11

Other authorities denote other statutory and public authorities, including a university12 or an electricity board.13 Rajagopala Ayyangar J., in Ujjam Bai’s Case,14 observed:

"Again, Art. 12 winds up the list of authorities falling within the definition by referring to 'other authorities within the territory of India' which cannot, obviously, be read enjusdem generis with either the Government and the Legislature or local authorities. The words are of wide amplitude and capable of comprehending every authority created under a statute and functioning within the territory of India".

Local or Other Authorities under the Control of the Government of India: To fall within the ambit of article 12, such local and other authorities either must be located within the territory of India as defined by article 1 of the Constitution or must be subject to the control of the Government of India as defined by the General Clauses Act.

In Ramamurthy's Case,15 the Supreme Court held that an authority "under the control of the Government of India" included an authority even outside the territorial limits of India, but the word "control" was interpreted to denote only functional control and not administrative control. On this view of the matter, the operation of fundamental rights gets an extra-territorial dimension, but an authority outside India, even though under the administrative control of the Government of India, would be outside the purview of article 12 if it exercises a judicial or quasi-judicial function.

Judiciary: As article 12 does not specifically mention judiciary, the question has arisen whether "the State" under article 12 and for the purpose of Part III may be said to include the judiciary. The state as ordinarily understood includes the judiciary, and besides, there is the American practice of inter-

11 Sec. 3(31), General Clauses Act, 1897.
12 Umesh Chandra v. V. N. Singh, A.I.R. 1968 Pat. 3.
preting "the State" to include judiciary for the purpose of enforcing rights. Citing with approval the view of Frankfurter J., in *Snowden v. Hughes*, 16 Das C. J., in *Budhan Chowdhury v. State of Bihar*, 17 observed as follows:

"It is suggested that discrimination may be brought about... even (by) the judiciary and the inhibition of Art. 14 extends to all actions of the State denying equal protection of the laws whether it be the action of any one of the three limbs of the State... What may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of purposeful discrimination".

This cautious statement of the position of the judiciary as a part of the state in the context of the fundamental right under article 14, received a severe jolt in the Supreme Court's decision in *Naresh Sridhar Mirajkar v. State of Maharashtra*. 17a In this case, which raised the question of violation of article 19(1)(a) resulting from an order of Tarkunde J. prohibiting the publication of the evidence of a witness during a trial not held in Camera, the Court clearly took the position that the judiciary is not part of the state when an allegation relates to the violation of article 19.

The position is now, therefore, uncertain. But it seems certain that even a court exercising executive or legislative power is part of the state, and again, at least, in respect of some articles, say, articles 17 and 20, in all probability the exclusion of the judiciary from the ambit of article 12 would strike at the very foundation of the fundamental rights.

**LAWS INCONSISTENT WITH FUNDAMENTAL RIGHTS**

**ARTICLE 13**

Articles 13 runs as follows:

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

16 *Snowden v. Hughes* (1943) 321 U.S. S.

S:CR-17
(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 contravention, be void.

(3) In this article, unless the context otherwise requires—

(a) 'Law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) 'Laws in force' includes 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”.

Article 13 has two objectives in view. The first is to declare by its clauses (1) and (2) that a law inconsistent with the fundamental rights shall be void to the extent of inconsistency. This declaration amounts to an express authorisation of the judiciary to declare a law void. But it seems that even in the absence of this article the power of the judiciary to declare a law void because of its inconsistency with fundamental rights, or any other provision of the Constitution, is implicit in the scheme of the Constitution itself, and Kania C. J. observed, in Gopalan's Case, as follows:

"The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid".\(^\text{18}\)

The second objective of article 13 is to provide definitions of "law" and "laws in force" for the purpose of Part III of the Constitution. Clause (3) of this article defines these expressions in a manner that enlarges the operational scope of Fundamental Rights and invests the judiciary with wider powers of judicial review. It is proper, therefore, to consider clause (3) of article 13 first.

DEFINITIONS OF "LAW" AND "LAWS IN FORCE"

The definitions of "law" and "laws in force" provided by clause (3) of article 13 are not exhaustive but inclusive defini-

tions. They are of wide import, but they have been defined only in relation to article 13, or for that matter Part III of the Constitution. They are meant to be of uniform application, unless the context precludes their such application.

"Law": Law has been defined by article 13(3)(a) in very wide terms to denote not only an enactment, but also to include "any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law." What is, therefore, crucial to determine whether a conduct norm is law is to ascertain whether it has the force of law in the territory of India. The expression "in the territory of India" does not, in this context, mean the whole of India, but simply implies existence within the bounds of India even though confined to a part of the country.

Apparently, this is tautological to say that a norm is law if it has the force of law. But this attitude is based on what is now known as the test of justiciability of a conduct norm to determine whether it is law. Justiciability simply means the cognisability of a norm as law by a competent court and has no direct reference to its enforceability. A norm can be said to have the force of law if it is recognised, or is recognisable, as law by a competent court.

It is, therefore, not the name given to a norm, nor its source, that is material in determining under article 13(3)(a) whether a norm is law, but it is its cognisability as law that is crucial. Thus, whatever the name, Ordinance, order, bye-law, rule, regulation or notification, if the instrument has the force of law, it is law. But an executive order is not law.\(^{19}\) This, however, should not lead to the conclusion that because an executive order is not law within the meaning of article 13(3)(a), it cannot be declared invalid on the ground of its consistency with Part III of the Constitution,\(^{20}\) or for that matter with any other provision thereof.

The use of the words "Ordinance, order, bye-law, rule, regulation and notification" in article 13(3)(a), as also in article 372, to denote the instruments which may be treated as laying down law is, however, of interest. Their use gives an

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express recognition to the principle that law-making in its wider sense is not confined to the legislative process in Parliament and the State Legislatures. The executive and the administration, too, make laws at various levels, and their law-making powers have been expressly recognised by the Constitution.

Customs: Customs and usages stand on par with an enactment or a rule or regulation for the purposes of article 13(3) (a), although a custom to claim this parity must first sustain the test of its being in force as a law.

Amendment to the Constitution: In Sankari Prasad’s Case, the Supreme Court had held that an amendment to the Constitution is not law within the meaning of article 13(3) (a), although this view was reversed by the Court in Golak Nath’s Case. But after the Constitution (Twenty-fourth Amendment) Act, however, “law” in article 13 does not now include an amendment to the Constitution, the principle is now again restored that “law” in article 13 does not include constituent law but only ordinary law.

“Laws in Force”: The expressions “laws in force” in article (13) (3) (b) and “existing law” in article 366(10) have in effect the same meaning, although in their wordings the two display some dissimilarities. What has been said above of “law” also applies to the word “laws” in the expression “laws in force,” because article 13(3) (b) defines “laws in force” to include, additionally, unrepealed “laws passed by a Legislature or other competent authority in the territory of India before the commencement of this Constitution”, even if not in actual operation.

Personal Laws: In State of Bombay v. Narasu Appa, the Bombay High Court held that “laws in force” under article 13(3) (b) did not include personal laws. But it seems unlikely that this proposition can be taken as a proper view of the expression “laws in force” in this article. The more appropriate

view seems to be that personal laws are laws within the meaning of this article, and to uphold them on the ground that they are based on reasonable classification within the meaning of article 14, or reasonable restrictions within the meaning of article 19.  

**LAWS INCONSISTENT WITH FUNDAMENTAL RIGHTS VOID TO THE EXTENT OF INCONSISTENCY**

Both Clauses (1) and (2) of article 13 contain the declaration that a law inconsistent with any provision of Part III of the Constitution shall be void to the extent of consistency. But whereas clause (1) concentrates on laws in force at the time of the commencement of the Constitution, clause (2) relates to laws subsequent to such commencement.

In applying these two clauses the Supreme Court has drawn a distinction between pre-Constitution laws and post-Constitution laws for declaring a law void for inconsistency with Part III, and therefore, these two clauses have now separate meanings attributed to the same word "void" used in them. But in any case, an inconsistent law does not *ipso facto* become inoperative. A court must declare a law, whether pre-Constitution or post-Constitution, void before it can become inoperative. Without such a declaration even such a law remains in force as a valid law.

**Pre-Constitution Laws:** Until changed by a competent authority, laws in force at the commencement of the Constitution were continued in force by article 372(1). But their existence was expressly made by that article subject to the provisions of the Constitution. What article 13(1) does, therefore, is to further reinforce this subjection by requiring that any law in force in the country immediately before the commencement of the Constitution shall be void to the extent of its inconsistency with Fundamental Rights contained in Part III of the Constitution.

The implications of article 13(1) are now well-settled. In the first place, this article has been inserted by way of abundant caution and its existence does not materially alter the position of any pre-Constitution law which was made to live by article

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372(1). Secondly, the question that such a law is void for inconsistency with Fundamental Rights must be determined in a competent court, which means the Supreme Court or a High Court, before it can become ineffectual. Thirdly, such a law becomes void only to the extent of its inconsistency with Part III. Fourthly, the declaration of invalidity of a law does not make such a law void ab initio, because the Constitution is not retroactive. Consequently, any past transaction or completed proceeding, but not a continuing act or pending proceeding, is not entitled to the benefit of article 13(1). And fifthly, the effect of the declaration by a court that a particular law is void to the extent of its inconsistency with Part III is not to wipe-off, to obliterate, its inconsistent part from the statute book. This part becomes merely unenforceable in relation to the persons or things to whom Part III applies, and not that it becomes non-existent.

The Doctrine of Eclipse: This fifth implication, that a void law, or the void part of a law, does not, for the purpose of article 13(1), become obliterated from the statute book but merely becomes unenforceable, is now known as the doctrine of eclipse. It means that the law in question became overshadowed by the coming into force of the Constitution, and it could regain life and vigor if the shadow can be removed subsequently in the appropriate manner. The Constitution did not kill it, but merely made it inactive, and by removing the inconsistency either by legislative or constitutional amendment, the law may be made to leap to action. Das A. C. J. stated the doctrine of eclipse as follows in Bhikaji’s Case:

"The true position is that the impugned law became, as it were, eclipsed for the time being by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951, was to remove the shadow and to make the impugned Act free from all blemish or infirmity. If that were not so, then it is not intelligible what ‘existing law’ could have been sought to be saved from the operation of article 19(1)(g) by the amended clause (6) in so far as it sanctioned the creation of State monopoly, for, ex hypothesi, all existing laws creating such monopoly had already become void at the date of the commencement of the Constitution in view of clause (6) as it then stood."

Post-Constitution Laws: Article 13(2) is onward looking and carries a prohibition on the state to make any law inconsistent with Part III of the Constitution. It requires that the state shall not make any law which takes away or abridges any of the rights conferred by Part III. But this does not authorise the court to interfere with the legislative process. The consequence contemplated is that any law made in contravention of clause (2) of article 13 shall be void to the extent of its inconsistency with Part III, and the court can become seized of the question of inconsistency only when a law is challenged before it in a proceeding involving a breach of a fundamental right in Part III.

With regard to clause (2) of article 13 also it is now firmly established that the aforesaid first three propositions relating clause (1) of this article apply to clause (2) as well. So far as the above fourth proposition is concerned, it is also now well-settled that unlike a pre-Constitution law, a post-Constitution law is void ab initio, unless otherwise saved under the doctrine of prospective overruling, and no right or liability whatsoever can be sustained under a post-Constitution void law. But the position with regard to the fifth proposition, namely, whether even a void post-Constitution law also becomes only eclipsed, as stated in the context of clause (1) above, is not free from ambiguities.

In Saghir Ahmad v. State of U.P.,\(^27\) arising out of a challenge to the U.P. Road Transport Act, 1951, a post-Consti-
tution law, the Supreme Court declared its position through Mukherjea J. (as he then was) as follows:

"A statute void for unconstitutionality is dead and cannot be vitalized by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted."

But in the same year, later in Bhikaji's Case,\(^28\) the whole question of a void law was re-examined, and Das A. C. J. observed as follows, even with regard to a post-Constitution law:

"All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provision of article 13,


\(^{28}\) Bhikaji's Case, op. cit. Italics are mine.
rendered void 'to the extent of such inconsistency'. Such laws were not dead for all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remained in dormant or moribund condition'.

Again, in Sundararamaier v. State of A.P., 29 relating to a post-Constitution law, Venkatarama Aiyar J. made a distinction between lack of legislative competence and a limitation on legislative competence for the purpose of declaring a law void, and agreed that both of them raised the issue of unconstitutionality of law and had "the same reckoning in a Court of law". But he posed a vital question:

"But does it follow from this that both the laws are of the same quality and character, and stand on the same footing for all purposes?"

He felt that they were not, and accordingly summed up the result of authorities as follows:

"Where an enactment is unconstitutional in part but valid as to the rest, assuming, of course, that the two portions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even the portion which is unenforceable on the ground that it is unconstitutional will operate proprio vigore when the constitutional bar is removed, and there is no need for fresh legislation".

But notwithstanding Sundaramaier's Case and the recognition much earlier of the distinction between creation of legislative power and restriction on legislative power in R. v. Burah, 30 the Supreme Court, in Deepchand v. State of U.P., 31 by a majority of three to two held that the doctrine of ellipse was to be kept confined to only pre-Constitution laws and had no application to post-Constitution laws. In Mahendra Lal v. State of U.P., 32 a unanimous Court rejected the distinction between lack of legislative power and restriction on legislative power and affirmed the distinction between the operations of clause (1) and clause (2) of article 13. The Court said:

"It must be held that unlike a law covered by Art. 13(1) which was valid when made, the law made in contravention of the prohibition contained in Art. 13(2) is a still-born law either wholly or partially depending upon the extent of the contravention... All post-Constitution laws which contravene the mandatory injunction contained in the first part of Art. 13(2) are void, as void as are the laws passed without legislative competence, and the doctrine of eclipse does not apply to them.

But although Mahendra Lal's Case apparently puts a final seal on the inapplicability of the doctrine of eclipse to post-Constitution laws by dismissing the distinction between lack of legislative power and limitation on legislative power, it does not seem to have cleared the deck of all the doubts and contradictions, particularly those arising out the recognition of this distinction in the context of the legislature's power to revive an unconstitutional statute and the recent importation of the doctrine of prospective overruling in this country. It seems that the doctrine of eclipse does claim application in the case of post-Constitution laws also in consonance with the aforesaid two specific situations.

**Void to the Extent of Inconsistency or Contravention:** Whether pre-Constitution or post-Constitution, a law is void within the terms of clauses (1) and (2) of article 13 only to the extent of its inconsistency with or contravention of Part III of the Constitution. There is no difference between "inconsistency with" or "contravention of" for the purpose of declaring a law void under article 13. In determining this extent, the doctrine of severability has been developed by the courts.

**Doctrine of Severability:** This doctrine means that when a particular provision or portion of a statute is invalid for inconsistency or contravention, the whole of the statute need not fall through if it can reasonably survive even after the invalid provision or portion be severed off. That test is:

"Whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or whether on a fair review of the whole matter it cannot be assumed that the Legislature would have enacted at all that which survives without enacting the part that is ultra-vires".33

CHAPTER 12

RIGHT TO EQUALITY: ARTICLE 14

In the history of human struggle for securing an identity between the interests of the governors and the governed, which basically is also the history of all constitutions, the concept of equality has indeed provided the keynote. But in the real world of facts equality can never possibly mean identity. It can but be an exercise in proportionality. In its amplitude, now, as an idea equality implies “from each according to his capacity, to each according to his need”; as a working proposition it means “equality of status and of opportunity”; and as a legal principle it stands for “equality before the law” and “the equal protection of the laws”.

What article 14 of the Constitution of India seeks to secure is, as the marginal note of this article suggests, “equality before law” or legal equality. This article enjoins:

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

To the constitutional edifice of fundamental rights article 14 provides the cornerstone, and it is the king-pin of the right to equality guaranteed in articles 14 to 18 and also carried forward to some other articles of Part III of the Constitution relating to fundamental rights, notably articles 29(2) and 30(2). Article 14 is the first of the series of the articles which seek to realise the ideal of equality enshrined in the glorious Preamble to the Constitution,¹ but it is in essence the keystone of all the constitutional guarantees that a person may claim in this country.

The protection of article 14 is of a general nature.² It is also of a residuary character. The guarantees contained in articles 15 to 18 relating to right to equality, or for that matter those contained in articles 29(2) and 30(2) relating to prohibition of discrimination in certain matters, are treated as being

of specific nature, supplementing article 14. In case of a conflict between article 14 and these latter articles, the latter prevail on the principle that the particular prevails over a general provision of a document.

Even article 19 is deemed to be of a special nature in relation to article 14. The right conferred on citizens under article 19(1) cannot be said to be in conflict with the principle of legal equality of all persons embodied in article 14. In some situations the protection of article 14 and the guarantees of article 19 may, however, converge. Thus the court may find that an authorisation of an administrative agency to exercise discretionary power is not a reasonable restriction within the terms of article 19(2)-(6), which it may also find as an unreasonable discrimination within the meaning of article 14. But simply because a law escapes the net of article 14, it cannot ipso facto be said not to violate article 19 also.

Any person within the territory of India comes under the protective umbrella of article 14. For the purpose of article 14 it is not material whether the person is a citizen or alien, or natural or juristic. Prima facie, a public person is also a person within the meaning of article 14, although such a person may be treated as a class by himself. A person in government service, as also a person in prison, may claim the protection of article 14. What is material is that a person must be within the territory of India to claim the protection of article 14.

But this article protects a person against a law and not against a contract. However, law in this context is broadly conceived to refer to law as defined in article 13 to include even an order, notification or custom having the force of law and not only legislative enactments. Besides, this article is not helpless in protecting a person against a discriminatory administrative order of any public authority.

Article 14 is directed against the state, i.e., any public authority coming within the ambit of article 12. The prohibition of article 14—"The State shall not deny"—is addressed not only against legislative action, but against any action of any public authority. For attracting article 14 it is not the nature of the action impugned, but the nature of the authority that is material. If the person against whom relief is sought on the ground of inequality is a public person, article 14 comes into play, irrespective of the fact whether the impugned act of the person is legislative, executive or judicial in nature.

As held in Samdasani v. Central Bank of India, the court cannot give any relief against any private person within the terms of article 14, however flagrant the charge of violation of the principle of equality may be. In such a case, the aggrieved person can have relief only under any other relevant law, and article 14 is of no use to him.

EQUALITY BEFORE THE LAW AND THE EQUAL PROTECTION OF THE LAWS

Equality Before the law: Pericles in his funeral oration after the Athenian victory in the Peloponnesian War observed that all Athenians were equal in the eye of the law and the principle of equality before the law has since then figured in all legal systems wedded to the ideals of democracy and the rule of law. England, the classic land of modern constitutionalism, fashioned the concept of equality before the law as an element of the English common law primarily as a personal shield against royal or executive arbitrariness. In the British constitutional history it was not the court but Parliament whose primacy came to be finally established and the court, which had acted initially as an ally of Parliament, also came to accept this principle of Parliamentary sovereignty.

It was in this tradition that when Dicey stated his views on the rule of law as an element of the British Constitution, his formulation of the rule of law became an essay in individual liberty versus the executive discretion. And as a part of his formulation of the rule of law he spoke of the principle of equality before the law as the middle term of the three conceptions

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which, according to him, constituted the principle of the rule of law or the supremacy of law. He stated:

"It (the rule of law) means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals."

To Dicey the whole of the rule of law is to bit, and bridle the royal or executive arbitrariness and even discretion, and the purpose of his thus stating his second conception of the rule of law is obviously to subject the "governors" to the same set of law that governs the "governed". His primary target is the executive wing of the government, because Parliament, the legislative wing, is the people. When Dicey said that the concept of equality before the law demanded the subjection of both the rulers and the ruled to the same scheme of conduct norms, he did not really mean that the powers and functions of the public authorities were the same as those of the private individuals. What he stood for was the equality in the standing of the officials and the common man before the courts, the adjudicatory forums.

In a sense, therefore, Dicey's equality before the law is a negative concept and a product of the peculiar British experience of its constitutional struggle in which the doctrine of the sovereignty of Parliament came to be firmly established by the 1688 Glorious Revolution. It comes into play in the sphere of the application of the laws. And Jennings also thinks that equality before the law means that the "right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status, or political influence." He, however, views the concept of equality before the law in an extended manner to make it converge somewhat to the position of the equal protection of the laws. He says:

"Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike."

Equal Protection of the Laws: In their constitutional struggle the English had shaped or reshaped the concept of equality before the law to shield themselves from royal and executive arbitrariness, but the American colonies had to confront the tyranny of both the British Crown and the British Parliament in their struggle for independence. What the U.S.A., therefore, enshrined as the equal protection of the laws in its Constitution was meant to become a defensive rampart against both executive and legislative actions. It is in this sense that the expression "equal protection of the laws" may be said to be positive in nature. It is positive in the sense that it reaches the formulation of laws also and is not confined merely to the application of laws.

But in so acting the principle of the equal protection of the laws carves out for the judiciary the power to review statutes also, to test the validity of an enactment as well, as the concept of equality before the law invests the judiciary with the competence to test the validity of an executive act, including that of administrative legislation and adjudication. Precisely, the doctrine of legal equality contained in the expression "equality before the law" empowers the judiciary in the British tradition to merely review the legality of an executive or an administrative action, including administrative legislation and adjudication only, whereas that contemplated by the expression "the equal protection of the laws" authorises the judiciary in the American tradition to review the validity of statutes also.

Again, some of the assumptions underlying "due process of law", such as that of natural justice or a fair hearing, including the right to be represented by a legal practitioner, also implicit in the conception of legal equality, may be taken away by the legislature without violating the constitution that merely enshrines the principle of equality before the law even in the absence of any express authorisation to this end. But under a constitution that incorporates the doctrine of the equal protection of the laws, the legislature cannot depart from the assumptions of "due process of law" without violating the constitution, unless there is any express authorisation to that effect. Field J. of the U.S. Supreme Court, in Barbier v. Connolly, said:

"The Fourteenth Amendment, in declaring that no State shall deprive any person of life, liberty or property without due process of law, nor
deny to any person within its jurisdiction the equal protection of the laws, 
undoubtedly intended not only that there should be no arbitrary deprivation 
of life or liberty, or arbitrary spoliation of property, but that equal pro-
tection and security should be given to all under like circumstances in the 
enjoyment of their personal and civil rights."\(^{11}\)

The similarity between "due process clause" and the "equal protection clause" of the U.S. Constitution was noted again by 
the U.S. Supreme Court, in *Louisville Gas Co. v. Coleman*, as follows:

"The equal protection clause, like the due process of law clause, is not 
susceptible of exact delimitation. No definite rules in respect of either, 
which automatically solve the question in specific instances, can be formu-
lated. Certain general principles, however, have been established in the 
light of which the cases as they arise can be and are to be considered".\(^{12}\)

**Legal Equality Does Not Imply Identity:** Evidently, Legal 
equality contemplated by equality before the law or the equal 
protection of the laws, like any other conception of equality, 
ever aims at identity. Equality before the law, Lord Wright 
said, means: "All are equally subject to law, though the law 
to which they are subject may be different from the law to which 
others are subject."\(^{13}\) And of the equal protection of the laws, 
Willis writes\(^{14}\):

"The guarantee of the equal protection of the laws means the protec-
tion of equal laws. It forbids class legislation, but does not forbid classi-
fication based on reasonable grounds of distinction. It does not prohibit 
legislation which is limited either in the objects to which it is directed 
or by the territory within which it is to operate. 'It merely requires that 
all persons subjected to such legislation shall be treated alike under like 
circumstances and conditions both in the privileges conferred and in the 
liabilities imposed (Hayes v. Missouri, 1887, 120 U.S. 68).' 'The inhibition 
of the Amendment....was designed to prevent any person or class of 
persons from being singled out as a special subject for discriminating and 
hostile legislation (Pembina Mining Co. v. Pennsylvania, 1888, 125 U.S. 
181).' It does not take from the States the power to classify either in the 
adoption of police laws, or tax laws, or eminent domain laws, but permits 
to them the exercise of a wide scope of discretion, and nullifies what they

\(^{11}\) Barbier v. Connolly, (1885) 113 U.S. 27.
\(^{12}\) Louisville Gas Co. v. Coleman, (1928) 277 U.S. 32.
do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis.... Many different classifications of persons have been upheld as constitutional. A law applying only to one person or one class of persons is constitutional if there is sufficient basis or reason for it."

**LEGAL EQUALITY IN INDIA**

If one were to leave aside the ancient Indian tradition of legal equality, although beginning with the Charter Act of 1813 the concept of legal equality found partial expressions in many Acts passed by the British Parliament in relation to India and the 1858 Declaration of Queen Victoria, *inter alia*, specifically spoke of the equal legal protection, it was not until the commencement of the present Constitution that the twin concepts of "equality before the law" and "the equal protection of the laws" came to be fully incorporated in the Indian legal system. Now article 14 enshrines both, "equality before the law" and "the equal protection of the laws," as embodying the general principle of legal equality in the scheme of the Constitution. This incorporation of both these expressions is in consonance with article 7 of the *Universal Declaration of Human Rights*, which reads as follows:

"All are equal before the law and are entitled without any discrimination to equal protection of the law."\(^{15}\)

It would, thus, be improper not to treat the use of the expressions "equality before the law" and "the equal protection of the laws," which have been derived from the British and the U.S. Constitutions, respectively, as a deliberate act of the founding fathers. Besides, unless there is a paramount necessity, it is always against a primary principle of construction to treat any expression in a legal document as mere surplusage, tautological or redundant. And it seems that in some of the earlier

\(^{15}\) See also the *Covenant on Human Rights*, article 20(1), which says: "All are equal before the law, and shall be accorded equal protection of the law."
decisions of the High Courts the separate existence of the expression "equality before the law" was duly recognised. For example, the Madras High Court, in V. G. Row v. State of Madras, said:

"The principle of equality before the law does not come into play in any controversy as to the legality of a law enacted by the State. It comes into play really in the sphere of its enforcement."

However, the Supreme Court continued to blur the line of demarcation between "equality before the law" and "the equal protection of the laws" until Subba Rao, J. (as he then was) commented on them as follows in the State of U.P. v. Deoman:

"All persons are equal before the law is fundamental of every civilised constitution. Equality before law is a negative concept, equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances."

Predominance of the Equal Protection Clause: But in spite of some early observations of the High Courts and the comment of Subba Rao J. (as he then was) in Deoman's Case, the general tendency in this country is to so apply article 14 as to give predominance to its "equal protection of the laws" clause over its "equality before the law" clause. The "equal protection of the laws" under the Constitution of India has come to be so conceived as to include all that "equality before the law" connotes.

In effect, the expression "equality before the law" exists in the scheme of the Constitution only as a part of the meaning attributed by our superior courts to the expression "the equal protection of the laws" of article 14. What article 14 now stands for is the "equal protection of the laws" as understood in the U.S. Constitution. It is in this spirit that the courts in this country have been relying upon the U.S. Supreme Court.

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decisions relating to the "equal protection clause" in the U.S. Constitution.

It has been repeatedly recognised by our superior courts that the decisions of the U.S. Supreme Court on "the equal protection of the laws" clause are to be looked into for interpreting the provisions of article 14 of the Indian Constitution. This has in effect meant a complete identification of the American "equal protection of the laws" clause with the provisions of article 14 of the Constitution of India. And consequently, our superior courts have persistently affirmed the proposition that what article 14 forbids is class legislation but it does not forbid reasonable classification, a proposition which involves a total importation of the meaning of "the equal protection of the laws" from the American constitutional system into the scheme of the Indian Constitution.

ARTICLE 14 FORBIDS CLASS LEGISLATION BUT DOES NOT PROHIBIT REASONABLE CLASSIFICATION

Apparently, article 14, unlike article 15 or 19, is phrased in absolute terms. It reads to operate as a complete prohibition on the state to deny any person equality before the law or the equal protection of the laws. And prima facie it forbids the state to make any distinction between one person and another on whatever ground. Das C. J., in Basheshar Nath's Case,\textsuperscript{18} said:

"It will be observed that, so far as this Article (i.e., article 14) is concerned, there is no relaxation of the restriction imposed by it such as there are in some other articles, e.g., Article 19, Cls. (2) to (6)."

This view of article 14 would only mean that all laws must be universal and all persons must be identical before the laws. But such an interpretation of article 14 would, indeed, amount to paralysing the state system, because what obtains really in any social formation is inequality and equal treatment of inequalities is both inequality and inequity. It is also impracticable if not impossible.

Consequently, this formal absoluteness is of little practical significance, and even in one of the earliest cases under article 14.

\textsuperscript{18}Basheshar Nath's Case, op. cit.
RIGHT TO EQUALITY: ARTICLE 14

14, Chiranjit Lal v. Union of India, the Supreme Court recognised the limitations of this article and said:

"The guarantee against the denial of equal protection of the laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions. It means only that there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same."

The individual Judges stated the position more explicitly in Chiranjitlal's Case. Mukherjea J. observed:

"The Legislature undoubtedly has a wide field of choice in determining and classifying the subjects of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection, but the classification should never be arbitrary."

Patanjali Sastri J. also noted:

"A legislature empowered to make laws on a wide range of subjects must of necessity have the power of making special laws to attain particular objects and must, for that purpose, possess large powers of distinguishing and classifying the persons or things to be brought under the operation of such laws, provided the basis of such classification has a just and reasonable relation to the object which the legislature has in view."

And Das C. J. said as follows:

"The inhibition of the Article that the State shall not deny to any person equality before the law or the equal protection of the laws was designed to protect all persons against legislative discrimination amongst equals and to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. It does not, however, mean that every law must have universal application, for all persons are not by nature, attainment or circumstances in the same position. The varying needs of different classes of persons often require separate treatment and it is, therefore, established by judicial decisions that the equal protection clause of the Fourteenth Amendment of the American Constitution does not take away from the State the power to classify persons for legislative purposes. This classification may be on different bases. It may be geographical or according to objects or occupations or the like. If a law deals equally with all of a certain well defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other

persons, and therefore, there is no discrimination amongst equals. It is plain that every classification is in some degree likely to produce some inequality, but mere production of inequality is not by itself enough. The inequality produced, in order to encounter the challenge of the Constitution, must be actually and palpably unreasonable and arbitrary."

Again, in delivering the unanimous judgment of the Supreme Court, in the *State of Bombay v. F. N. Balsara,* Fazl Ali J. summarised the principles relating to article 14 as follows:

"(1) The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

"(2) The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.

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

"(4) The principle (of equality) does not take away from the State the power of classifying persons for legitimate purposes.

"(5) Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

"(6) If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

"(7) While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

The Supreme Court, in *Lachmandas v. State of Bombay,* plainly stated that while "article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation", a proposition which was again affirmed by the Court in *Budhan v. State of Bihar.* In *Lachmandas's Case* the Supreme Court observed:

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"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group, and (ii) that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act."

PROHIBITION OF CLASS LEGISLATION

Evidently article 14, as judicially determined, now means not universal laws or identical treatment, but prohibition of discriminatory legislation for or against any person or class of persons. Precisely, article 14 forbids discrimination, although unlike article 15 the word "discrimination" is itself not to be found in this article.

Discrimination: Discrimination means an unfavourable bias, and it is in this sense that discrimination has been prohibited under article 14. However, what article 14 forbids is not only discrimination against a person or a class but discrimination also in favour of a person or class. The reason is that where a person or a class is shown any undue special favour, it ipso facto involves that others similarly situated suffer denial of that favour, and are thereby discriminated against. And herein lies the value of the equal protection of article 14.

Discrimination in Regard to Political Rights: The prohibition of discrimination under article 14 is confined not to civil rights only, but extends to any other right of a person he is legally capable of. It is not the nature or type of rights, but the fact of creation, recognition or application of legal rights and obligations that attracts the prohibition of article 14. It is clear then that article 14 comes into play even when discrimination relates to political rights on the same principles as it operates in the case of civil rights.

In Nain Sukh Das v. State of U.P., the Supreme Court held

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that article 15(1) applies to political rights. And the principle laid down in that case applies also to article 14, although the question whether there has really been a violation of article 14 in any particular situation must remain a question of fact in the case of both civil and political rights.  

**Intention to Discriminate:** To determine whether the state has discriminated against a person or a class under article 14, it is not necessary that discrimination should have been made “with an evil eye or an unequal hand” or it should have been “intentional or purposeful discrimination”, as these expressions used by the U.S. Supreme Court, in *Snowden v. Hughes*, may seem to suggest.

It is not the intention to discriminate but the effect of discrimination that is material in considering whether a state action is discriminatory within the meaning of article 14, although intention of discrimination may be of supporting value, particularly in cases where discrimination is alleged in the administration of a law. Mukherjea J. (as he then was) observed in *Anwar Ali’s Case*:

“If a legislation is discriminatory and discriminates one person or class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter, it cannot but be regarded as ‘hostile’ in the sense that it affects injuriously the interests of that person or class. Of course, if one’s interests are not at all affected by a particular piece of legislation, he may have no right to complain. But if it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, I do not think that it is incumbent upon him, before he can claim relief on the basis of his Fundamental Rights, to assert and prove that, in making the law, the Legislature was actuated by a hostile or inimical intention against a particular person or class.”

**PERMISSION OF CLASSIFICATION**

If negatively article 14 has been held to prohibit discrimination or class legislation, positively it has been construed to

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27 *Snowden v. Hughes*, (1944) 321 U.S. S.
permit reasonable classification by the state to meet the diverse needs of a politically organised society and face the actual fact of inequalities in the society.

**Power of the State to Make Classification**: Article 14 does not take away the power of the state to make classification for legitimate purposes, because it has to deal with an infinite variety of situations in a community of persons who are endowed with diverse natural capacities and are diversely situated and circumstanced in a society. Every classification may produce some inequality, but mere production of inequality is not enough unless it also imports an element of adverse discrimination. What article 14 forbids is adverse discrimination and not classification.

In fact, in certain cases classification may be found necessary to promote equality in a community abounding in inequalities. Equal treatment in the sense of identical treatment of essentially unequal subjects is itself a breach of equal protection. Finding differences where there are none is inequality, but so is not recognising differences where they really exist.  

**Sub-Classification also Permissible**: Article 14 permits sub-classification also. Thus, for example, when a certain article is selected for special legislation, it is permissible to confine a statute to a particular variety of the article and not to cover all the varieties of the article.

**Classification by the Constitution and Legislation**: A classification under article 14 may be made by the state in the exercise of its constituent or legislative powers or, for that matter, even executive or judicial powers. Thus the Constitution itself treats women and children as special classes for the purposes of article 15. Again, special provisions are contemplated by article 310(1) for government servants, or for taxation by the States of road transport under Entry 56, List II.

**Classification by the Executive**: The legislature may itself make a complete classification of the persons or things to whom

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the law is to apply. Alternatively, the legislature may authorise the executive to make classification. But in such a case the usual expectation is that the legislature would indicate the broad guide-lines to be followed by the executive in making the classification. The legislature may also itself indicate only certain things or persons to whom a law is to apply in the first instance and leave it to the executive to add like things or persons according to the exigencies of a situation.  

Classification under Both Substantive and Adjective Laws:
The rule against adverse discrimination under article 14 is applicable to both substantive and procedural laws, because the state may exercise its powers of classification not only through substantive law but also procedural law. All litigants who are similarly situated ought to be able to resort to the same procedural formalities to secure their similar rights. However, minor or unsubstantial procedural differences may not be discriminatory for the purpose of articles 14.

Only a substantial departure from normal procedure attracts article 14. To determine whether there has been a substantial departure, the test to be applied is not the degree of departure, but the reality of it. But it is always permissible to prescribe a substantially different or a special procedure for the trial of a matter or a class of persons if the procedure is based on the principle of permissible classification.

Provision for Special Courts or Tribunals: Thus in numerous cases the Supreme Court has upheld the setting up of special courts and tribunals for adjudging certain matters in respect of certain persons, for which substantially different procedures had been prescribed. What is demanded in these cases is that the provisions relating to the special courts and tribunals must fall within the permissible limits of classification of article 14, although it has been noted with enough caution that each case of alleged procedural discrimination must be determined on its own merit and no principle of general application may be laid down. In Kathi Raning's Case, Patanjali Sastri C. J. said:

“The power of the State to regulate trials by constituting different courts with different procedures according to the needs of different parts of its territory is an essential part of its police power (cf. Bowman v. Lewis). Though the differing procedures might involve disparity in the treatment of the persons tried by them, such disparity by itself is insufficient in my opinion to outweigh the presumption and establish discrimination unless the degree of disparity goes beyond what the reason for its existence demands”.33

Reasonable Classification: What article 14 permits is not any classification, but only a reasonable classification. To satisfy the test of reasonableness it is essential to ascertain whether, considering all the circumstances attending an enactment, there is a reasonable basis of the classification made by the Act, and not that the Act fails to cover similar other persons or things.34

Power to Finally Determine the Reasonableness of Classification: As in article 19, it is for the courts to finally determine the question of reasonableness under article 14. It is for them to say whether a classification is reasonable for the purpose of this article. And it is in the exercise of this power that the Supreme Court has evolved, what may be called, the test of double or dual reasonableness to uphold the validity of any classification under article 14. However, there is deemed to be a presumption in favour of the constitutionality of a legislative classification, but in any event the courts alone finally pronounce upon the validity of any such classification.

The Test of Dual Reasonableness: It is now a well settled principle that a classification to be reasonable must be doubly reasonable. The validity of any classification must be tested with reference to both the intelligibility of the criterion of classification and the rationality of the nexus of the classification with the object of legislation. The twin tests of intelligibility of differentiation and rationality of nexus together must be applied to determine the reasonableness of classification.35

Intelligible Differentia: The base on which a classification

35 Ram Krishna Dalmia’s Case, op. cit.
is founded must not be arbitrary; it must be reasonable. The classification must be founded on an intelligible differentia. Some real and substantial distinction must be relied upon to demarcate a class recognised by an enactment.

\textit{Rational Nexus:} The differentia adopted to demarcate a class must also have a rational relation with the object which the concerned statute seeks to achieve. In effect, even if there is an intelligible differentia for demarcating a class, if the classification is not reasonably relatable to the object or purpose of legislation, the classification cannot be sustained.\textsuperscript{36} It is to be noted, however, that “reasonable relation with object of legislation” does not necessarily imply a relation meant to further the object of legislation.

\textit{Object of Legislation and Basis of Classification:} The differentia of classification and object or purpose of legislation are two distinct elements. It is not, however, that the object of legislation may not by itself stand out as a distinct category. But for the purpose of classification under article 14, the object of legislation is relevant only in so far as the court seeks to ascertain a reasonable nexus between the differentia on which a classification is founded and the object which the legislation aims at achieving.

However laudable an object of legislation, it cannot by itself be a basis of classification for the purpose of article 14. Nor can it be relevant to justify discrimination, even if it is meant to further a Directive Principle, unless the discrimination has itself been authorised by the Constitution, as in article 15 or 16.\textsuperscript{37}

\textit{Different Bases of Classification:} It is not possible to enumerate exhaustively the bases or the criteria on which classifications under article 14 may be made. Any basis or criterion which is intelligible and may be reasonably related to the object of legislation may be a basis of classification. And only some

\textsuperscript{36} Ibid.

of the bases on which classifications may be made are noted below.

Time: A classification may be made on the basis of time, or in consideration of historical reasons. Thus, in fixing a new tax rate it is competent for the legislature to provide that assessment in respect of any pending proceeding when the new tax rate becomes effective would be at the rate prevailing at the time the pending proceeding commenced.

Place: A classification may have a territorial or geographical basis. Thus, it is competent for the legislature to introduce trial by jury in a few districts only. Similarly, a law relating to tenants may be confined to a particular part of a State.

Person: The persons affected by legislation may be considered as providing a reasonable basis for classification. Thus, in enacting a prohibition law a distinction between civil and military personnel is permissible. Similarly, a corporate or public person may be treated as a separate class.

Single Individual: A single individual may be the basis of classification. But this does not imply that the legislature may thereby arrogate to itself the power which is essentially adjudicatory in nature, and, therefore, it cannot pass an ad hoc legislation which simulates a Bill of Attainder.

Trade, Calling, Profession: The nature of the trade, calling, business or profession may be an intelligible differentia for classification. Forward trading may be a rational basis for classification.

Degree of Harm: The legislature is free to recognise the degree of harm which calls for special treatment, and it may confine itself to the cases of such harm where the need is deemed

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39 Ibid.
41 Ram Krishna Dalmia's Case, op. cit.
to be the clearest. In effect, the degree of harm sought to be prevented or the urgency of the remedy or regulation may also be a good basis for classification.44

No Requirement of Mathematical or Scientific Precision: Although a classification must be based on any of the aforesaid or similar other intelligible criteria, it is not necessary that such a classification should be mathematically accurate or scientifically precise. A classification, which though not logically complete or perfectly identical, is a valid classification if it is based on broad similarities among the persons or things constituting a class.45

Presumption of Constitutionality of Classification: There is always a presumption in favour of the constitutionality or validity of a classification made by the legislature for the purpose of article 14. This presumption is based on the sound principle that the legislature best understands the necessity of classification.

Legislature Best Understands the Need for Classification: The legislature is deemed to best understand the national good and correctly appreciate the needs of the people. Its laws must be taken to be directed always at the solution of the problems made manifest by experience and its classifications as based on adequate grounds.46

Every State of Facts Relevant to Sustain Classification: The court, in upholding a classification, may rely on any state of facts that may reasonably be conceived to justify it. To this end the court may take into consideration matters of common knowledge and common report as well as the history of the times and the state of facts surrounding the passage of a statute.47

Presumption Against Undisclosed or Unknown Reasons for Classification: There is always a presumption in favour of the good faith and knowledge of the existing conditions on the

44 Ram Krishna Dalmia's Case, op. cit.
45 Kedarnath's Case, op. cit.
46 Ram Krishna Dalmia's Case, op. cit.
47 Ibid.
part of the legislature. But in the absence of any thing on the face of the law or the surrounding circumstances brought to the notice of the court to sustain a classification, the presumption of constitutionality cannot be carried to the extent of always holding that there must be certain undisclosed or unknown reasons for subjecting certain individuals or corporations to discriminatory or hostile treatment.  

Rebuttal of Presumption: It is true that there is always a presumption in favour of the constitutionality of a statute. But the presumption is of no avail when such a statute is on the very face of it discriminatory. Again, there is a presumption against any undisclosed or unknown reason for making a discrimination. Besides, a petitioner may rebut a presumption by adducing external evidence to prove that a classification is discriminatory.  

Onus of Proof: The presumption being always in favour of the reasonableness of a classification, the burden of proof that a classification is discriminatory lies on the person who alleges discrimination by the classification. It is for the petitioner to prove that the persons or objects between whom the legislature has allegedly discriminated are similarly situated. However, if an impugned statute on the very face of it does not disclose any ground to justify the allegedly discriminatory classification, the onus may shift on the state to adduce further evidence to sustain the classification.  

Reasonableness with Reference to Different Sources of Law: Reasonableness of classification may not, however, be tested with reference to two statutes emanating from two distinct legislative authorities. In Mandawar’s Case, the Supreme Court said:

48 Ibid.
49 Chiranjit Lal’s Case, op. cit.; Ram Krishna Dalmia’s Case, op. cit.; and Anwar Ali’s Case, op. cit.
50 Ram Krishna Dalmia’s Case, op. cit.
“Article 14 does not authorise the striking down of a law of one State on the ground that in contrast with the law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of the authority for the two statutes being different, Art. 14 can be of no application.”

The Doctrine of Classification as Summarised in Dalmia’s Case: A steady stream of cases decided by the Supreme Court and finally culminating in Ramakrishna Dalmia v. Justice Tendolkar and further supplemented by Mandarwar’s Case, may be summarised in the following terms as stating the law relating to reasonable classification under article 14:

(i) Article 14 prohibits class legislation but does not forbid reasonable classification for the purpose of legislation.53

(ii) Article 14 prohibits discrimination by substantive law as well as by procedural law.54

(iii) Under article 14, permissible classification to be reasonable must satisfy the test of dual reasonableness, viz.,

(a) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and

(b) the differentia must have a rational relation to the object sought to be achieved by the statute in question.55

(iv) The differentia of classification and the object of legislation are two distinct elements and the object by itself cannot be the basis of classification.56

(v) A permissible classification does not imply mathematical nicety, perfect equality or identity of treatment.57 Nor does article 14 require that legislative classification should be scientifically perfect or logically complete.58

(vi) A classification may have different bases, namely, geographical,59 nature or subject of law, object of law and the like. In short, any intelligible criterion may provide a reasonable basis for classification.60

(vii) A single thing or an individual may be a class by himself.61

(viii) The legislature is at liberty to recognise degrees of harm and

53-55 Ram Krishna Dalmia’s Case, op. cit.
56 Anwar Ali’s Case, op. cit.
57 Balsara’s Case, op. cit.
58 Kedarnath’s Case, op. cit.
60-61 Dalmia’s Case, op. cit.
RIGHT TO EQUALITY : ARTICLE 14

confine its remedies to those cases where the need is deemed to be the clearest.\textsuperscript{62}

(ix) There is always a presumption in favour of the constitutionality of an enactment and the burden of proof lies on a petitioner to show that there has been a clear transgression of the constitutional principle.\textsuperscript{63}

(x) To sustain the presumption of constitutionality, the court may take into account matters of common knowledge and of common report, the history of the times and may assume every state of facts which can be conceived.\textsuperscript{64}

(xi) The presumption is that the legislature best understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.\textsuperscript{65}

(xii) While good faith and knowledge of the existing conditions on the part of the legislature is to be presumed, in the absence of anything on the face of an enactment or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be sustained, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile legislation.\textsuperscript{66}

(xiii) Reasonableness of a classification cannot be tested by a comparative study of two statutes emanating from two different State Governments or a State Government and the Central Government, even if the statutes deal with the same or similar matter.\textsuperscript{67}

THE FIVE CLASSES OF SUPREME COURT CASES UNDER ARTICLE 14

Das C. J., in Ram Krishna Dalmia v. Justice Tendolkar,\textsuperscript{68} pointed out that the cases decided by the Supreme Court, which have enunciated the aforesaid principles relating to article 14 of the Constitution may be placed in the following five categories:

"(i) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In determining the validity or otherwise of such a statute the Court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group

\textsuperscript{62-67} \textit{Ibid.}

\textsuperscript{68} \textit{Mandawar's Case, op. cit.}

\textsuperscript{68} \textit{Ram Krishna Dalmia's Case, op. cit.}
and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are to apply only to a particular person or thing or only to a certain class of persons or things. Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law, as it did in Chiranjit Lal v. Union of India, State of Bombay v. F. N. Balsara, Kedar Nath Bajoria v. State of West Bengal, V. M. Syed Mohammad and Company v. State of Andhra, and Budhan Choudhury v. State of Bihar.

(ii) A statute may direct its provisions against one individual or thing or against several individual persons or things, but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the Court will strike down the law as an instance of naked discrimination, as it did in Ameernissa Begum v. Mahboob Begam and Ramprasad Narain Sahi v. State of Bihar.

(iii) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute does not lay down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situated and, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action taken under such a law, as it did in State of West Bengal v. Anwar Ali Sarkar, Dwarka Prasad v. State of Uttar Pradesh, and Dhirendra Kumar Mondal v. Superintendent and Remembrancer of Legal Affairs.

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification, the Court will uphold the law as constitutional as it did in Kathi Raming Rawat v. State of Saurashtra.

(v) A statute may not make a classification of the persons or things to whom its provisions are to apply and leave it to the discretion of the
Government to select and classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for the guidance of the exercise of the discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by this Court, e.g., in *Kathi Raning Rawat v. State of Saurashtra*, that in such a case the executive action but not the statute should be condemned as unconstitutional.

**The Executive’s Discretionary Power of Classification:**
Evidently, in the above five classes of the cases mentioned by Das C. J. the basic proposition is that classification for the purpose of article 14 is a legislative function which the legislature cannot delegate to the executive without violating the Constitution. In classifying persons or things the legislature must, therefore, either itself provide a complete classification which, of course, to be valid must satisfy the test of dual reasonableness; or lay down the policy or principle to guide the executive in the exercise of its discretion to classify the persons or things and in this case also the test of dual reasonableness will have to be satisfied. But in the context of the 14th Amendment of the American Constitution Willis says:

"Perhaps the best view on the subject is that 'due process' and 'equality' are not violated by the mere conference of unguided power but only by its arbitrary exercise by those upon whom conferred. (Plymouth Coal Co. v. Pennsylvania, 1914, 232 U.S. 531)."

On such a view of the matter, as also because few laws can be said to embody no policy or principle, is it to be treated as an absolute proposition under article 14 that a statute which does not explicitly lay down policy or principles to guide the exercise of the discretion of the executive in classifying persons or things to which its provisions are to apply is an invalid statute? This question assumes particular significance because one vital purpose of delegation is to provide for contingencies. Besides, certain discretionary powers may be incapable of statutory guidance.

Cases thus far decided by the Supreme Court in regard to delegation in general do not seem to furnish any conclusive answer to this question. For example, it has been held that if wide discretionary powers are vested in an authority of very
high standing, the delegation may not be invalid simply because there are no definite guide-lines in the statute. In *Pannalal v. Union of India*, Bhagwati J. said:

"This power is vested not in a minor official, but in top ranking authorities like the Commissioner of Income-Tax and the Central Board of Revenue, who act on the information supplied to them by the Income-tax Officers concerned".

**Power to Exempt**: The point may again be illustrated with reference to the executive’s power to exempt certain persons from the operation of a statute. In *F. N. Balsara’s Case*, the Supreme Court upheld the discretionary powers of the executive to allow exemptions in appropriate cases even in the absence of legislative guide-lines and added:

"Delegation of the character which these sections involve cannot in our view be held to be invalid . . . The Legislature while legislating cannot foresee and provide for all future contingencies, and S. 52 does no more than enable the duly authorised officer to meet the contingencies and deal with various situations as they arise. The same considerations will apply to SS. 53 and 139(e)."

But in the context of article 14, the general tendency of the Supreme Court is, however, to still insist upon the existence of statutory policy or principle to guide the executive discretion of classification. This tenuous attitude of the Supreme Court is likely to subsist so long as it adheres to the view that classification is essentially a legislative function and, therefore, it cannot be delegated to the executive without laying down principle or policy. And in each case the court has to decide whether an impugned statute lays down principles or policy for guiding executive classification.

**Ascertainment of Policy or Principle**: However, it is now well-settled that a policy or principle to guide an executive classification may be apparent on the face of a statute or such a policy or principle may not always be apparent on the face of the statute. In that case the court may look to the preamble to

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the statute and other relevant aids to construction to ascertain the policy or principle of the state or it may even rely on the evidence adduced by the concerned parties. Even rules framed under a statute may be considered to ascertain whether there is any guide-line for the executive to exercise its discretion.\textsuperscript{71}

\textbf{DISCRIMINATION IN THE ADMINISTRATION OF LAWS}

It is now a well-established principle that article 14 operates to protect not only against discrimination in making laws but also against discrimination by an executive or administrative agency in applying laws. In an early case, \textit{Dhanraj Mills Ltd. v. B. K. Kochar}\textsuperscript{72} before the Bombay High Court, Chagla C. J., however, had said:

"A clear distinction must be borne in mind between the law and the administration of law. If the law itself permits discrimination, even though the law may appear to be fair and undiscriminatory, the Court may interfere and say (sic) ‘We are more concerned with how the law actually works rather than how it appears in black and white’. One may even have a case where in exercising the discretion vested in officers under the statute, the State may, as a policy of administration, require its officers to exercise the discretion unfairly and unequally. Even in such a case, the Court may interfere and say ‘the administrative orders suggest behind them a policy of the State of discrimination.’ But...the position is different when a subject comes to the Court and challenges a specific act of an individual officer as being in contravention of Article 14, the officer...acting contrary to the law and not in conformity with or in consonance with the law. In such a case the subject comes to the Court not for protection under Article 14, but protection against the dishonest officer. The Court is not powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under Article 14 or under Article 226.”

But the Supreme Court has repeatedly held that any improper exercise of statutory power, which results in adverse discrimination against a person, attracts article 14. Mukherjea J. said in \textit{State of W. Bengal v. Anwar Ali}\textsuperscript{73}:

"It appears to be an accepted doctrine of American Courts that the purpose of the equal protection clause is to secure every person within.

\textsuperscript{72} \textit{Dhanraj Mills Ltd. v. B. K. Kochar}, A.I.R. 1951 Bom. 132.
the State against arbitrary discrimination, whether occasioned by the express terms of the statute or by their improper application through duly constituted agents."

Again, in *Kedar Nath v. State of West Bengal*, it was observed:

"If it be shown in any given case that the discretion (entrusted to the executive) has been exercised in disregard of the standard or contrary to the declared policy and object of the legislation, such exercise could be challenged and annulled under Article 14 which includes within its purview both executive and legislative acts".

However, a discrimination arising out of a *bona fide* error of an official, in the absence of any deliberate and systematic discrimination practised by him, is not enough to attract article 14. Besides, a mere breach of a law by an executive or administrative authority resulting in any discrimination does not amount to violation of the equal protection of the laws unless it is shown that there is also an element of intentional and purposeful discrimination.

**Discrimination by Judiciary:** Article 14 prohibits discrimination by the state and the judiciary being part of the state, the principle of the equal protection of the laws also applies to judicial actions. However, to attract article 14, it is necessary that the impugned judicial act must have an element of arbitrary and wilful discrimination. In the case of the judiciary, it has been also held that the vesting of wide discretionary powers in the judiciary, even in the absence of any legislative guidelines, will not be bad within the terms of article 14.

**DISCRIMINATION IN FAVOUR OF THE STATE**

Article 14 prohibits discrimination by the state against any person but this does not imply that the state cannot make any discrimination in favour of itself against a private person. The

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state by its very nature is a public person and is, therefore, a class by itself. Again, the different public authorities covered by article 12 in the definition of "the State" in that article may properly be treated as belonging to different categories justifying appropriate classification for the purpose of article 14.

In the result, a discrimination in favour of the state, or for that matter against any public authority referred to in article 12, is not hit by article 14. In Saghir Ahmad's Case, it was held that a monopoly created in favour of the state did not attract article 14, because the state can be "differentiated from ordinary citizens and placed in a separate category so far as the running of business is concerned and this classification will have a rational relation to the object of the State."\(^{79}\)

Thus, any discrimination in favour of the state, whether relating to a sovereign or a non-sovereign function, is immune from the prohibition of article 14, because the state does not cease to be a state even when it enters a trading, business or commercial activity.

ARTICLE FOURTEEN IN SOME SPECIFIC AREAS

C.P.C. and Cr. P.C.: The validity of section 80 of the C.P.C. has been upheld\(^{80}\) under article 14, and so has a longer period of limitation in favour of Government under the Limitation Act.\(^{81}\) Similarly, sections 197\(^{82}\) and 417\(^{83}\) of the Cr. P.C. giving special treatment to Government have been held to be valid within the terms of article 14.

Land, Land Reforms and Land Acquisition: Section 18\(^{84}\) of the East Punjab Holdings (Consolidation and Fragmentation) Act, 1948; section 115\(^{85}\) of the U.P. Consolidation of Holdings Act, 1953; and sections 4 and 6 of the Land Acquisition Act, 1894,\(^{86}\) have been held not to violate article 14. In all these cases the statutes had been challenged, \textit{inter alia}, on the ground

\(^{85}\) Ram v. Dy, Director, A.I.R. 1959 All. 525.
\(^{86}\) Nirmala Textile v. 2nd Punjab Tribunal, (1957) S.C.R. 335.
of vesting of discretionary powers in the executive. But, as held in *Kameshwar Singh’s Case*, a discriminatory provision for payment of compensation is invalid within the terms of article 14.

**Industrial, Commercial and Labour Matters**: Section 10 of the Industrial Disputes Act; section 38(b)(iii) of the Banking Companies Act; section 5 of the Employees Provident Fund Act have been considered to be good laws within the meaning of article 14.

**Education**: Section 4 of the Bihar State Universities (Amendment) Act, and section 12(5) of the Allahabad University Act have been held valid under article 14. These cases specifically raised the question of vesting of certain discretionary powers in the Chancellor of a University.

**Religious and Charitable Institutions**: Special treatment of temples and other religious and charitable institutions have been held as not violative of article 14. Sikh and Hindu trusts and Muslim and Christian endowments have been upheld under article 14.

**Rent, Revenue and Taxes**: In numerous cases relating to rent, revenue and taxes, it has been held that article 14 applies to tax laws also. However, in applying this article to tax laws “the courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long as it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of ‘wide range and flexibility’ so that it can adjust its system of taxation in all proper and reasonable ways”.

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90 *Jagdish v. Vice-Chancellor*, A.I.R. 1965 Pat. 11.
WHAT ARTICLE FOURTEEN MEANS TODAY

Article 14, today, may be said to really mean: "The State in making and administering laws shall not discriminate against a person within the territory of India". This general proposition of article 14 is subject to three exceptions. In the first place, the Constitution has itself provided for numerous occasions requiring special treatment of persons and things, and the general proposition against discrimination under article 14 does not apply to these specific provisions of the Constitution. Secondly, the state may make any discrimination in favour of itself without infringing article 14, because by its very nature the state is a distinct being, a public person.

Thirdly, the prohibition of discrimination under article 14 does not preclude classification of persons and things for making or administering laws, because mere differentiation is not deemed to be discrimination. The rule of classification has become so much ingrained in the proposition of general prohibition of discrimination under article 14 that the apprehension of its whittling down the protection of article 14 made Subba Rao J. (as he then was) observe as follows in Lachman Das v. State of Punjab:

"Over emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the Article of its glorious content. This process would eventually end in substituting the doctrine of classification for the doctrine of equality; the fundamental right to equality before the law and the equal protection of the laws may be replaced by the doctrine of classification".95

But, objectively speaking, any doctrine of mere legal equality in the face of socio-economic and political inequalities is destined to live on exceptions, and it is in the nature of things that under the U.S. Constitution the "equal protection" clause was interpreted to mean the "reasonable classification" principle. In the scheme of the Constitution of India the American view has been adopted by our Supreme Court, and the Court has reserved for itself the final competence to pronounce upon the validity of any classification for the purpose of article 14.

This implies that the Court has to progressively keep itself in line with the socio-economic realities in the country, in order that the equal protection of the laws under article 14 may not mean only protection for classification considered reasonable by it, or else the legislatives bodies, specially Parliament, must be not only "presumed" but "deemed" to make only reasonable classifications by so legislating progressively as to eliminate, so far as practicable, occasions for making classifications. In short, either the judiciary must play its social role to realise the real objective of equality under article 14, or it must accept the doctrine of Parliamentary sovereignty to make article 14 a reality. Real equality can alone be the true basis of legal equality.
CHAPTER 13

RIGHT TO EQUALITY: ARTICLES 15 TO 18

Articles 15 to 18, which form part of the right to equality guaranteed by the Constitution, are of specific nature. Of these, articles 15 and 16 are of wider import, but articles 17 and 18 are limited to the abolition of untouchability and the abolition of titles, respectively. Again, of articles 15 and 16, article 15 is of more general application and article 16 is confined to merely matters relating to public employment. The difference between article 14, which is of a general nature, and articles 15 and 16, which are of specific character, was stated by Patanjali Sastri C. J., in Kathi Raning v. State of Saurashtra,¹ as follows:

"The legislative differentiation is not necessarily discriminatory. In fact the word 'discriminaton' does not occur in Art. 14. The expression 'discriminate against' is used in Art. 15(1) and Art. 16(2), and it means, according to the Oxford Dictionary, 'to make an adverse distinction with regard to', 'to distinguish unfavourably from others'. Discrimination thus involves an element of unfavourable bias and it is in this sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisions to those Articles. But the position under Art. 14 is different. Equal protection claims under that Article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the Legislature must, of necessity, possess in making laws operating differently as regards the different groups of persons in order to give effect to its policies."

PROHIBITION OF DISCRIMINATION ON GROUNDS OF RELIGION, RACE, CASTE, SEX OR PLACE OF BIRTH: ARTICLE 15

Article 15 reads as follows:

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

(2) No citizen shall, on grounds only of religion, race, caste, sex,

place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

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

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

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

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

The fundamental right against discrimination conferred by article 15 is a right conferred only on an Indian citizen as an individual and not as a member of any religion, caste or community. The prohibition of discrimination on the specified grounds against a citizen contemplated by this article is aimed, first, at state actions by virtue of its clause (1) and secondly, also against the action of any other person, whether natural or juristic, private or public, citizen or non-citizen, by virtue of its clause (2). But the rule against discrimination laid down by these first two clauses of article 15 are not absolute. They are subject to the exceptions contained in clauses (3) and (4) of this article.

**DISCRIMINATION**

Article 15 forbids discrimination on grounds specified therein. In clause (1) of this article the expression used in this regard is “discriminate against”. And as observed by the Supreme Court in Kathi Ranning’s Case, “it, means according to the Oxford Dictionary, ‘to make an adverse distinction with regard to’, ‘to distinguish unfavourably from others.’ Discrimination thus involves an element of unfavourable bias,” and the expression “discriminate against” in article 15(1), or for that matter in article 16(2), is a grammatical inflexion of the word “discrimination”.

The discrimination referred to in this context is, thus, invidious discrimination and does not denote any differentiation,

as was observed in *Anjali v. State of West Bengal.* It is the element of unfavourable bias that determines the issue whether a citizen has been discriminated against, and it is on this view that the Hindu Succession Act, though dealing with merely the Hindus, can be held to be valid.

Although the word "discrimination" or its any grammatical inflexion does not figure in clause (2) of article 15, this clause forbids subjection "to any disability, liability, restriction or condition" for the purposes and on the grounds specified therein. Obviously, the words "disability, liability, restriction or condition" of clause (2) raise a question of unfavourable bias, and thus even in the absence of the word "discrimination" they are meant to convey singly or collectively the same sense as the expression "discriminate against" really has.

To attract this article two conditions must be satisfied. In the first place, it must be shown that a differentiation has been made only on grounds, or any of them, specified by the clause concerned; and secondly, the court must also be satisfied that the differentiation is no mere classification, but results in an adverse discrimination against a citizen. The basic distinction between article 14 and article 15, or for that matter article 16, in this regard is that once it is shown that a differentiation has been made on any of the prohibited grounds under articles 15 or 16, the presumption in favour of the constitutionality of an impugned law ceases to be effective.

**NO DISCRIMINATION BY THE STATE ON SPECIFIED GROUNDS**

Article 15(1) forbids the state to discriminate against any citizen for any purpose whatever, except for a purpose expressly or by necessary implication excluded by this or any other article of the Constitution, on grounds only of religion, race, caste, sex, place of birth or any of them. The prohibition of this clause covers all legislative, executive, administrative and judicial actions of the state and extends to both civil and political rights of a citizen. And for the purpose of this clause, there cannot possibly be a discrimination between a natural-born and a naturalised citizen.

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4 *Kathi Raning's Case,* op. cit.
"Grounds only of Religion, Race, Caste, Sex, Place of Birth or Any of Them": Neither clause (1) nor the closely following clause (2) of article 15 is attracted unless a discrimination is alleged only on the grounds specified by these two clauses. Hence, if a discrimination is on a ground not contained in clause (1) of article 15, a complaint must be made under the general article 14. Again, article 15(1) is also not attracted if a discrimination is made not only on a ground specified by it but also on some other reasonable ground. But a mere mention of some other ground is not enough if the impugned law has the effect of making a discrimination against a citizen on any of the specifically prohibited grounds.

Religion: The prohibition of discrimination on the ground of religion is to be deemed as an aspect of secularism and also aimed at eradicating the vice of communalism. Religion in this context is to be conceived in a broad sense to denote not only the major world religions prevailing in India, but also to include any religious sect or sub-sect or denomination obtaining in this country. The protection given by article 15(1) is, however, not meant for a religious group collectively, but for the Indian citizen individually who may be a member of any religious group.

But the prohibition of discrimination on the ground of religion does not mean, however, that religion cannot be a basis of classification for any state action, because so long as a religion or a religions group exists as a fact, the state in its operations has to take note of it. What article 15(1) forbids, therefore, is adverse discrimination on religious grounds, which is not otherwise justifiable.

Personal Law Reforms: It is on such a view of the matter that the reforms of the personal laws of the Hindus have been upheld in numerous cases. For example, in Srinivasa Iyer v. Saraswathi Ammal, the Madras High Court held that the Madras Hindu Bigamous (Prevention and Divorce) Act, 1949, did not discriminate between the Hindus and the Muslims on

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the ground of religion, and hence it did not violate article 15. In H. B. Singh v. Ongbi Bhani Devi, a on similar considerations monogamy under the Hindu Marriage Act, 1955, was upheld.

*Communal Electorates:* Prohibition of discrimination on the ground of religion seeks to eradicate communalism in any form and covers cases relating to political rights as well. Consequently, in *Nain Sukh v. U.P. State,* the Supreme Court held that provisions for elections to local bodies on the basis of separate electorates or reservation of seats would violate article 15, clause (1), if they were not protected by the exceptions contained in clauses (3) and (4) thereof.

*Race and Caste:* Racialism never was nor is a problem of Indian life, although in pre-Independence days the Europeans and the Americans claimed for themselves a privileged status in certain matters. On the eve of the commencement of the Constitution, the Criminal Law (Removal of Racial Discrimination) Act, 1949, was passed to end the special privileges of the Europeans and the Americans under the Indian criminal law. Discrimination by the state against a citizen on racial ground is prohibited now.

Caste is, however, an ominous factor in India, and a prohibition of discrimination by the state on the ground of caste is aimed at ending the vice of casteism in the country. However, to attract the protection of article 15(1) it must be proved that for belonging to a particular caste a person has been adversely treated by the state. Thus, it is not valid to require of a Brahmin candidate higher qualifying marks, or qualifications, for admission into an educational institution. Similarly, an exemption under section 15(5) of the Police Act to Harijans and Muslims was held to be based on caste and communal considerations, and hence violative of article 15(1).

*Customary Law:* But where even a customary law covers a single caste or community but is equally applicable to all the persons within a State, it is not invalid on the ground of dis-

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8a *H. B. Singh v. Ongbi Bhani Devi,* A.I.R. 1959, Mani. 20.
crimination on the basis of caste. Thus the Punjab's customary law limiting the right of alienation of the ancestral property in the hands of a male proprietor is not repugnant to article 15(1), because the law applies equally to all living in the Punjab.\textsuperscript{11}

Sex: The prevention of discrimination on the ground of sex is impliedly for the benefit of the female sex, and this prohibition has to be read in conjunction with the exception in favour of women and children contemplated by article 15(3). It is for this reason that many legal provisions favouring women have been upheld. A provision favouring women does not, however, necessarily import an element of beneficial effect on women. This prohibition on the ground of sex is, thus, clearly to protect women from unfavourable discrimination in social, economic and political spheres.\textsuperscript{12}

Place of Birth: The prohibition of discrimination on the ground of place of birth is aimed at rooting out provincialism. Any discriminatory treatment based on the criterion of the place where a citizen is born is violative of article 15(1). But merely because the citizens born in a particular place are subject to a particular personal or customary law, a statute affecting that personal or customary law would not violate the mandate of article 15(1).\textsuperscript{13}

Domicile and Residence: When article 15(1) forbids discrimination on the ground of place of birth, this prohibition does not extend to place of domicile or place of residence. It has been held, in \textit{D. P. Joshi v. State of M. B.},\textsuperscript{14} that residence or domicile is distinct from the place of birth. And this has made provincialism perpetuate itself through back-door.

Language: Provincialism also tends to shield itself by providing for a linguistic qualification for certain employments under a State Government, because the States in India are, by far, linguistic units and language is not a proscribed ground.

\textsuperscript{11} \textit{Nathu v. Ralla, A.I.R. 1951 Pun. 445.}
\textsuperscript{13} \textit{Bhabani v. Sarat Sundari, A.I.R. 1957 Cal. 527.}
PROHIBITION OF DISCRIMINATION IN PUBLIC PLACES

Clause (2) of article 15 says that, on grounds only of religion, race, caste, sex, place of birth or any of them, no citizen shall suffer any disability, liability, restriction or condition with regard to, first, his access to shops, public restaurants, hotels and places of public entertainment; and second, his use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public.

The protection of clause (2), like that of clause (1), is available only to the citizens individually; but unlike clause (1), clause (2) directs its interdiction against all persons, and not only against the state, to protect the citizens against discrimination. The proscribed grounds for discrimination under both the clauses are also the same and they have the same implications in both the cases. However, whereas clause (1) prohibits discrimination generally on the specified grounds, clause (2) forbids discrimination on the same grounds for specified purposes.

No discrimination in Access to Shops, Public Restaurants, Hotels and Places of Public Entertainment: In the first place, the discrimination which clause (2) seeks to end is in respect of access to shops, public restaurants, hotels and places of public entertainment. These words used to indicate the places in respect of which discrimination has been forbidden are not to be taken as terms of art nor are they to be given a literal or narrow meaning.

And although they have not been defined by the Constitution itself, an enactment like the Untouchability (Offences) Act, 1955, provides only inclusive and not exhaustive definitions of some of these words. This is because an effort to exhaustively define them is neither practicable nor desirable. It was in keeping with the spirit of article 15(2) that Ambedkar spoke of shops and places of public entertainment in very wide terms in the Constituent Assembly,\(^{15}\) and the Untouchability (Offences) Act also defines them as follows:

Shop: Section 2(e). "A 'shop' means any premises where goods are sold either wholesale or by retail or by both

wholesale and retail and includes a laundry, a hair cutting saloon and any other place where services are rendered to customers”.

**Place of Public Entertainment**: Section 2(c). “A ‘place of public entertainment’ includes any place to which the public are admitted and in which an entertainment is provided or held.”

**No Discrimination in Use of Wells, Tanks, Bathing Ghats, Roads and Places of Public Resort**: Secondly, clause (2) forbids discrimination in the use of wells, tanks, bathing ghats, roads and places of public resort. But to attract the protection in respect of the use of these things or places it is not enough to show that the discrimination has been made only on a proscribed ground, but it must also be shown that these things or places are (i) either maintained wholly or partly out of state funds, or (ii) are dedicated to the use of the general public.

Evidently, the words “wells, tanks, bathing ghats, roads and places of public resort” are to be given very liberal interpretation, and Ambedkar told the Constituent Assembly\(^{16}\) that “tanks”, for example, included “ponds” and “places of public resort” included a burial or cremation ground. The Constitution itself, however, does not define any of these expressions nor are their suitable definitions to be found in any of the relevant statutes. They are to be very broadly construed to give effect to the objective of article 15(2).

**Places of Public Resort**: However, as there has developed a controversy about the expression “places of public resort”, it needs some attention. One view is that a place of public resort is a place where members of the public are in fact allowed access and to which they usually resort, irrespective of the existence of any legal right to do so. The other view, which is a narrow one and is said to be based on the principle of *ejusdem generis*, is that such a place means only a place where the public have a legal right to access, whether for a restricted or an unrestricted purpose.

It seems that there is no reason to justify a restricted interpretation of the expression “places of public resort”, and the

\(^{16}\) Ibid.
Calcutta High Court held that the Calcutta Maidan, an extensive open space maintained by the Government of India, is a place of public resort.\(^{17}\) And an idea as to what places may be places of public resort may be gathered from section 4(1) (iv) of the Untouchability (Offences) Act, 1955, which relates to

"the use of, or access to, any river, stream, spring, well, tank, cistern, water-tap or other watering place, or any bathing ghat, burial or cremation ground, any sanitary convenience, any road or passage, or any other place of public resort which other members of the public, or persons professing the same religion or belonging to the same religious denomination or any section thereof, as such person, have a right to use or have access".

**Maintained Wholly or Partly out of State Fund:** The question whether a well, tank, road or place of public resort is maintained wholly or partly out of state fund is of vital relevance in determining whether a citizen can seek access to the place or not. The regular use for the purposes of any such place of any money of any public authority which is deemed to be the state within the meaning of article 12, irrespective of the fact of the initiation or ownership of the place, brings the place within the ambit of article 15(2) (a).

**Dedicated to the Use of the General Public:** Whereas a well, tank, road or place of public resort maintained wholly or partly out of state fund *ipso facto* acquires public character to attract the protection 15(2) (a), such a place, if privately owned and maintained, gains public character for the purpose of article 15(2) (b) by its dedication to the use of the general public.

The use of the word "general" to qualify the word "public" means that the expression "general public" has been used in the English sense to denote the public generally. However, if a dedication is made in favour of a section of the public, article 15(2) (b) is not attracted\(^{18}\), even though in a broader sense it may be treated as a dedication for the benefit of a section or class.\(^{19}\)

A dedication for the use of the general public may, however, be either complete, i.e., both the ownership and the use is transferred to the public; or it may be partial, i.e., only the use, and not ownership, is given to the public. But a complete dedication is not necessary for a bathing ghat, although it may be presumed in the case of tanks.

The extent and the nature of dedication is a matter of proof; and when there is a deed relating to dedication, the terms of the deed must prevail unless any of them violates the Constitution. Similarly, a customary dedication is also a matter of proof, but a custom cannot violate the Constitution.

**EXCEPTIONS**

The protection against discrimination given by clauses (1) and (2) of article 15 are subject to two exceptions mentioned in clauses (3) and (4) thereof. These exceptions are first, in favour of women and children, and second, in favour of socially and educationally backward classes, including the Scheduled Castes and the Scheduled Tribes.

**Special Provisions for Women and Children:** Clause (3) of article 15 empowers the state to make special provisions for women and children, and this seems to be based on the principle that women and children, being the weaker sections on whose well being the entire social well being is founded, need special treatment. Special treatment of women under Indian conditions may be further justified because of certain peculiar actual disabilities to which they are still subject.

Initially, there was some controversy whether special provision for women meant a provision beneficial to women. But in *Anjali v. State of W. Bengal*, Chakravarty C. J. repelled the view that the expression “for women” imported any element of beneficence, it simply involved tilting the balance in favour of women. The Supreme Court, in *Abdul Aziz v. State of Bombay*,
a case relating to section 497 of the I.P.C. providing that a woman shall not be punishable as an abettor in a case involving the charge of adultery, also felt that the expression “for women” meant only “in favour of women” and did not necessarily mean “for the benefit of women”. In this case the Supreme Court also put to rest the doubt which had been raised as to the time of the operation of this exception clause (3). It was held that this exception clause applied to both existing and future laws.

Again, it was with reference to article 15(3) that the reservation of seats for women in municipal elections was upheld in Dattatraya v. State of Bombay.\textsuperscript{25} Section 497(1) of the Cr.P.C. providing for liberal conditions for granting bail to women and children\textsuperscript{26} was also upheld with reference to article 15(3).

It may be noted here that as sex is a proscribed ground for discrimination under clauses (1) and (2) of article 15, an express exception in favour of women under clause (3) thereof is unexceptionable. But it was pointed out, in Anjali v. State of W. Bengal,\textsuperscript{27} that age not being a forbidden ground for discrimination under either article 14 or 15, the inclusion of the word “children” in this clause (3) is redundant. It seems, however, that the use of the word “children” in clause (3) is meant to emphasise a proposition, to raise it above the scope of controversy, for otherwise it would have been left to the judiciary to finally adjudicate upon the validity of a classification based on age. The word “children”, therefore, is not a surplusage but a word of express exclusion and emphasis.

Special Provisions for Backward Classes: Under clause (4) of article 15 comes another exception, an authorisation of the state for making special provisions for the advancement of socially and educationally backward classes of citizens and for the Scheduled Castes and the Scheduled Tribes. This clause (4) was the sequel to the Supreme Court decision in State of Madras v. Champakam.\textsuperscript{28} It was introduced by the Constitution (First

\textsuperscript{26} Choki v. State, A.I.R. 1957 Raj. 10.
\textsuperscript{27} Anjali v. State of West Bengal, A.I.R. 1952 Cal. 825.
Amendment) Act, 1951. The statement of Objects and Reasons of the Constitution (First Amendment) Bill, 1951, said:

“It is laid down in Art. 46 as a Directive Principle of State Policy that the State should promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. In order that any special provision that the State may make for the educational, economic or social advancement of any backward class of citizens may not be challenged on the ground of being discriminating, it is proposed that Art. 15(3) be suitably amplified”.

The validity of this clauses (4) was tested in Sankari Prasad v. Union of India, and to protect any special provision under this clause three conditions must be fulfilled. In the first place, the special provision must be for the advancement of those for whom it is meant. Secondly, the special provision must relate to a socially and educationally backward class, or the Scheduled Castes and the Scheduled Tribes. And thirdly, it must also be reasonable in the circumstances of the case so as not to operate to the detriment of the society in general and unduly hamper the fundamental rights of others.

Provision for Advancement: What clause (4) authorises is the making of special provisions for the advancement of backward classes and not merely the making of special provisions. Therefore, although the executive or legislative view of what constitutes a provision for advancement is respected, the courts reserve to themselves the final determination whether a provision made in this regard is really for the advancement of, i.e., for the benefit of the persons for whom it is meant.

Socially and Educationally Backward Classes and Scheduled Castes and Scheduled Tribes: The Constitution does not define the term “backward class”, not to speak of “socially and educationally backward class”, although the constitutional provisions in regard to the categorisation of any caste or tribe under Scheduled Castes and Scheduled Tribes, respectively, is free from any ambiguity. The test to determine when a class may be

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29 Gazette of India, Pt. II Sec. 2; p. 357.
32 Arts. 341, 342.
said to be a socially and educationally backward class for the purposes of article 15(4) is, therefore, a judicially evolved test, and the Supreme Court has declined to lay down any inflexible rule in this behalf.\textsuperscript{33}

The determination of backwardness is a complex question and many factors need to be taken into account. But the following propositions laid down, in \textit{Balaji v. State of Mysore},\textsuperscript{34} by the Supreme Court are, however, of relevance in determining whether a class may be treated as a backward class:

In the first place, backwardness contemplated by clause (4) of article 15 is not a reletative conception, and hence it is not determinable merely by comparison of a class to be treated as backward with the most advanced class of citizens. Secondly, this clause does not contemplate any sub-classification of backwardness, such as more backward or less backward. Thirdly, backwardness must be both social and educational and not only social or educational.

Fourthly, this clause refers to \textit{backward class} and not \textit{backward caste}, and, indeed, where a backward class has no caste, the caste criterion must suffer a complete break-down. Fifthly, social backwardness is largely a result of property, although caste may be an accentuating element in this regard. Sixthly, caste may be a factor in determining social backwardness, but it cannot be the sole criterion of backwardness. Seventhly, occupation may also be of relevance in determining social backwardness, particularly when such an occupation is looked down upon as lowly. Eighthly, habitation, particularly habitation in a particular area of a village, may be a determinant of backwardness, because in a sense social backwardness is a problem of rural India.

Ninthly, educational backwardness may be determined with reference to literacy, but the average literacy of the class must be “well below” the average of the State concernd. And lastly, as laid down in \textit{State of A.P. v. Sagar},\textsuperscript{35} the backwardness contemplated by this clause is real backwardness in the nature of the social and educational backwardness of the Scheduled Castes and the Scheduled Tribes.

Reasonableness of Special Provisions: The purpose of clause (4) of article 15 being the protection of the weaker sections of society, the protection given to them can be only special and not exclusive, i.e., to protect them and not to preclude others from the benefits of the substantive guarantees of clauses (1) and (2) of this article. In protecting the backward classes the interests of the entire society cannot be ignored. An exception cannot be made to wipe out the substantive provisions of an article of the Constitution. The Supreme Court feels:

"It would be extremely unreasonable to assume that where the advancement of the backward classes or the Scheduled Castes and Tribes are concerned, the fundamental rights of the rest of the society were to be completely and absolutely ignored... A special provision contemplated by Art. 15(4), like reservation of posts and appointments, contemplated by Art. 16(4), must be within reasonable limits. The interests of the weaker sections of society which are first charge on the States and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art. 15(4)."

Obviously, then, reservations are to be reasonable. If, on the one hand mere reservation of seats cannot be made to debar a member of a backward class to compete on merit with regard to the general seats, on the other, the reservation of seats cannot be made a plea for completely obliterating the scope for competing on the basis of merit. It should also be pointed out that the onus of proving that a class concerned is backward and the reservation or special provision is reasonable lies on the person who claims benefit under clause (4) as an exception.

EQUALITY OF OPPORTUNITY IN MATTERS OF PUBLIC EMPLOYMENT: ARTICLE 16

Of the five articles, articles 14 to 18, dealing with the right to equality in Part III of the Constitution, only article 16 speaks of equality of opportunity, a vital aspect of equality contemplated by the Preamble, although this equality of opportunity is limited to matters of public employment only. However, this

article requires not for the provision of opportunities for public employment, much less of adequate opportunities, but only aims at ensuring equal treatment of citizens in matters relating to available opportunities for public employment. Article 16 runs as follows:

“(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them be ineligible for, or discriminated against in respect of, any employment or office under the State.
(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.
(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens, which, in the opinion of the State, is not adequately represented in the services under the State.
(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.”

The protection of article 16 is available to a citizen in his individual capacity and not as member of any community, sect or denomination, but it is a protection available only against the state, and any discrimination in matters of employment by a private employer is not covered by this article. The state, of course, in the context of article 16 also embraces all public authorities, but this article is not couched is absolute terms and carries within its ambit express exceptions.

EQUALITY OF OPPORTUNITY IN MATTERS RELATING TO EMPLOYMENT OR APPOINTMENT TO ANY OFFICE UNDER THE STATE

Equality of Opportunity: Clause (1) of article 16 guarantees equality of opportunity to all citizens in matters regarding employment or appointment to any office under the state. Apparently, the expression “equality of opportunity” is an expression of highly positive content. But in the context of
article 16(1) it means nothing more nor less than a claim to equality of treatment by equals in matters connected with services under the state.

This article does not create a right to public employment, but a right to equal treatment of equals in matters of employment to the same post under the state.\(^{37}\) This is at bottom nothing but a claim of a citizen against adverse discrimination in matters of public employment. And this view of article 16(1) is in line with the interpretation put on article 14 as a general right against discrimination.

**Qualifications, Tests and Conditions of Employment**: The right to equality of treatment under article 16(1) does not preclude the state from laying down technical or other necessary qualifications for appointment to a post,\(^{38}\) nor does it forbid the state from holding selection tests or competitions.\(^{39}\) The Government may also take into consideration the antecedents or the character of an appointee,\(^{40}\) and it is competent to prescribe rules regulating the service conditions of its employees by virtue of article 309 of the Constitution.

**Matters Relating to Employment**: What article 16(1) guarantees is equality of opportunity in "matters relating to employment or appointment", and not only in matters of employment or appointment. Consequently, the Supreme Court has held that article 16(1) is widely framed to include matters even during the course of an employment. Thus, not only recruitment, but also training, pay, promotion, retirement and the like, i.e., any matter connected with the employment of a person under the state, is covered by article 16(1).

**Advertising Public Posts**: It is implicit in the right to equality of opportunity in matters relating to public employment that vacancies under the state should be sufficiently advertised. However, in *Parmatma Saran v. Chief Justice*,\(^{41}\) the Rajasthan

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High Court said that advertisements in all cases may not be necessary, particularly when it is a case of promotion, because "the emphasis is that as between A and B there should be no discrimination in the matter of appointment". But a better view seems to be that unless it is a case of promotion under service rules, a public vacancy should be sufficiently advertised.\textsuperscript{42}

**Pay and Emoluments:** Article 16(1) does not prevent the state from creating different pay scales for different services, even when the work performed by the employees may be of the same or similar nature. The I.T.O.s Class I and II may be given different pay scales.\textsuperscript{43} The same principle applies to other emoluments and pecuniary or non-pecuniary benefits attached to a public post, including retirement benefits.

**Promotion and Seniority:** Promotion is not a matter of right by virtue of mere seniority,\textsuperscript{44} but both promotion and rules of seniority are matters relating to employment covered by article 16(1). Hence, when a rule provided for weightage of three years of seniority in favour of promotees to Class I I.T.O.s it was held to be *ultra vires*.\textsuperscript{45}

**Termination of and Retirement from Service:** Termination of a temporary service is not a denial of equal opportunity, even if an employee junior in service to the petitioner is retained in service.\textsuperscript{46} But an order arbitrarily imposing a ban on a Government servant, whose services were terminated, from ever being employed under the Government was held invalid.\textsuperscript{47}

It is a well-settled principle that the Government may require its employees to retire compulsorily, without violating the provisions of the Constitution. In *Shivcharan v. State of Mysore*,\textsuperscript{48} it was held that as Rule 285 of the Mysore Civil Service Rules, 1959, relating to compulsory retirement applied to all Government servants, the rule did not violate article 16(1).

\textsuperscript{45} S. G. Jaisinghan v Union of India, A.I.R. 1964 Pun. 155.
Office under the State: In explaining the meaning of the word “office” in a context similar to article 16 (1), Lord Wright observed in McMillan v. Guest:

“The word ‘office’ is of indefinite content. Its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for the purposes of this case the following: ‘a position or place to which certain duties are attached, specially one of a more or less public character.’

It was held by Chagla C. J., in Dattatraya v. State of Bombay, that the word “appointment” in article 16 (1) following after the word “employment” therein in the context of any office under the state is to be construed ejusdem generis, which implies that the employment or appointment is under the state, i.e., the person concerned stands in relation to the state as an employee stands in relation to his employer. Consequently, it was held that the word “office” in article 16 (1) covered only the “employees” of the state and did not include an elected councillor of a municipality.

Such an interpretation of the word “office” also gains support from clause (2) of this article, where this word has been used in juxtaposition with the word “employment” in the expression “employment or office under the State”. It means then that article 16 (1) does not apply to what is known as political part of the state, but is confined to merely its permanent part, so to say, and hence, it applies to judicial offices also. But a mere contract to sell goods to the state is not employment, although “there may be cases in which the contract may include within itself an element of service.”

PROHIBITION OF DISCRIMINATION ON SPECIFIED GROUNDS IN MATTERS OF PUBLIC EMPLOYMENT

Be Ineligible For or Discriminated Against: Evidently, although clause (1) of article 16 speaks in positive language

51 See, however, High Court, Calcutta v. Amar Kumar, (1963) 1 S.C.R. 437.
and does not use the word "discrimination" or any of its grammatical inflexions, it has come to mean now only a right against discrimination in matters relating to public employment. Article 16(2), on the other hand, speaks of "be ineligible for or discriminated against", and forbids discrimination in matters of public employment on specified grounds.

It says that no citizen shall be ineligible for, or discriminated against, in respect of any employment or office under the state on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them.

To be ineligible for an employment or office means to be ineligible for initial appointment, but to be discriminated against in respect of any employment or office has a wide connotation to include any matter relating to the employment or office. The expression "or discriminated against in respect of" in clause (2) of article 16, thus, expands the scope of this clause.

Prohibited Grounds of Discrimination or Ineligibility:
The only grounds on which discrimination or ineligibility has been prohibited are: "religion, race, caste, sex, descent, place of birth, residence or any of them". Any discrimination or ineligibility based not only on any of these grounds, but on some other considerations also is not condemnable under article 16(2), although it may be condemnable under, say, article 14.\(^{53}\)

It is to be noted that religion, race, caste, sex and place of birth also figure as grounds prohibiting discrimination under article 15(1) and (2) and they have the same meaning in article 16(2) as they have in article 15(1) and (2). But article 16(2) has two more grounds on which it forbids discrimination, namely, descent and residence.

Descent: The word "descent" refers to ancestry. In *Gazula Dasratha v. State of A.P.*,\(^ {54}\) the Supreme Court held that the provisions relating to the office of the village munsif under the Madras Hereditary Village Officers Act, 1895, violated article 16(2), in as much as the Act required that the person deemed best qualified from "among the family of the holder of the office" should be elected.


Residence: Residence refers to the place where a person actually lives and may be different from the place of birth, domicile or home. What clause (2) of article 16 forbids is discrimination on the ground of the place of residence, and a requirement as to the knowledge of the language of the place of employment is not covered by this clause.55 Besides, Parliament is competent to legislate requiring residential qualification in accordance with clause (3) of article 16.

EXCEPTIONS

Clauses (3) to (5) of article 16 contain the exceptions to the aforesaid principles enunciated by clauses (1) and (2) thereof. The first exception empowers Parliament to make laws requiring residential qualifications in certain cases; the second is in favour of the power of the state to make reservations for backward classes; and the third relates to the laws requiring membership of a religion or denomination for holding an office in connection with the affairs of an institution of the religion or denomination concerned.

Parliament's Power to Require Residential Qualification: By virtue of clause (3) of article 16, Parliament has the power to make laws in regard to any category of public employment in a State or a Union Territory requiring residence within that State or Union Territory as a pre-condition for being taken into that employment. Parliament passed the Public Employment (Requirement as to Residence) Act, 1957, in pursuance of article 16(3) authorising the Central Government for five years to frame rules requiring residential qualifications in certain cases. This Act came into force on March 21, 1959, and was amended by the Public Employment (Requirement as to Residence) Amendment Act, 1964, which extended the rule-making power of the Central Government from five years to ten years. There is then the Mulki Rules Act for Andhra Pradesh.

Reservations for Backward Classes: Article 16(4) permits reservation of appointments or posts for any backward class of citizens, whom the state considers to be not adequately re-

presented in the services under the state. This exception clause (4) comes into operation only when two conditions are satisfied, namely, (i) the reservation is made in favour of any backward class, and (ii) the state is of the opinion that such a class is not adequately represented in the services under the state.

If, however, no reservation is specifically made for a backward class, the mere fact that a candidate taking a general competitive test for a service is a member of a backward class cannot be taken into account in appointing him to a post in preference to another candidate who does not belong to such a class but has secured higher marks. But the mere fact that certain reservations have been made for such a backward class candidates does not disentitle the candidates belonging to that class from competing on merit in respect of non-reserved seats.

**Backward Class**: The Constitution does not define the expression “backward class” but it is not synonymous with “backward caste” or “backward community”. It is also not synonymous with the expression “socially and educationally backward classes’ of article 15(4), and seems to be susceptible of a broader application.

**Appointments or Posts**: In *General Manager v. Rangachari*, the Supreme Court held by a majority that the word “posts” in article 16(4) is not a term of art and hence the expression “appointments or posts” only refer to posts in the service and not ex-cadre posts. Hence, even a selection post to which appointment may be made by promotion is covered by article 16(4).

**Limits of Reservation**: Article 16(4) does not itself put any limit on the extent of reservation in respect of any category of services that may be made in favour of the backward classes. However, the Supreme Court has held that in reserving seats for backward classes

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“an attempt should always be made to strike a reasonable balance between the claims of the backward classes and the claims of other employees as well as the important consideration of the efficiency of administration”.60

This implies that in making reservations for the backward classes considerations of administrative efficiency are of paramount importance in the general interests of the society and the state must also see to it that the number of posts reserved is reasonable in the light of the interests of all sections of the society. In M. R. Bajali v. State of Mysore, the Supreme Court said:

“Therefore, what is true in regard to art. 15(4) is equally true in regard to Art. 16(4). There can be no doubt that the Constitution-makers assumed, as they were entitled to, that while making adequate reservations under Art. 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservations, for that would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction among the employees, materially affect efficiency. Therefore, like the special provisions improperly made under Art. 15(4), reservations made under article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution”,61

The Principle laid down in Balaji’s Case was affirmed by the Supreme Court in Chitralekha’s Case62 and in Devadasan’s Case.63 The Court again emphasised this principle in Tewari’s Case.64 It is to be noted that in Devadasan’s Case, the Court by a majority of 4 to 1 laid down the following as a general proposition:

“A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under Cl. (4) would in effect efface the guarantee contained in Cl. (1) or at best make it illusory”.

Offices Relating to Denominational Institutions: Clause (5) of article 16 is self-explanatory, and is intended to protect religious freedom. It says that the prohibitions against discrimination contained in clauses (1) and (2) of article 16 do

60 Ibid.
not apply to invalidate any law which provides that the incumbent of an office relating to the affairs of any religious or denominational institution is to be a person who professes the particular religion or denomination to which the institution belongs. This also is an aspect of secularism.

ABOLITION OF UNTOUCHABILITY: ARTICLE 17

The scourge of untouchability in the Indian social life, like the cursed caste system, is the baneful bye-product of a society’s effort to survive through generations of political imbalances by creating inner and outer barriers to basically withstand social inter-penetrations between the external “rulers” and the internal “ruled”. Untouchability as a social problem, however, became intolerable because of the ignorance and conservatism that took deep roots in the days of growing political degeneracy, and its practice became attended with crassness and cruelties that reflected the vileness of this securely sitting social system.

In the nation’s fight for freedom, the new social and political leaders naturally also revolted against this social evil that was eating into the very vitals of the national life, and Gandhiji put in his supreme effort to eradicate this social vice. He started the Harijan as an organ of his views. In fact, his devotion to the cause of the political freedom of the country was as deep as was his faith in the social emancipation of nearly one-sixth of the Indians who suffered the stigma of untouchability. And it was symbolic of his love for these millions of untouchables that article 17 of the Constitution, which abolished untouchability, was adopted by the Constituent Assembly with the acclamation of Mahatma Gandhi Ki Jai.

Article 17 lays down:

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

As Article 17 is directed against the “heinous monstrosity” of untouchability, it not only abolishes untouchability and forbids its practice in any form, but also makes the enforcement of any disability arising out of untouchability punishable in accordance with law. This article is directed not only against
the state but also against any other person. But essentially it is in the nature of a declaration that this article operates, and its actual enforcement requires further appropriate legislative action. Yet article 17 is a great charter of deliverance and a significant step in the direction of establishing the grand ideals of social justice and equality of status, as also of promoting fraternity, which the Preamble enshrines.

However, the word "untouchability" has not been defined by the Constitution. "Untouchability" is to be understood in the historical context in which it was used in article 17, although literally it would denote any situation of a temporary or permanent nature in which a person declines to touch another person for any reason whatever. Article 17 specifically aims at the system of "untouchability" in the Hindu society. But although this article is primarily meant to protect those elements of the Hindu society whom Gandhiji called the Harijans, it seems that even, say, a Muslim may seek the protection of this article if a Hindu practises "untouchability" against him. The wide phraseology of the article appears to justify this view of the matter.

It is to be noted that even before the adoption of article 17 of the Constitution, various State Governments had passed laws to remove the curse of untouchability and after the commencement of the Constitution they continued to be in force by virtue of article 372. But because of article 35, which empowers Parliament alone to legislate for any matter relating to fundamental rights, no State Legislature is now competent to pass any law for giving effect to the prohibition contained in article 17.

It seems desirable to refer to some of the cases under some of the State laws relating to "untouchability". In Banamali Das v. Pakhu Bhandari, the validity of the Bengal Hindu Social Disabilities Removal Act, 1948, was questioned on the ground that the Act was discriminatory. This case arose out of a complaint lodged by one Banamali Das, a cobbler, against Pakhu Bhandari and others for their refusal to cut the complainant's hair and to render similar services to his caste-men. The Calcutta High Court ruled that the Act was valid, and observed:

"All it does is to prohibit him from discriminating between one Hindu and another in carrying out his duties as a barber. The Act compels him
to serve all and really enlarges the scope of his services rather than restrict the same... The citizens of India should not be subdivided, but should form a united body and that is an end that is rightly sought for by our law-making bodies. The makers of the Constitution have recognised it and have abolished untouchability and have also provided that there should be no discrimination only on the ground of caste or religion... The Act does not discriminate, but penalises and abolishes tendencies in Hindu society to discrimination... (It) does not deny any person equality before law. It tends to make all persons equal in society and before the law and it cannot possibly be argued that this Act denies any person equal protection of laws”.

Again, in State v. Banwari, the U.P. Removal of Social Disabilities Act, 1947, was challenged as discriminatory by five barbers and two washermen in a joint petition before the Allahabad High Court. The Court unanimously upheld the validity of the Act and said that the petitioners could not refuse to render their services to persons belonging to a Scheduled Caste.

In the exercise of its powers under article 35, Parliament passed the Untouchability (Offences) Act, 1955. The Home Minister, speaking on the Untouchability (Offences) Bill, said:

“This cancer of untouchability has entered into the very vitals of our society. It is not only a blot on the Hindu religion, but it has created intolerance, sectionalism and fissiparous tendencies. Many of the evils that we find in our society today are traceable to this heinous monstrosity. It was really strange that Hindus with their sublime philosophy and their merciful kind heartedness even towards insects should have been party to such an intolerable dwarfing of manhood. Yet, untouchability has been there for centuries and we have now to atone for it... The idea of untouchability is entirely repugnant to the structure, spirit and provisions of the Constitution”.

And explaining the scope of the Bill, he added:

“This Bill does not apply to Hindus alone. It applies to all... It will apply to not only to Scheduled Castes, but probably to the Christians in the South who are not allowed to enter churches by those who consider themselves as belonging to higher classes. There are certain Muslims who are treated in the same manner by the followers of Islam. They will have the benefit of this provision. It is for their benefit that the word

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'untouchability' has been left undefined. So far as the Scheduled Castes are concerned, the Act makes it clear that they are entitled to the benefit of the provisions of this Act in any case”.

The Act is fairly comprehensive in nature. It came into force in June 1955 and replaced all the concerned State laws. It prescribes a punishment which may extend to imprisonment for six months or a fine up to five hundred rupees or both for any one enforcing on the ground of untouchability religious disabilities, social disabilities, or refusing to admit into hospitals, or to sell goods or render services, or committing other offences arising from untouchability. The Act also prescribes for cancellation of licences or suspension of business in certain cases. Section 10 of the Act makes an abetment of an offence under the Act also punishable.

Significantly, section 12 provides that when an offence under the Act is committed against a member of the Scheduled Castes as defined in article 366(24), the presumption would be that the offence has been committed on the ground of untouchability, and the onus of proving that the offence was not committed on such a ground lies on the accused person concerned. All offences under the Act are cognizable but may be compounded with the leave of the court.

It should, however, be remembered that any deeply entrenched social malady like untouchability can never have an adequate remedy merely of a legal nature. The nation needs to work on all fronts, social, economic, educational, political, religious, ethical, moral and psychological, to fully cure the country of the curse of untouchability and to establish a social order in which the ideals of justice, equality, liberty and fraternity can be truly realised.

**ABOLITION OF TITLES: ARTICLE 18**

The Constitutional provision relating to the abolition of titles forming part of the constitutional right to equality is also

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67 Sections 3-7, Untouchability (Offences) Act, 1955.
68 Section 8.
69 Section 12.
70 Section 15.
to be considered in historical context. Both the American and the French Revolutions stood against royal conferment of titles, and in the Indian struggle for independence the titles conferred on Indians by the British crown were always under heavy fire.

Although the desire for distinction, which may be said to be at the root of all titles, is by itself not reprehensible, its aspect that has come in for condemnation is the degree of inequality that the system of titles, particularly the royal titles, produced in any society. Article 18 is a dedication to the concept of equality that the Constitution contemplates. It says:

“(1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument or office of any kind from or under any foreign State.

Article 18 is yet another step in the direction of securing the equality of status of all citizens of which the Preamble speaks, and, broadly speaking, it is declaratory in the nature of article 17. A title is, so to say, an appendage to a person’s name denoting his distinctive position as an individual or a class of individuals. This article runs as a prohibition on both the state and individual citizens. Its clause (1) forbids the state to confer any title on any person which does not denote academic or military distinctions and its clause (2) forbids an Indian citizen from receiving any title from a foreign state.

Clause (3) prohibits any person in the employment of the state, who is not an Indian citizen, from receiving any title from any foreign state without the consent of the President. Again, clause (4) forbids any person, whether a citizen or not, holding any office of profit or trust under the state to receive any present, emolument or office of any kind from or under any foreign state without the consent of the President. The objective of these two clauses is to secure the independence and loyalty of the persons in public employment from being adversely influenced by any foreign state by offering benefits and rewards.
However, unlike article 17, article 18 is not couched in absolute terms, and carries exceptions within its ambit. But these exceptions are necessary and justified in the public interest. In the first place, the state is not precluded from instituting and conferring military and academic distinctions. The exception in favour of a military distinction has been made because of the special nature of the military service and that in favour of an academic distinction because of the wide definition of the term “state” in article 12, which includes a university as a public body.

Secondly, the exception in favour of a person in the public employment in India, who is not an Indian citizen, to receive a foreign title with the permission of the President, is meant to secure both the services of competent foreign personnel and to promote international friendship. On the same grounds is based the exception in favour of any person, whether a citizen or not, in public employment to receive any present, emolument or office from or under a foreign government with the consent of the President.

Again, unlike article 17, article 18 does not provide that any violation of the latter article shall be punishable in accordance with law. But this does not preclude Parliament from prescribing appropriate punitive measures to enforce the provisions of this article, although no such enactment has thus far been made. Besides, a violation of clauses (2) and (3) of article 18, which are directed against any person in the employment of the state would presumably *ipso facto* create a ground for a disciplinary action against him. And Ambedkar reminded the Constituent Assembly of the possible consequences of the violation of article 18 on a citizen in the following words, although his words are yet to be enacted into a law:

“The non-acceptance of titles is a condition of continued citizenship. It is not a right, it is a duty imposed upon the individual that if he continues to be the citizen of this country, then he must abide by certain conditions. One of the conditions is that he must not accept a title, if he did, it would be open for Parliament to decide by law what should be done to persons who violate the provisions of this article. One of the penalties may be that he may lose the right of citizenship.”

It seems, then, that although article 18 is justiciable as a right being a part of Part III of the Constitution and is meant to be self-executory, it runs more as a duty than as a right. It partakes more of the nature of the Directive Principles than of the Fundamental Rights. Besides the psychological and ideological bases of this article are rather insecure.

And it is these reasons that, perhaps, explain the institution in 1954 of the decorations of the Bharat Ratna, Padma Vibhushan, Padma Bhushan and Padma Shree. Even within the decoration of Padma Vibhusan there are Pahla Varg (First Class), Dursa Varg (Second Class), and Tisra Varg (Third Class). Notably, the holders of the Bharat Ratna also become entitled to the ninth place in the Warrant of Precedence, i.e., a place just below the Union Cabinet Ministers.

The Bharat Ratna is awarded for "exceptional service towards the advancement of Art, Literature and Science, and in recognition of public service of the highest order," and the other decorations are awarded in order of the degree of merit for "distinguished public service in any field, including services rendered by Government servants."

And the official view is that these decoration are not titles to figure as appendages to the names of their holders, but they merely signify the recognition of the merit of their contributions to the advancement and service of the nation. But critics are quick to point out that for practical purposes there may not be any distinction between an award or a title.

It seems that on principle the system of decorations on the basis of merit may be unquestionable, because the state, which is an instrument of public action, must have the means to recognise the merit of a person for his public performance in a manner otherwise than in mere monetary terms or public posts or appointments. These decorations are the expressions of national appreciation of an individual's distinctive contribution to social life.

What is needed, however, is tremendous caution and a great sense of responsibility and public purpose, in order that these, or any other like decorations, may not be used for ulterior purposes. And it is no use denying the fact that the working
of the decorations system in this country has not been immaculate, and it is already tending to generate a not very healthy atmosphere for promoting self-less national service among the people in general.

RIGHT TO EQUALITY IS RIGHT AGAINST DISCRIMINATION

Evidently, the basic nature of the constitutional right to equality in this country is a legal right against discrimination. This restricted view of legal right to equality is a direct consequence of the concept of legal equality inherent in the liberal theory of the state as subject to the rule of law, and it is in consonance with the principles and practices of the existing constitutions in the liberal world. Such a view of legal liberty, must less of liberty in general, is bound to be negative in approach and must, in principle, be inadequate for the positive conception of the state as a service entity.

But there seems to be no escape from the fact that any scheme of right to legal equality administered by the judiciary alone can but exist and operate as a scheme of prohibition of discrimination for or against individuals. Not only that, but the general prohibition of discrimination has to be further sustained by contemplating innumerable exceptions, and this bitter fruit mankind seems destined to continuously swallow for having engrafted a formal concept of legal equality onto a real situation of actual inequalities.

That the right to equality in the scheme of the Constitution of India is essentially a right against discrimination to which numerous exceptions attach, can be substantiated here in a summary manner with reference to the different articles relating to the right to equality discussed at some length above. And it can be conclusively suggested that not only these articles have been framed in a manner as not to positively provide the substance of real equality, but they have also been interpreted and are being administered to constrict the effective realisation of factual equality.

To begin with article 14, although this article does not use the word “discrimination”, it has now been judicially interpreted
to mean a right against adverse discrimination. The broad concept of legal equality contained in this article has been thus restricted to the cases which raise questions of discrimination, and the courts have reserved to themselves the final authority to determine when a discrimination is condemnable within the terms of this article. It is a well settled principle now that article 14 does not forbid reasonable classification, and it has been also held that the state is a class by itself justifying special discriminatory treatment in its favour. Besides, the Constitution itself provides for numerous occasions for discriminatory treatment.

Article 15 specifically speaks of discrimination which it forbids on the grounds contained therein. This article also in clauses (3) and (4) carries exceptions. The same principle applies to article 16 which in clause (1) speaks of equality of opportunity in matters of public employment and in clause (2) forbids discrimination in this regard on specified grounds. Clauses (3) to (5) of this article also run as exceptions to the general principles contained therein.

Again, article 17 is aimed at abolishing "untouchability", a social system arising in the course of history which discriminates against an individual on the grounds of birth, race, religion and caste. This article 17 does not cover a case when, say, a person is made outcaste by any caste as a matter of social sanction. Article 18 also, which seeks to abolish titles, is essentially directed at eliminating only undue distinction between man and man by prohibiting the conferment and receipt of titles. Academic and military distinctions based on merit have been excepted from the scope of this article, and so have been the receipt of titles and emoluments in the case of persons in the service of the state with the special permission of the President. Reference in this context may also be made to articles 29 and 30, giving certain protections to minorities, but they do not have a different story to tell.

True, such a view of the rights guaranteed by articles 14 to 18 of the Constitution is unexceptionable on grounds of expediency and practical limitations. But the fact is that the Preamble aims at equality of status and of opportunity, a concept of equality which is highly positive. Equality of status implies
not only equality of legal status, but also the provision of a national minimum standard of living for all citizens; and equality of opportunity does not imply only the claim of equal treatment in the available opportunities, but also the provision of adequate opportunities for the development of all to the best of their capacities.

This means that the state must function vigorously as a service entity, in order that the ideal of equality of status and of opportunity enshrined in the Preamble to the Constitution may be a reality in the life of every Indian. It must not remain contented with administering the scheme of right to equality as envisaged by these five articles, and as now being interpreted and applied by the judiciary.
CHAPTER 14

RIGHT TO FREEDOM: ARTICLE 19

Liberty, a word of highly emotive content, sought to be enshrined in its plenitude in the Preamble to the Constitution of India essentially as an attribute of mind, carries its theme into Part III of the Constitution as “Right to Freedom” embodied in articles 19 to 22. These four articles, along with the articles relating to freedom of religion and articles such as those concerning cultural and educational right and right to property, seek to actualise the ideal of liberty as a scheme of fundamental rights within the frame of the Constitution.

Of the four articles, 19, 20, 21 and 22, dealing with the right to freedom, article 19 is the key article because of its general, abstract, positive and plenary nature, reflecting the stage of socio-economic and political evolution, the scheme of socio-economic and political institutions and the scale of social values of the nation, although it must also be deemed to be a paradigm of the proposition posited by Mukherjea J., in A. K. Gopalan v. State of Madras,¹ as follows:

“What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control. To me it seems that Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law, so that they may not conflict with public welfare or general morality”.

Article 19 reads:

(1) All citizens shall have the right—
   (a) to freedom of speech and expression;
   (b) to assemble peaceably and without arms;
   (c) to form associations or unions;
   (d) to move freely throughout the territory of India;
   (e) to reside and settle in any part of the territory of India;
   (f) to acquire, hold and dispose of property; and
   (g) to practice any profession, or to carry on any occupation, trade or business.


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(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional and technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

The seven freedoms of article 19 are the rights of the citizens of India, although the claim to Indian citizenship is itself not a fundamental right under the Constitution. The guarantees of this article are not available to a person who is not a citizen of India, but for the purpose of this article there is no distinction between a natural-born and a naturalised Indian citizen.
The freedoms conferred by article 19, are, however, the rights of an Indian citizen in his individual capacity and not as a member of a community, a sect, a group, an association or a corporation. A corporate body or a juristic entity, such as an association of citizens, or a deity, is not a citizen for the purpose of this article. It was held in *Tata Locomotive v. State of Bihar*, that the theory of "tearing the corporate veil" cannot be applied to a corporation whose all or majority of the members are Indian citizens to give it the benefit of this article.

The rights conferred on an individual citizen by article 19 are the rights available to him only against state actions. Of course, the state in this context means any public authority covered by article 12. In case a citizen complains of an infringement of any of the rights under this article by a private person, whether another citizen, an alien, a natural person or a juristic person, his remedy lies in other relevant laws, including article 226, and not under article 32, unless such a complaint relates to any private act sustained in any form by the state.

Article 19, which is evidently the longest article detailing a set of fundamental rights, contains as many as six clauses which constitute two parts of this article. Part one has clause (1), which enumerates seven freedoms, and part two consists of clauses (2) to (6), which specify the corresponding restrictions on these freedoms. But convenience of comprehension commends the treatment of each freedom in juxtaposition with the related restrictions, except that the general nature and characteristics of the freedoms and the restrictions thereon call for some separate comments.

**THE FREEDOMS**

The Constitution, except for the Preamble, does not have the word "liberty" simpliciter. Article 21 speaks of "personal liberty", an expression which both Kania C. J. and Das J. in *Gopalan’s Case* conceived to be of narrower connotation than the word "liberty", but considered capable, by itself, of includ-

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ing many more elements than mere liberty from constraint on person and containing within its fold all the seven freedoms in the forms of which liberty figures in article 19(1). The Court by a majority of 4 to 1 held that article 19(1) embodied only those aspects of personal liberty as seven freedoms, which the founding fathers deemed to be of special significance and intended them to be outside the ambit of “personal liberty” in article 21.

Article 19(1), then, enshrines the seven great freedoms of the Indian citizens, which are only some significant aspects of liberty, or more precisely personal liberty, and they do not exhaust all the freedoms an Indian citizen enjoys, much less exhaust all the vital aspects of liberty or personal liberty. For example, the right to eat and drink, or the right of self-defence, is much more vital than the right to move about, yet in article 19(1) it is the latter that finds a place and not the former. This is because article 19(1) stands basically for those freedoms, those aspects of liberty or personal liberty, which have, through the history of the struggle of mankind for securing an identity between the interests of the governors and the governed, come to be regarded as the palladium of free life.

No Theory of Natural Rights: Thus, although the Constitution of India does not subscribe to the theory of natural rights, it is this thematic ancestry of article 19(1) coupled with article 21, that carries into Part III of the Constitution a simulacrum of natural rights. And the Supreme Court, in *State of West Bengal v. Subodh Gopal*, felt inclined to observe that article 19(1) provides for

> "Those great and basic rights which are recognised and guaranteed as the natural rights inherent is the status of a citizen of a free country".

It should, however, be distinctly realised that article 19(1) is not a mid-twentieth century Indian constitutional contribution to the theory of natural rights. For otherwise it is most likely to land one in the fairyland of “inherent”, “immutable” or “transcendental” rights of man and citizens, making thereby the scheme of the rights in Part III of the Constitution a sheet-

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anchor of judicial and juridical “reason”, “righteousness” or, nay, even “truth”, a situation not in keeping with the spirit of the Constitution.

**Article 19(1) Contains Fundamental Rights of Civil Nature:**
The value of article 19(1) lies in the fact that it seeks to give a more concrete shape to some important aspects of liberty, or personal liberty, in the form of justiciable norms and installs them on a high pedestal as fundamental norms. They form part of the Constitution as fundamental rights and become invested with all the elements peculiar to a fundamental right. For example, they cannot be waived or contracted out; or again, they are enforceable by the Supreme Court under article 32.

But this does not imply that each and every act done in the pursuit of a right under article 19(1) must also be deemed as a fundamental right. Thus while the right to enter into a contract as incidental to the right to property under article 19(1)(f), or the right to practice a profession or carry on any occupation, trade or business under article 19(1)(g), is a fundamental right, any right arising out of such a contract is a mere contractual right governed by the law of contract.7

The seven freedoms of article 19(1)—the freedom (a) of speech and expression; (b) of peaceable assembly without arms; (c) of forming associations or unions; (d) of moving throughout the territory of India; (e) of residing and settling in any part of the territory of India; (f) of acquiring, holding and disposing of property; and (g) of practising any profession or of carrying on an occupation, trade or business—are to be treated as the gift of the Constitution to all the citizens of India. In the shape of these freedoms the Constitution gives the people legal liberty or liberty through law.

True, these seven freedoms installed as fundamental rights in article 19(1) of the Constitution are of immense value to free life in an open society, but nonetheless they should not be looked upon as having been anointed with a greater sacrosanctity than any other right in Part III, or for that matter in any other part, of the Constitution. They are simply constitutional rights of an Indian citizen, and apart from the mode

of their enforcement, which also they share with other rights in Part III, they may lay claims to no special status only because the Supreme Court considered them as “natural rights inherent in the status of a citizen of a free country.”

*Rights of Civil Nature:* The freedoms in article 19(1) figuring as fundamental rights are those freedoms which are usually associated with the civil liberty of a person and as such they are civil rights as distinguished from political rights. But they are not divorced from political rights, because they provide the conditions necessary for a meaningful and effective exercise of political rights. They only aim at investing a citizen of India with certain capacities for action in certain directions.

*The Seven Freedoms as Rights:* The seven aspects of liberty, or personal liberty, commonly characterised as the seven freedoms of article 19(1) are the rights, legal rights, of an Indian citizen. And call them constitutional, fundamental or civil, their basic utility lies in their search for actualising some aspects of liberty as rights; as certain capacities of an Indian citizen to do, or not to do, certain things or to demand from others the doing, or not doing, of certain things.

They represent, as it were, some of the faculties an Indian citizen is deemed capable of exercising, and in this sense they are general and abstract; but they are also particular and concrete. They are positive in the expectation that the citizen will exercise these faculties to be his own self as a part of the great national life; but they are also negative. And they are plenary in the sense that they use words to express a citizen’s faculties as capacities without providing any definitions for those words. The words used to express the seven freedoms are common words of wide connotation, and, by themselves, claim to be given the widest possible meaning. These freedoms, by themselves, are almost absolutely phrased. But nonetheless they are limited rights.

*Negative Right:* An interesting issue that was raised before the Supreme Court in this context is whether the fundamental right of a citizen under article 19(1) to exercise any of the freedoms enumerated therein also includes his fundamental
right not to exercise any of these freedoms. In *Tika Ramji v. State of U.P.*, 8 which related to article 19(1) (c), dealing with the right to form associations or unions, the Court seemed reticent to regard the negative right not to exercise any freedom under article 19(1) as fundamental, but held that there could be no compulsion on jointing an association.

In another case, *Hathising Mfg. Co. v. Union of India*, 9 arising under article 19(1) (g), relating to the right to practice a profession or carry on an occupation, or a trade or business, the Court was cautious enough not to lay down any general proposition in this regard, but held that in the instant case a right included its negative aspect as a fundamental right.

It seems reasonable to assume then that the negative right of not doing anything enumerated in clause (1) of article 19 is also fundamental in nature, subject, of course, to the corresponding restrictions contemplated by clauses (2) to (6) of this article.

**Co-existence of the Seven Freedoms in a Scheme of Rights:**

As the seven freedoms are but a group of rights of all the citizens of India, conflicting situations may arise in the course of their exercise by an individual citizen. Five broad classes of such situations may possibly be conceived. First, a citizen's any right under article 19(1) may come in conflict with his another right or rights in the same article. Secondly, his any right under article 19(1) may come in conflict with the same right of another citizen or other sections of citizens. Thirdly, his any right under article 19(1) may come in conflict with the other right or rights of another citizen or another section of citizens under the same article. Fourthly, his any right under article 19(1) may come in conflict with his any right in other articles of Part III of the Constitution, or his any other constitutional right. Fifthly, a citizen's any right under article 19(1) may come in conflict with any other fundamental or constitutional right of any citizen or person or any section of citizens or persons.

Generally speaking, in all these cases of conflict the principle of harmonious interpretation has to be applied, and

all efforts should be made to give the best effect to all the rights that come in conflict. But it is possible that in certain cases a construction of possible co-existence of conflicting rights is wholly ruled out, because one right by necessary implication may ease out the operation of another right in a particular situation. In that case, depending on the nature of case in hand, one must yield to the other.

The question of construction involving conflicting situations relating to rights has yet at least two other significant aspects which may, in the absence of any better terminology, be called time aspect and totality aspect, implying, respectively, thereby that these conflicting situations have to be considered not at a particular point of time but at different points of time, or through a period of time, because a constitution is meant to serve the community through ages; and that they are to be considered from the angle of the total life of the community, the totality of the community, or public angle, because a constitution provides the fundamental frame for the overall operations of the community.

Such a view of the issue of the co-existence of rights, then, clearly reflects two distinct though interrelated needs. The first is the need for a perspective of construction, and this has already been explored at length above. The second is the need for restrictions on rights, which has but been mentioned earlier, and, therefore, call for some further elucidation.

THE RESTRICTIONS

The need for restrictions on rights stems from the obvious and basic fact of man’s social existence. As he is, all his acts and abstentions have inevitable impacts on others around him, and consequently, the necessity for so ordering his acts or abstentions as to make these impacts harmonise with the totality of such impacts in a community of persons. Human existence, or rather any existence, itself implies existence within limitations. Any actual existence can mean only a limited

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12 See above Chaps. 2 and 6.
unit. It is a well recognised principle, affirmed even by a confirmed individualist like Hobhouse, that “an organised society is something more than the individuals that compose it”.\textsuperscript{14} That the society is something more than the individuals comprised in it carries a corollary that the individuals composing a community have also a social facet to their personalities. An individual’s personality has both private and public aspects, and this is in addition to the public personality of the community concerned.

It is in the interest of a community to foster the private and public elements of an individual’s personality, but it is also in the general interest that the public personality of the community should be protected. There has got to be personal liberties, but, as Denning observes,\textsuperscript{15} they must be matched with social security, by which he means “the peace and good order of the community”.

Then emergencies, whether internal or external, which threaten the very existence of the community in which liberties are to be enjoyed call for drastic limitations on their enjoyment,\textsuperscript{16} in order that the community may return to normal conditions making their full enjoyment possible.

The community, then, must secure its own existence and ensure integrated social progress in an orderly and disciplined manner, in order that each of its members may realise his personal development to the fullest. And similarly, man must march on to progress individually, in order that the community to which he may belong may benefit most from his contributions.

As Willoughby observed, “freedom and restraint are thus but obverse and reverse sides of the same shield”.\textsuperscript{17} This means, first, as Barker said,\textsuperscript{18} that the truth that each ought to be free has the complementary and consequential truth that none can be absolutely free. Secondly, that the need of liberty of each is qualified and conditioned by the need of liberty of all. Thirdly,

\textsuperscript{14} Hobhouse, L. T.: \textit{Metaphysical Theory of the State}, 1926; p. 27.
\textsuperscript{15} Denning, Alfred: \textit{Freedom Under the Law}, 1949; p. 5.
\textsuperscript{17} Willoughby: \textit{An Examination of the Nature of the State}, 1912; p. 110.
“liberty in the State, or legal liberty, is never the absolute liberty of each, but the qualified liberty of all.” Fourthly, that “liberty within the State is then a relative and regulated liberty.” And lastly, that “a relative and regulated liberty, actually operative and enjoyed, is a liberty greater in amount than absolute liberty could ever be—if indeed such liberty would ever exist, or ever amount to anything more than nothing at all.”

Besides, in a period of intensely organised living, highly technical progress and positive state actions the question of social control of individual liberties gets a sharp focus. Social action by its increase also expands correspondingly the area of social control. Social progress, on the one hand, implies increased individual opportunities for self-realisation, but it also simultaneously involves accentuated social control. As new liberties are wrested from the nature, new restraints follow on their heels.

Restrictions on rights are the instruments of harmonising orderly social existence and progress with individual development. From the point of view of the community, they are, as it were, the core of social rights; from individual angle, they are circumferential in relation to his personal rights.

It is an eternal task then, the task of adjusting the respective claims of the individual and the community, that has always called for constraints on both the individual and the community; the citizen and the state; the governed and the governors. The search for new equilibria between them is the search for further identification between the interests of the two. But there seems to be no point of final equilibrium, it is a problem of continuing equilibration that mankind has thus far confronted and appears destined to face in all futurity.

**RESTRICTIONS IN ARTICLE 19, CLAUSES (2) TO (6)**

It is in this conceptual context that the restrictions contemplated by clauses (2) to (6) of article 19 on the freedoms in clause (1) of this article are to be viewed. In a country where no such express restrictions have been contemplated by the constitution itself, judicial interpretation has imported them into the scheme of their constitutional rights. This explains the origin of the doctrines of “police power” and “eminent domain” in the U.S. Constitution. Besides, no constitution can be said
to be devoid of express provisions for limitations on rights. Willis says as follows even of the U.S. constitutional system\(^\text{19}\):

"In the United States Constitution an attempt has been made to strike a proper balance between personal liberty and social control through express limitations written into the Constitution and interpreted by the Supreme Court, by implied limitations created by the Supreme Court, and by the development of the governmental powers of regulation, taxation, and eminent domain by the Supreme Court."

What the Constitution of India has done by expressly providing for restrictions in clauses (2) to (6) of article 19 on the rights it gives by clause (1) of this article is not only secure on solid conceptual foundations, but has also a very wide and realistic historical, social and constitutional perspective. The restrictions in article 19(2) to (6) indicate, first, the end of the era of laissez faire and the existence and acceptance of the age of social action. Secondly, they reflect the social needs in some definite areas, for example, the one relating to the needs of the tribal people, peculiar to India.

Thirdly, they write into the Indian Constitution most of which the U.S. Supreme Court had to read into the U.S. Constitution. Fourthly, they recognise the primacy of the principle of Parliamentary sovereignty over the doctrine of judicial review, both of which have their assigned roles in the Constitution. Fifthly, they seek to impart an element of certainty and definiteness in the realm of liberties, and consequently, they demand a clear understanding of their various implications.

**The Nature of Restrictions in Article 19(2) to (6):** To begin with the nature of the restrictions contemplated by clauses (2) to (6) of article 19, the primary question that comes up for decision is whether the provisions of these clauses are as fundamental as the provisions of clause (1) of this article, that is, whether the restrictions in article 19 are equally fundamental as the rights therein. In *Ram Singh v. State of Delhi*,\(^\text{20}\) Bose J. felt inclined to treat only rights in article 19(1) as fundamental and not the limitations thereon.

\(^{19}\) Willis: *Constitutional law of the United States, op. cit.*; p. 478.
But it seems that there is no reason for taking such a view of article 19. This is, first, because a right like the right to assemble in article 19(1) (b) has been conferred on the citizen with a limitation in its womb as the right "to assemble peaceably and without arms"; and secondly, no right in clause (1) of this article can become an operative concept except with reference to the corresponding restrictions in clauses (2) to (6) thereof.

True, the restrictions in clauses (2) to (6) of article 19 do not represent the core contents of the rights in its clause (1), but they are definitely the fringe lines indicating the orbit of these rights. The ambit of any of the rights in clause (1) of article 19 is not intelligible save in the context of the restrictions contained in clauses (2) to (6) of this article. These restrictions may be thus circumferential in nature, nonetheless they are as fundamental a part of a right as is its actual area marked out by the circumference.

Besides, as Seervai suggests, these restrictions may as well be looked upon as social rights, although negatively phrased, provided it be recognised that the concept of social rights does not connote merely the rights of the community as a whole, or public rights, but also includes certain rights appertaining to the social, or public, aspect of the personality of any individual in the community.

The Meaning of Restriction: Following the comments of Kania C. J. and Das J. in Gopalan's Case, that "restriction" did not mean "deprivation", it was felt earlier that "restriction" did not include complete prohibition or ban. But now it is no longer in doubt that "restriction" may mean even total prohibition or ban, depending on the nature of the subject-matter and the circumstances of a case before the court. It is, however, for the court to finally decide whether in a given case "restriction" may reasonably include total prohibition or ban. In Narendra Kumar v. Union of India, Das Gupta J., after reviewing the earlier authorities on this point, concluded:

22 A. K. Gopalan's Case, op. cit.
“It is reasonable to think that the makers of the Constitution considered the word ‘restriction’ to be sufficiently wide to save the laws ‘inconsistent’ with article 19(1) or ‘taking away the rights’ conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. There can be no doubt, therefore, that they intended the word ‘restriction’ to include ‘prohibition’ also. The contention, that a law prohibiting the exercise of a fundamental right is in no case saved, cannot, therefore, be accepted.”

Power of Imposing Restrictions: Clauses (2) to (6) of article 19 act, first, to save the operation of any existing law in so far as it imposes restrictions on a right in its clause (1), and secondly, to waive the element of prohibition, which any of these rights may imply, on the state against “making any law imposing” restrictions within the terms of clauses (2) to (6). The power to impose a restriction under article 19 vests in the state as defined by article 12. But the state can impose a restriction within the terms of these clauses only by laws. It is the laws then which must, first, authorise the restrictions, and secondly, they must also prescribe the mode of operating the restrictions. But it is not necessary that such a law should be exclusively for the purpose of imposing restrictions.

In effect, an executive or administrative authority must be able to refer to a law before he can act in a manner that works to restrict any of the rights conferred by article 19(1). Law in this context is, of course, not confined to mere legislative enactments but also includes administrative legislation as widely conceived in article 13. But such a law must be a valid law.

Valid Law: The question of the validity of a law for the purposes of article 19(2) to (6) is not a question confined to merely article 19. It is a question which has to be determined with reference to the entire Constitution. Thus, the question of validity in this context may also raise the question of compatibility of article 19 with other articles of the Constitution or may raise the question of legislative competence or extent of delegation. But in all cases the court alone is the

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27 Yasin v. Town Area Committee, (1952) SC.R. 572.
final authority to adjudge the validity of a law for the purpose of article 19.

"Reasonable restrictions": All restrictions imposed in the exercise of powers under clauses (2) to (6) of article 19 on the rights of a citizen under clause (1) thereof, to be effective, must be reasonable restrictions. The expression "reasonable restrictions" occurs in all the restriction clauses. It is intended to apply in the case of them all with equal emphasis, except in relation to the second part of clause (6), which has the effect of *ipso facto* saving any restriction arising out of any existing or future law in regard to professional or technical qualifications for a profession, occupation, trade or business, or authorising the state to carry on any trade, business, industry or service even on a monopoly basis.

*Substantive and Procedural Reasonableness of Restrictions*: It is to be noted that the adjective "reasonable" in the expression "reasonable restrictions" is predicated of the word "restrictions" that are imposed by laws and not laws themselves. Consequently, in considering an impugned law under clauses (2) to (6) of article 19, the court has to consider whether a restriction sought to be imposed by the law is reasonable from substantive as well as procedural points of view and is not to test the necessity for legislation or the wisdom of the policy. That is, the court is to consider the reasonableness of the quality and quantity of the restriction sought to be imposed as well as the mode of imposing the restriction, but it is not to question the policy of legislation.

This requirement of both substantive and procedural reasonableness, in effect, imports in the scheme of the Constitution of India the substantive and procedural elements of the American due process, in however limited and indirect a manner it may be. The influence of American decisions is clearly evidenced by the phraseology of the cases decided under article 19, although the Supreme Court has said that "caution has to be exercised before the literal application of American decisions." And

due process has thus crept into the Constitution through the back-door of article 19, although the founding fathers deliberately excluded it from article 21.

Restrictions “in the interests of”: Clauses (2) to (6) of article 19 contemplate restrictions “in the interests of” the objects specified by each one of them. The purpose of using the expression “in the interests of” in preference to other expressions, such as “for the maintenance of”, “with regard to”, “relating to”, “in respect of” or “regarding”, is two-fold. In the first place, the expression “in the interests of” imports an element of depth and width in laws concerning any matter enumerated in any of these clauses; and secondly, it clearly indicates that such a law need not be directly related to any of these matters.

Thus, the expression “in the interests of” includes the tendency to cause a matter. In Ramji Lal Modi v. State of U.P., the Supreme Court said:

“Any law may not have been designed to directly maintain public order and yet may have been enacted in the interests of public order . . . (because) certain activities have a tendency to cause public disorder.”

Proximity of Restrictions: But this does not imply that any “remote and fanciful connection” between an impugned statute and the object of its enactment is saved by the expression “in the interests of”, because that would amount to pampering this expression at the cost of the requirement of the reasonableness of restrictions. A restriction must in all cases be reasonable, which implies that, considering the circumstances of each case, it must have rational, direct and proximate relation with the object in the interests of which it is enacted into law and it must not also be excessive. This, then, casts a burden on the courts to determine the exact application of the expression “in the interests of” in regard to each impugned enactment.

Non-Acceptance of Clear and Present Danger Test: But to say that a restriction must have rational, direct and proximate

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relation with the object of restriction does not imply an acceptance of the “clear and present danger test” for imposing restrictions as stated by Holmes J. in Schenck v. U.S.\textsuperscript{34} The Supreme Court has rejected the application of this test to article 19, because the framework of our Constitution is different from that of the U.S. Constitution,\textsuperscript{35} a difference which has also been recognised by Douglas J. of the U.S. Supreme Court in Kingsley Corporation v. University of New York.\textsuperscript{36}

**Specificity of Objects:** A Restriction on a right in clause (1) of article 19 can be imposed only in the interests of the corresponding specified objects in its clauses (2) to (6). For example, clause (1) (a) of this article gives an Indian citizen the right to “freedom of speech and expression”. The corresponding restriction clause for this right is clause (2) of article 19. Consequently, a restriction on the freedom of speech and expression of a citizen can be imposed only within the terms of clause (2) of this article, unless the Constitution otherwise provides elsewhere anything to the contrary, which may not be harmoniously reconciled with this proposition.

It is possible, however, that a restriction on a right may be imposed on more than one ground within the same corresponding restriction clause. It is also permissible to impose restrictions by the same law on different grounds in two or more relevant restriction clauses, provided the law deals with a matter involving the exercise of more than one right in article 19 (1).

The same propositions apply to the other rights in clause (1) of article 19 and the other restriction clauses therein. But this does not in any case imply that a law seeking to impose a restriction on a right within the terms of article 19 must specifically recite a specified object for which it has been made. It is enough if its object is covered by any of the corresponding specified objects.

**Exhaustively Enumerated Objects:** But the grounds for imposing restrictions have been exhaustively stated by each of the restriction clauses. It is required that a restriction on a

\textsuperscript{34} Schenck v. U.S., (1918) 249 U.S. 47.
\textsuperscript{36} Kingsley Corporation v. University of New York, 360 U.S. 684.
right should be not with reference to a clause which does not seek to impose any restriction on the right, but also not with reference to any other matter outside any of the restriction clauses (2) to (6) of article 19. The objects in the interests of which a restriction may be imposed have been exhaustively enumerated and are intended to be strictly construed in the interests of the rights of the citizens.\(^37\)

**Other Constitutional Objects of Restriction on Rights in Article 19(1):** However, it should be noted that by necessary implication, or by express provision, the Constitution may and does contemplate situations in which a restriction comes into play on the rights of a citizen under article 19(1).\(^38\) Thus, when articles 105 and 194, concerning the privileges of Parliament and the State Legislatures, operate, particularly in regard to contempt of Parliament or a State Legislature, as the case may be, a restriction comes into effect on the right to freedom of speech and expression of a citizen, although such a contempt is not contemplated by clause (2) of article 19.\(^39\)

**Application of the Principle of Reasonableness:** However, whether a particular restriction is reasonable is a highly complex question, compelling the Supreme Court to refrain from laying down any fixed proposition to test reasonableness in all cases. The Supreme Court has said that reasonableness of a restriction is to be determined in the context of each individual case. Consequently, although some generalisations may be made on the basis of judicial pronouncements as to what would constitute reasonableness in a particular case, the question of reasonableness must always remain a question of the conscience of the courts, particularly the Supreme Court, or even the conscience of individual judges.

**Reasonableness as the Dictate of Reason:** In Chintaman Rao v. State of M.P.,\(^40\) Mahajan J. said, "the word 'reasonable'\


implies intelligent care and deliberation, that is, the choice of a course which reason dictates”. And it seems that as a general principle there should be no objection to this statement. But the question arises: whose reason? Is this reason capable of objectification to the extent necessary for the purpose of justice according to law? The common experience has been that in actual practice the application of this principle of “dictate of reason” has tended to vary as the feet of the judges.

The Objective Test of Reasonable Person: It is said that not the subjective reason of the judge but the objective test of what a reasonable man would necessarily consider proper should determine if a measure is reasonable. This test of “reasonable man” was stated by Holmes J., in *Lochner v. New York*, 41 as whether “A reasonable man might think it (the impugned statute) a proper measure” in the given context. But the experience of the working of the U.S. Supreme Court, however, shows that this test has failed to inject necessary objectivity in its working.

Enumerative or Individual Approach: The Supreme Court seems to have preference for individual approach to different cases and determine whether an impugned law is valid from both substantive and procedural angles in the light of all the attendant considerations. The following observations of Patanjali Sastri C. J., in *State of Madras v. V. G. Row*, 42 amply reflect the Court’s attitude in this regard:

“It is important . . . to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned; and no abstract standard, or general pattern of reasonableness, can be laid down. The nature of the rights alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.”

The aforesaid observations of Patanjali Sastri C. J. apparently concentrate on what may be deemed primarily the

elements coming under the substantive aspect of reasonableness, although they are by no means exhaustive. But it should be noted that it may be possible that an element falling under procedural aspect of reasonableness may make or mar its substantive aspect quite effectively. For example, if the High Court be vested with very wide discretionary powers to impose stringent regulations on, say, obscene literature in relation to the youth, the stringent substantive measure would possibly become justified because of the manner of its application.

Thus all the elements constituting both the substantive and procedural aspects of reasonableness are significantly intertwined. In deciding reasonableness, both substantive and procedural, the courts pick and choose only some of these diverse elements that are considered relevant to the case in hand. Naturally,

"a decision dealing with the validity of restrictions imposed on one of the rights conferred by Article 19(1) cannot have much value as a precedent for adjudging the validity of the restriction imposed on another right, even when the constitutional criterion is the same, namely, reasonableness, as the conclusion must depend on the cumulative effect of the varying facts and circumstances of each case."\(^{43}\)

Consequently, in any general discussion relating to the reasonableness of restrictions, whether from substantive or procedural angle, under article 19, it is then always more utilitarian to state some of the major elements which the courts take into account in deciding a case under article 19. This is what the enumerative approach essentially means, and the elements enumerated below are in addition to the elements of "proximity" and "specificity" discussed above.

**The Nature of the Right**: In determining the reasonableness of a restriction from the substantive or procedural aspect the nature of the right sought to be affected is taken into account. The nature of the right has such an impact on the scheme of article 19 that the meaning of "restriction" or an "object of restriction" may, also, receive its hue from the nature of the right itself.

**The Person or Persons of Inherence**: The person or persons of inherence may be taken into account in determining the

\(^{43}\text{State of Madras v. V. G. Row, op. cit.}\)
reasonableness of restrictions. The youth may be treated separately for the purpose of restrictions. So may Government servants, students, and factory workers be distinctly treated in consideration of their calling in respect of, say, freedom of speech or expression, or the right to form unions or associations.

The Subject-matter or Object of Right: The deleterious, dangerous or harmful nature of the subject-matter or object of right itself may be a factor in determining the reasonableness of restrictions. This may involve even a stretching of the meaning of the word "restriction" itself to include prohibition.

The Purpose or Objective of Restriction: The underlying purpose or objective of restrictions is clearly a factor to be taken into account in determining both the substantive and procedural aspects of reasonableness.

The Extent or Urgency of Evil: The extent or urgency of the evil sought to be remedied is a relevant consideration in determining the reasonableness of a restriction. A very drastic measure to curb a persistent or rampant evil is permissible.

The Proportionality of Restriction: The degree of restraint imposed is a relevant factor to determine its reasonableness. It should not be in excess of, but proportionate to, the degree of evil sought to be remedied. The principle is that the limitation imposed on a person in the enjoyment of his right should not be arbitrary, or of an excessive nature, beyond what is required in the interests of the public.44

In each case the court has to determine whether the restriction is commensurate with the need to protect the interests of the general public.45 A restriction should also not be destructive of the right itself.46

Means of Restriction: Although generally it is not for the court to pronounce upon the reasonableness of the means

44 Chintaman Rao's Case, op. cit.
adopted to impose a restriction to achieve the objective of an enactment, in certain cases the means adopted, which could otherwise seem unreasonable, may be upheld, or a means contemplated by the legislature may be struck down as arbitrary.

*Time and Conditions:* The time when a restriction was given a legal shape and the conditions then prevailing are necessary factors for determining the reasonableness of the restriction, because an Act is to be construed only in the context of its time and the surrounding circumstances.

Time is also a factor as to the temporary or permanent nature of a restrictive measure. It may also be a factor to take note of the then prevailing social mores, that is, to relate a piece of legislation to the philosophy of its time.

*Retroactivity:* Retroactivity of a law imposing a restriction *ipso facto* does not make the restriction bad, but it is a relevant factor in determining whether a restriction, because of its having been made retroactive, can be treated as reasonable in the face of the facts and circumstances of a case.

*Vagueness and Uncertainty:* A legal provision seeking to impose a restriction may be held invalid if it is too vague and uncertain. Thus, in *State of M.P. v. Baldeo Prasad,* it was held that the impugned law provided a vague definition of the word “Goondas” for preventive action against them by the State Government.

*Policy Considerations:* The court may and does take into account the general policy, particularly in matters of social legislation, of the country as a whole, because “the courts are not, in these matters (that is, in matters of social legislation), functioning, as it were, in vacuo, but as parts of a society which is trying, by enacted law, to solve its problems and achieve social

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49 Khare v. State of Delhi, op. cit.
concord and peaceful adjustment and thus furthering the moral and material progress of the community as a whole".53

The Directive Principles: The Directive Principles of State Policy in Part IV of the Constitution are also taken into account to determine the reasonableness of restrictions,54 although they are yet to fully occupy their rightful place in the interpretation and working of the Constitution as a whole.

Contemporaneous Legislation: Contemporaneous legislation forming the same or single scheme with an impugned statute may be taken into account to adjudge the reasonableness of the restriction contemplated by the statute, because such contemporaneous laws may have the effect of softening the rigors of the contemplated restriction.55

Conflicting Rights: The cases raising conflicting situations relating to the exercise of the different rights in article 19, or other articles, by different persons are also relevant to determine the reasonableness of restrictions.56

Safeguards of Procedural Nature: Safeguards of a procedural nature, such as the vesting of powers to impose restrictions in a high administrative, or judicial, authority or providing for appeals, revisions and references, are taken into consideration for determining the reasonableness of a restriction, although a restriction patently invalid on substantive grounds cannot be saved because of reasonable safeguards against its possible abuse by the administering authority.57 The following issues deserve to be noticed in this regard:

(i) Natural justice does not form a procedural pre-condition as an indispensable factor for imposing a restriction. But its existence may go a long way to soften the drastic nature of a restriction, or its absence in certain cases may even lead to the striking down of the restriction itself as unreasonable.58

56 In re Vengan, A.I.R. 1952 Mad. 95.
(ii) The existence of express provisions for judicial review in general, or alternative suit, revisions, appeals or reviews is considered adequate to uphold as reasonable a restriction which may otherwise appear drastic and disproportionate.\(^{59}\)

(iii) Provisions for appeals, reviews or revisions by higher administrative authorities are also relevant in considering reasonableness.\(^{60}\)

(iv) The vesting of discretion in an authority to impose restrictions on subjective satisfaction is not unreasonable in itself. This factor may, however, become relevant in determining the reasonableness of a restriction depending on the nature of a right and the facts and circumstances of a case,\(^{61}\) although the mere possibility of abuse of a discretionary power is not relevant.\(^{62}\)

What makes such a discretionary power bad is unguided or unfettered discretion. But even wide discretionary powers vested in high authorities may be reasonable,\(^{63}\) and emergency may justify the vesting of very wide discretionary powers to impose restrictions on the subjective satisfaction of an administrative authority. Even the power to grant exemptions, which is usually \textit{prima facie} looked upon as unreasonable, may be reasonable if there are guide-lines for its exercise.\(^{64}\)

(v) Vesting of even unguided discretionary power in the judiciary is considered reasonable, because by its very nature the judicial function is deemed to be independent and impartial, which also provides a maximum procedural safeguard.\(^{65}\)

(vi) It is also reasonable to provide special procedure for


\(^{60}\) Babulal Parate \textit{v.} State of Maharashtra, \textit{op. cit.}

\(^{61}\) State of Madras \textit{v.} V. G. Row, \textit{op. cit.}


the trial of certain offences arising out of the violation of a restriction on a right, or for the enforcement of any civil liability.\textsuperscript{66}

**Reasonableness in regard to Taxing Laws**: Taxing power is an independent and distinct power of the state, and there is no fundamental right not to be taxed. The exercise of this power cannot be questioned on the ground that it contravenes article 19.\textsuperscript{67} However, if a tax law is challenged because it is a confiscatory law in the guise of a tax law, article 19 may be invoked to test both the substantive as well as the procedural aspects of the reasonableness of such a law.\textsuperscript{68}

**Presumption of Reasonableness**: There is a presumption that a legislative restriction is reasonable. But a *prima facie* arbitrary or excessive restriction may displace this presumption.\textsuperscript{69} Besides, in certain cases the court may be inclined to attach less than due weight to this presumption.

**Onus of Proof**: The onus of proving that a restriction is unreasonable lies on the person who challenges a restriction as unreasonable.\textsuperscript{70} Even the onus of proof being thrown on an accused by legislation in certain cases has been upheld as reasonable for the purposes of article 19.

**Reasonableness in Article 14 and Article 19**: The scope of enquiry as to the reasonableness of a classification under article 14 and the reasonableness of a restriction under article 19 is not the same, although in certain areas these two issues of reasonableness may meet or overlap. Consequently, a law valid under article 14 need not necessarily be valid under article 19 or *vice versa*.\textsuperscript{71}

Evidently, the enumerative approach to determine the reasonableness of a restriction in clauses (2) to (6) of article


\textsuperscript{69} Hamdar Dawakhana v. Union of India, (1960) 2 S.C.R. 671.

\textsuperscript{70} Abdul Hakim v. State of Bihar, A.I.R. 1961 S.C. 448. See also Sampathu’s Case, op. cit.

\textsuperscript{71} Collector of Customs v. Sampathu, op. cit.
19 tends to greater objectivity than the "dictate of the reason" test, but even in this enumerative approach subjectivity has an inevitability to penetrate and perpetuate. Patanjali Sastri C. J. made a pointed reference to this inevitability, in *Row's Case*,\(^7\) as follows:

"... In evaluating such elusive factors and forming their own conception of reasonableness, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint, and the sobering thought that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable".

But it seems that this "inevitability" cries for urgent elimination. And it is not the dictate of self-control and realisation of certain other factors that can eliminate this intrusion of judicial subjectivity in the objective sphere of justice according to law, but the assignation to the Directive Principles of State Policy their rightful place in the working the Constitution that alone can clinch the issue.

It should be obvious by now that however hard attempts may be made to objectify "reasonableness" within the terms of article 19, it is destined to remain ensconced in the "reason" of the Supreme Court, or rather of its individual Judges, unless the Court recognises the scheme of objectivity of the Directives as providing the perspective of the Constitution.

**FREEDOM OF SPEECH AND EXPRESSION:**  
**ARTICLE 19, CLAUSES (1) (a) AND (2)**

The Constitution of India establishes India as a Sovereign Democratic Republic, and accordingly its Preamble speaks, *inter alia*, of *liberty of thought and expression* as an essential ingredient of democratic life. This aspect of liberty actualises itself as a right in the form of the "freedom of speech and expression" of an Indian citizen in clause (1) (a) of article 19 read in conjunction with its clause (2).

\(^7\) *State of Madras v. V. G. Row*, op. cit.

\(s: ci-23\)
This right to freedom of speech and expression presupposes the liberty of thought, and of belief, and lays the firm and lasting foundations of free and democratic life in the country, because above all democracy is government by public opinion. In *Romesh Thaparr v. State of Madras*, Sastri J. (as he then was) commented as under:

"... freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of popular government, is possible".

The right to freedom of speech and expression in article 19(1)(a) is itself founded, then, on the freedom of thought which the Preamble expressly mentions and article 19(1)(a) presupposes. Thinking is an internalised mental process which becomes externalised through the use of the other organs of body, specially the vocal organ, for expressing what the mind thinks, feels or wills.

**MEANING OF FREEDOM OF SPEECH AND EXPRESSION**

Article 19(1)(a) confers on all the citizens of India "the right to freedom of speech and expression" and is, thus, seemingly simply phrased. In actual working, however, its even simple words have raised issues of legal construction, some of which are indeed delicate and are yet to be finally determined.

**Right to Freedom**: "The Right to freedom" conveys an idea of the competence to exercise faculties freely, at will. This competence may be positive, that is, the competence to utilize one's faculties, but this may also be the negative competence not to utilize one's faculties. "The right to freedom of speech and expression" means in effect "the right of freedom to speak or express or not to speak or express". A citizen has the positive freedom of speech and expression, but he has also the negative liberty not to speak out, or express himself.

**Speech**: In the expression "freedom of speech and expression" the word "speech" has been used conjunctively, and not

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disjunctively, with the word "expression". What an Indian citizen has is the freedom of both speech and expression. Consequently, although in certain cases, as in the U.S. Constitution, "speech" may refer to all that usually comes under "expression" and either of the words "speech" and "expression", is, in the absence of any one, interpretable to include all that is denoted by the other, in the context of article 19(1)(a) "speech" is limited to only expressions by the use of vocal organ, including such an expression aided by any mechanical device.

Thus freedom of speech under article 19(1)(a) is confined to spoken words, or uttered sounds, and it includes soliloquies, monologues, dialogues, discussions, talks, debates, lectures, speeches, statements, comments, remarks, readings, recitations, catechisms and singing, and possibly even laughing and crying. The test in each case is whether a person is actually uttering words or sounds from his own mouth, that is, he is using his vocal organ, and exercising his faculty of speech. It is immaterial whether, in this process, any amplifying or like mechanical device is used for facilitating communication.

**Expression**: "Expression" is a term of much wider import intended to include all other possible forms of expressing thoughts, feelings, convictions, beliefs and ideas, which are not embraced by "speech".

Literally conceived, "expression" connotes merely an act of externalisation of an internalised idea, and it is complete as soon as an internalised idea becomes externalised. The element of communication, or dissemination, of an idea is but a social aspect of expression, although a very vital aspect.

But expression need not in all cases be the expression of one's own ideas. It does not also involve the value or validity of the ideas expressed. Nor has it any reference to the mode or medium of expression. Thus any posture or gesture, or any matter or thing, produced or reproduced through any device, which is designed to be a medium of externalising any idea of one's own, or of some one else, is a form of expression. It is the fact of expression, coupled with its social consequences, that constitutes the right to freedom of expression.

The freedom of expression in the social context implies, however, the existence of more than one party, although none
of the parties need be definite or determinate. And this makes the element of communication lend the concept of expression added dimensions. The freedom of expression does not remain merely the freedom to externalise, but also becomes the freedom to propagate, disseminate, communicate or convey ideas. It equally turns into the freedom to seek and to receive ideas.

The freedom of expression in its widest amplitude thus involves the freedom not only to impart, communicate or propagate, but also the freedom to seek and receive, any idea through any medium. It is in this plenitude that the word “expression” figures in article 19(1)(a), whose twin words “speech” and “expression”, though used conjunctively, constitute a single compact category of right investing the citizens with the widest conceivable freedom of speech and expression.

The fundamental right to freedom of speech and expression enshrined in article 19(1)(a), in effect, means the right of an Indian citizen to freely think, impart, seek and receive an idea of his own, or of some one else, through any medium of communication, including the press, record-player, radio, television and cinematograph. Precisely, it connotes a free flow of ideas.

RESTRICTIONS ON FREEDOM OF SPEECH AND EXPRESSION

But however widely this right may be conceived from an individual’s point of view, for operational purposes in society it has to reckon with the restrictions contemplated by clause (2) of article 19, and the controversies relating to this right primarily centre round these restrictions. Besides, elements of other restrictions are there. First, this right is subject to articles 105 and 194 relating to the privileges of Parliament and the State Legislatures, respectively. Secondly, when a Proclamation of Emergency under article 352 is declared, this right, along with the other rights of article 19, automatically gets suspended.

Thirdly, as held in Jamuna Prasad’s Case, it has no application to certain statutory rights, such as, for example, to sections 123(5) and 124(5) of the Representation of the People Act, 1951. Fourthly, as observed in Naresh v. State of Maha-

rashtra, it does not apply to a court order like the one prohibiting the publication of the statement of a witness. Lastly, as laid down in Jang Bahadur’s Case, the exercise of this right by one must not also involve any violation of similar rights of others.

**RESTRICTIONS CONTEMPLATED BY CLAUSE (2) OF ARTICLE 19**

Clause (2) of article 19 carries the restrictions on the right to freedom of speech and expression in clause (1) (a) of this article, and, as originally enacted, this clause (2) read as follows:

“Nothing in sub-clause (a) of clause (1) shall aﬀect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which oﬀends against decency or morality or which under-mines the security of, or tends to overthrow, the State”.

But the decisions of the Supreme Court in Romesh Thappar’s Case and Brij Bhusan’s Case, and the observations of the special bench of the Patna High Court in Bharati Press’s Case, which though on appeal to the Supreme Court were not favourably viewed, led Parliament to retrospectively amend clause (2) of article 19. In Romesh Thappar’s Case, which arose out of a challenge to the validity of the Madras Maintenance of Public Order Act, 1949, the Supreme Court made a distinction between “public order”, which it deemed to be of wider import, and “security of the State”, which it thought to be of narrow connotation, and struck down the Act as not being related to the security of the state.

Brij Bhusan’s Case, which related to censorship, affirmed this distinction. In the background of the Supreme Court decisions in the above two cases, Sarjoo Prasad J., in the Bharati Press Case, did not exaggerate when he said that a person could with impunity incite violence and murder, a view which though

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77 Romesh Thappar’s Case, op. cit.
disapproved of by the Supreme Court on appeal, seems to be, indeed, a logical corollary of that Court’s above two decisions. Consequently, it became unavoidable to amend clause (2) of article 19 retrospectively, and this was done by the Constitution (First Amendment) Act, 1951. The retrospective effect of this amendment was considered in *State of Bihar v. Sailabala Devi*,\(^{79a}\) and a further amendment was made by the Constitution (Sixteenth Amendment) Act, 1963, making this clause (2) to read now as follows:

Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Clause (2) of article 19, as it stands today, saves the operation of existing laws, as well as the power of the state to make laws, imposing reasonable restrictions in the interests of the matters specified therein. Already detailed comments have been made earlier with regard to the reasonableness of restrictions and the wide ambit of the expression “in the interests of” has been explained. This expression in the context of “public order” in clause (2) was commented upon by the Supreme Court, in *Ramji Lal’s Case*,\(^{80}\) as follows:

“Clause (2) of Art. 19 protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression ‘in the interests of’ public order, which is much wider than ‘for maintenance of’ public order. If, therefore, certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restrictions ‘in the interests of’ public order, although in some cases, those activities may not actually lead to a breach of public order.”

Thus the amended clause (2) now has also the effect of protecting laws which are meant to curb tendencies unless, of course, the restrictions contemplated happen to be too remote.


or indirect. And looking at the matters for which such laws may now be made, there is justifiable reason to feel that the amendments have not gone beyond what was absolutely necessary, particularly so when the courts have the final authority to determine the meaning and scope of each of the specified grounds for imposing restrictions. These matters, or grounds, are: sovereignty and integrity of India; security of the state; friendly relations with foreign states; public order; decency or morality; contempt of court; defamation; or incitement to an offence.

**Sovereignty and Integrity of India:** The first ground of sovereignty and integrity of India for imposing a restriction on the freedom of speech and expression of a citizen is a ground to protect the country against threats of dismemberment or disintegration and was introduced on the recommendation of the Committee on National Integration and Regionalism, appointed by the National Integration Council. The necessity of this ground in clause (2) is beyond controversy and its scope quite obvious to call for any detailed comments.

**Security of the State:** Security of the state is a matter in the interests of which reasonable restrictions may be imposed on the freedom of speech and expression. And this is a matter which includes any threat to the security of the country, whether internal or external. However, it does not include a mere public disorder or an ordinary breach of the peace, and particularly so because of the existence now of "public order" and "incitement to an offence" in clause (2).

Security of the state would cover all offences in the Chapter "Offences against the State" of the Indian Penal Code. Maintenance of official secrets is also necessary for the security of the state, and therefore, the Official Secrets Act is protected.

**Revolutionary and Subversive Movements:** Obviously, any revolutionary or subversive movement aimed at overthrowing the organised government directly endangers the security of the state. Accordingly, any restriction imposed on the freedom of speech and expression of a citizen for putting down or controlling such movements would be in the interests of the security
of the state, provided it is reasonable. However, the mere advocacy of a revolutionary creed, without anything more, is, perhaps, protected by article 19(1)(a).

Sedition: The offence of sedition is punishable under section 124A of the Indian Penal Code and its ingredients are as follows, according to that section:

"Whoever by words, either spoken or written or by signs or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India shall be punished . . . ."

In Kedarnath Singh v. State of Bihar, constitutionality of this section was challenged, even though this section in its Explanations 2 and 3 excludes certain comments expressing disapproval of governmental measures or administrative actions. The Supreme Court gave a narrow construction to the offence of sedition under section 124A to include only such acts as have any intention, or tendency, to cause public disorder, or disturbance of law and order, or violence, and said:

"... the expression 'the Government established by law'... is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted... That is why sedition, as the offence in 124A has been characterised, comes under Chapter VI relating to offences against the State... (and) any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously included in the term 'revolution', have been made penal by the section in question".

Disaffection, Disapprobation or Criticism: Mere causing of disaffection, without anything more, viz., the intention, or tendency, to cause public disorder or violence, is now no longer an offence. But section 3 of the Police (Incitement to Disaffection) Act, 1922, is in the interests of the security of the state because of the nature of the functions of the police.

Disapprobation, however strongly worded, of Government measures or actions, by itself, does not fall within the term

82 Ibid.
“security of the State”. The criticism of a public agency or a funcionary, including a minister, is also not covered by the expression “security of the state”.

*Advocacy of Change*: A mere advocacy or movement for a change in Government or socio-economic formations without an intention, or tendency, to cause public disorder or violence is also not included in the ground of the security of the state.

*Friendly Relations with Foreign States*: The requirement of restriction on the freedom of speech and expression on the ground of friendly relations with foreign states, though in a sense a constitutional novelty, is in consonance with the concept of fraternity in the Preamble and the spirit of article 51 of the Directives dealing with promotion of international peace and security. It is also in line with the common law principles and article 2(j) of the Covenant on Freedom of Information and the Press of the United Nations Conference, 1948, which approves of legislation against

“systematic diffusion of deliberately false and distorted reports which undermine friendly relations between peoples or States”.

“It is perfectly true”, as Nehru himself admitted, “that the phrase we have put in—friendly relations—is a wide phrase,” and is, unless caution is the key word in this context, likely to lead to muzzling of any criticism of the Government’s foreign policy. The need for Parliament’s power to impose restrictions in the interests of friendly relations with foreign states is above controversy in the Indian context. The Press Commission observed in 1954:

“The framers of the Constitution thought that the world conditions existing in 1951 and the non-alignment policy which India was pursuing made it necessary to invest Parliament with the necessary power in case an emergency arose ... There is more disequilibrium in world conditions now ..., and the policy pursued by India, her geographical position and her relations with foreign States have become far more important than

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84 *Kedarnath Singh’s Case, op. cit.*
85 *Parliamentary Debates, June 1, 1951.*
they were in 1951 when the amendment was made. We do not, therefore, think that any clear case has been made for depriving Parliament of the power to legislate, in case of necessity, placing restrictions on the freedom of speech and expression in the interests of friendly relations with foreign States.

Public Order: "Public Order" is a condition of existence and progress of both the individual and the society and this would normally include all that comes under "security of the State" as well as "incitement to an offence". But since the latter two expressions form separate grounds for imposing restrictions, the Supreme Court felt in Ram Manohar Lohia’s Case that the expression "public order" is to be read as a residuary expression in juxtaposition with the expressions "security of the State" and "incitement to an offence". In O. K. Ghosh v. E. X. Joseph the Court said:

"So far as cl. (2) is concerned, security of the State having been expressly and specifically provided for, public order cannot include the security of the State, though in its widest sense it may be capable of including the said concept. Therefore, in cl. (2), public order is practically synonymous with public peace, safety and tranquillity."

Restrictions in the interests of public order would then include any internal situation, whether localised or on national scale, which causes, or tends to cause, public disorder or disturbs, or tends to disturb, public peace, public tranquillity or public safety. In determining the validity of a restriction, however, all the attendant circumstances of a case must be taken into account.

Public Peace and Tranquillity: "Public tranquillity" has not been defined anywhere. But from Chapter VIII of the Indian Penal Code it may be deemed to include (i) unlawful assembly; (ii) rioting; (iii) promoting enmity between different classes; and (iv) affray.

Promoting Enmity Between Different Classes: Preaching hatred or enmity between different classes is an offence under

section 153A of the I.P.C. and this is in the interests of public order. Section 295A of the I.P.C. relating to the deliberate insult of the religious beliefs of a class of citizens is also in the interests of public order.

Public Safety: Public safety is an aspect of the maintenance of public order and would include ensuring public health; preventing public nuisance, such as regulating use of loud-speakers; securing the public or their rights and freedoms from danger; guarding against internal disorders or rebellion; and preventing interference with the supply and distribution of essential commodities and services.

Regulation of Loud-speakers: In Rajani's Case the Allahabad High Court held that the use of loud-speakers, or like mechanical devices, was not included under freedom of speech and expression; but in Indulal's Case a contrary opinion expressed by the Gujarat High Court seems to take a more rational and realistic view of the matter. Of course, the state can regulate such a use in the interests of public order.

Section 144 Cr. P.C.: In Babulal Parate's Case, the Supreme Court upheld the validity of section 144 of the Cr. P.C. as not infringing article 19(1) (a) and (b), as it imposes reasonable restrictions on the right to freedom of speech and expression and the right to assemble peaceably and without arms in the interests of public order.

Agitation and Instigation: A merely agitational approach to a public issue, without anything else, does not justify restrictions in the interests of public order. Mere instigation not to pay Government dues does not cause a disturbance of public order, because all breaches of law are not necessarily against public order. Thus in Superintendent v. Ram Manohar Lohia, the Supreme Court observed:

91 State v. Ramanand, A.I.R. 1956 Pat. 188.
“It is said that in a democratic set-up there is no scope for agitational approach and that, if a law is bad, the only course is to get it modified by democratic process and that any instigation to break the law is in itself a disturbance of public order. If this argument without obvious limitations be accepted, it would destroy the right to freedom of speech which is the very foundation of the democratic way of life. Unless there is a proximate connection between the instigation and the public order, the restriction, in our view, is neither reasonable nor is it in the interests of public order”.

**Riotous Conduct**: The right to freedom of speech and expression and the right to assemble peaceably and without arms cannot be invoked to justify the riotous conduct of a person at a private or a public meeting. The conduct of a person who becomes violent, indecorous or disorderly in making a demand at any such meeting calls for reasonable restrictions. 96

**Decency or Morality**: The words “decency” and “morality” have been used disjunctively in clause (2) of article 19 and a restriction would be valid if an act sought to be restrained is merely indecent, although it may not be immoral. Decency is a wider term than morality, and indecent is possibly not merely obscene. Rajmannar J. observed:

“In one sense there is a certain amount of overlapping in the qualities described as indecent and obscene. But it is possible to give instances of words or representations which are indecent without being obscene”. 97

Hence, a restriction in the interests of decency or morality may include more than is meant for restraining obscenity. But there is no decided case to show that indecency as a concept wider than obscenity has been accepted as ratio decidendi in this country. The Supreme Court, in *Ranjit v. State of Maharashtra*, 98 adopted the test of obscenity, as laid down, in *R. v. Hicklin*, by Cockburn C. J. who had said 99:

“... the test of obscenity is this, whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such

immoral influences, and into whose hands a publication of this sort may fall."

**Contempt of Court**: Independent and efficient working of justice according to law postulates the maintenance of the dignity of the courts and the judges. The right to freedom of speech and expression is no plea to commit contempt of the court, which, generally, includes any conduct that tends to bring the administration of justice into disrepute or interfere with the proper discharge of judicial function or due course of justice.\(^{100}\) In *State v. Ram Chander*,\(^{101}\) the Punjab High Court said:

"... maintenance of dignity of the Courts is one of the cardinal principles of rule of law in a free democratic country. No Court can look with equanimity on a publication which may have tendency to interfere with the administration of justice."

"Contempt of court" has not, however, been defined by the Constitution, the General Clauses Act, or any other enactment in this regard, and as the Patna High Court said, in *Das Gupta's Case*,\(^{102}\) this was not considered necessary because of the acceptance in India of the English common law meaning of this expression, which gives a wide scope for its application within the scheme of the Constitution. But it is also recognised that as a highly powerful and flexible weapon it should be sparingly used, and mere legitimate criticism of the judiciary should not be muted.

The power of the Indian courts to punish for contempt is to be found in articles 129 and 215 of the Constitution, sections 175 to 180 and 228 of the Indian Penal Code, and the Contempt of Courts Act, 1952. Under this 1952 Act, the High Court has very wide powers to punish for contempt of itself or for courts subordinate to it, including tribunals.\(^{103}\)

**Defamation**: The Preamble aims at ensuring, *inter alia*, the dignity of the individual, and the gist of defamation is an

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\(^{100}\) *R. v. Carey*, (1900) 2 Q.B. 36.

\(^{101}\) *State v. Ram Chander*, A.I.R. 1959 Pun. 41.


injury to a man’s reputation. Defamation is thus a proper ground for imposing restrictions on the right to freedom of speech and expression, and for this purpose it embraces both oral and written matters, that is, the distinction between defamation and libel is not material for this purpose.\textsuperscript{104}

Defamation raises both civil and criminal liabilities. The Indian law relating to civil defamation is based on the English common law principles, but the offence of criminal defamation is to be found in sections 499 and 500 of the I.P.C., and these laws are constitutionally valid restrictions on the freedom of speech and expression.

**Incitement to an Offence:** Incitement to an offence as a ground for imposing restrictions on the freedom of speech and expression is an aspect of the ground of public order in general. Accordingly, sections 107 and 117 of the I.P.C. impose valid restrictions on the freedom of speech and expression. However, merely, “an instigation to break a law”, without anything else, is not to be treated as an incitement to an offence in a democratic society.\textsuperscript{105}

**SOME SPECIFIC FORMS OF FREEDOM OF EXPRESSION**

**Freedom of the Press:** Amazements were expressed by some members in the Constituent Assembly at the “glaring omission” of the freedom of the press from the phraseology of article 19(1)(a), but Ambedkar effectively met the criticisms by pointing out that freedom of the press included nothing more than the freedom of speech and expression of individual citizens.\textsuperscript{106} The Supreme Court, in *Romesh Thappar’s Case*, also felt that

“there can be no doubt that freedom of speech and expression includes the freedom of propagation of ideas and that freedom is ensured by the freedom of circulation.”\textsuperscript{107}

“Thus”, as the Press Commission said, “freedom of the Press, particularly of newspapers and periodicals, is a species

\textsuperscript{105} Ram Manohar Lohia’s Case, op. cit.
\textsuperscript{107} *Romesh Thappar’s Case*, op. cit.
of which the freedom of expression is a genus".\textsuperscript{108} And the freedom of the press in the widest sense is the freedom to publish any written, or otherwise documented, matter\textsuperscript{109} and circulate it among the public.\textsuperscript{110} Freedom of the press has thus two cognate elements: (i) the freedom of publication and (ii) the freedom of circulation. None of these can be restricted except as is absolutely necessary for the preservation of the society.\textsuperscript{111} And for this purpose the state is competent to impose restrictions on the press as much as on individual citizens.

The freedom of the press has been assigned a place of pride in the scheme of the Constitution in a recent judgment of the Supreme Court in \textit{Bennett Coleman and Others v. Union of India}.\textsuperscript{112} This case arose out of a challenge to the Union Government's newsprint policy for 1972-73. The Union Government, in the exercise of its powers under the Essential Commodities Act, 1947, first issued the Import Order, 1955, for regulating the import of newsprint. Then the Newsprint Control Order, 1962, was framed within the terms of section 3 of the Essential Commodities Act, 1947, which authorised the Government to frame regulations for controlling and prohibiting production, supply, distribution and trade and commerce in paper, including newsprint. The newsprint policy for 1972-73 was declared in pursuance of this 1962 Order.

Basically, four requirements of the 1972-73 newsprint policy were challenged: first, that a person owning more than one newspaper could not start a new paper or a new edition of any of his papers; second, that the number of pages in a newspaper could not be more than 10; third, that allotted newsprint could not be interchanged between different newspapers even under the same ownership; and fourth, that papers with less than 10 pages were to have a 20% increase in their page number, provided it did not exceed the ten-page limit. The policy was challenged as an unreasonable restriction on the right to

\begin{footnotesize}
\begin{enumerate}
\item[111] \textit{Express Newspaper's Case}, op. cit.
\item[112] \textit{Bennett Coleman and Others v. Union of India}, The Statesman, Calcutta, October 31, 1972.
\end{enumerate}
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freedom of speech and expression under article 19(1)(a) as also discriminatory within the meaning of article 14.

The Supreme Court affirmed that the freedom of the press is a vital aspect of the freedom of speech and expression as contained in article 19(1)(a). It is "an ark of covenant" in a democratic country; it is a palladium of free and open society. By its nature, the Court felt, the freedom of the press is both qualitative and quantitative. This freedom is in respect of both the content and circulation, because the one without the other is meaningless in practice. The Court concluded that the newsprint policy for 1972-73 constituted an unreasonable restriction on the freedom of the press, because it sought to indirectly and unduly curtail the freedom of circulation of newspapers. The policy was also held to be discriminatory within the terms of article 14. Accordingly, by a majority judgment, the Court struck down the impugned policy as unconstitutional.

Censorship of Newspapers: Normally, pre-censorship of newspapers and publications is not considered reasonable, but, as held in Brij Bhusan's Case,\textsuperscript{113} circumstances may justify the imposition of pre-censorship regulations. This position was affirmed in Virendra v. State of Punjab.\textsuperscript{114}

Requirement of Licence and Registration: The press may also be asked to take out licences or get its publications registered before exercising its right to freedom of speech and expression. The state may also validly require the disclosure of the names of the printers, publishers and editors in regard to published matters.

Requiring Security: Security for keeping good behaviour may also be demanded from the press as from individual citizens, because the freedom of the press is a part of the freedom of speech and expression of the people.

Advertisement: Advertisement is a recognised mode of expression. But a distinction is drawn between an advertisement for the purpose of expressing ideas and views and a

\textsuperscript{113} Brij Bhusan's Case, op. cit.
\textsuperscript{114} Virendra's Case, op. cit.
purely commercial advertisement. In *Hamdard Dawakhana’s Case*, the Supreme Court held that an advertisement for purely commercial purposes did not fall within the right to freedom of speech and expression in article 19(1)(a).

**Regulation of Mail and Telephonic Message and Censorship of Correspondence:** It is competent for the state to impose any scheme for regulating mails and censoring correspondence to see that individual activities do not imperil the needs of security of the state, public order or decency or morality. Accordingly, section 5 of the Indian Telegraph Act, 1885, and sections 19 to 23 and 26 of the Indian Post Office Act, 1898, are valid laws imposing restrictions on the right of circulation or dissemination of news and views. So is section 11 of the Customs Act, 1962, which seeks to forbid import and export of certain specified materials. However, telephone tapping is *prima facie* bad, but there may be extenuating circumstances to justify it in particular cases.

**Distribution of Literature and Handbills and Canvassing and Soliciting Business:** Distribution of literature and handbills and canvassing for and soliciting business in public and private places are part of the freedom of speech and expression, but they can always be made subject to reasonable restrictions by the state, in certain cases even amounting to total prohibition.

**Public Speeches and Processions:** Public speeches and processions are also recognised forms of giving expression to the ideas and feelings of the persons concerned. But the state has also the power to regulate these matters by licensing or requirement of previous permission. In certain cases, public speeches and processions may also be totally banned without violating the Constitution.

**Demonstrations, Picketings and Strikes:** Demonstrations, picketings and strikes are also deemed to be the legitimate means of expressing one’s opinions, feelings and demands. But whereas demonstrations and picketings are deemed to be part

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of the freedom of speech and expression in article 19(1)(a), there is no fundamental right to strike within the meaning of this article. In any case, there cannot be the right to commit violence or cause apprehensions for breach of the peace or obstruct others from lawfully exercising their own rights. Accordingly, gherao is bad in law and section 7 of the Criminal Law Amendment Act, 1932, validly provides as follows:

(1) Whoever—
(a) with intent to cause any person to abstain from doing or to do any act which such person has a right to do or to abstain from doing, obstructs or uses violence to or intimidates such person or any member of his family or person in his employ, or loiters at or near a place where such person or member or employed person resides or works or carries on business or happens to be, or persistently follows him from place to place, or interferes with any property owned or used by him or deprives him of or hinders him in the use thereof, or
(b) loiters or does any similar act at or near the place where a person carries on business, in such a way and with intent that any person may thereby be deterred from entering or approaching or dealing at such place,
shall be punished with imprisonment for a term which may extend to six months, or with a fine which may extend to five hundred rupees or with both . . . ."

Cinematograph, Radio, Television and Loudspeaker: Censorship of cinematograph films, licensing cinema houses, radios and television sets are legitimate restrictions on the media of exercising the right to freedom of speech and expression. This principle applies to any other mechanical device, such as the loudspeakers, used for communicating ideas.

Since in India there is no private system of broadcasting or telecasting, the question of their licensing does not arise at present. But if such private units grow up in future, they would be subject to licensing and censorship regulations.

119 Indulal’s Case, op. cit.
Dramatic and Theatrical Performances: Dramatic and theatrical performances are also the means of exercising the right to freedom of speech and expression and they are subject to licensing and censorship. Of course, these restrictions must be reasonable within the meaning of article 19(2).\textsuperscript{120}

Freedom of Speech and Expression of Public Servants: A person in public employment does not lose his fundamental right to freedom of speech and expression accruing to him under article 19(1)(a) as an Indian citizen. However, consistently with the requirements of integrity and discipline in the services, the state is competent to impose reasonable restrictions on his this right. Thus, a Government servant may validly be interdicted from publicly criticising a policy or an action of the Government.\textsuperscript{121}

THE RIGHT TO ASSEMBLE: CLAUSES (1)(b) AND (3) OF ARTICLE 19

The right to assemble, to gather, to meet, to come together, at any time and place with a common objective is a right cognate to the right to freedom of speech and expression in the context of man’s social existence. It is basically derived from human sociability and is an essential condition of effective democratic living.\textsuperscript{122} Denning says:

“If men are ever to be able to break the bonds of oppression or servitude, they must be free to meet and discuss their grievances and to work out in unison a plan of action to set things right”.\textsuperscript{123}

SCOPE OF THE RIGHT TO ASSEMBLE

What article 19(1)(b) of the Constitution of India guarantees to every citizen is “the right to assemble peaceably and without arms”. Consequently, the citizens are free to assemble, to meet together, for exchange of ideas or for taking any action, or for any other common object, but they must assemble peace-

\textsuperscript{120}State v. Baboolal, A.I.R. 1956 All. 571.

\textsuperscript{121}Chacko v. State of T.C., A.I.R. 1957 Ker. 7.


\textsuperscript{123}Denning, Lord: Road to Justice, London, 1955 ; p. 98.
ably and without arms, i.e., in a peaceful and orderly manner and unarmed. The object of the assembly must not also be unlawful. The right to assemble includes, however, the negative right not to assemble, but the state is under no obligation to provide conditions for an effective exercise of this right.

Right to Bear Arms: An Indian citizen has no right to carry to, or bear arms at, any meeting or assembly even if he is a licensed owner of arms. And even in the context of national defence and security he has at best the duty to bear arms, but has never the right to do so unless specifically authorised by law to that effect. He, however, enjoys the limited right of armed self-defence in appropriate cases.

LIMITATIONS ON THE RIGHT TO ASSEMBLE

The fundamental right to assemble is thus the right to assemble only peaceably and without arms, and for lawful purposes. It is not an absolute right. The right in clause (1) (b) of article 19 is further subject to the limitations contemplated by clause (3) of the article, which saves the operation of any existing or future law seeking to impose reasonable restrictions on this right in the interests of "the sovereignty and integrity of India" or "public order".

The expressions "the sovereignty and integrity of India" and "public order" have already been commented upon in the context of the right to freedom of speech and expression, and evidently, the general principles governing a right and the restrictions thereon in article 19 set out in detail earlier apply also to the right to assemble and the restrictions on it. "Restriction" in this case also includes total prohibition in a particular situation. But in all cases a restriction on the right to assemble "in the interests of the sovereignty and integrity of India or public order" must, in the circumstances of the case in hand, be reasonable both from substantive and procedural angles and it must also be proportionate and proximate.

The Issue of Unlawful Assembly: The requirement is that an assembly must not be unlawful only at the initial stage but also at its all subsequent stages of progress. This means that an assembly initially lawful may become unlawful due to any
supervening factor. Chapter VIII of the I.P.C. lays down the conditions which make an assembly unlawful, of which section 141 specifies the common objects for which any assembly of 5 or more persons is unlawful. Section 127 of the Cr. P.C. authorises the magistrate or the police to order the dispersal of not only an unlawful assembly, but also a lawful assembly "if it is likely to cause a disturbance of the peace". A violation of such an order is punishable under section 151 of the I.P.C.

Then there is section 144 of the Cr. P.C. under which a magistrate may prohibit any assembly, meeting or procession, otherwise lawful, if there is a "risk of obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray". Similarly, section 107 of the Cr. P.C. empowers the magistrate to require a person to furnish security for keeping the peace if he is "likely to commit a breach of the peace".

Evidently, there can be no prima facie objection to these provisions of the I.P.C. or the Cr. P.C. including any provision of these and other laws vesting discretionary powers in an administrative authority to impose restrictions on the right of assembly on his subjective satisfaction. But the crux of the matter is that an otherwise lawful assembly may be declared unlawful for no fault of the persons participating in the assembly because of the apprehension of a breach of the peace. And Chafee's comments on the issue are worth noting:

"The breaches of the peace theory is peculiarly liable to abuse. It makes a man criminal simply because his neighbours have no self-control, and cannot refrain from violence". 124

SOME SPECIFIC FORMS OF ASSEMBLY

Public Meetings: Generally speaking, public meetings are the meetings which have as their object the discussion of matters of public interest. The Constitution, however, does not specifically speak of the right of public meetings, but this right is a corollary to the right to freedom of speech and expression and is implicit in the right to assemble. The citizen has, then, the fundamental right of public meetings as a part of the right to

assemble peaceably and without arms guaranteed to him by article 19(1) (b). But this right of public meetings does not include, however, the right to hold such meetings on the property of another person without his permission.  

The right to hold public meetings, being a part of the right to assemble peaceably and without arms, is subject to the restrictions to which the right to assemble is itself subject. A public meeting must be peaceful and orderly and it must be for lawful purposes. It should not also turn into a riotous or unlawful assembly. In re Annadurai,

it was held that section 41 of the Madras City Police Act, 1888, was valid so far as it authorised the Commissioner of Police to pass an order prohibiting public meetings, an order which by convention had been kept limited to only 14 days at any time. Similarly, section 37 of the Bombay Police Act, 1951, and section 14 of the U.P. Opium Smoking Act, 1934, have been upheld as valid. Sections 126 and 127 of the Representation of the People Act, 1951, sections 127, 141 and 151 of the I.P.C. and sections 107 and 144 of the Cr. P.C. likewise impose reasonable restrictions on the right to hold public meetings. But a blanket order prohibiting any meeting "in any place of public resort" in a city may be bad.

The Prevention of Seditious Meetings Act, 1911: The Prevention of Seditious Meetings Act, 1911, which defines a public meeting as a "meeting which is open to the public or, any class or portion of the public", empowers the District Magistrate or the Commissioner of Police to prohibit any public meeting in any "proclaimed area", "if, in his opinion, such meeting is likely to promote sedition or disaffection or to cause disturbance of public tranquility". This is a valid Act, although in view of the Supreme Court decision, in Kedar Nath's Case, the words "sedition or disaffection" in its section 5 need now a narrow construction.

Processions: The right to take out a procession is also not specifically mentioned in the Constitution. In Gopal Charan v.

126 In re Annadurai, A.I.R. 1959 Mad. 63.
Daitary Nandy,\textsuperscript{129} it was considered to be a fundamental right. It may be said to follow from the right to assemble in sub-clause (b) and the right to move freely throughout the territory of India in sub-clause (d) of article 19(1), although it may also involve the right to freedom of speech and expression in sub-clause (a) thereof.

Thus, the right to take out processions is a fundamental right. It has nothing to do with custom\textsuperscript{130} or religion,\textsuperscript{131} and it is subject to the restrictions to which the right to assembly, the right to freedom of movement and even the right to freedom of speech and expression in article 19(1) are subject. The Police Act, 1861, authorising a police officer to direct the conduct of and prescribe the route and time for any procession, or meeting, imposes a valid restriction. So is its requirement to obtain prior permission or a licence for such a purpose. Similar provisions of the Bombay Police Act, 1951, and the Madras City Police Act, 1888, are valid. The provisions of the I.P.C. and the Cr. P.C. relating to unlawful assembly and public nuisance are also reasonable in this context. But the mere fact that a magistrate feels that he would be powerless against oppositionists can possibly be no ground for restraining a lawful procession.\textsuperscript{132} Restriction in this context may include even total prohibition,\textsuperscript{133} although the reasonableness of such a total ban is to be judged with reference to the exigencies of the situation, and a total ban on all processions within a municipal area without any limitation may be invalid.\textsuperscript{134}

Agitations, Demonstrations and Picketings: Agitations, demonstrations and picketings are recognised forms of freedom of speech and expression. But these may also involve the right to assemble in appropriate cases and are, consequently, subject to restrictions which apply to the right of assembly.

Strikes and Gheraos: Strikes and gheraos are manifestly the methods which are not protected by the right to freedom

\textsuperscript{130} Martin & Co. v. Faiaiz, (1943) 48 C.W.N. (P.C.) 397.
\textsuperscript{131} Manzur v Zaman, (1924) 29 C.W.N. (P.C.) 486.
\textsuperscript{132} Subhaya v. Faluundin, (1926) 101 I.C. 893.
\textsuperscript{133} Manjooran v. State, A.I.R. 1954 T.C. 47.
\textsuperscript{134} Motilal v. Emperor, A.I.R. 1951 Bom. 300.
of speech and expression, nor are they covered by the right to assemble.

Public Servants’ Right to Assemble: Public servants are entitled to the fundamental right to assemble peaceably and without arms, although their this right may be subjected to a greater degree of restraint by putting a liberal interpretation on the expression “public order” for the purposes of maintaining discipline in the services. But a total prohibition on a Government servant, like the one in Rule 4A of the Bihar Government Servant Conduct Rules, 1956, from participating in any demonstration in connection with any matter pertaining to the condition of his service is not a good law.\(^{135}\)

THE RIGHT TO FORM ASSOCIATIONS AND UNIONS: CLAUSES (1) (c) AND (4) OF ARTICLE 19

Like the right of assembly the right of association also has the solid foundation of the fact of human social existence, but unlike the former the latter “presupposes organisation and a relation of permanence between the persons”.\(^{135a}\) Like an assembly an association is also a human collectivity, but the latter is characterised by a more organised and enduring relationship among the persons and a course of co-operative action extending far beyond any single act.

The value of the right of association should be evident if it be realised that the proposition that man is a social animal has, now, the core content that an individual’s personality is unintelligible save in the context of the numerous voluntary associations in which he lives his life. Indeed, the society is, today, essentially pluralistic.

The voluntary associations are, in modern times, so numerous, diverse and powerful that the political proposition “man versus the state” has really turned into “groups versus the state”, and in fact, they form the lifeline of the entire democratic process in a country. Political parties are voluntary associations \textit{par excellence}.

\(^{135a}\) See Willis: Constitutional Law of the United States, op. cit.
SCOPE OF THE RIGHT OF ASSOCIATION

Article 19(1) (c) guarantees to all citizens "the right to form associations or unions". Obviously, the word "associations" is by itself capable of conferring on a citizen the widest conceivable right to form associations for any lawful purpose whatsoever. It seems that the word "unions" has been added by way of abundant caution and it adds nothing to what a citizen could have got by the use of the word "associations" only.

A citizen's freedom of association connotes, then, his freedom to form any association for any lawful purpose. And this freedom to form an association is not confined to the inceptive act of association but is also the right to the continued existence of the association. The right to form an association also includes the negative right of not forming or joining an association.

But the right conferred by article 19(1) (c) relates to only the formation and continuation of an association and has no reference to the objects of an association or activities of its members, which may be subjected to restrictions on other appropriate grounds, or which are not treated as fundamental rights. The guarantee of this right does not also carry the guarantee for an effective exercise of the right of association or the fruition of its objects. Nor does it include the right of association conferred by a particular enactment. There does not also seem to be the fundamental right to form secret societies.

Again, the fundamental right to form an association does not imply the right to recognition by the Government.

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However, the requirement of recognition, or a precondition for recognition, is an issue to be taken into account in considering whether it renders the fundamental right to association illusory, because in certain cases it may strike at the very root of the right of association and render it meaningless.\textsuperscript{143}

RESTRICTIONS ON THE RIGHT OF ASSOCIATION

The right of association or union contained in clause (1) (c) of article 19 is not absolute. It is subject to the restrictions contemplated by clause (4) of that article. This clause (4) provides for reasonable restrictions “in the interests of the sovereignty and integrity of India or public order or morality.” These grounds for imposing restrictions on the right to form an association or union have already been explained in the context of the right to freedom of speech and expression.

The general principles governing the requirement of a restriction to be reasonable have also been dealt with earlier and none of them needs to be elaborated here. But it should be noted that in consideration of the objects or activities of an association, the right of association may become, in practice, subject to other appropriate restrictions contemplated by clauses (2) to (6) of Article 19, or even by other relevant articles of the Constitution. In All India Bank Employees’ Association’s Case,\textsuperscript{144} the Supreme Court said:

“While the right to form a union is guaranteed by sub-cl. (c), the right of the members of the association to meet would be guaranteed by sub-cl. (b), their right to move from place to place within India by sub-cl. (d) . . . and so on—each of these freedoms being subject to such restrictions as might properly be imposed by Cls. (2) to (6) of Article 19 as might be appropriate in the context.”

The state has, then, the power to impose restrictions on the right of association and to regulate the formation and working of associations and unions. Numerous statutes, such as the Companies Act, Cooperative Societies Act, Societies Registration


\textsuperscript{144} All India Bank Employees’ Association v. N.I. Tribunal, A.I.R. 1962 S.C. 171.
Act, and Trade Unions Act, have been passed by the state in the exercise of this power to regulate and impose restrictions on associations or unions.

The Issue of Lawful Purpose: The requirement is that the purpose for which an association is formed and continued in existence must be a lawful purpose. This implies that both the means and the end adopted by an association must be lawful. It is on this view of the matter that section 120B of the I.P.C. is deemed to be a good law. It is also on this view that a secret watch on a suspect to record the nature and extent of his association with other persons does not violate article 19(1) (c). This view also sustains the banning, prohibition or dissolution of an association whose purposes are subsequently declared as illegal by a valid law.

Restrictions Imposable on the Subjective Satisfaction of the Executive: Prima facie, as laid down in State of Madras v. V. G. Row, the leading case on the right to form associations, a restriction to be imposed on the right of association on the subjective satisfaction of the executive is unreasonable. Patanjali Sastri C.J. observed:

"The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields that the vesting of authority in the executive government to impose restrictions on such right, without allowing the grounds of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry is a strong element, which in our opinion, must be taken into account in judging the reasonableness of the restrictions imposed . . . The formula of the subjective satisfaction of the Government in Article 22 may be viewed as reasonable in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights."

SOME SPECIFIC FORMS OF RIGHT OF ASSOCIATION

Employees' and Trade Unions: Article 19(1) (c) expressly recognises the right to form unions, and employees or trade unions are a species of this genre. These labour and employees' unions generally aim at conserving the interests and ameliorating and improving the condition of the working classes, and

all sections of labour or employees have the fundamental right to form trade unions. The state may, however, impose restrictions on this right, but they must not be unreasonable.

In Ramkrishnaiah v. President, the requirement that an elementary school teacher could be a member of only an officially approved teachers’ union was struck down as bad, although it may be a good law to require a primary school teacher to seek the permission of the authorities before engaging in political activities. Similarly, section 4B of the Central Services (Conduct) Rules, 1955, forbidding Central public servants from joining any service association not recognised by the Government was also held invalid.

But, as held in Kulkarni’s Case, the right to form a trade union does not include the right of every union to represent the workers, and hence the requirement that a union representing, say, at least 15% of the workers would alone be recognised for the purposes of conciliatory or adjudicatory proceedings relating to industrial disputes is valid.

Again, although there may not be a legal right to admission to a particular trade union, the exclusion of a member from a trade union must be in accordance with its rules. Besides, a trade union cannot insist on having a non-union person excluded from employment, nor can it compel a person to be its member.

Collective Bargaining and Strikes: Although collective bargaining is the key activity of trade unions and this may exist as a statutory or ordinary right, it is not treated as a fundamental right. There is also no fundamental right to strike. In All India Bank Employees’ Association’s Case, Ayyangar J. said for the Supreme Court:

“... even a very liberal interpretation of sub-cl. (c) of Cl. (1) of

Art. 19 cannot lead to the conclusion that the trade unions have a guaranteed right to an effective collective bargaining or to strike”.

Employers’ and Businessmen’s Combines: The fundamental right of association also accrues to employers, industrialists and businessmen to form their own associations, and chambers to protect and further their interests. Their this right is subject to the general propositions stated above in regard to the general right of associations and unions under article 19(1) (c) within the terms of article 19(4).

Collective Bargaining or Lock-out. What applies to collective bargaining or strikes by employees’ unions also applies to collective bargaining or lock-outs by employers’ combines, because in All India Bank Employees’ Association’s Case,153 Ayyangar J. went on to add:

"The right to strike or the right to declare a lock-out may be controlled or restricted by appropriate ... legislation, and the validity of such legislation would have to be tested not with reference to the criteria laid down in Cl. (4) of Art. 19 but by totally different considerations.”

Government Servants’ Right of Association: The principle is that Government servants have the right of association like any other section of citizens. But in actual operation this proposition gets constricted from the inherent nature of the tasks they have to perform and in the interests of their efficiency and discipline. Thus in P. Balakotiah v. Union of India,154 in which the validity of Rules 3 and 7 of the Railway Service (Safeguarding of National Security) Rules, 1949, were impugned as violative of article 19(1) (c), the Supreme Court said:

"The orders (of dismissal from service) do not prevent them (the appellants) from continuing to be Communists or trade unionists. The appellants have no doubt a fundamental right to form associations under Art. 19(1) (c), but they have no fundamental right to be continued in employment by the State ...”

However, the requirement of Rule 4B of the Central Services (Conduct) Rules, 1955, that a Central Government

153 Ibid. Italics are mine.
servant cannot join an unrecognised service association was held invalid in *O. K. Ghosh v. E. X. Joseph.* In the same case Rule 4A of these 1955 Rules, in so far as it prohibited any demonstration by public servants was invalidated. But there is no fundamental right to strike in any case.

THE RIGHT TO MOVE FREELY THROUGHOUT THE TERRITORY OF INDIA: CLAUSES (1) (d) and (5) OF ARTICLE 19

Taken *simpliciter*, the right to move freely implies the competence of a person to remove himself bodily at will from one place to another. It is the freedom of the movement of the body and not belongings or goods. It has reference to physical locomotion, and is thus an aspect of the right to personal liberty or liberty of the person. The freedom to move about from one place to another, as a visible aspect of freedom, is deemed so necessary a part of human personality that, invariably, its deprivation is conceivable only as preventive or punitive measures, situations separately dealt with under articles 21 and 22 of the Constitution.

The right to move freely means positively the right to move into a place and negatively not to move to or from a place. In its amplitude it has, at least three dimensions. In means, first, the freedom of a citizen to move within his country from one place to another. Secondly, it involves his freedom to move out of his country to a foreign country. Thirdly, it implies his freedom to move back into his country from any place outside it. It has yet another aspect. It, perhaps, also includes the right not to be expelled out of one’s own country.

**SCOPE OF THE RIGHT TO MOVE FREELY THROUGHOUT THE TERRITORY OF INDIA**

What article 19(1) (d) of the Constitution confers on an Indian citizen is “the right to move freely throughout the territory of India”. Thus phrased the right to move freely in article 19(1) (d) has been interpreted to denote merely the freedom of a citizen to move from one part of the country to

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another without discriminatory barriers. To a citizen, for the purpose of his moving about at will, the whole country is a single entity and its administrative sub-divisions do not constitute any barrier against his free movement throughout the country.

To Move Freely: The right to move freely means the freedom to move as well as not to move. It is essentially of a physical nature and refers, in the scheme of the Constitution, to only one aspect of the right to free movement as commonly understood, viz., the right to move freely inside the country. The right to take out processions, as noted earlier, is an element of this general right of free movement. And in view of the Supreme Court decision, in Abdul Rahim's Case, it possibly also includes the right not to be expelled from India, except when a person has lost his Indian citizenship in accordance with a law made by Parliament. The other two aspects of the right to move freely is not covered by article 19(1)(d). They can possibly come only under article 21.

Throughout the Territory of India: It is from the expression “throughout the territory of India” that the right to freedom of movement in article 19(1)(d) is said to receive its real meaning. The real emphasis is on free movement throughout the territory of India and not on mere free locomotion as an incidence of the freedom of the person. The expression “throughout the territory of India” also operates to exclude the other two aspects of the freedom of movement as widely conceived. And “territory of India” is to be ascertained with reference to article 1.

RESTRICTIONS ON THE RIGHT TO MOVE FREELY

The citizen’s “right to move freely throughout the territory of India” in clause (1)(d) of article 19 is subject to restrictions contemplated by clause (5) of that article. Under

this clause (5), the state may impose reasonable restrictions “in the interests of the general public or for the protection of the interests of any Scheduled Tribe” on a citizen’s right of free movement. Evidently, the broad principles governing the reasonableness of restrictions applicable to the other rights of article 19(1) discussed above apply also to the right to freedom of movement.

Grounds for Imposing Restrictions: But instead of specifically enumerating the grounds for imposing restrictions on the right to freedom of movement, clause (5) of article 19 uses the omnibus expression “in the interests of the general public”, which, supplemented with a more explicit expression “for the protection of the interests of any Scheduled Tribe,” invests the executive and the legislature with a wider discretion in imposing restrictions and also casts on the judiciary an increased burden of determining in each case the exact ambit of the interests of the general public.

“In the Interests of the General Public”: The omnibus expression “in the interest of the general public” is a wide, flexible and elastic expression to cover diverse conditions under which restrictions may be imposed on the freedom of movement. It is wide enough to cover not only the negative elements of public security, public order or positive elements of public morality169 or health but also progressive elements of public policy and public good, including a legislation for implementing the Directives.162 Precisely, the expression “in the interests of the general public” means “for public purposes.”

“For the Protection of the Interests of any Scheduled Tribe”: The express mention of the protection of the interests of any Scheduled Tribe as a ground for imposing restrictions on the freedom of movement is to be understood in the context of the backwardness, exclusiveness and simplicity of the Scheduled Tribes due to historical reasons, and a legislation to protect their interests may include the preservation of the cultural and other peculiarities of any Scheduled Tribe.

Some Forms of Restrictions: Restrictions on the freedom of movement of a citizen may take numerous forms. He may be externed from an area or he may be interned in a locality. He may also be excluded from entering into an area or locality altogether or his entry into, or departure from, an area or locality may be made subject to express authorisation, permit or pass.

Externment from an Area: Externment from an area, say, from the limits of a city or district, is permissible. Thus, externment orders under section 27(1) of the City of Bombay Police Act, 1902, and sections 56 and 57 of the Bombay Police Act, 1951, were held valid.\textsuperscript{163} But an order under the Central Provinces and Berar Goondas Act, 1946, as amended in 1950, was held void for want of necessary safeguards and precision.\textsuperscript{164} Externment under section 20 of the Suppression of Immoral Traffic in Women and Girls Act, 1956, is also valid.\textsuperscript{165}

Externment from a State: Externment from the entire area of a State may be reasonable depending on the circumstances of a case. Externment of a person from even his home State may be valid.\textsuperscript{166} However, it seems that such an externment order coupled with an order to reside only in a specified area, particularly when the climate and conditions of the area are not suitable for the person, may not be deemed reasonable.\textsuperscript{167}

Externment from India: Externment of a citizen from the country is not valid unless he has, prior to externment, lost his Indian citizenship, even if this externment be for the breach of any condition attached to a permit for his entry into the country.\textsuperscript{168} However, the rendition of a person under an extradition treaty is not expulsion from India.\textsuperscript{169} So is not the handing over of an abducted person.\textsuperscript{170}

\textsuperscript{166} Khare's and Kaushalya's Cases, op. cit.
\textsuperscript{169} In re Chockalingam, A.I.R. 1960 Mad. 548.
Internment, or Direction to Reside, in an Area: Internment in an area, or the direction to reside in an area, is aimed at containing the movements of a person to a locality either to limit his activities or to keep a watch on his activities, and such orders are deemed reasonable in the context of specific situations. These cases resemble the orders for preventive detention, but are distinguishable on the ground that they do not fall under any law specifically providing for preventive detention within the meaning of article 22. Thus, provisions in this behalf in the Suppression of Immoral Traffic in Women and Girls Act, 1956, Madras Restrictions on Habitual Offenders Act, 1948, and Police Act, 1861, have been held valid.\(^{171}\)

Regulation of Entry by Permit, Passes, and the Like: It is reasonable to restrict the entry of a citizen even into a public place.\(^{172}\) The entry of a citizen into the country from outside the country may also be restricted.\(^{173}\)

Restrictions Imposable on the Subjective Satisfaction of the Executive: It is not ipso facto unreasonable to provide that restrictions on the freedom of movement shall be imposed on the subjective satisfaction of the executive, because such restrictive measures are of an extraordinary nature. But in judging the reasonableness of such a legislation, the court may, and does, take into account the object and phraseology of the statute, the status of the administrative authority, the requirement to furnish grounds, the opportunity to make representation, the scope for administrative or judicial appeals or reviews, and the like.\(^{174}\)

\textbf{ARTICLE 19(1) (d) AND SOME OTHER ARTICLES}

Article 19(1) (d) and Articles 5 and Articles 301 and 302: Article 19(1) (d) is in the spirit of article 5 which establishes single citizenship for India. This article is also comparable to


\(^{173}\) Ebrahim's Case, op. cit.

\(^{174}\) Khare's and Baldeo's Cases, op. cit.
articles 301 and 302 whereby freedom of trade and intercourse throughout the country is ensured and Parliament alone is empowered to impose restrictions on this freedom.

Article 19(1)(d) and Articles 21 and 22: Article 19(1)(d), which guarantees to a citizen the freedom of movement throughout the territory of India, and articles 21 and 22, which deal with the deprivation of the personal liberty of any person, whether as a punitive or preventive measure, are delicately linked. And although in A. K. Gopalan's Case\textsuperscript{175} the exclusiveness of their respective provisions was emphasised, the balance since then seems to have turned in favour of increasingly recognising the significance of their relationship.\textsuperscript{176}

THE RIGHT TO RESIDE AND SETTLE IN ANY PART OF THE TERRITORY OF INDIA: CLAUSES (1)(e) AND (5) OF ARTICLE 19

The right to move freely throughout the country and the right to reside and settle in any part of it are concomitant rights. As operative concepts, indeed, neither is conceivable without the other. Generally, the freedom to move implies human body in motion, the freedom to reside and settle has reference to the body at rest.

SCOPE OF THE RIGHT TO RESIDE AND SETTLE

Article 19(1)(e) ensures a citizen “the right to reside and settle in any part of the territory of India” at will. “To reside” at a place means to stay at the place temporarily, and “to settle” in a place denotes to set up a permanent home or to have one’s domicile in the place. And the words “reside” and “settle” have been used conjunctively to cover all possible forms of living in any part of the country.

But what article 19(1)(e) confers on a citizen is the right of living and not the right of livelihood which is covered by article 19(1)(g). It is the right only to reside and settle in any part of the country without being subjected to any discriminatory treatment in this regard. The fundamental right to


\textsuperscript{176} See Chap. 15 below for further elucidation.
reside and settle is both positive and negative, and like the right to freedom of movement it is confined within the four corners of the country. The emphasis in this case also is on the freedom to reside and settle “in any part of the territory of India”, and it does not cover the cases of the transfer of any portion of disputed, or other territory, of India to a foreign country.  

This article does not also prevent the state from providing for the conferment of certain benefits on a person who has resided in a place for a specified period.

RESTRICTIONS ON THE RIGHT TO RESIDE AND SETTLE

The right to reside and settle at will in any part of India conferred on a citizen by clause (1) (e) of article 19 is subject to the same restrictions as is his right to move freely throughout the country, viz., in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Precisely, the relation between clauses (1) (e) and (5) of article 19 is the same as that between its clauses (1) (d) and (5). Consequently, the state is competent to impose reasonable restrictions on a citizen’s freedom to reside and settle in any part of the country in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

Thus, restrictions imposed on the residence of habitual offenders; orders on public women to leave a particular area and their removal from the area; and ex cernmen orders are valid restrictions on the right to reside and settle in any part of the country.

Re-entry into the Country from Abroad: It is also competent for the state to regulate or restrict the re-entry of an Indian citizen into the country by permit or passport. But a citizen who enters into the country under a permit or passport cannot, without losing or being deprived of his citizenship, be deported from India even for violating a condition attached to

177 See A.I.R. 1969 Delhi 64.
178 P. Arumugham’s Case, op. cit.
179 Kaushalya’s Case, op. cit.
180 Khare’s Case, op. cit.
the permit or passport, although he may be punished for such a violation.\(^{181}\)

THE RIGHT TO PROPERTY: CLAUSES (1) (f) AND (5) OF
ARTICLE 19

It is the concept of ownership that is the core of the right to property. It is, so to say, the proprietary right and not mere property right that is the heartland of the right to property. In its amplitude, however, the right to property includes any right in, or relating to, property, whether founded on or flowing from ownership or not.

The right to property is, thus, meaningful and can be fundamental, or even sacred, only in a society which, as Tawney called, is “acquisitive”, i.e., a society that subscribes to the ideology of liberalism, individualism or capitalism. It cannot possibly be deemed really fundamental in a society which says with Proudhon that all property is theft, i.e., a society that believes in the doctrine of socialism or communism, although even the constitution of a socialist country, like that of the U.S.S.R.,\(^{182}\) may declare:

“The personal property right of citizens in their incomes and savings from work, in their dwelling-houses and subsidiary husbandries, in articles of domestic economy and use and articles of personal use and convenience, as well as the right of citizens to inherit personal property, is protected by law.”

But in any case, a guarantee of the right to property can never imply a guarantee of the concept of the right to property, i.e., a guarantee that certain immutable elements would constitute the right to property at all times. Besides, like any other right, the right to property can only be a limited right.

THE SCOPE OF THE RIGHT TO PROPERTY

It is in this theoretical perspective that the right to property in article 19(1)(f) is to be viewed, because it was, perhaps, the awareness of this perspective that gave rise to controversies in the Constituent Assembly relating to the in-

\(^{181}\) Ebrahim’s Case, op. cit.

\(^{182}\) Art. 10, Constitution of the U.S.S.R.
clusion of the right to property in Part III of the Constitution. 183

What article 19(1)(f) confers upon a citizen is the right to property in its widest amplitude as "the right to acquire, hold and dispose of property." The words "acquire, hold and dispose of" figure conjunctively in this article, and together they embrace all possible forms of right in, or relating to, property, including the negative right of not acquiring, holding or disposing of property.

Acquire: The word "acquire" basically refers to the lawful acquisition of any property which is capable of lawful ownership, and includes gaining control over or bringing under possession any such property.

Hold: Although in an early case, the Nagpur High Court 184 put a restricted interpretation on the word "hold", there seems to be no reason for doing this. "To hold" means not only to possess lawfully, whether as an incident of ownership or not, but also to use and enjoy property, 185 although only lawfully. Thus, a house cannot be used as a brothel or gambling den, a national flag cannot be torn, or a copy of the Constitution cannot be burnt 186 under the cloak of the right to use and enjoy property.

The right to hold property also denotes the right to manage property, and includes the right to evict the tenant and enter into the possession of a building. 187 There is also the right to hold a fair on one's own land. But this right of management is incidental to proprietary right and cannot exist independently as a mere right of management. 188

Dispose of: "To dispose of" includes any lawful and volitional transfer of property by one person to another. It also includes the right to destroy one's property, unless prohibited

183 See below Chap. 19.
186 In re N. V. Natarajan, A.I.R. 1965 Mad. 11.
by law. However, the property to be disposed of in this context can mean only the property which is capable of being held or disposed of.

Property: The Indian Constitution and the laws of the land do not provide any general definition of the word "property" *simpliciter*. The Constitution does not define "property" at all and the General Clauses Act defines "immovable property" in section 3(26) and "moveable property" in section 3(36).

In a very broad sense, any right, or a bundle of rights, is property, whether capable of transfer or not. But in *Chiranjit Lal's Case*, it was observed that property in article 19(1) (f) referred only to property which was by itself capable of being acquired, held or disposed of. Consequently, a shareholder's right to vote at a company meeting or any other incidental right flowing from his holding a share was not property, unless, of course, law recognises it separately as property. And, then, in *Subodh Gopal's Case*, a distinction was drawn between abstract right and concrete right to property, and it was said that article 19(1) (f) denoted only the abstract right to property, the concrete right being covered by article 31. But the Supreme Court took a broad view of property, a view which is now firmly established, in *Lakshmindra Swamiar's Case*, and the present position may be stated as follows:

(i) The right to property in article 19(1)(f) includes both the abstract right and concrete right to property.
(ii) The right to property in article 19(1)(f) and that in article 31 are not necessarily mutually exclusive. Articles 19(1)(f) and 31(1) are interlinked, although articles 19(1)(f) and 31(2) are not.
(iii) Property in article 19(1)(f) includes both immovable and moveable properties.

Consequently, property in article 19(1)(f) includes, first, any immovable property, including easement, *profits-a-prendre,*

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180 See *Ashby v. White*, (1763) 2 Ld. Raym. 938.
or the like, that falls under section 3(26) of the General Clauses Act or section 3 of the Transfer of Property Act. Secondly, it includes any moveable property, including money and choses in action, that falls under section 3(36) of the General Clauses Act.

Thirdly, it includes a number of other rights over, or relating to, property or interests in property which the Supreme Court has recognised as property within the meaning of article 19(1) (f). Thus, the Court has held that even a precarious or temporary proprietary interest is property. But the interest of a quasi-permanent allottee of evacuee property is not property. The office of a mahant or sebait is property, but not the office of a mutwalli. Similarly, the right to manage property as a part of the right to hold property, including the right of a hereditary trustee, is covered by article 19(1) (f). But the right of bare management, such as the right of a custodian or trustee of any property, including the right to manage an educational institution, is not property.

Any incorporeal right, such as the right to institute a suit in a court for the recovery of one's claim, or the decree of a court, is property. Patent, copyright and every other thing of an exchangeable value is property. But an incorporeal right not capable of alienation apart from the corpus of the property is not property.

A business or an interest in a business, commerce or industry, or any material used in a business or industry.

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198 Lakshmindra Swamiar's Case, op. cit.
200 Amar Singh's Case, op. cit.
207 Dwarkadas's Case, op. cit.
is property. There can even be property in liquor. The goodwill of a business is also property. But there can never be a right to property in things which are not recognised by law as objects of property. Thus, there cannot be a right to property in smuggled goods.

It should be noted that article 19(1)(f) comes into play only when a lawful right to acquire, hold or dispose of property actually exists. It is not meant to cover a dispute relating to the title to any property in dispute. Similarly, if a right to property terminated before the Constitution came into force, it cannot be revived by virtue of this article which is meant to protect only existing and established rights in, or relating to, property.

Conversational Right as Property: The principle is that contractual rights are not fundamental rights, and consequently, a purely contractual right is not property. In Dwarkadas v. Sholapur Spg. and Wvg. Co., Das C. J., however, felt that benefits accruing to a person under a contract are property, a view that was assumed in the V. S. Rice and Oil Mills Case. Consequently, a merely personal right under a contract is outside article 19(1)(f), but an interest in a property arising out of such a contract is possibly within the ambit of this article.

The Issue of Lawful Objects of Property: The requirement is that there can be no property in unlawful things or things which are not recognised, or have ceased to be recognised, as capable of being objects of property. This means that a right to property in a particular object may cease to exist once the object ceases to be lawful or becomes derecognised. An interesting question in this context arises out of a right to an object which is otherwise lawful, but which is being used in an unlawful trade or business. The legal position in this regard

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208 State of Bombay v. F. N. Balsara, op. cit.
does not seem to be finally settled, although in *Rajindra Singh’s Case*,\(^{214}\) the Punjab High Court made very sweeping observations:

"... nothing can be the subject of property which is not recognised by law to be such and similarly, when law withdraws such recognition, a thing from which recognition is withdrawn ceases to be property."

**RESTRICTIONS ON THE RIGHT TO PROPERTY**

Evidently, this right to property in article 19(1)(f) is not absolute, and apart from the contemplation that there can be property only in lawful and recognised objects, clause (5) of article 19 provides that reasonable restrictions on the right to property in clause (1)(f) of this article may be imposed "in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

In article 19, what constitutes "the interests of the general public" in clause (5) in the context of the right to move freely throughout the territory of India under clause (1)(e) also applies to the right to property in clause (1)(f). Thus, for example, property of one person cannot be taken away, or interfered with, for the benefit of another person, without a dominant public purpose.\(^{215}\) This expression also includes the positive elements of public weal, prosperity and progress. Likewise, the protection of the interests of any Scheduled Tribe has the same connotation in the context of both sub-clauses (e) and (f) of article 19(1). And the principles concerning the requirement of a restriction to be reasonable, which are applicable to the other rights in article 19(1), also apply to the right to property in that article.

**Restriction Includes Total Prohibition:** Restriction in the context of the right to property in article 19(1)(f) also includes total prohibition, as in the case of other rights in article 19(1), but such a total prohibition must be reasonable in the circumstances of the case in hand. This total prohibition is, however, distinguishable from the cases of deprivation covered by article

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\(^{215}\) *Kochun’s Case, op. cit.*
31. But in the latter case also deprivation is now required to be reasonable and in the interests of the general public or for the protection of the Scheduled Tribes within the terms of article 19(5).\textsuperscript{216}

Restrictions Imposable on the Subjective Satisfaction of the Executive: The authorisation of the executive to impose a restriction on the right to property in article 19(1)(f) is not \textit{per se} unreasonable.\textsuperscript{217} But the courts insist that the delegation should not be excessive or arbitrary, \textit{sans} guiding principles or policies. The courts also insist on adequate safeguards in the form of vesting of powers in high officials, judicial approach, or provisions for appeals, revisions or reviews by higher administrative authorities or the judiciary. And, of course, any restriction imposed by the executive without the authorisation of a valid law is always indefensible.\textsuperscript{218}

\textit{SOME SPECIFIC FORMS OF RIGHT TO PROPERTY AND RESTRICTIONS THEREON}

Ceiling on Property: It is quite reasonable to impose ceiling on the ownership and holding of any property by a person. Ceiling on incomes, profits, rents, urban or rural property, and even total property-holding of a person may be imposed within the terms of article 19(5).

Agrarian Reforms and Land Utilization: It is competent for the state to introduce land reform measures like consolidation of agricultural holdings\textsuperscript{219} and imposition of ceiling on total land holding by an individual. The state may also regulate land utilization.

Protection to Tillers and Tenants: Laws may also be validly passed under article 19(5) to protect, say, the interests of share-croppers and other actual tillers of the soil. This may include protection against eviction\textsuperscript{220} or the option to purchase

\textsuperscript{216} Ibid.
\textsuperscript{219} Attar Singh v. Uttar Pradesh, A.I.R. 1959 S.C. 564.
tenanted property at statutory price.\textsuperscript{221} Protection of the interests of tenants includes fixation of reasonable rent.\textsuperscript{222}

**Debt Relief**: The Madras Debt Relief Act, 1938, was also considered to be a reasonable measure\textsuperscript{223} under article 19(5).

**Urban Land and Building Regulation and Rent Control**: Regulation of use of land and buildings in urban areas is valid, and this includes the approval of building designs and regulation of tenant-landlord relationship. Urban rent controls is also permissible.\textsuperscript{224}

**Eviction from Buildings**: Eviction from buildings, including government buildings, is also permissible. But there must be adequate procedural safeguards.

**Right of Pre-emption**: Pre-emption is a clog on the freedom to acquire, hold and dispose of property, but it is deemed to have a constitutional basis in article 19(5), although earlier, in *Bhanu Ram v. Baij Nath*,\textsuperscript{225} the Rewa State Pre-emption Act, 1946, was held invalid. In this case, the court based itself on the ground of general inconvenience and the real import of the enactment which, though apparently aiming at providing for pre-emption on the ground of vicinage, was really meant to prevent strangers, \textit{i.e.}, persons belonging to other religions, races or castes, from acquiring property in a particular area.

Thus, the reasonableness of the right of pre-emption in an urban area on the ground of vicinage may not be free from doubt. But even in the case of urban property, persons sharing the same staircase, or entrance, may reasonably enjoy the right of pre-emption.\textsuperscript{226} The right of pre-emption on the ground of vicinage in the case of agricultural property is valid. And in all cases of urban or rural property the right of pre-emption of a co-sharer is deemed reasonable.\textsuperscript{227}

\textsuperscript{223}Krishnamurthy \textit{v. Venkateswaran}, A.I.R. 1952 Mad. 11.
Religious and Charitable Endowments: The head of a Hindu religious institution, such as a mahant or a sebait, has property interests in his office, which are covered by article 19(1)(f). However, it is reasonable to impose restrictions on these interests within the terms of article 19(5), say, for carrying out the objects of the trust or its good management. But the application of an unduly extended doctrine of cy pres is unreasonable.

Transfer of Funds to a Statutory Body: Section 3 of the Bombay Labour Welfare Fund Act, 1953, provided that all fines realised by employers from their employees and all accumulated payments due to the employees were to be transferred to a Labour Welfare Fund under the Act. The Supreme Court held that the requirement for the transfer of fines realised was valid, but that for the transfer of the accumulated arrears was invalid because it did not discharge the employers from their liability.

Employer-Employee Relations, Working Conditions and Labour Welfare: The state is competent to regulate employer-employee relations, including fixing of wages, regulating conditions of work and providing for compulsory conciliation or adjudication of labour or industrial disputes. Regulations for the welfare of labour and other working classes may also be introduced as reasonable restrictions on the right to property in article 19(1)(f).

Control of Essential or Dangerous and Noxious Commodities: Imposition of restrictions on the acquisition, holding and disposal of essential, dangerous and noxious commodities is also permissible within the terms of article 19(5). But a restriction on the use of, say, alcohol in medicinal and toilet preparation may not be reasonable.

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235 Ibid.
Preservation of Natural Resources Like Forests and Mines: Regulations imposed for the preservation of forests, mines and wild lives, or other natural resources are valid.

Considerations of National Economy: Considerations of national and financial stability justify reasonable restrictions of stringent nature within the terms of article 19(5).²³⁶

Implementation of the Directive Principles: Measures to implement the Directive Principles may also be justified as valid restrictions on the right to property in article 19(1)(f).²³⁷

Permits and Licences: Permits, licences, certificates, and the like in relation to, or as a condition for, acquiring, holding or disposing of property are considered reasonable instruments for furthering the interests of the general public under article 19(5). But a licence fee should not result in a total prohibition of a normal business for practical purposes.²³⁸

Searches, Seizures, Surveillance and Inspection: Searches, seizures, surveillance and inspection are measures which may be reasonable within the terms of article 19(5), depending on the circumstances of a case.

**TAXING POWER**

Taxation is an independent power and there can be no fundamental right not to be taxed. But the validity of a tax law may be tested with reference to article 19(1)(f), read in conjunction with article 19(5), on the ground that the tax is excessive or confiscatory. It may also be challenged on the ground of procedural reasonableness within the meaning of article 19(5).²³⁹

**ARTICLE 19(1)(f) AND SOME OTHER ARTICLES**

Article 19(1)(f) and Article 26: Article 19(1)(f) deals with an individual citizen’s right to acquire, hold and dispose of

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²³⁷ F. N. Balsara’s Case, op. cit.
property. But article 26 deals, *inter alia*, with the right to own, acquire and administer property of every religious denomina-
tion or sect.

Article 19(1)(f) and Article 31: Although in an early case, *State of Bombay v. Bhanji*, 240 it was thought that articles 19(1)(f) and 31 are mutually exclusive, it is now well-estab-
lished that the right in article 19(1)(f) is related to the right in article 31 in a manner that makes the two articles a con-
tinuum. However, articles 19(1)(f) and 31(1) have been held to be intertwined, but not articles 19(1)(f) and 31(2). 241

RIGHT TO PRACTISE ANY PROFESSION OR TO CARRY ON ANY OCCUPATION, TRADE OR BUSINESS: CLAUSES (1)(g) AND (6) OF ARTICLE 19

Broadly viewed, the right to practise any profession or to carry on any occupation, trade or business is the right to liveli-
hood, a right so necessary for man that the Supreme Court felt that this right is a natural right to carry on any trade, profession or calling, which a person has as a member of a civilized society, anterior to any state authorisation. 242 But the right to livelihood never implies the right to any particular concept of livelihood.

This view of the right to livelihood as a natural right should, however, be taken merely to emphasise the necessity of the right and not to import into the scheme of the fundamental rights the doctrine of natural rights, because after the commence-
cement of the Constitution fundamental rights must be said to be founded on the provisions of Part III thereof and not on any particular theory of rights. 243 True, the right to livelihood in article 19(1)(g) is as vital as the right to life dealt with in article 21, but they are fundamental not because they are natural, but because they are deemed as fundamental in the scheme of the Constitution. The right to livelihood in article 19(1)(g) is, like the right to life in article 21, a legal right enshrined as a fundamental right in Part III of the Constitution.

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SCOPE OF THE RIGHT TO LIVELIHOOD

Article 19(1)(g) ensures to every citizen the right to practise any profession or to carry on any occupation, trade or business. In short, article 19(1)(g) guarantees the right to livelihood, and the words used by it must be so liberally construed as to include any possible form of livelihood, whether mental or manual, recognised by society, because these words are neither the terms of art nor are they exhaustive. They are to be taken as they are commonly understood as merely indicative of some methods of earning a living.

Profession: Practising a profession involves the use of the personal qualifications of a person, and it may become a business if profit element is added to it by investing capital in this process.\(^{244}\) Legal practice is, however, not a fundamental right but is a mere statutory right.\(^{245}\)

Occupation: To carry on an occupation means to be engaged in an employment, business or calling to get one’s livelihood. Consequently, a student does not carry on an occupation,\(^ {246}\) but a teacher does.

Trade: The term “trade” ordinarily denotes any bargain or sale, and in its broadest sense includes any business carried on with a view to profit, although in certain cases profit motive may not be the final determinant.\(^ {247}\)

Business: The world “business” is of wider connotation than the term “trade” and may be said to include all that “occupies the time, attention and labour of a man, for the purpose of profit”.\(^ {248}\)

But the guarantee of article 19(1)(g) is a guarantee of livelihood and not of the concept of livelihood. That is, it ensures the freedom to pursue any recognised and lawful mode of gainful avocation and not any means of earning a living. This article does not also carry the guarantee to earn a living.

\(^{246}\) Samir Kumar v. Someswar, A.I.R. 1953 Cal. 783.
in a particular place, or on a monopoly basis. Contractual or statutory rights also fall outside its ambit. But this does not, however, lead to the acceptance by the Constitution of the concept of "rights as franchise".

Right Only to Lawful and Recognised Livelihood: Even in an early case, Sheoshankar v. State, the Nagpur High Court held that because the legislature considered that consumption of liquor was not in the public interest, it became a noxious material incapable of being a legitimate object of property or commerce. Later, in State of Bombay v. R. M. D. Chamarbaughwalla, a case relating to gambling, it was conclusively settled that there can be matters with respect to which there can be no right to livelihood. In regard to gambling there can be no such right, although prize competitions involving substantial skill are business. Venkatarama Aiyar J. said:

"As regards competitions which involve substantial skill, however, different considerations arise. They are business activities protection of which is guaranteed by Art. 19(1)(g)".

Likewise, in State of U.P. v. Kartar Singh, it was held that there can be no fundamental right to carry on trade in adulterated foodstuffs. And there also can possibly be no right to practise prostitution. However, with regard to liquor trade, in a recent case, Krishan Kumar v. State of J. & K. the Supreme Court distinguished it from gambling and declined to conceive liquor as incapable of the protection of article 19(1)(g), although the Court felt that such a trade can be totally prohibited as a reasonable restriction. Thus, in any case a noxious livelihood may be totally banned as a reasonable restriction, even if it may be said to be entitled to the protection of article 19(1)(g).

No Individual Obligation to Pursue Livelihood: Article 19(1)(g) confers upon a citizen the right to livelihood. It does not cast on him the obligation to pursue a means of earning his living. Precisely, clause (1)(g) of article is both positive and negative, it gives a citizen the right both to practise a profession or to carry on any trade, occupation or business or not to pursue any of these, although the state may take reasonable steps covered by clause (6) of this article. This principle was laid down by the Supreme Court in Hathising Mfg. Co. v. Union of India.\textsuperscript{257} Thus, article 19(1)(g) does not involve "a duty to work".

No State Obligation to Provide Livelihood: What clause (1)(f) of article 19 gives a citizen is the right to livelihood, \textit{i.e.}, the right to pursue, or not to pursue, any legal or recognised avocation of his choice for earning a living. It does not guarantee that a citizen shall be provided with such an avocation by the state. There is, in short, no "right to work" in the Constitution. The Government is also not obliged to enter into a contract with any citizen.\textsuperscript{258}

\textit{RESTRICTIONS ON THE RIGHT TO LIVELIHOOD}

The right to livelihood in clause (1)(g) of article 19 is subject to restrictions within the terms of clause (6) thereof, which, as amended in 1951, saves, first, any future or existing law seeking to impose "in the interests of the general public reasonable restrictions on the exercise of the right . . . .", and secondly, "in particular, . . . any law relating to (i) the professional or technical qualification necessary for practising any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the State, or by a corporation owned and controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise". It may be noted here that the 1951 Amendment of article 19(6) is not retrospective.

Reasonableness of Restrictions in Article 19(6): The normal proposition of article 19 is that a restriction on a right

\textsuperscript{257} Hathising Mfg. v. Union of India, A.I.R. 1960 S.C. 923.
in its clause (1) must be reasonable, but evidently restrictions imposable within the terms of its clause (6) need not in all cases be reasonable. They are required to be reasonable only when they are imposed “in the interests of the general public”. But restrictions in clause (6) arising out of the state’s prescription of necessary professional or technical qualifications, or state trading, do not raise the question of reasonableness. But nothing in this context should lead to the conclusion that the Indian Constitution has accepted the American doctrine of “business affected with public interest”, a doctrine itself now under cloud in its own homeland.

However, when a restriction in clause (6) of article 19 is required to be reasonable, which it is if imposed “in the interests of the general public”, the principles relating to its reasonableness are the same as those discussed earlier in the context of the restriction clauses (2) to (5) of this article, and the expression “in the interests of the general public” in clause (6) has the same broad connotation as it has in clause (5).

Restriction in Clause (6) Includes Total Prohibition: Restriction is clause (6) includes total prohibition, and this is in addition to the doctrine of res extra commercium accepted in Chamarbaugwalla’s Case. Such a prohibition may, however, be imposed in the interests of the general public or may result from the prescription of technical or professional qualifications or state trading activities. But like any other restriction in clause (6) it is not in all cases that a total prohibition is required to be reasonable.

Reasonableness of Total Prohibition in Clause (6): A total prohibition imposed on a right falling under clause (1)(g) of article 19 within the terms of its clause (6) must stand the test of reasonableness if it is imposed in the interests of the general public. But in case it arises out of the prescription of any technical or professional qualifications or state trading operations, it is exempted from the test of reasonableness. In determining the reasonableness of a total prohibition, the court takes into account not only whether a trade or business relating to a commodity or service is essential or is inherently noxious.

or dangerous, but also whether it is not excessive or arbitrary as in Chintaman Rao's Case.\footnote{Chintaman Rao v. State of M.P., (1950) S.C.R. 759. See also Tahir Hussain v. District Board, A.I.R. 1954 S.C. 630.} In this case a total ban on employing agricultural labourers for manufacturing bidis was struck down as unreasonable and it was observed that as the absolute prohibition related to both permissible and impermissible limits, it would not be upheld even as regards the permissible limit.

Then, it has always to be considered whether a total prohibition is relatable to the interests of the general public. Thus, in Arunachal v. State of Madras,\footnote{Arunachal v. State of Madras, A.I.R. 1959 S.C. 300.} substantial elimination of middlemen under the Madras Commercial Crops Markets Act, 1933, was upheld as reasonable because it aimed at preventing the exploitation of the poor cultivators producing commercial crops, although earlier, in Yasin v. Town Area Committee,\footnote{Yasin v. Town Area Committee, (1952) S.C.R. 572.} the total stoppage of wholesale business in vegetables within a town had been considered as a ground for invalidating certain municipal bye-laws.

Narendra's Case,\footnote{Narendra v. Union of India, (1960) 2 S.C.R. 375.} arising out of a challenge to Clauses 3 and 4 of the Non-ferrous Metal Control Order, 1958, and Rahman's Case,\footnote{Rahman v. Union of India, A.I.R. 1961 S.C. 1471. See also Glass Chantons Importers and Users Assn. v. Union of India, (1962) 1 S.C.R. 862.} relating to prohibition, or closure, of business as a coercive measure for tax realisation, now conclusively settle that a total prohibition within the terms of article 19(6) may be upheld on the ground of its being "in the interests of the general public"; which however, must be considered in the context of each particular case.

Ban on Cattle Slaughter: In Hanif Quareshi v. State of Bihar,\footnote{Hanif Quareshi v. State of Bihar, (1959) S.C.R. 629.} the Supreme Court stated its conclusions in regard to ban on cattle slaughter as follows:

"... (i) that a total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the Directive Principles laid
down in Art. 48, (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are useful as milch and draught cattle is also reasonable and valid, and (iii) that a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interests of the general public”.

Restrictions Imposable on the Subjective Satisfaction of the Executive: The mere vesting of directionary powers in the executive to impose a restriction, including the power to grant exemptions, even if a restriction be imposable on the subjective satisfaction of an executive authority, is not bad per se, but only when it is deemed excessive, arbitrary, uncontrolled or unguided.266

Exceptional circumstances, such as emergency,267 need for the maintenance of essential supplies,268 and inherently dangerous or noxious269 nature of a trade or business, may incline the courts to view more favourably such cases of discretionary powers. But the courts are, normally, not inclined to view such powers favourably in the absence of adequate safeguards or exigencies of a particular situation. However, they are not competent to judge the reasonableness of such powers if they are vested in an authority in consequence of the prescription of any technical or professional qualifications by the state or the trading activities of the state.

Discretionary Power of the High Courts to Refuse Admission to the Bar: In Babul Chandra v. Chief Justice and Other Judges, Patna High Court”, section 9(1) of the Indian Bar Councils Act, 1926, which provided that any rule framed under the Act “shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion” was held reasonable, although it vested unfettered discretionary power in the High Courts; because, it was said, that such a power had to be vested in some authority and there could be no more appropriate authority than these Courts.

SOME SPECIFIC FORMS OF RESTRICTIONS ON THE RIGHT TO LIVELIHOOD

Regulation of Place and Time of Trade or Business: There can be no fundamental right to carry on any occupation, trade or business in any particular place or during any particular hours. Consequently, the state may regulate the place and time of carrying on an occupation, trade or business. Thus, a scribe may be excluded from the compound of a collectorate, goods may be required to be sold at specified places or times, and transport vehicles may be required to ply on specified routes and in accordance with a prescribed time-table.\(^{270}\)

Regulation of Production and Distribution of Goods and Services: It is competent for the state, depending on the nature of the goods and services and the interests of the general public, to require that only certain goods, in certain quantities and of certain qualities shall be produced and distributed by certain persons. It may be also possible to prescribe that these goods may be supplied only to certain persons or classes of persons.\(^{271}\)

Control on Storage and Movement: Control on storage and movement of commodities is also permissible in the interests of the general public.

Marketing and Sale Regulation: Marketing and sale of goods,\(^{272}\) including elimination of competition, open marketing,\(^{273}\) bargaining, and the like, may be controlled in the interests of the general public.

Levy, Procurement, Quota System and Rationing: Levy on and procurement of commodities is reasonable in the interests of the general public, depending on the needs of the hour.\(^{274}\) Quota system or rationing of supplies is also reasonable.

Quality and Price Control: Quality and price control measures are also deemed reasonable restrictions in appropriate cases.

Control of Essential Commodities and Services: It is perfectly valid to regulate the production, distribution, supply, storage, movement and sale of essential goods, or services, in the interests of the needs of the community.\(^{275}\)

Export & Import Regulation: In modern times, a right of unrestricted export and import is an impossibility.\(^{276}\) Regulation of export and import trade, including the canalisation of such trade through specialised agencies,\(^{277}\) is deemed reasonable.

Regulation of Industrial and Labour Matters: Compulsory adjudication of industrial disputes and enforcement of work regulation in industrial establishments are reasonable. Labour and welfare measures, including the payment of compensation and fixation of minimum wages,\(^{278}\) are deemed reasonable.

Registration, Certification, Permit System or Licensing: Registration, certification, permit system and licensing are some of the valid means for regulating occupation, trade and business. However, vesting of wide discretionary powers in this regard, particularly the power to cancel licences, in administrative authorities is disfavoured by the courts.

Conditions in a Licence: It is also permissible to attach conditions to a licence, but as held in *Seshadri v. District Magistrate*,\(^{279}\) such a condition must be reasonable in the circumstances of a case.

Requirement of Licence Fee: The state may validly require fees to be paid for registration or licensing. But such a requirement to pay a fee is usually expected to be to meet the administrative cost incurred in this regard, although such fees may also be levied for revenue purposes.\(^{280}\) However, a licence fee should not be so unreasonable as to result in the total stoppage of a normal trade or business.\(^{281}\)

\(^{280}\) *Cooverjee's Case*, op. cit.
\(^{281}\) *Yasin's Case*, op. cit.
Surveillance, Inspection and Investigation: A system of surveillance, including the filing of returns; maintaining of records; maintaining of vigilis, including inspections; and investigations into the affairs of a business, including an investigation leading to prosecution, are all permissible for enforcing restrictions on trade and business.

Control of Monopolies and Restrictive Trades: It is quite reasonable to prevent monopolistic and restrictive trade practices, but any measure in this regard must be reasonable in the circumstances of a case. There can be no fundamental right of a person to carry on a trade or business on a monopoly basis, even if the person be a cooperative society. However, the state may, in appropriate cases, create monopolies in favour of any person, including a cooperative.

Professional and Technical Qualification: The state is competent to require appropriate technical or professional qualification for carrying on an occupation, trade or business or for practising a profession, and such a requirement is not justiciable, although it seems that the courts may enquire whether a particular prescribed qualification is relatable to the occupation or profession in question.

State Trading Activities: Now state trading activities may penetrate any occupation, trade or business, and any restriction or impact on the right in article 19(1)(g) arising out of such activities cannot be questioned in a court of law. Before the 1951 Amendment, such a restriction was, however, required to be reasonable.

State Monopoly: As the language of article 19(b)(ii) makes it evident now, state trading activities may be even on a monopoly basis. State monopoly business may also be carried out on behalf of the state even by its agent.

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TAXING POWER

In *Ramjilal's Case*, it was clearly laid down that taxation is an independents affair not coming under fundamental rights. However, it is possible to impugn the validity of a tax law as constituting an unreasonable restriction on the right to trade as, say, imposing an excessive burden.

**ARTICLE 19(1)(g) AND SOME OTHER ARTICLES**

**Article 19(1)(g) and Article 21:** Evidently, article 19(1)(g) and article 21 have distinct operational areas. Article 19(1)(g) gives the right to livelihood, whereas article 21 guarantees the right to life. Besides, the former is positively phrased.

**Article 19(1)(g) and Articles 301 and 302:** Article 19(1)(g) deals with profession, occupation, trade or business and article 301 also speaks of trade, commerce and intercourse. Article 19(6) provides for restrictions on article 19(1)(g), and article 302 contemplates restrictions on article 301. But article 19(1)(g) provides for the freedom of practising any profession or carrying on any occupation, trade or business by any citizen, article 301 ensures the freedom of trade, commerce and intercourse throughout the territory of India. The former has a personal implication, the latter contains a territorial emphasis.

Evidently, the above broad and summary view of the diverse dimensions of article 19 has a constant under-current. In this age of intensely organised living, the dominant operational theme of article 19 is the primacy of public interests in the shape of social action and social control. The working of this article over all these past years conclusively suggests that public interest represented by social control has come to acquire a decisive precedence over public interest in individual enjoyment of its seven great freedoms. The scale has become inevitably tilted on the side of social control, and significantly, this has resulted from almost a concerted move by the executive, the legislature and the judicature.

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Yet "reasonableness" in article 19 must always stand for a balancing between individual liberty and social control. In an open society the seven freedoms of this article must continue to provide the basis for the democratic political system which the Constitution envisages. A citizen must legitimately cherish the hope that these freedoms will increasingly flourish in the form of the growing availability of specific opportunities to all for their realisation, so as to sufficiently nourish the democratic process in the country. In A. K. Gopalan's Case, Das J. made the undernoted pointed observations in this regard:

"Social interest in individual liberty may well have to be subordinated to other greater social interests. If a law ensures and protects the greater social interests, then such law will be a wholesome and beneficent law, although it may infringe the liberty of some individuals, for it will ensure for the greater liberty of the rest of the members of the society. At the same time, our liberty has also to be guarded against excessive executive legislative as well as judicial usurpation of powers and prerogatives (sic.)"²⁹¹

CHAPTER 15

RIGHT TO FREEDOM: ARTICLES 20 TO 22

Article 19 confers seven great freedoms on all citizens. It invests the citizens with capacities of a positive nature. But the rights contemplated by articles 20 to 22 are in the nature of specific immunities guaranteed to all persons, including citizens. These latter articles protect all persons from certain hazards and are basically negative in character, although of necessity, they also import some positive elements as well. Mukherjea J. spoke, in Gopalan’s Case,\(^1\) of article 19 and of articles 20 to 22 as follows:

"... Art. 19 ... gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law, so that they may not conflict with public welfare or general morality. On the other hand, Arts. 20, 21 and 22 are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons would be taken away in the interests of the society and they set down the limits within which State control should be exercised. Art. 19 uses the expression ‘freedom’ and mentions the several forms and aspects of it which are secured to individuals, together with the limitations that could be placed upon them in the general interest of the society. Arts. 20, 21 and 22 ... do not make use of the expression ‘freedom’ and they lay down the restrictions that are to be placed on State control where an individual is sought to be deprived of his life or personal liberty."

The rights under article 19, thus, provide a citizen with opportunities for action, the guarantees under articles 20 to 22 to a person aim at preventing the state from reducing him to inaction. Under article 19 certain freedoms of a citizen are declared and certain restrictions thereon are stated. Under articles 20 to 22 the restriction is not on the liberty of a person but on the power of the state to take away the liberty. However, in the ultimate analysis all these articles—articles 19 to 22—have the same objective in view, namely, the objective of securing individual liberty in consonance with social security.

"TRIPLE ANTIGEN" OF ARTICLE 20

Article 20 provides:

"(1) 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.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

Thus, what may, truly, be termed as the "triple antigen" of article 20 seeks to protect any person exposed or likely to be exposed to a criminal or like charges. Read with article 367 and sub-sections (42) and (47) of section 3 of the General Clauses Act, this article covers every person, natural or juristic, citizen or non-citizen, and protects him only against state action. These protections of article 20 may be expressed as (i) the rule against ex post facto criminal laws; (ii) the rule against double jeopardy; and (iii) the rule against self-incrimination.

THE RULE AGAINST EX POST FACTO CRIMINAL LAWS

By clause (1) of article 20 the state has been interdicted from making and administering what are known as ex post facto criminal laws, although the expression "ex post facto laws" does not itself appear in this clause. "But an ex post facto law which only modifies the rigour of a criminal law does not fall within the said prohibition of article 20(1)" because its objective is to protect a person from undue exposure and not to prevent him from being given a new protection.

Clause (1) of article 20 then requires, first, that a person cannot be convicted except for the violation of a law in force at the time of the commission of the act which has been charged as an offence, and secondly, he cannot be subjected to a penalty greater than that which could have been inflicted for the offence when the act was committed. Thus, this clause has a double

3 Rattan Lal v. State of Punjab, (1594) 7 S.C.R. 676 p. 681. Per Subba Rao J. (as he then was).
action, on the conviction for an offence as well as on the quantum of punishment for the offence.

No Conviction for a New Offence: In the first place, clause (1) of article 20 forbids the state to make a law which declares an act to be an offence subsequent to its commission and prohibits conviction and sentence therefor. This means that the protection of article 20(1) is available to both pre-Constitution and post-Constitution laws, because “the article is not confined to the passing or validity of law but extends to the conviction or sentence”, and fullest effect must be given to it.

“All that it amounts to is that the future operation of the fundamental right . . . may also in certain cases result from acts and situations which had their commencement in the pre-Constitution period. The general principle, therefore, that the fundamental rights have no retrospective operation is not in any way affected by giving the fullest effect to the working of article 20. This article must accordingly be taken to prohibit all convictions and subjections to penalty after the Constitution in respect of ex post facto laws, whether the same was a post-Constitution law or a pre-Constitution law.”

But this also means that since article 20(1) forbids conviction for an “offence” under an ex post facto law, unless an act is an offence involving a criminal proceeding leading to a judicial conviction therein, its protection cannot be available to a person. Hence, civil rights or liabilities, preventive detentions or extermination orders do not attract this article 20(1). Again, in the case of a continuing offence or a recurring wrong, article 20(1) is not attracted, because in such cases the law punishes the course of a conduct if continued even after its proscription by a law.

The prohibition of article 20(1), then, is based on the principle that a person can be punished only for a deliberate act constituting an offence. If an act was not an offence at the time it was committed, the person cannot be said to have an intention to commit the act for violating the law which declared that act as an offence. If no law in force at the time of the

commission of an act declared the act to be an offence, no law subsequent to the commission of the act can declare the act as an offence without violating the fundamental basis of individual liberty, that a person is free to do all that is not interdicted by law, and the primary rule of criminal jurisprudence, that a person is deemed to be innocent unless an offence against him has been proved to the hilt. Hence, if a retrospective construction of a law would violate article 20(1), the law should be so construed as to avoid invalidity.⁸

**Law in Force:** In *Shiv Bahadur Singh v. State of V.P.*,⁹ the Supreme Court held that to give real effect to article 20(1)

"the phrase 'law in force' as used in Art. 20 must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law 'deemed' to have become operative by virtue of the power of the legislature to pass retrospective laws".⁹

**Act Charged as An Offence:** Clause (1) of article 20 protects a person from his being charged for an offence for his any act which was not an offence at the time of its commission. This only means that an act which was not an offence at the time of its commission cannot be subsequently declared to be an offence. But it does not mean that if such an act was an offence at the time of its commission, new rule of evidence to prove the offence cannot be framed. Thus, it was held that section 5(3) of the Prevention of Corruption Act, 1947, did not create a new offence but merely prescribed a new rule for proving an already existing offence,¹⁰ and therefore, it did not violate article 20(1).

In effect, what article 20(1) forbids is conviction and sentence under an *ex post facto* law and not a trial under such a law, because the principle is that no person has a vested right to a particular procedure,¹¹ unless it involves "any constitutional objection by way of discrimination or the violation of

any other fundamental right". The court has, however, to guard against the fact that in the garb of prescribing a new procedure, a new offence is not created nor is a higher penalty authorised.

**Greater Penalty for an Offence:** Secondly, article 20(1) forbids the imposition of a penalty greater than that which could have been imposed at the time when an act, which has been charged as an offence, was committed. Precisely, a sentence following conviction for an offence, in whatever form, cannot be more than the maximum sentence prescribed by the law at the time of the commission of the offence.

This implies that a new law dealing with the same offence cannot retrospectively provide for a greater punishment. But then it must be a punishment or penalty in consequence of the conviction for an offence. Thus, in *Jawala Ram v. State of Pepsu,* the Supreme Court held that as an unauthorised use of canal water was not an offence, an enhanced charge for such a use was not a penalty. Again, in *State of W. Bengal v. S. K. Ghosh,* the Supreme Court held the forfeiture of any embezzled Government property as not a penalty for the purposes of article 20(1).

**THE RULE AGAINST DOUBLE JEOPARDY**

The rule against double jeopardy laid down by clause (2) of article 20—that a person shall not be prosecuted and punished for the same offence more than once—is traceable to the ancient maxim of "*Nemo bis debet punire pro uno delicto*", i.e., no one ought to be punished twice for the same offence. This rule was elucidated by Charles J., in *R. v. Miles,* by saying

"that where a person has been convicted of an offence by a Court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence".

The proposition laid down in *R. v. Miles* was cited with approval by Bhagawati J. in *Maqbool Hussain v. State of

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14 *R. v. Miles,* (1890) 24 Q.B.D. 423.
Bombay,\textsuperscript{15} and the Supreme Court held in that case that article 20(2) incorporated the principle of \emph{autrefois convict} only and not also the principle of \emph{autrefois acquit}. But under the Indian legal system the plea of \emph{autrefois acquit} is also available, though not as a constitutional plea, by virtue of section 403(1) of the Cr. P.C., which says:

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237."

Thus the protection of this section 403(1) is of wider import. It is further supplemented by the rule of \emph{res judicata} available in criminal proceedings as well.\textsuperscript{16} And the Privy Council said:

"...the effect of verdict of acquittal pronounced by a Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication".\textsuperscript{17}

The Constitution, in article 20(2), however, contains only the principle of \emph{autrefois convict} and gives only protection in cases where a person has been both prosecuted and punished. What article 20(2) forbids is prosecution and punishment more than once for the same offence in a law court or judicial tribunal and not mere prosecution.

**Prosecution and Punishment:** In \textit{Maqbool Hussain's Case},\textsuperscript{18} the Supreme Court held that the words "prosecuted" and "punished" in article 20(2) have been used conjunctively and not disjunctively. A person must be both prosecuted and punished to claim the benefit of the constitutional rule against double jeopardy.

\textsuperscript{17}\textit{Samba Sivam v. P.P. of Malaya}, (1950) A.C. 458.
"Prosecuted" : The Supreme Court in the same case further elucidated,

"... and prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."

"A Court of Law or a Judicial Tribunal" : This view of prosecution implies that article 20(2) refers to a proceeding either by way of indictment or information in a criminal court in order to put the offender on his trial. Consequently, a proceeding which is not of a criminal nature before a court of law or a judicial tribunal does not attract article 20(2). To attract article 20(2) it is essential that the first and the subsequent proceedings must be of a criminal nature before a law court or a judicial tribunal. The sea customs authorities were held to be not a law court or a judicial tribunal for the purposes of article 20(2). In Maqbool Hussain's Case, the Supreme Court held:

"We are of the opinion that the sea customs authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy."

In Thomas Dana v. State of Punjab, the Supreme Court affirmed the proposition laid down in Maqbool Hussain's Case, and in Venkataraman's Case, the Court had earlier applied that proposition to inquiries against, and departmental punishment of, delinquent public servants. In effect, the protection of article 20(2) does not extend to matters which generally come under the jurisdiction of what are known as administrative tribunals, because these tribunals are not law courts or judicial tribunals, and proceedings before them are not criminal proceedings in pursuance of prosecution.

"Punished" : The word "punished" means a punitive measure, i.e., a sentence passed in pursuance of the prosecution, trial and conviction of an accused person. If a person is not punished after prosecution, article 20(2) is not attracted. But

the quantum of punishment is not material. What is vital is
that a person must have been convicted and some punishment
must have been inflicted. Consequently, when a person is de-
tained as a measure of preventive detention\(^{21}\) or when any other
preventive action is taken against him,\(^{22}\) the measure is not
punitive, and hence, it does not attract article 20(2). Nor is a
departmental punishment a punishment for this purpose.\(^{23}\)

**Punishment Twice for the Same Offence:** Article 20(2)
prohibits punishment for more than once for the same offence,
and broadly, offence in this context has the meaning it has under
section 3(38) of the General Clauses Act. In *State of Bombay
v. S. L. Apte*,\(^{24}\) the Supreme Court held that the expression
“same offence” means an offence whose ingredients are the same.
Even when some ingredients are common in certain cases, offences
may be different for the purposes of article 20(2). Besides,
the same act may constitute different offences. It is
also to be noted that article 20(2) does not apply to continuing
offences.\(^{25}\)

**THE RULE AGAINST SELF-INCrimINATION**

The rule against self-incrimination, or testimonial compul-
sion, is “a protection to the innocent, though a shelter to the
guilty, and a safeguard against heedless, unbounded, or tyrann-
nical prosecution”;\(^{26}\) and as incorporated in article 20(3) of the
Constitution, it requires that no person accused of an offence
can be compelled to be a witness against himself. In *M. P.
Sharma v. Satish Chandra*,\(^{27}\) Jagannadhadas J. explored the
English and American background of this rule against self-
incrimination and found that its utility has been a subject of
controversy. Consequently, he observed:

“In view of the above background, there is no inherent reason to
construe the ambit of this fundamental right as comprising a very wide


\(^{23}\) See above **Dana's Case** and **Venkataraman's Case**.


\(^{26}\) **Twining v. New Jersey**, (1908) 211 U.S. 78.

range. Nor would it be legitimate to confine it to the purely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to prevent its circumvention”.

It is in this spirit that the courts in India have been working the rule against self-incrimination contained in article 20(3), and it has been held that its protection is available also to a juristic person. But in keeping with the spirit of the preceding two clauses of article 20 as also the wording of this clause (3), it has been held that the protection of clause (3) is limited to only criminal proceedings.28

As laid down in Dastagir’s Case,29 this rule comes into play when two facts are established: (a) that the concerned person was accused of an offence; and (b) that he was compelled to be a witness against himself. From these two basic facts flow the four specific ingredients of article 20(2), namely, (i) the concerned person must have been accused of an offence; (ii) he must have been put under compulsion; (iii) the compulsion must have been to be a witness; and (iv) he must have been compelled to be a witness against himself.

**Accused of An Offence:** A person who is not accused of an offence cannot be protected by article 20(3). An offence in this context, broadly, means an offence within the meaning of section 3(38) of the General Clauses Act. In Bansilal’s Case,30 the Supreme Court held that section 240 of the Companies Act did not look upon a person asked to produce certain documents as an accused charged with an offence, and, therefore, article 20(3) did not apply. On the same principle, in Joseph’s Case,31 the Supreme Court said that section 45G of the Banking Companies Act, 1949, providing for public examination of certain persons did not violate article 20(3). Similarly, contempt proceedings being *sui generis* do not attract article 20(3).

It is essential that the person concerned must have been accused of an offence at the point of time in respect of which refuge under article 20(3) is sought. If an act, or a statement,

which, even if incriminating, was made by a person before he became actually accused of the offence to which the act or statement relates, the act or statement is a valid piece of evidence against him.\footnote{32 Dastigir’s Case, op. cit.}

**Compulsion:** What article 20(2) prohibits is testimonial compulsion. Compulsion in this context means no mere mental state induced by mere hope or apprehension, but actual duress which is a situation “where a man is compelled to do an act by injury, beating or unlawful imprisonment,”\footnote{33 Jowitt, Earl: Dictionary of English law.} and the like. In *Oghad’s Case*,\footnote{34 State of Bombay v. Kathi Kalu Oghad, A.I.R. 1961 S.C. 1808.} the Supreme Court observed:

“The compulsion in this sense is a physical, objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and therefore extorted.”

Consequently, a voluntary statement by an accused, as the one under section 342A of the Cr. P.C., is outside the ambit of article 20(2), and then he may possibly be cross-examined in appropriate cases. The voluntary statement of an accused against another co-accused is also a valid piece of evidence. The answering of questions put by the court under section 342 of the Cr. P.C. has also been upheld as valid in *In re Ramakrishna*, because an accused is not under any compulsion to answer the question.\footnote{35 *In re B. N. Ramakrishna*, A.I.R. 1957 Mys. 100.} But since the section permits the drawing of any adverse inference by the judge or the jury for an accused’s refusal to answer a question in this regard, this provision for drawing inference in the section does not seem to be in accord with the spirit of article 20(3). The seizure of materials from an accused person voluntarily surrendering before a magistrate does not also raise the issue of compulsion.\footnote{36 *In re Palani Moopan*, A.I.R. 1955 Mad. 495.}

**To Be a Witness:** The expression “to be a witness” in article 20(3) does not mean “to appear as a witness”, but is wide enough to include any compelled testimony obtained from
an accused even outside, or previous to, a court proceeding, including documentary evidence. It generally means imparting of personal knowledge of a relevant fact. But this expression is not so wide as to include production of any incriminatory material, including any document, unless such a production has been obtained from and through the accused under compulsion. It was observed in Oghad's Case\(^\text{37}\) that section 139 of the Evidence Act recognised the distinction between "being a witness" and "producing a document".

**Admissibility of Materials and Documents:** Materials and documents seized by the police during any search are admissible as evidence. Similarly, materials and documents recovered by the police in pursuance of a statement of an accused person in police custody, including the relevant portion of the statement, are admissible as evidence under section 27 of the Evidence Act, provided the statement was not extorted under compulsion. Any document or material voluntarily produced by an accused is also admissible as evidence. But it has been held, in Shyamalal's Case,\(^\text{38}\) that under section 94 of the Cr. P.C. the court cannot compel an accused person to produce any document.

**Admissibility of Finger-prints and Other Identification Marks:** On the same principle, it has been settled by the Supreme Court that the taking of finger-prints, foot-prints, and the like, obtaining of specimen writings and exposition of the body for identification of an accused person do not attract the rule against testimonial compulsion. The holding of a test identification parade of an accused person is also not invalid under article 20(3).

"**Against Himself**": What article 20(2) forbids is compelling an accused person to be a witness against himself. Consequently, he can voluntarily be a witness for himself. He is also a competent witness against his co-accused. The confession of an approver is also admissible without violating article 20(3). Similarly, a wife is a competent witness against the husband and vice versa. The doctrine of testimonial compul-

\(^{37}\text{Oghad's Case, op. cit.}\)

sion, thus, affords protection only against self-incrimination under duress.

**THE CASE OF STATE OF BOMBAY VERSUS KATHI KALU OGHAD**

The case of *State of Bombay v. Kathi Kalu Oghad*,\(^{39}\) decided by a bench of eleven Supreme Court Judges, provides, by far, the best overall exposition of the rule against self-incrimination, or testimonial compulsion, contained in article 20(3) of the Constitution, and therefore, the conclusions reached therein need mention even at the cost of a degree of repetition of what has already been noted earlier in this regard.

The Supreme Court unanimously held, first, that "to be a witness under article 20(3) did not simply mean "to appear as a witness" in a court-room, but it extended to any compelled testimony obtained from a person at any time and at any place after he became an accused for the offence concerned. Secondly, "to be a witness," in relation to oral evidence, means, generally speaking, "impacting knowledge of relevant facts by a person who has personal knowledge of the facts to be communicated to the court." And thirdly, on such a view of "to be a witness" in relation to oral evidence, the expression "to be a witness" in article 20(3) must be taken to cover compelled production of any documentary evidence by an accused.

The conclusions of the Court laid down by a majority of 8 to 3 (the majority judgment being delivered by Sinha C. J. and the minority by Das Gupta J.), including the aforesaid three unanimous conclusions, may be stated as follows:

In the first place, to bring an incriminatory evidence within the prohibition of article 20(3), the person concerned must have stood in the character of an accused at the time when he was compelled to testify against himself and not that he should subsequently become an accused in the matter.

Secondly, "to be a witness" means imparting knowledge in respect of the relevant facts by an oral statement, or a statement in writing, made or given in a court or otherwise.

Thirdly, "to be a witness" in its ordinary grammatical sense means giving oral testimony in courts, but case law has given

this expression now a wider meaning, namely, bearing testimony in a court or out of a court by a person accused of an offence, orally or in writing.  

Fourthly, “to be a witness” is, however, not equivalent to "furnishing evidence" in its widest sense, i.e., as including not merely making of any oral or written statement but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused. 

Fifthly, giving thumb impressions or impressions of foot, palm or fingers, or specimen writings, or showing parts of body for identification is not included in the expression “to be a witness.” 

Sixthly, an accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody without anything more, although the fact of such custody in conjunction with other disclosed circumstances in the case may be relevant to determine the question of compulsion. 

And lastly, the mere questioning of an accused person by a police officer resulting in a voluntary statement, eventually turning into incriminatory evidence, does not amount to testimonial compulsion. 

This, then, is the total view of the protection given by article 20(3) as determined by the Supreme Court, and the Court could, therefore, properly claim for itself the credit for having found a just solution of a complex proposition that the doctrine of testimonial compulsion presents. The Court said:

"Our decision, founded on reason and truth, gives to individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and to the courts, that judicial integrity so necessary in the true administration of justice.”

PROTECTION OF LIFE AND PERSONAL LIBERTY UNDER ARTICLE 21

In the scheme of fundamental rights contained in Part III of the Constitution, specially the right to freedom envisaged by articles 19 to 22, articles 21 and 22 together provide a complete

40 Ibid.
code concerning the guarantees to life and personal liberty. This does not, however, in any way imply the insularity of these two articles, it simply denotes their speciality.

It means that in their respective areas they are meant to be of particular application and are to prevail against any other article in respect of matters covered by them. But in matters not specifically entrusted to them, they are meant to be of equal significance with any other article in Part III, or for that matter in any other part, of the Constitution.

In Gopalan’s Case,\textsuperscript{41} it was held that article 19 is at work only so long as a person has not been disabled from exercising the rights contained therein because of his subjection to either article 21 or 22. Once article 21 or 22 is set in motion in relation to a specified matter, or a person, article 19 ceases to operate in respect of that matter or person. Consequently, article 19 does not apply to cases covered by article 21 or 22.

It, then, implies that when deprivation of the personal liberty of an individual takes place either as a punitive or preventive measure by the operation of article 21 or 22, as the case may be, article 19 ceases to operate in relation to him. But this does not mean that the person himself \textit{totally ceases} to be capable of exercising, or to be in a position to exercise, any of the rights conferred on him as a citizen by article 19. The rights of article 19 continue to be available to him in so far as they are consistent with his loss of personal liberty under article 21 or 22.

A person who has lost his personal liberty either under article 21 or 22 is to be deemed to have become incapacitated for the exercise of his any right under article 19 only to the extent demanded by such a loss of personal liberty, and should not be considered as wholly incapable of enjoining any rights under article 19 appertaining to his status as an Indian citizen\textsuperscript{42}; because even when he is, as a person, subjected to article 21 or 22, he does not cease to be an Indian citizen.

However, in Gopalan’s Case,\textsuperscript{43} the Supreme Court apparently took the position that the validity of an enactment under


\textsuperscript{43} Gopalan’s Case, op. cit.
which a person is totally deprived of his liberty and is put in prison cannot be tested with reference to article 19. This position was again affirmed in Ram Singh’s Case.\textsuperscript{44} But, then, Kharak Singh’s Case,\textsuperscript{45} only hinted at the rumblings which in Pandurang’s Case gave a serious jolt to this situation, and the Supreme Court said:

“The principle accepted by Das J., as he then was, does not appear to be the basis of the conclusion arrived at by the other learned Judges who agreed with his conclusion. Different reasons are given by the learned Judges for arriving at the same conclusion. As has been pointed out by this Court in the second Kochummi’s Case (A.I.R. 1960 S.C. 1080), the views of the learned Judges may broadly be summarised under the following heads: (1) to invoke Art. 19(1) of the Constitution, a law shall be made directly infringing the right; (2) Arts. 21 and 22 constitute a self-contained code; and (3) the freedoms in Art. 19 postulate a free man. Therefore, it cannot be said that the said principle was accepted by all the learned Judges who took part in A. K. Gopalan’s Case (A.I.R. 1950 S.C. 27). That apart, there are five distinct lines of thought in the matter of reconciling Art. 21 (with article 19), namely, (1) if one loses his freedom by detention, he loses all the other attributes of freedom enshrined in article 19; (2) personal liberty in Art. 21 is the residue of personal liberty after excluding the attributes of that liberty embodied in Art. 19; (3) the personal liberty included in Art. 21 is wide enough to include some or all in Art. 19, but they are two distinct fundamental rights, a law to be valid shall not infringe both the rights; (4) the expression ‘law’ in Art. 21 means a valid law and therefore even if a person’s liberty is deprived by law of detention, the said law shall not infringe Art. 19; and (5) Art. 21 applies to procedural law, whereas Art. 19 to substantive law relating to personal liberty. We do not propose to pursue the matter further or to express our opinion one way or other. We have only mentioned the said view to show that the view expressed by Das J., as he then was in A. K. Gopalan’s Case is not the last word on the subject.”\textsuperscript{46}

That “the view” expressed by Das J. (as he then was) in A. K. Gopalan’s Case, “is not the last word on the subject”, was thus only indicated by the Court, but it did not consider the precise relationship between articles 19 and 21. In Cooper v. Union of India,\textsuperscript{47} the majority held that an enactment, whatever its object or form, will attract article 19 if it directly affected

\textsuperscript{44} Ram Singh v. State of Delhi, A.I.R. 1951 S.C. 270.
\textsuperscript{46} Pandurang’s Case, op. cit.
\textsuperscript{47} Cooper v. Union of India, A.I.R. 1970 S.C. 564. Italics are mine.
a right thereunder, and thus clearly declined to accept the proposition of the majority in A. K. Gopalan's Case of the mutual exclusiveness of articles 19 and 21. Shah J., in stating the majority view, observed:

"We have carefully considered the weighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim; it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief.

If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental; it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by the direct operation upon the individual's rights."

Besides, the particularity of article 21 or 22 does not imply that other articles concerning the right to freedom, or other fundamental or constitutional rights, have no application to cases under article 21 or 22. For example, article 20 is of decisive application in cases relating to article 21, the former being of special and the latter being of general nature covering certain matters relating to personal freedom. Again, with regard to article 14 in relation to personal freedom, in Kathi Raning v. State of Saurashtra,\(^4^8\) Patanjali Sastri C. J. said:

"It is . . . not correct to say that Art. 14 provides no further constitutional protection to personal liberty than what is afforded by Art. 21. Notwithstanding that its wide general language is greatly qualified in its practical application by a due recognition of the State's necessarily wide powers of legislative classification, Art. 14 remains an important bulwark against discriminatory procedural laws."

Therefore, the proposition, that articles 21 and 22 together form a complete code relating to the right to life and personal liberty, is another way of saying that in relation to the specific right to life and personal liberty covered by articles 21 and 22.

article 19 stands as a general article and has no application when article 21 or 22 applies, on the principle that a general article cannot bar the application of a particular article.

But this does not involve the proposition that to a case subject to article 21 or 22 article 19 has no relevance at all. Nor does it imply that article 19 is substantive and article 21 is merely procedural. It does not also import the sweeping proposition that to a case under article 21 or 22 no other article of Part III, or of the Constitution itself, has any application whatever.

Article 21 reads:

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

The protection of article 21 in regard to deprivation of life and personal liberty is available to any person, whether a citizen or an alien, but the benefit of this article, by the very nature of its guarantee, is available only to natural, but not juristic, persons. And the protection of this article is available only against the state as defined by article 12, and not against any private persons.49

Thus, the vital right to life and personal liberty, which article 21 seeks to protect from deprivation, is an equation in the scheme of individual's rights against public authorities, and this represents a stage in the evolution of human society in which, unless the private right of self-defence is at work, only a public authority is deemed competent to lawfully deprive an individual of his life or personal liberty.

What article 21 guarantees is not an absolute right to life or personal liberty, but a right to be deprived of life or personal liberty by a public authority only in accordance with procedure established by law. On the one hand, it assumes that the state alone has the right to deprive a person of his life or personal liberty, and, on the other, it requires that such a deprivation by the state cannot be except according to procedure established by law.

This article does not question, so to say, the state's inherent competence to deprive an individual of his right to life or

personal liberty. It simply insists that this deprivation must be made after following a prescribed procedure. Consequently, this article also assumes the state's inherent competence to prescribe a procedure for depriving a person of his life or personal liberty, and thus, the guarantee of this article becomes an effective guarantee not against state action in general, but against the action of the executive alone, which may seek to deprive any one of his life or personal liberty without any authorisation of law and without following the procedure established by law in this behalf.

Precisely, article 21 is a protection against only executive action, and possibly also against judicial action, but not against any legislative action, unless it is also shown that the legislature in the exercise of its authority to prescribe by law the deprivation of the life or personal liberty of a person under article 21 has transgressed any other relevant mandatory provision of the Constitution.

Article 21 by itself is meant to muzzle only executive arbitrariness, and is not aimed at restricting legislative competence to deprive a person of his life or personal liberty. This article is, thus, in the tradition of the British conception of the supremacy of law and Parliamentary sovereignty and is at marked and deliberate variance with the American tradition of due process of law.

What this article requires is (i) that before a public functionary can deprive a person of his life or personal liberty, there must be a legal authorisation for the purpose, and (ii) that the functionary must strictly follow the prescribed legal procedure for the purpose. And it is this view of article 21 that a close analysis of its phraseology would conclusively suggest.

"NO PERSON SHALL BE DEPRIVED"

The expression "shall be deprived" first, assumes, as Mukherjea J. said in Gopalan's Case, that "The right to the

50 Gopalan's Case, op. cit.
52 Gopalan's Case, op. cit. Italics are mine.
safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort, is the inherent birth-right of a man". Secondly, it implies that, although the Supreme Court earlier held that "deprivation" in the context of article 21 means "total loss", it is now well settled that the word "deprivation" refers to not only taking away, or a total loss, of life or personal liberty, but also includes any case of interference with these rights; because, to quote Mukherjea J. again, "the essence of these rights consists in restraining others from interfering with them." However, "deprivation" in article 21 and "restriction" in article 19 do not mean the same thing, although in borderline cases they may cover the same situation.

Thirdly, it means that although a person may become deprived of his life or personal liberty in numerous ways, article 21 covers the cases only of such deprivations as arise in the course of state actions. Fourthly, it means that although the state is competent to deprive an individual of his life or personal liberty in the interests of society, this deprivation must be in accordance with the requirements of law. And fifthly, "deprivation" refers not only to initial deprivation but also to the continuation of such deprivation in relation to a person.

**LIFE AND PERSONAL LIBERTY**

**Life**: The protection given under article 21 to the life of a person involves "safety of his life and limbs," and even faculties, and not merely of his life: and although "life" in this context is not to be widely construed to include "livelihood", there is no reason to construe it narrowly to denote only the extreme case of death. As Field J. said, in *Munn v. Illinois*, it ought to mean

"Something more than mere animal existence. The inhibition against

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53 Ibid.
55 Gopalas Case, op. cit.
56 Pandurang's Case, op. cit.
57 Gopalas Case, op. cit. Per Mukherjea J.
its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world."

**Personal Liberty**: The expression "personal liberty" in article 21 is of vital significance in determining the operational ambit of this article, and necessarily it has generated a storm of judicial and juridical controversies which are yet to be finally settled. Even the Constituent Assembly had to grapple with this question.

It is to be noted that as recommended by the Sub-Committee on Fundamental Rights, its draft report in clause 11 said: "No person shall be deprived of his life, liberty or property without due process of law." The final report of the Sub-Committee reproduced this clause 11 as clause 12 without any change, but to it was added the "legal equality" provision. The Advisory Committee itself omitted reference to "property" from clause 12, but otherwise reproduced it verbatim as clause 9 of its report submitted to the Constituent Assembly, which was adopted without any amendment on April 30, 1947.

But the October 1947 Constitutional Draft of the Constitutional Adviser, B. N. Rau, with a view to restricting the scope of the word liberty prefixed to it the epithet "personal", because Rau felt that otherwise, say, even price control might be regarded an interference with liberty of contract between buyers and sellers. The expression "personal liberty" then figured in the same context in article 15 of the Draft Constitution of the Drafting Committee. The Committee, however, also substituted the expression "procedure established by law" on the model of article 31 of the Japanese Constitution for the expression "due process of law" which had been taken from the American Constitution. It also stated that it was of "opinion that the word 'liberty' should be qualified by the insertion of the word 'personal' before it, for otherwise it might be construed very widely so as to include even the freedoms already dealt with in article 13."60 And it is in this form and in the same context

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that this expression now finds place in article 21 of the Constitution, except that the “legal equality” provision has been excluded.

Obviously, then, the use of the word “personal” to qualify the meaning of the word “liberty” is intended to allow the latter a restricted scope, but the specific area of liberty covered by the expression “personal liberty” does not get explained thereby. Because both the Constitutional Adviser and the Drafting Committee merely negatively spoke of the restrictions on the scope of this expression, but they did not positively define its specific area.

The question of interpretation of the expression “personal liberty” was directly raised before the Supreme Court in Gopalan’s Case, 61 and was elaborately dealt with by the Court. But the interpretations put on this expression by the individual Judges display significant differences which deserve a close scrutiny, particularly because they also explored the relation between this expression in article 21 and the right to move freely throughout the territory of India in article 19(1)(d).

Kania C. J., with whom Patanjali Sastri J. agreed, observed:

“Article 19(1) does not purport to cover all aspects of liberty or personal liberty. In that article only certain aspects of liberty are dealt with. ‘Personal liberty’ would primarily mean liberty of the physical body. The rights under article 19(1) do not directly come under that description. They are the rights which accompany the freedom or liberty of the person. By their very nature they are freedoms of a person assumed to be in full possession of his personal liberty. If article 19 is considered to be the only article safeguarding personal liberty, several well-recognised rights... will not be deemed protected under the Constitution... It seems to me to be improper to read Article 19 as dealing with the same subject as article 21”.

Das J. also felt that in the scheme of the Constitution articles 19 and 21 related to distinct areas of liberty, although taken by themselves the words “personal liberty” did not mean only liberty of the person but denoted liberty, or rights, attached to the person (jus personarum), and hence were capable of including the rights in article 19(1). And Mukherjea J. spoke of personal liberty in more specific terms as follows:

“In ordinary language personal liberty means liberty relating to or

concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. According to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification... It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory".

Thus, according to Kania C. J. and Patanjali Sastri, Das and Mukherjea JJ. the right to move freely throughout the territory of India under article 19(1) (d), in which the emphasis was not on free movement but on free movement throughout the territory of India, is distinct from the connotation of the expression "personal liberty" in article 21, and the latter merely means a situation which stands in contrast from physical restraint or coercion. It is liberty of, relating to, or concerning, the person or body of an individual and not the liberties attaching to, or appertaining to, a person. And, obviously, this majority view of the Supreme Court is in consonance with the opinion of Dicey actually expressed as follows:

"The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." 62

But, of 'personal liberty' Fazl Ali J., in his minority dissenting opinion, observed as follows:

"I am confirmed in my view that the juristic conception that personal liberty and freedom of movement connotes the same thing is the correct and true conception... I am strongly of the view that article 19(1) (d) guarantees the right of freedom of movement in its widest sense, and that freedom of movement being the essence of personal liberty, the right guaranteed under the article is really a right to personal liberty."

Besides, Das J. raised a third line of reasoning, based, perhaps, on his apprehensions of executive interference with the liberties of the citizens without the authorisation of law. He felt inclined to think that personal liberty in article 21 may

be interpreted as the "residue of freedoms" not included in article 19, although this may be said to break down in view of the religious freedom guaranteed by articles 24 to 28, or the right to property contained in article 31.

Then to Blackstone, as Barker points out, personal liberty consisted in three articles: personal security, not only of life and health, but also of reputation; personal freedom, especially of movement; and personal property. To him personal liberty included as an element "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law." Denning similarly observes:

"By personal freedom I mean the freedom of every law-abiding citizen to think what he will, to say what he will and to go to where he will on his lawful occasions, without let or hindrance from any person."

Thus, the concept of personal liberty even when Gopalan's Case was decided was not finally settled. Although it was agreed by all that in article 21 the expression "personal liberty" is used in a restricted sense, the question still remained undetermined as to what specifically restricted area this personal liberty did really refer. Because, even in the limited sense of "freedom from physical restraint and coercion of any sort," it may claim for itself a wider domain than is denoted by the loss of liberty by incarceration, and the like.

Cases decided subsequent to Gopalan's Case indicate the tendency of expanding the meaning of the expression "personal liberty". For example, in Kharak Singh v. State of U.P., the Supreme Court held that nocturnal domiciliary visits by the police, which involved knocking at the door of the person under surveillance, awaking him if he was asleep, making him open his door and allowing the police in to be satisfied about him, violated personal liberty under article 21 in the absence of authorisation by a valid law. In fact, in this case a significantly

63 Barker says that this personal liberty is synonymous with civil liberty and is an aspect of the trinity of civil, political and economic liberties which together constitute the notion of liberty. See his Principles of Social and Political Theory, 1952; pp. 146-149.
64 Denning, Lord A.: Freedom under the Law, 1949; p. 5.
broad proposition in regard to personal liberty in article 21 was formulated so as to make it a residuary concept to include

"within itself all the varieties of rights which go to make up the
personal liberty of man other than those dealt with in the several clauses
of Article 19(1)."

In Pandurang's Case,⁶⁶ the Supreme Court held that preventing a detenu from sending a scientific book outside the jail to his wife for publication, without any authority of law, violated personal liberty under article 21. However, it seems that intellectual or educational freedom⁶⁷ in general would not attract article 21. Then, in Satwant Singh v. D. Ramarathnam,⁶⁸ the Supreme Court said that personal liberty of an Indian citizen under article 21 included his right to go abroad and travel outside India, and he could not be refused a passport without violating article 21, unless the refusal is warranted by a valid law.

It should be obvious then that the concept of personal liberty is now being given a wider interpretation than was given to it by Mukherjea J. in Gopalan's Case. The potentiality of this concept to further expand its domain depends on the question whether a challenge to an alleged interference by the state with a person's liberty can be effectively dealt with by the superior courts under any other article of Part III, or any other provision of the Constitution, and if not, whether the courts consider such a challenge to be of sufficient importance to bring it within the fold of article 21, as being an interference with personal liberty. The general confirmed tendency, however, now is to attribute a wider meaning to the expression "personal liberty", and thereby expand the operative field of article 21.

"PROCEDURE ESTABLISHED BY LAW"

Article 21 says that a person shall not be deprived of his life or personal liberty except according to procedure established by law, and the expression "procedure established by law" in

⁶⁶ Pandurang's Case, op. cit.
this article has also given rise to some controversies. This has happened because of some early attempts to equate this expression with the American due process of law.

In this regard, it is essential to note that the expression “procedure established by law” in article 21 of the Constitution is the result of a deliberate choice by the Constituent Assembly in preference to the phrase “due process of law”. And yet, in A. K. Gopalan’s Case it was suggested that article 21 was procedural and article 19 was to be treated as substantive in relation to personal liberty, and it was argued at length that the expression “procedure established by law” imported the notion of “due process of law”, at least “procedural due process”, and the word “law” in this expression meant *jus naturale*, natural law, or general law.

The Supreme Court resolutely repelled the suggestion that article 19 is substantive and article 21 procedural. At best, as Patanjali Sastri J. said, article 21 is an excellent example of fusing substantive and procedural norms together; of combining a negative as well as a positive aspect. What article 21 does is to cast an obligation on the state to follow a procedure established by law in depriving a person of his life or personal liberty and not to provide a person with any vested right to a procedure. Consequently, the Court held that article 21 does not import a notion of due process of law, and Das J. felt it “incongruous to import the doctrine of due process of law without its palliative, the doctrine of police power, which could not be read into article 21.”

Procedure: “The word ‘procedure’ in article 21 must be taken to signify”, said Das J. in Gopalan’s Case, “some step or method or manner of proceeding leading up to the deprivation of life or personal liberty. According to the language used in the article, this procedure has to be established by law”.

Established: Das J. further added:

“The word ‘establish’ according to the Oxford English Dictionary, Vol. VIII, p. 127, means, amongst other things, ‘to render stable or firm; to strengthen by material support; to fix, settle, institute or ordain

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70 Ibid.
71 Ibid.
72 Ibid.
permanently by enactment or agreement.' According to Dr. Annadale's edition of the New Gresham Dictionary the word 'establish' means, amongst other things, 'to found permanently; to institute; to enact or decree; to ordain; to ratify; to make firm.' It follows that the word 'established' in its ordinary natural sense means, amongst other things, 'enacted'. 'Established by law' will, therefore, 'mean enacted by law'."

Law: "If this sense of the word "established" is accepted, then", according to Das J.,\textsuperscript{73} "the word 'law' must mean State-made law and cannot possibly mean the principles of natural justice". And Mukherjea J. also came to the conclusion "that in article 21 the word 'law' has been used in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice".\textsuperscript{74}

Kania C. J. stated the whole position in this regard under article 21 as follows\textsuperscript{75}:

"Normally read, and without thinking of other constitutions, the expression 'procedure established by law' must mean procedure prescribed by the law of the State. If the Indian Constitution wanted to preserve to every person the protection given by the due process clause of the American Constitution, there was nothing to prevent the (Constituent) Assembly from adopting it, or if they wanted to limit the same to procedure only, to adopt that expression with only the word 'procedure' prefixed to 'law'. However, the correct question is what is the right given by article 21? The only right is that no person shall be deprived of his life or liberty except according to procedure established by law. One may like that right to cover a larger area, but to give such a right is not the function of the Court; it is the function of the Constitution. To read the word 'law' as meaning rules of natural justice will land one in difficulties because the rules of natural justice, as regards procedure, are nowhere defined and, in my opinion, the Constitution cannot be read as laying down vague standard. This is particularly so when in omitting to adopt 'due process of law' it was considered that the expression 'procedure established by law' made the standard specific. It cannot be specific except by reading the expression as meaning procedure prescribed by the legislature. The word 'law' as used in this Part has different shades of meaning but in no other article it appears to bear the indefinite meaning of natural justice."

\textsuperscript{73} Ibid.

\textsuperscript{74} Ibid.

\textsuperscript{75} Ibid. Italics are mine.
imposed by the word 'procedure' and the insertion of the word 'established' thus bring out more clearly the idea of the legislative prescription in the expression used in article 21. By adopting the phrase 'procedure established by law' the Constitution gave the legislature the final word to determine the law.”

**Law means State-made Law**: “Law” in the context of article 21 means then state-made law, both the state and law being widely conceived as under articles 12 and 13, respectively, and is not confined to only laws made by the legislatures. Consequently, a proceeding for contempt of court is “procedure established by law” within the meaning of article 21, and so is the proceeding for violation of parliamentary privileges.

**Law Does Not Mean General Law or Natural Law**: Patanjali Sastri J. also felt that “law” in article 21 did not mean “the immutable or universal principles of natural justice . . . In my opinion, ‘law’ in article 21 means positive or State-made law”. But he felt that the expression “procedure established by law” “does not mean . . . any procedure which may be prescribed by a competent legislature”, but “the ordinary and well established criminal procedure, that is to say, those settled usages and normal modes of proceeding sanctioned by the Criminal Procedure Code, which is the general law of criminal procedure in this country”.76 Besides, Fazl Ali J. was of the lone view that the word law in article 21 involved a notion of natural law, and therefore, the expression “procedure established by law” imported into article 21 at least the concept of procedural due process.77

But the majority opinion in Gopalan’s Case hinges on the expression “procedure established by law” as meaning the mode or manner of enforcing a law as laid down by a competent legislative body.78 And this meaning, as broadly stated by Kania C. J. and cited above, has been adopted in all the subsequent cases decided by our superior courts, except that it is no longer conceded that “the Constitution gave the legislature the final word to determine law,”79 even though this exception may be said to run, in a way, counter to the principle of Parliamentary

76 Ibid. Italics are mine.
77 Ibid.
78 Ibid.
79 Ibid. Per Kania C. J.
sovereignty in the Constitution and work in the aid of the doctrine of judicial review therein.

Law Means Valid Law: This new position may, apart from the aforesaid observations of Patanjali Sastri and Fazl Ali JJ., be traced to the following observations of Mukherjea J. in Gopalan's Case\(^{80}\):

"The article presupposes that the law is a valid and binding law under the competency of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for ... It is enough, in my opinion, if the law is a valid law which does not transgress any of the fundamental rights declared in Part III of the Constitution".

The proposition, that law under article 21 means a valid law, later definitely affirmed in Kathi Raning v. State of Saurashtra\(^{81}\) and Collector of Malabar v. Ebrahim,\(^{82}\) has subsequently been followed in numerous cases leading to its culmination in Cooper's Case\(^{83}\) wherein it was laid down that even article 19 may be applied to test the validity of a law coming under the purview of article 21 if the law has the effect of directly affecting the rights of a citizen contained in article 19. And this has added to the domain of "judicial review" at the cost of "Parliamentary sovereignty", but the value of this accretion to the judicial power can be judged through time only as the judiciary in the country increasingly displays consciousness of, and willingness to play, the social role conceived for it by the Constitution.

It should, then, be obvious that although in some of the early cases\(^{84}\) it was felt that article 21 did not give a person anything more than what he already enjoyed before the Constitution came into force, this article is increasingly expanding its effective domain. But this has, however, implied that even article 21, a marvel of brevity, meant by the founding fathers also to be a paragon of precision by a deliberate exclusion of

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\(^{80}\) Ibid.

\(^{81}\) Kathi Raning's Case, op. cit.


\(^{83}\) Cooper's Case, op. cit.

the due process clause, and apparently given a plain and natural interpretation in Gopalan’s Case\textsuperscript{85} is yet to find a final, firm and fixed meaning to its contents. And this should make it desirable to have a look at the American due process of law \textit{vis-a-vis} the working of the Indian Constitution.

**DUE PROCESS OF LAW**

Viewed historically, “due process of law” may be traced to the expression “\textit{per legem terrae}”, “by the law of the land”, of Magna Carta. But the actual expression “due process of law” is to be found for the first time used in Statute 28, Edw. III, c3 (1354) as follows:

“That no man of what estate or condition shall be put out of land or tenement nor taken, nor imprisoned nor disinherited nor put to death without being brought to answer by due process of the law.”

The “due process of law” enshrined in the Fifth and Fourteenth Amendments of the American Constitution also, originating as “simply the modes of procedure which were due at the common law”, specially in trials relating to criminal offence,\textsuperscript{86} came to acquire a definite substantive core by the eighties of the nineteenth century.\textsuperscript{87} In 1898, the U.S. Supreme Court, in Holden v. Hardy,\textsuperscript{88} even though recognising the difficulty of precisely defining due process of law affirmed that “it is certain these words imply a conformity with natural and inherent principles of justice.”

Today, it is the most important and an all-inclusive concept in the American constitutional system. “The guarantee of due process of law is so all-inclusive that all other constitutional guarantees could be abolished and there still would be sufficient protection of personal liberty.”\textsuperscript{89} And this unprecedented conceptual and operational transformation of the words “due process of law” through history necessarily precludes any pro-

\textsuperscript{85} Gopalan’s Case, op. cit.


\textsuperscript{87} Willis: Constitutional Law of the United States, 1936; p. 705.

\textsuperscript{88} Holden v. Hardy, (1898) 169 U.S. 366. See also Chicago v. Minnesota, (1890) 134 U.S. 418.

\textsuperscript{89} Willis: Constitutional Law of the United States, 1936; p. 642.
phecy about their future course, except that, "it is safe to say that they are going to have a great deal more history."\(^{90}\)

The concept of due process of law is, however, extremely elusive; its operations equally unpredictable. The U.S. Supreme Court said in *Twining v. New Jersey*:

"Few phrases of the law are so elusive of exact apprehension as this . . . This Court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by process of inclusion and exclusion in the course of the decision of cases as they arise."\(^{91}\)

Due process of law now seems to be a legal quick-silver capsule epitomising the abstract concept of justice in the American constitutional system. The American due process of law stands for the American sense of righteousness and fairness, and may be even truth. And it is no wonder that an effort to comprehend this legal phrase often turns into a crystal-gazing task. Frankfurter J. observed in *Solesbee v. Balkcom*:

"Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated."\(^{92}\)

In the scheme of the American Constitution due process of law is not a product but a process; not a perfected machine, but an instrument on the anvil. Its majesty is not yet a realisation, but something to be realised. It is not being, but becoming. Frankfurter J. made a pointed reference to this aspect of due process of law in *Anti-Fascist Refugee Committee’s Case*, and added:

"Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, ‘due process’ is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process".\(^{93}\)

\(^{90}\) Ibid.

\(^{91}\) *Twining v. New Jersey*, (1908) 211 U.S. 78.


\(^{93}\) *Joint Anti-Fascist Refugee Committee v. McGrath*, (1951) 341 U.S. 123.
Necessarily, then, due process, intended to equally embrace all the three branches of government, the executive, the legislature and the judicature, has become the amulet of the judiciary to still the dissenting voices of the executive and, particularly, the legislature. Due process of law is what the judiciary, specially the U.S. Supreme Court, says it is. It is, thus, never revealed, but is a process of revelation performed in the charmed circle of the court chamber. And yet the American Judges tend to look upon it as "the compendious expression for all those rights which the Courts must enforce because they are basic to our free society." \(^{94}\)

As Willis points out, more than any other constitutional provision, the due process clause "gives the Supreme Court the opportunity to draw the line which ought to be drawn between personal liberty and social control". \(^{95}\) And as Frankfurter said, in Wolf's Case,

"the clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognise that it is for the Court to draw it by the gradual and the empiric process of 'inclusion and exclusion'." \(^{96}\)

The recognition of this "clue" has made the U.S. Supreme Court to substitute its own intellectual yardstick for that of the legislature. This has resulted in the widest application of the due process clause by the Supreme Court in declaring statutes unconstitutional not because they are in conflict with any written provisions of the U.S. Constitution, but because the Court deems them inconsistent with the meaning read by it into the scheme of the Constitution. "Therefore, in the United States the role of the written Constitution is insignificant and the role of the due process clause and the Supreme Court is very significant". \(^{97}\)

The U.S. Supreme Court now insists that any enactment to be valid must conform to its conception of reasonableness, and it is this element of reasonableness that the Court claims to derive from its crystalgazing of the due process clause.


\(^{96}\) Wolf v. Colorado, op. cit.

\(^{97}\) Willis: Constitutional Law of the United States, op. cit.; p. 65.
No longer does the Court keep itself limited to ascertaining procedural reasonableness, but it also tests the substantive reasonableness of a statute. Consequently, due process is, today, both procedural due process and substantive due process.

**Procedural Due Process:** Procedural due process in the American constitutional system refers to the mode of enforcing a law and it invests a person with an inherent right to procedure which is “essential to the very concept of justice.” It gives a person a vested right to procedural fairness. It does not deny, however, that the state has the power to prescribe the procedure of its courts in consonance with its policy, but it demands that in so doing the state shall not offend “some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”. It stands for a minimum level of procedural formalities which are founded on “settled usages and modes of procedure”; the “general rules established in our systems of jurisprudence for the security of private rights”.

And yet, what these minimum procedural formalities in a given case would be, the U.S. Supreme Court has never definitively decided. Generally, procedural due process may be conceived as the American substitute for the English natural justice. But the former, flanked as it is with substantive due process and the U.S. Supreme Court’s power to declare a statute invalid, claims for itself a wider and deeper operational field, and hence it is more imprecise, albeit flexible, flexible even at the cost of certainty.

Daniel Webster’s famous formulation of procedural due process in *Dartmouth’s Case* was approved by the U.S. Supreme Court in *Hovey v. Elliot* by stating that due process

>“is the process of law which hears before it condemns, which proceeds upon enquiry and renders judgment only after trial. Its meaning is that every citizen shall hold his life, liberty and property and immunities under the protection of the general rules which govern the society.”

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99 *Bardwell v. Anderson*, (1890) 44 Minn. 97.
100 *Brown v. Mississippi*, (1936) 297 U.S. 278.
101 *Hagar v. Reclamation Dist.*, (1884) 111 U.S. 701.
102 *The Dartmouth College Case*, (1819) 4 Wh. 518.
103 *Hovey v. Elliot*, (1897) 167 U.S. 409. Italics are mine.
To Willis, who finds procedural due process applicable not only to the working of judicial tribunals but also to the executive and administrative actions regarding power to tax, power of eminent domain or police power, procedural due process consists of four elements: (i) a notice; (ii) an opportunity of being heard; (iii) an impartial tribunal; and (iv) an orderly course of procedure. Notice in this context must be sufficient notice, sufficient to enable the person concerned to prepare and make his answer. An opportunity of hearing is concomitant with the requirement of sufficient notice and is founded on the principle that a person must be heard before being condemned. The hearing must also be reasonable. The ingredient of an impartial tribunal is, in essence, a restatement of the principle of natural justice that a person cannot be the judge in his own case nor can a prosecutor be the judge, and it, therefore, implies that an impartial tribunal need not necessarily be a judicial tribunal or a court.

The fourth element, an orderly course of procedure, is a compendious expression to cover many things. It requires the court "to examine the entire record, to ascertain the issues, to discover whether there are facts not reported and to see whether or not the law has been correctly applied to facts". Besides, it involves quite a few other things. For example, it implies a public trial and "the presence of witnesses when the opportunity to defend oneself is involved," including the power "to compel the attendance of witnesses". An orderly course of procedure "also includes the right to counsel and proper opportunity for counsel to prepare a case." Then there may be many such other elements.

**Substantive Due Process:** In spite of the best judicial and juridical efforts, to all intents and purposes, the elements of procedural due process may never be fully stated. And this is the case when one has to deal with the manner of the law. And necessarily, therefore, when one has to look to the matter of the law in the light of the substantive due process, one enters a highly acrobatic area of legal reasoning, all the more acrobatic.

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because substantive due process, too, "applies to all the three branches of the Federal and State Governments".\textsuperscript{105}

The Supreme Court in this case demands that an enactment not only in its mode of application, \textit{i.e.}, procedure, but also with regard to the matter it deals with, \textit{i.e.}, the substance, must conform to the standards of reasonableness, fairness and justice as understood by the Court which, thus, becomes an arbiter of the reasonableness of the purpose of the law. The Court also requires that such a law must operate equally and without discrimination. In addition, the law must be plain and precise in order to provide a clear guideline for the conscience and conduct of the persons for whom it is made. In effect, substantive due process means that the law itself, and not merely the procedure for its application, must be reasonable.

The test of dual reasonableness—procedural reasonableness and substantive reasonableness—is the core of the American due process of law. Due process of law plainly stated would mean, then, that an enactment to be valid must conform to the test of procedural and substantive reasonableness as conceived by the American judiciary, specially the Supreme Court. And although this lends a degree of flexibility to an otherwise rigid constitutional system, in the absence of any guidelines it has also caused "judicial whim and caprice to play havoc with legislative programmes." It substitutes the judicial intellectual yardstick for the executive or legislative intellectual yardstick to measure the conscience of the community and the needs of the nation. Commenting on its past working in relation to social legislation, Douglas says\textsuperscript{106}:

\begin{quote}
"It seemed for a while that the Due Process Clause had given the Supreme Court powers comparable to a super legislature. For the Court had so construed due process in a substantive sense as to curtail drastically the power of the State to legislate."
\end{quote}

\textit{SUPREMACY OF LAW AND DUE PROCESS OF LAW}

The supremacy of law is essentially a concept of English jurisprudence, and it means that the law is supreme in the

\textsuperscript{105} \textit{Ibid.}; pp. 706-707.

\textsuperscript{106} Douglas, W. O.: \textit{We the Judges from Marshall to Mukherjee}, Calcutta University Tagore Law Lectures; p. 273.
governance of a country. Dicey's\textsuperscript{107} statement of the concept of the supremacy of law is still classic, in spite of its clear limitations. He conceived it as an aspect of the rule of law as forming a fundamental principle of the British Constitution, and stated this aspect in the following terms:

"It (the rule of law as a fundamental principle of the British Constitution) means, in the first place, the absolute supremacy or predominance 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. Englishmen are ruled by the law, and by the law alone; a man may, with us, be punished for a breach of law, but he can be punished for nothing else."

It should be obvious even to a casual observer that originating as a version of the English concept of supremacy of law, the American view of due process of law has now substituted the supremacy of the U.S. Supreme Court for the supremacy of the U.S. Constitution and the laws. This has come to mean not only that the concept of due process of law is incompatible with the principle of Parliamentary or legislative sovereignty, it has also struck at the very foundation of the doctrine of the supremacy of law by substituting for the defined established law of the land the indefinable reason of the Supreme Court.

As a plain fact, the American due process of law lives by subverting the supremacy of the law; by insisting that the law to be supreme must satisfy the test of reasonableness as conceived by the U.S. Supreme Court, and double reasonableness at that. Due process of law in the American constitutional system is no longer a process of law at all. Originating as a legal process, it has moved far beyond its moorings. It has now reached a point wherefrom it seeks to realise itself as a transcendental element of reason immanent in the entire American legal system, and is a modern epitome of the ancient and medieval natural law.

The American due process of law is, then, American reason, especially the reason of the Supreme Court, incarnate. It at least claims this status for itself. Or, as Dicey would have said, unlike the supremacy of law, it does not stand for the substitu-

tion of the regular law for discretionary authority. Due process seeks to substitute judicial discretion for executive and legislative discretion. Law becomes the Delphic Oracle and the due process clause the magic incantation in the U.S. Supreme Court. And how it can work then in actual life in the U.S.A., or anywhere else, needs no great imagination to visualise.

**DUE PROCESS IN INDIA**

Conceived as a palladium of people's liberty, due process of law operates now if at all in defence of liberty in the American constitutional system, it operates in the defence of liberty against democracy. And Ambedkar pin-pointed this role of the American due process when he told the Constituent Assembly that

"'due process' raises, in my judgment, the question of relationship between the legislature and the judiciary . . . The question which arises in considering this matter is this. We have no doubt given the judiciary the power to examine the law made by different legislative bodies on the ground whether that law is in accordance with the powers given to it . . . The question now raised by the introduction of the phrase 'due process' is whether the judiciary could be given the additional powers to question the laws made by the State on the ground that they violate certain fundamental principles."\(^{108}\)

And yet, although the Drafting Committee had taken the care to substitute the expression "except according to procedure established by law" in the Draft Constitution for the words "without due process of law", as suggested by the Advisory Committee on Fundamental Rights, Ambedkar left this vital question open for decision by the Constituent Assembly. The debates in the Assembly on this issue were both learned and lively, and from a purely academic point of view, no other part of the Assembly debates relating to fundamental rights reached the height of sophistication of these debates. The members were almost equally divided on the issue, but finally the Assembly made "due process of law" formally bow out, allowing the continuation of "procedure established by law" to retain its rightful place in the scheme of the Constitution of India.

The attitude of the Constituent Assembly appears to have been determined primarily by three factors. First, all realised

the contradictions and uncertainties underlying the expression "due process of law." Secondly, the acceptance of the expression "procedure established by law" in article 31 of the Japanese Constitution in line with the words "in accordance with law" of article 40 of the Irish Constitution and in preference to the American due process of law provided a clear line of action for the Indian founding fathers. And thirdly, the founding fathers did not desire the judiciary to sit in judgment over the legislature. They aimed at Parliamentary sovereignty to the maximum possible extent and judicial review to the minimum unavoidable limits to operate in India.

And it was in keeping with this line of thinking that, in A. K. Gopalan's Case, the first case that directly raised the question of the meaning of the expression "procedure established by law," the Supreme Court by a majority concluded that procedure established by law meant a procedure laid down by an enacted law and it did not import any notion of due process of law. Law in this context means state-made law and not jus naturale. Das J. (as he then was) squarely stated the position as follows:

"A procedure laid down by the legislature may offend against the Court's sense of justice and fair play and a sentence provided by the legislature may outrage the Court's notion of penology, but that is a wholly irrelevant consideration... Our protection against legislative tyranny, if any, lies in ultimate analysis in a free and intelligent public opinion which must eventually assert itself... I am not convinced that there is any scope for the introduction into Article 21 of our Constitution of the doctrine of due process of law even as regards procedure."

Procedural Due Process: In the same case Fazl Ali J. thought, however, that there was an element of procedural due process implicit in article 21. But the Supreme Court has consistently held that in India there is no vested right to a particular form of procedure whatsoever, implying thereby that procedural due process does not exist in this country. But a point in this regard is worth remembering. Does this view of article 21 imply that even the minimum requirements of natural justice to be observed by a judicial authority, including a tribunal, can be obviated by legislative fiat? For example,
can the legislature in India provide that a liability or guilt shall be determined in a judicial forum and at the same time require that the forum shall not observe even the basic requirements of natural justice? Precisely, is the legislature under the Indian Constitution competent to convert by a legislative decree a tribunal or court proceeding into an administrative or executive proceeding?

It seems that the legislature is free to determine whether an issue shall be decided by a court or a tribunal or by other authorities. The legislature may also prescribe that a court or a tribunal shall follow a particular procedure of a very summary nature. But it seems that the legislature cannot, by the very nature of things, make the court or tribunal not to observe even the minimum rules of natural justice or any procedure at all. Because this would amount to unreasonableness under article 19, and it has been held by the Supreme Court under that article that procedural law is also subject to scrutiny on the ground of reasonableness. Again, such a procedural law may attract article 14. It may also attract articles 20 and 22.

Substantive Due Process: So far as substantive due process is concerned, it, too, has slipped into the working of the Constitution. The requirement of a restriction to be reasonable under article 19 is a glaring instance to the point. The Supreme Court has insisted that a restriction on the seven freedoms in clause (1) of article 19 imposed by the legislature within the terms of clauses (2) to (6) of this article must satisfy the test of reasonableness as understood by the Court. The legislature is not the final judge of what is reasonable for the purposes of this article.

Similarly, a classification under article 14 for legislative purposes has to be reasonable and the Supreme Court has laid down the test of dual reasonableness in this regard. Here again, the Court and not the legislature is the final judge of what classification is reasonable. Questions of reasonableness may also arise in the context of articles 15, 16, 29 and 30.

In consequence, it seems that due process of law has its own logic. The logic is that whenever courts are empowered to declare a statute void, due process of law must creep in whether directly or indirectly, because it stands for “reasonableness” of
the courts. In the scheme of the Constitution of India, the acceptance of the doctrine of Parliamentary sovereignty properly made the founding fathers to directly exclude the due process clause from the ambit of the Constitution, but their simultaneous acceptance, however limited according to them, of judicial review of statutes kept a back-door opening for due process to show up in the working of the Constitution. And that it has done, both in matters of procedure and substance, albeit in a limited and subtle manner.

The logic of judicial review of statutes demands due process of law. Parliamentary sovereignty stands for supremacy of law, or procedure established by law. The Constitution of India has both judicial review and Parliamentary sovereignty. It also has and must have both due process of law and procedure established by law. The question can only be of harmonising them in our case and not of banishing one or the other. Even if not in name, in fact, due process must operate in this country, however disguised or limited its scope, so long as the superior courts have the power to declare a statute void. And the lovers of legislative supremacy ought to realise this inevitability, although it may be always heartening to them to remember that, unlike the U.S.A., this country has in the Directive Principles the perspective, the objective guidelines, for the executive and the legislature, as well as the judiciary, for operating the Constitution in accordance with the intendment of the founding fathers.

SAFEGUARDS RELATING TO ARREST AND DETENTION UNDER ARTICLE 22

Article 22 seeks to provide certain specific guarantees to two classes of persons. First are the persons who may be arrested and detained in custody on the charge of a criminal or a like offence; and second come the persons who are detained under any law providing for preventive detention. This article acts as a limitation on the power of the state to establish by law the procedure for depriving a person of his life or personal liberty under article 21.

Article 22 is more in the nature of article 20 and stands out as a special provision relating to the right to freedom vis-a-vis article 21 and the more general article 19. It was ob-
served in *Gopalan's Case*,¹¹⁰ "to the extent the procedure is prescribed by Art. 22, the same is to be observed: otherwise Art. 21 will apply". It is to be noted, however, that although article 22 has overriding effect on the provisions of articles 19 and 21, it is not deemed to have such an effect in relation to the other articles of Part III. For example, a law under article 22 may attract article 14.¹¹¹

Article 22 runs as follows:

1. No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

2. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

3. Nothing in clauses (1) and (2) shall apply—
   (a) to any person who for the time being is an enemy alien; or
   (b) to any person who is arrested or detained under any law providing for preventive detention.

4. No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—
   (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
      Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or
   (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

5. When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made.

and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an enquiry under sub-clause (a) of clause (4).

The primary purpose of article 22 is to give protection to any person arrested and detained by the executive, unless he is an enemy alien or his detention is under any law providing for preventive detention. Thus, except in cases expressly excluded from the purview of article 22, the protections under this article are available to any person, necessarily a natural person, whether a citizen or non-citizen, and these are the protections available only against state action.

Clauses (1) and (2) of article 22 together provide protections with regard to four matters. Clause (1), first, provides for the communication of the ground of arrest by the authorities to the person arrested; and secondly, it requires that the arrested person shall have the opportunity to consult and be defended by a legal practitioner of his choice. Clause (2), first, demands the production of an arrested person before the nearest magistrate within twenty-four hours of his arrest; and secondly, it requires that his further detention after his production before a magistrate can be made only under the authority of the magistrate.

CONDITIONS FOR THE APPLICATION OF ARTICLE 22(1) (2)

To claim these four protections contained in clauses (1) and (2) of article 22, four conditions are essential. In the first place, a person must have been arrested and detained in custody.
Secondly, he must have been arrested without a warrant from a competent court. Thirdly, he must have been taken into custody on the allegation, accusation or suspicion of any offence of a criminal nature or an act prejudicial to the public interest. And fourthly, he must not be a person excluded by clause (3) of article 22 as an enemy alien or a preventive detenu from enjoying the protections of clauses (1) and (2) of this article. But once these conditions have been satisfied, the protection of the article continues even after release on bail.

**Arrest and Detention in Custody:** Mere taking a person into custody does not amount to arrest. Thus, for example, an abducted person taken into custody under the Abducted Persons (Recovery and Restoration) Act\(^{112}\) cannot be said to have been arrested within the meaning of article 22. Similarly, the removal of a minor girl from a brothel under a valid statute does not amount to arrest within the terms of this article.\(^{113}\) A person can be said to have been arrested for the purpose of article 22 only when his arrest is in connexion with any criminal or like charge by the executive without warrant.

An arrest under a warrant of a court is outside the purview of article 22. So is an arrest under section 123 of the Cr. P.C. for failure to give security. An arrest for failure to pay an adjudged fine by a panchayat adalat is also not covered by article 22. Arrests for the recovery of public demands are also beyond the ken of this article. But an arrest under a Speaker’s warrant, however, falls under this article, because such a warrant is not a judicial warrant.\(^{114}\)

Detention in custody for the purpose of article 22 means the taking away of a person’s liberty to move about according to his will. It is confinement within a limited space. Hence, externment is not a case of detention. So is not preventive detention. It is detention in custody in pursuance of arrest.

**COMMUNICATION OF GROUNDS OF ARREST AND FACILITIES FOR LEGAL AID**

**Communication of Grounds of Arrest:** Article 22(1) requires that a person, who has been arrested, cannot be detained


\(^{114}\) Ajaib Singh’s Case, op. cit.
in custody without being informed of the grounds for his arrest, as soon as may be.

**Grounds for Arrest**: The requirement to furnish an arrested person with the grounds for his arrest has the objective to provide him with materials for moving a bail petition or a *habeas corpus* petition, as also to equip him for his defence. The grounds communicated should be somewhat like the charge framed by a trial court.

But this does not imply that the authority must furnish the arrested person full details of his offence. He is only entitled to be furnished with grounds sufficient for the purpose of his bail or *habeas corpus* petition, and it is for the court to determine in each case whether grounds furnished to a person are sufficient within the meaning of article 22(1).

Thus, it has been held that the mere information that a person has been arrested under section 7 of the Criminal Law Amendment Act, 1932, without disclosing the particular acts alleged to constitute the offence, is not sufficient compliance with this article.\(^{115}\)

**Communication as Soon as May Be**: Article 22(1) requires not only the furnishing of sufficient grounds for the arrest of a person, but says that the grounds for his arrest must be communicated to him as soon as possible. Thus, this article does not set any specific time limit for furnishing the grounds for arrest, but simply says that this must be done as soon as possible. This implies that the court has to apply the test of reasonableness to determine whether, considering the facts and circumstances of the arrest and detention of a person, he has been furnished with the grounds for his arrest within a reasonable time.

The failure of an authority to furnish a person with the grounds for his arrest within a reasonable period may render his further detention unconstitutional even if his initial arrest was lawful and valid.\(^{116}\) And when a person is not furnished with the grounds for his arrest by the date of return in a


habeas corpus proceeding, a subsequent communication of such grounds to him cannot save the invalidity of his detention.\footnote{117}

Facilities for Legal Assistance: Article 22(1) further requires that a person arrested and detained in custody must not be denied the right to consult and be defended by a legal practitioner of his choice. What this requirement means is that an arrested person should be given all facilities to consult a legal practitioner and be defended by him, \textit{i.e.}, after his arrest he should have the opportunity to engage the services of a legal practitioner for consultation and defence. The benefit of this article does not accrue to a person who has not been put under arrest, although he may claim benefit under section 340 Cr. P.C. In addition, no cause of action arises under this article unless an arrested person asks for such an opportunity and is denied permission by the authorities, or the facilities given by the authorities are illusory.\footnote{118}

Thus, if trial is held on a date not previously notified to the accused, he is deemed to have been denied of the opportunity to engage the services of a legal practitioner.\footnote{119} A law also cannot validly make it discretionary for the presiding officer of a trial court to allow or not to allow a person to be defended by a legal practitioner. But this article does not give an accused person the right to be provided with the services of a legal practitioner by the state at public cost,\footnote{120} nor does a legal practitioner of choice means a practitioner who is disabled under any law to practise his profession.

\textit{PRODUCTION BEFORE MAGISTRATE AND REMAND}

Production Before Magistrate: Clause (2) of article 22 requires that an arrested person must be produced before the nearest magistrate within twenty-four hours of his arrest, excluding the time taken for his journey from the place of his arrest to the court of the magistrate. The purpose of this clause being to make an arrested person to be produced before a judicial authority, a person arrested under the orders of a court

\footnote{117}{Vimal v. State of U.P., A.I.R. 1956 All. 56.}
\footnote{118}{Ram Sarup v. Union of India, A.I.R. 1965 S.C. 247.}
\footnote{119}{Ibid.}
\footnote{120}{Janardhan v. State of Hyderabad, (1951) S.C.R. 344.}
may instead be produced before the court itself. But if a magistrate himself, in his executive capacity, arrests a person, he must send the arrested person for production before another magistrate acting in judicial capacity. But acting in judicial capacity has, however, no reference to court-room.

Remand: This clause (2) also provides that an arrested person after his production before a magistrate can be further detained in custody only under the order of the magistrate. It means that orders remanding an arrested person in custody from time to time must issue from a competent magistrate. But for remands on subsequent occasions no personal production of the arrested person is necessary, nor does this clause say whether further remands should be in police custody or in jail custody.

**ENEMY ALIEN AND PREVENTIVE DETENU**

The four-fold guarantees under clauses (1) and (2) of article 22 relating to the arrest and detention of a person by the executive without a valid warrant of a competent court are, by virtue of the provision of clause (3) of this article, not available to a person who is an enemy alien or is a preventive detenu.

**Enemy Alien:** The Constitution does not provide a definition for the expression “enemy alien”, and although the expression has been defined by the Explanation of section 83 of the C.P.C., it seems that the definition therein is restrictive and meant only for the purposes of the Code. There is, however, Halsbury’s *Laws of England* which gives the following definition:

“An alien enemy is one whose Sovereign or State is at war with the Sovereign of England or one who is voluntarily resident or who carries on business in an enemy’s country even though a natural-born British subject or naturalised British subject.”

The wide definition of Halsbury may, *mutatis mutandis*, be applicable to India also. However, clause (3) concerns itself

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with those enemy aliens who may be present in India, and apparently, if even they be detained under any law providing for preventive detention, they are entitled to all the protections which any other person under such a law may claim.

**Preventive Detenu:** A preventive detenu is a person who has been detained in pursuance of any law providing for preventive detention. His detention is not a punitive measure but a preventive act. "Preventive justice . . . consists in restraining a man from committing a crime he may commit, but has not yet committed, or doing some act injurious to members of the community, which he may do but has not yet done."\(^{122}\)

However, there is no authoritative definition of the expression "preventive detention". The word "preventive" is used in contradistinction of the word "punitive". Preventive detention seems to involve two elements. First, it is detention by the executive without trial or enquiry before a law court. Secondly, the object of detention is prevention and not punishment.

To treat a person as a preventive detenu under article 22, the only safe test is to examine the nature of the law under which the person has been detained. It must be a law specifically providing for the detention of a person by the executive as a preventive measure. Consequently, an externment law is not a preventive detention law. Confinement of a person in a rescue home under the Suppression of Immoral Traffic in Women and Girls Act is also not preventive detention. Chapter VIII of the Cr. P.C. also does not lay down a law for preventive detention.

A law providing for preventive detention is a law which has been specifically for the purpose passed by Parliament or a State Legislature in the exercise of its powers under the Constitution and in consonance with the requirements of article 22. It is to be noted that under article 246 read with Schedule VII Parliament and the State Legislatures have the authority to legislate for preventive detention. Parliament has such a power under Entry 9 of List I and Entry 3 of List III. The State Legislatures have such a power under Entry 3 of List III.

CONSTITUTIONAL GUARANTEES REGARDING PREVENTIVE DETENTION

Speaking about the provision for preventive detention in the Constitution of India as a peace-time measure, rather an extraordinary measure in a democratic constitutional system, Patanjali Sastri J. (as he then was) commented in Gopalan’s Case\textsuperscript{123} as follows:

"The outstanding fact to be borne in mind in this connection is that preventive detention has been given a constitutional status. This sinister-looking feature, so strangely out of place in a democratic Constitution, which invests personal liberty with the sacrosanctity of a Fundamental Right, and so incompatible with the promises of its Preamble, is doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic".

True, preventive detention as a normal feature of Part III of the Constitution implies a serious invasion on the domain of personal liberty, and the Constitution has, therefore, laid down certain safeguards against the misuse of the power of preventive detention. The safeguards are, however, only procedural in nature. But they are mandatory in character and the superior courts have not only been putting a strict construction on a law relating to preventive detention, but they have also been jealously guarding the modicum of safeguards provided by article 22 with regard to preventive detention. Patanjali Sastri C. J., in Ram Singh v. State of Delhi,\textsuperscript{124} observed:

"Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court".

Clauses (4) to (7) of article 22 deal with the safeguards relating to preventive detention, which may be considered under the following heads: (i) the law to provide for preventive detention; (ii) the order of preventive detention; (iii) the period of detention; (iv) the requirement regarding Advisory

Board; (v) communication of the grounds for detention; (vi) opportunity for representation against detention; (vii) ambit of the court's jurisdiction in preventive detention cases; and (viii) Parliament's powers to legislate for preventive detention.

Law to Provide for Preventive Detention: Any law providing for preventive detention must be a valid law passed by a competent legislative authority. Law in this context does not include subordinate legislation, but may possibly include an Ordinance passed by the President or a Governor. But in any case, without the authorisation of a valid law, the executive cannot proceed to put a person under preventive detention.

Order of Preventive Detention: The Constitution does not say what authority or authorities are competent to order preventive detention, and, therefore, it is for the enactment concerned to prescribe the authorities who are competent to issue an order of detention. Normally, such a power is vested in the Central and the State Governments, to be delegated to their respective subordinate functionaries as specified by a statute or any rules or regulations made thereunder.

The power to issue an order of detention lies entirely in the discretion of the authority issuing the order. No objective test has been laid down by the Constitution to govern the discretion and no statutory test is also prescribed. It is the subjective satisfaction of the authority issuing the order of detention which leads to the passing of an order of detention.

But the authority issuing an order of detention must conform to the requirements of the law authorising preventive detention, and he must also act in good faith. What can, therefore, be questioned with regard to a preventive detention order is (i) whether the order conforms to the prescribed legal requirements, and (ii) whether it has been issued in good faith.

Mala Fide: The authority issuing an order to put a person under preventive detention must not act mala fide. The question of mala fide exercise of a power is a question which has to be determined with reference to each case and no comprehensive test can possibly be laid down for determining when an order
can be said to be *mala fide*. Ordinarily, an order made for an ulterior or collateral purpose is a *mala fide* order. An exercise of powers on improper, irrelevant or non-existent grounds is also a *mala fide* exercise of power. The question of *mala fide* also arises when an authority does not apply his mind to the facts of a case, or makes an order for a purpose not mentioned as a ground for detention. But a mere allegation of *mala fide* is not sufficient, and the detenu has the responsibility to prove it.

**Bona Fides of Successive Detention Orders:** The *bona fides* of a fresh detention order when a previous order has been invalidated by a court or when a proceeding regarding the previous order is pending before a court, has been authoritatively settled by the Supreme Court in *Naranjan Singh v. State of Punjab.*\(^{125}\) If a detention order is declared invalid on merits, a subsequent detention order on the same grounds is *mala fide*. But if the declaration of invalidity was based on the invalidity of law or irregularity of form, a fresh order under valid law or in regular form, as the case may be, is not *mala fide*. In the case of a pending proceeding, the mere issue of a fresh detention order does not raise a question of *mala fide* unless it has been issued obviously to defeat the pending petition.

**Period of Detention:** The Constitution itself does not provide for any minimum or maximum period for which a person may be detained. What it says is that beyond three months a person can be detained only on the advice of an Advisory Board. But Parliament has the power under article 22(7) to require even a longer period of detention without consulting an Advisory Board under circumstances or for class or classes of cases to be prescribed by it.

Parliament may also lay down the maximum period for which any person may be detained, and although the Preventive Detention Act, 1950, as originally enacted, did not contain any such maximum time limit, by a subsequent amendment of the Act the maximum period was fixed at one year. But this did not prevent the authorities from prolonging detention beyond one year by issuing *bona fide* successive detention orders.

However, it is now settled that an order finally confirming the detention of a person after his representation must contain the exact period for which he is to be detained and this period cannot be extended.\textsuperscript{126} Only a fresh detention order can continue his further detention.

**Requirement Regarding Advisory Board:** Unless Parliament provides otherwise, a person can be detained beyond three months only on the recommendation of an Advisory Board consisting of persons who are, or have been, or are qualified to be, High Court Judges, before the expiry of the period of three months, “that there is in its opinion sufficient cause for such detention.”

The expression “such detention” in this context means detention as such and has no reference to the period of detention. It is for the detaining authority to finally decide upon the period of detention, and the Advisory Board cannot offer any recommendation on this score. It can only say that detention even beyond three months is justified in its opinion. The authority must also specifically mention in his final order the period for which a person is to be detained, but in no case a person can be detained beyond the maximum period, if any, laid down by law made by Parliament.

“All that Advisory Board can reasonably be asked to do, as a safeguard against the misuse of power, is to judge whether the detention is justified and not arbitrary or mala fide.”\textsuperscript{126}

But a detaining authority is bound by the advice of the Board. However, a petition of *habeas corpus* before a court does not affect the case of a detenu before a Board, although the opinion of the Board counter to the court’s order cannot stand. The procedure to be followed by a Board may be prescribed by Parliament, but unless so prescribed, it determines its own procedure which need not satisfy the test of natural justice, because the Board is not a tribunal nor does it exercise any judicial or quasi-judicial function.

\textsuperscript{126} A. K. Gopalan’s Case, op. cit. Per Sastri J. See also Puranlal v. Union of India, (1957) S.C.R. 460.
Communication of the Grounds for Detention: Clause (5) of article 22 requires that the authority making an order of detention of a person "shall, as soon as may be, communicate to such person the grounds on which the order has been made." Communication of the grounds of detention to a detenu is obligatory and its purpose is to afford him an opportunity to make representation against the order, which this clause (5) also gives him as a right. The grounds communicated must, therefore, contain sufficient materials for an effective exercise of this right to represent against an order of detention.

Privilege of Not Disclosing Certain Facts: However, clause (6), which runs as an exception to clause (5), empowers the detaining authority not "to disclose facts which such authority considers to be against the public interest to disclose", in communicating the grounds of detention to a detenu. The question whether a matter is of public interest is not justiciable and its decision lies in the discretion of the concerned authority. Again, this authorisation to withhold certain facts does not entail any obligation to disclose all other facts which are not so withheld, and the authority is not bound to tell the detenu, unless he asks for further details, that certain matters have been withheld from him in the public interest.127

Grounds, Acts, Facts and Particulars: The authority ordering detention must furnish sufficient grounds necessary for the realisation of the right of making representation against the detention order. Grounds of detention do not, however, mean the object of detention, but have reference to the conclusions or reasons for detention based on certain acts, facts or particulars relating to the detenu.

Clause (5) requires that all the grounds must be disclosed to the detenu, although the authority is not bound to fully disclose all the acts, facts or particulars on which his conclusions or reasons, i.e., the grounds are founded. But the particulars disclosed should be sufficient and precise to make the right to representation a reality, and it is for the courts to finally pronounce upon the sufficiency and precision of the grounds furnished to a detenu.

Supplementary Communication: The law on this point as stated in Atma Ram’s Case\textsuperscript{128} is that there is no absolute bar to making a supplementary communication to a detenu. What the detaining authority cannot do is not to add new grounds for detention. It can always furnish further particulars, or facts, relating to the grounds contained in the first communication.

Insufficient, Vague, Irrelevant or Non-existent Grounds: Grounds not considered sufficient for the actualisation of the right of representation against an order of detention are “insufficient grounds”. Grounds which are not precise and clear or intelligible are vague grounds. A vague ground is an antonym of “definite” ground, and no more than this can be stated affirmatively to determine what is a vague ground.

An irrelevant ground is a ground which is not relevant to, or has no connection with, the object of legislation. This connection must be real and proximate. A non-existent ground is a ground which in fact can never be said to have occurred.

It is well-settled that the court has the final authority to pronounce upon the aforesaid aspects of the grounds supplied to a detenu. It is also now finally settled that even if any of the several grounds communicated to a detenu be vague, irrelevant or non-existent, his detention is invalid.\textsuperscript{129}

Communication of Grounds “as Soon as May Be”: The grounds communicated must not only be sufficient, relevant, precise, and existent, but they must also be communicated “as soon as may be”. This expression “as soon as may be” raises the question only of the “reasonableness” of the time taken to furnish grounds and does not fix any definite time limit for furnishing grounds. It is now settled that the test of “reasonableness” applies also to any supplementary communication and it is for the courts to finally pronounce upon the reasonableness of the time taken by the authority to first communicate grounds or to make any supplementary communication.\textsuperscript{130}

\textsuperscript{130} Ujagar Singh v. State of Punjab, A.I.R. 1952 S.C. 350; Jogelkar
Opportunity for Representation Against Detention: Clause (5) of article 22 gives a detenu the right to make representation against an order of detention passed on him. The Constitution does not say to whom the representation is to be made and what procedure the authority is to follow. However, the Preventive Detention Act, 1950, provided for representation to the appropriate Government, and the following observations of the Supreme Court, in Jayanarayan Sukul v. State of W. Bengal,\(^\text{131}\) are worth attention in this regard:

"Broadly stated, four principles are to be followed in regard to representation of detenus. First, the appropriate authority is bound to give an opportunity . . . (for) representation and consider . . . (it) as early as possible. Secondly, the consideration of the representation . . . by the appropriate authority is entirely independent of any action by the Advisory Board, including the consideration of the representation . . . by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of the time . . . Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board."

The detenu makes a written representation and the authority considering his petition is not bound to follow any principle of natural justice or to allow the detenu personal appearance, unless Parliament by law provides otherwise. But in any case, the final order made after considering the representation by a detenu must specify the period of his detention, which cannot exceed the maximum period prescribed by Parliament, and the order cannot be revised to extend the period of detention.

Ambit of the Court's Jurisdiction in Preventive Detention Cases: When a superior court, the Supreme Court or a High Court, is presented with a petition for *habeas corpus* under article 32 or 226, as the case may be, in a case involving preventive detention, the court is competent to release the detenu if it finds his detention invalid. To this end the court may examine, first, whether the law under which an order of detention has been passed is valid. Secondly, the court may consider whether

the prescribed procedure for detention has been followed by the authority.

Thirdly, it may also examine whether the grounds, or any of the grounds, supplied to the detenu are not sufficient, vague, irrelevant or non-existent or any supplementary communications made to the detenu raises additional or new grounds. Fourthly, it may also consider whether the initial or supplementary communication was made within reasonable time. And fifthly, the court may consider whether an exercise by the authority of the power of detention has been bona fide. It should thus seem that the courts have evolved sufficiently effective tests to give relief to a person where justice demands judicial intervention in a case involving preventive detention.

Parliament’s Power to Legislate for Preventive Detention: The scheme of the provisions of the Constitution relating to the power to legislate for preventive detention brings it to light that the founding fathers desired Parliament, as the national and more responsible body, to pass enactments for the purpose. And this was possibly intended to be a check on any reckless exercise of the legislative power relating to preventive detention.

Under Entry 9 of List I of Schedule VII, Parliament may legislate with respect to “Preventive detention for reasons connected with Defence, Foreign Affairs, or security of India; persons subjected to such detention,” and under Entry 3 of List III of this Schedule, both Parliament and the State Legislatures may legislate regarding “Preventive detention for reasons connected with the security of a State, the maintenance of supplies and services essential to the community; persons subjected to such detention”. There is no entry relating to preventive detention in List II.

Besides, Article 22(7) authorises Parliament alone to legislate for laying down (i) the circumstances or class or classes of cases in which a person may be detained for more than three months without consulting an Advisory Board; (ii) the maximum period of preventive detention in any case; and (iii) the procedure to be followed by an Advisory Board.

Preventive Detention Act: Parliament passed the first Preventive Detention Act in 1950 meant to be in operation for a
year only, but its life was extended from time to time, until it was allowed to lapse on December 31, 1969. But there still is at the moment the Maintenance of Internal Security Act, 1971, passed by Parliament, which provides for preventive detention in a new garb.

It should seem that any law of preventive detention may be, as Gledhill says, perhaps, "an administrative necessity in India," and be reasonably justified on the ground that the nation has, since Independence, been passing through an age of crises, both internally and internationally. But the utility and value of such a law can be explained only with reference to its actual working from day-to-day and also to its ultimate success in rendering itself unnecessary by getting lapsed or by falling into desuetude.

132 Gledhill, Alan: "Fundamental Rights in India", The Indian Yearbook of International Affairs, Vol. 1; pp. 9, 126.

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CHAPTER 16

RIGHT AGAINST EXPLOITATION

The word "exploitation" in the context of human relations is of very wide connotation and covers any utilization of a man for the advantage or gain of another, and it is, indeed, against any scheme of a just social order. It is not only degrading and inhuman, but it is also inefficient, counter-productive and un-economic.¹

The rights against exploitation guaranteed in articles 23 and 24 are, however, only of a limited character, although the Constitution itself, both in the Preamble and the Directive Principles, speaks of justice, social, economic and political, which obviously banishes exploitation of man by man in any form from the scheme of the Constitution.

Article 23 forbids traffic in human beings and begars or similar forms of forced labour; and article 24 prohibits child labour. These twin articles are mere symbolic of the national objective of complete abolition of exploitation in all forms and they are not meant to eradicate all the evil socio-economic formations which sheltered exploitation in the pre-Constitution days.

Articles 23 and 24 are meant to focus attention on the issue of the eradication of exploitation rather than provide a complete code therefor. As T. T. Krishnamachari said, they aim at ensuring certain rights to the individual, in order that he would be ennobled.² Precisely, they invest the individual with dignity of which the Preamble speaks and emphasise the theme of justice, which both the Preamble and the Directive Principles enshrine.

PROHIBITION OF TRAFFIC IN HUMAN BEINGS, BEGARS AND SIMILAR OTHER FORCED LABOUR: ARTICLE 23

Article 23 lays down:

"(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

¹ Cf. Marx and Engels: Communist Manifesto.
(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them”.

Article 23 thus prohibits traffic in human beings and begar and other similar forms of forced labour. The protection of this article is available to all persons in India alike, whether citizens or aliens, and the protection is available against both private and public persons, i.e., individuals, juristic persons, and the state. But the state is competent to require compulsory service for public purposes without making any discrimination on grounds only of religion, race, caste or class. Article 23 is, however, not a complete code, but it contemplates further legislation to effectuate its objective.

Traffic in Human Beings: The expression “traffic in human beings” is to be liberally interpreted to include not only the cases where human beings are treated as mere chattels with no free-will and independent personality, subject to tradition, sale or gift, like property, as in the case of slavery, but also where by custom a person pledges himself in the garb of a volitional action either for meeting certain pecuniary liabilities, as in the case of the system of “sagri” or “hali” in Rajasthan, for paying off debt, or for serving a religious order, as in the case of the system of “devadasi” in Madras.

Consequently, although the Constitution itself does not use the word “slavery”, “hali” or “devadasi”, all these institutions are covered by the expression “traffic in human beings”. Thus, the Madras Devadasi (Prevention of Dedication) Act, 1947, is a valid legislation to further the objective of article 23(1).

Traffic in Women and Girls: Article 23(1) has been interpreted to cover traffic in women and girls for immoral purposes, although such a traffic may have an element of profession or business involved in it and its prohibitions may imply an infringement of article 19(1)(g). In Shama Bai v. State of U.P.,\(^3\) it was held that the provisions of sections 3 to 10 and 18 of

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the Suppression of Immoral Traffic in Women and Girls Act, 1958, validly make punishable traffic in human beings.

In effect, even apart from the question of a reasonable restriction which the state is competent to impose on the freedom guaranteed under article 19(1)(g), article 23(1) prohibits traffic in human beings and makes the act punishable according to law. Any contravention of the provisions of article 23(1) is by itself sufficient to condemn an impugned legislation, because article 19 being a general article, it must yield to article 23 which is a specific article.

It should, however, be noted that in spite of the provisions of the Indian Penal Code and other statutes and efforts on the part of the Union and State Governments, traffic in women and girls still continues not only through many subterfuges but also even in the open form of prostitution. This degrading vice is yet to be eradicated, and a committee appointed by the Central Social Welfare Board to go into all the aspects of the problem of immoral traffic in women observed that the issue can be considered only in the context of the national economic and social progress. It added:

"An entirely new policy will have to be laid down by the State, the whole system would have to be overhauled not only from the point of view of outlook and attitudes, but of management, administration, routine, programmes, placement and after-care."

**Begar**: Begar is essentially an Indian concept, and in the Constituent Assembly Raj Bahadur hailed article 23 in the following words:

"This article is a complement of the charter of freedom (Art. 19). This frees and poor, downtrodden and dumb people of the Indian States from the curse of begar. This begar has been a blot on humanity and has been a denial of all that has been good and noble in human civilisation. Through the centuries, this curse has remained a dead weight on the shoulders of the common man, like the practice of slavery."

"As a man coming from an Indian State, I know what this begar, this extortion of forced labour has meant to the downtrodden and dumb people of the Indian States. If the whole story of this begar is written, it will be replete with human misery, human suffering, blood and tears".4

Indeed, the curse of begar prevailed in one form or another throughout the country, like the curse of untouchability, and when Kamath pointed out that the Constitution does not contain a definition of begar, Nagappa rightly said that begar, which prevailed throughout the country, was a commonly understood word.\(^5\)

Molesworth, however, defines begar as “labour or service exacted by a Government or person in power without giving remuneration for it”, and Wilson’s Glossary considers it as “forced labour, one pressed to carry burden for individuals or public; under old system when pressed for public service no pay was given.” These definitions were cited with approval in S. Vasudevan v. S. D. Mittal\(^6\) which, though subsequently reversed by the Supreme Court,\(^7\) continues to provide a valid and authoritative judicial definition of the term “begar”.

Begar, thus, has two elements: (i) forcing a person to work against his will, and (ii) denying him payment for such a work. Accordingly, it has been held that the Central Services Maintenance Ordinance, 1960, did not contravene article 23(1), because even though the effect of the Ordinance was to exact work against the will of the worker, it was not a work without payment.\(^8\) Again, the U.P. Removal of Social Disabilities Act, 1947, was held not to offend article 23(1), because the requirement that anybody would not refuse a person service on the ground that he belonged to a Scheduled Caste did not amount to forced labour similar to begar.\(^9\)

Other Similar Forms of Forced Labour: Art. 23(1) prohibits not only begar but also “other similar forms of forced labour”. The expression “other similar forms of forced labour” is to be construed ejusdem generis with begar,\(^10\) and should not be interpreted as prohibition on all forms of forced labour as in the case of every form of forced labour under the 13th Amendment of the American Constitution.

\(^5\) Ibid.; pp. 806-7.  
Prohibition of forced labour under article 23(1), therefore, covers cases of forced labour against the will of the persons for which no payments are made. In effect, when a person contracted to do extra work for additional remuneration, or benefits, it was held to be not a case of begar or forced labour.\(^{11}\) Similarly, a law prohibiting strikes in essential services does not involve begar or forced labour within the terms of Art. 23(1).\(^{12}\)

Again, the emphasis being on “labour”, when there is no compulsion to work, it is not a case covered by Article 23(1). Thus, Rule 3(26)(d) of the Punjab Civil Service Rules was held not to violate article 23(1), because it simply required that a Government servant under suspension would be deemed to be in service even after he attained the age of superannuation.

However, in *Suraj v. State of M.P.*,\(^{13}\) it was held that withholding of pay of a Government servant as a punishment violates Art. 23(1). It was said: “To ask a man to work and then not to pay him any salary or wages savours of begar. It is a fundamental right of a citizen of India not to be compelled to work without wages”. Similarly, a village custom which required every house-holder to render a day’s free labour to the village headman was held as infringing article 23(1).\(^{14}\)

But in the absence of any appropriate legislation the court cannot compel payment of any wages to be determined by itself for any begar exacted by a person, nor can the court punish a person for violating article 23(1) in the absence of appropriate legislation, unless, of course, the principle of punishment for contempt of the court be brought into play.

**Punishment for Violation of Article 23(1):** Any violation of article 23(1) is “punishable in accordance with law.” The punitive element of Article 23 does not operate automatically but needs further supplementary legislation. Parliament alone is competent to legislate under article 35(a)(ii) on matters relating to punishment for offences under Part III, although any

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\(^{11}\) *Dubar v. Union of India*, A.I.R. 1952 Cal. 496.


pre-Constitution law in this regard continues to be in force by
virtue of article 35(b).

Thus, for example section 374 of the Indian Penal Code
says: "Whoever unlawfully compels any person to labour
against the will of that person, shall be punished ..." The
Madras Devadasi (Prevention of Dedication) Act, 1947, and the
Bihar Harijans (Removal of Civil Disabilities) Act, 1949, also
provide for appropriate punishment for violation of article
23(1). The Union Parliament has not, however, passed any
comprehensive legislation relating to violation of article 23(1),
although there is the Suppression of Traffic in Women and Girls
Act, 1958, which prescribes punishment for trafficking in women
and girls for immoral purposes.

It should be noted that although article 35(a)(ii) says,"Parliament shall, as soon as may be after the commencement
of this Constitution, make laws for prescribing punishments for
the acts referred to in sub-clause (ii)", there is no legal means
available to compel Parliament to make any such law. The only
effect of this requirement is that Parliament has the power, and
an obligation which is not enforceable in courts, to make laws
providing for punishment for any violation of article 23(1),
and in this sense the punitive element of article 23(1) is
identical with the punitive element of article 17 which abolishes
untouchability.

Compulsory Service for Public Purposes: Article 23(2)
empowers the state to require the rendering of compulsory
labour for public purposes. In imposing such a compulsory
labour for any public purpose, the state cannot, however, make
any discrimination "on grounds only of religion, race, caste,
or class or any of them".

Clause (2) thus runs as an exception to clause (1) of article
23, and it aims at securing from the people compulsory service
in the interests of the society. Such a compulsory labour can
be imposed only by the state as defined in Article 12. But for
its imposition no formal legislation is necessary and a mere
executive order may require compulsory labour under article
23(2). Nor is there the requirement of payment for any such
compulsory labour, so long as there is no discrimination.
Public Purpose: For requiring compulsory service of any person under article 23(2), the existence of public purpose is an essential pre-condition. The expression “public purpose” in this article, as in any other article in the Constitution, has not been defined, and it should, therefore, be construed to include any purpose or objective which is generally referable to the interests of the community as opposed to particular individual interests.\(^{15}\)

The question of the existence of a public purpose is to be finally determined by the courts. Accordingly, it was held that the Chamba Force Paid Labour Act was violative of article 23, because public purpose could not be said to justify the imposition of compulsory service for “the purpose of carrying load of Government property” by the Tahsildar or any Government servant in normal times.\(^{16}\) In effect, the question what is public purpose must depend on the fact and circumstances of each impugned situation.

Conscription for Military, Police or Civil Purposes: Public purpose has, however, been held to include conscription for military purposes for the defence of the country, or even for social services.\(^{17}\) Hence, Parliament may under entry 1 to List I raise forces by conscription for defence or war, without violating article 23. Again, in Dulal v. Distt. Magistrate,\(^{18}\) compulsory police service under sections 17 and 19 of the Police Act, 1861, was held not to violate article 23, as it was covered by clause (2) thereof.

Work as Punishment for an Offence: Similarly, it is permissible to prescribe compulsory labour for a person convicted of an offence on the ground that the labour required of him is for public purpose, namely, punishment for the offence.

PROHIBITION OF CHILD LABOUR: ARTICLE 24

Article 24 requires:

“No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment”.

\(^{17}\) Ibid.
Article 24 imposes a bar on employing children under fourteen years of age in any factory, mine or in any hazardous work. This article reflects the policies embodied in the Directive Principles and is, broadly, in line with modern thinking on child labour. In India, there are the Factories Act, 1948, the Plantation Labour Act, 1951, and the Mines Act, 1952, which aim at implementing the objective of article 24 in factories, plantations and mines.

No legislation is, however, available to cover all aspects of the expression "any other hazardous employment". It seems that this expression must be taken ejusdem generis with work in any factory or mine. The question whether an employment is hazardous is to be considered with reference to children and not adults, and it is for the courts to finally determine whether an employment is hazardous for the purpose of article 24.

Although it is gratifying that the Constitution forbids employment of children below 14 in factories, mines and other hazardous work, the national objective, as an ideal, ought to be to prevent employment of children on any work whatsoever, except when such a work has direct and proximate nexus with the educational or vocational training of a child. And that such a prohibition up to the age of the children of primary stage of education is a logical corollary to the national objective of free and compulsory primary education needs hardly to be pointed out in this regard.

In conclusion, it may be pointed out that the working of articles 23 and 24 and the laws relating to them reveal a serious gap between the ideals for which the Constitution stands and the actual social conditions under which it operates. Like the abolition of untouchability under article 17, the right against exploitation under articles 23 and 24 exists more in the letters of law than operates in the life of the community. True, in both these cases, their successful working depends to a large extent on the national socio-economic development, but it seems that not sufficient concerted efforts are being made by the people to realise true fraternity and justice in all spheres of national life.
CHAPTER 17

RIGHT TO RELIGIOUS FREEDOM:
ARTICLES 25 TO 28

The liberty, inter alia, of “belief, faith and worship”, as also, in a sense, of “thought and expression”, enshrined in the Preamble realises itself in the form of the fundamental right to freedom of religion in articles 25 to 28 in Part III of the Constitution. And although of these the first two are positively and the next two are negatively phrased, they have the same common objective to secure freedom of religion. The right to freedom of religion as embodied in these four articles represents but a specific area of the human right to liberty in general and is a manifestation of the secular element of the Sovereign Democratic Republic of India immanent in the scheme of the Constitution.

The Constitution itself does nowhere, however, expressly speak of India as a secular state, although it uses the word “secular” in the context of religious freedom. But it was the secular state that was aimed at by the founding fathers when the Constituent Assembly declined to accept the suggestion of Kamath to inset the expression “in the name of God” in the Preamble. The attitude of the Assembly is reflected in the following words of Ananthsayanam Ayyangar:

“We are pledged to make the State a secular one. I do not, by the world ‘secular’, mean that we do not believe in any religion, and that we have nothing to do with it in our day-to-day life. It only means that the State cannot aid one religion or give preference to one religion as against another”.¹

“In other words”, to quote Lakshmi Kanta Maitra, “in the affairs of the State the professing of any particular religion will not be taken into consideration at all”.² But it should seem to any observer that notwithstanding the unholy aberrations of medieval India and unhappy Hindu-Muslim holocausts raised

during the last days of the British rule in India, this country has had the ancient tradition of religious toleration. In fact, the practical necessity and the theoretical formulation of the concept of the secular state is a peculiar product of the church-state controversy of mediaeval Europe, and in the Indian context the issue never assumed the poignancy that it did in Europe.

Yet the acceptance of the principle of secularism by the Constituent Assembly was of vital significance, because in the diversified Indian social life secularism must be an article of political faith. And the technical question whether the Indian Republic is "secular" or "jurisdictionalist", or "Erastian", i.e., whether there are two distinct spheres in India, the sphere of the state and the sphere of the church, or whether India believes in the supremacy of state powers does not seem to be of much practical interest.

There should be no hesitation in regarding India as a secular state if the essential element of secularism be said to lie in the fact that the state is not the medium of intercession between man and God nor God is the foundation of the state. A secular state does not deny the existence of God, although it does not also accept the existence of God unless, of course, its recognition of the concept of religious freedom be construed as an indirect acceptance. But, then, there may be a religion even without God. In fact, a secular state only says that all political power is derived from the people, a more visible, although not a very determinate source, than God, and this the Preamble to the Constitution of India also affirms.

Secondly, there can be no state-religion in a secular state. But this does not mean that in state emblems, symbols, ceremonies and functions certain forms or styles which have become part of culture should not figure, even if they may have religious affinities or signification. It simply means that the state does not deem itself committed to pursue its activities in accordance with the tenets of a particular religion. And in this sense India is a secular state having no state-religion.

5 C.A.D., Vol. VII; p. 825, per H. V. Kamath.
Thirdly, as a corollary, it also follows that any office under the state should not be reserved for the followers of a particular religion. But it does not imply that certain reservations cannot be made for religious minority groups, nor does it involve the appointment to, or holding of, any office in connection with the affairs of a religion, or its any sect, of a person who is not a member of that religion or sect, even if the institution be under state management or control.

In India, all offices under the state, whether elective or others, are open to all citizens irrespective of their religion or sect. Not only that there is no requirement of belonging to a particular religion for particular offices, but that articles like 15 and 16 specifically forbid discrimination on the ground of religion also. The provisions relating to elections are also based on the secular principles of universal adult suffrage.

Fourthly, secularism means that the state shall not foster any particular religion and no tax for religious purposes is levied. But this does not mean that a secular state is irreligious or anti-religious, or even indifferent to religion.\(^6\) It involves not also any oblivion of moral or ethical questions. The state is even not precluded from aiding, initiating or running religious and charitable institutions for public purposes.\(^7\)

Fifthly, secularism implies a complete absence of discrimination by the state between any two religions or persons belonging to different religions. In short, it implies the absence of discrimination on the ground of religion and this, among other things, the Constitution aims at in its guarantee of the right to equality in articles 14 to 18. Then, there are other constitutional provisions in this regard.

Sixthly, secularism means non-interference by the state in religious matters. The policy of the state is “to protect all religions but to interfere with none”.\(^8\) It implies the freedom of conscience and religious freedom for all. But in the name of religious freedom socio-economic reforms cannot be blocked, even if they have religious implications.

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\(^8\) Vasudeva v. Vanamali, (1831) I.L.R. Bom. 80.
Lastly, but not least significantly, secularism means religious toleration, because religious freedom can never involve a “free for all religions” situation. It can only mean a peaceful and cooperative existence of all communities comprised within a state, and the state has the responsibility for maintaining religious peace. Ayyangar J., in Saifuddin v. State of Bombay,\(^9\) observed:

“Articles 25 and 26 embody the principles of religious toleration that has been the characteristic feature of Indian civilization from the start of history, the instances and periods when this feature was absent being merely temporary aberrations. Besides, they serve to emphasise the secular nature of the Indian Democracy which the founding fathers considered should be the very basis of the Constitution.”

In the Indian context secularism has also a practical necessity as an assurance to the minority religious groups. Precisely, then, secularism means that religious questions are not to be allowed to cast their shadows on socio-economic issues involving state decisions and actions. And it is in this spirit that the constitutional provisions relating to the freedom of religion should be viewed.

The fundamental right to religious freedom embodied in articles 25 to 28 is, thus, an aspect of Indian secularism. Article 25 ensures the freedom of conscience and the freedom to profess, practise and propagate any religion, subject to the restrictions contemplated by it and other articles of Part III. Article 25 is of a general nature and articles 26 to 28 relate to specific matters. Of the latter three, however, article 26 has a wider application than articles 27 and 28. Article 26 carries the marginal note “Freedom to manage religious affairs” and aims at guaranteeing, so to say, institutional freedom in religious matters. Article 27 deals with “Freedom as to payment of taxes for promotion of any particular religion,” and article 28 relates to the “Freedom as to attendance at religious institution or religious worship in certain educational institutions.”

In the scheme of the Constitution, however, the rights in articles 25 to 28 are not meant to be exclusive either \textit{vis-a-vis} the other fundamental rights nor \textit{inter se}, and article 25, at

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least, explicitly affirms this. Thus, for example, the right to freedom of speech and expression in clause (1) (a) of article 19 read with its clause (2) contains implications for the right in article 25. Again, articles 25 and 26 are to be looked upon as a continuum. Besides, it should also appear that articles 25 to 28 are, at least in certain matters, not meant to exhaust all guarantees relating to religion. There are articles 15 and 16 which forbid discrimination on religious grounds, and again, articles 29 and 30 carry guarantees for religious minorities.

FREEDOM OF CONSCIENCE AND THE RIGHT FREELY TO PROFESS, PRACTISE AND PROPAGATE RELIGION: ARTICLE 25

Article 25, the opening article of the right to freedom of religion in the Constitution, has been phrased to read as follows:

"(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2) the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly".

The guarantee of freedom of conscience and of profession, practice and propagation of religion in article 25 is available to all persons, whether citizens or not. But the question whether the expression "all persons" also includes corporate persons does not seem to have been finally settled. The Supreme Court left the question open in Lakshmindra Swamiar's Case\(^9a\) because it felt

that the issue is not material to the exercise of the right under article 25:

"A question is raised as to whether the word 'persons' here means individuals or includes corporate bodies as well. The question, in our opinion, is not at all relevant for our present purpose. A Mathadhipati is certainly not a corporate body... It is his duty to practise and propagate the religious tenets of which he is an adherent. Institution as such cannot practise and propagate religion; it can be done only by individual persons and whether these persons propagate their personal views or the tenets for which the institution stands is really immaterial for the purposes of Article 25".

Evidently, the use of the expression "freedom of conscience" in article 25 and express mention of religious institutions in article 26 justify the above view of the Supreme Court. In any case, however, it now seems settled that the guarantee of article 25 is available to a person in his individual capacity and not as a member of a particular religion or sect. But this guarantee to him is available against the state only and not against a private person unless the actions of a private person are supported by the state in any manner.

It is also to be noted that in line with the other rights in Part III of the Constitution, the right in article 25 is also not absolute but is subject to the restrictions contained therein. And interestingly, of all the articles in Part III, article 25 alone has been expressly made subject to the other provision of this Part, which, perhaps, reflects the anxiety of the founding fathers to weave the guarantee of religious freedom of an individual into a consistent design in the whole fabric of the fundamental rights, or even possibly the entire scheme of the Constitution.

**SCOPE OF THE RIGHT UNDER ARTICLE 25**

Article 25(1) provides that "all persons" are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion, subject, however, to the relevant restrictions. The guarantee of article 25(1) has, thus, two elements. First, all persons are equally entitled to freedom of conscience, and secondly, all alike have the like claim to the right freely to profess, practise and propagate religion. And both these two are intended to operate conjunctively.
Freedom of Conscience: Conscience is a concept of wider connotation to include not only religious faith or belief, but any innermost or intimate thought or conviction of a person. And freedom of conscience is, indeed, at bottom the freedom of thought elevated as an anointed and sublimated mental process in the region of reason, religion, ethics or morality.

But freedom of conscience also includes the freedom to entertain ideas which are anti-rational, anti-religious or irreligious, and even unethical or immoral by prevailing standards of reason, religion, ethics or morality. It may also, in appropriate cases, include political, social and economic doctrines. And on this view of freedom of conscience alone can the vital significance of the opening words of article 25(1), “Subject to public order, morality and health...,” becomes apparent, although as an operational idea the mental freedom of conscience must be deemed to be absolute until sought to be externalised.

The Right Freely to Profess, Practise and Propagate Religion: Whereas the constitutional freedom of conscience is a mental process, the right freely to profess, practise and propagate religion refers to the entire process of externalisation of an area of the mental freedom of conscience, the area relating to religion or to religious matters. The words “profess, practise and propagate” in article are intended to be liberally and conjunctively interpreted to include any possible form of expression of a religious faith or belief, including, of course, anti-religious or irreligious notions or atheistic doctrines.

Profess: The word “profess” means to express or declare openly one’s thoughts, beliefs or convictions, and in the setting of articles 25(1), it should be taken to denote all public expressions of a person’s religious ideas and beliefs and the declaration of his adherence to any religious denomination or sect. However, “to profess religion” must also in this context include expression of atheistic or anti-religious creeds. Further, Explanation I in article 25 provides that “The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.”

Practise: While to "profess" means to openly express or declare, to "practise" refers to the overt performance of an act in pursuance of profession.\textsuperscript{12} Thus, the right of a person to freely practise religion includes his right to perform himself, or through somebody else, religious rites, rituals, forms and ceremonies, including participation in religious processions, and to worship or to participate in the performance of worship by somebody else.\textsuperscript{13}

Propagate: The word "propagate" refers not only to dissemination or communication of ideas but also to canvassing actively for, or persuading or even inducing conversion or adherence to, a particular idea or creed. There is little wonder, then, that in the Constituent Assembly the voices of vehement opposition to the inclusion of this word in article 25(1) as a constitutional novelty had to be muted by men like Munshi by reminding the Assembly of the compromise with the minorities, wherein "on this word the Christian community laid the greatest stress...because the word 'propagate' was a fundamental part of their tenet."

Notwithstanding the support given to the inclusion of the word "propagate" by Santhanam, Krishnaswami Bharati and Kashi Kanta Maitra,\textsuperscript{14} the true position in this regard is to be found in the following observations of Alladi Krishnaswami Aiyar\textsuperscript{15}:

"... it was probably unnecessary to have included the expression 'propagate' in view of the fact that freedom of expression is already guaranteed under article 19, but the expression was inserted by way of abundant caution to satisfy certain missionary interests who were zealous about it."

The right freely to profess, practise and propagate religion must, then, in its amplitude be taken to include any claim to

\textsuperscript{15} Aiyar, Alladi Krishnaswami: The Constitution and Fundamental Rights, Srinivasa Sastri Memorial Lectures, 1955; p. 45.
freedom in regard to religion which, of course, is subject to appropriate restrictions. And accordingly, the Supreme Court said:

"... every person has a fundamental right under our Constitution not merely to entertain such religious beliefs as may be approved of by his judgment or conscience but to exhibit his belief or ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others".16

The Concept of Religion: However, the core of the right to freedom of religion is the concept of religion itself, which the Constitution does not define. In the Indian context, it is not always enough to say that "the term 'religion' has reference to one's views of his relation to his creator",17 because a religion like Buddhism or Jainism does not believe in God or Creator. Besides, in view of the phraseology of article 25(1), the word "religion" is not to be confined to a system of beliefs, tenets or doctrines, but should be deemed to include the scheme of forms, rites and ceremonies forming part of a religion or a religious denomination or sect.

Thus, "religion" refers to the body of ideas as well as the practices and performances peculiar to a religion.18 The Supreme Court said in *Lakshmindra Swamiar's Case*19:

"... A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress".

Forms and Observances as Integral Parts of Religion: But the crux of the question is what practice, performance, rites, rituals, ceremonies, observances, forms or modes are to be treated as integral parts of a religion or matters of religion? The Supreme Court rightly felt that it is not an easy task to lay down any definite test in this regard, but added:

18 R ativ. Gandhi's Case, op. cit.
19 Lakshmindra Swamiar's Case, op. cit.
"What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself".20

Consequently, in determining this question the court is to see whether the concerned religious community itself considers a matter as an integral part of its religion, and eventually, it is a question of proof whether the matter is, or the community consider it to be, an integral part of religion.21 But, as Gajendragadkar C. J. observed, in Govindlalji v. State of Rajasthan,22 it seems that in the case of an obviously secular matter, the court would be justified in rejecting its being claimed as a religious practice on the ground of that claim being based on irrational considerations. However, in cases of doubt, as Latham C. J. pointed out,23 the Court should take a common sense view and be guided by the considerations of practical necessity.

**Some Matters Held to be Essential Parts of Religion:** Offering of food to the deity, recital of sacred text, and rites and ceremonies, including oblations to the sacred fire, prescribed by the tenets of the Hindu religion are essential parts of religion.24 Again, what persons are entitled to enter a temple, where they are to stand and worship and how worship is to be conducted and by whom are matters of religion.25 The power of the Dai, the head of the Dawoodi Bohra community, to excommunicate a member is also a religious matter.26

**Some Matters Held to Be Not Essential:** The right to elect members of a committee for the administration of the property of a Gurudwara27 and the power to modify a budget or give directions to the trustees of a religious endowment for giving effect to the wishes of the founder of the trust are matters outside the ambit of religious freedom.28 Acquisition of wakf

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23 *Adelaide Company's Case*, op. cit.
24 *Lakshminda Swamiar's Case*, op. cit.
25 *Ratilal Gandhi's Case*, op. cit.
26 *Saifuddin's Case*, op. cit.
property does not also affect the religious freedom of a mutwalli.\textsuperscript{29}

The right of religious freedom does not include the right of a Muslim to sacrifice cow.\textsuperscript{30} This right does not also include the right of a Hindu to celebrate Saraswati Puja in a Christian Missionary College.\textsuperscript{31} Nor does it include the exclusive right to practise priesthood in a village, or the compulsion to be initiated by a religious teacher even under a customary law. Photographing of women for election purposes is also not forbidden by the Hindu or Muslim religion. The refusal to salute the national flag in the name of religious freedom is also not permissible.

In the name of religious freedom polygamous or bigamous practices also cannot be sustained.\textsuperscript{32} A father cannot also claim the right to the custody of his children for rearing him up in his religion in preference to the power of the High Court as parens patriae.\textsuperscript{33}

RESTRICTIONS ON THE RIGHT UNDER ARTICLE 25

Obviously, the freedom of conscience and the right freely to profess, practise and propagate religion contained in article 25(1) are not absolute, although technically the former being a mental process must be deemed to be an absolute freedom if such a freedom is at all conceivable. However, apart from the limitation on them arising out of the definition of religion, as including tenets and matters only essential to religion, article 25 expressly provides for five types of restrictions on them.

In the first place, they are subject to public order, morality and health. Secondly, they are subject to the other provisions of Part III of the Constitution. And these two provide the opening words of clause (1) of article 25 which contains the substantive provisions in their regard. Thirdly, clause (2) (a) of this article saves the operation of any existing law, or the power of the state to make any law, regulating or restricting any economic, financial, political or other secular activity asso-

\textsuperscript{30} Hanif Quareshi's Case, op. cit.
\textsuperscript{31} See A.I.R. 1957 Cal. 524.
\textsuperscript{33} Margarrate v. Chacko, A.I.R. 1970 Ker. 1.
ciated with religious practice. Fourthly, its clause 2(b) likewise empowers the state to provide for social welfare and reforms. And fifthly, this clause 2(b) also authorises the state to throw open Hindu religious institutions of a public character to all classes and sections of Hindus.

"Subjection" or "restriction" in the context of article 25 includes total prohibition in appropriate cases, and it should appear that such a restriction is not required to be reasonable. Besides, in operation these restrictions are not confined to article 25 alone but also apply, mutatis mutandis, to article 26. These five express categories of limitations are those that have been read by judicial interpretation into the scheme of the constitution of a country like the U.S.A. or Australia, and they are deemed necessary in all countries.

Restrictions for Subjecting to Public Order, Morality and Health: The freedom of conscience and the right freely to profess, practise and propagate religion in clause (1) of article 25 are subject to public order, morality and health. Their this subjection by the very opening words of clause (1) of article 25 indicates that a tenet or practice, deemed however integral or basic by a community to its religion, is liable to be restricted if it raises an issue offending public order, morality or health. However, the courts alone are to finally judge whether it does so offend.

Subjection to the Other Provisions of Part III: Similarly, by its opening words the right in article 25(1) is subject to the other rights in Part III of the Constitution. Consequently, article 25(1) must be deemed to run subordinately to the other articles relating to fundamental rights, and in the case of a conflict between them the former must yield to the latter.

Regulation or Restriction of Economic, Financial, Political or Other Secular Activity Associated with Religious Practice: Clause 2(a) of article 25 saves the operation of any existing law, and the power of the state to make any law, which seeks to regulate or restrict any economic, financial, political or other secular activity which may be associated with any religious practice. Necessarily, in such a situation the primary question for determination is whether an activity associated with any
religious practice, which the state seeks to regulate or restrict, partakes of the nature of economic, financial, political or any other secular activity, because on the answer to this question hinges the possibility of the application of article 25(2)(a).

It seems that, although an obviously economic, financial, political or other secular activity may not possibly be reasonably claimed to be immune from the ambit of article 25(2)(a) because the religious community concerned claims it as an integral part of its religious practice, the general attitude of the Supreme Court, as stated in *Lakshmindra Swamiar's Case*, is as follows:

"... What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any sect of the Hindus prescribe that offerings of food should be given to the idols ..., that periodical ceremonies should be performed ..., or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion, and the mere fact that they involve expenditure of money or employment of priests or servants, or the use of marketable commodities should not make them secular activities ... What Article 25(2)(a) contemplates is not regulation by the State of religious practices as such, but regulation of activities which are economic, commercial or political in their character, though they are associated with religious practices".

Providing for Social Welfare and Reform: Freedom of conscience and the right freely to profess, practise and propagate religion in clause (1) of article 25 cannot, as clause (2)(b) of this article requires, operate to obstruct the state in making provisions for social welfare and reformatory measures, i.e., measures which are for the benefit of the society or which aim at eradicating dogmas and practices obstructing social progress or well-being. But the expression "social welfare and reform" does not possibly enable the state to reform a religion out of existence or identity.

Throwing Open of Hindu Religious Institutions of a Public Character: Clause 2(b) of Article 25 also empowers the state

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34 *Cf. Govindlalji's Case, op. cit.* Per Gajendragadkar C. J.
37 *Saifuddin's Case, op. cit.*
to throw open a Hindu religious institution of a public character to all classes and sections of the Hindus, and Explanation II in this article says that the reference to the Hindus in this context "shall be construed as including a preference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

This authorisation for throwing open Hindu religious institutions of a public character to all sections or classes of the Hindus is, evidently, aimed at eradicating untouchability in the sphere of religious practices and is an aspect of social reformation. However, this article 25(2) (b) should be so construed as to subsist, as far as practicable, with article 26 (b) which ensures a religious denomination, or its any section, the right to manage its own affairs in matters of religion.\(^{38}\)

**Institutions of a Public Character**: Only a Hindu religious institution of a public character can be thrown open to all classes or sections of the Hindus. The expression "institutions of a public character" includes not only an institution dedicated to the Hindu public as a whole but also to those founded for a section thereof, e.g., for the Gowda Sarswata Brahmins.\(^{39}\) And although the Constitution does not define "institutions of a public character", section 2(d) of the Untouchability (Offences) Act, 1955, lays down as follows:

"... 'place of public worship' means a place, by whatever name known, which is used as a place of public religious worship or which is dedicated generally to, or is used generally by, persons professing any religion or belonging to any religious denomination or any section thereof, for the performance of any religious service, or for offering prayers therein; and includes all land and subsidiary shrines appurtenant or attached to any such place".

**FREEDOM TO MANAGE RELIGIOUS AFFAIRS: ARTICLE 26**

The next article, article 26, dealing with the right to freedom of religion, provides:

"Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—


\(^{39}\)See Venkataramana's Case, op. cit.
(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire moveable and immoveable property; and
(d) to administer such property in accordance with law.

As indicated earlier, whereas to all persons accrue freedom of conscience and the right freely to profess, practise and propagate religion as a personal right on an individual basis, article 26 concentrates on the freedom to manage the religious affairs by every religious denomination or its any section as an institutional right on a collective basis, although the restrictions in the former and the principles relating to them also apply, mutatis mutandis, to the right in the latter. And like the right in article 25, the right in article 26 is also available against state actions only unless an individual’s action is sustained by a state measure.\(^{40}\)

**Religious Denomination or Section Thereof:** A “denomination” is a collectivity carrying a distinctive designation characterised by common ideals and organisation.\(^{41}\) Depending on the context, it is capable of both wide and narrow constructions to include all the followers of a religion or any of its sects or sections.\(^{42}\) The protection of article 26 has been, however, made expressly available to every religious denomination or any section thereof. Thus, for example, the followers of Madhavacharya, the Swetambar Jains, the Gowd Sarswata Brahmins, the Zoroastrians and the Dawoodi Bohras are entitled to the protection of article 26. A *math* or a religious fraternity is also covered by this article.

**SCOPE OF THE RIGHTS UNDER ARTICLE 26**

Article 26 secures to every religious denomination, or its any section, as a collectivity, four correlated and conjunctively operating rights, although it is not necessary that any denomination or its any section must be actually enjoying them *all* in order to claim the protection of this article. In the first place,

\(^{40}\text{See Tejraj's Case, op. cit.}\)
\(^{41}\text{Lakshmindra Swamiar’s Case, op. cit.}\)
\(^{42}\text{Ramchandra v. State of Orissa, A.I.R. 1959 Ori. 5.}\)
every religious denomination or its any section has the right to establish and maintain institutions for religious and charitable purposes. Secondly, it has the right to manage its own affairs in matters of religion. Thirdly, it has the right to own and acquire moveable and immoveable property. And lastly, but not least significantly, it has the right to administer such property is accordance with law.

**The Right to Establish and Maintain Religious and Charitable Institutions**: Article 26(a) gives to every religious denomination or its any section the right to establish and maintain religious and charitable institutions. In this context institutions refer to associations, organisations or units, such as temples, mosques, dharamsalas, maths and monasteries, set up for religious or charitable purposes; and the words “establish and maintain” go together, so that the right of a denomination or its any section to maintain such an institution comes into play only in regard to an institution which has been established by it.\(^{43}\) However, the right to maintain includes the right of management, although it must be shown that the right to manage rests in a definite denomination or its any section.\(^{44}\)

**The Right to Manage its Own Affair in Religious Matters**: Every religious denomination or its any section is entitled under article 26(b) to manage its own affairs in religious matters. Precisely, it is the doctrine of internal autonomy in religious matters that has been writ into this article. The Supreme Court said in *Lakshmindra Swamiar’s Case*.

"Under Article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matters of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property . . ."\(^{45}\)

*Religious Matters*: The religious denominations and their sections have, then, complete autonomy in matters of religion.


\(^{44}\) *Bir Kishore Deb v. State of Orissa*, (1964)7 S.C.R. 32.

\(^{45}\) *Lakshmindra Swamiar’s Case*, op. cit.
But what are "matters of religion"? The Constitution defines neither "religion" nor "matters of religion", and as the Supreme Court said in Ratilal Gandhi's Case, the dividing line between "matters of religion" and "matters of secular administration" not often appears to be a thin one. The manner of offering food to the deity may be a matter of religion, so can be the regulation of the manner of worship in a temple, and even excommunication. All that seems certain is that the court in each case has to finally decide what is a matter of religion, and the expression "religion" in article 25 has the same meaning as the expression "matters of religion" has in article 26.

The Right to Own and Acquire Property: By virtue of article 26(c) every religious denomination or its section has the right to own or acquire moveable or immovable property. "Property" in this article also denotes both a bundle of rights relating to a thing, whether moveable or immovable, or the thing itself. But it does not include a right which never vested in a denomination, nor is any denomination's property incapable of being acquired or requisitioned by the state.

The Right to Administer Property: Clause (c) of article 26 gives to a religious denomination or its any section the right to own or acquire any immovable or moveable property and clause (d) of this article entitles every such denomination or its section "to manage its property in accordance with law". The word "property" in both the clauses has the same meaning and, therefore, in this clause also it does not include a right which never vested in a denomination.

What article 26(d) gives to a denomination is the right to manage its property in accordance with law, and consequently, the state is competent to regulate by law the manner of managing such a property. But the regulation of the right

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46 Ratilal Gandhi's Case, op. cit.
47 See Lakshmindra Swamiar's, Venkataramana's and Saifuddin's Cases, op. cit.
48 Durgah Committee's Case, op. cit.
50 Durgah Committee's Case, op. cit.
51 Lakshmindra Swamiar's Case, op. cit.
to manage property does not imply deprivation of the right of managing property, or even undue interference with the right of such management.\textsuperscript{52} The doctrine of \textit{cy pres} cannot also be applied in this case unless there is sufficient surplus money available and caution and reason dictate its application in the context of a particular case.\textsuperscript{53}

Clause (b) and Clause (d) of Article 26: Thus, there is a significant difference between the right in clause (b) and that in clause (d) of article 26. While the former confers complete autonomy to a religious denomination to manage its religious affairs, the latter gives such a denomination the power to manage its property only in accordance with law.

\textit{Restrictions on the Rights under Article 26}

All the four rights under article 26 are subject to restrictions. They suffer, first, from a limitation arising out of the definition of "matters of religion". Secondly, all their operations are alike subject to public order, morality and health to which freedom of conscience and the right freely to profess, practise and propagate religion in article 25 are also subject. And lastly, they are, \textit{mutatis mutandis}, subject to the other restrictions in article 25. Thus, for example, the authority of the state to throw open a Hindu religious institution of a public character under article 25(2)(b) may involve a restriction on the right of a denomination to manage its matters of religion in article 26(b).

Article 25(2)(b) and Article 26(b): In dealing with the relationship between articles 25(2)(b) and 26(b), the Supreme Court said in \textit{Venkataramana's Case}.\textsuperscript{54}

"If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art. 25(2)(b), then, of course, on our conclusion that Art. 25(2)(b) prevails as against Art. 26(b) the denominational right must vanish. But where that is not the position,


\textsuperscript{53} Govindaliji's Case, op. cit. See also Ratilal Gandhi's Case, op. cit.

\textsuperscript{54} Venkataramana's Case, op. cit. See also Tejraj's Case, op. cit.
and after giving effect to the right of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art. 25(2) (b) as to give effect to Art. 26(b).

**FREEDOM OF NOT PAYING TAXES FOR ANY RELIGION: ARTICLE 27**

Article 27, the briefest and the least controversial article relating to the right to freedom of religion, lays down:

“No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”

The freedom as to payment of taxes for promotion of any particular religion in article 27 is the freedom guaranteed to all persons, natural or juristic, citizens or non-citizens. The protection of this article is, obviously, available only against state actions, because the state alone has the taxing power.

**THE SCOPE AND LIMITS OF THE RIGHT IN ARTICLE 27**

The gist of this freedom is that no person can be compelled to pay a tax the proceeds of which are specifically used for the promotion, or maintenance, of any particular religion. Article 27 does not prevent the state from spending public funds for religious and charitable purposes without making a discrimination between different religions or between religious and secular institutions. In *Lakshmindra Swamiar's Case*, the Supreme Court observed as follows with regard to article 27:

“What is forbidden by the Article is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religious denomination. The reason underlying this provision is obvious. Ours being a secular State and there being freedom of religion guaranteed by the Constitution, both to individuals and to groups, it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination. But the object of the contribution under section 76 of the Madras Act is not fostering or preservation of the Hindu religion or any denomination within it. The purpose is to see that religious trusts and institutions, wherever they exist, are properly administered.”

*Lakshmindra Swamiar's Case, op. cit.*
The Supreme Court, again, affirmed this position in Jagannath Das’s Case, and consequently, any levy, contribution, or fee, as distinguished from tax in regard to a religious institution or endowment specifically for the purpose of defraying the expenses of the administration of its property is valid.

FREEDOM OF NOT ATTENDING RELIGIOUS INSTRUCTIONS OR WORSHIPS IN EDUCATIONAL INSTITUTIONS: ARTICLE 28

Article 28, the concluding article of the right to freedom of religion, provides:

“(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to any educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person, or if such person is a minor, his guardian has given his consent thereto.”

The protection of article 28, by the nature of its contents, is available only to individuals and not corporate persons. But its writ of interdiction runs against both the state and private persons, whether natural or juristic, although in view of the Supreme Court opinion, in Samdasani’s Case, it is doubtful whether this writ against a private person can be enforced under article 32.

THE SCOPE AND LIMITS OF THE RIGHT IN ARTICLE 28

No Religious Instruction in Educational Institution Wholly Maintained by the State: The prohibition of article 28 is two pronged. In the first place, there is a total prohibition under clause (1) of this article on imparting any religious instruction in any educational institution maintained wholly out of state funds. However, by virtue of clause (2) if the state even wholly

57 Samdasani’s Case, op. cit.
maintains an educational institution in administering capacity within the terms of any endowment or trust under which the institution has been established, this prohibition cannot operate if the endowment or trust requires the imparting of religious instruction in such an institution.

Religious Instruction: An interesting issue in this regard may be what the meaning of the expression "religious instruction" is. A lively exchange of words took place even in the Constituent Assembly between Ambedkar, the Chairman of the Drafting Committee, and Lakshmi Kanta Maitra, a member from West Bengal, in this regard. And although Ambedkar felt that this expression meant only religious dogmas, Maitra remained unconvinced.

It should seem that no doctrinaire approach to this issue is possible, because the dividing lines between religion, culture, ethics and morality do not build water-tight compartments. The issue has to be resolved finally in each case by the court on a commonsense view and on considerations of practical necessity. However, it seems certain that moral or ethical instructions and imparting of nationalist and patriotic ideas are permissible under article 28.

No Compulsion to Attend Religious Instructions or Worships: Then, article 28(3) forbids the compulsory attendance of any person attending an educational institution recognised or aided by the state at any religious instruction or worship conducted in the institution or any premises attaches to it unless the person concerned, or the guardian of any such minor person, voluntarily consents to such an attendance.

Article 28(3) is to be read with articles 29 and 30. Under the latter two, inter alia, religious minorities have been given guarantees to run their own educational institutions, and if such an institution gets state recognition or grant it becomes an institution to which persons of any religion may seek admission. Consequently, it is appropriate that even state recognised or aided denominational, or other, educational institutions should not impart compulsory religious instruction. However, as in

the case of wholly state maintained educational institutions, in state-aided or state-recognised educational institutions also moral, ethical or patriotic instructions are not forbidden.

It should be obvious, thus, to any observer that in the country's life the rights embodied in articles 25 to 28 of the Constitution are an ingredient of the Indian secular democracy. They also provide a protective shield for religious minorities, an essay on essential human dignity and a lesson in national integration. They are but part of the Indian tradition of religious toleration now anointed as fundamental rights to serve as operative instruments for fostering the dignity of the individual and the unity of the nation.
CHAPTER 18

CULTURAL AND EDUCATIONAL RIGHTS

"Culture" is a compendious expression to indicate the totality of the way of life of a group of people, and significantly, the Constitution of India in article 351 recognises the composite character of the Indian culture which expresses the genius of Indian life, although the Constitution nowhere defines the word "culture". Das C. J., in In re Kerala Education Bill, 1957\(^1\), observed:

"Throughout the ages endless inundations of men of diverse creeds, cultures and races—Aryans and non-Aryans, Dravidians and Chinese, Scythians, Huns, Pathans and Mughals—have come to this ancient land from distant regions and climes. India has welcomed them all. They have met and gathered, given and taken and got mingled, merged and lost in one body. India’s tradition has thus been epitomised (by Tagore) in the following noble lines:

‘None shall be turned away
From the shore of this vast sea of humanity
That is India’.”

“Indeed, India has sent out to the world her message of goodwill enshrined and proclaimed in our National Anthem:

‘Day and night, thy voice goes out from land to land,
Calling Hindus, Buddhists, Sikhs and Jains round thy throne,
and Parsees, Mussalmans and Christians.
Offerings are brought to thy shrine by the East and the West
to be woven in a garland of love.
Thou bringest the hearts of all people
into the harmony of one life.
Thou dispenser of India’s destiny,
Victory, Victory, Victory to thee!’\(^2\)

This is the Cultural Glory that is Ind, and the Constitution of India has adopted the novel attitude in specifically guaranteeing, among other rights, the cultural right of every section of the Indian society. The cultural and educational

\(^2\) This is part of Tagore’s poem, Jana Gana Mana, whose opening part has been adopted as the National Anthem.
rights contained in articles 29 and 30 of the Constitution were
classified in the Constituent Assembly by a person like Lari
as inadequate and as too liberal by a person like Damodar
Swarup Seth. However, as finally adopted, they are, indeed,
unique in depth and breadth, although their simulacra, in the
forms of linguistic and educational guarantees may not be found
wanting in some other constitutional systems also.

As the marginal notes to articles 29 and 30 indicate, these
cultural and educational rights primarily run as guarantees to
the minority communities in the country, but as the Supreme
Court observed, in State of Bombay v. Bombay Education
Society, at least the protection under article 29(2) extends to
each citizen, irrespective of the fact whether he belongs to a
minority group or a majority community.

DEFINITION OF MINORITIES

However, as the cultural and educational rights in articles
29 and 30 are instruments par excellence for the protection of
minorities, the question of defining “minorities” for the purposes
of these two articles becomes of prime significance. The Constit-
tution itself does not define the term “minorities” nor is there
any definition of it in the General Clauses Act. Consequently,
the conception of “minorities” has to be deduced from the cases
decided by the superior courts relating to these two articles.
In In re Kerala Education Bill, 1957, the Supreme Court took
note of the different views placed before it on the conception
of “minorities”, but declined to express any final view on the
matter, for, the Court said,

“the Bill before us extends to the whole of the State of Kerala and
consequently, the minority must be determined by reference to the entire
population of the State. By this test Christians, Muslims and Anglo-
Indians will certainly be minorities in the State of Kerala”.

On this view of the matter, a minority community for the
purposes of articles 29 and 30 may be based on language, culture

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3 See, for example, the U.S. Supreme Court decisions in Meyer v.
Nebraska, (1922) 262 U.S. 390; and Pierce v. Society of Sisters, (1925) 268
U.S. 510; and section 93, Canadian Constitution and article 43, Irish Constit-
tution.


or religion, and its position vis-a-vis the majority community is to be determined not with reference to the particular area in which it may be concentrated, or in which a particular action is sought to be taken, but to the entire area to which an impugned statute may apply. Generally, the test of minority may, then, be said to have been satisfied if a community claiming minority status is based on religion, language or culture and is numerically less than fifty per cent of the total population of the entire area covered by an impugned statute, although in actual working this test may also present some difficulties.

PROTECTION UNDER ARTICLE 29

Article 29, which carries a marginal note “Protection of interests of minorities”, says:

“(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them”.

Article 29, first, guarantees to every section of Indian citizens the right to conserve its own distinct language, script and culture, and secondly, it forbids discrimination against any Indian citizen in respect of admission into educational institutions maintained or aided by the state on grounds only of religion, race, caste or language. Obviously, the protection of article 29 is available only to Indian citizens against any person, including the state. Commenting on the significane of this article Jaipal Singh felt: “This article seems to open a new era for Indians.” And Santhanam added:

“This article solves one of the most difficult problems which free India will have to face. The problems of religious minorities and of the Scheduled Castes are legacies of the past and I expect that in the near future they will simply lapse owing to circumstances. But the question of linguistic minorities will be a problem for many decades to come and, I am afraid, it is going to cause the country a great deal of trouble.”

Protection of Language, Script and Culture: Clause (1) of article 29 extends direct protection to any section of Indian

citizens within the territory of India to conserve its own distinct language, script or culture. This clause (1), which is, unlike article 19(1), couched in absolute terms is not subject to any reasonable restriction, express or implied. Consequently, the Supreme Court held that section 123(3) of the Representation of the People Act, 1951, which declares as a corrupt practice any appeal by a candidate or his agent to a voter to vote or refrain from voting on the ground of language, must yield to article 23(1). In effect, the right conferred by article 23(1) also includes the right "to agitate for the protection of the language".  

Again, the right to conserve language, script and culture necessarily implies the right to establish and run educational institutions for the purposes of such conservation. This right has been expressly recognised by article 30(1) which forms a complement of article 29(1). Article 29(1), read with article 30(1), invests minority groups with an additional right to impart instruction to their children in their own languages and the power of the state to prescribe the medium of instruction must yield to this paramount requirement of fundamental rights.

Prohibition of Discrimination in Admission into Educational Institutions: Article 29(2) forbids discrimination against any citizen in regard to his admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them, and the Supreme Court has held that unlike clause (1) of article 23, which confers right on a citizen as a member of a minority community, clause (2) thereof clothes every individual citizen with a right. Clause (2) is, therefore, of general application available alike to all citizens individually.

The first case under article 29(2), which came before the Supreme Court, was that of State of Madras v. Champakam. This case arose out of the Communal G.O. of the Madras State allotting seats in the medical and engineering colleges of the

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State in the ratio of the population of the different communities in the State. The G.O. was challenged on the ground that it was based on religion, race or caste. The Supreme Court rejected the plea that the G.O. was meant to further the Directive Principles and declared the G.O. void. The Court added that while article 29(1) protected the language, script and culture of any section of citizens, article 29(2) guaranteed the fundamental right of individual citizens. And article 15 of the Constitution had to be amended by the Constitution (First Amendment) Act, 1951, to provide for special beneficial treatment of socially and educationally backward classes of citizens or the Scheduled Castes and Scheduled Tribes.

In the next case of interest, *State of Bombay v. Bombay Education Society*, the Supreme Court again emphasised the general nature of article 29(2) as capable of application to all Indian citizens. This case was a sequel of a January 1954 Order of the Bombay State Government, which interdicted every primary or secondary school in the State, where the medium of instruction was English, from admitting any section of Indian citizens whose mother tongue was not the English language. The Court struck down the Order and said of the right under article 29(2) as follows:

"To limit this right only to the minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. We see no cogent reason for such discrimination."

**Educational Institutions Maintained or Aided by the State:** The protection of article 29(2), though available to all individual citizens, is not available in the case of all educational institutions. Only institutions maintained by the state or receiving any aid from the state are covered by the prohibition of discrimination under article 29(2). Obviously, an institution which is wholly financed by the state is a state-maintained institution. So far as the word 'aid' is concerned, it has not been defined by the Constitution and must, therefore, be taken in the ordinary

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sense of the term to denote all recurring grants to an institution, including the grant which were being given to the Anglo-Indian institutions under article 337 up to January 26, 1960.\textsuperscript{11}

\textit{Denial of Admission on Grounds only of Religion, Race, Caste, Language} : To attract article 29(2) it is essential that a citizen must have been denied admission into a state-maintained or state-aided educational institution "on grounds only of religion, race, caste, language or any of them," even in the case of educational institutions maintained or aided by the state. Obviously, a ground other than those falling within the ambit of article 29(2) may be made a pre-condition for admission even into these educational institutions.

Thus, beneficial conditions or limitations, such as previous training, appropriate age, good character, physical fitness, vaccination, or even dissociation from harmful associations and activities, may be required as a pre-condition for admission into even state-maintained or state-aided educational institutions. Again, such educational institutions may refuse admission,\textsuperscript{12} or expel a student,\textsuperscript{13} on proper grounds, including misconduct or indiscipline, provided it does not involve an abuse of discretion or a violation of any other mandatory provision of the Constitution, say, article 15 or article 14.\textsuperscript{14} Residence may also be made a ground for denial of admission.

However, in determining whether admission has been denied "on grounds only of religion, race, caste, language or any of them", the court is not concerned with the object of denial, because this plainly raises a question of state policy, but with "the immediate ground and the direct cause for denial" of admission. If the immediate ground and the direct cause is one interdicted by article 29(2), namely, religion, race, caste or language, the court is bound to give relief, even when an order denying admission is not actually based on any of these grounds but has the effect of denying admission on the basis of any of them.

\textsuperscript{11} \textit{In re Kerala Education Bill, 1957, A.I.R. 1958 S.C. 956.}
\textsuperscript{12} \textit{Vikaruddin v. Osmania University, A.I.R. 1954 Hyd. 25.}
\textsuperscript{13} \textit{Ramesh v. B.B. Inter College, A.I.R. 1953 All. 90.}
\textsuperscript{14} \textit{Chitra Ghosh v. Union of India, A.I.R. 1970 S.C. 35.}
Thus, in *State of Bombay v. Bombay Education Society,* the Supreme Court struck down an order of the Bombay Government, to the effect that no pupil whose mother tongue was not English could be admitted into a primary or secondary school where the medium of instruction was English, on the ground that the order made discrimination on the ground of language and the plea that the object of the order was to promote the introduction of Hindi, or any other Indian language, was rejected.

*Article 29(2) and Article 15:* Article 29(2) prohibits discrimination against a citizen in the matter of admission into a state-maintained or state-aided educational institution on grounds only of religion, race, caste or language and is, thus, of a specific nature. Article 15(1) forbids the state to discriminate against a citizen in any matter whatsoever “on grounds only of religion, race, caste, sex, place of birth or any of them,” and is, therefore, of a general nature. In *State of Bombay v. Bombay Education Society,* the Supreme Court said:

“Article 15 protects all citizens against discrimination generally, but article 29(2) is a protection against a particular species of wrong, namely, denial of admission into educational institutions”.16

But this does not mean that the special provisions of article 29(2) control the general provisions of article 15(1). They are complementary, and thus, refusal of admission into an educational institution on grounds of sex or place of birth will be bad in law under article 15(1), even though it is not bad within the terms of article 29(2).17 Article 15(1) is, however, limited only to state-maintained educational institutions, but article 29(2) covers state-aided educational institutions as well.

Again, article 29(2) carries no exceptions, but article 15(1) carries exceptions in clauses (3) and (4) of article 15. Clause (3) of article 15 makes exception in favour of "special provisions for women and children" and clause (4) thereof says:

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16 Ibid.
“Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes”.

These exceptions of article 15 apply, mutatis mutandis, also to article 29(2). However, a measure to be protected under Clause 15(4) must be for the advancement of the specified classes or Castes or Tribes and not operate against them.¹⁸

PROTECTION OF ARTICLE 30

Article 30 has a marginal note “Right of minorities to establish and administer educational institutions,” and it reads as follows:

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Article 30, on the one hand, guarantees to minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice, and, on the other, prohibits the state from making any discrimination against such minority educational institutions in the matter of giving aid. Unlike article 29, the protection of article 30 extends not only to citizens but to all persons alike, provided they are resident in India. But like article 29(1), benefits under article 30 can be claimed only by a plurality of persons as a unit or of a community of persons necessarily fluctuating, provided the unit or community is a minority based on religion or language. Again, article 30 is available only against the state, whereas article 29 is available, in certain cases, even against private persons.

Minorities Based on Language or Religion: Article 30 protects all minorities based only on religion or language, provided they are resident in India. But it does not cover

cultural or other minorities. Once it is established that a group is based on religion or language, its minority status then is always a question of fact. Speaking very generally, a group claiming minority status must be less than fifty per cent of the total population of the area to which an impugned statute may apply.

**Right of Minority to Establish and Administer Educational Institutions of Their Choice:** What article 30(1) guarantees to religious and linguistic minorities is "the right to establish and administer" educational institutions of their own choice. The word "establish" means "to bring into existence", and where an institution was founded by the Government, it cannot be a minority institution because it was established as a result of the efforts of a minority or a minority, somehow, came to administer the institution after its establishment. But an institution established by a minority in pre-Constiution days is, however, covered by article 30(1). The word "administer" implies running an institution from day-to-day and is wide enough to include the appointments to the institution, and maintenance of discipline therein.

The words "establish" and "administer" are to be read conjunctively, implying thereby that religious and linguistic minorities have the right to administer only those educational institutions which they have themselves established and not one whose management has, somehow, fallen into their hands or one which has been really established by the Government, even though at the instance of, or by the efforts of, a minority group. Nor can a minority claim the fundamental right to administer an institution merely because the majority of the students in the institution belong to that minority community.

A religious or linguistic minority has thus the fundamental right to administer only those educational institutions which have been established by it in pre-Constiution or post-Constiution days. This right, however, is not exclusive in the sense that the area in which a minority has established an educational

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institution of its own choice cannot have another similar institu-
tions established or run by another minority, or majority, community.

**Educational Institutions of Their Choice:** The key to clause (1) of article 30 is its expression "of their choice". It is this expression which unfolds the meaning of the expression "educational institutions" in its plenitude. The expression "of their choice" signifies that the choice of the linguistic and religious minorities with regard to the subjects to be taught and the curricula to be followed is unlimited.\(^{23}\)

In effect, the expression "educational institutions of their choice" is of wide import to cover the right of religious and linguistic minorities to establish not only educational institutions for the members of their own communities but also to establish educational institutions of a general nature, including universities.\(^{24}\)

The "educational institutions" of minorities under article 30(1) may, in appropriate cases, be treated even as institutions for "charitable purposes" under article 26.\(^{25}\) It is also to be noted that the protection of article 30(1) to religious and linguistic minorities to establish and administer educational institutions of their choice is in addition to the right which a member of such a minority group enjoys in this behalf as a citizen of India under article 19(1)(g).

**Prohibition of Discrimination by the State in Granting Aid:** Article 30(1) protects the right of linguistic and religious minorities to establish and administer educational institutions of their choice, whereas article 30(2) prohibits discrimination in granting aid by the state against "any educational institution on the ground that it is under the management of a minority, whether based on religion or language".

Clause (2) of article 30 is but a part of the general prohibition against discrimination contained in the Constitution, and it does not imply that such minority run institutions are protected only against discrimination in the matter of granting aid.

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\(^{24}\) *Aldo Maria Patroni v. E. C. Kesavan*, A.I.R. 1965 Ker. 75.

These institutions are entitled to all the benefits which accrue to them under other articles of the Constitution, particularly articles 14, 15 and 29; and clause (2) is to be viewed as an additional guarantee of a specific nature. By virtue of this clause (2) any educational institution established and managed by a religious or linguistic minority within the terms of clause (1) of article 30 becomes entitled to state aid like all other educational institutions.

ARTICLE 29 AND ARTICLE 30

Articles 29 and 30 are complementary. In *In re Kerala Education Bill, 1957*, the Supreme Court held that these two articles, as indicated by the marginal notes, have for their primary purpose the conferment of certain fundamental rights on minority groups specified by them. The right conferred by article 30(1) is to be looked upon as supplementing the right contemplated by article 29(1), because the right to establish and maintain an educational institution by a minority is concomitant with its right to conserve its distinct language, script or culture. But, as was observed by the same Court, in *W. Proost v. State of Bihar*, "the width of Art. 30(1) cannot be cut down by introducing in it considerations on which Art. 29(1) is based", because article 29(1) is general, while article 30(1) is special.

However, the right conferred by article 30(1) is subject to the limitations imposed by article 29(2), and consequently, a minority institution receiving state aid cannot deny admission to citizens only on the ground of religion, race, caste or language.

STATE'S REGULATORY POWERS OVER MINORITY EDUCATIONAL INSTITUTIONS

Evidently, unlike article 19, there is nothing in articles 29 and 30 to expressly authorise the state to impose restrictions on

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27 Ibid.
29 Ibid.: p. 976.
the educational institutions founded and run by religious and linguistic minorities. But it has been held that the state may impose reasonable regulations in the interests of efficiency, discipline, health, public order, morality, sanitation, and the like. Such regulations cannot be construed as restrictions on the substance of the right under article 30(1). Although no final test of reasonableness has been laid down, in Sidhraj bhai v. State of Gujarat, the Supreme Court has stated the position in this regard as follows:

"The right established by Art. 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Art. 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right granted by Art. 30(1) will be but a 'teasing illusion', a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution, while retaining its character as a minority institution, effective as an educational institution. Such regulations must satisfy a dual test—the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it".

However, the moment a regulation, whose only purpose can be to assist the better administration of a minority run institution, moves beyond that limit and in truth acts as a restriction on the right under article 30(1), its existence cannot be justified on the ground of the interests of the general public. A regulation can be made only to subserve the interests of the concerned institution. Consequently, even in granting aid or giving recognition the state cannot impose a condition which would amount to a surrender of the fundamental right guaranteed by

32 Ramanikanta v. Gauhati University, A.I.R. 1951 Ass. 163.
article 30(1). On the same principle, supersession of a denom-inational educational institution and its substitution by an ad hoc committee contravenes article 30(1).

Power to Grant Recognition: The state has the power to grant recognition to any educational institution, including a minority institution, as a regulatory measure, and the right of the minority to establish and administer an educational institution under article 30(1) also implies the right to receive recognition from the state, if the state imposes a restriction on the scholars of an unrecognised institution in matters of further education, or employment.

It has been held by the Supreme Court, in In re Kerala Education Bill, 1957, that for giving recognition to a minority educational institution covered by article 30(1), the state cannot impose a condition which would amount to a restriction on the right under article 30(1). Thus, a university cannot validly prescribe a single medium of instruction as a condition for granting affiliation to a minority educational institution, if the minority has a different language of its own as the medium of instruction in the institution. But the mere fact that a university requires a teachers' representative to be associated with the managing body of a minority educational institution as a precondition of recognition, does not amount to a violation of article 30(1).

Power to Prescribe Medium of Instruction: Similarly, although the state has the power to prescribe the medium of instruction in an educational institution, the power cannot be so exercised as to infringe the right of a minority under articles 29 and 30. In Shri Krishna v. Gujarat University, the Gujarat High Court held that a university could not prescribe a single medium of instruction which was not the medium of instruction in a minority educational institution as a condition for granting affiliation to that institution, because it would violate article

39 Ibid.; p. 117.
30(1). The Supreme Court, however, upheld the decision of the Gujarat High Court, in *Gujarat University v. Shri Krishna*, on the ground that the State lacked the competence to prescribe the medium of instruction in higher educational institutions, and did not comment on the question of the violation of fundamental right referred to by the Gujarat High Court.

**CULTURAL AND EDUCATIONAL RIGHTS AND DIRECTIVE PRINCIPLES**

The Supreme Court and the High Courts have repeatedly held that in a case of conflict between any fundamental right and the Directive Principles the former shall prevail. In *State of Madras v. Champakam*, the Supreme Court said that any reservation of seats in an educational institution in violation of article 29(2) was bad, even if it purported to further the Directive Principles. Consequently, article 15 of the Constitution had to be amended to set matters right. Again, in *In Re Kerala Education Bill, 1957*, the Court went a step further and said that the state's power to prescribe the medium of instruction in an educational institution was subject to the cultural and educational rights under articles 29 and 30. The Court in another case said that though Hindi is the national language and its promotion has been enjoined by article 351, the state, in prescribing the medium of instruction, cannot act in contravention of articles 29 and 30.

The cumulative effects of the decisions of the Supreme Court and the High Courts have been two-fold. In the first place, these superior courts have amplified their power of judicial review in relation to matters arising under articles 29 and 30. Thus, for example, they have taken upon themselves the power to determine when a *regulation* becomes a *restriction* on the right guaranteed by article 30(1). Secondly, their decisions have placed the minority run educational institutions covered by articles 29 and 30 in a favoured class. The guarantees meant to protect minority interests have become, in effect, the palladium

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of special privileges. These privileges now have a tendency to effectively block any integrated national move on educational front to realise "a social order in which justice, social, economic and political shall inform all institutions of the national life." And one is, thus, left wondering whether this effect was intended by the founding fathers in enacting articles 29 and 30 relating to cultural and educational rights.

45 Art. 38. Italics are mine.
CHAPTER 19

RIGHT TO PROPERTY

In the schemes of the rights envisaged by the living constitutions on the earth, no provision relating to rights has, in the course of its working, created history of the kind and on the scale as has done the right to property as initially encysted as a single article 31 of Part III of the Indian Constitution, the “due process clause” of the American Constitution notwithstanding. And the nature and scope of this fundamental right can be appreciated now only after a preliminary exploration of its genealogy and the history created by it, however limited the efforts on this score may be. Indeed, the right to property in article 31 is unintelligible today save in historical perspective.

THE BASIS AND GENESIS OF THE RIGHT TO PROPERTY IN ARTICLE 31

As noted in the context of article 19(1)(f), the fundamental right to property has now come to have historic association with the theory of individualism, liberalism or capitalism. But even in a socialist set-up personal property right, as in article 10 of the Constitution of the U.S.S.R., may get recognition. And it seems that in individual-state equation, it has always worked as a vital factor.

THE CONTEXT OF OTHER COUNTRIES

England: In England, Magna Carta declared: “No freeman shall be disseized or divested of his freehold... but by the law of the land.” Mention may also be made here of the Petition of Rights, 1628, and the Bill of Rights, 1689, as also of the Glorious Revolution and Locke’s apologia, the Second Treatise on Government. Nearer still, Blackstone considered the right to property as one of the three absolute rights inherent “in every Englishman”. To him the right to private property consisted

1 Article 17 of the Universal Declaration of Human Rights also says: “Everyone has the right to own property alone as well as in association with others.”

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"in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."

With the sanctity of private property, then, England has also always recognised the public power of interfering with it, but only under the authority of law. In *Entick v. Carrington*, Lord Camden said:

"No man can set foot upon my ground without my licence. If he admits the fact, he is bound to show, by way of justification, that some positive law has empowered or excused him."

Under the authority of law an Englishman's right to property may be not only interfered with, but he may also be stripped of this right. Property may be seized or confiscated under the authority of law made by Parliament. Parliament may also authorise compulsory acquisition or requisition of property, and this is in addition to the acquisition or requisition by the state with the consent of the owner. This power of compulsory acquisition or requisition without the consent of the owner is the power referred to as the power of eminent domain in the American and Continental legal systems.

The courts in the cases of compulsory acquisition or requisition insist, first, on a clear Parliamentary intention as expressed in plain words of, or following by necessary implication from, a statute, and secondly, on a strict adherence to the prescribed rules of procedure for acquisition and requisition. Then there is a presumption against Parliament's intention to interfere with the right to property without payment of compensation.

In addition, there is the power of Parliament to tax for revenue purposes and the power to define or delimit the ambit of any right relating to property. But it should be noted that because of the existence of the crowning principle of Parliamentary sovereignty in the English constitutional system, the need for treating power as police power, or the power of eminent domain, or taxing power never presented itself as a theoretical

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3 *Entick v. Carrington*, (1765) 17 St. Tr. 1067.
or practical proposition as it did in the case of a country like the U.S.A. In fact, Halsbury’s *Laws of England* does not contain any reference to police power or the power of eminent domain as an element of the English legal and constitutional system.

**The U.S.A.:** In the U.S.A., in the tradition of *Magna Carta*, the Glorious Revolution, and its defence by John Locke in his *Second Treatise on Government*, the American Declaration of Independence also spoke of the inalienable right of life, liberty and pursuit of happiness, and in the Constitution of the U.S.A. came to be enshrined by the first ten Amendments a Bill of Rights in 1791, to which was added the Fourteenth Amendment in 1868.

The Fifth and the Fourteenth Amendments alike provide, *inter alia*, that no person shall be “deprived of life, liberty or property without due process of law”; but the former also adds, “nor shall private property be taken for public use without just compensation.” And when “reason” of the courts, specially of the Supreme Court, anointed due process of law as natural justice in defence of individual liberties, the dictate of practical necessity gave rise to a three dimensional concept of state power as the means of interfering with these liberties. The American Constitutional system came to develop the trio of “taxing power”, “police power” and the “power of eminent domain” all of which continue to be terms of indefinite connotation, because they have to grapple with an elusive conception of “due process of law”.5

**Taxing Power:** Of all the three powers, taxing power seems to have acquired a greater precision, and Willis defines it “as the legal capacity of government to impose charges upon persons or their property to raise revenue for governmental purposes”.6 And yet, if the courts feel, even taxation may be condemned as confiscation in disguise.

**Police Power:** The concept of “police power” is the most indefinite, and it is, generally, referred to as the residue of the

5 See Appendix IV on Due Process of Law.
state power. According to Willis, this power refers to "the legal capacity of government to control the personal liberty of individuals for the protection of the social interests". For its exercise, first, "there must be a social interest to be protected which is more important than the social interest in personal liberty", and secondly, there must be a rational nexus between the end to be accomplished and the means adopted for this purpose. In *Barbier v. Connolly*, the Supreme Court viewed it as the power of the state

"to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

**Power of Eminent Domain:** The power of eminent domain is the power arising out of superior dominion, of dominant jurisdiction, that the public has of necessity over all private property. To quote Willis again:

"The power of eminent domain is the legal capacity of government to take private property of individuals for a public use upon the payment of just compensation. Eminent domain is the superior dominion of the State over all the property within the State. Eminent domain differs from the police power in that the police power is not a taking of any rights, but a limitation on the exercise of such rights, although the police power may also result in making people lose their property. Eminent domain takes property for use by the public or for the benefit of the public while the police power prevents people from using their own property so as to injure others."

It should appear, then, that the power of eminent domain is, in a sense, a species of the police power and these two supplemented with the taxing power embrace all forms of public control, or public action, touching upon private rights. The exercise of the power of eminent domain in the U.S.A. now presupposes three conditions. In the first place, there must be the authority of law for taking property. Secondly, the purpose

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7 *loc. cit.*
9 Willis, *op. cit.*; pp. 224-25, 716-17.
10 *loc. cit.*
for which property can be taken must be a public purpose. Thirdly, property can be taken only after payment of just compensation. In addition, the condition of procedural reasonableness may be read or required because of the requirement of due process of law. And in all these cases has to be kept in mind the power of judicial review of the Supreme Court.

**Australia:** The American Declaration of Independence and the Constitution of the U.S.A. were followed by other revolutions and constitutional arrangements, notably the French Declaration of the Rights of Man and Citizens and the Revolution of France and the Revolution of the U.S.S.R., and the Constitutions of these countries as also the Constitution of Canada and the Constitution of Australia. But of direct interest in this context is section 51 of the Australian Constitution, which empowers the Australian Parliament “to make laws for the peace, order and good government of the Commonwealth with respect to:—,” *inter alia,*

“(XXXI) the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws.”

**THE INDIAN CONTEXT**

**Early Developments:** Leaving aside the ancient Indian attitude towards the right to private property and the extent of social control on it and beginning with the British rule in this country, there seems to have been in operation no constitutional or statutory guarantee of the general right to private property, although it existed as a recognised fact, or, at best, as a principle of common law as applied to India, subject to the power of the state to control, confiscate, or acquire or requisition property.

So far as acquisition is concerned, mind goes back to the acquisition of land for constructing Fort William after about two decades from the battle of Plassey. But no details in this regard are available now. Then came Regulation I of 1824, which contained provisions for compulsory acquisition of land and payment of compensation. The first Land Acquisition Act was passed in 1870, to which was added the Land Acquisition (Mines) Act, 1885, but the 1870 Act came to be replaced by the existing Land Acquisition Act, 1894. And thereafter nothing
substantially was done to alter this situation until the 1935 Reforms were introduced.

The 1935 Reforms: Although in total disregard of the Indian sentiments the idea of a Bill of Rights in the Indian context did not find favour with either the Statutory (Simon) Commission or the Joint Parliamentary Committee, the latter, as a clog on progressive economic measures, did contemplate some safeguards for the right to property:

"We think that some general provision should be inserted in the Constitution Act safeguarding private property against expropriation, in order to quiet doubts which have been raised in recent years by certain Indian utterances . . . We think that it should secure that legislation expropriating, or authorising the expropriation of, the property of particular individuals, should be lawful only if confined to expropriation for public purpose, and if compensation is determined, either in the first instance or on appeal, by some independent authority".11

But the idea of having "some independent authority" for determining compensation was, according to the Attorney-General, not the real answer to the problem of confiscation without adequate compensation, and he felt that only "a veto on the part of the Governor-General is really the most effective proposal . . ."12 Consequently, under the Government of India Act, 1935, the question of justiciability of the amount of compensation was not entrusted to any independent judicial authority, but its adequacy or otherwise was left to the discretion of the Governor-General to be exercised in the form of his veto power.

The Government of India Act, 1935: The guarantees relating to the right to property came to be embodied in sections 299 and 300 of, and the relevant entries in the Seventh Schedule to, the Government of India Act, 1935. Of sections 299 and 300, the former was intended to be of general application, whereas the latter dealt with certain grants made before 1857 and certain pensions payable before the commencement of Part III of the 1935 Act.

Section 299: Section 299, which provided substantially the contents and the frame of the original article 31, said:

"(1) No person shall be deprived of his property in British India save by authority of law.

(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purpose of any land or any commercial or industrial undertaking, or any interests in or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, it is to be determined.

(3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue shall be introduced, or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

(5) In this section 'land' includes immoveable property of every kind and any rights in or over such property, and 'undertaking' includes part of an undertaking."

Thakur Jagannath's Case: It may be desirable to note here the attitude of the Federal Court of India, in Thakur Jagannath's Case, relating to a challenge of the U.P. Tenancy Act, 1939, under the above section 299(2). Upholding the Tenancy Act, Gywayer C. J. said that a law regulating the landlord-tenant relationship and thereby diminishing the right of the landlords over their tenants is not a law authorising compulsory acquisition for public purpose, and was, therefore, outside the scope of section 299(2). No reference was made to "police power" or "eminent domain" in disposing of the case, but the Court considered desirable to emphasise the ambit of the Legislature's power and said:

"We desire, however, to point out that what they are now claiming is that no Legislature in India has any right to alter the arrangements embodied in their Sanads nearly a century ago; and for all we know, they would deny the right of Parliament itself to do so".13

On appeal, the Privy Council sustained the judgment, and significantly, the concepts of police power and eminent domain were not referred to by the Council also. This case, even after the commencement of the Constitution, was cited with approval by the Supreme Court in Umeg Singh's Case and Kishan Singh's Case, both of them relating to tenancy laws. Clearly, then, even in the working of the 1935 Act, police power and eminent domain were not part of the Indian legal system.

The Constituent Assembly: It is in this Indian and foreign legal background that the Constituent Assembly became seized of the problem of incorporating the right to property in the Constitution of Independent India. The Assembly did not have a tabula rasa to write on the right to property. It had to work on a criss-cross canvas of a conflicting design. This scene became also surcharged with the ideologies, commitments and attitudes of the founding fathers and their assessment of the nation's objective socio-economic conditions and needs. And the result was that of all the provisions relating to fundamental rights, the drafting of those concerning the right to property proved to be the most difficult.

The Munshi draft of fundamental rights gave double protection to property by requiring in one clause that no person shall be deprived of his life, liberty and property without due process of law and by ensuring to all citizens and others in another clause the right to acquire, hold and dispose of property. But a different attitude was displayed by K. T. Shah's draft which sought to arm the state with wide powers of regulation and acquisition of private property.

When on March 26, 1947, the sub-committee on fundamental rights look up the Munshi draft for discussion, it found favour with the majority of its members, but two days later it was thought more desirable to substitute it with provisions based on section 299 of the 1935 Act. The due process clause was dropped in the case of property also as it was done in the case of life and liberty, and finally, the sub-committee formulated

the following provision in this regard as clause 27 of its draft report:

“No property, moveable or immovable, of any person or corporation, including any interest in any commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of just compensation for the property taken or acquired and specifies the principles on which and the manner in which the compensation is to be determined.”

This clause 27 of the draft report also attracted criticisms, particularly from those who visualised for India massive agrarian and economic reconstruction. B. N. Rau, the Constitutional Adviser, specifically suggested that a new clause providing, that “the State may limit by law the rights guaranteed by sections 11, 16 and 27 whenever the exigencies of the common good so require”, be inserted. But although it was lost when put to vote, it is interesting to note that article 31C, now introduced by the Constitution (Twenty-fifth Amendment) Act, 1971, is rooted in this line of thinking. However, the sub-committee stood by its draft, and its proposals on the right to property figured as clauses 12 and 26 of its final report, of which of direct interest in the context of article 31 is clause 26 only.

The Advisory Committee on Fundamental Rights and Minorities again critically scrutinised this clause 26 in the light of the economic and developmental needs of the country. On the one hand, Pant, supported by Rajagopalachari, wanted the expression “public use” to be substituted by some such expression as “governmental purpose” and Panikkar pleaded for the dropping of the word “just”; on the other, Ambedkar felt that the expression “public use” would not obstruct legislation for progressive economic reforms and Alladi Krishnaswami Ayyar maintained that the existence of the word “just” did not make much difference because the word “compensation” itself implied a just compensation for the property taken. The proposal of Pant was lost, but that of Panikkar was accepted and this clause 26 in this slightly altered form, i.e., sans “just”, became clause 19 of the Advisory Committee's Interim Report on Fundamental Rights.

The Constituent Assembly itself took up the consideration of this clause 19 on May 2, 1947, and although controversies
again came to the surface with regard to the provision for compensation in this clause, it was adopted without any amendment, after Vallabhbhai Patel explained the position to the Assembly. And in the Constitutional Draft of the Constitutional Adviser, B. N. Rau, clause 19 was only renumbered as clause 25 with some drafting changes intended to make it conform more to section 299 of the 1935 Act.

The Drafting Committee considered clause 25 on November 1, 1947, and from January 20 to 22, 1948, in the light of the needs for socio-economic reforms. On January 20, 1948, indeed, the Committee thought of inserting a new clause to save laws made to implement socio-economic reforms and the Directive Principles. But eventually, it decided to remain contented by moving much closer to section 299 of the 1935 Act. Clause 25 then became article 24 of the Draft Constitution, which came to have three clauses. Its first clause reproduced verbatim the first sub-section of section 299; the second clause comprised the provision of clause 25; and the new third clause read as follows:

“(3) Nothing in clause (2) of this article shall affect—
(a) the provisions of any existing law, or
(b) the provisions of any law which the State may hereafter make for the purpose of imposing or levying any tax or for the promotion of public health or the prevention of danger to life or property.”

When the Draft Constitution was circulated for eliciting opinion, the suggestions made in regard to article 24 reflected the polarity of the attitudes of the persons concerned, and the “compensation clause” proved to be the proverbial Bastille round which the storm of controversies raged. The socialist stream of thought spearheaded by Jaiprakash Narayan and Guptanath Singh wanted to sweep away all provisions that, in their opinion, could stand in the way of progressive socio-economic reforms, although a person like B. N. Rau was quick to point out that even in the U.S.S.R. there were certain guarantees for personal property rights, including the right of inheritance.

There were the forces of the right, which wanted “due process” and “just compensation” to provide the key to the
provisions affecting individual's property. Then, notably, the Central Ministry of Industry and Supply, drawing attention to the Government of India Resolution of April 6, 1948, relating to industrial policy, felt that any property should be taken only on payment of fair and equitable compensation. The Ministry of Works and Mines and Power also stood for "just", "fair" or "equitable" compensation.

In fact, the situation became so saturated with conflicting cross-currents that when on December 9, 1948, the article was due to be moved for consideration by the Constituent Assembly, T. T. Krishnamachari suggested its postponement and the Assembly readily agreed. The storm of controversies still continued to rage outside the Assembly Hall, and the Drafting Committee convened in July 1949 a conference of the Provincial Premiers, because, as Ambedkar told the conference, the article had given the Committee "a lot of headache". There also differences of opinion were sharp, if not bitter, and the conference left the final draft of the article to be settled by the Drafting Committee.

Accordingly, the Committee brought out a compromise redraft. And in its new form, article 24 came to have six clauses. Its previous clause (1) remained unaltered; from clause (2) the words "the payment of" were omitted and clause (3) was renumbered as clause (5). Besides three new clauses, clauses (3), (4) and (6) were also added.

Nehru himself moved the amended article 24 on September 10, 1949. In a long speech\(^\text{17}\) he explained that any vagueness or lack of clarity in the article was inevitable in the situation "when you try to bring together a large number of ideas and approaches and factors and put them in one or a number of phrases." The new Constitution did not aim at expropriation, but simply recognised the power of the state to acquire property for compensation, he assured.

He, however, drew a distinction between acquisition of small bits of property, or even relatively larger bits, for public use for which the law had laid down a fixed standard, and acquisition for large schemes of social reform and social engineering for which no fixed standard of fair or equitable com-

pensation could exist but would have to be determined by Parliament in consideration of the needs of the community. For, fair or equitable compensation must mean fair or equitable both to the individual and the community. Regarding the role of the judiciary in determining compensation under clause (2), he said:

"Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in. Parliament either fixes the compensation itself or the principles governing the compensation and they should not be challenged except for one reason where it is thought that there has been a gross abuse of the law, where in fact there has been a fraud on the Constitution. Naturally, the judiciary comes in to see if there has been a fraud on the Constitution or not. But normally speaking, one presumes that any Parliament representing the entire community of the nation will certainly not commit a fraud on its own Constitution and will be very much concerned with doing justice to the individual as well as the community."

Even in its new form article 24 had to face a spate of criticisms in the Assembly, and as many as 97 amendments were moved. Damodar Swarup Seth asserted that the article was a "Magna Carta in the hands of capitalists of India. Socialism would be impossible". Sibban Lal Saxena felt: "It will be a lawyers' paradise if this is passed in this form". Some desired Parliament alone to be the final judge of compensation and others stood for expropriation without compensation. Then there were also the champions of the individual's right to property, and Jaspal Roy Kapoor wanted at least the word "equitable", a word of sufficient flexibility and elasticity, to qualify the word "compensation".

However, Pant presented a spirited defence of Nehru's stand and eventually this article 24 was adopted on September 12, 1949, with two minor amendments which did not affect its substance in the least. At the revision stage, the Drafting Committee renumbered it as article 31 and also recast its clauses (4), (5) and (6), but this did not involve any major change. And thus was born article 31, a compromise baby with congenital contradictions, and to the woe of the progressive persons, the

18 Ibid.; pp. 1199-1215.
propertied sections soon set it up as the proverbial Trojan war horse to serve their ends.

Article 31 carried a marginal note "compulsory acquisition of property" but, indeed, embodied much more than that. Regarding compulsory acquisition and requisition entries were also inserted into the three Lists of the Seventh Schedule. Entry 33 to List I dealt with "Acquisition or requisition of property for the purposes of the Union"; entry 36 to List II provided for "Acquisition or requisition of property, except for the purposes of the Union, subject to the provisions of entry 42 to List III"; and entry 42 to List III spoke of "Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State for any public purpose is to be determined and the form and the manner in which such compensation is to be given."

But like article 31, as these entries, too, gave rise to curiously conflicting judicial decisions, the Constitution (Seventh Amendment) Act, 1956, deleted entry 33 to List I and entry 36 to List II, and entry 42 to List III was made to simply read: "The acquisition and requisitioning of property". No further change in this regard has since then been found necessary.

THE ORIGINAL ARTICLE 31 AND A PRELIMINARY NOTE ON ITS AMENDMENTS

Article 31, as finally passed by the Constituent Assembly, laid down:

"(1) No person shall be deprived of his property save by authority of law.

(2) No property, moveable or immoveable, including any interests in, or in any company owning, any commercial or industrial undertaking shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received
his assent, then notwithstanding anything in this Constitution the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or...

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

The 1951 Amendment: Soon, by the Constitution (First Amendment) Act, 1951, two new articles, article 31A, providing for "Saving of laws providing for acquisition of estates, etc."; and article 31B, concerning "Validation of certain Acts and regulations", were introduced into the Constitution retrospectively. This Amendment Act also added the Ninth Schedule listing the thirteen State Acts validated by Article 31B. In Sankari Prasad v. Union of India, Sastri C. J., in upholding this Amendment, explained its background as follows:

"What led to that enactment is a matter of common knowledge. The political party now in power ... carried out certain measures of agrarian reform ... by enacting legislation which may compendiously be referred to as Zamindari Abolition Acts. Certain Zamindars ... attacked the validity of those Acts on the ground that they contravened the fundamental right ... The High Court at Patna held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh and Madhya Pradesh, respectively. Appeals from those decisions are pending in this Court. Petitions filed in this Court by some other Zamindars seeking
the determination of the same question are also pending. At this stage, the Union Government with a view to putting an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution, brought forward a Bill to amend the Constitution, which after undergoing amendments in various particulars, was passed by the requisite majority as the Constitution (First Amendment) Act, 1951".19

The 1955 Amendment: Certain pronouncements of the Supreme Court in State of West Bengal v. Bela Banerjee,20 State of West Bengal v. Subodh Gopal Bose,21 and Dwarkadas Shrinivas v. Sholapur Spg. & Wvg. Co.,22 all cases relating to article 31 and decided in 1954, provided the immediate cause for amending articles 31 to 31B by the Constitution (Fourth Amendment) Act, 1955. The 1955 Amendment Act made the following changes:

Changes Relating to Article 31:

i. The then clause (2) of article 31 was amended to read as below:

"(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate".23

ii. The undernoted new clause (2A) was added:

"(2A) where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property notwithstanding that it deprives any person of his property."

Changes Relating to Articles 31A and 31B:

i. By the 1955 Amendment article 31A was thoroughly recast to provide a new definition for "estate" and to cover

19 Sankari Prasad v. Union of India, (1952) S.C.R. 89.
20-22 (1954) S.C.R. 558, 587, 674. See below for further details of these cases.
23 Italics are mine and indicate the newly substituted words.
agrarian reforms in general as also economic and regulatory measures relating to companies, managing agents and big business houses, and individual and commercial undertakings.\(^ {24}\)

ii. The 1955 Amendment Act also added seven more Acts to the Ninth Schedule to validate them within the terms of article 31B.

**The 1964 Amendment:** The Constitution (Seventeenth Amendment) Act, 1964, was enacted primarily with a view to bringing ryotwari settlement within the meaning of "estate"\(^ {25}\) and it introduced changes only in Articles 31A and 31B.

**Changes in Article 31B:** Article 31A was amended by adding a further proviso requiring that certain acquisition of land under personal cultivation could be made only for compensation at the rate of the market value of the land. The definition of the word "estate" was also changed in the article to include ryotwari settlement.

**Change in Article 31B:** The Ninth Schedule was further amended to add forty-four more Acts to bring them within the purview of article 31B.

**The 1971 Amendments:** The Constitution (Twenty-fifth Amendment) Act, 1971, was passed with a view to off-setting the impact of *R. C. Cooper v. Union of India* on article 31, and also to further safeguard economic and social welfare legislation\(^ {26}\) by inserting a new article 31C. No changes were made in respect of articles 31A and 31B and the Ninth Schedule.

**Changes in Article 31:** The twenty-fifth Amendment Act caused the following changes in article 31:

i. It provides for the substitution of the undernoted clause (2) as a new clause in the place of the old one:

"(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may


\(^ {25}\) See the Statement of Objects and Reasons.

\(^ {26}\) *R. C. Cooper v. Union of India* (popularly referred to as the Bank Nationalisation Case), A.I.R. 1970 S.C. 568. See also the Statement of Objects and Reasons.
be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash."

ii. It further provided for the insertion of a new clause (2B) after clause (2A) in article 31:

"(2B) Nothing in sub-clause (3) of clause (1) of article 19 shall affect any such law as is referred to in clause (2)."

**Provision for a New Article 31C**: The 1971 Amendment Act also provided for the introduction of a new article 31C for "Saving of laws giving effect to certain directive principles", i.e., laws for implementing "the principles specified in clause (b) or clause (c) of article 39."

**The Constitution (Twenty-ninth Amendment) Act, 1971**: The Constitution (Thirty-second Amendment) Act was a sequel to the land reform measures in Kerala. This Amendment aimed at including in the Ninth Schedule the Kerala Land Reforms (Amendment) Act, 1969, and the Kerala Land Reforms (Amendment) Act, 1971, so that they could become entitled to the protection of article 31B.

**NATURE, AMBIT AND OPERATION OF THE RIGHT TO PROPERTY UNDER ARTICLE 31**

In the scheme of the Constitution, article 31 is the focus of the fundamental rights relating to property. Though phrased negatively, it is no mere recognition of the state's competence to deprive acquire or requisition the property of any person, nor is it an expression of the limits on this competence of the state. It is impregnated with the core contents of the right to property carried over from article 19(1)(f). And in fact, its operative domain is much wider because unlike the latter it protects all persons, and not only citizens, capable of acquiring, holding and disposing of property under any law.

This article 31 is, in essence, also a positive assertion of all persons' right to property, although this has been done circum-

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27 *See* below for details on the relationship between articles 31 and 19(1)(f).
ferentially. But this peripheral nature of the right under this article, though of interest in appreciating its ambit and operations, should not detract, in the least, from its intrinsic value and efficacy.

NO DEPRIVATION OF A PERSON'S PROPERTY WITHOUT AUTHORITY OF LAW: ARTICLE 31(1)

To begin with, in the first place, article 31 forbids deprivation of any person's property save under authority of law. Its clause (1) provides:

"No person shall be deprived of his property save by authority of law."

An obvious verbatim reproduction of section 299(1) of the Government of India Act, 1935, this clause (1) of article 31 is interpretable in the English tradition as a general interdiction against deprivation of property without legislative authorisation. But a lively controversy was triggered off in the context of interpreting this clause (1) vis-a-vis the other clauses of article 31 in view of the Supreme Court's inclination to look also across the Atlantic, because it was felt that the Bill of Fundamental Rights in the written federal Indian Constitution was more in the tradition of the American Constitution. Question, therefore, was raised whether article 31 contained the doctrines of "police power" and "eminent domain", and sharp differences of opinion were displayed by the Supreme Court Judges.

Police Power: In Chiranjit Lal's Case\textsuperscript{28}, Das J. felt that clause (1) of article 31 dealt with "police power" and clause (2) of this article contained the principle of "eminent domain," and consequently, the two clauses were mutually exclusive operating in two distinct areas. But Mukherjea J., in the same case, took the view that

"in interpreting the positions of our Constitution we should go by the plain words used by the Constitution-makers and the importing of expressions like 'police power' which is a term of variable and indefinite connotation in American law, can only make the task of interpretation more difficult."

\textsuperscript{28} Chiranjit Lal v. Union of India, (1950) S.C.R. 920.
However, in *Kameshwar Singh’ Case*\(^{29}\), Das J. again came out with the view that clauses (1) and (2) of article 31 are mutually exclusive and the former deals with “police power”, whereas the latter relates to the “power of eminent domain”, a view he stood by even in a still later case, *State of West Bengal v. Subodh Gopal*\(^{30}\).

But in *Subodh Gopal’s Case*, Patanjali Sastri C.J. took a completely different view of the matter. He entirely agreed with the observation of Mukherjea J. quoted above, and referring to Blackstone and Cooley in the same strain, as if the two were speaking of the same proposition\(^{31}\), he said that clause (1) of article 31 did not contain the doctrine of “police power”. It merely enjoined that the state acting through its executive organ could deprive a person of his property only under legislative authorisation. To him, “deprivation” contemplated by clause (1) of article 31 was the same as “acquisition or taking possession of property” referred to in clause (2) of this article.

On this view of the matter, he concluded that the first two clauses of article 31 were not mutually exclusive. He, however, did not expressly say whether they together embodied the doctrine of eminent domain, although he explained that “taking possession” in article 31(2) did not include “taking of property for public use” as understood in the U.S.A.

He further added that the state’s emergency power to deprive a person of his property without compensation fell under article 31(5) (b) (ii). In addition, such emergency powers could also operate as part of article 19(5) in the form of reasonable restrictions short of deprivation within the meaning of article 31, although the question whether a particular measure is restrictive or deprivative must be decided in the light of the facts of each case.

Ghulam Hassan J. agreed with the above conclusion of Patanjali Sastri C. J. regarding article 31, evidently, as he ex-

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\(^{31}\) Patanjali Sastri C.J. quoted Blackstone’s *Commentaries*, Book I; p. 110, and Cooley’s *Constitutional Limitations*, Vol. II; p. 1119. But evidently, these two authorities, as quoted, are concerned with two distinct issues; Blackstone dealing with Parliamentary authorisation of deprivation of property and Cooley concentrating on the power of eminent domain.
pressed later in *Dwarkadas's Case*, "on a simple and straight forward context in which it stands and unhampered by the provisions of the American Constitution." Jagannathdas J. also agreed with the views of the learned Chief Justice in a separate judgment, but clearly said:

"I am unable to agree with the view that article 31(1) has reference only to the power of Eminent Domain".

Mahajan J. also agreed with Patanjali Sastri C. J. and Ghulam Hassan J. but to him, it seems, as he said more explicitly later in *Dwarkadas's Case*: "Article 31 deals with the field of eminent domain and the whole boundary of that field is demarcated by this Article." In this latter case he also felt that "police power" in India was to be found in article 31(5) (b) (ii). It should seem, thus, that the opinions of Das and Mahajan JJ. notwithstanding, there is an overwhelming trend against importing the doctrine of "police power" in the frame of the Constitution.

**Eminent Domain**: So far as the doctrine of eminent domain is concerned, it has been noted above that Das J. in *Chiranjit Lal's Case* freely used this expression, and although in that case Mukherjea J. frowned upon the importation of the doctrine of "police power" in interpreting the Constitution, he felt free to speak of the power of the state under article 31 as

"a right inherent in every sovereign to take and appropriate private property belonging to individual citizens for public use. This right, which is described as eminent domain in American law, is like the power of taxation, an offspring of political necessity..."

In *Kameshwar Singh's Case*, Mukherjea J. again emphasised the inherent nature of the power of the state under article 31, and explained that the "constitutional provisions do not confer this power, though they generally surround it with safeguards." In this case, Mahajan J. traced back the doctrine of

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32 *Dwarkadas's Case*, op. cit.
33 Ibid.
34 *Chiranjit Lal's Case*, op. cit.
35 *Kameshwar Singh's Case*, op. cit. Italics are mine.
eminent domain to the work of Hugo Grotius, De Jure Belli Et Pacis, written in 1625, and concluded that article 31 concerned itself with this power of eminent domain. Chandra Sekhar Aiyar J. also felt alike, and it is hardly necessary to add that Das J. firmly stood by his views expressed earlier in Chiranjit Lal's Case, that article 31(2) dealt with eminent domain.

There was, however, a difference of opinion amongst the Judges with regard to the specific ingredients of eminent domain. Das J., in conformity with the American views, held that it involved three elements, viz., (i) authorisation by law for taking property, (ii) for a public purpose, and (iii) for payment of compensation. Mahajan J. referred to Nichols and considered the above first two conditions indispensable. But regarded the third condition as only added by judicial interpretation. Chandra Sekhar Aiyar J., however, went a step further and found, with reference to Thayer's Cases on Constitutional Law, that

"the meaning of the power in its irreducible term is: (a) power to take, (b) without the owner's consent, (c) for the public use."

It should, thus, appear that the majority of the Supreme Court Judges did not consider the requirement to pay compensation as an essential ingredient of the power of eminent domain. But the Court decided by a majority that, whatever the position with regard to the ingredients of eminent domain might be, for acquisition or taking possession of property article 31 requires, first, that there must be an authorisation by law; secondly, that there must be a public purpose for the acquisition or taking possession; and thirdly, the law must also provide for the payment of compensation. If this be the case, one is left wondering whether all the aforesaid references to eminent domain were at all necessary to arrive at a conclusion like this.

It seems that like “police power” “eminent domain” also has necessarily no constructive role to play in the scheme of the Constitution of India, although as noted earlier, both Das and Mahajan JJ. again spoke of it in subsequent cases. It is more

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36 Chiranjit Lal's Case, op. cit.
in the spirit of the Constitution to agree with the following observations of Bose J. in Dwarkadas's Case: 39

"With the utmost respect I deprecate, as I have in previous cases, the use of doubtful words like "police power", "social power", "eminent domain", and the like... In my opinion, it is wrong to assume that these powers are inherent in the State in India and then to say how far the Constitution regulates and fits in with them. We have to interpret the plain provisions of the Constitution and it is for jurists and students of law, not for Judges, to see whether our Constitution also provides for these powers and it is for them to determine whether the shape which they take in India resembles any of the varying forms which they assume in other countries".

**PROTECTION OF ARTICLE 31 TO ALL PERSONS AND PROPERTY**

It is to be noted here that all persons and property have the protective umbrella of article 31 spread over their heads. But all are not equally effectively protected. Thus, for example, a citizen has a greater protection under article 31, because he also enjoys the right to property under article 19(1)(f); or again, money is deemed to be not an object of acquisition, though it may be an object of deprivation.

**Person**: The word "person" in article 31 includes any person who is capable of holding, acquiring or disposing of property and includes a citizen or a non-citizen, a natural or a juristic person. A person, thus, includes a deity or a *mohant*. Even a public authority is a person within the meaning of this article.

**Public Person**: Any public person who is the state within the meaning of article 12 is protected by article 31, provided he is liable to be deprived of his property or whose property is capable of being acquired or requisitioned. Thus, a State Government is a "person" within the meaning of this article, but the Union Government is not. 40

**Enemy Aliens**: Although article 31 protects all persons including an alien, an enemy alien is not entitled to its protection and his right to property may be interfered with in the exercise of Act of State.

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39 Dwarkadas's Case, op. cit.
Property: Property in article 31, generally, refers to all that is property within the meaning of article 19(1)(f). It refers to the bundle of rights relating to a thing as well as the thing itself. It denotes any right to property which is by itself capable of being acquired, held or disposed of, and would, thus, include the business of managing agents even.

Acquisition of Money or Choses in Action: However, it has been held by the Supreme Court that money cannot be treated as property for the purpose of article 31(2). Mukherjea J. said in Kameshwar Singh’s Case:

"Taking money under the right of eminent domain when it must be compensated by money afterwards, could be nothing more or less than a forced loan and it is difficult to say that it comes under the head of acquisition or requisitioning... and is embraced within its ordinary connotation".

Consequently, the word “property” in clause (2) of article 31 is of narrower connotation that it is in its clause (1). But the real effect of this narrow construction is to give it a greater protection under article 31(2) by declaring certain things as incapable of being acquired or requisitioned. It seems, however, that there is no constitutional bar to the state taking any forced loan.

**A Plain Reading of Article 31(1)**

Shutting out the oblong murky shadows of “police power” and the “power of eminent domain” and looking at the plain meaning of the requirements of article 31 as in pari materia with the provisions of section 299 of the 1935 Act, clause (1) of this article may be reconstructed to read in active voice as follows:

"The state shall not deprive any person of his property save by authority of law".

Article 31(1), which, thus, essentially corresponds to article 21, carries a general prohibition against the state acting through

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41 Chiranjit Lal’s Case, op. cit.
43 See Kameshwar Singh’s Case and Dwarkadas’s Case.
44 Kameshwar Singh’s Case, op. cit.
its executive organ to deprive any person of his property without legislative authorisation. Precisely, article 31(1) says that the executive cannot deprive a person of his property in the absence of legislative authorisation. And the measure of the fundamental right to property in this article may, in positive form, be put as follows:

"Any person may be deprived of his property by authority of law."

**Deprivation:** To attract article 31(1), then, the basic requirement is that a person must have been deprived of his property. But when can a person be said to have been deprived of his property? Very broadly construed, "deprivation" would include any loss of property that a person may suffer. But the deprivation contemplated by article 31(1) is the deprivation only by the state as defined in article 12 of the Constitution. This does not mean that all state actions interfering with the right to property can be construed as deprivation. Deprivation in article 31(1) marks out an area which must be distinguished from mere restriction in article 19(5) and acquisition or requisitioning in article 31(2).

**Restriction and Deprivation:** That which is restriction in article 19(5) on the right to property in article 19(1) (f) is not deprivation, and is, therefore, outside the ambit of article 31(1). But two points are of interest. In the first place, the question may arise whether an ostensibly restrictive measure is a deprivative device in disguise, and the courts have to decide the issue on merits. Thus, when of a bundle of rights relating to any property some rights are taken away or restricted, the courts have to ascertain whether what has been left is not merely the husk of title or is illusory. In *Subodh Gopal's Case*, Patanjali Sastri C. J. said:

"No cut and dried test can be formulated as to whether in a given case the owner is deprived of his property within the meaning of article 31; each case must be decided as it arises on its own facts. Broadly speaking, it may be said that an abridgement (of the right of the owner) would be so substantial as to amount to a deprivation within the meaning of Article 31 if, in effect, it withheld the property from the possession and enjoyment of the owner, or seriously impaired its use and enjoyment by him, or materially reduced its value."46

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45 Kameshwar Singh's Case, op. cit.
46 Subodh Gopal's Case, op. cit.
Secondly, as it has now been firmly established, that articles 19(1)(f) and 19(5) apply also to cases under article 31(1), a deprivation under article 31(1) must satisfy the criterion of reasonableness in article 19(5). Such a deprivation also can only be in the interests of the general public or for the protection of the interests of the Scheduled Tribes. Precisely, a deprivation under article 31(1) must be reasonable and for a public purpose only, including the interests of the Scheduled Tribes.

Deprivation in article 31(1) and Acquisition and Requisition in article 31(2): By itself “deprivation” is capable of including “acquisition and requisition,” the latter being merely some modes of deprivation. In fact, the Supreme Court, in Subodh Gopal’s Case and Dwarkadas’s Case, felt that deprivations in article 31(1) was co-terminous with “acquisition or taking possession of” in article 31(2), although Das J. in these as well in an early case, Chiranjit Lal’s Case, stressed the exclusiveness of clauses (1) and (2) of article 31. The Supreme Court in Kochuni’s Case, which was decided after the 1955 Amendment, came to the conclusion that deprivation in clause (1) and acquisition and requisitioning in clause (2) of article 31 relate to two distinct subjects. Consequently, deprivation in article 31(1) is deprivation otherwise than by acquisition or requisitioning.

Thus, article 31(1) concerns itself with the deprivation of a person’s property by the state otherwise than by way of restriction in article 19(5) and acquisition and requisitioning in article 31(2) or taxation in article 265. But a right to property must have been subsisting when the Constitution became effective and it must also be a settled and not a disputed right when its deprivation takes place. This deprivation may, however, take many forms, such as destruction, confiscation, seizure, or forfeiture of any property. Assumption of control of a busi-

47 Kochuni’s Case, op. cit.
48 Chiranjit Lal’s Case, op. cit.
ness, removal of a mahant from his office, or even mere deprivation of possession or enjoyment is also covered by this article.

Compulsory payment of bonus, converting mortgages or charges into unsecured debts, forcing a mill-owner to work his mill at a loss, or even levying a prohibitive rate of licence fee is deprivation within the meaning of article 31(1). But the mere termination of a conditional, contractual or statutory right within the terms of the agreement or statute is outside the scope of this article.

"Save by Authority of Law": Article 31(1) seeks to prevent the state from depriving a person of his property "save by authority of law". The state is competent to deprive a person of his property, but this can be done only under the authority of a law. An action does not lie against the state if a deprivation takes place in pursuance of any law. The real fetter on state action under article 31(1) is not forged by "deprivation" but by the expression "save by authority of law". The law must authorise deprivation and it must also prescribe the mode of deprivation.

Law: Law in this context means statute law or Ordinances, and includes any rules, regulations or schemes framed under a statute or an Ordinance. An act done in pursuance of a subsisting contract is also under authority of law. Of course, such a law must be a valid law with reference to the other rights in Part III and the other provisions of the Constitution. It must, for example, be reasonable from both substantive and procedural angles within the meaning of article 19(5), or must not be discriminatory within the terms of article 14.

51 Dwarkadas's Case, op. cit.
59 Kochuni's Case, op. cit.
Compensation for Deprivation: There is absolutely no constitutional requirement to pay any compensation or solatium for depriving a person of his property under article 31(1). But there is also nothing in the Constitution to prevent the state from making any payment for depriving a person of his property under this article.

In fact, as such a deprivation is now required to stand the test of reasonableness under article 19(5), any provision for paying compensation for depriving a person of his property may incline the courts to view such a deprivation more favourably. Recently, the state, in taking over the management of collieries, provided for compensation at a specified rate under the Coal Mines (Taking Over of Management) Ordinance, 1973.60

NO ACQUISITION OR REQUISITION SAVE FOR A PUBLIC PURPOSE AND UNDER AUTHORITY OF LAW REQUIRING PAYMENT OF AMOUNT: ARTICLE 31(2)

In line with section 299(2) of the Government of India Act, 1935, the original clause (2) of article 31 spoke of “acquisition and taking possession of” property. And this, as noted above, inclined the Supreme Court to feel that the “deprivation” referred to in clause (1) of article 31 was the same as “acquisition and taking possession of” in its clause (2). The Court also thought that article 31(2) embodied the American doctrine of eminent domain.

But the 1955 Amendment of Article 31 has set the record straight. Article 31(2) speaks now of “acquisition and requisitioning of property”, and so does entry 42 of List III, Schedule Seven. Clause (2A) has also been added to article 31 to clearly state that acquisition or requisitioning is confined respectively to a case in which any property is vested in or possession is transferred to the state or a corporation owned or controlled by the state.

COMPULSORY ACQUISITION AND REQUISITIONING

It is now conclusively settled that the expression “acquisition and requisitioning” in clause (2) of article 31 is distinct from the expression “deprivation” in its clause (1). Precisely,

clauses (1) and (2) of article 31 are exclusive. It is equally clear that acquisition and requisitioning in article 31(2) do not mean "the taking of property" in the exercise of the power of eminent domain under the American Constitution. They are to be attributed the meaning which a plain reading of article 31(2) (2A) provides. However, the power of acquisition or requisitioning under article 31(2) is of such a dominant character that it cannot be contracted out.

**Acquisition:** Acquisition of property implies the transfer of the title to a property from its owner to the person acquiring it. In *Chiranjit Lal's Case*, Mukherjea J. said:

"Acquisition means the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title may be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing to the former."

This observation of Mukherjea J. was viewed with favour by Das J. in *Subodh Gopal's Case*, where he considered acquisition to connote the concept of purchase, whether voluntary or involuntary, although the majority led by Sastri C. J. in this case felt that even in the absence of such a transfer of title there could be acquisition if there was a substantial abridgement of the rights relating to any property.

Now, clause (2A) of article 31 adopts the views of Mukherjea and Das JJ. and explicitly provides that there can be no acquisition within the meaning of clause (2) of this article unless the action results in the transfer of the ownership of the property to the state or a corporation owned or controlled by the state. The word "state" in this context is to be construed widely as understood in article 12 to include, say, even municipalities or panchayats.

Nothing should lead, however, to the conclusion that acquisition in article 31(2) (2A) covers only the cases of divesting and vesting of the totality of the rights relating to any property.

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61 Kochunni’s Case, op. cit.
62 Chiranjit Lal’s Case, op. cit.
63 Subodh Gopal’s Case, op. cit.
Thus, leasehold rights may be acquired by the state. What is material in acquisition is the transfer of title and not the totality of rights or the degree of interference with the right. Thus, it has been held that the cession of the property of a subject to a foreign state, forfeiture of property of a subject by a foreign state; forfeiture of property to the Government; taking over by the state of the management or superintendence of property; the levy of full assessment on inam land, or a fresh assessment of rent free land; or an employer's contribution to provident fund is not acquisition.

An interesting aspect of acquisition relates to proceedings for consolidation of land-holdings. It has been held that in such a proceeding any reservation of land for the use of the public in general, even though the affected proprietors are also the participants in the benefits, is acquisition. The reservation of land for the purpose of a village panchayat is also acquisition by the state. But any reservation for the common benefit of only the concerned proprietors does not amount to acquisition.

It should, thus, seem that by retaining the proportionate proprietary benefits of the affected landowners consolidation of land-holdings and introduction of cooperative, or even some sort of collective, farming may be introduced without violating the Constitution.

Requisition: Whereas acquisition concerns itself with proprietary right, requisition has reference to possessory right. In acquisition the title is to be transferred, in requisition possession is required to be transferred. As initially framed, article 31(2) did not use the word “requisition.” It spoke of “taking possession of”. But the Constitution (Fourth Amendment) Act, 1955, has now omitted the words “taking possession of”, and has inserted instead the word “requisitioning”.

Article 31(2A) makes it clear that there is no requisition unless there is the requirement of transferring possession of any property to the state or any corporation owned or controlled by it. This provision of article 31(2A) is plainly in consonance

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67 Bhagat Ram's Case, op. cit.
with the minority view of Das J. in Subodh Gopal’s Case, where he said that the question of requisition arose only

"...where there was an actual taking of the property out of the possession of the owner or possessor into the possession of the State or its nominee. Of course, the manner of taking possession must depend on the nature of the property itself."

In the context of article 31(1)(2A), it should be clearly understood that the protection of this article does not cover all acquisitions or requisitioning of property, but only those that involve the transfer of ownership or possession of any property to the state or a corporation owned or controlled by the state. The state is also competent to acquire or requisition property in situations not covered by this article. Thus, land may be acquired or requisitioned under the Land Acquisition Act for a company.

Consequently, the definition of acquisition or requisition in this article does not restrict the meaning of these words in Schedule VII, List III, entry 42. Again, the word "acquire" in article 31A(1), proviso 2, has not the same meaning as it has in article 31(2). Obviously, therefore, the definitions of the words "acquisition" and "requisition" in article 31(2)(2A) are meant for the specific context in which they have been used.

CONDITIONS FOR VALID ACQUISITION AND REQUISITION UNDER ARTICLE 31(2)

No person or property is outside the competence of the state to acquire or requisition property under article 31(2). But as noted above, the Central Government is not a person within the meaning of article 31, and hence its any property, as well as money and choses in action, cannot possibly be acquired or requisitioned under article 31(2).

This wide power of acquisition and requisition of property under article 31(2) is, however, subject to three conditions "and those limitations" as Das J. said in Subodh Gopal’s Case, "constitute the protection granted to the owners of the property as his fundamental right." In the first place, there is the require-

69 Subodh Gopal’s Case, op. cit.
70 Ibid.
ment that no property can be acquired or requisitioned save for a public purpose. Secondly, there can be no acquisition or requisition save by authority of a law. And thirdly, such a law must provide for the payments to be made for the acquisition or requisition.

Save for a Public Purpose

The existence of public purpose is the absolute condition for the exercise of the power of acquisition or requisition under article 31(2). Even when the expression “save for a public purpose” did not explicitly figure in article 31(2) as initially framed, which spoke of “acquisition and taking possession of... for public purposes,” the existence of public purpose as an implied, but imperative, precondition for the exercise of the power under this article was assumed by the Supreme Court in Kameshwar Singh’s Case71. Mahajan J. said:

“The existence of a ‘public purpose’ is an implied condition of the exercise of compulsory power of acquisition by the State, but the language of Article 31(2) does not expressly make it a condition precedent to acquisition. It assumes that compulsory acquisition can be made for a public purpose only, which is thus inherent in such acquisition.”

Now, after the 1955 Amendment the existence of a public purpose has been expressly made a precondition for acquisition or requisition. This precondition of public purpose has both a positive and a negative aspect. Positively, it involves that any property can be acquired or requisitioned for a public purpose, and negatively, it implies that no property can be acquired or requisitioned for a private purpose.

The Supreme Court said:

“As between individuals no necessity, however great; no exigency, however imminent, no improvement, however valuable; no refusal, however unneighbourly; no obstinacy, however unreasonable; no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate71a”.

But significantly, although this precondition is absolute, the concept of public purpose itself is not absolute. It is a concept

71 Kameshwar Singh's Case, op. cit. Italics are mine.
71a Ibid.
of indefinite connotation. And this position is recognised even in the U.S.A. where "taking property for public use" has come to mean "taking property for public benefit".\footnote{Cooley: Constitutional Limitations, op. cit.; pp. 756-75. See also Wills: Constitutional Law of the United States, op. cit.}

The courts in this country have always tended to take a broad and flexible view of what constitutes public purpose. Even in \textit{Hamabai Petit v. Sec. of State for India},\footnote{\textit{Hamabai Petit v. Sec. of State for India}, H.I.R. 1914 P.L. 20.} a case decided before the Constitution came into force and approved by the Privy Council and followed consistently by the Supreme Court in post-Constitution cases, Bachelor J., considered public purpose to

"include a purpose, that is, an object or aim in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

In \textit{Kameshwar Singh's Case}, Das J. observed as follows\footnote{Kameshwar Singh's Case, op. cit.}:

"No hard and fast definition can be laid down as to what is a 'public purpose' as the concept has been rapidly changing in all countries, but it is clear that it is the presence of the element of general interest of the community in the object or aim that transforms such object or aim into a public purpose, and whatever furthers the general interest of the community as opposed to the particular interest of the individual must be regarded as a public purpose.

With the onward march of civilization our notions as to the scope of the general interest of the community are fast changing and widening with the result that our old and narrower notion as to the sanctity of the private interest of the individual can no longer stem the forward flowing tide of times... The emphasis is unmistakably shifting from the individual to the community. This modern trend in the social and political philosophy is well reflected and given expression to in our Constitution... It is quite clear that a fresh outlook which places the general interest of the community above the interest of the individual pervades our Constitution... In the never ending race the law must keep pace with the realities of the social and political evolution of the country as reflected in the Constitution... We must not read a measure implementing our mid-twentieth century Constitution through spectacles tinted with early nineteenth century notions as to the sanctity or inviolability of individual rights."

Evidently, this broad spectrum of "public purpose" embraces any purpose of the state as defined in article 12, and in-
cludes even a purpose which, though resulting in immediate benefit to individuals, arises out of, or is in furtherance of, a scheme of public utility. Thus, implementation of Directive Principles is within the ambit of public purpose, although the implementation of the mere programme of a political party is outside its scope.

It is not the use by the general public, but the usefulness, the utility, to the public generally, that determines the meaning of “public purpose”, and the mere fact that payments for acquisition or requisition are to be made not out of state funds does not condemn a purpose as a private purpose. Again, usefulness, or utility, to the public generally has reference not only to the present demands of the public but also the future needs of the community.

The constitutional conspectus of “public purpose”, thus, includes the housing of a minister; a public servant; a member of a foreign embassy or consulate; an employee of a state transport corporation; a worker of an industry; the poor living in slums; the general public in cases of acute shortage of housing accommodation, say, because of refugee influx; or the members of a cooperative society.

Schemes for mitigating or eliminating unemployment, introducing land reforms, preventing concentration of means of production, eliminating intermediaries and vesting management of land in a village body, giving land to companies, or

74 Ibid.
75 Nichols : Eminent Domain, op. cit., p. 447.
81 Nanji’s Case, op. cit.
82 Barkaya’s Case, op. cit.
84 Bhanji’s Case, op. cit.
87 Kameshwar Singh’s Case, op. cit.
88 Ibid.
establishing public institutions of charitable and educational nature\(^{91}\) are also within the meaning of "public purpose". But an acquisition or requisition for the mere purpose of raising revenue\(^{92}\), or for the purpose of giving the property to another individual\(^{93}\) cannot constitute a public purpose.

However, the legislature, in authorising acquisition or requisition of property, has only to see to it that the acquisition of requisition is only for a public purpose. It is not required to state explicitly that the authorisation is for this or that particular purpose\(^{94}\). Consequently, unless this authorisation has been used for a collateral purpose, or has been used *mala fide*, it is not unconstitutional to divert an acquired or requisitioned property from one public use to another.\(^{95}\)

**Justiciability of Public purpose:** But expressed or not, the question whether an acquisition or requisition is for a public purpose is to be finally determined by the court. The legislative view of a purpose as being a public purpose is not only not conclusive, but also there is no presumption in favour of such a purpose being a public purpose\(^{96}\). Consequently, any law excluding the jurisdiction of the courts to finally determine the existence of a public purpose for any acquisition or requisition is unconstitutional and section 6(3) of the Land Acquisition Act, 1894, has been saved only because of article 31(5) (a)\(^{97}\).

However, as there is no requirement of express legislative statement of the public purpose for any acquisition or requisition, the courts have to gather the purpose from the entire circumstances attending a statute. The whole of an impugned Act, including its preamble, if any, has to be read by the light of the circumstances in which it has been passed to determine whether it has a public purpose\(^{98}\). And in thus arriving at its


\(^{92}\) *Kameshwar Singh’s Case*, op. cit.

\(^{93}\) Ibid.

\(^{94}\) *Barkaya’s Case*, op. cit.

\(^{95}\) *Sonawanti’s Case*, op. cit.

\(^{96}\) *Kameshwar Singh’s Case*, op. cit.

\(^{97}\) *Bela Banerjee’s Case*, op. cit.

\(^{98}\) *Arora’s Case*, op. cit.
own view of public purpose, the court is expected to respect the legislative view of public purpose.\(^{99}\)

Besides, once the court comes to the conclusion that there exists a public purpose for any acquisition or requisition, it is not to adjudge the necessity of the measure for acquisition or requisition. The legislature is the sole judge as to this necessity, the timing of the action and the extent of acquisition or requisition. The court has no role to pay in the determination of these issues.\(^{100}\)

**Save by Authority of a Law**

Article 31(2) also requires that no property can be acquired or requisitioned “save by authority of a law”. This means that the executive can acquire or requisition property only under legislative authorisation. This requirement is intended to be a check on the executive, whereas the requirements of a public purpose and of the payments for acquisition or requisition bridle the legislature as well.

**Law Means Valid Law**: Obviously, a law authorising acquisition or requisition means an otherwise valid law, i.e., a law that is not inconsistent with the mandatory provisions of the Constitution. Such a law may, and does, also prescribe the procedure to be followed for acquiring or requisitioning property. And the prescribed procedure also must be valid within the terms of the Constitution. Besides, as article 31(3) requires, a law passed by a State Legislature for acquisition or requisitioning of any property must receive the sanction of the President.

**Article 19(1)(f) and Article 31(2)**: It should, however, be distinctly understood that in testing the validity either from substantive or procedural angle, clauses (1)(f) and (5) of article 19 have now no role to play. The initial line of thinking was that article 19(1)(f) and article 31 covered mutually exclusive fields.\(^{101}\) In *Kochuni's Case*\(^{102}\), however, the Supreme

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\(^{99}\) *Sonawanti's Case*, op. cit.

\(^{100}\) *Arora's Case*, op. cit.

\(^{101}\) See the cases of Chiranjit Lal, Kameshwar Singh and Subodh Gopal, op. cit.

\(^{102}\) *Kochuni's Case*, op. cit.
Court felt inclined to treat these two articles to be interlinked. But in *Barkaya's Case*\(^{103}\), it was clearly laid down by the Court that article 19(1)(f) has no application to cases under article 31(2), a position which was again affirmed in *Sitabati Devi's Case*\(^{104}\).

In *Cooper's Case*\(^{105}\), however, the Court seemed to have reversed this position. But the Twenty-fifth Amendment, 1971, plainly seeks to restore the earlier position by providing for the addition of a new clause (2B) as follows:

"Nothing in sub-clause (f) of clause (1) of article 19 shall affect any such law as is referred to in clause (2)."

*Amount for Acquisition or Requisition*

The crux of the imperative triple conditions for acquiring or requisitioning any property by the state under article 31(2) is the constitutional command to make payments for acquisitioning or requisitioning any property. The requirement is that the law authorising acquisition or requisition must itself fix the amount to be paid in such a case or lay down the principles for its determination and the manner for its payment. However, in appropriate cases, law in this context may include an order passed under an Act.\(^{106}\)

*The Concept of Compensation*: Very generally, any payment for any loss suffered by a person may be regarded as compensation. But law not only looks upon the various payments made for different kinds of losses as belonging to different categories, but also the word "compensation" itself contains certain distinctiveness in the context of acquisition or requisitioning of property.

Etymologically, the word "compensation" is a derivative from the Latin words "*com" and "*pensare*" which mean "to weigh". It should seem then that the word "compensation" itself carries in its womb the idea of just, fair or equivalent payment for taking a person's property, and the use of the word, "just",

\(^{103}\) *Barkaya's Case*, op. cit.
\(^{104}\) *Sitabati Devi v. State of West Bengal*, C.A. 322 of 1961 S.C.
\(^{106}\) See, for example, A.I.R. 1953 Cal. 548, relating to an order under the Essential Supplies (Temporary Powers) Act, 1946.
or "equivalent", before it may be treated more as a mode of emphasis than of elucidation.\textsuperscript{107}

However, as noted earlier, the Constituent Assembly did deliberately omit the word "just" from article 31(2), allowing thereby the provisions of this article in regard to compensation to continue as \textit{pari materia} with those in section 299(2) of the Government of India Act, 1935. And it came generally to be believed then that the legislature could fix different rates of compensation for different purposes leaving only a narrow strait for judicial intervention in the matter only when it amounted to a gross abuse of power.

\textbf{Justiciability of Compensation:} But the courts in the country struck a completely different note in some of the very earliest cases that raised the question of compensation. The Patna High Court, in \textit{Kameshwar Singh v. State of Bihar}\textsuperscript{108}, and the Allahabad High Court, in \textit{Surya Pal Singh v. State of U.P.}\textsuperscript{109}, stood firmly for just, fair or equivalent compensation. In \textit{Bela Banerjee v. State of West Bengal}\textsuperscript{110}, the Calcutta High Court also took a similar solid view, although in another case relating to ceiling prices, it spoke through Bose J. as follows:

"There can be no doubt that the economic conditions prevailing in the country and the food situation of the country require that ceiling prices fixed by the Government should be treated or accepted as the measure of just compensation."\textsuperscript{111}

So far as the Supreme Court is concerned, it did not have to directly pronounce upon the just measure of compensation in \textit{Kameshwar Singh's Case}\textsuperscript{112} or \textit{Surya Pal Singh's Case}\textsuperscript{113}. And the same may be said also about \textit{Thakur Raghunath Singh's Case}\textsuperscript{114} and \textit{Gajapati's Case}\textsuperscript{115}. But the general tenor of the Court's judg-

\textsuperscript{107} Cf. Nichols: \textit{Eminent Domain, op. cit.}, p. 29.
\textsuperscript{108} AIR. 1951 Pat. 91.
\textsuperscript{109} A.I.R. 1951 All. 674.
\textsuperscript{110} A.I.R. 1952 Cal.
\textsuperscript{111} \textit{Gobind v. Dinesh}, A.I.R. 1952 Cal. 100.
\textsuperscript{114} \textit{Thakur Raghunath Singh v. Court of Wards}, (1954) S.C.R. 1049.
ments in these cases was that compensation meant just, fair or equivalent compensation. In 1954, in State of West Bengal v. Bela Banerjee\textsuperscript{116}, the Court had, however, to deal directly with the question of adequacy of compensation and its justiciability, and it stated its position in the following terms:

"While it is true that the Legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court."

Thus, the Supreme Court unequivocally asserted, first, that compensation meant a just equivalent of the property taken, and secondly, that the Court had the competence to determine whether the criteria or the principles for determining the payable amount were just. And needless to say that the Court, in so doing, visualised for itself a role in relation to article 32(2) in the image of that of the U.S. Supreme Court in the context of "eminent domain", and clearly this had no reference to the intention of the founding fathers.

This situation became further complicated because the Supreme Court held in Subodh Gopal's\textsuperscript{117} and Dwarkadas's Cases\textsuperscript{118} that deprivation in clause (1) of article 31 meant "acquisition or taking possession of" in its clause (2), and further that a substantial abridgement of any right to property could amount to acquisition or taking possession of property within the meaning of article 31(2). This implied then that the Court also reserved to itself the power to determine whether in a case there has been such a substantial abridgement of any right to pro-

property as to make it a case of acquisition or taking possession of property.

The Supreme Court further pressed the point of just and adequate compensation in *Zamindar of Ettayam's Case*\(^ {119}\) and *Nathmal's Case*\(^ {120}\), although the statute in the former had to be upheld because of the protection of article 31(6) and in *Bhanji's Case*\(^ {121}\) later the Court reiterated the exclusiveness of articles 19(1)(f) and 31. Parliament in this situation decided to push through the Constitution (Fourth Amendment) Act, 1955.

The Constitution (Fourth Amendment) Act, 1955: As already noted earlier, by substituting “acquisition and requisitioning of property” for “acquisition and taking possession of property” in article 31(2) and by introducing a new clause (2A), the 1955 Amendment clarified the meaning of the words “acquisition” and “requisition”. And so far as justiciability of compensation is concerned, it sought to set all doubts at rest by further elaborating article 31(2) as follows:

“...and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.”

After the 1955 Amendment, there seems to have followed a period of lull. The Supreme Court appears to have adopted a limited view of its power to test the validity of laws under article 31. In *Kamkhya's Case*\(^ {122}\), it adumbrated the idea of mutual exclusiveness between articles 19(1)(f) and 31(2), a view it again expressed in *Lilavati v. State of Bombay*\(^ {123}\). And interestingly, in *Collector of Malabar v. Erimal Ebrahim*\(^ {124}\), the Court, in line with its attitude in *Bhanji's Case*\(^ {125}\) and with the ring of the early observations of Das J. in *Gopalan's Case*\(^ {126}\) and


\(^{125}\) *Bhanji's Case*, op. cit.

\(^{126}\) *Gopalan's Case*, op. cit.
Chiranjit Lal's Case\textsuperscript{127}, stated as follows in regard to the relation between articles 19(1)(f) and 31:

"If the property itself is taken lawfully under article 31, the right to hold or dispose of it perishes with it and Art. 19(1)(f) cannot be invoked."

Kochuni's Case: Even in early 1960, in State of V.P. v. Moradhwaj\textsuperscript{128}, the Supreme Court upheld the validity of the impugned Act. But the same year, the Court by a majority consisting of Sinha C.J. and Subba Rao and Shah JJ. felt inclined to strike a new path in Kochuni v. State of Madras.\textsuperscript{129} Indeed, the facts of that case were plainly unwholesome in so far as the impugned Act relating to sthanam property in Madras blatantly sought to transfer the property of one person to another without the foundation of any public purpose. But what is of vital significance is that to do justice to the case the Court formulated a broad proposition of far-reaching implications and said:

"Before the Amendment, the Court...held by a majority in (1954) S.C.R. 587 (Subodh Gopal's Case) that clauses (1) and (2) of Art. 31 were not mutually exclusive... On that basis, it was possible to hold, as this Court had in (1955) S.C.R. 777 (Bhanji's Case), on the analogy drawn from Art. 21, that when the property therein was requisitioned within the meaning of Art. 31, the operation of Art. 19 was excluded. But there is no scope for drawing such an analogy after the Constitution (Fourth Amendment) Act, 1955... The decision of this Court in Bhanji's Case... no longer holds the field after the Constitution (Fourth Amendment) Act, 1955.

Although none disputed the actual decision of the Supreme Court in that case, a fresh controversy became evident in regard to the relation between articles 19(1)(f) and 31, because it was considered that the majority proposition in this behalf would enlarge the scope of judicial review of the laws under article 31. The Supreme Court, for its part, did not overrule this majority proposition, but restricted it only to clause (1) of article 31 in Barkya's Case\textsuperscript{130}. It unanimously stated in Sitabati Devi

\textsuperscript{127} Chiranjit Lal's Case, op. cit.
v. State of W. Bengal\textsuperscript{131}, that whereas articles 19(1)(f) and 31(1) were intertwined, articles 19(1)(f) and 31(2) must be held to be mutually exclusive and explicitly added:

"The observation ... that Bhanji's Case 'no longer holds the field' has, therefore, to be understood as meaning that it no longer governs a case of deprivation by means other than requisition and acquisition by the State."

It was in the process of revision and restriction of the above proposition of Kochuni's Case that Burarakur Coal Co. v. Union of India\textsuperscript{132}, a case relating to adequacy of compensation came to be decided by the Supreme Court. In this case the Court took a pedestrian view of adequacy and justiciability of compensation. It upheld the impugned Coal Bearing Areas (Acquisition and Development) Act, 1957, as an Act protected by article 31A(1)(e).

But there is little doubt that notwithstanding the subsequent restrictive interpretation put by the Supreme Court on Kochuni's Case in the cases of Barkaya and Sitabati and its restrained attitude in Burarakur Coal Co.'s Case, the voice raised by it in Kochuni's Case provided a turning point in its attitude towards article 31. A series of decisions relating to adequacy and justiciability of compensation was handed down by it as reflective of this new situation. In fact, it is this voice of, so to say, protest that reverberated in the Court-room since then, whenever a question arose under article 31.

Thus, although in West Ramnad Elec. Co. v. State of Madras\textsuperscript{133}, the Supreme Court upheld the Act, its judgment was clearly based on the consideration that it was possible to pay just and fair compensation within the terms of the Act. Then, again, although in Sonawanti's Case\textsuperscript{134} the Court emphasised the mutual exclusiveness of articles 19(1)(f) and 31(2), the message of the Constitutional (Seventeenth Amendment) Act, 1964, which amended retrospectively the definition of "estate" in article 31A and added entries 21 to 64 to the Ninth Schedule, was completely ignored by it. And in 1964 itself, in Champalal's

\textsuperscript{132} Burarakur Coal Co. v. Union of India, (1962) 1 S.C.R. 44.
Case\textsuperscript{135} and in Namasivaya’s Case\textsuperscript{136}, the Court declared the impugned Acts invalid because they did not provide for fair compensation.

\textit{Vajravelu’s Case}\textsuperscript{136a}: In 1965, in \textit{Vajravelu v. Special Dy. Collector}, the Supreme Court summed up the impact of the 1955 Amendment on the question of adequacy and justiciability of compensation and suggested that by retaining the word “compensation” the Amendment must be said to demonstrate Parliament’s awareness of the Court’s view as to what this word implied. And after indicating the cases in which the Court could still interfere, it stated its position as follows with regard to compensation, although it felt that any solatium lower than that in the Land Acquisition Act was by itself not bad:

“But this much is clear. If the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition, it can be said that the Legislature committed a fraud on power, and therefore, the law is bad. It is a use of the protection of Art. 31 in a manner in which the Article was hardly intended.”

In 1965, \textit{Jeejeebhoy’s Case}\textsuperscript{137} was also decided by the Supreme Court. Although this was a case under section 299(2) of the Government of India Act, 1935, the Court said that even that section spoke of just and fair compensation. And then, although by a majority of 3 to 2 the Supreme Court upheld the validity of the Seventeenth Amendment, in \textit{Sajjan Singh’s Case}\textsuperscript{138}, it was becoming increasingly obvious which way the wind was blowing.

In 1967 came \textit{Union of India v. Metal Corporation of India}\textsuperscript{139}, a case which disputed the validity of the Metal Corporation of India (Acquisition of Undertaking) Act, 1965. The Court in this case moved back to very near its position in \textit{Bela Banerjee’s Case}\textsuperscript{140}. It struck down the Act as invalid because the Act did

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\textsuperscript{135} \textit{State of M.P. v. Champalal}, (1964)6 S.C.R. 35.
\textsuperscript{136a} \textit{Vajravelu v. Special Dy. Collector}, (1955)1 S.C.R. 614, Per Subba Rao J.
\textsuperscript{139} \textit{Union of India v. Metal Corporation}, A.I.R. 1967 S.C. 637.
\textsuperscript{140} \textit{Bela Banerjee’s Case}, op. cit.
not provide for just compensation and the principles laid down by it for the purpose of determining compensation were considered not relevant within the terms of article 31(2).

I. C. Golaknath’s Case\(^{141}\): The movement from Metal Corporation’s Case to Golaknath’s Case marked but a culmination, or a recumulation, of the Supreme Court’s attitude towards article 31 evidenced earlier in Bela Banerjee’s Case\(^{142}\), Kochuni’s Case\(^{143}\) and Vajravelu’s Case \(^{143a}\). In this case, however, the issue was not the adequacy or justiciability of compensation nor the construction of article 31 or 19, but the question of the very validity of the constitutional amendments relating to the fundamental rights was ventilated.

As is common knowledge now, the Court with a majority of 6 to 5 ruled that Part III of the Constitution could not be amended in the manner provided for by article 368, although by applying the doctrine of prospective overruling it sustained as valid all the amendments made therein till then. And the Court’s renewed insistence early next year on “just compensation” in Kamalabai’s Case\(^{144}\) or “real and just compensation” in Durganath’s Case\(^{145}\) really paled into insignificance in the glare of the majority proposition in Golaknath’s Case.

The Supreme Court’s decision in Golaknath’s Case took the country by storm and the adverse criticisms that it attracted seem to have somewhat softened the attitude of the Court towards the issue of adequacy and justiciability of compensation. In late 1968, in Udai Ram’s\(^{146}\) and Ambalal’s Cases\(^{147}\), the Court upheld the validity of the impugned enactments. In fact, these cases marked the beginning of a new move by the Court that resulted in its decision in Shantilal’s Case\(^{148}\), although in between it invalidated, in Balammal’s Case\(^{149}\), an Act under article 31(2)

\(^{142}\) Bela Banerjee’s Case, op. cit.
\(^{143}\) Kochuni’s Case, op. cit.
\(^{143a}\) Vajravelu’s Case, op. cit.
\(^{144}\) Union of India v. Kamalabai, (1968)1 S.C.R. 463.
\(^{146}\) Udai Ram Sharma v. Union of India, (1968)3 S.C.R. 41.
for inconsistency with article 14, which but also reflected a new shift of emphasis to article 14 in cases coming under article 31.

Shantilal’s Case: In State of Gujarat v. Shantilal\textsuperscript{150}, the Supreme Court took a decisively distinct stand. It now stood against illusory compensation and not for just compensation as earlier in Metal Corporation’s Case. It overruled Metal Corporation’s Case and characterised as obiter some observations in Vajravelu’s Case, and by a majority, speaking through Shah J. with whom Hitayatullah C. J. concurred, ruled as follows:

“It is certainly out of the question that the adequacy of compensation (apart from compensation which is illusory or proceeds upon principles irrelevant to its determination) should be questioned after the Amendment of the Constitution. The Amendment was expressly made to get over the effect of the earlier cases which had defined compensation as just equivalent. Such a question could not arise after the Amendment.”

The Court upheld the enactment and further ruled that compensation need not be paid in cash nor in one single form or instalment; a point which has now been sought to be explicitly expressed by the Twenty-fifth Amendment, 1971. But clearly the Court retained the power to adjudge whether any compensation fixed is illusory or the principles laid down for its determination are irrelevant. And, therefore, its balanced attitude in this case could have hardly meant to provide any definite pointer to its future course of action.

R. C. Cooper’s Case\textsuperscript{151}: Naturally, when R. C. Cooper v. Union of India, also commonly referred to as the Bank Nationalisation Case, came for decision before the Supreme Court in 1970, the Court, after referring to the twin lines of thought pursued in the two cases of Vajravelu and Shantilal, came out for “true recompense” under article 31(2), which was to be determined according to “the relevant principles”. The Court substantially broadened the scope of its power to determine the adequacy of compensation. It even explicitly added:

“the Constitution guarantees a right to compensation an equivalent in money of the property compulsorily acquired.”

\textsuperscript{150} State of Gujarat v. Shantilal, op. cit.
The Court further said that article 19(1) (f) applied to cases under article 31(2). It did in fact apply this proposition in deciding the case in hand leading to the effect that even when a banking company's banking business was taken over, the company did not become extinct as a person and continued in existence as capable of carrying on other business within the terms of its articles and memorandum of association. And also compensation was to be paid to a banking company as a corporate personality and not to its shareholders on individual basis.

The Twenty-fourth and Twenty-fifth Amendments, 1971: Evidently, the Bank Nationalisation Case reserved the trend set by Shantilal's Case and went back to the days of Vajravelu's Case and Metal Corporation's Case. The basic difference in the approach of the courts and that of the legislatures seemed to be that whereas the former considered compensation as a mere means for converting any property into its money equivalent, the latter looked upon it as an instrument of social justice also.

There, thus, was no alternative to amending article 31(2). But as there was a bar against such an amendment created by Golaknath's Case, Parliament first passed the Constitution (Twenty-fourth Amendment) Act, 1971, to offset the effect of Golaknath's Case, and then it passed in the same year the Constitution (Twenty-fifth Amendment) Act to also set at rest the controversies relating to the question of adequacy and justiciability of compensation payable for acquisition or requisitioning of property by suitably amending article 31(2). Some other Amendments were also pushed through.

Article 31(2) was amended by the Twenty-fifth Amendment to read as follows:

"No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash."

Thus, in the first place, the Twenty-fifth Amendment omitted the word "compensation" from article 31(2) leaving only
the word “amount” and thereby eliminating the impact of the observation in Vajravelu’s Case, that as the Constitution (Fourth Amendment) Act, 1955, retained the word “compensation”, Parliament must be deemed to have been aware of the meaning of this word as denoting just or fair equivalent of the property acquired or requisitioned.

Secondly, it also affirmed the proposition made explicit by the Fourth Amendment, that the adequacy of the amount to be paid for acquisition or requisitioning of property is not to be questioned in any court of law.

Thirdly, it explicitly provided that any such payable amount may be paid otherwise than in cash, a principle which the Supreme Court had recognised earlier in Shantilal’s Case.

Fourthly, by adding a new clause (2B) it further sought to offset the effect of the Bank Nationalisation Case, that article 19(1)(f) has application to a law under article 31(2). This clause (2B) says:

“Nothing in sub-clause (f) of clause (1) of article 19 shall affect any such law as is referred to in clause (2).”

And lastly, it also provided for the addition of a new article 31C for “saving of laws giving effect to certain Directive Principles, i.e., clauses (b) and (c) of article 39.

Swami Keshavanand Bharathi’s Case: The Twenty-fourth and Twenty-fifth Amendments did not, however, quiten the controversy. Swami Keshavanand Bharathi of Edaneer Mutt in Kerala, who first challenged the Constitution (Twenty-ninth) Amendment Act, 1971, before the Court, which related to the protection of the Kerala land reforms measures, presented a petition on August 4, 1972, before a Division Bench of the Court, which included the Chief Justice, for amending his plaint to also impugn the validity of the Twenty-fourth and Twenty-fifth Amendments.

The matter was fixed for a preliminary hearing on August 9 and the Division Bench directed that the petition be placed for consideration by the Constitution Bench the next day, after the Attorney-General said that the Government was not opposed to a reconsideration by the Court of its decision in Golaknath’s Case. The Constitution Bench ordered that the question of validity of the Twenty-fourth, Twenty-fifth and Twenty-ninth
Amendments would be determined by the Full Bench. It fixed a date for hearing and directed notices to be served on appropriate parties.\textsuperscript{152}

The Court heard the matter along with five other petitions, all raising the common question as to the validity of the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments, for sixty days and wholly upheld the alterations made in respect of article 31.\textsuperscript{153} Consequently, article 31(2) does not now speak of “compensation” but only of “amount”. Yet the full impact of this change may reveal itself only as fresh questions relating to acquisition or requisition are determined by the Supreme Court in the coming years.

This is particularly so because the thirteen judges hearing the case delivered altogether eleven separate judgments, of which only two judgments, one by Shelat and Grover JJ. and the other by Hegde and Mukherjea JJ., happened to be concurrent. These judgments running into some 1800 pages carry numerous loaded passages hinting at innumerable future controversies. For example, both the concurrent judgments speak of reasonable nexus between the amount fixed and the property to be taken or the reasonableness of the principles laid down for determining such amount.

\textit{Taking Over the Management of Coal Mines}: Then, again, while the Supreme Court was still hearing the above case, the Central Government on January 30, 1973, took over the management of all coal mines, excepting a few ones belonging to the Indian Iron and Steel Works and the Tata Iron and Steel Co., under the Coal Mines (Taking Over of Management) Ordinance, 1973. The management of the concerned collieries was vested in a Coal Mines Authority constituted by the Ordinance. Provision for the payment of compensation at the rate of 20 paisa \textit{per} tonne on the basis of the highest monthly production of coal during the last four years of working of any affected colliery was also required to be paid to its management within the terms of the Ordinance.

On February 12, 1973, the Constitution Bench of the Court admitted three writ petitions challenging the validity of the Ord-

\textsuperscript{152} \textit{The Statesman}, Calcutta, August 5, 10, 11, 1972.

nance. These petitions, which challenged the Ordinance as violating articles 14, 19, 21 and 31 of the Constitution, and also prayed for interim stay orders, were presented by the New Satgram Engineering Works, the Swadeshi Mining & Manufacturing Co. and the Jamshedji Colliery. The Court granted a stay order in respect of the taking over of the management of the engineering concerns of the New Satgram Engineering Works.154 The matter is still (August 1973) sub judice, precluding any further comments in this regard.

Claimants for Payment and the Time and Mode of Payment: Usually, the determination of amount also involves the fixing of the claim of each person entitled to it, but this need not be done by the statute itself. Besides, after the decision in the Bank Nationalisation Case, shareholders may not directly claim compensation when a company is nationalised.

So far as actual payment is concerned, the Constitution does not require it as a precondition for acquisition or requisitioning of property. It only insists on the determination of the amount to be paid. It does not require actual payment of the amount to precede acquisition or requisition. Besides, the mode of payment is also outside the purview of the protection of the Constitution.

THE PRESENT MEASURE OF PROTECTION OF ARTICLE 31(2)

Now, it should be possible to state broadly the measure of the protection afforded by article 31(2) at the moment. In the first place, article 31(2) comes into play only when there is a case of acquisition or requisitioning of any property of any person. "Property" in this context means the same as it does in article 19(1)(f) and, thus, includes the right to management as incidental to proprietary right. However, money and choses in action cannot be made subject of acquisition or requisition. And "person" in this article includes juristic and public persons, including a State Government, but not the Central Government.

Secondly, any acquisition or requisitioning under article 31(2) can be made only for a public purpose, and the courts

have the power to adjudge the existence of public purpose. Any exclusion of the court's jurisdiction in this regard is unconstitutional. Thirdly, any acquisition or requisition to be valid under article 31(2) must be authorised by a valid law. And although the validity of such a law cannot be tested with reference to article 19(1)(f), other provisions of the Constitution, notably article 14, may apply to determine its validity. Such a law passed by a State Legislature must also receive the assent of the President.

Fourthly, the law authorising acquisition or requisitioning of any property must also either fix the amount to be paid for the purpose or must provide for the principles on which such amount is to determined and the manner in which the amount is to be paid. And fifthly, possibly the principles laid down for determining the payable amount should not be arbitrary or irrelevant. But the adequacy of the amount to be paid or the fact of any payment to be made otherwise than in cash cannot be questioned in a court.

Courts' Competence to Interfere: It should seem, thus, that in spite of the Twenty-fifth Amendment, there is scope for judicial review of statutes under article 31(2). The court may enquire whether there is a public purpose. It may also enquire whether the impugned law is invalid as violative of the other provisions of the Constitution, excepting article 19(1)(f). Then, it may also examine whether the principles laid down for determining any payable amount are irrelevant, although it may not question the adequacy of the amount itself. Besides, it can always enquire whether the executive has overstepped the statutory limits of authorisation or has not conformed to the prescribed procedure for acquisition or requisitioning. The bona fide of an executive authority's motive in acquiring or requisitioning any property may also be challenged.

EXCEPTIONS: CLAUSES (4) TO (6) OF ARTICLE 31

Broadly, clauses (4) to (6) of Article 31 contain the exceptions to the guarantee given by clause (2) of this article, some of which are meant to cover only the transitional needs.

Bills Pending at the Commencement of the Constitution: Article 31(4) provides that any Bill pending in a State Legis-
lature at the commencement of the Constitution was outside the ambit of article 31(2), if after being passed by the Legislature, it was reserved for the assent of the President and he gave his assent thereto.

The purpose of this saving clause was to protect the then pending Zamindari abolition Bills in the various State Legislatures. The courts extended this clause to cover any modification of such a pending Bill during the course of its being passed by the Legislature. However, article 31(4) saves such a Bill only for non-conformity with article 31(2) and not with any other provision of the Constitution. It does not also protect any amendment subsequent to the receipt of Presidential assent.

**Saving of Certain Existing or Future Laws:** Article 31(5) saves certain laws from the operation of Article 31(2). Such exceptions relate, in the first place, to any existing law except the one covered by article 31(6). Thus, the Land Acquisition Act is saved by virtue of clause (5)(a) of article 31. Secondly, clause (5)(b) excludes from the operation of article 31(2) certain future laws which the state may make for the purposes prescribed by it, which are of three types.

**Taxation and Penalties:** Any law which the state may make for the purpose of imposing or levying any tax or penalty is placed outside the scope of clause (2) of article 31 by virtue of its clause (5)(b)(i). Consequently, a taxing law or a law seeking to impose any pecuniary penalty does not attract article 31(2).

**Public Health and Preventive Measures:** Article 31(5)(b)(ii) lays down that the state is competent to make any law "for the promotion of public health or the prevention of danger to life or property" unimpeded by the requirements of article 31(2). This exception savours of the American doctrine of police power. But it would, however, be unreasonable to equate it with, or to deem it as exhaustive of, this American concept.

**Evacuee Property Legislation:** Clause 5(b)(iii) of article 31 provides that any law relating to a property declared by law to be evacuee property, which may be made in pursuance
of an agreement between the Indian Government and any other
Government, is outside the ambit of clause (2) of article 31.

State Laws Enacted 18 Months before the Commencement
of the Constitution: Article 31(6) requires that a State law
enacted more than 18 months before the commencement of the
Constitution was to be placed before the President within three
months from such commencement for certification. If the
President so certified the law by a public notification, it became
immune from any challenge to its validity on the ground of
its contravention of article 31(2) or section 299(2) of the Gov-
ernment of India Act, 1935.

SAVING OF CERTAIN LAWS UNDER ARTICLES 31A TO 31C

Articles 31A to 31C run as exceptions primarily to the
provisions of article 31(2). They are meant to protect certain
state actions impinging upon an individual's property from the
operation of article 31(2). But as they are meant to secure
certain economic reforms of a socialistic nature, for achieving
their this abroad objective, they have been made to have even
much wider overriding effects.

SAVING OF LAWS PROVIDING FOR ACQUISITION OF
ESTATES, ETC.: ARTICLE 31A

Article 31A provides as follows:

“(1) Notwithstanding anything contained in article 13, no law provid-
ing for—

(a) the acquisition by the State of any estate or of any rights
therein or the extinguishment or modification of any such
rights, or

(b) the taking over of the management of any property by the
State for a limited period either in the public interest or in
order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the
public interest or in order to secure the proper management
of any of the corporations, or

(d) the extinguishment or modification of any rights of managing
agents, secretaries and treasurers, managing directors, directors
or managers of corporations, or any voting rights of shareholders
thereof, or

(e) the extinguishment or modification of any rights accruing by
virtue of any agreement, lease, or licence for the purpose of

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searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by article 14, article 19 or article 31:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compartment at a rate which shall not be less than the market value thereof.

(2) In this article—

(a) the expression ‘estate’ shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall include—

(i) any jagir, inam or muafí or other similar grant and in the States of Tamil Nadu and Kerala, any janmam right;
(ii) any land held under ryotwari settlement;
(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures, occupied by cultivators of land, agricultural labourers and village artisans;

(b) the expression ‘rights’, in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat, or other intermediary and any rights or privileges in respect of land revenue.”

Article 31A opens with a *non obstante* clause to make its provisions prevail against the requirements of articles 14, 19 and 31. By virtue of this article the state is competent to provide by law for the matters specified by this article even if such a law be inconsistent with the provisions of articles 14, 19 and 31. But the court may enquire whether such a law violates any other mandatory provision of the Constitution. Article 31A does not also save a colourable legislation. Besides, as the first proviso to article 31A(1) says, when such a law
has been passed by a State Legislature, it must receive the assent of the President before it can become effective.

Evidently, article 31A is both of wider and narrower implications than article 31(4). It is wider because it has overriding effect as regards the provisions of not only article 31(2), but also those of the whole of article 31 and articles 14 and 19; and it is narrower because it applies only to matters specified by it, whereas article 31(4) is of general application. The matters for which the state may make laws within the term of article 31A are: (i) acquisition, extinguishment or modification of any rights in estates; (ii) temporarily taking over of management of any property; (iii) amalgamation of corporations; (iv) extinguishment and modification of rights of managing agents, directors, and shareholders; and (v) the extinguishment and modification of rights under any mining agreement, lease or licence.

**Acquisition, Extinguishment or Modification of Rights in Estates:** Clause (1)(a) of article 31A protects two different kinds of laws.\textsuperscript{155} In the first place, these are the laws providing for acquisition by the state of any estate or of any rights therein. Secondly, these are the laws relating to extinguishment or modification of any rights in any estate. But in both the cases the general purpose being to effectuate agrarian reforms, the courts must interpret such a law liberally, and it should be given

"its fullest effect, consistently with the purpose behind the enactment, provided, however, that such a construction does not involve any violence to the language actually used."\textsuperscript{156}

**Laws Providing for Acquisition of Estates:** Any law providing for the acquisition of an estate or any right therein is protected by article 31A(1)(a). Acquisition in this context does not, however, mean the same as it does in article 31(2)(2A). For the purpose of this article it is not necessary that the law must expressly provide for the vesting of any estate or a right in it in the state. It is also not essential that the acquisition


\textsuperscript{156} Ibid.
must be immediate. It is sufficient if such an enactment indicates that the acquisition is by the state. Notably, the protection of article 31A(1) (a) also extends to an amendment of such an Act.

However, as the second proviso to article 31A(1) requires, if a law providing for the requisition of any estate relates to any land held by a person under his personal cultivation the law must provide for payment of compensation at a rate which is not to be less than the market value thereof. But to attract the protection of this proviso the land sought to be acquired must be within the ceiling limit applicable for the time being to the person concerned. Land in this context includes building or a structure standing thereon or appertaining thereto. It, thus, broadly denotes immovable property within the meaning of the General Clauses Act or the Transfer of Property Act.

**Extinguishment or Modification of Rights in Estate**: Extinguishment of a right implies the determination of a right not involving the process of acquisition, and would, thus, include the tradition of property from one person to another if it relates to any scheme of agrarian reforms, but not otherwise.

Modification of any right in an estate is to be distinguished, on the one hand, from extinguishment of a right and, on the other, from a mere restriction on a right or its suspension. Modification means a substantive reduction of a right and includes the fixing of limits on the maximum holding of a landlord, providing for the transfer of landlord’s title to the tenant and keeping in abeyance the title of an owner for a period of time.

**The Meaning of “Estate” and “Rights in an Estate”**: To give a wider application to the provisions of article 31A(1) (a), article 31A(2) defines the expressions “estate” and “rights in an estate” in very broad and realistic terms.

**Estate**: Article 31A(2) (a) defines an estate, “in relation to any local area”, to “have the same meaning as that ex-
pression or its local equivalent has in the existing law relating to land tenures in force in that area”. This definition of the word “estate” is made inclusive to also contain within its ambit the following types of land tenure:

(i) Any jagir, inam, or muafı or other similar grants and jannam rights in the States of Tamil Nadu and Kerala;

(ii) any land comprised in ryotwari settlement; and

(iii) any land held or let out for agricultural or ancillary purposes, including waste, forest or pasture land, or sites for buildings or structures in the occupation of cultivators, labourers or artisans.

This expansive definition of the word “estate” now nullifies the effect of the Supreme Court decisions in Medhi’s Case,161 Paikaji Kolhe’s Case162 and Nambudiri’s Case,163 all decided before the 1964 Amendment of article 31A.

Rights in an Estate: Article 31A (2) (b) likewise provides an inclusive definition of the expression “rights in an estate”. Such rights include any rights vested in a proprietor, sub-proprietor, under-proprietor, tenure holder, raiyat, under-raiyat or any other intermediary and any rights or privileges in respect of land revenue.

Temporarily Taking Over the Management of Any Property: Within the terms of article 31A (1) (b), the state may make laws for temporarily taking over the management of any property in the public interest or in order to secure the proper management of the property without attracting articles 14, 19 and 31. But an antinomy between articles 31 and 31A (1) (b) is not intended by the Constitution.164 Thus, apart from the fact that such a law may contravene any other mandatory provision of the Constitution, the court may also enquire whether the taking over of management is for indefinite period.

Besides, the court may also enquire whether such a legislation is in the public interest or is aimed at securing the proper management of the property. Such a legislation is also open

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161 Medhi’s Case, op. cit.
to judicial review on the ground that it does not provide for merely taking over of management of any property.\textsuperscript{165}

Amalgamation of Corporations: Article 31A(1)(c) authorises the state to provide for amalgamation of two or more corporations in the public interest or in order to secure the proper management of any of the corporations. This article is aimed at eliminating unhealthy competition and inefficient management in the sector of private economy and to promote national economic well-being.

Extinction or Modification of Certain Rights in Corporations: In accordance with the provisions of article 31A(1)(d) the state may make laws for the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations. The state may also legislate for the extinguishment or modification of any voting rights of the shareholders of a corporation.

Extinction or Modification of Certain Mining Rights: The last, but not the least important, in this chain is the authorisation of the state under article 31A(1)(e) to provide for the extinguishment of any rights accruing to a person by virtue of any mining agreement, lease or licence. Such an agreement, lease or licence may relate to any mining operation, such as those for the purpose of searching for or winning any mineral or mineral oil. The power of the state under this article also includes the power to prematurely terminate or cancel any such agreement, lease or licence.

\textit{PROVISIONS OF ARTICLE 31B}

By the Constitution (First Amendment) Act, 1951, the following article 31B was introduced:

"Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof, shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred

\textsuperscript{165} State of Rajasthan v. Manohar, (1954) S.C.R. 996."
by any provisions in this Part, and notwithstanding any judgment decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

The introduction of article 31B in Part III of the Constitution is, in a sense, a constitutional novelty. In the first place, this article is an example of legislation by incorporation, and secondly, it makes the impact of its provisions transcendental over the provisions of the entire Part III of the Constitution.

In nature, article 31B in as much a saving article as is article 31A. But whereas the former is of a general character, the latter claims for itself a special status because it opens with the words "without prejudice to the generality of the provisions contained in article 31A." However, the Supreme Court has held that article 31B is not to be treated merely as providing certain illustrations for article 31A.166

Besides, article 31B is both wider and narrower in implication than article 31A. It is wider in the sense that whereas article 31A has overriding effect on the provisions of only articles 14, 19 and 31, article 31B aims at overriding the provisions of the entire Part III of the Constitution. It is narrower because article 31A covers matters which are of more general implication, whereas article 31B protects only the Acts, Regulations or provisions specified in the Ninth Schedule. The effect of article 31B is that any Act, Regulation or provision incorporated in the Ninth Schedule becomes immune from the challenge that it infringes any fundamental right contained in Part III.167

But, evidently this article does not protect a law for the contravention of any other mandatory requirement of the Constitution. Besides, this article protects a law only as it stands on the day of its incorporation in the Ninth Schedule. Consequently, any subsequent amendment to such a law by the appropriate legislative body, to claim the protection of this article, must also be incorporated in the Ninth Schedule.

166Kameshwar Singh's Case, op. cit.
SAVING OF LAWS TO EFFECTUATE CERTAIN DIRECTIVE PRINCIPLES: ARTICLE 31C

Article 31C, introduced by the Constitution (Twenty-fifth Amendment) Act, 1971, provides:

"Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31.

Provided that where such law is made by the Legislature of a State the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

This latest addition to the series of articles relating to the fundamental right to property is also in the nature of a saving article which, in a manner, seeks to turn certain directory provisions of the Constitution into a mandatory one. It also reflects the new trend in the national thinking, which stands firmly committed to building a socialistic society in the country.

Article 31C opens with a *non obstante* clause and provides that any law made by the State to implement the principles contained in clauses (b) and (c) of article 39 cannot be deemed void on the ground of its inconsistency with articles 14, 19, and 31. However, such a law, to be effective, if passed by a State Legislature, requires the assent of the President.

It may be of interest to note that as initially enacted by the Constitution (Twenty-fifth) Amendment Act, the substantive part of article 31C concluded by also providing: "and no law giving effect to such policy (i.e., the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39) shall be called in question in any court on the ground that it does not give effect to such policy." But the Supreme Court struck down this portion as unconstitutional in *Keshavanand Bharathi's Case*.

Thus, this article takes out of the competence of the courts the right to adjudge the validity of such a law on the ground of its inconsistency with articles 14, 19 and 31 only. The court may, however, enquire whether such a law actually effectuates

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168 *Keshavanand Bharathi's Case, op. cit.*
the purposes of article 39(b) (c), or whether it is inconsistent with any other mandatory provision of the Constitution.

The aforesaid historical view of the fundamental right to property as contained in articles 31 to 31C conclusively suggests that article 31 has always functioned as a protective rampart round the right to private property, which, indeed, is an essential ingredient of the existing Constitution. And situated though it is in the epicentre of all the socialist quakes in the country, its steel-frame still stands solid and erect, the corrosive impacts of even the latest Amendments notwithstanding.
CHAPTER 20

RIGHT TO CONSTITUTIONAL REMEDIES:
ARTICLES 32 TO 35

*Ubi jus, ibi remedium,* where right is, remedy there must also be, because a right without remedy is, indeed, a rope of sand. And naturally, Ambedkar, the Chairman of the Drafting Committee, speaking on the significance of article 32, told the Constituent Assembly:

"If I were asked to name any particular article in this Constitution as the most important—an article without which the Constitution would be a nullity—I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it."  

In equally significant terms, the Supreme Court stated its position in relation to article 32 in *Ramesh Thappar v. State of Madras*:

"Under the Constitution the Supreme Court is constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights, although such applications are made to the Court in the first instance without resort to a High Court having (a) concurrent jurisdiction."

REMEDIES FOR ENFORCEMENT OF RIGHTS CONFERRED
BY PART III : ARTICLE 32

This significant article 32 reads as follows:

"(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.  
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, qua warranto and certiorari, whichever

may be appropriate for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the power conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

The sole object of article 32 being the enforcement of the rights in Part III of the Constitution, it protects any person who is cloathed with any right, including the right under article 32 itself, under this Part. Thus, only a person whose any fundamental right has been infringed can approach the Supreme Court under this article, although in the case of habeas corpus and quo warranto petitions the position is slightly different. Besides, article 32 comes into play only when there is an allegation of an actual or threatened violation of a fundamental right and not for the purpose of either stifling any legislative process or carrying on an academic exercise.

The writ of article 32 runs against any public authority which is the state within the meaning of article 12 and it runs throughout the country. However, the article is thus far reticent to bring within its fold private persons who violate another person's fundamental rights, unless the former's action is also sustained by some action of the state.¹

It is significant that article 32 gives direct access to the Supreme Court for the enforcement of a fundamental right and the claim for relief under this article is treated ex debito justiciae.² This makes the Supreme Court the real guarantor and protector of fundamental rights. The Court has in the past acted in this regard with vigour and speed, although there seems to be constant complaints of misuse of the forum by the parties and delays by the Court in the disposal of cases.

The exercise of jurisdiction under article 32 is not dependent upon the exhaustion or adequacy of alternative remedies. Nor is the Court to decline intervention because an application under this article involves an enquiry of disputed facts or taking of

¹ See Samdasani's Case, op. cit.
The only basic condition for the exercise of jurisdiction under article 32 is that the petitioner's fundamental right is in jeopardy.

In the exercise of its jurisdiction under article 32 the Supreme Court has very wide powers to accord relief to a petitioner. It has the "power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate". The technicalities of the prerogative writs do not bind the Court, nor is the Court precluded from giving a merely declaratory order. The mere fact that a petition does not claim the proper writ or order is also not to be taken into account in disposing of. Subba Rao J. (as he then was) said in Kochuni's Case:

"Under Art. 32, we must, in appropriate cases, exercise our discretion and frame our writ or order to suit the exigencies of this (sic) case brought about by the alleged nature of the enactment we are considering... We see no reason why, in an application under Art. 32 where declaration and injunction are proper reliefs, respondents 2 to 17 cannot be made parties."

Evidently, article 32 has a key role in Part III of the Constitution, and it is in consideration of this fact that its clause (4) interdicts its suspension except as otherwise provided by the Constitution itself, although its scope may be enlarged by Parliament within the terms of its clause (3). Besides, the right under this article cannot be taken away without amending the Constitution.

**ARTICLE 32 AND ARTICLE 226**

The sole purpose of article 32 is the enforcement of fundamental rights, but it is not the lone article for this purpose. The jurisdiction of the Supreme Court under article 32 is not meant to be exclusive. It is a concurrent jurisdiction exercised by it in conjunction with the jurisdiction of the High Courts under article 226. Besides, clause (3) of article 32 provides: "Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers

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exercisable by the Supreme Court under clause (2)". But as no such authorisation has thus far been made by Parliament, the only question of current interest in this regard is the relation between articles 32 and 226.

In the first place, the right under article 32 is itself a fundamental right, whereas the right under article 226 is merely a constitutional right. But it should be noted that in spite of this distinction in status neither the right in article 32 nor that in article 226 can be taken away or abridged by a legislature. Although their operation may become limited, or may get suspended, in accordance with the provisions of the Constitution under, say, articles 34, 35, 358 or 359.

Secondly, only a person, whether natural or juristic, citizen or non-citizen, whose any fundamental right is in jeopardy may resort to article 32, although the case of habeas corpus or qua warranto is slightly different. Such a person may also approach a High Court under article 226 for appropriate relief. Any person whose any legal right has been infringed may also approach the High Court for relief under article 226, but the doors of the Supreme Court are closed to him under article 32.

Thirdly, from the standpoint of subject-matter, the remedy under article 32 is available only for the enforcement of fundamental rights in Part III of the Constitution. But the remedy under article 226 covers not only fundamental rights but also any other legal right for which there may not be any other adequate legal remedy available to an aggrieved person. The "open sesame" of article 32 is the allegation of an infringement of a fundamental right, including the right under article 32 itself.

Fourthly, from territorial angle, the writ of article 32 runs throughout the territory of India. But the jurisdiction of a High Court under article 226 is limited to the territory in relation to which it exercises its jurisdiction in other matters. It seems obvious, therefore, that although from the point of view of subject-matter the jurisdiction of a High Court under article 226 is wider than that of the Supreme Court under article 32, territorially the jurisdiction of the former is narrower than that of the latter.

Fifthly, it has been held that the relief under article 32 can be claimed *ex debito justitiae* once an infringement of a fundamental right is alleged. But the remedy under article 226 is generally said to be discretionary.\(^9\) But it seems that when an infringement of a fundamental right is alleged, even relief under article 226 may be claimed *ex dito justitiae*.

Sixthly, as both the Supreme Court and the High Courts exercise concurrent jurisdiction for enforcing fundamental rights under articles 32 and 226, respectively, the choice of forum lies in the discretion of an aggrieved person. It has, however, been held that once an application is made to a High Court under article 226, the doctrine of *res judicata* bars the matter under article 32.\(^10\) However, the Supreme Court tends to distinguish in such cases between matters dismissed under article 226 on merits and those dismissed on some preliminary grounds.

Seventhly, as laid down in *Samdasani's Case*, article 32 can be availed of only against state actions. The remedy under article 226 is available even against other persons also. But in the context of the enforcement of fundamental rights, it should be remembered that both articles 32 and 226 come into play when an allegation is against state actions only.

Eighthly, the remedy under article 32 as well as that under article 226 is available only when there has been a transgression of a right of the petitioner. The articles cannot be resorted to either to muzzle a legislative procedure or to discuss a legal issue by way of academic interest.

Lastly, the nature of remedy and the scope of relief under both the articles 32 and 226 are, broadly speaking, the same, except that appeals to the Supreme Court may be taken under appropriate articles against any decision of a High Court under article 226. Besides, if a 226 petition is heard by a single Judge of a High Court, a Letters Patent appeal from the decision of the Judge may also be made to a division bench of that Court. In the case of decisions under article 32 no appeal lies to the Supreme Court itself or to any other judicial forum, although it is competent for the Court to constitute a constitu-


tion bench or a special or full bench for hearing a petition under this article.

MODIFICATION OF FUNDAMENTAL RIGHTS IN APPLICATION TO FORCES: ARTICLE 33

Article 33 says:

"Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

Article 33 empowers Parliament to determine by law the extent to which any of the rights conferred by Part III shall be available to the members of the Armed Forces or the Forces charged with the maintenance of public order. The purpose of this authorisation is to ensure the proper discharge of their duties by the Forces and the maintenance of discipline among them.

The provisions of this article, which run as exception to the rights conferred upon a person by Part III of the Constitution, are in line with the similar constitutional principles or practices in other countries. In all the countries members of the Armed Forces are treated as a class by themselves for rights and obligations. On the one hand, they are subject to rights and obligations as an ordinary citizens, and, on the other, they are subject to duties and discipline peculiar to the services to which they belong.

It is to be noted that although in India the responsibility for maintaining law and order in the country has been entrusted to the States, Parliament alone is competent to legislate for abrogating or abridging any fundamental right of a person belonging to any Force charged with the maintenance of public order. This requirement seems to express the anxiety of the founding fathers to maintain a uniform national norm in this regard. Parliament has passed by virtue of its power under article 33 the Public Forces (Restriction of Rights) Act, 1966, which aims at restricting certain fundamental rights in their application to the members of the Armed Forces charged with the maintenance of public order. Besides, there is the military
law in the country containing some restrictions on fundamental rights.

**MILITARY LAW**

Military law refers to the law relating to the Armed Forces of a country. In India, the Union Government alone is responsible for the defence of the country and is entrusted with all matters concerning it. Consequently, Parliament, and not a State Legislature, is competent to legislate for the Armed Forces of the country. Parliament has passed the Army Act, 1950, the Air Force Act, 1950, and the Navy Act, 1957, to govern the matters covered by them. All these constitute the military law of the country. They also contain certain provisions whereby the application of Part III of the Constitution has been restricted in many respects to the Armed Forces. These restrictive provisions are within the terms of article 33 which empowers Parliament to abridge or abrogate any rights contained in Part III in application to the Armed Forces of the country.

**Court Martial:** A special feature of the military law of any country is the provision for court martial for any military offence committed by a member of the Armed Forces. The enactments referred to above also provide for courts martial in India. For example, the Army and Air Force Acts provide for general court martial, district court martial and summary general court martial. Besides, the Army Act speaks of summary court martial.

These courts martial are outside the appellate jurisdiction of the Supreme Court and the High Courts. Notably articles 135 and 227 expressly exclude them from the jurisdiction of the Supreme Court and the High Courts, respectively. However, they are subject to the writ jurisdiction respectively of the Supreme Court and the High Courts under articles 32 and 226. Besides, when a court martial acts without or in excess of jurisdiction, it is liable under ordinary law of tort, or even for criminal actions.11

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12 *Dawkins v. Paulet*, (1869) 5 Q.B. 94.
RESTRICTION ON FUNDAMENTAL RIGHTS DURING MARTIAL LAW: ARTICLE 34

Article 34 lays down:

"Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area."

Article 34 is also in the nature of article 33 and runs as an exception to the provisions of articles 14 to 32 of Part III of the Constitution. It empowers Parliament to pass Acts of Indemnity to protect any person for anything done by him in connection with the maintenance or restoration of public order when martial law is in force in any area in the country. It also authorises Parliament to validate any sentence passed, punishment given or forfeiture ordered during the period of martial law.

ACT OF INDEMNITY

An Act of Indemnity is a piece of legislation which immunises a person from any liability to which he may be exposed because of his any action in pursuance of his functions. Such an Act is passed in conditions of emergency when the state, for the purpose of maintaining or restoring public order, feels constrained to overstep the normal bounds of its relationship with the citizens.

Under article 34, Parliament alone is competent to pass such an Act of Indemnity, although the President may also in the exercise of his Ordinance making power pass an Ordinance of Indemnity. This article requires that such an Act can be passed only when martial law is in force. It seems, therefore, that when a Proclamation of Emergency is made under article 352 and articles 358 and 359 relating to the suspension of fundamental rights are brought into operation, Parliament cannot possibly pass an Act of Indemnity covering this period of emergency unless, of course, martial law is also simultaneously declared.
MARTIAL LAW

The expression "martial law" is, indeed, a misnomer, because it refers to no law but merely a condition of facts or a state of affairs. Martial law in the scheme of any constitutional system is to be distinguished, on the one hand, from military law, i.e., the law relating to the Armed Forces, and on the other, from martial law as a concept of international law, i.e., the law administered by an army commander in any occupied enemy territory in times of war.

As a part of constitutional system, martial law denotes a situation in which military authorities substitute the civil authorities in the administration of country or its any part. In the scheme of the Indian Constitution this situation is to be distinguished from the mere "use of the armed forces of the Union in aid of civil power" referred to in entry 1 to List II, Schedule VII.

It is, however, not possible to indicate with precision when can it be said that military authorities have actually substituted civil authorities in the administration of a country or its any area. When there is a formal declaration of martial law, the courts in a country are to take this declaration as final and conclusive. But, as for the existence of martial law a formal declaration is not required\(^{13}\), the courts may have to determine whether martial law actually exists, or existed, in a particular situation.

When martial law comes into operation, military authorities become invested with full competence to deal with a situation as the circumstances justify to maintain or restore public order. They may use force but such use of force must be proportionate to the need for maintaining or restoring public order. They also set up military tribunals for punishing offenders. But these tribunals are not courts, nor are they subject to courts' control.\(^{14}\) It is, however, not necessary that once martial law becomes operative, the working of the courts becomes automatically suspended. It is for the military authorities to decide whether military tribunals are to be set up or not.

A significant point to note in this regard is that the mere fact that martial law exists at any time does not automatically

\(^{13}\) *Tilonko v. Att.-G. of Natal*, 1907 A.C. 93.

immunise military authorities from liability for acts done by them during this period. They become subject to the ordinary civil or criminal laws of the land once martial law ceases to be effective and courts begin to function normally. The courts may then adjudge the legality of the acts of the military authorities done during the period of martial law, and the test to determine the legality is whether the impugned act was necessary in the circumstances in which it was done.

It is to obviate this situation that Acts of Indemnity are passed to immunise military authorities from any liability before courts after the cessation of martial law. But it seems that even such an Act of Indemnity is aimed at protecting only the bona fide acts of the military authorities, and the spirit of article 34 in our Constitution suggests that the principle laid down in Wright v. Fitzgerald would guide the interpretation of an Act of Indemnity passed by the Indian Parliament.

**LEGISLATION TO GIVE EFFECT TO PART THREE:**

**ARTICLE 35**

Article 35 provides:

"Notwithstanding anything in this Constitution—

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and

(ii) for prescribing punishment for these acts which are declared to be offences under this Part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii).

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any matters referred to in sub-clause (1), clause (a), or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made under article 372, continue in force until altered or repealed or amended by Parliament.

Article 35 empowers Parliament and forbids State Legislatures to make certain laws concerning fundamental rights. Thus,

15 Wright v. Fitzgerald, (1799) 27 St. Tr. 768.
Parliament's legislative competence gets enlarged for giving effect to certain provisions of Part III of the Constitution. This article also validates certain enactments in existence at the time of the commencement of the Constitution.

Article 35(a)(i), first, empowers Parliament to make laws requiring residential qualification for any job under any local or public authority in a State or a Union Territory under article 16(3). Secondly, it authorises Parliament to make laws for empowering any court to exercise the power of the Supreme Court under article 32(2) within the terms of article 32(3). Thirdly, Parliament is also authorised to legislate for restricting or abrogating any fundamental rights in application to the members of the Armed Forces or Forces charged with the maintenance of public order as laid down in article 33. And lastly, Parliament is empowered to pass Acts of Indemnity when martial law comes in force in accordance with article 34.

Clause (a)(ii) authorises Parliament alone to prescribe punishment for acts which are declared to be offences under Part III of the Constitution. Such an offence may, for example, be declared for practising untouchability under article 17, or for trafficking in human beings under article 23(1). This clause also requires Parliament to make laws for prescribing these punishments "as soon as may be after the commencement of this Constitution". But this requirement is directory and not mandatory in nature.

Article 35(b) provides that any law in force immediately before the commencement of the Constitution of India relating to any of the above matters shall continue to be in force with such modifications or adaptations as may be made within the terms of article 372. Parliament may, however, alter or repeal any such law in force. The explanation in Article 35 says that the expression "laws in force" in this context has the same meaning as it has in article 372.

**GENERAL OBSERVATIONS**

At the end of this last chapter relating to the rights in Part III of the Constitution some general comments may be appended. Objectively speaking, it should seem, whether from historical or technical angle, that any just human formation can only have for its basis the concept of equality and for its purpose
the cultivation of liberty. Necessarily, then, equality must be the foundation and liberty the function of any organised scheme of rights.

Significantly, the scheme of fundamental rights in Part III of the Constitution vitally subscribes to this position, although the broad conspectus of equality of status and of opportunity as enshrined in the noble Preamble finds only a limited expression in articles 14 to 18. And the Supreme Court justly feels that the fundamental right to equality in the Constitution has implications spilling over far beyond the limits of articles 14 to 18. Article 14, for example, has its antennae spread out to as far as article 31 relating to the right to property.

True, as ever, even now equality does not imply universality or identity. The courts, in administering the right to equality, have always to reckon with the stark facts of real inequalities. This has resulted in their acceptance of the doctrine of reasonable classification as the core content of any scheme of legal equality. For, it is not the courts but the other public organs, political and administrative, that have the responsibility for so restructuring human relations as to minimise the occasions for classification.

Unless judicial pronouncements effectively obstruct the smooth constitutional functioning of the other public organs for progressively securing an egalitarian social order, they stand above criticism. And although, in the absence of a definite acceptance of an operational perspective or a clear avowal of an ideological parameter, the decisions of the superior courts relating to the fundamental right to equality can be anything but paragons of clarity, precision or consistency, they, on the whole, cannot be condemned as clogs on any constitutional revolution for egalitarianism. Even the little that can be said against them will have to be reconciled with the deeper and larger issues of lack of purpose, honesty, sincerity and efficiency in the various spheres of public life in the country.

In the realm of liberty enshrined in its plenitude in the glorious Preamble, which finds place in the scheme of fundamental rights as right to freedoms, including personal liberty, the courts have discharged their role in the manner of the role performed by them in regard to the fundamental right to equality. And although they have shown a greater concern for
protecting the freedoms of man and citizens, they never have set up road-blocks in achieving the national objective of providing the citizens with adequate material conditions for the true enjoyment of the constitutional guarantees.

Decided cases relating to the right to freedoms, civil, religious or cultural, do consistently reflect the anxiety of the courts to enlarge the freedoms of the citizens consistently with the express or implied constitutional constraints. This is true, for example, as much with regard to the seven freedoms in article 19 as it is with regard to personal liberty in article 21. In fact, the constitutional, religious and cultural guarantees have, at times, been so interpreted as to give certain minority groups protections far beyond the intendments of the founding fathers. But such emphases even though occasionally regressive in character, may appear justifiable in the context of the national awareness of the minority problems in general.

There is, however, an area of the right to freedoms, the freedom to acquire, hold and dispose of property and the right to property as contained in articles 31 to 31C, which the superior courts have constantly considered as a specially fortified sector, a forbidden land for the executive and the judiciary to lightly tread upon. In fact, the courts have sadly failed in adequately appreciating property as an element of power in any organised community. Property is no mere object of use and enjoyment as property. It is also an engine of power, an instrument of control, in any human formation.

But is not the judiciary within its right in steadfastly standing sentinel by the right to property and continuously reminding the executive and the legislature that the Constitution, as originally framed, was never intended to serve as an instrument of socialist revolution, although it may be used as a device for social revolution? It seems that the judiciary may fairly hold that the Constitution is not a socialist document, although a welfare, or at best a socialistic, society may be realised within its frame.

If the political leadership in the country is conclusively convinced of the national consensus on socialism, is it unreasonable to expect to have the expression "socialism" or "socialist society" explicitly incorporated into the Constitution, at least in the Part relating to the Directives? Without a
shadow of doubt such a course will most readily provide the judiciary with the desired parameter for a new type of decisions relating to the fundamental rights in general and the right to property in particular.

That some such course is an obvious necessity is, indeed, undeniable. And also undeniable is the fact that the brilliant galaxy of the grand fundamental rights is destined to remain as mere lofty phrases to the man in the street who starves for a loaf of bread. To the millions in the country these fundamental guarantees mean nothing real. They are unsubstantial, airy and illusory. To them the more pressing needs of food, raiment and shelter are more fundamental, and these needs are yet to be satisfied even at the barest subsistence level.

The spate of cases relating to the fundamental rights now inundating the superior courts represent the interests of the social haves and organised powerful groups. And interestingly, the more historic of these cases have been those relating to property, and not to person. The common man, naturally, finds himself totally unprotected. He is thoroughly exposed even today to the idiosyncrasies of human powers and the vagaries of the natural forces. The Constitution, the rights, the liberties and the opportunities, so often solemnly spoken of, are mere empty words for him; they convey no intelligible meaning to him. He has only paper rights and even these rights he cannot enforce because he cannot pay for it. Articles 32 and 226 are meant only for those who can afford the luxury of litigation.

Rights, fundamental or others, must first be carried to the doors of the teeming millions in the country in the tangible terms of goods and services. Rights must be concretised for all before they are to be claimed in the courts. For, otherwise, as in the U.S.A., a Bill of Rights is most likely to be

"used by vested interests to protect their anti-social behaviour."  

Besides, any human scheme of justice, social, economic, and political, sought to be expressed in terms of justiciable rights must, in the ultimate analysis, depend for their realisation on

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16 Jennings, Sir I.: *Some Characteristics of the Indian Constitution*, op. cit.; p. 44.
social ethos. It is the community’s consciousness of the need for the creation and maintenance of these rights that gives the greatest guarantee against their frequent infraction, continuous corrosion and final liquidation. No right can live simply by the goodwill of the “governors”, much less of the judiciary.

It is the public will, the public opinion, that must always strive for securing to man and citizens in a country the rights, the conditions, without which they cannot be their best selves. For a true realisation of rights public will and opinion must be both positive, i.e., creative, and negative, i.e., defensive. But, woe be to this land, that even a casual observer of the Indian socio-political scene ruefully becomes aware of a total absence of this creative and defensive public will and opinion. And one is left wondering what effective response in this situation may be expected of the judiciary.
PART FOUR

GOVERNMENT AND ADMINISTRATION
N.B.—The new Code of Criminal Procedure, 1974 (Act 2 of 1974), classifies the criminal courts now as “(i) Courts of Session; (ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates; (iii) Judicial Magistrates of the second class; and (iv) Executive Magistrates.” It also contemplates the offices of Sessions, Additional and Assistant Sessions Judges; Chief, Additional Chief and Sub-divisional Judicial Magistrates; Chief and Additional Chief Metropolitan Magistrates; District, Additional District and Sub-divisional Magistrates; and Special Judicial and Special Executive Magistrates.
CHAPTER 21

CONSTITUTIONAL GOVERNMENT
AND ADMINISTRATION

In consonance with the spirit of this age, which requires the government and administration of a country to be conducted in accordance with its constitution, the Constitution of India envisages an elaborate scheme of government and administration for the country. Although in any case the government of a country must, for the most part, remain submerged like an iceberg in the fathomless ocean of unknowns, informalities and imponderables, political power in all cases now must seek legitimacy in constitutional provisions, or as Max Weber would have said in rational grounds, or reason of the system, or, as Lipset says, in belief or faith in the system.¹

Precisely, in a country with a constitution, persons in authority must ultimately be able to trace back the root of any of their powers to some provision of the constitution. Constitutional government and administration necessarily means then the governance of a country by public authorities with defined or delimited power, no matter how broad or narrow the definitions or limitations are. The primary purpose of a constitution is to define or delimit the power of public organs. Constitutional government and administration is limited government and administration.

Such a view of constitutional government and administration also involves a degree of separation of powers, a scheme of checks and balances, however limited or disguised this involvement may be. It may be in the limited shape of judicial independence and impartiality as in England or on an elaborate scheme as in the U.S.A. where the executive, legislative and judicial powers are vested distinctly in the President, Congress and the Supreme Court. It may also be in the Indian style where the Constitution in the same breath accepts the principles

of parliamentary government, parliamentary sovereignty and judicial review, or in any other form. But it must find a niche for itself in all schemes of constitutional government and administration.

However, this viewpoint of constitutional government does not import any notion of an amortisation of or a moratorium on all political power in a country. A constitution is meant to respond to the needs of a living and growing community. What it aims at is providing the mechanism for finally settling all issues concerning the community within the constitutional four-corners, and it is not important whether the legislature or the judiciary finds a place of pride in this process. This objective may be achieved by accepting the unqualified legislative sovereignty in a country like England, or may be secured by providing for judicial review and formal amendment of the Constitution in a country like the U.S.A. The same goal may also be reached by admitting all these three devices—legislative supremacy, judicial review and formal amendment—within the scheme of the Constitution in a country like India. Besides, there may be numerous other informal devices to keep a constitution in constant conformity with the needs and aspirations of the nation.

Constitutional government also involves some arrangement for the articulation of the voice of the people at the different levels of government. It also stands for the recognition of a scheme of rights of man and citizens necessary to let them pursue their happiness with dignity and efficiency as equal partners in the life of the community. Thus, democracy must be the essence of any form of constitutional government.

INGREDIENTS OF INDIAN CONSTITUTIONAL GOVERNMENT

In the light of what has been broadly stated above, it may be interesting to pin-point some of the basic elements of constitutional government and administration in India. On a very general view, the canopy of constitutional government and administration in India, whose fabric is made of the cooperative philosophy of the state, rests on the seven fundamentals of democracy; republicanism; federalism; parliamentary, or cabinet, form of government; parliamentary sovereignty; judi-
cial independence and impartiality, including judicial review; and administrative neutrality.

The constitutional elements of democracy, republicanism and federalism have already been noted at some length in the preceding chapters relating to them. Suffice it to say at this point that in the scheme of the Indian Constitution democracy in the political sphere implies representative government having the concept of rotation in office and majority rule impregnated with a system of justiciable rights of man and citizens. Republicanism stands for elected head of the state and federalism subscribes to the modern concept of cooperative federalism.

The Constitution provides for a President of India, but not for the presidential form of government, a form of government in which the executive, neither singly nor collectively, is responsible to the legislature but is directly responsible to the people. India has thus a president, not presidential form of government. It has parliamentary, or cabinet, form of government in which the executive is directly, and collectively, responsible to the legislature.

The choice of parliamentary form of government was deliberate. In the Constituent Assembly Munshi said⁵:

"The strongest and the most elastic executive have been found to be in England and that is because the executive powers rest in the Cabinet supported by a majority in the Lower House which has financial powers... As a result it is the rule of the majority in the Legislature; for it supports its Leaders in the Cabinet, which advises the head of the State... The Government in England is found strong and elastic under all circumstances..."

We must not forget a very important fact that, during the last hundred years, Indian public life has largely drawn upon the traditions of British constitutional law. Most of us have looked up to the British model as the best. For the last thirty or forty years, some kind of responsibility has been introduced in the governance of this country. Our constitutional traditions have become parliamentary..."

Alladi Krishnaswami Aiyar pointed to the difficulties of vesting wide powers in the Rulers of the Princely States without sufficient legislative control and also added⁶:

⁶ Ibid.; pp. 985-86.
"An infant democracy cannot afford, under modern conditions, to take the risk of a perpetual cleavage, feud or conflict or threatened conflict between the Legislature and the Executive. The object of the present constitutional structure is to prevent a conflict between the Executive and the Legislature and to promote harmony between the different parts of the governmental system... After weighing the pros and cons... the Indian Constitution has adopted the institution of Parliamentary Executive."

The considered opinion of Nehru-Patel-Prasad triumvirate, after giving "anxious thought to this matter", was also that the form of constitutional government in India should be parliamentary. And the value and validity of the conclusions of the founding fathers relating to the form of government in India have been tested through time.

But without being unduly cynical or being exposed to the charge of heresy, one may also suggest that to crown all the cogent reasons for adopting the present parliamentary form of government in the country, the consideration of also reasonably accommodating in the proposed scheme of Government the numerous outstanding comrades-in-arm in the struggle for Independence did not prove the least decisive in the matter. Also, Gandhi unlike Washington, chose not to move into the Rashtrapati Bhavan. Consequently, the Presidency came to be a seat of dignity and authority but not a centre of real power.

This parliamentary form of government is sustained by the principle of legislative supremacy that India has accepted. And although more will be said later of the doctrine of Parliamentary sovereignty as found in India, it may be noted here that the Indian Parliament has been built in the image of the British Parliament to the extent it has been possible within the limits of her written federal Constitution.

Sized up with Parliamentary sovereignty is judicial independence and impartiality, including the power of judicial review, which the Constitution gives due recognition for the purpose of its effective functioning. Of the element of judicial independence and impartiality, including the system of judicial review, more shall be seen in the context of the subsequent discussions on the judiciary. But it is significant to note here that all the Amendments to the Constitution to-date notwithstanding, this element still retains its inner vitality.
So far as administrative neutrality is concerned, the Constitution conceives it as a condition for the effective and efficient working of the Indian political system in the tradition of the western liberal democracies. Administrative neutrality does not, however, imply administrative apathy. But it surely precludes sympathy for a particular political party or group. Although something more may be noticeable about this element when the attention is specifically turned to the services under the state, it is not gainsaying the fact that the Constitution rules out the allegiance of the services to any principles which it does not itself expressly avow.

STRUCTURE OF GOVERNMENT

The panoply of constitutional government and administration in India consists principally of the Union and State Governments. It also includes the administration of the Union Territories and the Tribal and Scheduled Areas. Then units of local self-government, including the panchayati raj institutions, also form part of it. So do the constitutional provisions relating to the services under the Union or the States. People's representation, franchise and elections also find place within its fold.

UNION GOVERNMENT

According to the General Clauses Act, the Union Government, Government of India, or Central Government, means the President of India. But in this discussion these expressions have been used to include all the organs of government at the Centre. Part V of the Constitution concentrates on the Union Government which is, by far, the most significant segment of the scheme of constitutional government and administration in the country.

There is, first, the President of India, who is the repository of all executive powers of the Union, as also of numerous other constitutional and statutory powers. To aid and advise him in the discharge of his functions, the Constitution provides for a Council of Ministers headed by the Prime Minister. On the executive side there are also functionaries like the Vice-President, Comptroller and Auditor-General and Attorney-General and bodies like the Union Public Service Commission, the Finance Commission, the Minorities Commission,
the Language Commission and the Election Commission. Note may also be taken of an extra-constitutional body like the Planning Commission or the National Development Council.

The Union legislative body, known as Parliament, consists of the President and two Houses, called the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). The Presiding Officer of the former is designated as Chairman and that of the latter as Speaker.

The Supreme Court of India is the judicial body at the Union level, which is also the highest court in the land. The country has a unified judicial system, and the Supreme Court sits at the apex of the entire administration of justice.

**STATE GOVERNMENT**

The General Clauses Act also defines a State Government to mean the Governor, or, in relation to a Union Territory, the President. However, the expression “State Government” in the context of this discussion embraces all the three branches of Government. Part VI of the Constitution deals with the State Governments, although articles 370 to 371C outside this Part also make some special provisions for some States.

The Constitution contemplates a Governor for each State, although two or more States may together have one Governor. All the executive power of a State, as also many other constitutional and statutory powers, vests in the Governor. In the discharge of his functions, in so far as he is not required to act in his discretion, he is aided and advised by a Council of Ministers headed by the Chief Minister. Then a State has its Advocate-General and Public Service Commission.

The State Legislature may be bi-cameral or uni-cameral, as the Constitution may provide. Whereas a bi-cameral Legislature has two Houses known as Legislative Council (Vidhan Parishad) presided over by the Chairman and Legislative Assembly (Vidhan Sabha) presided over by the Speaker, a uni-cameral Legislature has the latter House only.

The State judiciary comprises a High Court and other subordinate courts, viz., District and Sessions Court and the courts of sub-judges, munsifs and magistrates. A presidency town like Calcutta, Bombay, or Madras has City Civil and Sessions Court and courts of presidency magistrates.
Divisional and District Administration: For administrative convenience a State is divided into divisions, each headed by a Divisional Commissioner. A Division consists of two or more districts, each headed by a District Magistrate or Deputy Commissioner. A district has two or more sub-divisions, each headed by a Sub-divisional Officer. Then there are development blocks, usually coinciding with the areas of police stations, headed by the Block Development Officers.

Local Self-Government: Units of local self-government are also spread over throughout a State. There are urban local bodies like municipal corporations, municipalities, notified area authorities, improvement trusts, metropolitan authorities, cantonments and port authorities. Then there are panchayati raj institutions for rural areas.

SPECIAL STATUS OF JAMMU AND KASHMIR

Due to historical reasons, the State of Jammu and Kashmir enjoys a special status in the country. It has its separate Constitution framed by its own Constituent Assembly. But the structure of its government does not differ substantially from that of any other State in the country. The basic distinction between Jammu and Kashmir and the other States of the Union arises from the fact that the former has special ties with the Union. The Constitution of India applies to Jammu and Kashmir only as modified by the Presidential Order issued within the terms of article 370.

UNION TERRITORIES, AND SCHEDULED
AND TRIBAL AREAS

The Constitution also makes special provisions for the administration of Union Territories and Scheduled and Tribal Areas. The Union Territories have been dealt with in Part VIII and the Scheduled and Tribal Areas in Part IX of the Constitution.

Union Territories: The administration of a Union Territory vests in the President and he administers it through an administrator. Parliament may provide, and has provided, for unicameral Legislatures and Councils of Ministers headed by the Chief Ministers for some of the Union Territories.
Scheduled And Tribal Areas: The administration of the Scheduled and Tribal Areas within a State forms the special responsibility of the Governor of the State. In the Fifth Schedule to the Constitution detailed provisions have been made for the administration and control of the Scheduled and Tribal Areas. Schedule VI contains provisions specifically for the administration of Tribal Areas in Assam.

INTER-STATE AND ZONAL COUNCILS

Then there are Inter-State and Zonal Councils. Under article 263, the Constitution provides for the formation of Inter-State Councils. Five Zonal Councils are contemplated by section 15 of the States Reorganisation Act, 1956.

At the door-step of this chapter an Organisation Chart depicting the major public organs at the different levels of Government has been added as a source of ready and compact reference. However, in discussions relating to them in the subsequent chapters in this part it has been considered more convenient to group them as executive, legislative or judicial authorities, as the case may be, and not as Union or State level authorities distinctly.

But this should not lead to the conclusion that this type of approach is meant to emphasise the principle of separation of powers. For, as indicated earlier, this principle has secured only a partial and implicit recognition from the Constitution. This approach is also not intended to detonate the essentially federal nature of constitutional government in the country.
CHAPTER 22

EXECUTIVE POWER

The Constitution uses the expression "executive power" without defining it. Interestingly, also the Constitution uses the words "executive" and "administrative" interchangeably without defining either of them. These words have not been defined by the General Clauses Act either. But it seems that in the scheme of the Constitution the word "executive" is intended to have the meaning commonly given to it in legal and political parlance and it is meant to be of wider connotation to include all that is denoted by the word "administration" also.

NATURE OF EXECUTIVE POWER

Historically, it seems that government began as an executive function. It was at a subsequent stage that the legislative and judicial functions branched out of this common stock. Etymologically, the word "executive" has been derived from the Latin words ex and sequi meaning to follow out. Ducrocq, therefore, in his Traité du Droit Administratif, says that the mind can conceive of but two powers; that which makes the law and that which executes it. Goodnow also, in his Politics and Administration, finds that all state actions consist either in operations necessary to the expression of its will or in operations necessary to the execution of that will. But the executive power, like any other power, must involve a series of decisions and actions.

However, any effort at defining the executive power is, in a sense, an effort at conceiving the totality of governmental powers in categories contemplated by the traditional theory of separation of powers. Although for the purpose of comprehending the nature of executive power it is not necessary either to accept the dichotomy between the formulation and the execution of laws or to subscribe wholly to the now out-moded traditional theory of separation of powers, it is always convenient to recognise the value and validity of the tripartite
division of governmental powers into the three broad categories of executive, legislative and judicial powers. Consequently, in *In re Delhi Laws Act*,\(^1\) the Supreme Court rightly felt that the Constitution implicitly accepts the doctrine of separation of powers.

Wharton's *Law Lexicon*\(^2\) speaks of the executive as

"that branch of the Government which puts the laws into execution as distinguished from the legislative and judicial branches. The body that deliberates and enacts laws is legislative, the body that judges and applies the law in particular cases is judicial and the body that carries the laws into effect or superintends the enforcement of them is executive."

Such a view of the executive rests on the etymological meaning of this word. Wynes, however, conceives of the executive more widely "as the authority within the State which administers the law, carries on the business of government, maintains order within, and security from without, the State."\(^3\) But it seems that to conceive the executive except by residuary method and without reference to the mode or manner of its action is most likely to be an exercise in futility. And this is the more so in this age of positive state functions. In Halsbury's *Laws of England*, therefore, the following definition of the executive function is to be met with:

"Executive functions are incapable of comprehensive definition, for they are merely the residue of the functions of Government after legislative and judicial functions have been taken away. They include in addition to the execution of the laws, the maintenance of public order, the management of crown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations and the provision or supervision of such services as education, public health, transport and State assistance and insurance. In the performance of these functions, public authorities are bound to issue orders which are not far removed from legislation, and to make decisions affecting the personal and proprietary rights of individuals which, while not strictly judicial, are quasi-judicial in character. In addition to these quasi-legislative and quasi-judicial functions, the executive has also been empowered by statute to exercise functions which are strictly legislative and strictly judicial in character...."\(^4\)

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\(^1\) *In re Delhi Laws Act*, (1951) S.C.R. 747. See also *Associated Cement Co. v. P. N. Sharma*, (1965) 1 S.C.R. 723.


\(^3\) Wynes: *Legislative and Executive Powers in Australia*, 1962; p. 318.

This view of the executive function, founded on the residuary method and impregnated with the service concept of state operations, was accepted by the Supreme Court in Ram Jawaya’s Case:5

“It may not be possible to frame an exhaustive definition of what executive function means or implies. Ordinarily the executive power connotes the residue of governmental functions that remains after legislative and judicial functions are taken away, subject, of course, to the provisions of the Constitution or of any law......

The executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.”

This residuary and service concept of the executive power, which was again emphasised by the Supreme Court in Jayantilal v. Rana,6 reflects the inevitably increasing global ascendency of the executive (including the administrative) branch of the government. The executive is gaining strength and importance at the cost of the legislature and the judiciary as much as it is deriving its growing power from the complexities of modern industrial urban life and the service concept of state functions in general. The executive is also growing because of the constant crisis condition of this age, and it is being armed to act on its own in times of crisis when the legislature and the judiciary cannot function normally.

Executive ascendency, self-sufficiency and autonomy are established elements of modern constitutionalism. And, Dicey notwithstanding, so is the element of executive discretion. The service and crisis requirements of this age demand the executive power to be more discretionary in nature so that it may operate effectively and efficiently to meet the diverse social ends. Equally established are the ingredients of executive secrecy and executive privilege.

Besides, this residuary and discretionary nature of the executive power must remain incomplete without a reference to the

summary manner or mode of taking an executive action. And this aspect has also been universally recognised, and developed later in this discussion in the context of the exercise of the executive power.

**EXTENT OF EXECUTIVE POWER**

The residuary, discretionary and summary nature of executive power necessarily precludes a definite demarcation of its extent. For, otherwise it would amount to defining all public powers in eternity, which is simply not feasible. The executive alone is in a position to deal with the varying situations involving public issues and it must deal with them as and when the needs of the community command their effective handling.

Consequentially, any realistic delineation of the executive power “can never be exhaustive”, it can be only inclusive or indicative, although the desirability of this delineation in a written constitution cannot be denied. Besides, as the division of powers and functions between the general and the regional governments is the quintessence of federalism, a federal constitution must also provide for the distribution of the executive power. And it is in this spirit that articles 73 and 162 of the Constitution of India relating to the executive powers of the Union and the States, respectively, are to be considered.

**EXTENT OF UNION EXECUTIVE POWER**

Before turning to the consideration of article 73, which relates to the extent of the executive power of the Union, it is to be noted, first, that the Constitution recognises a distinction between the executive powers of the Union as vested in the President within the terms of article 53 and the executive and other powers vested in him in accordance with the other provisions of the Constitution; a distinction emphasised by Shah J. in *Jayantilal’s Case.* Thus, all the executive and other powers vested in the President under the different provisions of the Constitution are not to be deemed as the executive power of the Union. This technical distinction between the executive power of the Union and the executive and other powers of the President, however, may not, except for the limited purpose of

7 *ibid.*
delegation, be of any substantial operational significance, as the Council of Ministers is meant to aid and advise the President under article 74 in the discharge of all his functions.

Secondly, in line with the now well-settled principle, that the executive power cannot be exhaustively demarcated, clause (1) of article 73 provides that “the executive power of the Union shall extend to” the matters specified in this article. The word “extend” in this context is readable as the word “include” in the context of an inclusive definition, and hence, the expression “shall extend to” does not mean “shall extend to only”.^8^

Thirdly, the standpoint that article 73 does not exhaustively delineate the extent of the executive power of the Union is also substantiated by other provisions of the Constitution, some of which expressly speak of additional areas of the executive power of the Union outside the ambit of article 73.

Article 73 itself reads as follows:

“(1) Subject to the provisions of this Constitution, 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.

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.”

Evidently, article 73 lays down both the spatial and functional extensible limits of the executive power of the Union. The operation of this article has, however, been expressly made “subject to the provisions of this Constitution.” This express requirement has a double action. It goes to extend the executive power of the Union in certain directions. It also imposes

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certain limitations on this power. For example, the executive cannot levy or collect a tax without the authority of law.

**Territorial Extent**: Territorially, the executive power of the Union extends to the whole of India because Parliament has power to make laws with respect to whole or any part of the country. The executive power of the Union also extends to territories outside India because Parliament may make laws having extra-territorial validity. Besides, there is article 260 which provides that the Government of India may undertake any executive, legislative or judicial functions in relation to a foreign territory within the terms of this article.

**Functional Extent**: Functionally, the executive power of the Union extends to all matters with respect to which Parliament has the exclusive power to make laws. Rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement also fall within the ambit of the executive power of the Union. This means that the Union has exclusive executive power with respect to the matters in List I and matters relating to treaty or agreements with foreign powers and such other matters as the Constitution specifically entrusts to the exclusive legislative authority of Parliament.

Clause (1) (a) of article 73 provides for the general proposition that the Union executive power is co-extensive with the legislative power of Parliament. But this article makes two exceptions to this principle. In the first place, unless the Constitution or a law made by Parliament expressly provides otherwise, if the legislative power of Parliament relates to a matter with respect to which the Legislature of a State has also the power to make laws, i.e., it is a concurrent matter, the executive power of the Union does not extend to such a concurrent subject.

Secondly, until otherwise provided by Parliament, a State or its any officer or authority is to continue to exercise executive power in respect of any matter which was within its executive competence immediately before the commencement of the Constitution, although such a matter may, under the Constitution, fall within the legislative competence of Parliament.

In addition to article 73, the Constitution has some other provisions relating to the extent of the executive power of the Union. For example, article 256 extends the executive power
of the Union to the giving of directions to a State for ensuring compliance with existing laws or laws made by Parliament. Again, under article 257 the executive power of the Union also extends to the giving of necessary directions to a State to so exercise its executive power as not to impede or prejudice the executive power of the Union. The executive power of the Union under this article also extends to the giving of necessary directions to a State for the construction and maintenance of the means of communication of national or military importance as well as for measures to be taken for the protection of railways within the State, although any expenses incurred by a State as a result of any such direction are the responsibility of the Union.

Besides, under clause (1) of article 339 the executive power of the Union also extends to the giving of a direction “to a State as to the drawing up and executing of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State”. Similarly, under para 3 of Schedule V the executive power of the Union has been extended to the giving of directions to a State as to the administration of any Scheduled Area within that State.

In times of emergency also the Union has the power to issue certain directions to the States. Article 352(a) provides that while a Proclamation of Emergency is in operation, “the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised.” In case of a Financial Emergency, the executive power of the Union also extends under article 360(3) “to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.”

Interestingly, irrespective of the fact whether the Union issues a direction to the States in normal times or in times of emergency, all the directions have a sanction behind them. Article 365 lays down that “Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union”, the President may “hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this
Constitution.” And this may result in the application of article 356 to such a recalcitrant State.

The executive power of the Union also extends to the making of any grants for any public purpose within the terms of article 282, even if such a purpose is not one with respect of which Parliament may make laws. Again, under article 292 the executive power of the Union extends to the borrowing upon the security of the Consolidated Fund of India, subject, however, to such limitations, if any, as may be fixed by Parliament.

Article 298 extends the executive power of the Union in three more directions. In the first place, the carrying on of any trade or business falls within the ambit of the Union executive power. Secondly, the executive power of the Union also includes acquisition, holding and disposal of property. And thirdly, the Union has also the executive power of making any contract for any purpose. However, the executive power of the Union to carry on a trade or business or to make a contract is subject to legislation by a State, if the trade, business or contract relates to a matter with respect to which Parliament has no power to make laws. Notably, the executive power of the Union may get extended also by reason of delegation by a State of its executive power within the terms of article 258A, although the Union may also delegate under article 258 its any executive power to a State.

Significantly again, in times of emergency, the executive power of the Union may further become extended by virtue of the provisions of articles 353(b) and 357(1)(b). When a Proclamation of the Emergency is declared, article 353(b) empowers Parliament to make laws conferring powers and imposing duties on Union officers and authorities even with regard to matters not contained in the Union List. Again, when article 356 operates to suspend the constitutional machinery in a State, article 357(1)(b) authorises Parliament, the President or any authority having power to make laws during the period, to invest Union officers and authorities with powers in regard to State matters also.

To crown all these express constitutional provisions extending the executive power of the Union, the doctrine of Act of State and the power to declare martial law have also to be kept in mind in evaluating the operative extent of the executive power
of the Union. It is also to be noted that there is no constitutional provision to take away any executive power vested in the Union. The Union may, however, delegate its any executive power to a State in accordance with the provisions of article 258.

**EXTENT OF STATE EXECUTIVE POWER**

In considering the executive power of the States under article 162 also the three preliminary points stated in regard to the executive power of the Union have to be kept in mind, for they apply to the States also *mutatis mutandis*. Consequently, there is a distinction between the executive power of a State and the executive and other powers of its Governor; article 152 lays down only the extensible limits of the executive power of a State; and there are also other provisions in the Constitution relating to the executive power of a State. Article 162 provides as follows:

"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Article 162, which corresponds to article 73 relating to the extent of the executive power of the Union, also lays down only the extensible limits of the executive power of the States. The operation of article 162, like that of article 73, is also "subject to the provisions of this Constitution".9

**Territorial Extent**: On the basis of the principle contained in article 245 of the Constitution, that the Legislature of a State has the power to make laws only with respect to that State, the executive power of a State extends merely to the area covered by that State.

**Functional Extent**: Article 162 lays down that the executive power of a State is co-extensive with its legislative power.

The State executive is empowered to exercise powers in respect of any matter regarding which the State Legislature is competent to make Laws. This competence of law making does not, however, refer to the body of laws actually in existence, but the subject-matter with regard to which laws might have been made or may be made in future. But this article is not intended to substitute the State executive for the State Legislature, nor is it aimed at conferring any power on the executive to make rules having statutory force. The State executive cannot also claim an authority under this article to violate any fundamental or constitutional rights.

The substantive requirement of article 162, that the State executive power is co-extensive with the State legislative power, has, however, an exception provided by this article itself. If a State Legislature and the Union Parliament have the power to make laws with regard to any matter, the executive power of the State is subject to, and limited by, the executive power expressly vested by the Constitution or any Parliamentary law in the Union or an officer or authority of the Union.

Article 162, read with article 73, implies that the executive power of a State extends to all matters in List II, Schedule VII. Secondly, the State executive power extends also to all matters in List III of this Schedule in so far as the executive power with regard to any such matter has not been expressly vested in the Union by the Constitution or any Parliamentary law. Thirdly, until Parliament by law provides otherwise, the State executive power also extends to all matters which fell within its executive competence before the commencement of the Constitution. And fourthly, it may also be noted that the Union may confer upon the State any of its executive powers in terms of article 258.

Then, as in the case of the Union, there are some articles of the Constitution expressly providing for the extension of the executive power of the States. There is, for example, article 282 which authorises the States to make grants for any public purpose even if it is not a purpose to which the legislative power of the State extends. Again, article 293(1) extends the execu-

tive power of a State to borrowing on the security of its Consolidated Fund within the limits laid down by the Legislature. Besides, para 2 of Schedule V enlarges the executive power of a State to include the Scheduled Areas within that State.

There is also a three dimensional extension of the State executive power contemplated by article 298. This article authorises the State executive, like the Union executive, to carry on any trade or business; to hold, acquire or dispose of any property; and to enter into contract for any purpose. However, the executive power of a State relating to any trade or business or a contract for any purpose is subject to the legislative power of Parliament if it is a trade, business or purpose with regard to which the State does not have any legislative competence.

There is yet another aspect to the extent of the State executive power. Unlike the extent of the Union executive power, in certain circumstances the extent of the State executive power is also contractible resulting in a proportional corresponding expansion of the extent of the Union executive power. These situations are in addition to the delegation by a State of its executive power to the Union under article 258A, although there is no provision for inter-State delegation. And it seems that the constitutional provisions relating to these extraordinary situations have been framed with an emphasis on national unity and cooperative federalism.

There is article 249 which authorises Parliament to legislate with respect to any matter in List II if the Rajya Sabha declares the matter to be of national interest by a two-thirds majority. Ostensibly, such an enactment may also provide for investing the Union with any executive power exercisable under the statute. Similarly, article 250 authorises Parliament to make laws with regard to any matter in the State List, when a Proclamation of Emergency is in operation. Article 353(b) says that in such a situation the power of Parliament to make laws includes the power to confer upon the Union executive power relating to any such matter. Article 360, which deals with Financial emergency, has also an adverse impact on the extent of the State executive power, and so have the constitutional provisions for issuing directions by the Union to the States under articles 256 and 257.
An extreme case of contraction of the executive power of a State also arises when article 356 is brought into operation to supersede the constitutional machinery in a State. Article 357(1)(b) lays down that Parliament or the President may invest the Union with executive power relating to any matter within the jurisdiction of a State to which article 356 has been applied.

EXERCISE OF EXECUTIVE POWER

Of the exercise of the executive power of the Union or the States a fuller view has been presented in the subsequent chapters. Only a few essential issues may be indicated here. The principal point that deserves attention in this regard is that the procedure of an executive action is basically summary in nature, because the executive is required to act effectively under diverse situations. The far-reaching implication of considering the executive function of a residuary, discretionary and summary nature is that unless the Constitution provides otherwise expressly or by necessary implication, legislation is not a precondition for the exercise of any executive power.

Prior Legislation for Exercise of Executive Power: The general principle is that prior legislation, substantive or procedural, is not necessary for the exercise of any executive power by the Union or the States unless it appears otherwise from the expressed or implied provisions of the Constitution. Thus, an article like 31 or 265 may require that the executive can act only when there is prior legislative authorisation. However, in other cases also if there is an enactment relating to any matter the executive is obliged to observe the terms of the statute.

It follows that the executive may act freely so long as its any action does not encroach upon the area of power reserved by the Constitution for any specific agency; or does not infringe any constitutional or legal right of a man or citizen; or violates any statutory or other legal rule of substantive or procedural nature. Besides, the executive cannot act *mala fide*, for the basic requirement of the exercise of any discretionary power is that it must be used in the interest of the subject.

13 See Ram Jawaya's and Jayantilal's Cases, op. cit.
Power of Dispensation: However, the executive may be authorised to dispense with laws in certain cases. Such a power of granting exemptions is a sort of delegated legislative power and in this case it has to be shown that the legislature has laid down guidelines for the exercise of this power. Otherwise, the authorisation may be held invalid.\textsuperscript{13a} Besides, this power is to be distinguished from discretionary power.\textsuperscript{13b}

Exercise of Union Executive Power: All the executive power of the Union is vested in the President and is exercisable by him either directly or through officers subordinate to him.\textsuperscript{14} He has a Council of Ministers headed by the Prime Minister to aid and advise him in the discharge of his functions.\textsuperscript{15} All the executive actions of the Union are expressed to be taken in the name of the President and he frames rules for the more convenient transaction of the business of the Union Government.\textsuperscript{16} The Union may, however, delegate any of its executive powers to a State.\textsuperscript{17}

Exercise of State Executive Power: The Governor of a State is the repository of all the executive power of the State,\textsuperscript{18} and he has a Council of Ministers headed by the Chief Minister to aid and advise him in the discharge of all his functions, except those which he is required to perform in his discretion.\textsuperscript{19} The executive actions of a State are expressed to be taken in the name of the Governor and he frames rules for the more convenient functioning of the State Government.\textsuperscript{20} The States may also delegate their any executive power to the Union.\textsuperscript{21}

UNION-STATE ADMINISTRATIVE RELATIONS

Any scheme of federal government demands a division of powers, executive or legislative, between the general and the

\textsuperscript{13b} Ganga Ram v. Tezpur Fishery Society, (1957) S.C.R. 479.
\textsuperscript{14} Art. 53.
\textsuperscript{15} Arts. 74, 75.
\textsuperscript{16} Arts. 77, 78.
\textsuperscript{17} Art. 258.
\textsuperscript{18} Art. 154.
\textsuperscript{19} Arts. 163, 164.
\textsuperscript{20} Arts. 166, 167.
\textsuperscript{21} Art. 258A.
regional governments. Ambedkar, while replying to the critics of the Indian federal system, said in the Constituent Assembly:

"The basic principle of Federalism is that the legislative and the executive authority is partitioned between the Centre and the States not by any law to be made by the Centre, but by the Constitution itself. This is what the Constitution does. The States are in no way dependent upon the Centre for their legislative or executive authority. The States and the Centre are co-equal in this matter."²²

This demand of federalism has, however, to reckon with the command of the realities of the industrial urban civilisation in an era of tremendous speed and technological transformations. This is the command for cohesion and coordination. In major areas, specially economic, the general and regional governments must act in unison. It is for this reason that the current concept of cooperative federalism finds its maximum expression in the executive, administrative or financial operations of a federal state. Necessarily, the Union and the Units act not only as co-equals but also in a coordinated and united manner to serve the social objectives in a community. This need for coordination and unison is all the greater in a developing society that seeks rapid and integrated socio-economic changes. Consequently, a number of formal and informal links are forged between the Union and the Units for the smooth and efficient governance of the country.

It is as a reflexion of this need for concerted action in major areas that Chapter II, Part XI, of the Constitution relating to the "Union-State Administrative Relations" is essentially a chapter concerning Union-State administrative co-ordination. Its essential objective seems to be to secure an efficient and smooth implementation of all national socio-economic plans. To this end, this Chapter, on the one hand, arms the Union Government with powers to effectively control matters with regard to which Parliament has the power to make laws, and on the other, prescribes a scheme of Union-State cooperation in achieving all socio-economic objectives. This Chapter also provides the necessary mechanism for inter-State co-ordination and co-operation. In fact, the entire constitutional scheme of Union-

State administrative relations is a grand design of inter-Governmental co-ordination and co-operation.

However, a broad and realistic view of the Union-State administrative relations involves not only an appreciation of the respective areas of the executive powers of the Union and the States, but also an assessment of the operational roles of quite a few other constitutional provisions and some extra-constitutional devices. In considering the specific aspects of the over-all Union-State administrative relations, the principal point urging attention is that articles 73 and 162, relating respectively to the extent of the Union and State executive powers, assign the States a place of pride in the execution of laws. In most matters even the Union looks to the States for the implementation of its policies and laws.

This situation has to be considered in the historical context of the British rule under which the three Presidencies of Bombay, Calcutta and Madras, along with certain other Provinces, came to be welded into the Government of India. This historical legacy still persists in the sense that the States are expected to do much more than the Union in relation to all internal affairs of the country. Besides, there is the inexorable logic of the service state in this age of tremendous technological growth. It becomes necessary, therefore, that for a successful working of all its policies the Central Government should have the means to galvanise the State machinery for its own purposes as well.

This situation has resulted in vesting in the Union as well as the President some decisive powers in relation to the States. In the first place, the President has significant powers to appoint to and dismiss from certain State offices. He appoints the Governor of a State who holds office during his pleasure.\(^{23}\) He also appoints the Judges of the High Courts\(^{24}\) and the Accountant-Generals in the States. He has also a distinct role in the removal of a High Court Judge, an Accountant-General and the Chairman or a member of a State Public Service Commission.\(^{25}\)

The President also exercises control over a State in certain legislative matters. A Bill, like the one under article 304, may

\(^{23}\) Arts. 155, 156.

\(^{24}\) Art. 216.

\(^{25}\) Art. 317.
require his previous sanction for introduction into a State Legislature. A State Act, like the one under article 31(3), 31A, 31C or 288(2), requires the assent of the President for being effective. Then under article 200 the Governor may reserve any Bill passed by the State Legislature for the assent of the President. He must reserve a Bill which, if enacted into law, would so derogate from the powers of the High Court as to endanger its constitutional position.

Besides, when the Governor exercises his Ordinance making power under article 213, he cannot pass an Ordinance relating to a matter which would require the previous sanction of the President for introduction into the State Legislature; or is a matter which the Governor would have deemed necessary to reserve for the consideration of the President; or is a matter which, without the previous assent of the President, would not operate as a valid law.

So far as Chapter II, Part XI, of the Constitution itself is concerned, it has some nine odd articles. There is, first, article 256 which says that the executive power of every State is to be so exercised as to ensure compliance with Parliamentary and existing laws applicable to that State. This article also authorises the Union to issue such directions to a state as it may consider necessary for the purpose of securing such compliance. Significantly, the existence of a law is an operational pre-condition of this article.  

Then article 257 requires the States to so exercise their executive power as not to impede or prejudice the exercise of the Union executive power. The Union is also competent to issue necessary directions to a State for this purpose. The Union has also the power of issuing directions to a State as to the construction and maintenance of the means of communication declared in the direction to be of national or military importance. This requirement is, however, not in derogation of Parliament’s power to declare highways and waterways to be national highways and waterways or the power of the Union to construct and maintain means of communication as part of its function with respect to naval, military and air force works.

Besides, this article also authorises the Union to issue

directions to a State regarding the measures to be taken for the protection of the railways within that State. Interestingly, however, if a State incurs any cost in carrying out any directions of the Union relating to the construction or maintenance of the means of communication of national or military importance and the protection of the railways within that State, the Union is to pay to the State such sums as may be agreed. If the Union and the State fail to reach an agreement with regard to such a payable amount, the matter is determined by an arbitrator appointed by the Chief Justice of India.

In parenthesis, it may also be noted that the Union is competent to issue directions to a State with regard to certain matters falling outside the ambit of this Chapter II. For example, under article 339(2), the Union has the power to give directions to a State for the preparation and execution of schemes essential for the welfare of Scheduled Tribes in the State. Under article 350A, the President may issue directions to a State for providing adequate facilities for instruction in the mother-tongue at the primary stage of education to the children of the linguistic minority groups in that State.

Besides, when a Proclamation of Emergency under article 352 is in force, the Union may issue directions to a State under article 353(a). Again, when a Financial Emergency is declared under article 360, the Union has the competence to issue to a State necessary directions for observing financial propriety, which may include

"(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affair of a State;
(ii) a provision requiring all Money Bills or other Bills to which the provisions of article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State."

All the aforesaid directions, whether issued within the terms of Chapter II, Part XI, or in accordance with any constitutional provisions outside this Chapter, have been provided with teeth. Article 365 lays down that if a State does not comply with any directions given by the Union, the President may hold that the Government of the State cannot be carried on in accordance with the provisions of the Constitution and article 356 may be applied to that State.
The Constitution also provides for the delegation of the Union executive power to the States and *vice versa*, although it should be distinctly noted that there is no constitutional provision for inter-State delegation of executive powers. Article 258 relates to the delegation of the Union executive power. It opens with a *non obstante* clause and says that with the consent of the concerned State Government the President may entrust, conditionally or unconditionally, to the State Government any function relating to a matter falling within the fold of the Union executive power. Parliament also may by law confer powers or impose duties relating to any matter on a State Government or its any officer, even if it is a matter with regard to which the State Legislature has no power to make laws.

Under article 258, a State acts as a delegate and not as an agent of the Union, and interestingly, wrongful acts of a State in this capacity of delegate may be challenged even without challenging the validity of the instrument of delegation. However, article 258(3) makes it incumbent on the Union to pay a State an agreed sum for defraying the costs incurred by the latter in carrying out any such delegated function. In case no such agreement is reached, the matter is settled by an arbitrator appointed by the Chief Justice of India.

Article 258A, which also opens with a *non obstante* clause, authorises the Governor of a State to entrust to the Government of India, or its any officer or authority, any function relating to any matter within the ambit of the State executive power. This entrustment can be made only with the consent of the Government of India and it may be conditional or unconditional. But there is no express obligation for the State to compensate the Union with regard to costs incurred by it for carrying out such a delegated function.

On principle similar to that in article 258(1), the Union acts as a delegate, and not as an agent, of the concerned State under article 258A. The Orissa High Court said in *N. B. Singh v. Duryodhan Pradhan*:

"The relationship arising by virtue of Art. 258A cannot be said to pertain to the law of agency but is only a constitutional statutory entrust-

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ment in relation to the exercise of the executive power which is a sovereign power...

Article 260 authorises the Government of India to undertake any legislative, executive or judicial functions in regard to any territory outside India. The Government of India may undertake this function only by agreement with the affected territory and any such agreement is subject to any law relating to foreign jurisdiction. The Government of India acts in this regard as a delegate of the concerned foreign government, but subject to any law, it can sub-delegate its this agency function to a State Government.

Inter-State Co-ordination

Although the Constitution does not provide for inter-State delegation of executive power, it provides devices for inter-State coordination, which to a great extent also facilitate even Union-State, or national, coordination. There is article 262 which deals with the adjudication of disputes relating to inter-State rivers or river valleys. It says that Parliament may make laws providing for the adjudication of any dispute or complaint relating to the use, distribution or control of waters of, or in, any inter-State river or river valley. And notwithstanding anything in the Constitution, Parliament may also under this article exclude any such dispute or complaint from the jurisdiction of any court, including the Supreme Court. Parliament has passed the River Boards Act, 1956, and the Inter-State Water Disputes Act, 1956, in pursuance of the power conferred on it by this article.

Article 263 provides for the constitution of Inter-State Councils. An Inter-State Council under this article is established in public interest by the President, who is also competent to define the nature and duties of such a Council and to lay down its organisation and procedure. Such a Council may be of ad hoc, temporary or permanent nature. A Council may be charged with the duty of—

"(a) inquiring into and advising upon disputes which may have arisen between States;

(b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or
(c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject”.

Some specific purpose Councils like the Central Council of Health, the Central Council of Local Self-Government and Northern, Eastern, Western and Southern Regional Councils of Sales Tax came to be constituted under this article. But no Inter-State Council with more comprehensive duties could be set up until the establishment of the North-Eastern States Council, although the Administrative Reforms Committee pleaded for the setting up of such a comprehensive Council. The teething troubles of even the North-Eastern States Council are yet not over, and its future seems nebulous.

Note may also be taken of the Zonal Councils formed under section 15 of the States Reorganisation Act, 1956. Five such Councils—Northern, Southern, Eastern, Western and Central—have been constituted under the Act. A Zonal Council consists of a Union Minister, nominated by the Central Government; the Chief Ministers of the States concerned; two State Ministers, nominated by each of the State Governments concerned; and two representatives each from the concerned Union Territories. The Union Minister acts as the Chairman of the Council which meets as and when required by the Chairman. Its decisions are in accordance with the majority vote, but the decisions are advisory in nature.

Some Other Constitutional Provisions for Inter-Governmental Co-ordination

Article 261 contains significant provisions for securing co-ordination between the Union and the states and the States inter se. It requires full faith and credit to be given throughout the country to all public acts, records and judicial proceedings of the Union and of every State. Parliament is to provide by law the manner in which and the conditions under which such acts, records and proceedings are to be proved and their effects determined. This article further provides that final

judgments, orders, including decrees,29 passed by a civil court in any part of the territory of India are capable of execution anywhere in the country according to law. However, the decree of a former Princely State passed before January 26, 1950, is a foreign decree for the purpose of this article.29a

The impact of the emergency provisions of the Constitution on the Union-State administrative relations have also to be kept in mind. When a Proclamation of Emergency is declared, Parliament becomes invested with the power to legislate on any matters contained in the State List. Consequently, the Union may be invested by a Parliamentary law with executive power with regard to any matter in the State List. Besides, the Union may issue any directions to the States during this period.30

Vitally significant powers are vested in the Union by article 355 which imposes an obligation on the Union to protect the States from external aggression and internal disturbances and to ensure the carrying on of the State Government in conformity with the Constitution. This article makes the Union the overlord in certain matters of law and order within a State, and it may deploy its armed forces like the C.R.P. for this purpose even without consulting, or against the advice of, a State Government.

Then a more drastic measure may follow. The entire constitutional machinery of a State may be scrapped by the President by a Proclamation made under article 356, who may assume to himself all or any of the functions of the State executive.31 Similarly, in the case of Financial Emergency under article 356, the Union executive gets an increased power to direct the State executive in financial matters.

Again, there are some constitutional agencies and functionaries playing vital roles in Union-State administrative relations. These agencies and functionaries, by operating on all-India basis, provide viable instrumentalities for inter-Governmental coordination. Mention in this context may be made of the roles of the Finance Commission, the Comptroller and Auditor-General

29a Ibid.
30 Art. 353.
31 Art. 356 (1) (a).
and the Election Commission. The All-India Services have their own contributions to make in this sphere.

**Extra-Constitutional Methods of Inter-Governmental Coordination**

In any discussion relating to the Union-State administrative relations the modalities of inter-Governmental coordination must remain incomplete without a note on the part played by extra-Constitutional and informal devices for making the various levels of government work in unison and harmony. The respective roles of the Planning Commission and the National Development Councils are well-known in this regard. So are the working of the C.B.I. and C.R.P. Governors’ conferences and conferences of the State Ministers-in-charge of the different State departments as also of the State Chief Secretaries and Secretaries under the aegis of the Union also go to great lengths in securing inter-Governmental unison.

Besides, numerous informal get togethers, social gatherings and contacts and discussions also contribute to iron out inter-Government discordancies. The role of political parties and their leaders, particularly the predominating influence of the Congress party throughout the country, is also vital in harmonising Union-State administrative relationship and securing inter-Government coordination for pursuing national socio-economic objectives in harmony and unison.
CHAPTER 23

THE PRESIDENCY

India is a Sovereign, Democratic Republic. In vitally significant terms, article 52 of the Constitution declares that "There shall be a President of India"1; and not that "The Head of Federation shall be the President...", as the Union Constitution Committee recommended2; nor that "the Chief Executive and Head of the State in the Union shall be called the President of India," as K. T. Shah suggested.3 But this concise and pithy article, which provides the first postulate of constitutional government and administration in the country, is, however, not a marvel of precision. It is as much expressive as it is elusive.4

THE PRESIDENT OF INDIA

The President of India has been conceived in the image of the British Monarch but cast in the matrix of the Governor-General of India under the Government of India Act, 1935. He is a unique constitutional colossus mounted on the columns of Parliamentary sovereignty and parliamentary form of government within the frame of a written and elastic federal Constitution having provisions for judicial review. The Indian President is, indeed, a peerless person in authority on the earth.

The founding fathers intended the President of India to be "a symbol of the country"5; a visible symbol of the state, the Republic of India; and a living personification of the nation.6 He is also embraced within the meaning of the term "the State"

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1 Italics are mine.
2 Report of the Union Constitution Committee, C.A.D. Vol. IV.
4 See Rao, K. V.: Parliamentary Democracy of India, 2nd ed., Calcutta 1965, p. 27. He characterises the phraseology of this article as "delightfully vague."
5 C.A.D., Vol. IV; p. 734. Per Jawaharlal Nehru. See also Ambedkar's speeches before the Assembly.
in article 12 of the Constitution. And although not expressly stated, he is the head of the state, the crest of the Republic of India.

The free tenant of the Rashtrapati Bhavan is the first citizen of India. He is the highest dignitary in the land; the first to figure on the Warrant of Precedence. He is the occupant of the highest office in the country; a position of great dignity and authority in the land. He is the first authority in the realm; the first person formally bound by official oath or affirmation "to devote to the service and well-being of the people of India." And he is also obliged, albeit morally, to "preserve, protect and defend the Constitution and the law."*7

The President is the principal hypothesis of the scheme of constitutional government and administration in India. He is the capstone of the grand edifice of constitutional government and administration in the country. He is a constituent unit of Parliament.7a He is the Government of India, as the General Clauses Act says. Under the terms of the Act, he is also "the State Government" in relation to the Union Territories. He is a trustee of certain State and minority rights.

The President is also the chief executive of the Union, the repository of all the executive power of the Union and of numerous other constitutional and statutory powers, although Ambedkar told the Constituent Assembly that "He (the President) is the head of the State but not of the Executive".8 For, what Ambedkar, in all probability, really meant, was that the President is not the head of the Government. He must be having in mind the distinction between the head of state and head of government, although he might also be emphasizing the position of the President as a constitutional or formal head of the state and chief executive.

ELIGIBILITY FOR PRESIDENCY

Article 58 of the Constitution throws open the portals of the Presidency to all citizens of India, whether natural-born or naturalised. To be qualified for being elected as President a

7 Art. 60.
7a Art. 79.
8 Cf. C.A.D., Vol. IV; p. 734.
citizen must have completed the age of thirty-five years and he must also be qualified for election as a member of the Lok Sabha. It implies, then, that within the terms of article 84(c), which relates to Parliament’s power to prescribe any qualification for its members, Parliament may lay down by law necessary qualifications for election to the Presidency. The only requirement is that such qualifications must be made applicable to the members of the Lok Sabha as well.

This article also requires that a person is not eligible for being elected as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments. But neither the Constitution nor the General Clauses Act defines the expression “an office of profit”. However, Finlay J. observed in *Henry v. Galloway*:

“No ‘office of profit’ is not a thing particularly easy to define... It is, of course, and must be an office, and no doubt it must be an office to which remuneration is in some way or other attached.”

To determine whether a person holds an office of profit under the Government, a simple test seems to be whether an office carries a remuneration, even if payments are made from a source other than Government revenue, and whether it is under the control of Government. A contract is not an office of profit. But any voluntary foregoing of remuneration does not make the office cease to be one of profit. This article itself excludes, however, the office of the President, the Vice-President, the Governor or a Minister of the Union or a State from being treated as an office of profit for the purpose of election to the Presidency.

The fact that article 58 recognises the office of the President as not being an office of profit for being elected as President has to be taken into account with what article 57 has to say about eligibility of the President for re-election. This article says:

“A person who holds, or who has held, office as President shall, subject

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to the other provisions of this Constitution, be eligible for re-election to that office.

**ELECTION OF PRESIDENT**

The founding fathers took into account all the necessary factors in determining the manner of electing the President. The method of direct election was not considered desirable because of Parliamentary sovereignty; the parliamentary form of government; the expenses involved; and the large size of the population. The Constitution prescribes indirect election to the office of the President. The election is held under the supervision of the Election Commission and Parliament has passed the Presidential and Vice-Presidential Elections Act, 1952, to supplement the constitutional provisions relating to the election. Rules have also been framed under the Act.

**Time of Election:** Article 62 requires that an election to fill a vacancy caused by the expiry of the term of the President is to be completed before the expiration of the term. If an election is to be held because of the death, resignation or removal of a President, it should be held as soon as possible, but not later than six months from the date of occurrence of such a vacancy.

**Electoral College:** Article 54 requires the President to be elected by an electoral college consisting of the elected members of both Houses of Parliament and the elected members of the Legislative Assemblies of the States. However, any vacancy in the electoral college for whatever reason cannot be a ground for invalidating the election of a President. The purpose of constituting this broad-based electoral college is to instal in the office of the President a person who enjoys confidence at home and also respect abroad. This point was specifically emphasised by Nehru that a President elected only by the members of Parliament would have a much too narrow popular base making him appear as a mere representative of the majority in Parliament.

But even as at present constituted, the composition of the electoral college tends to favour the majority party in Parliament, although it is counterbalanced to a degree by the requirement that the President shall be elected in accordance with
the system of proportional representation by means of the single transferable vote. No Prime Minister can sit on the fence in such a vital matter.

*Manner of Election*: The manner of election prescribed by article 55 of the Constitution is intended to secure a parity between the Union and the States in the matter of electing the President. It also aims at uniformity in the scale of representation of the different States. Besides, it also goes to ensure some weight for the opinion of minority groups in electing the President. But, as in the case of electoral college, the manner of election of the President generally tends to favour the party in power at the Centre.

Clause (3) of article 55 requires the election of the President to "be held in accordance with the system of proportional representation by means of the single transferable vote." The voting at such an election is to be by secret ballot. The system of proportional representation by means of the single transferable vote is a variety of the system of proportional representation which may take numerous forms. It is traceable to *The Election of Representatives* published by an Englishman, Thomas Hare, in 1851. All the varieties of the system of proportional representation have, however, one underlying basic objective. This is to give representation to all shades of opinion of the electors corresponding proportionate representation in the elected body.

Generally, the system of proportional representation assumes multi-member constituencies, although it may be made applicable to a single member constituency also. Under this system a person is elected only if he secures his *quota of votes*. This quota is one more than the quotient obtained after dividing the number of the valid votes cast in a constituency by adding one to the number of the seats to be filled in the constituency. Any fraction less than a half is ignored, and if it is more than that the quotient is increased by one. This position may be stated as follows:

\[
\frac{\text{Number of Valid Votes}}{\text{Number of Seats} + 1} + 1 = \text{Quota}
\]

Under this system an elector is given a ballot paper carrying the names of all the candidates in a constituency. He has
then to indicate in the case of each of the candidates his ordinal preferences as first, second, third, fourth, and so on. In the first counting only the first preferences are taken into account. The candidates or the candidate securing the desired quota gets elected. But if the first counting is not decisive, the candidate getting the lowest first preference votes is eliminated. His ballot papers are then distributed among the remaining candidates not declared elected in proportion to the second preferences shown in those ballot papers. This process of elimination and distribution goes on till all the seats or the seat is filled in.

In a multi-member constituency it may also happen that only some of the seats get filled in after the first counting. In such a case it is also permissible that the highest surplus votes obtained by a winning candidate is first distributed among the other candidates not declared elected in proportion to the second preference votes in those surplus ballot papers, then the next highest, and so on till all the seats are filled in. However, this process of surplus distribution involves an element of chance. It should also be noted that in a multi-member constituency a combination of both the processes of elimination and surplus distribution may be necessary to fill in all the seats.

In the Presidential election this system simply implies that a person must secure absolute majority for being elected as President. The founding fathers might have stated this requirement in plain terms. But this might also have meant, in certain cases, polling of votes for more than once until a person is able to secure absolute majority. By providing for the present system of preferential voting this contingency has been absolutely obviated.

With a view to securing uniformity in the scale of representation of the different States in the Presidential election and also a parity between the States, on the one hand, and the Union, on the other, clause (2) of article 55 specifies the number of votes which each elected M.L.A. or M.P. is entitled to cast at such an election. An elected M.L.A. has votes equal to the quotient obtained by dividing the total population of the State by the total number of the elected M.L.A.s of the State further divided by one thousand. The quotient thus obtained is to be increased by one if the remainder is not less than five hundred. The population of a State for this purpose refers to the population figure
published as a result of the census preceding such an election. The quota of votes of each elected M.L.A. may be stated as follows:

\[
\frac{\text{Total Population of the State}}{\text{Number of Elected M.L.A.s}} + 1000 = \text{Quota of Each Elected M.L.A.}
\]

For the purpose of determining the number of votes to be cast by each elected M.P. the total vote entitlements of all the elected M.L.A.s in the States are calculated first. The total number of votes thus obtained is then divided by the total number of elected M.P.s and to the quotient is added one if there remains a fraction of more than one-half. This quotient is the quota of votes to be cast by each elected M.P. If \( Q, Q_1, Q_2, \ldots \) be the quota of votes of each elected M.L.A. in, say, States A, B, C, and the total number of the elected M.L.A.s in each of these States be \( T, T_1, T_2 \ldots \), respectively, the quota of votes of each elected M.P. may be expressed as follows:

\[
\frac{Q \times T + Q_1 \times T_1 + Q_2 \times T_2 \ldots}{\text{Total Number of Elected M.P.s}} = \text{Quota of Each Elected M.P.}
\]

A person to be elected as President must secure an absolute majority of the total number of valid votes cast by all the elected M.L.A.s and M.P.s. It is, however, possible that in a Presidential election, as it actually happened in 1969, no candidate may secure absolute majority in the first counting and the second or third counting may be found necessary for electing a President.

**Election Disputes:** Any doubts or disputes in respect of the election of the President is to be enquired into and decided by the Supreme Court. The Court in deciding such an election dispute rather acts as a tribunal\(^{13}\), and it determines its own procedure for deciding such a dispute. The grounds on which the election of a President may be called in question have been enumerated in section 18 of the Presidential and Vice-Presidential Elections Act, 1952, which are exhaustive.\(^{14}\)


Filling in of Casual Vacancies in the Presidency

It has, however, to be noted that there may occur casual vacancies in the office of the President arising out of his death, resignation, removal or otherwise. The Vice-President takes over as President in such a situation until the date on which a new President enters upon his office after being duly elected. Besides, when the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President discharges his functions until the President resumes his duties.\textsuperscript{15}

The Constitution also authorises Parliament to make necessary provisions for the discharge of the function of the President in any other contingency\textsuperscript{16} and such a contingency arose in 1969, when the then Vice-President entered upon the office of the President at the latter’s death, but resigned subsequently to contest the Presidential election.

Parliament then passed the President (Discharge of Functions) Act, 1969. This Act provides, \textit{inter alia}, that if a vacancy occurs both in the office of the President and in that of the Vice-President, the functions of President shall be discharged by the Chief Justice of India, or, in his absence, by the seniormost Judge of the Supreme Court. It is also to be noted that any person assuming the functions of the President is entitled to all the emoluments and privileges of the President during the period he discharges these functions.

\textit{TERM AND CONDITIONS OF OFFICE}

Every person, whether elected to the office of the President or filling in any casual vacancy in the office of the President is required to make and subscribe an oath or affirmation which binds him, though not legally but morally, to faithfully discharge the functions of his office. The prescribed oath or affirmation in article 60 is in the following form, and it is made and subscribed in the presence of the Chief Justice of India, or, in his absence, the available seniormost Judge of the Supreme Court:

\begin{quote}
\textit{I, A.B., do solemnly affirm that I will faithfully execute the office of President (or discharge the functions of the President) of}
\end{quote}

\textsuperscript{15} Art. 65. \textsuperscript{16} Art. 70.
India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India."

**Term of Office**: A person elected to hold the office of the President is entitled to remain in office for five years from the date on which he enters upon his office and he continues to hold office until his successor enters upon his office. The Constitution does not contemplate any interregnum in his office. He, however, may resign his office or may also be removed by impeachment. It is also to be noted that he is eligible for being re-elected any number of times. But, as the first President of India, Rajendra Prasad, provided a happy precedent of re-election only for once, it seems that this has by now crystallised into a firm constitutional convention in the country.

**Resignation**: While in office, the President may by writing resign his office. Such a resignation is addressed to the Vice-President and it is to be immediately communicated to the Speaker of the Lok Sabha. In this regard, an interesting episode of 1969 may be taken vote of. Zakir Husain, the then President of India, expired in May 1969, and V. V. Giri, the then Vice-President stepped into the office of the President. The Presidential election was scheduled to be held in August 1969 and the Acting President, V. V. Giri, desired to resign his post in July 1969 to contest the Presidential election. In the absence of any clear constitutional provision to cover this contingency, on the advice of the Attorney-General, V. V. Giri resigned his office of Vice-President by sending a letter of resignation to the President’s Secretariat and addressed to the President of India. Copies of the resignation letter were forwarded to the Prime Minister and the Chief Justice of India.

**Impeachment**: The President is also liable to be removed from office by impeachment in the manner prescribed by article 61 of the Constitution. This impeachment can be only for violation of the Constitution, but Parliament is the sole judge whether the Constitution has really been violated by a Pres-
dent. The courts have no say in the matter, and the Constitution also does not provide any guideline for Parliament to determine a violation of the Constitution.

Either House of Parliament is competent to prefer a charge of impeachment against the President for removing him from office. A proposal to prefer such a charge is, however, to be moved in a House in the form of a resolution after a written notice of not less than fourteen days to the House. This notice must carry the signatures of at least one-fourth of the total members of that House. The resolution containing the proposal must then be passed by a majority of not less than two-thirds of the total membership of the House.

A resolution thus passed by either House is then forwarded to the other House of Parliament for investigating the charge, or causing the charge to be investigated, against the President who has the constitutional right to appear and to be represented at such an investigation. If the other House, as a result of the investigation, declares by a resolution, passed by at least two-thirds of its total membership, that the charge preferred against the President has been sustained, the resolution has the effect of removing the President from his office on and from the date it is passed by the House. It is a self-operating resolution.

Only time will tell, as Gledhill suggests, whether the President would choose to become a dictator and be ultimately able to carry the country with him when impeachment proceedings are set in motion, but evidently, the procedure for impeaching the President is attended with numerous checks. It is designed to be an instrument of the last resort.

Conditions of Office: The President, though a unit of Parliament in the technical sense, cannot be a member of either House of Parliament or of a Chamber of a State Legislature. He is also not entitled to hold any other office of profit.

Emoluments and Immunities

The President is entitled to enjoy the use of his official residences without payment of rent. He is also entitled to other

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20 Art. 59(1) (2).
emoluments, allowances and privileges that may be determined by Parliaments by law. However, until Parliament makes necessary provisions in this behalf, the Presidential emoluments, allowances and privileges are to be in accordance with the Second Schedule. But the emoluments and allowances of the President cannot be diminished during the term of his office, and the purpose of this interdiction is to ensure the independence of the President.

At the moment the President enjoys a salary of Rs. 10,000 a month. Besides, the President may spend annually up to Rs. 15,26,000 on travels, entertainment, discretionary grants, staff, household expenses, and his own allowances. He is also entitled to an annual pension of Rs. 15,000 on vacating his office. Parliament supplemented the pension of the first President by Rs. 12,000 a year after his retirement from office in 1962. In 1969, when Zakir Husain, the third President, died in harness, however, a pension was also given by Parliament to his wife as a special case.

Article 361 clothes the President with personal immunities as head of the state. He is not answerable to any court for the exercise and performance of powers and duties of his office or for any act done or purporting to be done by him in performance of his functions. However, his conduct may be investigated by any court or tribunal appointed by either House of Parliament for the purpose of his impeachment under article 61. But article 361 should not be construed to preclude a person from bringing suitable proceedings against the Government of India for securing appropriate remedies.

No process for the arrest or imprisonment of the President can issue from any court during his term of office. Any criminal proceedings whatsoever cannot be instituted or continued against the President during his term of office.

In regard to civil proceedings, however, the Constitution only requires that any relief claimed against the President in respect of his any act done in his personal capacity cannot be made the subject-matter of a civil suit in any court without the specified notice to him. Such a notice must be given to the

21 Art. 59(3)(4).
22 Bimanchandra v. H. C. Mukherjee, (1952)56 C.W.N. 651.
President in writing two months before the institution of a suit and state “the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.”

POWERS OF THE PRESIDENT

The Constitution makes the President a repository of immense and diverse, though self-contained, powers on an unprecedented scale. He is a vast reservoir of executive, legislative and judicial powers. Then he has also substantial financial power. And added to these are his numerous other constitutional and statutory powers. His powers, indeed, are unparalleled. In fact, the powers vested in the President make him appear as an authority constituted to carry on all the functions of the state on his sole responsibility without running the risk of violating the Constitution, should the needs of the moment so dictate in national interest.

Executive Powers

The executive powers of the President include the executive power of the Union; the administrative powers of appointment, removal, dismissal and disciplinary control; military and defence powers; emergency and martial law powers; and diplomatic and foreign affairs powers. They also include some other constitutional and statutory powers of executive nature vested in him by the relevant provision of the Constitution or enactments. One such constitutional power is his power to administer Union Territories through Administrators. So is his power in relation to the Tribal Areas. And a statutory power of this nature is his power as the Visitor of a Central University.

Union Executive Power: Article 53 of the Constitution says:

“(1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.
(3) Nothing in this article shall—
(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or
(b) prevent Parliament from conferring by law functions on authorities other than the President”.

By virtue of article 53(1) the executive power of the Union, which is co-extensive with its legislative power, except in so far as the Constitution expressly or by necessary implication provides otherwise, is vested in the President of India. Powers of executive and other nature are also vested in the President under some other constitutional or statutory provisions. Article 53 is, however, confined to merely the vesting and exercise of the executive power of the Union as delimited by article 73 and other related articles of the Constitution.

But nothing in this article should be construed as intending to transfer to the President any power or function conferred by any pre-Constitution law on any State Government or any other authority. This article does not also preclude Parliament from conferring functions on authorities other than the President. Such a conferment must, however, conform to the other requirements of the Constitution, and must not denude the President of his essential constitutional powers. Of course, articles like 53(2); 324(2), (5); 354(2); 356(3) and 359(3) empower Parliament to regulate the exercise of certain Presidential powers. Parliament, thus, may invest a subordinate functionary with a power in accordance with the requirements of the Constitution. And in so far as such a power is conferred on such an authority, the President gets relieved of the power.23

Clause (1) of the article 53 also says that the President may either personally exercise the powers vested in him or may exercise them through his subordinate officers. The Ministers are officers subordinate to him for this purpose.24 This constitutional provision is of an enabling and not of a mandatory character. It is in conformity with the essentially constitutional position of the President, and it also reflects the need for delegation of powers to subordinate authorities in modern times. In fact, it is neither desirable nor possible that the President under the Parliamentary form of Government that India has should

24 Ibid.
do all his acts personally. But in all cases, the President must exercise his powers in accordance with this Constitution, for otherwise he would be liable to impeachment.

Delegation of President’s Powers: Evidently, article 53(1) enables the President to delegate to any subordinate authority any power vested in him by this article. But this authorisation does not cover the cases coming under articles like 123, 124, 217, 268-279, 309-311, 338, 340, 344, 356 and 360 which also invest the President with powers of different characters. Besides, some other constitutional or statutory powers vested in the President may, by their very nature or necessary implication, preclude delegation. These are the acts which the President is obliged to perform under the Constitution, or a statute, personally, although this should not be taken to absolve the President of his responsibility to act on the advice of his Ministers under article 74(1) in all cases not expressly otherwise provided by the Constitution. In Jayantilal’s Case, the Supreme Court held that his power of this nature cannot be delegated by the President to any authority either under article 53(1) or article 258A. 25

Administrative Powers: Article 53(1), that invests the President with the whole of the Union executive power, also installs him as the chief executive of the Union in so far as this article also enables him to exercise the executive power of the Union either directly or through officers subordinate to him. However, although the President of India holds an office, an office of unrivalled dignity and authority in the country, he is not an officer of the Union Government, or the Government of India. He is himself the Union Government, or the Government of India, within the terms of the General Clauses Act, and any other person, including a Minister, is an officer subordinate to him within the meaning of article 53(1). The same principle applies when the President is treated as the State Government in relation to a Union Territory.

Then, clause (1) of article 77 requires that all executive action of the Union shall be expressed to be taken in the name of the President. He also prescribes by rules the manner in

which the orders and instruments made and executed in his name are to be authenticated.\(^{26}\) Likewise, all contracts made by the Union in the exercise of its executive power are to be made by the President and executed on his behalf in the manner and by persons authorised or directed by him.\(^{27}\)

But this technical position of the President as the Union chief executive has of necessity to be harmonised with the logic of the Parliamentary, or Cabinet, form of Government that the Constitution contemplates. The President has the authority under article 77(3) to frame rules for the more convenient transaction of the business of the Government of India and also to provide for the allocation of business among the Ministers. This rule-making power is a means to actualise this harmonisation. Under the rules framed under article 77(3), the Government of India functions through a number of Ministries, which again are usually divided into Departments, although a Department may sometimes enjoy the status of a Ministry. At the head of a Ministry is placed a Cabinet Minister, or even a Minister of State, who is the political chief of his Ministry which has in the Secretary to the Ministry its permanent chief.

The real organs of administration are the Ministries and the Departments under the direct control of the concerned Ministers. The powers constitutionally vested in the President are actually exercised by the Ministers responsible to the Lok Sabha. Besides, the President has no specific constitutional responsibility to execute the laws. In effect, therefore, the President turns into a formal chief executive, whereas the real chief executive of the Union becomes the Prime Minister. The President as the chief executive, thus, provides a significant example of a constitutional fiction.

The President has, however, under his direct control a small secretariat located in the Rastrapati Bhavan, wholly staffed by permanent officers and men. But the President's secretariat, though having very high ranking officials, including Secretaries, is meant, in fact, to function as a post-box rather than as a power-keg.

**Appointing Powers:** Of the different kinds of administrative powers vested in the President his wide ranging appointing

\(^{27}\) Art. 299(1).

\(^{26}\) Art. 77(2).
powers may be taken note of first. He appoints the Prime Minister of India and also other Ministers of the Union on the advice of the Prime Minister.\(^{28}\) He also appoints the Attorney-General for India;\(^{28a}\) the Comptroller and Auditor-General of India\(^{29}\); the Judges of the Supreme Court, including giving consent to the appointment of ad hoc and attendance of retired Judges;\(^{30}\) the Judges of the High Courts, including Additional and Acting Judges\(^{31}\) and Judicial Commissioners; and the Governor of a State,\(^{32}\) including the Administrator of a Union Territory.\(^{33}\)

The President constitutes and makes appropriate appointments to the Inter-State\(^{34}\) and Zonal Councils; the Finance Commission\(^{35}\); the Union Public Service Commission or a Joint Public Service Commission for two or more States\(^{36}\); the Election Commission\(^{37}\); the Commission on the administration of Scheduled Areas and the Welfare of Scheduled Tribes\(^{38}\); the Commission on the condition of backward classes\(^{39}\); and the Commission on Languages\(^{40}\). He also appoints the Special Officer for the Scheduled Castes and Scheduled Tribes\(^{41}\) and the Special Officer for linguistic minorities\(^{42}\).

The President also appoints military officers of various ranks, including some officers of the Central Police and other Armed Forces of the Union, and also officers in the different branches of civil administration of the Union. Besides, he has quite a few appointing powers under various statutes relating to public bodies, including educational institutions, public undertakings, enquiry commissions and tribunals, which function under the control of the Union Government.

In this regard, however, it should be clearly kept in mind that India does not have the American spoils system, and consequently, in making military and civil appointments, the President has to conform to the necessary constitutional or statutory pre-requisites which have been formulated and operate to make him function as a formal chief executive.

\(^{28}\) Art. 75(1).
\(^{30}\) Arts. 124, 126-128.
\(^{33}\) Art. 239.
\(^{36}\) Art. 316.
\(^{39}\) Art. 340(1).
\(^{42}\) Art. 350B(1).
\(^{28a}\) Art. 76.
\(^{31}\) Arts. 217, 223, 224.
\(^{34}\) Art. 263.
\(^{37}\) Art. 324(2).
\(^{40}\) Art. 344(1).
\(^{29}\) Art. 148(1).
\(^{32}\) Art. 155.
\(^{35}\) Art. 280.
\(^{38}\) Art. 339(1).
\(^{41}\) Art. 338(1).
Removing, Dismissing and Disciplinary Powers: Broadly, the persons appointed by the President, including the persons in the civil or military employment of the Union Government, hold office during his pleasure. But judges of the Supreme and the High Courts, the Comptroller and Auditor-General, the Election Commissioner, and the Chairman and members of the Union or a Joint or State Public Service Commission hold office during good behaviour or until the prescribed age-limit. The President has the power to remove the Prime Minister of India and other Ministers of the Union; the Attorney General for India and the Governor of a State, including the Administrator of a Union Territory.

He also removes the Judges of the Supreme Court or of a High Court, the Comptroller and Auditor-General and the Election Commissioner in pursuance of the specified address by Parliament, and the Chairman or a member of the Union, a Joint or a State Public Service Commission on the report of the Supreme Court or on the happening of the prescribed contingencies. Under article 311, he may dismiss, remove or reduce in rank a person in the civil employment of the Union.

Besides, he enjoys this power of removal, dismissal or reduction in rank in respect of military, Central Police or Armed Forces’ personnel and some other statutory posts. But, as in the case of appointments, in all these cases of removal, dismissal or disciplinary control, the President is, by and large, required to act as a constitutional head of the state, or the formal chief executive of the Union.

Military and Defence Powers: The concept of military power is of indefinite connotation. It includes, first, the supreme command of the armed forces of a country. Clause (2) of Article 53 invests the President with "the supreme command of the Defence Forces of the Union". This constitutional provision ensures the subordination of the military authorities to the civil authorities in the land. Consequently, any action by the military authorities in the absence, or in defiance, or without the fiat of the civil authorities would constitute a violation of the Constitution.

43 Art. 75(2).
44 Art. 76(4).
45 Art. 156(1).
However, the exercise of this power of the President is required to be "regulated by law", and evidently, law in this context refers to Parliamentary enactments, including Presidential Ordinances and subordinate legislation. Besides, this constitutional provision is not to be deemed as investing the President with any power vested in this regard in any other authority. Nor does it restrict the power of Parliament to confer by law military functions on authorities other than the President.

Secondly, military power also refers to the power to defend the country, and it is, therefore, also referred to as "defence power", an expression which is itself hard to define, for the necessities of war and defence are impossible to be specified under any situation. Dixon J. said:

"These necessities make it imperative that the defence power should provide a source whence the Government may draw authority over an immense field and a most ample discretion."\(^{46}\)

Entry 1 to List I—Union List—speaks of "Defence of India and every part thereof, including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation." Similarly, entry 2 to this List concerns "Naval, military and air force; any other armed forces of the union". Besides, there are other related entries to this List such as entries 4, 5 and 15; and article 355 casts the duty on the union" to protect every State against external aggression". All these constitutional provisions together with the Emergency powers of the President and his powers relating to martial law made the Union the sole repository of defence power in the scheme of the Constitution.

War and Peace: Military power also includes the power to declare war and conclude peace and also to declare whether a state of war exists or not. Entry 15 to List I—Union List—relates to "War and Peace". But this does not preclude the use of force without a formal declaration of war. However, any formal declaration of war, peace or the existence of state

of war by the executive is final and conclusive, and its validity cannot be questioned in a court of law.

In the scheme of the Indian Constitution there is no requirement of prior approval or subsequent ratification by Parliament of any declaration of war or conclusion of peace. Such a declaration may validly be made by the President, of course, subject to any law passed by Parliament in pursuance of article 53(2)(3). Besides, the President may also, subject to any Parliamentary enactments in this behalf, direct the use of the Armed Forces of the Union without a formal declaration of war, i.e., he is responsible for the deployment and movement of the Armed Forces of the Union, although the technical and logistical details rest with the officers of the Forces.

Emergency and Martial Law Powers: The President may proclaim a state of Emergency under article 352. By a proclamation he may also partly or wholly scrap the constitutional government in a State, and he may also declare a Financial Emergency. These Emergency provisions of the Constitution are of far-reaching implications and they can be used to subserve even extra or unconstitutional ends.

Although the Constitution does not specifically invest the President with the power to declare martial law, he alone is competent to declare martial law in the country as a whole or in its any part. Thus, unlike the Proclamation of Emergency under article 352, martial law may be declared in even a part of the country.

Diplomatic and Foreign Affairs Powers: The concept of diplomatic power is of wide import, although it has also a narrow meaning. In a narrow sense it denotes the appointing of diplomatic representatives abroad and receiving foreign diplomatic representatives in the country. It also refers to observing the rules of protocol in receiving foreign diplomatic representatives or dignitaries. The President of India has this diplomatic power.

In a wide sense diplomatic power is deemed identical with all the powers of the state relating to foreign affairs. Parliament has the law-making power with respect to foreign affairs within the terms of entries 10-14 to List I—Union List—and article 253. The executive power of the Union extends over all

47 Art. 356. 48 Art. 360.
the matters contained in these constitutional provisions and also covers "the exercise of such right, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty and agreement." The President has been invested with the executive power of the Union in this regard.

_Treaty-making Power:_ The President may, then, negotiate and conclude treaties. There is no constitutional requirement of Parliamentary ratification of a treaty to make it effective or valid. Nor is legislation necessary, _ipso facto_, for this purpose. However, if operation of a treaty in any manner impinges upon the rights of a citizen, or affects a Constitutional provision, appropriate Parliamentary legislation or constitutional amendment is imperative.

_Miscellaneous Powers:_ A miscellany of powers essentially in the nature of executive power may also be noted in this context. These powers include giving consent to use any foreign title by a person holding an office of trust under the state; approving the sitting of the Supreme Court in a place other than Delhi; referring a question of law or fact of public importance for the opinion of the Supreme Court; determining the number of Judges of a High Court; transferring a Judge from one High Court to another; and referring additional matters to the Union Public Service Commission for advice.

The President issues directions for implementing the report of the Parliamentary Committee to examine the recommendations of the Official Language Commission; directions for the official use by a State of a language used by a substantial section of a population of the State; and directions to a State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to the children belonging to linguistic minority groups. He gives consent to the use of Hindi or any other language for any official purposes of a State. He also declares a country to be a foreign state for the purposes of the Constitution.

49 Art. 73(1) (b).
51 Art. 18(4). 52 Art. 130. 53 Art. 143(1).
54 Art. 216. 55 Art. 320(3). 56 Art. 344(6).
57 Art. 347. 58 Art. 350A. 59 Art. 348(2).
60 Art. 367(3) Proviso.
He provides for the constitution of regional committees of the Legislative Assemblies of the specified States and also for any special responsibility of the Governor for the prescribed matters in respect of the specified States. He requires the Governor of a State to report to him regarding the administration of any Scheduled Areas in a State and gives appropriate directions for their administration. He makes an order declaring certain areas to be Scheduled Areas or that they will cease to be Scheduled Areas.

He gives previous approval to a notification of the Governor to apply the provisions of the Sixth Schedule to any tribal area or to exclude any area from such notification and he administers a tribal area of Assam through the Governor until such a notification. He also gives previous approval to the notification of the Governor of Assam to exclude the areas in the plains in the Table in Part B of the Sixth Schedule.

**Legislative and Financial Powers**

In line with the enormous executive powers vested in the President, the Constitution also equips him with considerable legislative and financial powers. Broadly, his legislative powers are of two types: (i) those that are vested in him in regard to the legislative process in Parliament or a State Legislature; and (ii) those that accrue to him by virtue of his, or a Governor's or an Administrator's Ordinance, law or rule-making authority. His financial powers may likewise be said to have two categories: (i) those that he enjoys in relation to the financial powers of Parliament or a State Legislature; and (ii) those that are vested in him either distinctly from the financial powers of Parliament or a State Legislature or are intended to operate as an interim measure pending the exercise of its financial power by a legislative body.

**Legislative Powers:** The President is a constituent unit of Parliament. He nominates twelve members to the Rajya Sabha, and may nominate to the Lok Sabha two members.

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61 Arts. 371(1), 371C.  
62 Art. 371(2).  
63 Chart Para 3, Schedule V.  
64 Art. Para 6, Schedule V.  
65 Part 18(1), Schedule VI.  
66 Para 18(2), Schedule VI.  
67 Para 20(3), Proviso, Schedule VI.  
68 Art. 79.  
69 Art. 80(1).
from the Anglo-Indian community if the community is not adequately represented in that House. He has the power to summon, prorogue, and dissolve Parliament and also to call a joint session of both Houses. He has the right of special address at "the commencement of the first session after each general election to the House of the People and at the commencement of the first session of each year." At any other time he has also the right to address either House of Parliament, or both the Houses assembled together, or to send messages to either House. His previous recommendation is required for introducing into Parliament a Bill effecting State boundaries, areas or names. State Bills imposing restrictions on freedom of trade also require his previous approval for introduction into a State Legislature.

He also causes some reports to be placed before Parliament for consideration and action. These include the annual report of the Union Public Service Commission, including explanations for the cases in which the advice of the Commission could not be accepted; the report of the Special Officer for the Scheduled Castes and Tribes; the report of the Commission to investigate into the condition of the backward classes, together with a memorandum explaining the action taken on it; and the report of the Special Officer for linguistic minorities.

**Assent to Bills**: Under article 111, every Bill passed by Parliament is presented to him for signifying his assent thereto. He may assent to such a Bill; he may withhold his assent; or he may return the Bill, not being a finance Bill, to Parliament for reconsideration. He may also let the Bill just lie on his table. However, he must give assent to a Bill which is returned to Parliament by him and is again passed by Parliament. He must also assent to any amendment passed within the terms of article 368. Certain State Bills also require his assent.

**Ordinance, Law or Rule-making Power**: Article 123 empowers the President to legislate by Ordinances during the recess of Parliament. In certain cases he instructs a Governor...
or an Administrator\textsuperscript{83} to promulgate an Ordinance. He assents
to regulations made by the Governor under sub-para 1(b) of
Schedule VI, para 19. When article 356 applies to a State and
the powers of the State Legislature are vested in Parliament,
Parliament may authorise the President to legislate for the State.
The President makes regulations for Union Territories, if there
is no legislative body for the Territory\textsuperscript{84}. He specifies the ex-
ceptions or modifications subject to which Union or State laws
may apply to any major port or aerodrome\textsuperscript{85}. He, by an Ordi-
nance under article 370, modifies the Constitution in application

The President is vested with rule-making powers in regard
to numerous matters. These are both constitutional and statu-
tory. However, in certain matters his rule-making power is
subject to any law made by Parliament with regard to that
matter\textsuperscript{86} and in some cases his rule-making power is an \textit{interim}
arrangement pending Parliamentary legislation on the matter\textsuperscript{87}.
A rule made by him may also be required to be placed before
Parliament. In certain cases the President may also be re-
quired to consult specified authorities before making rules.
But all the rules made by the President have the force of law
and they are law within the meaning of article 13 of the Con-
stitution.

His rule-making power relates to the manner in which orders
and instruments of the Union are to be made and executed in
his name and are to be authenticated; the transaction of the
business of the Government of India and allocation of work
among Ministers\textsuperscript{88}; the recruitment and conditions of service of
secretarial staff of Parliament\textsuperscript{89}; the prohibition of simulta-
eous membership of Parliament and a House of the Legislature
of a State\textsuperscript{90}; and the procedure with respect to the joint sittings
of the two Houses of Parliament\textsuperscript{91}.

He prescribes the manner of enforcement of the orders,
and the like, of the Supreme Court\textsuperscript{92} gives approval to the rules
relating to the Supreme Court\textsuperscript{93} and provides for the consulta-
tion of the Union Public Service Commission for the appoint-
ment of the officials of the Supreme Court\textsuperscript{94}. He prescribes the

\textsuperscript{83} Art. 239B. \hspace{1cm} \textsuperscript{84} Art. 240. \hspace{1cm} \textsuperscript{85} Art. 364.
\textsuperscript{86} Art. 324. \hspace{1cm} \textsuperscript{87} Art. 309. \hspace{1cm} \textsuperscript{88} Art. 77.
\textsuperscript{89} Art. 98. \hspace{1cm} \textsuperscript{90} Art. 101. \hspace{1cm} \textsuperscript{91} Art. 118.
\textsuperscript{92} Art. 142(1). \hspace{1cm} \textsuperscript{93} Art. 145(1). \hspace{1cm} \textsuperscript{94} Art. 146(1).
conditions of service of persons in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor General. He also provides for allocation among the States of emoluments payable to a Governor appointed for them jointly. He also prescribes for the discharge of the functions of a Governor in contingencies not provided for by the Constitution.

Regulations are made by him concerning recruitment and conditions of service of the persons in the employment of the Union, and for the payment of compensation for premature termination of a contractual service requiring special qualifications. He determines by rule the number of members of the Union or a Joint Public Service Commission and the conditions of their service, including those of the officers and men in the service of such a Commission. He also specifies the cases in which the Union Public Service Commission may not be consulted. Rules relating to the conditions of service and the tenure of office of the Election Commissioner are framed by him. In addition, he also specifies the castes and tribes to be classified as the Scheduled Castes and Scheduled Tribes.

Financial Powers: The President causes the Annual Financial Statement (budget) and supplementary budget, if any, to be placed before Parliament for consideration. Any demand for a grant; Money Bills; Bills involving expenditure from the Consolidated Fund of India and Bills affecting taxes in which States are interested can be moved in Parliament only on the President’s recommendation. He places before Parliament for consideration the reports of the Comptroller and Auditor-General relating to the Union accounts and the recommendations of the Finance Commission along with an explanatory memorandum of actions taken thereon.

Under article 111 he gives assent to Finance and Money Bills passed by Parliament, but he cannot return a Money Bill for reconsideration by Parliament. His assent is also necessary

95 Art. 148 (5). 96 Art. 158. 97 Art. 160.
98 Art. 309. 99 Art. 310. 100 Art. 318.
101 Art. 320 (3) Proviso. 102 Art. 324 (5). 103 Arts. 341-42.
104 Art. 112. 105 Art. 115. 106 Art. 113 (3).
110 Art. 281.
to a State Bill relating to the taxation of water and electricity of inter-State river or river-valley authorities, and his previous consent is necessary for State rules relating to this matter.\(^{111}\)

The President prescribes, after considering the recommendation of the Finance Commission, the amount, manner and time for distribution among the States of their share in taxes on income other than agricultural income.\(^{112}\) Until appropriate provisions are made by Parliament, the President provides for the grants to be made by the Union to certain needy States\(^{113}\) and for the custody of, payments into, withdrawals from, and other such matters concerning the Consolidated Fund, the Contingency Fund and the public accounts of India.\(^{114}\)

**Judicial and Pardoning Powers**

The judicial powers of the President are both constitutional and statutory and in the exercise of his powers he acts as a tribunal in the scheme of the Constitution. One such constitutional power he enjoys under article 103 which authorises him to decide upon questions as to disqualification of members of Parliament in accordance with the advice of the Election Commission. His notable statutory judicial powers include his power to take certain disciplinary actions against some officers subordinate to him and his certain judicial powers as the visitor of a Central University.

**Pardoning Powers**: Pardoning power is also vested in the President under article 72 of the Constitution, which reads:

"(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the powers conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial."

\(^{111}\) Art. 288(2).
\(^{112}\) Art. 270.
\(^{113}\) Art. 275(2).
\(^{114}\) Art. 283(1).
(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."

The President under article 72 of the Constitution has "the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence" in any Court Martial case; in any case for an offence concerning a matter to which the Union executive power extends; and in any case of death sentence. However, this pardoning power of the President does not affect "the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial". Nor does it affect "the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force." Such existing laws are to be found in sections 54 and 55 of the I.P.C. and Section 402 of the Cr.P.C.

Apparently, pardoning power may seem to be an act of mercy or grace, but basically it is a vitally necessary and flexible instrument for effectively maintaining any established social order in a just manner. It is considered essential in the scheme of constitutional government because all laws may not be just at all times and in all circumstances; or*even just laws may not be administered in a just manner; or there may be extenuating circumstances for committing an act categorised as an offence; or it may not be found practicable or expedient to execute a sentence. This makes it a highly discretionary power, and it is deemed an aspect of the executive power. The propriety of its exercise cannot be questioned in a court of law, although the courts may examine the question of vires in any particular case of its exercise.

Pardoning power comes into play only when an act characterised as an offence has actually been committed, and it may come into play before, during or after the trial for an offence. In India also it may be exercised under article 72 or 161 only when a person has been charged of an offence. It has reference to the penal consequences of a past act, including any civil disqualification resulting from conviction,\(^1\) and primarily relates to criminal offences. However, it is deemed to

\(^1\)\textit{D.I.G. v. Rajaram, A.I.R. 1960 A.P. 259.}
cover criminal contempt of courts but not civil contempts. It
does not also operate to cover contempt of legislative bodies or
punishments for any breach of their privileges, nor does it
apply to impeachment proceedings.

Pardoning power is, thus, distinguishable from the power
of dispensation which denotes the power to dispense with laws
with regard to particular persons and is futuristic. It is also
distinguishable from the power of indemnification which usually
refers to the power to absolve a person from the liability for
his any official act in times of Martial Law (or emergencies and
war) ; a power vested in Parliament under article 34. It is
also distinct from the power to enter a *nolle prosequre* which
stops a criminal proceeding and is given to a public prosecutor
in India as the power to “withdraw from the prosecution” under
section 494 of the Cr. P. C.

But, although technically pardoning power may be distin-
guished from the power to grant amnesty, which generally re-
lates to political offences and operates to overlook the offence
and absolve the offender, practically this distinction is of no
real significance in the scheme of the Constitution of India. For,
the pardoning power under article 72, or for that matter under
article 161, in appropriate cases, should be deemed to include
matters that come under the power to grant amnesty.

The concept of pardoning power is generally considered to
be of wide import. It includes acts of pardon, reprieve, respite,
remission, suspension and commutation of sentences. The Con-
stitution speaks of all these varieties of pardoning power. In
addition, section 382 of the Cr. P. C. authorises the High Courts
to stay the execution of death sentences in the prescribed cases.
Remission may be granted by the Central and State Govern-
ments under section 401 of the Code. Sections 54 and 55 of
the I.P.C. and sections 402 and 402A of the Cr. P. C. speak of
commutation of sentences.

*Pardon* may be *full, limited* or *conditional*, and the execu-
tive in India under article 72, or 161, has the power to exercise
all these three types of pardon. In *full pardon* the offence
itself is wiped off in the eye of law and both the conviction and
the sentence are rescinded. But even in this case rights ac-
quired by public and private persons over the offender as a
result of the judicial proceeding before the grant of pardon
continue to operate even after pardon is granted. A *limited*
pardon concentrates on the sentence for an offence and not on conviction, and normally pardoning power is deemed to be a limited pardon. A conditional pardon imposes some condition, e.g., the requirement to keep good behaviour, but such a condition may not extend beyond the period of judicial sentence.

Reprieve refers to a stay in the execution of a sentence for a temporary period. Respite means a lessening of a penalty in consideration of, say, state of pregnancy or absence of previous conviction. It usually vests in the courts, but in India the executive also enjoys this power under articles 72 and 161. Remission is reduction in the amount of sentence and is analogous with respite. Commutation is the change of one form of penalty into a lighter penalty of a different form.

The basic theme underlying all these acts is that they aim at ameliorating the rigours of punishment in social interest. And there are, apart from the question of vires, apparently no constitutional fetters on the power of the executive in India to relieve a person of such rigours. However, this view of the pardoning power has got to be reconciled with some observations of the Supreme Court in Nanavati's Case. Although it is a case directly relating to the pardoning power of the Governor under article 161, the Court's observations have application to the pardoning power of the executive in general, including that of the President under article 72.

In this case the Governor of Bombay suspended the sentence passed on Nanavati, a naval officer, for committing murder till the disposal of his appeal by the Supreme Court on condition that the accused remained in naval custody in which he had been till then. A Full Bench of the Bombay High Court referred with approval the Madras High Court's decision in In re Chennagadu 116 and upheld the order of the Governor 117. Then Nanavati applied to the Supreme Court for special leave to appeal and prayed for exemption from rule 5, Order 21, of the Supreme Court which requires an appellant to surrender to the sentence before his petition could be posted for hearing unless the Court orders otherwise. Gajendragadkar referred the prayer for exemption to a Constitution Bench which by a majority of 4 to

1 held the order of the Governor invalid from the moment the Supreme Court became seized with the matter.\textsuperscript{118}

To arrive at this conclusion the Court, first, considered the historical background of the pardoning power of the executive under articles 72 and 161 and found that they were in the nature of the prerogative power of the British Crown, which was subject to legislation. But this line of thinking is extremely nebulous, for there can be no notion of prerogative power in the scheme of the written Constitution of India. The pardoning power of the President and the Governors are constitutional powers founded in articles 72 and 161, respectively. And it should seem that this cannot be made a reasonably sustainable ground for the decision of the Court.

Secondly, the Court felt that the distinction between the executive and judicial control over sentences, a distinction amply explained by Sutherland J. in \textit{U. S. v. Benz}\textsuperscript{119} and cited with approval by Chenna Reddy J. in \textit{In re Chennagadu}\textsuperscript{120}, was an "over-simplification." But later, in \textit{Rabha's Case},\textsuperscript{121} this Bench itself clearly based its decision on this distinction. It also quoted \textit{in extenso} from the above judgment of Sutherland J. in support of its decision.

It should seem, thus, that the Supreme Court’s decision in \textit{Nanavati’s Case} cannot be taken as giving good law to the land. And the courts in India may not interfere with the exercise of the pardoning power of the executive except to determine whether an act done in this behalf falls within the ambit or article 72, \textit{i.e.}, belongs to the President, or whether it belongs to the Governor under article 161.

\textbf{POSITION OF THE PRESIDENT}

The efficiency; enormity and self-sufficiency of the potency, intensity, range and variety of powers vested in the President of India place him in a unique position among the persons in authority around the globe. This, in a sense, epitomises the degree of the mid-twentieth century executive ascendancy. It also reflects the recognition of the need to arm the executive to

\textsuperscript{120} \textit{In re Chennagadu}, op. cit.
let it work the Constitution on its own in hours ofgrave
national crises, when it is not possible for the legislature and
the judicature to function normally.

If the mere vesting of powers be the sole criterion, the
President of India is the most powerful person of this age. But
the essence of power is not its theoretical vesting but its prac-
tical exercise. And by the operation of the built-in inner mecha-
nism of Parliamentary form of Government that the Constitu-
tion contemplates and the evolution of concomitant constitu-
tional convections, the President has, by and large, become a
dignified rather than an efficient part of the Indian political
system, the Council of Ministers headed by the Prime Minister
having become the real efficient instrument.

The Union and Provincial Constitution Committees, to quote
the words of Patel, opted at their joint meeting on June 7, 1947,
for "the Parliamentary system of Constitution, the British type
of Constitution." And Nehru, in presenting the Report of the
Union Constitution Committee for consideration by the Consti-
tuent Assembly, told the Assembly on July 21, 1947, in the
context of the recommendations of the Committee relating to
the Presidential election:

"Many members possibly at first might object to this indirect election
and many prefer an election by adult suffrage. We have given anxious
thought to this matter and we come to very definite conclusion that it
would not be desirable, first, because we want to emphasise the ministerial
character of the government, that power really resided in the ministry
and in the legislature and not in the President as such. At the same
time we did not want to make the President a mere figure-head like the
French President. We did not give him any real power but we have made
his position one of great authority and dignity. You will notice that
he is also to be the Commander-in-Chief of the Defence Forces as the
American President is."\textsuperscript{121a}

Ambedkar also, in introducing the Draft Constitution in the
Constituent Assembly, spoke of the President as follows:

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

\textsuperscript{121a} C.A.D., Vol. IV; p. 733.
the Presidential system of America, the President is the chief head of the Executive. The administration is vested in him. Under the Draft Constitution the President occupies the same position as the King under the English Constitution... He will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice.”122

The President and his Council of Ministers

The President is the repository of immense powers, but he is not responsible for their exercise. It is the Council of Ministers, more specifically the Cabinet, headed by the Prime Minister that is responsible for the performance of the Union executive and other powers vested in the President, except in so far as the Council is expressly or by necessary implication precluded from rendering aid and advice to him.123 This is the keynote of Parliamentary form of government in India. T. T. Krishnamachari observed in the Constituent Assembly:

“It has been mentioned that one of the chief defects of this Constitution is that we have not anywhere mentioned that the President is a constitutional head and the future of the President's power is, therefore, doubtful... This is a matter which has been examined by the Drafting Committee... The position of the President in a responsible Government is not the same as the position of a Presidential under a representative Government like America and this is a mistake that a number of people in the House have been making... So far as the relationship of the President with the Cabinet is concerned, I must say that we have, so to say, completely copied the system of responsible government that is functioning in Britain today; we have made no deviations from it and the deviation that we have made are only such as are necessary, because our Constitution is federal in structure.”124

He might as well have added: “and because our Constitution is also written. It has a Bill of Fundamental Rights, a set of Directive Principles and an element of judicial review and is intended to provide against crisis-conditions within its four-corners.” However, there is no shadow of doubt that the President, unless it is apparent from the Constitution otherwise,

123 See, for example, article 103 relating to the President's power to decide upon the question of disqualification of a member of Parliament on the advice of Election Commission.
is to generally act only on the advice of his Ministers, although article 74(1) of the Constitution speaks of this aspect not in mandatory terms. It merely says:

"There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions."

 Ministers to Aid and Advise the President: Apparently, the function of the Ministers is advisory. The Council of Ministers is to aid and advise the President in the discharge of his functions. Plainly, the language is permissive. And in the Constituent Assembly the undernoted exchange of words between Rajendra Prasad, the President of the Assembly, and Ambedkar, the Chairman of the Drafting Committee, in the context of the consideration of an amendment moved by Sardar Hukum Singh, a member of the Assembly, is interesting and revealing:\(^{125}\):

"Mr. President: Where is the provision in the Draft Constitution which binds the President to act in accordance with the advice of the Ministers?

Dr. Ambedkar: I am sure that there is a provision and the provision is that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions.

Mr. President: Since we are having this written Constitution, we must have that clearly put somewhere.

Dr. Ambedkar: Though I cannot point it out just now, I am sure there is a provision. I think there is a provision that the President will be found to accept the advice of the Ministers. In fact, he cannot act without the advice of his Ministers.

Some Honourable Member: Article 61(1).

Mr. President: It only lays down the duty of the Ministers, but it does not lay down the duty of the President to act in accordance with the advice given by the Ministers. It does not lay down that the President is bound to accept the advice. Is there any provision in the Constitution? We will not be able even to impeach him, because he will not be acting in violation of the Constitution, if there is no provision.

Dr. Ambedkar: May I draw your attention to article 61 which deals with the exercise of the President’s functions. He cannot exercise any of his functions, unless he has got the advice, ‘in the exercise of his functions’. It is not merely to ‘aid and advise’. ‘In the exercise of his functions’, those are the most important words.

Mr. President: I have my doubts if these words could bind the President.

It only lays down that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. It does not say that the President will be bound to accept that advice.

Dr. Ambedkar: If he does not accept the advice of the existing Ministry, he shall have to find some other body of Ministers to advise him. He will never be able to act independently of the Ministers.

Mr. President: Is there any real difficulty in providing somewhere that the President will be bound by the advice of the Ministers?

Dr. Ambedkar: We are doing that. If I may say so, there is a provision in the Instrument of Instructions.

Mr. President: I have considered that also.

Dr. Ambedkar: Paragraph 3 reads: 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 his Ministers. We propose to make some amendment to that.

Mr. President: You want to change that. As it is, it lays down that the President will be guided by advice of the Ministers in the exercise of the executive power of the Union and not in its legislative power.

Dr. Ambedkar: Article 61 follows almost literally various other constitutions and the Presidents have always understood that the language means that they must accept the advice. If there is any difficulty, it will certainly be remedied by suitable amendment."

In fact there was a proposal to append an Instrument of Instructions to the Constitution to make the advice of the Ministers obligatory on the President in the discharge of his functions. Alladi Krishnaswamy Ayyar felt that the need for an express provision making the advice of Ministers obligatory on the President was “entirely without substance”, for, the aid and advise clause was a mere euphemism. And Ambedkar assured the Assembly of the applicability of the British convention in this regard to India also.\(^{126}\) Eventually, the Instrument was left out, and the aid and advise clause was continued without any qualification or elaboration. But the existence of a Council of Ministers at all times was made obligatory.

Quite appropriately, it is the Council of Ministers that the Constitution collectively makes responsible to the Lok Sabha, although the Ministers are also declared to hold office during the pleasure of the President. The Prime Minister, and not the President, is the head of the Council of Ministers and presides over the deliberations of the Council or the Cabinet. And signi-

ficantly, what the Prime Minister is obliged under article 78(a) to communicate to the President is the decisions of the Council relating the administrative affairs of the Union and legislative proposals. The Council thus decides a matter and does not recommend a course of action to the President. Besides, the Ministers directly man the various Union Ministries which are the operative arms of the Union Government.

In this context is also to be noted the difficulty of reducing into specific terms the centuries old practices and spirit of the British Parliamentary system. The very mechanism of Parliamentary, or Cabinet, form of Government presumes the head of the state to act generally in accordance with the advice of his Ministers. And it should seem that only the dignity and authority of the office of the President precludes, perhaps, the making of the Ministers' advice mandatory on him. In him is reposed the faith, the expectation, that he will act only on the advice of his Ministers.

Besides, as an article like 103, which entrusts the President with the power to adjudicate upon the question of disqualification of a member of Parliament in accordance with the advice of the Election Commission would have required either an exception clause in article 54(1) which provides for the aid and advice of the Council of Ministers, or would have been rendered contradictory or nugatory. And it also appears that the founding fathers were aware of certain unusual provisions in the Constitution like those relating to the President's powers as a trustee in certain federal and minority matters or his role in the event of any unforeseen situation or grave crisis.

Evidently, then, the unmistakable tenor of the debates in the Constituent Assembly on the relation between the President and his Council of Ministers seems to be that the President is normally bound by the advice of the Ministers, although the Constitution that emerged from the Assembly reposed full faith in the President and left the matter to the care of the conventions of the British type to be inducted into India. There is, however, no denying the fact that the founding fathers were also aware of contingencies for interstitially activating the Presidency in national interest. But it was even felt that any deviation from this general proposition would amount to a violation of the Constitution, for which, as Ambedkar said in reply to a query by Kamath, the President was liable to impeach-
Rajendra Prasad admirably stated the position in this regard in the following words:

“We have had to reconcile the position of an elected President with an elected Legislature, and in doing so, we have adopted, more or less, the position of the British Monarch for the President... His position is that of a constitutional President. Then we come to Ministers. They are, of course, responsible to the Legislature and tender advice to the President who is bound to act according to that advice... Although there are no specific provisions, so far as I know, in the Constitution itself making it binding on the President to accept the advice of his Ministers, it is hoped that the convention under which in England the King acts always on the advice of his Ministers will be established in this country also and the President, not so much on account of the written word in the Constitution, but as a result of this very healthy convention will become a constitutional President in all matters.”

And notwithstanding the occasional asides, the effective working of the Constitution over all these years and the admirable personal equation between the successive Presidents and the Prime Ministers and other Ministers have conclusively established the convention that the President is normally bound to act on the advice of his Ministers. The Supreme Court also, in *Ram Jawaya v. State of Punjab*, accepted this position in the following terms:

“Under article 53(1) of our Constitution, the executive power of the Union is vested in the President but under article 75(sic) there is to be Council of Ministers to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet... In the Indian Constitution, therefore, we have the same system of Parliamentary executive as in England.”

Here is, then, a crucial convention explicitly recognised by the Supreme Court. This convention, in all probability, thus gets transformed into law. It is, then, no mere convention now but also law, an article of the Constitution, albeit unwritten, that *the President shall act only in accordance with the advice of the Ministers, unless the Constitution provides otherwise expressly or by necessary implication.*

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The President and His Discretionary Powers

In the context of the relation between the President and his Council of Ministers and for an objective appreciation of the position of the President it is also desirable to ascertain whether the President may be said to have any discretionary power in the scheme of the Constitution. And this may reasonably be done only by having first in view a clear conception of discretionary power.

The concept of Discretionary Power: The word "discretionary" is an adjective form of the noun "discretion" which, broadly, means, on the one hand, an act of prudence, and on the other, an act to be done at pleasure. However, the expression "discretionary power" is taken to mean a power to be used at pleasure, at the will, of the person in authority. In constitution and law a power is, generally, said to be discretionary when the repository of the power is at liberty, first, to exercise or not to exercise the power at will; secondly, he has also the liberty as to the mode or manner of its exercise, i.e., the procedure to be followed in its exercise; and thirdly, he has the liberty to take a decision one way or the other.

Discretionary Power in India: Turning, however, to the specific Indian scene, it is to be noted that under the Government of India Act, 1935, discretionary power referred to the power which the Governor-General, or a Governor, was to exercise independently of his Ministers, and in the exercise of such a power he was not even required to consult the Ministers. There was a second group of power to be exercised in the individual judgment of the Governor-General, or a Governor, and in this case the Governor-General, or a Governor, was to consult his Ministers but was free to form his own judgment as to the course of action to be adopted. In matters not covered by these two groups the Governor-General, or a Governor, was to generally act on the advice of his Ministers.

Coming to the Constitution of India, it is significant that no provision of the Constitution speaks of the discretionary powers of the President, although, B. N. Rau, the Constitutional Adviser, had specifically suggested that the President should be expressly invested with discretionary powers in cer-
tain matters, a suggestion which was eventually turned down.\textsuperscript{130} And this is in sharp contrast from the case of a Governor who is provided with a Council of Ministers headed by the Chief Minister \textit{to aid and advise him} in the exercise of his functions, "except in so far as he is by or under this Constitution required to exercise his function or any of them in his discretion". This should go to show the fundamental difference in the approach of the founding fathers to the office of the President and that of the Governor. And added to this is the requirement that the President must always have a Council of Ministers headed by the Prime Minister to aid and advise him in the exercise of all of his functions, except, of course, as otherwise provided by the Constitution expressly and by necessary implication.

Evidently, then there is no express constitutional provision vesting in the President any discretionary power and, therefore, to say that the President has discretionary powers is rather to read into the Constitution the word "discretionary" as qualifying certain powers vested in the President in the light of a pre-conceived frame of the powers of the head of state, which is not reasonable. But can it not be said that the President has discretionary powers by necessary implication? In all probability not, if it be clearly understood that the concept of discretionary powers in the context of a constitutional head of state is fraught with grave dangers to democracy and constitutional government.

But not quite happily, for the surreptitious entry of the concept of discretionary power of the President, or even of his prerogative power, into any discussion relating to the Presidency in India, the stage was clearly set by the following observations of Ambedkar in the Constituent Assembly itself:

"Under a parliamentary system of government, there are only two \textit{prerogatives} which the King or the \textit{Head of the State} may exercise. One is the appointment of the Prime Minister and the other is the dissolution of Parliament. \textit{With regard to the Prime Minister}, it is not possible to avoid vesting the \textit{discretion} in the President. The only other way...is to require that it is the House which shall in the first instance choose its leader and then...the President should proceed to appoint the Prime Minister...One way is as good as the other and it is, therefore, felt desirable to leave this matter to the discretion of the President.

With regard to the dissolution of the House, there again, there is not any definite opinion so far as the British constitutional lawyers are

\textsuperscript{130} See B. N. Rau's Constitutional Draft, clause 11, Chap. I, Pt. IV.
concerned. There is a view that the President or King must accept the advice of the Prime Minister for a dissolution if he finds that the House has become recalcitrant or that the House does not represent the wishes of the people. There is also the other view that notwithstanding the advice of the Prime Minister and his Cabinet, the President, if he thinks that the House has ceased to represent the wishes of the people can *suo motu* and of his own accord dissolve the House... These are purely prerogatives and do not come within the administration of the country."

These observations of Ambedkar seem to suggest that the President has not only discretionary powers but also prerogative powers like the British Monarch. He also appears to speak of prerogative and discretionary powers interchangeably. But there is no justification for either lines of approach. Unless the Constitution speaks of any power of the President as a discretionary power, there can certainly be no reason for classifying it as such. And to speak of the prerogative powers of an elected President in the scheme of the Constitution of India is, indeed, a terminological travesty. Yet, since certain powers of the President have commonly come to be referred to as his discretionary power, their contents and implications need some inquiry.

*Power to Appoint Prime Minister*: Article 75(1) provides that the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President only on the advice of the Prime Minister. Thus, it is pointed out that when the President appoints a Prime Minister, he does not act on the advice of any Minister, and this is said to be one vital area of his discretionary power.

Technically, the Constitution assumes that in appointing a Prime Minister the President is not required to consult any person, much less to act on the advice of any Minister. But, in practice the President does not seem to have a free hand in appointing a Prime Minister. For the Prime Minister is a person at the head of the Council Ministers and the Council is required by article 75(3) to be collectively responsible to the Lok Sabha. Necessarily, then, in commissioning a person to form a Council of Ministers, the primary principle to guide the President is whether such a person commands, or is likely to

command, the confidence of the Lok Sabha. And he has absolutely no choice when the majority party in the Lok Sabha has an acknowledged leader.

However, in certain situations, such as when in a multi-party political complexion of the Lok Sabha, no single party has an absolute majority; or a majority party fails to elect its leader, or it gets split subsequent to electing a leader; or the leader of a majority party declines to accept office, the President may have to consider the suitability of different persons for heading a Council of Ministers. But even in all these fluid situations, his aforesaid guide-line is to be deemed decisive. And although these are marginal situations in which his action may tilt the scale of politics one way or the other and a politically prone President may be tempted to use these situations for power game, any wrong choice is bound to boomerang and he may have to sign his death-warrant.

This implies that, in effect, the power of the President to appoint a Prime Minister is, so to say, a computer function, and constitutionally speaking, there is little room for injecting into this process the President's personal policies, predilections or prejudices. The more accurate his calculations in commissioning a person to form a Council or Ministers, the more prudent will he be deemed in the judgment of time. And it does not appear reasonable to class this power as a discretionary power. Essentially, it is one of his constitutional powers with no claim for any distinct categorisation.

*Power to Dismiss a Minister or Council of Ministers*: Clause (2) of article 75 says that the Ministers shall hold office during the pleasure of the President. The implication of this pleasure clause is, first, that the Ministers are responsible to the President and secondly, that the President is at liberty to dismiss a Prime Minister, a Minister or the Ministers, without assigning any reasons whatever. It is suggested that the President has thus a discretionary power to dismiss a Prime Minister, a Minister or a Council of Ministers.

But, then, the Council of Ministers is collectively responsible to the Lok Sabha, and a basic element of this collective responsibility is that a Minister remains in office only so long as he enjoys the confidence of the House. Besides, a Minister is to be appointed only on the advice of the Prime Minister.
It should thus seem that, exceptional situations apart, such as when a Ministry defeated in the Lok Sabha declines to resign or seek electoral mandate afresh, the power vested in the President to dismiss the Ministers is intended to facilitate the smooth functioning of Parliamentary form of Government and not to invest the President with a discretionary power to be exercised at his sweet will.

Power to Dissolve the Lok Sabha: The President has the power under article 85 to summon and prorogue Parliament and to dissolve the Lok Sabha. This power of dissolution is said to be the discretionary power of the President. The power of dissolution is, indeed, vital in any scheme of constitutional government. It is a corrective device for continuously equilibrating the institutional expression of public policies, public power, public needs and public opinion. It is a "democratic fulcrum", as Lowenstein says, and its value lies in subserving and not subverting the democratic process in a country. The power vested in the President to dissolve the Lok Sabha is, except in marginal cases, the power to be generally exercised only on the advice of the Prime Minister, although this advice the President is to take into account with the greatest caution and prudence. And unless it is a case of political perfidy or profligacy dissolution should not be denied to the Prime Minister.

Power to Assent to Bills: The President's power to assent to a Bill, to withhold his assent thereto, to return it to Parliament for reconsideration, or to let it lie on his table, is also said to be a discretionary power. But evidently, no Parliamentary form of Government can function if the head of the state exercises his power to assent to Bills except on the advice of his Ministers. In this regard a September 5, 1951, note of the first President, Rajendra Prasad, to the first Prime Minister, Jawaharlal Nehru, in the context of the controversies relating to the Hindu Code Bill is instructive, and should show that even on the alleged ground of a contravention of the Directive Principles or any provision of the Constitution, the President cannot withhold his assent from a Bill without the advice of

his Ministers. The President's note expressed his desire to act solely on his own judgment and independently of the Ministers in assenting to Bills and also in sending messages to Parliament.133 The note was referred by the Prime Minister to the Attorney-General and Alladi Krishnaswami Ayyar for their opinion, for he considered it to have raised "serious matters of constitutional importance."134

The Attorney-General communicated to the Prime Minister his opinion on September 4, 1951, that the power of the President "cannot be exercised by him except without the concurrence of his Ministers and that in exercising them he is bound to act in accordance with" their advice.135 Alladi Krishnaswami Ayyar also wrote two letters to the Prime Minister,136 one on September 20, 1951, and the other on October 8, 1951, both of which in equally emphatic terms spoke of the role of the President as a constitutional head of the state. He observed:

"It will be constitutionally improper for the President not to seek to be guided by the advice of Ministers in exercising any of the functions legally or technically vested in the President".

Power Exercisable on Self-satisfaction: It is also said137 that the Constitution casts on the President the burden "to be satisfied" with regard to the existence of the specified conditions precedent for the exercise of his certain powers. This is taken as implying that the President must apply his mind to assess the existence of the specified conditions before arriving at a decision or taking an action in certain situations. And these are the situations contemplated by the Constitution under article 123(1), which authorises the President to promulgate Ordinances during the recess of Parliament; articles 352(1), 356(1) and 360(1) relating to the Proclamation of Emergency, failure of constitutional machinery in a State and Financial Emergency, respectively and article 311(2)(c) concerning dismissal of a civil servant without holding any enquiry against him.

134 Ibid.; p. 503.
135 Ibid.; pp. 592-93.

s:ci-42
But clearly the situations contemplated by these articles refer to the satisfaction of the Union Government or the Government of India which functions through a number of Ministries under rules framed within the terms of article 77(3). The President is not expected to shoulder exclusively the burden of a decision which, at one stage or another, will have to be defended before Parliament and ultimately before the people.

Statutory Powers: At times it may seem that certain statutory powers of the President are exercisable in his discretion. For example, the first President, Rajendra Prasad, once felt that his statutory powers as the Visitor of a Central University could be exercised independently of the Council of Ministers; a feeling which he conveyed to the Attorney-General for his opinion. The Attorney-General wrote back to the President that even such a power could be exercised by him only on the advice of his Ministers.

Thus, the powers which are commonly referred to as the discretionary powers of the President are, *stricto sensu*, merely his those constitutional powers which are attended with numerous unforeseen or unforeseeable situations under which they are to be exercised in the light of the needs of the hour and in the best interests of the nation, but always according to the letter and spirit of the Constitution. They are not his discretionary powers in the traditional sense, much less his prerogative powers. They cannot also be treated as *inherent or reserve*\(^{137a}\) powers appertaining to his office as the head of the state.

It should, then, be clearly realised that when the President is said to have some discretionary powers under the Constitution, it is a loose way of suggesting that in certain cases the President in the exercise of his such a power is to so conduct himself on the advice of his Ministers as not to let time condemn him as not prudent. His so called discretionary powers are, as it were, his prudential powers, *i.e.*, powers to be exercised on the advice of his Ministers with great caution and prudence. And even these occasions for prudent and cautious use of his powers are extremely limited.

Special Responsibilities of the President: Then there are some constitutional provisions which appear to invest the President with special responsibilities for certain matters. Three broad categories of such responsibilities are held out in this context: (i) responsibility relating to the appointment of the Supreme Court and High Court Judges; (ii) responsibility for certain minority rights; and (iii) responsibility for certain State rights.

Responsibility for Appointing Judges: It is said that to maintain the independence, impartiality and integrity of the judiciary, the President must look upon his power to appoint the Supreme Court and High Court Judges as a type of special responsibility cast on him by the Constitution. Certainly, the independence of Judiciary is an essential feature of the Constitution and to maintain this independence the power of the executive to appoint the Judges of the superior courts, or for that matter of any other court, must be used judiciously. But this judicious exercise of power does not necessarily involve any concept of special responsibility of the President in the scheme of the Constitution.

Responsibility for Minority Rights: It is further pointed out that the Constitution contemplates in the President the guardian of certain minority rights, particularly of the rights of linguistic minorities and of the Scheduled Castes and Scheduled Tribes. He is the trustee of their certain rights. Of particular relevance in this regard are articles 338-340, 347, 350A and 350B. But these articles should not lead to a theory of special responsibility of the President. They are meant to emphasise certain responsibilities of the Government of India, and their express vesting in the President can, at best, be construed to serve as a constant reminder to the party in power at the Centre to fulfil its obligations to the minority groups in the country.

Responsibility for State Rights: The President is also regarded as having special responsibility for preserving the federal scheme of the Constitution and protecting the interests of the States in some vital areas. In fact, at times his role in this context is pressed to the degree of projecting him as the focus of the Indian federation, and his constitutional responsibilities

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138 See, for example, Ray, Amal: Tension Areas in India's Federal System, Calcutta, 1970. See also Dash, S. C.: The Constitution of India,
in regard to certain matters affecting the States are claimed as areas in which he ought to exercise his individual judgment.

In the first place, under article 3 any Bill affecting the name, area or boundary of the State is required to be moved in Parliament only on the recommendation of the President. Thus requirement is considered to be a check on the recklessness of the party in power at the Centre to tinker with the area or boundary of a State for political ends. Although, apparently this view of article 3 may have a reasonable basis, in the ultimate analysis the burden of maintaining a federal structure is not on the President but on his Council of Ministers and Parliament. It is also on the State Ministries and the State Legislatures.

Secondly, it is said that, apart from the Supreme Court and the High Court Judges, there are functionaries and agencies appointed by the President whose working vitally affects State interests. The Governor of a State, Comptroller and Auditor-General of India, the Election Commissioner, the Special Officer for linguistic Minorities, the Language, Finance and Union Public Service Commission, or a Joint Public Service Commission, and even the Planning Commission, are some of these major authorities.

The President, it is pointed out, must see to it that the persons appointed in these capacities are capable of working independently, impartially and fairly. But if with its wide popular base and potent instruments Parliament cannot effectively muzzle the political adventurism of the Council of Ministers, it is utopian to expect the President to stop his Ministers from having their way in making undesirable appointments to these posts or bodies.

Thirdly, the President is also expected to act independently of his Council of Ministers in constituting an Inter-State Council under article 263. It is suggested that this Council should advise the President in matters affecting the interests of the States, including the appointment of certain functionaries whose operations directly affect State autonomy. But it should appear to even a casual observer that the Constitution does not intend an Inter-State Council to be a Super-Cabinet in the sphere of Union-State relations.

*A Comparative Study*, Allahabad, 1967, p. 324, where he speaks of “a reappraisal of the role of the President as the pivot of Union-State relations after the General Election of 1967.”
Fourthly, the requirement of article 274(1), that no Bill or amendment concerning taxes or duties in which States are interested can "be introduced in either House of Parliament except on the recommendation of the President," is interpreted to make the President a trustee of the financial interests of the States. But such a view of this article is not justifiable in the context of Parliamentary form of Government and Parliamentary sovereignty in the country.

And lastly, but not least importantly, it is expected of the President to exercise his judgment independently of his Council of Ministers before subjecting a State to the trauma of article 356, and particularly because clause (1) of this article requires him to be satisfied as to the conditions which are precedent for the operation of this article. But here also what is missed is the logic of Parliamentary, or Cabinet, form of Government. For, should the President decide to act on his own without reference to his Council of Ministers, he must be prepared to be embroiled in unsavoury political controversies which must normally follow the imposition of article 356 in a State.

It should thus seem that the logic of Parliamentary, or Cabinet, form of Government and the requirements of Parliamentary sovereignty, that the Constitution accepts, make the President the constitutional head of the state, who is generally bound to act only on the advice of his Ministers. However varied the phraseology of the numerous articles investing him with powers may be, the Constitution has no room for the doctrine of discretionary or prerogative powers; special responsibilities or individual judgment; implied or inherent powers; or residuary or reserve powers of the President. The powers commonly categorised under these heads, it may be suggested, ought to be looked upon as his situational functions, i.e., the functions of which the President has been made only a convenient repository and which depend for their real significance upon the peculiarity of the situations under which they may have to be exercised and not upon any special categorisation of his certain powers.

However, the diversities in the language of the different articles investing the President with powers are not devoid of significance, although to a degree they reflect a mere uncritical copying of the Government of India Act, 1935, and some other constitutions. In the case of these powers, the President may
choose to impress upon his Ministers with greater emphasis his own view of a particular matter. Besides, the very fact, that certain powers have been vested in the President in a particular phraseology and even the remotest possibility of his exercising such powers independently as the ultimate resort, ought to have an impact on the political adventurism or degeneracy of the Union Council of Ministers.

But clearly, notwithstanding his even situational or prudential functions, the President is the constitutional head of the state. He is not the head of the government; nor is he the real chief executive of the Union. A political recluse, he is the conscience of the nation and not its voice. Ambedkar said in the Constituent Assembly:

"He represents the nation but does not rule the nation... His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known."

Real Role of the Presidency

Yet, the compromise character of constitutional government and administration in the country; "the meticulous care" of the founding fathers in shaping the office of the President; their supreme concern for the unity of the nation; the vast and impressive array of constitutional and statutory powers, matchless in magnitude and diversity and immaculately self-contained, elaborately draping the Presidency; the highly exalted, honoured and neutral position of the President; the broad electoral college for electing the President and the provision for his re-election; and the expectation of only the good, the great and the grand Indians, bound by the oath of office to "preserve, protect and defend the Constitution", pacing the ailes of the RashtrapatI Bhavan do not reflect the design of the Presidency as just a magnificent zero, not even an infinitesimal fraction, in the equation of public power in the country.

Again, the constitutional contemplation of ignoring the Presidency interstitially; the provision for his even "directly" exercising the executive power of the Union; the use of the permissive clause of "aid and advise" in the context of the Council

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139 C.A.D., Vol. VII; p. 32.
of Ministers, indicating a belief in the magnanimity of the President; the bar to the jurisdiction of the court to enquire into the question of ministerial advice; the requirement that a person ceases to be a Minister only after he is not a member of either House of Parliament for six consecutive months; the provision for obtaining opinion of the Supreme Court on issues of law or fact of public importance; the scope for consulting the Attorney-General; the signification of faith in him in regard to certain issues affecting State interests; the reposing of trust in him in relation to certain minority and linguistic matters; the probabilities of constitutional crises; the constitutional provision for Emergency powers; and the adoption of only a few, and not all, of the British conventions do not also seem to intend the President to be a mere dignitary at all times and not a functionary on any occasion.

In fact, the tradition of the nation; the ethos of the community; the ecology of constitutional government and administration in the land; and the possibilities of political fluidities or even degeneration lend some obvious support to the view that "the President is not a figure-head."\(^{141}\) And although Alexandrowicz, may, on a consistent ground, claim that "the President is by convention reduced to a mere figure-head,"\(^{142}\) there can be no justification for borrowing in entirety "a convention from Great Britain or any other country without examining the reason which had led to its adoption in that country or the differing circumstances that prevail in our own."\(^{143}\) Besides, a convention may not be certain even in the land of its origin.

In the scheme of the Constitution of India, it seems reasonable to suggest that the President may not possibly remain mute when the need of the moment demands of him decisive action in the interests of the nation. The President is expected to act, he shall have to act, and he alone can act in certain situations to make government and administration in the country run in conformity with the Constitution. For, he has the obligation, albeit moral, to "preserve, protect and defend the Constitution


and the law” and devote “to the service and well-being of the people of India.”

It should seem that the first President of India, Rajendra Prasad, had, perhaps, this aspect of the Presidency in mind in his November 28, 1960, speech before an illustrious gathering, which included the Prime Minister, Jawaharlal Nehru, at the time of laying the foundation-stone of the Indian Law Institute, New Delhi. He suggested to the legal luminaries in the land to consider whether in the scheme of the Constitution, the Indian President could justly be treated as a mere replica of the British Monarch.

Although the President’s speech triggered off lively legal debates, which unhappily even degenerated into the President versus the Prime Minister controversy where the contending camps were sharply, if not bitterly, divided, the discussions on the whole generated more heat than light. The crux of the matter is to precisely state the situations, if any, in which the President may, or may have, to act independently of his Council of Ministers without violating the letter and spirit of the Constitution, and not to generally equate the Indian President with the American President or the British Monarch or to consider him as a queer concoction of the two.

Quite obviously, the Presidency in India, mounted as it is on the palladium of Parliamentary form of Government, cannot be cast in the lead role of the American Presidency. Nor can the Indian President be reasonably compared with the French or the Irish President, nor with the Australian or the Canadian Governor-General. But also, notwithstanding any constitutional provision or convention, the elected Indian President under the written, federal Indian Constitution with a Bill of Rights, Directive Principles and the requirement of judicial review can ever faithfully enact, or re-enact, the role of the hereditary British Monarch under the unwritten, unitary British Constitution with the transcendental principle of Parliamentary sovereignty.

True, the founding fathers had had to “reconcile the position of an elected President with an elected Legislature, and in doing so, we have adopted, more or less, the position of the British Monarch for the President,”144 making his office

144 C.A.D., Vol. X; p. 988. Per Rajendra Prasad. Italics are mine.
a seat of immense prestige and influence and not a centre of real powers and functions. They yet distinctly visualised the valuable role of the President in the working of the Constitution, which may, for convenience, be expressed, in terms of seven C's, as his customary role; constitutional role; ceremonial role; communication role; consultancy role; conscience role; contingency role; and crisis role.

**Customary Role:** Traditionally, the states have come to have heads of the states. And although in certain cases a collegial body may be invested with headship, in these cases also it has been found convenient to designate even by rotation a member of the body as its president or chairman, however nominal or formal his powers may be. The head of the state represents the unity of the nation and continuity of its life. He is the symbol of unity and loyalty. And what is a matter of tradition and convenience is also shown by experience to be necessary, for no collectivity finds it operationally feasible to dispense with a real or even formal head. Besides, invariably the head of the state has, in international and internal affairs, quite a few constitutional, ceremonial and communication functions attached to his office. And these functions also belong to the President of India.

**Constitutional Role:** Constitutional government implies, in a basic sense, government by public authorities with defined powers and under popular control. Yet the state is a sovereign body which has to contend with the growing complexities of modern life on an unprecedented scale. This requires that some public authority within the state must have very wide powers and capability for lightning action in the interests of the community. This need is at the roof of the ascendancy of the modern executive. It has resulted in India in making the President a vast reservoir of powers and constitutionalism has made his powers exercisable with the aid and on the advice of Ministers responsible to a popular body, the Lok Sabha. In addition, the fact that so powerfully built an office is to work within the limits of the rules and restraints of the Constitution also, by example, tends to promote constitutionalism in the affairs of

the nation. He is the custodian of constitutionalism in the country.

**Ceremonial Role**: Attached to the Presidency are also numerous ceremonies and formalities. Presidential presence lends them an unequalled halo of dignity and solemnity. They are no mere idle ceremonies and routine formalities. They play a significant role of communication even in a Republic and act as a vehicle of communication even in international dealings. They on the one hand, display the might, majesty, dignity and authority of the state and on the other, play a vital role in generating a sense of enthusiasm, enterprise, cooperation and faith in the people. They also may be used for expressing the approval or disapproval of the state for certain national or international actions or events. Even a Republic needs this ceremonial role.

**Communication Role**: The President is a link of international and internal communication. By his goodwill tours abroad and by well intentioned general statements he promotes international harmony and understanding. By virtue of his dignity and authority backed by the display of the might and majesty of the state at state ceremonies, a President may, if he carries himself in a dignified manner, make himself also a custodian of the interests of the nation and the Constitution. This image of the President has crucial political significance. It tends to strengthen the legitimacy of the political system.

A Cabinet may come and a Cabinet may go. The fortunes of a Prime Minister may fluctuate with his relations with his party or the performance of his party at the polls. Even at times fluidities and flux in party politics may result in political degeneracy and desperation. Although he may never feel inclined to sing for the President “O, Captain! My Captain,” yet, a man in the street may, with the President in the Rashtrapati Bhavan, sleep peacefully at night and work faithfully by day, ignoring political fluctuations and fluxes.

**Consultancy Role**: An elder statesman, a sagacies person and an objective observer, the President occupies a vantage point from where he can disinterestedly and calmly calculate with probity and perspicacity the diverse implications of a
public measure. His prestige, dignity and authority are unrivalled. And as a constitutional President he has, to use the famous words of Bagehot, “three rights—the right to be consulted, the right to encourage, the right to warn.” He need have no others, for his position is of great influence, though not of great powers, which he wields silently yet surely. Jagjivan Ram, a Union Cabinet Minister with the longest and most intimate and varied experience of ministerial office, feels that the President “exercises his moderating influence and inspires or moulds policies and actions so silently and unobtrusively that many are prone to think that...he neither reigns nor rules.” But in fact, his presence is felt and his views are respected by all in the Cabinet.

The President is not an administrative slot-machine. Jennings points out that “A function to be exercised on advice is not formal or automatic.” There is a lot of scope for a mutual persuasion on both the sides in the President-Minister relationship. It is the more so when the President has, in regard to certain minority and State rights, been invested with powers in specific terms. Although in the ultimate analysis the decisions are the decisions of the Ministers, “acting on ministerial advice does not necessarily mean the immediate acceptance of the Ministry’s first thoughts. The President can state all his objections to any proposed course of action and ask his Ministers in Council, if necessary, to consider the matter. It is only in the last resort that he should accept their final advice.” But this acceptance also may not be prudent in a rare contingency or crisis.

For an effective exercise of his consultancy function the Constitution in article 78 arms the President with powerful instruments. It is the duty of the Prime Minister to communicate to the President all decisions of the Council of Ministers concerning the affairs of the Union and legislative proposals. The Prime Minister must also furnish the President with such information regarding these matters as the latter may call for. The President may also require the Prime Minister to submit for the consideration of the Council of Ministers any decision

147 See Chowdhury, V. (ed.): Ajatsatru.
148 Jennings, I.: Law and the Constitution, op. cit.
149 See Rau, B. N.: India’s Constitution in the Making, op. cit.
of a Minister not considered by the Council and the Prime Minister is bound to comply with this requirement, although the Prime Minister may play a game of dilatoriness. It should be noted that this requirement is a double edged instrument of great potentiality, which may be used by the President both as a cementing factor for securing collective responsibility and team spirit in the Council of Ministers as also for the purpose of driving a wedge in the Council, although it does not seem to have been used either way so far.

Then there are other avenues. Nehru said at a Press Conference on July 7, 1959: “I see the President frequently and we discuss naturally current matters and developments and sometimes he writes to me, sometimes I write to him... Sometimes when he writes to me, I circulate the letters to members of the Cabinet.” Sometimes the President may be presented with memoranda, petitions and complaints by legislators, public persons and the members of the general public, which he forwards to the Cabinet or the appropriate Ministry with appropriate notes. Individual callers, including even the Ministers, and the modern media of publicity also facilitate the consultancy role of the President. And interestingly, although he cannot normally appeal to his countrymen over the Cabinet or Parliament, he has the subtle means in his conscience role to reinforce his right of consultancy.

**Conscience Role:** The consultancy role of the President, being in the nature of a *curtain lecture*, is essentially a backstage affair, away from the eyes of the common man. But his conscience role carries the glare of publicity. The President is not only a symbol of the nation but he also epitomises the conscience of the community. Apart from the solitary situation relating to the Hindu Code Bill in which the first President expressed his desire to follow his conscience in sending messages to Parliament and assenting to Bills,\(^\text{150}\) the Indian Presidents

\(^\text{150}\) Munshi, K. M.: *Indian Constitutional Documents*, Vol. I; p. 582. The President wrote to the Prime Minister:

“...I propose to watch the progress in...Parliament...and, if I feel at any stage that I should inform Parliament also of my viewpoint, I may send to it a message...My right to examine it on its merits...is there. But if I find that any action of mine at a later stage is likely to cause embarrassment to the Government, I may take such appropriate
have on quite a few occasions made pointed public references to the failures and weaknesses of the Government and administration in the country.

In his Republic Day broadcast in 1963, the Second President, S. S. Radhakrishnan, said that "our credulity and negligence" were responsible for our reverses in NEFA, which later at Bombay he characterised as "a matter of sorrow, shame and humiliation." Towards the end of the same year, in his Convocation address at the U.P. Agricultural University he considered "lack of true, wise leadership and administrative inefficiency" responsible for agricultural stagnation in the country. In his Republic Day broadcast of 1964, he cautioned against complacency towards administrative corruption and in that of 1967, while warning against the "inescapable prospect of a revolution," felt that "we cannot forgive widespread incompetence and the gross mismanagement of our resources." Following in his footsteps, the fourth President, V. V. Giri, also in the later half of 1973, in a speech at Lucknow, made a sharp and pointed reference to the inaction of the Government on economic front. And these should be taken not only as incidental comments but also as useful catharsis for both the governors and the governed.

*Contingency Role*: Contingency role of the President refers to those marginal situations in which he may have to make some real decision in appointing or dismissing a Prime Minister or dismissing the Council of Ministers or dissolving the Lok Sabha. These marginal situations are of significance because it is possible that depending upon the accuracy of his assessment of the political conditions he may be required to deal with, his any particular decision may tilt the balance of power in favour of a party or a person.

Necessarily, in all such cases the President is to act with extreme caution and prudence so as not to get subsequently dragged into unsavoury political turmoils. A faithful enactment of his contingency role expects of him not only political acumen, but he must have the sterling qualities of honesty, neutrality and sincerity. His any error of judgment may land not only him but also the whole nation into a dangerous situation. He action as I may feel called upon to avoid such embarrassment consistently with the dictates of my conscience."
must be able to carry conviction with both the people and the political parties that his contingency role he is playing in the interests of the nation and the Constitution. Besides, the expectation is also there that normally the leaders of the political parties would so carry themselves in these contingencies as not to cast on the President the burden of enacting his crisis role. Such a contingency role in a well organised Parliamentary system ought to be rare and a crisis role rarer still.

Crisis Role: The key-role of the President is, however, to keep government and administration in the country at work within the constitutional four-corners during periods of grave national crisis precipitated by extreme political fluidity or degeneracy, although mere kaleidoscopic Cabinet changes should not induce him to enact his crisis role. He should not act independently so long as there may be the least possibility of his having in accordance with the advice of his Ministers a Council of Ministers headed by the Prime Minister who has the confidence of the Lok Sabha. But he must act firmly and decisively when a constitutional crisis envelops the country as a conflagration, although the precise timing and extent of his any crisis role can never be spelled out and must be left to the need of the hour.

It seems that the whole issue of the crisis role of the President must ever remain in the twilight region of law, morality and politics. Of course, as a constitutional head of the state he is not expected to have his thumb on the lever of political power, but he must keep his ears to the ground to note the reports of a ravaging political storm which may threaten the very existence of the nation. Certainly, he is not the helmsman of the affairs of the nation. But he surely is the hull of the ship of the state, the Republic of India, though not its steering device. It is his function to keep the ship afloat when the weather is stormy and the sea is swollen; the spar is fallen, the rigs are scattered and the oars are broken; and above all, the real helmsman is not at his post. The survival of the Sovereign, Democratic Republic of India may, in certain moments of deep national crisis, depend upon his strength and behaviour.

In playing his crisis role, it is open to the President to reasonably rely on his power to appoint and dismiss the Prime Minister and other Ministers; his power to prorogue Parliament
and dissolve the Lok Sabha; his emergency and military or defence powers, including the power to declare Martial Law; and his Ordinance making power. But decidedly, even in such a situation, not to mention his profane intention of avoiding any impeachment proceeding, there is no shadow of justification for the collied conjuration of the constitutional chimera of Presidential dictatorship.\(^{151}\)

It is sacrilegious to suggest that there is nothing in the Constitution to prevent the President from becoming a dictator, for it has built-in mechanism of checks and balances to which time and convention have lent added operational smoothness, effectiveness, precision and efficiency. And unless the Constitution be treated as a brittle bundle of waste paper, it can, neither in letter nor spirit, condone constitutional dictatorship, whether of the President, the Prime Minister or the Cabinet. The Constitution is meant to tide over crises and not to usher in dictators. The only concern of the President, his sole anxiety, even in the darkest hours of any national crisis ought to be to secure a Prime Minister to head the Council of Ministers, which is to command the confidence of the Lok Sabha and be collectively responsible to it.

Conclusively, then, the Presidency is not a constitutional pitfall; nor is it a constitutional redundancy. Designed as a tall spar in constitutional statics; a balancing wheel in constitutional dynamics; and a dignified umpire in constitutional politics, the Presidency is a necessary, convenient and useful constitutional device. It has served the people well in the past, it is serving well in the present, and it is sure to serve well in the future; its efficacy at any time being a function of its incumbent and environment.

**THE VICE-PRESIDENT OF INDIA**

Article 63 of the Constitution says: "There shall be a Vice-President of India." Interestingly, in the scheme of the Constitution the office of the Vice-President of India has been designed on the pattern of the American Vice-Presidency, though with striking innovations regarding election, and succession to the Presidency to suit the conditions in this country. And although he is only second on the Warrant of Precedence,

under the Constitution his office is, as John Adams, the first American Vice-President, once spoke of his own office, also "the most insignificant that ever the invention of man contrived." However, the expectation seems to be that if the President is from North India, the Vice-President should be from South India and vice versa.

QUALIFICATIONS AND ELECTION OF THE VICE-PRESIDENT

The Constitution makes every citizen of India, who has completed the age of thirty-five years and is qualified for election as a member of the Council of States, eligible for the Vice-Presidency. But any person holding an "office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of the said Governments" is, however, not eligible for election as Vice-President. The expression "office of profit" in this context has the same meaning as it has in the context of the qualifications of the President, and a person is not deemed to hold an office of profit "by reason only that he is the President or Vice-President of the Union or the Governor of any State or is a Minister either for the Union or for any State."\(^{152}\)

The Vice-President is indirectly elected by an electoral college consisting of the members of both Houses of Parliament and any vacancy in the electoral college does not invalidate his election. He is elected "in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election" is by secret ballot. Parliament has passed the Presidential and Vice-Presidential Elections Act and appropriate rules have been framed under the Act to regulate other matters relating to the election of the Vice-President and the election is held under the supervision of the Election Commission. Any doubt or dispute "arising out of or in connection with" the election is determined by the Supreme Court, but the invalidation of an election does not invalidate the acts done by the Vice-President prior to the decision of the Court.\(^{153}\)

\(^{152}\) Art. 66(3) (4).
\(^{153}\) Arts. 66(1), 71.
TERMS AND CONDITIONS OF OFFICE
OF THE VICE-PRESIDENT

An election to fill in a vacancy arising out of the expiry of the term of a Vice-President is to be held reasonably in advance of the expiry of the term. But an election to fill in a vacancy "occurring by reason of his death, resignation, or otherwise" is required to "be held as soon as possible after the occurrence of the vacancy." A person elected to fill in such a casual vacancy is entitled to hold office for a full term of five years and there is no constitutional provision for an acting Vice-President.\(^{154}\)

Before entering upon his office the Vice-President makes and subscribes before the President, or a person authorised by him for the purpose, an oath or affirmation in the prescribed form.\(^{155}\) And whether elected to fill in a vacancy caused by the expiry of term or a casual vacancy, he holds office for a term of five years from the day he assumes the charge of his office, although he is to continue to hold office even after the expiry of his term until his successor enters upon his office.\(^{156}\) He is eligible for re-election any number of times.

The Vice-President may, however, resign his office by writing under his hand addressed to the President. He may also "be removed from his office by a resolution of the Council of States passed by a majority of all of the then members of the Council and agreed to by the House of the People." Although no resolution for this purpose can be moved in the Council unless at least fourteen days’ notice has been given of the intention of moving the resolution, the Vice-President has no right to represent his case before the Council.\(^{157}\)

There are no specific emoluments, allowances, immunities and privileges attached to the Vice-Presidency. When the Vice-President functions *ex-officio* as the Chairman of the Council of States, his emoluments, allowances, immunities and privileges are derived from the Chairmanship. And when he acts as the President, his emoluments, allowances, immunities and privileges are derived from the Presidency. The Vice-President cannot, however, hold any other office of profit. He cannot also

\(^{154}\) Art. 68.

\(^{155}\) Article 69 prescribes the form.

\(^{156}\) Arts. 67, 68(2).

\(^{157}\) Art. 67(a) (b).
be, nor can he continue to remain, a member of either House of Parliament or of a House of any State Legislature.\footnote{158}

**FUNCTIONS AND POSITION OF THE VICE-PRESIDENT**

The Vice-President has two-fold functions: first, an *ex-officio* function, and, second, a replacement function. There are no other powers and functions given to him. Like his American prototype, he is the *ex-officio* Chairman of the Council of States, the Upper Chamber of Parliament. But unlike the American Constitution, the Indian Constitution provides for his acting as the President within the terms of article 65, any other contingency being covered by article 70 and now provided for by the Presidential (Succession to Office) Act. Article 65 lays down:

"(1) In the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.

(2) When the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties.

(3) The Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging the functions of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as are specified in the Second Schedule."

Obviously, then, the political isolation, constitutional inanition and administrative insignificance of the Vice-President of India make him Benjamin Franklin’s *Most Exalted* “His Superfluous Highness.” Yet political expediency and convenience and constitutional contingencies and conventions seem to have retrieved him over the past years as the probationer for the Presidency. The Vice-Presidency appears to have become a stepping-stone to the Presidency, an ante chamber for ushering in a new occupant of the Rashtrapati Bhavan, although its future is yet not certain. It has also come to acquire a degree of magnificence, dignity and prestige from the personalities of its incumbents during all these years.

\footnote{158 Arts. 64, 65, 66(2), 97.}
THE ATTORNEY-GENERAL FOR INDIA

The first Law Officer of the country is the Attorney-General for India. His office was created for the first time by the Constitution, although section 15 of the Government of India Act, 1935, had provisions for an Advocate-General of the Federation, and even before that the Advocate-General of Bengal used to act as the law officer of the Government of India. The Union has also a Solicitor-General who, though not a constitutional functionary, is the second Law Officer in the country and assists the Attorney-General in the discharge of his functions. The Solicitor-General is assisted by an Additional Solicitor-General.

The Attorney-General is appointed by the President from among persons qualified to be the Judge of Supreme Court. There is no age limit for his appointment or reappointment. Under the Law Officers (Appointment and Conditions of Service) Rules, 1961, he is appointed for a term of five years and is eligible for reappointment any number of times. He holds office during the pleasure of the President. He receives a retainer of rupees four thousand a month and is also entitled to other prescribed allowances. The 1961 Rules do not debar him from private practice, but rule 8 lays down:

"(1) A Law Officer shall not—
(a) advise or hold briefs against the Government of India;
(b) advise or hold briefs in cases in which he is likely to be called upon to advise, or appear for, the Government of India;
(c) defend accused persons in criminal prosecutions without the permission of the Government of India; or
(d) accept appointment as Director in any company or corporation without the permission of the Government of India.

(2) In the event of a conflict between a private brief and a brief of the Government of India in the Supreme Court, the Law Officer shall give preference to the brief of the Government of India."

Article 76(2) says that the duty of the Attorney-General is to give advice to the Government of India upon legal matters and to do such other acts of a legal character as may be given to him by the President. He is also to discharge the functions conferred on him by the Constitution or any other law. He

\textsuperscript{159} Art. 76(1).

\textsuperscript{160} Art. 76(4).

\textsuperscript{161} See, for example C.P.C., Order XXVIIA and rule 5 of the Law Officers (Appointment and Constitutions of Service) Rules, 1961.
has a right to be heard in all courts in the country in the course of the performance of his duties,\textsuperscript{162} and has precedence over all other advocates. He has the right to enter appearance before the Supreme Court in any proceeding before the Court and the Court has also the power to issue notice to him in regard to any proceeding pending before it.\textsuperscript{163} Besides, the Attorney-General is entitled to speak, but not to vote, in either House of Parliament and in a Parliamentary Committee of which he may be a member. He also enjoys the privileges of a member of Parliament.\textsuperscript{164}

Evidently, the Attorney-General does not hold a political office. He is also not a full-time Government officer. He is retained by the Union Government as a legal adviser having the prescribed legal duties. The Union has a Law Minister who performs the political functions appertaining to the Attorney-General in England. There was a proposal in 1962 to merge the offices of the Attorney-General and the Law Minister, but was eventually not carried into effect because it was not considered expedient or even constitutional.\textsuperscript{165} There seems, however, a case for re-casting the office of the Attorney-General on the lines of the Procurator-General of the U.S.S.R. to make him function more independently and effectively, although, before implementation, this is a matter which must be given a more detailed and thorough examination.

THE COMPTROLLER AND AUDITOR GENERAL OF INDIA

The office of the Comptroller and Auditor-General of India may be traced back to the year 1857 when Canning, the then Viceroy, appointed for the first time an Accountant-General to the Government of India, although a Department of Audit and Accounts had been constituted as early as 1753. Then the office grew in significance and gained independence of the Government of India in 1919 under the Montford Reforms when the Auditor-General came to be appointed by the Secretary of State for India. The Government of India Act, 1935, further

\textsuperscript{162} Art. 76(3).
\textsuperscript{163} Supreme Court Rules, 1950, rule 1-2, Or. XLI.
\textsuperscript{164} Anns. 88, 104.
\textsuperscript{165} See, Pylee, M. V.: \textit{Constitutional Government in India}, op. cit.; pp. 385-86.
reinforced the importance and independence of the Auditor-General, but only under the Constitution the country came to have a Comptroller and Auditor-General with a status commensurate with his role and responsibilities.

The essence of Parliamentary form of Government is the control of the legislature over the executive and the crucial element of this control is the control of the public purse. The legislature has the power to authorise taxation and expenditure. But to make its control of the purse realistic and effective it must also have the means to keep a watch on the spending operations of the Government. This watch-dog function is a continuous, technical and detailed function for which a legislature has neither the proper organisation and skill nor sufficient time and energy. Yet it is a vital element of financial control known as auditing and is a necessary adjunct of accounting which refers to the book-keeping operations of financial receipts and expenses. It is these auditing and accounting operations that are under the independent and competent control and direction of the Comptroller and Auditor-General of India.

INDEPENDENCE OF THE COMPTROLLER AND AUDITOR-GENERAL AND HIS APPOINTMENT, REMOVAL AND TERMS AND CONDITIONS OF SERVICE

In the Constituent Assembly Ambedkar emphasised the vital role of the Comptroller and Auditor-General as the strict guardian of the public purse and as an effective instrument for securing financial responsibility and discipline in government.\textsuperscript{168} Pattabhi Sitaramayya, a member of the Assembly, spoke of the position of this functionary as follows:\textsuperscript{167}

"No matter how perfect our Constitution may be, no matter how numerous the checks and balances and safeguards of the right conduct of the business of the future, it is money that counts and we have to deal with huge sums and if all this money is not spent alright, and if the people deliver cheap gibes at men like me who count money..., then there is no government at all worth mentioning...It is dacoity. And who is to control this? The Comptroller and the Auditor-General must be supreme and independent as the Judges of the Supreme Court, perhaps even more so. He is not merely an Auditor-General, but he represents a judicial authority, with a judicial frame of mind and his acts must be acts of

\textsuperscript{167} C.A.D., Vol. X; p. 943. Italics are mine.
justice... At times, he is called upon to criticise the Executive and to expose it even to contempt. He should not, therefore, come under the ire of the Government."

Appointment, Removal, Terms and Conditions of Office

*Independence* of the Comptroller and Auditor-General became, thus, the keynote of the constitutional provisions, relating to his appointment, removal, and terms and conditions of service which clearly demonstrate the concern of the founding fathers for his independence to have been greater than that for even judicial independence. It has meant, in the first place, that under article 140(1) the Comptroller and Auditor-General is appointed by the President by warrant under his hand and seal for a fixed term of six years or until he reaches the age of sixty-five years, whichever in earlier. And although there are no constitutionally prescribed qualifications for him, for it was not considered desirable by the founding fathers, he is appointed on objective considerations. Secondly, he can be removed from his office "in like manner and on the like grounds as a Judge of the Supreme Court." Thirdly, before entering upon his office he is required to make and subscribe an oath or affirmation in the same form as that of a Supreme Court Judge and in the prescribed manner and before the specified authority.\(^{168}\)

Fourthly, article 148(3) requires that his salary and other conditions of service are to be as specified in the Second Schedule until Parliament may prescribe otherwise. But "neither the salary... nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment." At present he draws the same salary as that of a Supreme Court Judge and is also entitled to the prescribed allowances and a pension and other prescribed retirement benefits.\(^{169}\) Fifthly, the administrative expenses of his office, "including all salaries, allowances and pensions payable to or in respect of persons serving in that office" are charged upon the Consolidated Fund of India.\(^{170}\)

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168 See Art. 148(1)(2) and the Comptroller and Auditor-General (Duties, Powers, and Conditions of Service) Act, 1971.
169 Art. 148(3).
170 Art. 148(6).
Sixthly, and very significantly, article 148(4) makes him ineligible "for further office either under the Government of India or under the Government of any State after he has ceased to hold his office." Consequently, when a retired Comptroller and Auditor-General was made even the Chairman of the third Finance Commission, there were vehement criticisms. And although he was allowed to continue as Chairman and complete the work of the Commission, the provision of this article has since then been assiduously observed in letter and spirit.

But these six safeguards for securing the independence of the Comptroller and Auditor-General have to reckon with the fact that the Constitution does not invest him with appointing power and disciplinary control in regard to his subordinates. Ambedkar did not feel very happy over this gap. But he scented the sentiment of the Assembly "to be opposed to investing the Auditor-General with such a power" and acted accordingly. However, the working of the Constitution does not seem to have revealed any real threat to his independence resulting from this lacuna.

POWERS AND POSITION OF THE COMPTROLLER AND AUDITOR-GENERAL

In the office of the Comptroller and Auditor-General of India are comprised both accounting and auditing functions. These functions even today continue to be, more or less, the same as they were before the commencement of the Constitution. Relating to his functions is the Government of India (Audit and Accounts) Order, 1936, as adapted in 1947 by India (Provisional Constitution) Order, from which the Heads of Accounts, the Accounts Code and the Audit Code derive their authority. However, so as far as the Constitution is concerned, article 149, an article which hardly needs any comments, speaks of his powers and duties as follows:

"The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and the States or any other authority or body as may be prescribed in that behalf by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the

Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and the Provinces respectively."

Again, under article 150, the Comptroller and Auditor-General is competent to prescribe, with the approval of President, the form in which the accounts of the Union and States are to be maintained. But necessarily his functions are confined to not only accounting and auditing in a narrow sense, but also include broadly, in regard to any expenditure, his duty "to satisfy himself on behalf of Parliament as to its 'wisdom, faithfulness and economy'." Then, he is also responsible for auditing and accounting in regard to a large number of local and autonomous bodies and units of public enterprise. Besides, by an amendment of the Companies Act, 1956, he has been given certain supervisory and advisory roles in relation to the companies governed by the Act.

The Comptroller and Auditor-General is required to prepare reports relating to the accounts of the Union and the States. His reports relating to the accounts of the Union are submitted by him to the President who causes them to be placed before each House of Parliament. And his reports relating to the accounts of a State are presented to the Governor of the State who causes them to be laid before the Legislature of the State. These reports provide the basis for the work of the Public Accounts Committees of the Union Parliament or the State Legislatures. So far as the Public Accounts Committee of Parliament is concerned, the Comptroller and Auditor-General also assists the Committee in conducting its enquiry and discharging its functions.

Thus, it should seem that the Comptroller and Auditor-General has a vital constitutional and administrative role. Yet, though none denies the utility of auditing, his role is basically in the nature of a post-mortem performance. This implies that the watch-dog turns into a mere watching dog when a real mischief occurs. Besides, he has a tendency to clog administrative enterprise, innovation and speed, and a person may be tempted to plead even for the abolition of his post. Regarding his auditing function Appleby said:

"Auditors do not know and cannot be expected to know very much about good administration; their prestige is highest with others who do not know much about administration. Auditing is a necessary but highly pedestrian function with a narrow perspective and very limited usefulness... Many of the Comptroller’s reports are mere substitutes of hindsight for the kind of judgment possible and necessary and proper at the time of action."  

Then, beginning with the 1924 Muddiman Committee Report there has been a long standing and persistent plea for separating the accounting and auditing functions of the Comptroller and Auditor-General. Narhari Rao, the first Comptroller and Auditor-General, considered the separation of his auditing and accounting functions “essential and overdue”, a point conceded by the Public Accounts Committee.\(^{173a}\) Asok Chanda, his successor, emphasised the need for “the departmentalisation of accounts,”\(^{174}\) as it would effectively cure the malaise of the “divorce of authority from responsibility” in administration.

Although the case for the separation of the auditing and accounting functions of the Comptroller and Auditor-General is stronger, rather much stronger, than the case for the abolition of his office, this also seems to need a very thorough examination before being accepted. But, it is certain that to make the office of the Comptroller and Auditor-General really meaningful in the changed context of development and plan administration the complementary and cooperative roles of audit and administration are to be regarded

“as axiomatic, being essential for toning up the machinery of Government... The need for a re-orientation of the attitude and readjustment of the relations between Audit and Administration has, thus, assumed paramount importance.”\(^{175}\)

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\(^{173}\) Appleby, Paul H.: *A Re-examination of India’s Administrative System*, Government of India, New Delhi, 1956; pp. 27-29, 42.


\(^{175}\) Chanda, A. K.: *Indian Administration*, op. cit.; p. 249.
CHAPTER 24

THE COUNCIL OF MINISTERS AND THE PRIME MINISTER

The centre-piece of constitutional government and administration in the country is the Union Council of Ministers with the Prime Minister at the head constituted by article 74(1) as a collegial, though not a corporate, entity to aid and advise the President in the exercise of his functions. Though explicitly made responsible as a body only to the Lok Sabha,\(^1\) it is, par excellence, except in an extraordinary situation, a committee of Parliament.

The Council is a combine of the leaders of the party, or parties, in power and provides an excellent example of collective leadership. And although it has the constitutional capacity only “to aid and advise the President in the exercise of his functions”, it has more realistically come to be commonly spoken of as the “Government”, a more inclusive term, and also as the “Ministry”, a more exclusive expression denoting one or the other of the several Ministries through which the Government of India functions.

The core of the Council of Ministers is the Cabinet; a committee of the committee; “a wheel within the wheel.” Though duly recognised by the rules of business framed by the President under article 77(3) and the Salaries and Allowances of Ministers Act, 1952, enacted by Parliament under article 75(6), it is essentially a child of convention, but, of course, not of mere chance.\(^2\) It is nowhere noticed by the Constitution.

Yet the Cabinet has subrogated the Council of Ministers in all spheres and has, more appropriately, come to be referred to, in common with the Council, as the Government, or the Ministry. It is the collegial apex executive of the nation. The Union Cabinet is, indeed, the core of the Indian constitutional

\(^1\) Art. 75(3).
\(^2\) See Pylee, M. V.: Constitutional Government in India, op. cit.; p. 375.
system; "the keystone of the political arch"\(^3\) of the nation, as Lowell would have suggested; or "the pivot round which the whole political machinery revolves in the country,"\(^4\) as Marriot would have put.

The crest of the Union Council of Ministers and of the Union Cabinet is the Prime Minister of India; the head of the Government of India and the real chief executive of the Union. And although technically he is a functionary subordinate to the President of India and comes third on the Warrant of Precedence, he, indeed, is the uncrowned king of the land. The Prime Minister is, in fact, the sun in the constellation of the constitutional authorities in the country; all roads lead to him.\(^5\)

CONSTITUTION OF THE COUNCIL OF MINISTERS

Article 74 of the Constitution, the first article concerning the Union Council of Ministers, lays down as follows:

"(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so what, advice was tendered by the Ministers to the President shall not be inquired in any court."

Clause (1) of Article 74 demands that there must always be at the Centre a Council of Minister, \textit{i.e.}, a distinct collegial entity consisting of two or more Ministers, one of whom is to be the Prime Minister at the head of the Council. Read by the light of \textit{Sibnath Banerjee's Case},\(^6\) article 74(1) in conjunction with articles 12 and 53(1) assigns the Union Council of Ministers, including the Prime Minister, the \textit{status} of a public body comprising officers subordinate to the President of India, with the capacity to aid and advise him in the exercise of his functions. And the same is the position of the Central Cabinet.

The \textit{aid and advise clause} of article 74(1) is, however, a convenient mask; "a term of art"\(^7\) with a generally acknowledged connotation. It is rather a constitutional fiction. For,

under Parliamentary form of Government real power belongs to that part of the executive, which is deemed responsible to the legislature. Significantly, article 75(3) makes not the President but his Council of Ministers collectively responsible to the Lok Sabha. And interestingly, article 78(a) speaks of the “decisions of the Council of Ministers”, and not recommendations, to be communicated to the President by the Prime Minister. The Council of Ministers, or the Cabinet, is in fact, a body intended to act and decide and not to aid and advise only.

Clause (2) of article 74 casts the advice of the Ministers in non-justiciable mould, or, to import the phraseology of the American Constitution, declares it to be a political question. It enjoins that “the question whether any, and if so what, advice was tendered by the Ministers to the President cannot be inquired into in any court.”

Evidently, this clause incorporates into the Constitution the doctrines of executive privilege and executive secrecy and reflects at the same time the nature of the Council of Ministers as a high powered political body and the wide and flexible character of its functions. It also indicates that the basic issues of political power cannot realistically be interned in legal formulas to make them enforceable by the courts of law and forestalls the possibilities of judicial interference in an extremely fluid and sensitive area of constitutional government.

Then, there is article 75 which reads:

"(1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

(2) The Council of Ministers shall be collectively responsible to the House of the People.

(3) The Minister shall hold office during the pleasure of the President.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule."

Essentially, in very plain terms article 75 seeks to provide for the appointment and qualifications of the Prime Minister
and the other Union Ministers, the doctrine of their holding office during the pleasure of the President; the principle of their collective responsibility to the Lok Sabha; the requirement of their taking oaths of office and of secrecy; and the control of Parliament over their salaries and allowances. But necessarily, its plains language presents a mere surface view of all that the matters contained in it involve. For, it seeks to enact into legal forms some of the basic ingredients of Cabinet Government, which are essentially political and more conveniently conceivable only as conventions.

**THE PRIME MINISTER**

The Prime Minister heads the Union Council of Ministers which is constitutionally required to be collectively responsible to the Lok Sabha. This implies that the Prime Minister must be able to command the confidence of the Lok Sabha; he must have the support of the majority in the House. And although occasionally this majority support may be passive, permissive, fluid or floating, it generally must be the vigorous, active and solid support of the majority party in the House, which the Prime Minister leads in and outside Parliament.

Pedigree, personality, acceptability, service all these may count. At times, the party king-makers may prefer a person whom they consider more malleable or amenable to their dictates, and an iron or a strong man may be kept out of office by design or as a matter of expediency. But generally, the primary qualification of the Prime Minister is his leadership of his party. Transient or unprincipled improvisations apart, the Prime Minister must ever be, or eventually emerge, as the unquestioned leader of his party, else continue by sufferance or bid adieu.

However, the only constitutional requirement in this regard is that a person must not continue as Prime Minister if he does not remain a member of either House of Parliament for six months consecutively. In practice this means his membership of the Lok Sabha, for it is to this House that he and his colleagues in the Council of Ministers owe collective responsibility. And even when a person who is not a member of Parliament, or who is a member of the Rajya Sabha, is chosen as Prime Minister, he eventually secures a seat for himself in the Lok Sabha as a

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8 Art. 75(5)
matter of practical necessity. It should seem thus that the Constitution indirectly requires that generally a person aspiring to be Prime Minister must be qualified for being a member of the Lok Sabha.

Choice of A Prime Minister

The choice of a Prime Minister is the first step in the formation of a Council of Ministers at the Centre. Clause (1) of article 74 opens with the requirement that “The Prime Minister shall be appointed by the President...” This is the law of the Constitution. The fact is that the Prime Minister is a product of an extremely complex political process. At the top end the President legally appoints a Prime Minister, but the President himself is most likely always to be the manifest result of a political choice by the Prime Minister. At the grassroot level the electorate basically votes for a Prime Minister, but the electorate itself is not unlikely to be a charmed respondent to the magic call by the Prime Minister. And linking these extremes are the myriads of situational, personal, social, economic, political, national and international, party and Parliamentary elements, some of which are identifiable as definite party or Parliamentary processes, that lead to the final selection of the Prime Minister. The Prime Minister is not made but grows. And even when initially made, he must grow or quit.

In the context of the long struggle for Independence spearheaded by the Congress Party and its continued predominance even after the commencement of the Constitution, the practice seems to have set in the country that the President commissions a person as Prime Minister only after he is duly elected leader by the majority Parliamentary Party. Such an election is held after each general election to the Lok Sabha. If the office of the Prime Minister falls vacant due to his sudden demise, the seniormost member of the Council of Ministers is designated to act as the Prime Minister until the majority Parliamentary Party elects its leader and the President appoints him as a new Prime Minister. When the Lok Sabha is dissolved, the outgoing Prime Minister tenders his resignation. But at the request of the President he continues in office as the head of a Caretaker Government, until the office is duly filled in after the general election to the Lok Sabha.

However, the election of the leader of the majority Parlia-
mentary Party is a mere formal expression of the back-stage political consensus or agreements and disagreements among the leaders of the majority party in Parliament. As the acknowledged leader of the Congress Party, Jawaharlal Nehru became the first Prime Minister of India when the Constitution came into force on January 26, 1950. When he died in 1964, Gulzari Lal Nanda, the seniormost Minister was immediately sworn in as the acting Prime Minister and a search for consensus began. Under the lead taken by the Syndicate, a caucus of senior Congress leaders, which had started surfacing towards the declining years of Jawaharlal Nehru’s leadership, and with the support of the State Chief Ministers, Lal Bahadur Sastri was unanimously chosen by the Congress Parliamentary Party as its leader in June 1964. He then became the Prime Minister, but with his death on January 11, 1966, the office of the Prime Minister again went back to Gulzari Lal Nanda as the acting Prime Minister. And this time also the Syndicate, with an increased reliance on the State Chief Ministers, was able to secure Prime Ministership for Indira Gandhi, but only after a contested Congress Parliamentary Party election in which she got 353 and Morarji Desai, the only other contender for the post, polled 169 votes.

The roles of the Syndicate and the State Chief Ministers and the results they were able to secure came to have visible impacts on the importance and style of the incumbents to the office of the Prime Minister, raising vital issues of leadership. They also created fissures in the party machine which ultimately led to the Congress split in 1969, though apparently on the issue of Presidential election in which the concept of “conscience voting” was smuggled in to secure the success of the Presidential candidate supported by the Prime Minister. Indira Gandhi bid good-by to the Congress Syndicate and continued to head a minority Government with the floating support of some opposition groups, like the C.P.I., C.P.I.(M) and D.M.K., and some Independents. Then the Lok Sabha was prematurely dissolved by the President on her advice in 1970. She tendered her resignation as Prime Minister but continued in office as the head of a Caretaker Government. After fresh elections to the Lok Sabha she came back to power with unprecedented support and was unanimously elected leader of the Congress Parliamentary Party and became the Prime Minister.
It should appear then that personal, party and political complications may create a complex situation in which the President may not find his function to appoint a Prime Minister a mere matter of formality. For example, had the Prime Minister supported Presidential candidate lost to his contender in 1969, highly acrobatic political manoeuvrings might have followed and extremely unpredictable precedents might have been established. Thus, party splits; an absences of absolute majority of any party in the Lok Sabha; an existence of only a slender majority of a party; an untimely resignation by the Prime Minister; a sudden demise of the Prime Minister; a premature dissolution of the Lok Sabha; a defeat of the Cabinet in the Lok Sabha on a vital issue; an unwillingness of the majority party, or the Opposition, to form Government; a convulsive internal or external event that rocks the Government; or even an involvement of a powerful internal or international interest or pressure element may make the choice of a new Prime Minister really difficult.

It may be reasonable to expect that normally an outgoing Prime Minister should shoulder the responsibility for correctly advising the President on the issue of succession to Prime Ministership. Reliance may also be placed on the sense of responsibility of the political parties, including the opposition groups. The President is also expected to act prudently and cautiously in these cases, in order that a party or political crisis may not get metamorphosed into a constitutional crisis. Yet much must remain in the uncertain womb of the future. For, in these matters the Constitution shall have to live primarily on the course of events that follow a departure from an established precedent, although in all cases it must depend on the goodwill of all the concerned political elements who must be willing to keep within the limits of a national consensus on the fundamental, social, economic and political issues. As John Simon spoke of the English system, in this country, also

“Our Parliamentary system will work as long as the responsible people of different parties accept the view that it is better that the other side should win than that the Constitution should be broken.”

THE OTHER UNION MINISTERS

Like the Prime Minister the other members of the Union Council of Ministers must be able to enjoy the confidence of the Lok Sabha. Their eligibility for Ministership is more a matter of politics than of the Constitution. They must have a place in the structure of the majority party, although the Prime Minister may induct a non-party man into the Council for his personal qualities or for personal or party and political, national or international, reasons. The Constitution in the case of the other Ministers also indirectly requires that they should be eligible for being members of either House of Parliament, for a Minister who is not a member of either House of Parliament for any consecutive period of six months ceases to be Minister after the expiry of the period.\[11\]

Bank and Number of Ministers

The Constitution is silent on the rank and number of the Ministers. What has developed in this regard is a mere matter of convenience and convention, though also recognised in certain cases by rules or enactments. The Council of Ministers has three categories of Ministers. First come the Cabinet Ministers. Then there are the Ministers of State and Deputy Ministers. Parliamentary Secretaries, if any, are not Ministers. The Administrative Reforms Committee recommended for the continuance of this three-tier system which seems to have become by now firmly established.

Size of the Council of Ministers: The requirement of article 74(1), that there shall be a Council of Ministers to aid and advise the President in the discharge of his functions, implies that there must be at least one more Minister other than the Prime Minister to constitute the Council. This puts only an apparent floor limit on the number of Ministers. Thus, there is no maximum constitutional limit on the size of the Council of Ministers.

There being no constitutional provision with regard to the maximum number of Ministers what happens in this matter is only a question of convenience. The usual number of Ministers is in the region of fifty. The Administrative Reforms Committee suggested that normally the Central Council

\[11\] Art. 75(5).
of Ministers should have forty Ministers, although in exceptional cases there may be up to a maximum of forty-five Ministers. But it seems that the Prime Minister has almost a free will in determining the size of the Council of Ministers.

Deputy Prime Minister: The Constitution does not contemplate the appointment of a Deputy Prime Minister. Nor is his post recognised by any rules or statutes. Convention in this regard is also not yet established, for the country has thus far Deputy Prime Ministers only twice, and that too as a matter of political compromise on the question of leadership of the majority Parliamentary Party. The Administrative Reforms Committee suggested the appointment of a Deputy Prime Minister to be a regular feature of the Cabinet system, but this suggestion has not found general acceptance.

Selection of the Other Ministers

The President is required by article 74(1) to appoint the other Union Ministers only on the advice of the Prime Minister. This requirement is intended to emphasise the Prime Minister’s competence to freely choose his colleagues to secure homogeneity in the Council of Ministers; to inject team spirit; and to promote collective responsibility among the Ministers. Although in selecting Ministers he may consult party leaders or other concerned persons, the Prime Minister is constitutionally free to choose his colleagues in the Council of Ministers. The real extent of this freedom is, however, a function of an intricate political process.

Every Parliamentarian is a potential Minister. Then there are other party and non-party claimants on the basis of public image, personal liking, services rendered, confidence enjoyed, loyalty given, proficiency or achievement demonstrated, sympathy or support enjoyed, or specialisation or efficiency possessed. Ministry making is extremely intricate and delicate. For, it is not only “like the Zoo at feeding time”, as Lord Salisbury once said, but is also the chess-board of intense power game.

Some Ministers move into office of their own right because of their position in party, or service or loyalty to the party or

the Prime Minister, public eminence, or special competence. Representatives of party wings, groups or factions are also accommodated. Accommodation has also to be found for regional elements and even caste, religion or linguistic minority groups. International interests may also find reflection. Some ministerial positions have also to be found for the members of the Rajya Sabha. The special nature of any task to be performed has also to be kept in view. Senior colleagues of the Prime Minister often influence the appointment of junior Ministers.

There is always the need for training the younger generation and injecting new blood. The Council of Ministers works as a nursery and a kindergarten. It is also used as launching pad or a shunting ground for State political leaders or for other leaders in the party. Non-party men find place in the Ministry on considerations of their eminence in public life, expert knowledge, or regional considerations, or service or loyalty to the Prime Minister. These may include academicians, members of legal or other professions, retired judicial, diplomatic or civil personnel, and even social workers and persons otherwise prominent in public life.

**Deputy Prime Minister:** The selection of the Deputy Prime Minister on the past two occasions in the country has been the result of a political compromise on the issue of leadership in the party. The Deputy Prime Ministers on both the occasions have claimed their office by virtue of their position in the party and the Prime Ministers had no real options left.

**THE UNION CABINET**

In forming the Council of Ministers the Prime Minister has also to keep in mind the persons who are to constitute the Union Cabinet. And the qualifications of a Cabinet colleague are his importance in party; special competence and eminence or sympathies and leanings in public life; and above all his loyalty to the Prime Minister. The Cabinet has, on the one hand, got to be fairly representative, and on the other, it must also be a small, homogeneous and compact body to discuss issues intimately and arrive at decisions quickly and efficiently.

**Size of the Cabinet:** The size of the Cabinet, therefore, is a factor to be taken into account. Normally, the membership
of the Cabinet is in the range of twenty. A Deputy Prime Minister is always a member of the Cabinet. Finance, Foreign, Home and Defence Ministers are also invariably Cabinet Ministers. The question of other Ministers of Cabinet is a question of political expediency rather than of any primary principle. The Administrative Reforms Committee suggested that the Union Cabinet should not have more than 16 Ministers "to ensure homogeneity, speed and purposeful function."\(^{13}\)

A place in the Cabinet is a position of honour and reward and trust and power to which every politician aspires. But in making the Cabinet, the Prime Minister has to keep in mind not only the other factors which influence his decision in constituting the Council of Ministers but also to remember that his many a Cabinet colleague is a potential Prime Minister, and therefore, a constant rival in power game. The question of personal likes and dislikes gets more sharpened in the case of Cabinet colleagues. So do the issues of party unity and homogeneity and team spirit. The Cabinet is more a collection of loyals than a galaxy of luminaries.

**Inner or Kitchen Cabinet**

The Prime Minister usually collects around himself an inner or kitchen cabinet of a group of four or five trusted Cabinet colleagues, which may include even a person who is not a Minister. It is convenient to consult this group on vital issues before committing the nation to a course of action, although the Prime Minister is deemed competent to bind the nation on his own responsibility, provided he is confident of carrying the party and the country with him.

**Coalition or National Government**

When no single party is in absolute majority, the need for a coalition government arises. Various coalition combinations are possible. For example, the largest party may form a Government by an alliance with some other parties. Then, a very small party may provide the Prime Minister and the Deputy Prime Ministership and other important portfolios may be accepted by the largest single party. Again, Prime Ministership

\(^{13}\) Report of the Administrative Reforms Committee, op. cit.; p. 6.
may go to a single individual defecting from his party yet not joining any other party. So far as a national government is concerned, it is also a type of coalition government designed to embrace all shades of political opinion working under the same umbrella in moments of national crisis.

It should be noted, however, that coalition or national Governments combine on the basis of a common agreed minimum programme, and, therefore, except for the limited purpose of tiding over a crisis or meeting an unusual situation, such a Government is usually weak infected by internal differences. Cabinet Government is essentially a party government. The Cabinet derives its authority, strength and homogeneity basically from the fact that its members are derived from the rank of a single party. Thus, it is always conducive to the Cabinet form of Government to avoid coalitions. And significantly, there has thus far been no coalition Government at the Centre and some random demands for a national Government has not also been conceded, although occasionally quite a few prominent persons from outside the rank of the party in power have been included in the Union Cabinet.

Minority Government

In certain cases, as it actually happened at the Centre in 1969 after the great schism in the Indian National Congress, the single largest party may continue in office as a minority Government, or form a minority Government, with the support of other groups or parties which choose to remain outside the Council of Ministers. It is also possible that a small group or party may be allowed to be in power, or form a Government, with the support of the single largest party. A minority Government is also a weak government and its value lies in regarding it only as an interim arrangement.

WORK ASSIGNMENT AND TERM AND CONDITIONS OF MINISTERIAL OFFICE

Before entering upon his office, a Minister is administered the following oath of office by the President:\(^{14}\)

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\(^{14}\) See Schedule III, *Form of oath for a Union Minister*. Italics are mine.
"I, A. B., do solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and law, without fear or favour, affection or illwill."

Oath of Secrecy

The concept of secrecy in Government finds a constitutional expression also in the following oath of secrecy administered to a Union Minister along with his oath of office:  

"I, A. B., do solemnly affirm that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister."

Evidently, this oath of secrecy covers (i) "any matter which shall be brought under" the consideration of a Minister, and (ii) any matter which "shall become known to" a Minister. The Minister is not to disclose any such matter "except as may be required for the due discharge of his duties as a Minister." This element of secrecy is essential also for securing the collective responsibility of the Cabinet and for an efficient discharge of executive and administrative functions of the Government. Thus, it is a practical necessity constitutionally recognised and traditionally observed. It is also legally enforced by the Official Secrets Act, 1923.

Allocation of Work and Term of Office

Each Minister is usually assigned specific responsibilities and the Prime Minister decides upon the question of allocation of portfolios among the Ministers. It is possible, however, that the Prime Minister may or may not keep under his direct charge any specific portfolio or there may also be a Minister without portfolio. A Cabinet Minister is put in independent charge of a Ministry or a Department. Two or more Ministries or De-

\[\text{Ibid.}\]
partments may sometimes be placed under one Minister. A Minister of State is sometimes also placed in independent charge of a Ministry or Department. But normally, he is attached to a Cabinet Minister. A Deputy Minister is always kept attached to a Ministry or Department, although he may enjoy certain powers specifically delegated to him.

**Terms of Office:** The Constitution does not provide any fixed term of office for a Minister. And the provision that a person may remain a Minister for six consecutive months without being a member of Parliament, implies that he need not necessarily cease to be a Minister even when the Lok Sabha is dissolved at any time, although in the case of dissolution it is normal for the Ministry to resign and thereafter continue as a Caretaker Government. When, however, the Prime Minister resigns, or he dies in office, all Ministers cease to hold office. Generally, therefore, a Minister remains in office so long as the Prime Minister desires him to be in office, unless the Minister dies or decides on any ground to leave his office of or ceases to be a member of Parliament for more than six consecutive months.

**Salaries and Allowances of Ministers**

The salaries and allowances of Ministers are to be such as Parliament may determine from time to time. This is intended to give an added Parliamentary control over the Ministers. At present, a Cabinet Minister gets a monthly salary of Rs. 2,250 and a sumptuary allowance of Rs. 500 per month. A Minister of State is also paid Rs. 2,250 per month, but no sumptuary allowance, and a Deputy Minister receives Rs. 1,750. No Minister is entitled to draw any salary or allowance as a member of Parliament. Nor can he hold any other office of profit. He is, however, entitled to an official residence free of charges. He is also entitled to transport and other allowances permissible under the Salaries and Allowances of Ministers Act, 1952.

**Rights, Immunities and Privileges**

Under Article 88 a Minister is entitled “to speak in and otherwise to take part in the proceedings of either House, any

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16 Art. 75(6).
joint sitting of the Houses, and any committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote.” A Minister has a vote only in the House of which he is a member. The Minister does not enjoy like the President of India any personal immunities. He has, however, the immunities and privileges as a member of Parliament.

**MINISTERIAL CHANGE**

The issue of ministerial change is multi-dimensional. There may be a change in the work allotted to a Minister by what is commonly known as Cabinet reshuffle. Then, a Minister may cease to hold office by his removal from post, resignation or death. Removal from office or resignation from post may be of a single Minister or of some or all of the Ministers. A person also ceases to be a Minister if he is not a member of either House of Parliament for six consecutive months. Any change in the office of the Prime Minister is, however, a class by itself, for it implies an impact on the whole Ministry.

**Cabinet Reshuffle**

The question of Cabinet reshuffle has many facets. Such a reshuffle may be intended to drop out a single or some Ministers or to include new faces in a Ministry. A reshuffle in a Ministry may also involve a change or changes merely in the allocation of portfolios among the Ministers. The Prime Minister is constitutionally competent to effect any Cabinet reshuffle at any time without consulting any of his colleagues. But in case of any such reshuffle all the political and other factors that influence his decision regarding the formation of a Council of Ministers and allocation of work among the Ministers are equally at work. The question of any Cabinet reshuffle, therefore, is essentially a political question.

**Removal from Ministerial Office**

Article 74(2) provides: “The Ministers shall hold office during the pleasure of the President.” This implies that the President is competent to remove a Minister from his office at any time and without assigning any reason for his removal. But this technical position has to reckon with the realities of Par-
liametary form of Government and also with the express requirement of article 74(3) that the Council of Ministers is collectively responsible to the Lok Sabha, and also that of article 74(1) that the other Ministers shall be appointed by the President only on the advice of the Prime Minister.

Clearly, a Council of Ministers enjoying confidence of the Lok Sabha cannot be dismissed by the President. The question of removal of a Prime Minister is also of the same nature. The removal of an individual Minister is an issue which lies in the domain of the Prime Minister's advice. However, as Ambedkar pointed out in the Constituent Assembly, this pleasure clause may be of use when a Minister, or a Ministry, enjoying confidence of the Lok Sabha proves thoroughly corrupt or inefficient. In extreme crisis conditions also this clause may have to be relied upon. Besides, the clause may be used in the case of a Ministry declining to resign or seek fresh mandate after a defeat in the Lok Sabha. In effect, thus, the pleasure clause is of limited significance and its real value lies in ensuring a smooth working of the principle of collective responsibility of the Ministers.

Resignation of a Minister

Although the Constitution does not speak of the resignation by a Minister or a Ministry, it is implicit in the nature of a ministerial office itself. A Minister may resign, may have to resign, or may be made to resign. He may resign for personal reasons. He may also resign for a genuine difference of opinion with the Prime Minister or his other ministerial colleagues or because he may consider himself morally responsible for any lapse in the working of his department. Parliamentary criticism of his any action or inaction or that of his any subordinate may also lead to his resignation. In case the Lok Sabha censures a Minister or a Minister is defeated on an issue and the Ministry

16a C.A.D., Vol. VII; p. 1158. Ambedkar actually said: "It would be perfectly open under that particular clause to call for the removal of a particular Minister on the ground that he is guilty of corruption, bribery or maladministration, although that particular Minister probably is a person who enjoyed the confidence of the House. The two conditions that govern the tenure of a Minister in office are purity of administration and confidence of the House."
does not consider this as a no-confidence motion against itself, the Minister has to resign. The Prime Minister may also request a colleague to tender his resignation and this request is taken as an order.

At times, Ministers may hand in their resignations to the Prime Minister for facilitating Cabinet reshuffle. The whole Ministry has to resign when it is defeated in the Lok Sabha or at the polls, although in the former case the Lok Sabha itself may be dissolved. A confrontation with the President may also lead to resignation by a Ministry. Interestingly, individual or collective resignations may also be acts of power game, pressure politics, face-saving or gimmercrackery.

In all cases, however, a Minister sends in his resignation to the Prime Minister, although there does not seem to be any constitutional bar to his sending resignation directly to the President. And it is for the Prime Minister to advise the President to accept the resignation of a Minister. There is also no requirement of a Minister putting in a written resignation. A telephonic message, an oral statement, or even an announcement in Parliament, may, in certain cases, operate as a resignation. But usually, a resignation is in the form of a letter written by the Minister. If, however, a Prime Minister decides to resign alone, or on behalf of his colleagues, he sends in his resignation to the President directly.

Change of a Prime Minister

Any change in the Office of the Prime Minister has the effect of ending the Ministry itself. If a Prime Minister is removed from office, the whole Ministry ceases to function. A Prime Minister may resign alone or he may tender his resignation along with, or on behalf of, all his colleagues. But the practical effect of all these situations is the same, i.e., the whole Ministry falls through. When there occurs a vacancy in the office of the Prime Minister due to his death also, the whole Ministry comes to an end. This principle is a corollary of the rule that the Prime Minister is at the head of the Council of Ministers and if the head falls, the body cannot remain alive.

MINISTERIAL RESPONSIBILITY

An executive responsible to the legislature is the essence of Parliamentary Government. Parliamentary Government is
responsible Government and not merely responsive or representative Government. To Birch\textsuperscript{17} the expression "responsible Government" has a wider connotation. In the first place, it denotes the responsible conduct and character of the persons in authority, \textit{i.e.}, a "trustworthy" Government that will not abuse its legal powers. And this is a function of political culture. Secondly, it means "responsive" Government, \textit{i.e.}, a Government sensitive to the public opinion and obsequious to the wishes of the majority. Thirdly, and most specifically, it implies a Government answerable to a representative body of the people for all its actions. Precisely, and practically, it is this third aspect only that really provides the fundamental characteristic of responsible Government.

As an operative principle in the scheme of a constitution this responsible Government is secured by vesting wide and necessary governmental powers in the head of the state and making a body of advisers responsible to an elected representative body of the people for the exercise of those powers; the advisers themselves being the members of the representative body. But the constitutional responsibility of the advisers means their accountability and not their culpability. A failure is followed by a loss of public esteem or office and not by a judicial conviction and sentence. The responsibility is political, even though enacted into the body of a constitution.

\textit{Legal Liability}: It should be noted, however, that in a country like England where the head of the state cannot perform a public act without the countersignature of a Minister, the Minister is personally liable under ordinary civil or criminal law if such an act is a legal wrong against a person or property. But in India this principle of personal legal liability of a Minister has not been accepted by the Constitution. Here the President's public acts are authenticated by the countersignature of the specified permanent public servants. Besides, the courts cannot inquire into the question of any advice tendered by the Ministers to the President. Consequently, there is no scope for holding a Minister personally liable for any public act of the head of the state who himself has been declared by article 361 immune from any personal liability for such an act.

\textsuperscript{17} See Birch, A. H.: \textit{Representative and Responsible Government}, \textit{An Essay on the British Constitution}. 
RESPONSIBLE TO WHOM

In the scheme of the Constitution of India the powers of the President are the responsibilities of the Ministers. The President appoints the Prime Minister and the other Ministers are appointed by him on the advice of the Prime Minister. All the Ministers hold office during the pleasure of the President. Technically, thus, although not expressly contemplated by the Constitution, the Ministers are responsible to the President whom they render aid and advice in the exercise of his functions. But, as Asquith would have pointed out,

"They give that advice well knowing that they can, and probably will, be called upon to account for it by Parliament."\(^{18}\)

Realistically, therefore, the Constitution expressly makes the Ministers collectively responsible to the Lok Sabha. But it is inherent in Parliamentary Government that ministerial responsibility is not only collective but also individual. Clearly, thus, the constitutional responsibility of the Ministers is to the President, on the one hand, and to the Lok Sabha, on the other. The ministerial responsibility to the President is an implied collective and individual responsibility of a formal nature intended to facilitate the smooth working of their express collective and inherent individual responsibility to the Lok Sabha of Parliament.

Responsibility to the Party

In effective terms, however, the responsibility of the Ministers to the Lok Sabha implies only their responsibility to the majority in the House, which consists of the members of the party in power. Responsibility to the Lok Sabha, thus, spills over through the majority Parliamentary Party as responsibility to the party. But significantly, the relation between the party and the Government in a liberal democracy is not the same as it is in a people's democracy. And even in a liberal democracy the precise nature and extent of responsibility to the party cannot possibly be the same in the case of a Government enjoying the absolute majority support of a single party and a coalition or a minority Government.

Responsibility to the People

Then, the Government owes a responsibility to the people at large and to the electorate in particular. The voters elect the members of a party to power on the basis of, almost well defined and definite, policies and programmes of action. The people give the Government a mandate, and the Government deems itself bound by it. And if the Government finds itself obliged to exceed this mandate, it considers it its bounden duty, a part of its solemn pledge to the people, to cause a dissolution of the legislative body to which it is directly responsible and to face the electors anew for a fresh mandate.

COLLECTIVE RESPONSIBILITY

The concept of collective responsibility of the Ministers is a child of practical necessity. A high powered collegial executive like the Council of Ministers must act as one single person to impart unity and efficiency in the governance of the country. It is a sound principle of solidarity that the Ministers swim or sink together. It is also necessary for their efficiency and efficacy that they be jointly held responsible for all that passes in Government.

Why Responsibility "Collective"

A multiheaded executive with immense and flexible powers is most likely to behave like a heinous hydra of unscrupulous self-seekers unless made to live and act together under the compulsion of collective responsibility. In the first place, the very existence of such an executive demands of its members a united front on all sides. They must not even appear to differ. Secondly, this unity is necessary for efficiency, and thirdly, this unity is conducive to securing responsibility. A plurality of personnel requires to be off-set by a unity for existence, unity for action and unity for responsibility. In a Council of Ministers multiplicity of the Ministers must be matched by the solidarity of the Council.

Unity Essential for Existence: A Council of Ministers, like any other multi-headed formation, can survive only when united, and divided in must fall. Consist as it does mostly of the loyalists, eminents and the stalwarts in party or public life,

a united Council alone can be capable of convincing the President, controlling Parliament, carrying with it its supporters and party members, carrying conviction with the people and facing the world. Of course, there are limits beyond which unity may not endure. But then, the fall out, or the split, must not be serious enough to displace the centre of gravity. For otherwise, all alike must be thrown in the dust.

Unity is Necessary for Efficiency and Efficacy: The Council of Ministers must not only exist, but also live, and live vigorously. Unity lends vitality. The Council has not only to live in the present, but also to live for the future. It must not only remain in power, but also use the power for public ends. Hamilton wrote in The Federalist:

"Energy in the executive is a leading character in the definition of good government... The ingredients which constitute energy in the executive are unity; duration; and adequate provision for its support; competent powers... That unity is conducive to energy will not be dispute..."21

The Cabinet being the apex policy making, directing, controlling and coordinating body and its members having final powers in these matters, the Government can be run efficiently and effectively only when there is a maximum possible harmonization of their policies, decisions and actions. There is always the need for giving a continuous and concerted drive to the various branches of the administration for achieving well-defined objectives, without frittering away energy in any wasteful frictions. Collective responsibility promotes mutuality. In the Cabinet "sharing of both authority and responsibility occurs corporately."22 And in order that this sharing may be really meaningful, a Cabinet Minister.

"is steadily fed—often overfed—with informations, oral and written, of the joys and sorrows of his colleagues".23

Unity Reinforces Responsibility: The governance of a country is a vast and complex affair, and with all the human wit necessary to devise institutions it may not be possible to

22 Idem.
specifically fix responsibility for each act, or event, on a particular Minister or a particular person. Yet responsible Government implies that the Ministers must be held responsible for all that happens in Government. The concept of collective responsibility provides a solution to this dilemma. It simplifies the matter by making all the Ministers alike responsible for all that passes in Government. This secures effective responsibility in the Government and makes individual Ministers more watchful, conscientious and hard-working. It also stimulates democratic process and is a realistic approach to securing responsibility in an area where the danger is that the Ministers will rather mismanage public affairs than break the law. In this situation, said Anson,

"...we insist that the action of the Cabinet is the action of each member, and that for the action of each member the Cabinet is responsible as a whole."24

**Meaning of Collective Responsibility**

Collective responsibility is central to the existence, central to the efficiency, and central even to securing the responsibility of the Council of Ministers. Article 75() therefore, requires: "The Council of Ministers shall be collectively responsible to the House of the People." But as the Constitution does not define the expression "collective responsibility", it must be taken to derive its meaning from its English setting. In 1878, Lord Salisbury spoke of collective responsibility in the British Cabinet system as follows:

"For all that passes in Cabinet each member of it who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues..."25

Chamberlain expressed a similar view in more liberal terms:

"Absolute frankness in our private relations and full discussion of all matters of common interest...the decisions freely arrived at should

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be loyally supported and considered as the decisions of the whole of the Government. Of course there may be occasions in which the differences are of so vital a character that it is impossible for the minority… to continue their support, and in this case the Ministry breaks up or the minority… resigns”.26

The cardinal element of collective responsibility is, thus, absolute freedom inside and absolute responsibility outside the Cabinet. All are responsible for each and each is responsible for all. And any one not prepared to accept this position must quit. Evidently, a defeat or censure of a Minister on a vital issue in the Lok Sabha is the defeat or censure of the Cabinet, and the whole Ministry must come to an end, unless retrieved by the concept of individual responsibility of the Ministers and the Minister chooses to resign to save his colleagues, or is made to resign by the Prime Minister or his other Cabinet colleagues, or is removed from office by the President on the advice of the Prime Minister.

**Maintenance of Collective Responsibility**

The solid foundation of collective responsibility is unanimity on socio-economic and political fundamentals. The fact that Cabinet decisions are deemed to have been freely and frankly agreed upon by all its members claims loyalty and support from them. And interestingly, the Rules of Procedure and Conduct of Business of the Lok Sabha provide only for a motion of no-confidence against the Council of Ministers and not against any individual Minister. Rule 198 opens by saying that “A motion expressing want of confidence in the Council of Ministers may be made subject to the following restrictions,” and then proceeds to state the restrictions at some length.

The Cabinet is usually a body of the leaders of an ideologically coherent and operationally self-disciplined political party. Even in coalitions there is the need for a minimum common programme to maintain solidarity in the Ministry and the coalescing parties and groups may also provide institutional support by forming coordinating committees. Also the brutal fact of struggle for survival in the face of opposition further cements this cohesion. And the means adopted for maintaining this solidarity and making it felt are noteworthy.

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"Better All Be in the Same Story": All Ministers must tell the same story about a Cabinet decision or a Cabinet action or about an action or decision of an individual Minister. This implies that a Minister must be willing to face, in and outside Parliament, criticisms not only for his own decisions and actions but also for those of his colleagues or of the Ministry as a whole. He must also be willing to speak, or must actually speak if necessary or required, only in defence of these actions and decisions, whether in Parliament or before the general public.

It is the duty of a Minister not only to defend the Ministry but also "to refrain from making any speech or to do any act which may appear to implicate the Government". Adverse public comments on the policies or actions of a ministerial colleague or of the department under his charge is also not permissible. Lord Palmerston pointedly stated this position as follows in a letter to Gladstone in 1863, which the latter himself reiterated in 1883.

"A Member of the Government when he takes office necessarily divests himself of that perfect freedom of action which belongs to a private and independent member of Parliament, and the reason is this, that what a member of the Government does and says upon public matters must to a certain degree commit his colleague and the body to which he belongs if they by their silence acquiesce; and if any of them follow his example and express as publicly opposite opinions, which in particular cases they might feel obliged to do, difference of opinion between members of the same Government are necessarily brought out into prominence and the strength of the Government thereby impaired."

As a corollary, therefore, a Minister must not make advance policy announcements without previous authorisation of the Cabinet or, at least without, prior consultation with the Prime Minister. The Prime Minister is, however, deemed competent to bind his colleagues because of his pre-eminent position and also the need for taking speedy actions in certain contingencies.


Must Take the Whip: A Minister must also vote for a measure of the Ministry. If required to be present in the House he must be present when the bell sounds for division. He is not expected to abstain even. And certainly, it is a gross violation of collective responsibility to vote against a Government measure.

Conscience Questions: There may be some issues over which the Ministers may agree to differ, or over which they may be allowed "conscience voting". It happened, for example, in the election of the President in 1969. But these conscience or open questions are either temporary improvisations or are definite symptoms of a deeper malaise or weakness in the Government. These are rather exceptions which prove the validity of the aforesaid twin elements of collective responsibility. Necessarily then any so-called "agreement to differ" is profane.

Veil of Secrecy: A veil of secrecy shields the internal freedom and frankness in Cabinet discussions, the rather "irresponsible licence in discussion". Secrecy of Cabinet proceedings is "the natural correlative" of collective responsibility. A Minister must observe this rule of secrecy as a matter of practical necessity. For any leakage is most certain to impair the strength of the whole body of Ministers and damage the effectiveness and efficiency of individual Ministers and of Government as a whole. Differences on various issues may be among the Ministers, but they may be aired and ironed out only behind the closed doors of the Cabinet room, away from the eyes of Parliament and the people at large.

INDIVIDUAL RESPONSIBILITY

Collective responsibility has its twin brother in individual responsibility. They are complementary, and in a sense, the former survives because the latter sustains it. Individual responsibility of the Ministers is as much essential as is their collective responsibility, although of the latter the Constitution does not speak a single word.

32 See Amery, L. S.: Thoughts on the Constitution; p. 70.
Why Responsibility “Individual”

The grand and great engine of collective responsibility of Ministers finds, first, in the doctrine of individual responsibility a necessary safety valve. A Colleague is sacrificed for saving the souls of his other colleagues. Secondly, the principle of individual responsibility makes for increased efficiency in Government and administration by adopting a scheme for division of labour and fixing the specific responsibilities of each Minister. Thirdly, it also provides some scope for creative energies of a Minister and gives him the satisfaction of having an area of authority over which he presides independently. Fourthly, it is a convenient machine to mow down an incompetent, corrupt, autocratic, recalcitrant or delinquent Minister. And fifthly, it also injects a sense of increased responsibility in a Minister and secures thereby a greater degree of effective ministerial responsibility.

Meaning of Individual Responsibility

In the case of collective responsibility, the whole Ministry is responsible for all that passes in Government. In the case of individual responsibility each Minister is responsible for what happens within the area of work specifically allocated to him. Although he is perfectly within his right to point out that a particular lapse is the result of the negligence or over-zeal of civil servants, he must accept the ultimate responsibility for all that his subordinates bring in to pass. The Chagla Commission Report on LIC deal said:

“The minister must take full responsibility for the act of his subordinates. He cannot be permitted to say that his subordinates did not reflect his policy or acted contrary to his wishes or directions”.

Later, Nehru in accepting the resignation of the then Finance Minister, T. T. Krishnamachari, as a sequel to the above Report spoke of this individual responsibility in equally significant terms:

“According to our conventions, the minister has to assume responsibility, even though he might have very little knowledge of what others did and was not responsible for any of the steps.”

34 Idem.
Maintenance of Individual Responsibility

Absolute and irretrievable responsibility each Minister, then, must accept for all the policies, actions or lapses of his area of administration. His vigilance alone can save him from being taken to the gallows, unless his ministerial colleagues decide to defend him at any cost whatever. But it is always considered prudent or expedient to let an individual Minister pay the price than to bring the whole Ministry to an end or at least to subject it to a disrepute, once it is found that an incident is too hard to swallow and digest. The Minister in question quits his office, although sometimes a mere change in portfolio may be served as a sop to Parliament or the public.

SANCTION BEHIND MINISTERIAL RESPONSIBILITY

No court can enforce ministerial responsibility. The sanction behind ministerial responsibility, whether collective or individual, is loss of office in the last analysis. Ambedkar said in the Constituent Assembly:35

"Obviously, there cannot be legal sanction for collective responsibility. The only sanction through which collective responsibility can be enforced is through the Prime Minister. In my judgment, collective responsibility is enforced by the enforcement of two principles. One principle is that no person shall be nominated to the Cabinet except on the advice of the Prime Minister. Secondly, no person shall be retained as a member of the Cabinet if the Prime Minister says that he will be dismissed. It is only when members of the Cabinet both in the matter of appointment as well as in the matter of their dismissal are placed under the Prime Minister, that it would be possible to realise our ideal of collective responsibility."

And what is instrumental in securing collective responsibility also goes to ensure individual responsibility. But it must be a poor Prime Minister and a sad reflection on his personality if he has to advise the President to remove a recalcitrant or an erring colleague. Nor is such a course of action conducive to the health, vigour, solidarity and integrity of a Ministry. The British "tradition—a kind of public school fiction—that no Minister desires office, but that he is prepared to carry on for public good", 36 is a sound principle of responsible

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Government. This implies that a hint from the Prime Minister or a prick of conscience should be enough to make a Minister lay down his office “for the public good”.

ROLE AND RESPONSIBILITIES OF THE PRIME MINISTER

The Constitution conceives the Prime Minister in article 74(1) as the head of the Council of Ministers, or at best, to import John Morley’s celebrated expression, as “the keystone of the Cabinet arch”. And it sparingly only twice—once in article 75(1) and then in article 78—speaks of his powers and functions. Yet the logic of Parliamentary Government and the “flexibility of the Cabinet system” clothe him with powers comparable only to those of a dictator.

In the Constituent Assembly, K. T. Shah apprehended that “the power which the Constitution seeks to confer on the Prime Minister makes it inevitable that a degree of power will concentrate in his hands, which may very likely militate against the working of a real responsible and democratic government.” And although Ambedkar did not accept this contention, he conceded that in the scheme of the Constitution the Prime Minister and not the Indian President was comparable to the American President.

The truth is that the Indian Prime Minister is the most powerful person conceivable under any constitutional scheme. As Jennings would have said, he is “the keystone of the Constitution”; the pivot of Indian polity. He is the focus of the Indian political system; the key-figure in Indian politics. He is the helmsman of the ship of the state and the motive-power in the governance of the country. He is “the linchpin of the Government,” as Nehru succinctly said.

LEADERSHIP ROLE OF THE PRIME MINISTER

To crown all the Prime Minister is the leader: the leader

38 Ibid., p. 158.
40 Loc. cit.
42 See his speech in the Lok Sabha on July 30, 1956.
of the nation; a leader of the community of nations; the leader of the party in power at the Centre and a political leader in the country; the leader of the Lok Sabha; and the leader of the Government. Leadership is vital in any collective endeavour. It is the pivot of political process and crux of executive power. And it is in terms of leadership primarily that the position and powers of the Prime Minister may possibly be presented as a fascinating and consistent picture. For otherwise, he is most likely always to loom as a potential dictator in the land.

THE LEADER OF THE NATION

The Prime Minister is the leader of the nation and symbolises the weal and joy, the hopes and aspirations, of the country. He is the voice of the nation and represents the mood and mind, the will and determination, of the people. To him his countrymen turn for leadership, direction and guidance and render loyalty and tender regards. To him millions look in distress and sorrow for redress and relief and express gratitude and give thanks. And all look to him for the unity, security, peace, progress and prosperity of the Republic. All have faith and trust in him as the architect of the nation, as a "Man of Destiny", with a rallying call of Jai Jawan, Jai Kisan, or Garibi Hatao, who not unoften

"...seems to have such extraordinary wisdom and competence that the community prefers to strike the fetters of constitutionalism from his talents."43

Charismatic Leader

The Prime Minister is a divine icon, a royal image, a parental figure, a great colossus, a national hero, a human ideal, inspiring devotion, loyalty, veneration, awe, adoration and emulation. He presides over the destiny of the nation. He has the lingering halo of a martyr as a glorious legacy of the long struggle for national unity and independence more hallowed as a motif of continuing strife for economic and social emancipation of the country. His is the constant role of a patriot as a saviour and sentinel of the society and the nation and as a crusader and soldier against colonialism and imperialism. He

has the crucial assignment of a master social engineer to build and protect "a social order in which justice social, economic and political, shall inform all the institutions of national life".\textsuperscript{44} He has to be an excellent statesman, thinker, theoretician, politician and administrator. And his is the solemn duty as a servant of the people to

"bear true faith and allegiance to the Constitution of India as by law established, ... uphold the sovereignty and integrity of India, ... faithfully and conscientiously discharge ... duties as a Minister of the Union and ... do right to all manner of people in accordance with the Constitution and law, without fear or favour, affection or illwill."\textsuperscript{45}

Yet the charisma and image of the Prime Minister, though apparently rooted in national tradition, social ethos and political conditions, are also the handiwork of the magic and charm of his personality, mystery and might of his office and immensity and diversity of his opportunities, all immaculately groomed in the past, meticulously harnessed in the present and carefully cultivated for the future. The magnetism and magnanimity of his personality and the power and prestige of his office are assiduously tended each moment on all private or public, social or political, and national or international occasions and are finely flourished with the aid of all the modern media of publicity. And then there are events, internal or external, which prudently faced add new feathers to his cap.

However, the myth and majesty of the Prime Minister provide a gorgeous mantle to hide his feet of clay, which he as a human being has. Much of the lustre is bound to fade with the expansion in education, enlightenment of the masses and economic progress and prosperity of the country. A change in the present political situation; a spread of democratic spirit; a transformation in social attitude and behaviour; and a growth in the sense of respect for the dignity of the personality of each individual will also aid in bringing the Prime Minister down from his ethereal pedestal. Then, there may be his grim failures and stark weaknesses. And most of all a clear demonstration of the limitations of his in a given socio-economic formation will surely make him turn into a person of earthly character. A

\textsuperscript{44} See Art. 38.
\textsuperscript{45} See Third Schedule, Form of oath of office for a Union Minister.
free people need to be dignified even in their gratitude to a great
Prime Minister. Daniel O'Connel observed:\textsuperscript{46}

"No man can be grateful at the cost of his honour, no woman at the
cost of her chastity and no nation at the cost of liberty."

\textbf{A LEADER OF THE COMMUNITY OF NATIONS}

Jawaharlal Nehru used to say that the Indian Prime Minis-\textsuperscript{\textit{\text{ter}}}
is great because India is great. The Prime Minister of this\textsuperscript{\textit{\text{vast ancient land}}; of the largest liberal democracy; of the
most peace-loving people; and of the biggest non-aligned nation
must, ipso facto, claim the attention of the world. He is the
sincerest champion of the oppressed and depressed nations and
a constant crusador against imperialistic and hegemonistic
designs. He maintains direct contacts with foreign Govern-
ments; holds discussions with visiting foreign dignitaries;
attends international conferences; and goes out to other coun-
tries on goodwill tours. He helps in working out schemes for
international economic and cultural cooperation; lessening of
international tensions; exercising moderating and mediating in-
fluences; generating friendly and peaceful international climate;
and generally setting the tone for the harmonious and coopera-
tive relations between the nations. He is a leader of the com-
munity of nations.

\textit{Champion of Panchsheel, Non-alignment and
Peaceful Co-existence}

Jawaharlal Nehru, the architect of India's non-alignment
policy, was an author of the famous \textit{Panchsheel} which is now a
universally recognised basis for international peaceful co-exist-
ence and cooperation. Non-alignment is not a pusillanimous
policy of compromise on principles. Nor is it a negative policy
of neutrality of an on looker in the face of injustice and oppres-
sion. It is a simple technique of keeping off and containing the
big or super powers and generating a moral international
climate for securing the principles of democracy, rule of law,
and cooperation in the community of nations. \textit{Panchsheel pro-
vides the major conditions under which nations are to search

\textsuperscript{46} See O'Connell, John (ed.): \textit{The Life and Letters of Daniel O'Connell},
\textit{M.P., 1846, 2 Vols.}
for avenues of international cooperation and harmony for building and maintaining enduring and just and honourable international peace.

But undeniably self-existence is the parameter of any foreign policy. The effectiveness and efficiency of the Prime Minister in any sphere of international life depends on his internal strength and support, although his any international score may always be deployed, or is deployed, to build or boost his national support and prestige. The international strength of the Prime Minister is, in the ultimate analysis, the inner strength of the nation. And unless the country becomes advanced socially, educationally, economically, scientifically, technologically and politically, the Prime Minister may not be able to make any meaningful contributions to the realisation of the noble ideal of peace, progress and prosperity of mankind as the objective of the country's foreign policy. The nation must be made strong to live harmoniously, peacefully and honourably and to cooperate effectively with dignity and equality with the other peace loving nations of the world.

THE LEADER OF HIS PARTY

The Prime Minister is the leader of the majority Parliamentary Party. He is the leader of his party. The party is his bastion and arsenal. Sometimes, in his person may be combined the highest offices of the party and of the Government, but invariably he has a great influence in his party. Even when for a while he may not have the party machine in his full grip, he can ignore to eventually fully control this lever of power only at the peril of his authority and influence. The strength of the Prime Minister is his control over his party. He cannot afford to loosen his grip over the party organisation.

He works out the policies of the party, looks to its organisational affairs and programmes from the highest organ of the party to its lowest unit. He keeps a watch on the personnel involved in running the party machine. All the major posts in the party are filled in conformity with his wishes. He attracts new talents to the party; injects new blood in the party hierarchy; determines questions of alliance with other groups or parties; and holds sway on the rank and file of the party. Matters of discipline in the party are also his concern. And
he keeps in manageable limits the autonomy allowed to the
trade union, farmers', youth and students' wings of the party.

The Prime Minister's personality and prestige are his great
assets in party management. His authority and influences are
also significant contributors in this field. His office and power
prove decisive in containing the big party bosses and keeping
the quibbling factions together. Then he must be an astute
politician, a great political strategist, who takes all events,
opportunities and power and influence available to him for build-
ing his position in the party and for improving the image of
the party in the public esteem. His position in the party and
his image in the public are his capital. But these are capital
for his party as well. Hiren Mukherjee once said of Nehru:47

"If to a public figure nothing is more rewarding than the love of his
people, Jawaharlal Nehru has been one of the most fortunate persons."

Of him Srinivas Iyengar wrote:

"...when he enters an assembly, be it a Select Committee or mass
rally, the effect is invariably the same. All eyes converge towards him,
all hands clasp in eager affectionate welcome as if to a preordained tune,
and hushed expectancy watches his intrepid movements and strains to
catch his words and whispers."48

The Election Idol

The role of the Prime Minister in leading his party to a
victory at the polls is well recognised. He is the election idol
of his party and quite often, a general election is an election
really of the Prime Minister. This involves the effectiveness of
his election strategy and the charm of his personality. Election
strategy has a wide spectrum in a federal country like India.
It involves timing of the elections; working out election mani-
festoes; determining the candidates for contesting the elections;
agreeing to electoral alliances; working out the details of elec-
tion propaganda frame; coining rallying slogans like Garibi
Hatao, Land to the Tillers; planning election tours, public con-
tacts, meetings, posters and platforms.

The way the Prime Minister speaks, mixes with the people,
responds to their show of affections electrify the masses and
enthuse and enthrall them. Then of the personality of the Prime

47 The Illustrated Weekly of India, Aug. 6, 1959, "Symposium on Nehru."
48 The Hindustan Times, Nov. 13, 1953.
Minister, it is to be noted that often a Prime Minister like Jawaharlal Nehru may become a legend with his baton, a red rose in his achkan and the churidars.

As the election idol of his party the Prime Minister has to be an expert in mass management, mass communication and mass propaganda. He is a mass leader and he must keep his eyes and ears fixed on mass reactions. Or as Carlyle would have said, he must follow the masses because he is their leader. He must endear himself to them and must make them feel that he is their man, one of them and yet one above them. This sort of mass electioneering is also an element of the Prime Minister's strength. This "necessarily, is to give the Prime Minister a national standing which no colleague can rival so long as he remains the Prime Minister".  

A Link Between the Party and the Government

The Prime Minister's unique position in the party and his leading position in the Government makes him a singular link between the party and the Government. Gadgil wrote that this link role of the Prime Minister of India  

"is a peculiar one. In the Cabinet he naturally claims to be the mouthpiece of the Working Committee, and he naturally claims that it is his responsibility that the decisions of the Government are in conformity with the broad principles and policies laid down by the Congress. In the Working Committee, where he cannot escape dominating, he represents the Government and is in a stronger position to necessarily press his views, backed up as they are by administrative experience."

THE LEADER OF THE LOK SABHA

There is no constitutional bar in having a Prime Minister who is not a member of Parliament or is a member of the Rajya Sabha. And in fact, Indira Gandhi was a member of the Rajya Sabha when she became Prime Minister. But it has become a recognised principle that the Prime Minister has his seat in the Lok Sabha, for it is that body which is the heart of democracy. The Prime Minister is the Leader of the Lok Sabha, and is assisted by a Deputy Leader of the Lok Sabha and a Deputy Leader of the Rajya Sabha.

**The Focus of the Lok Sabha**

The Prime Minister is the principal spokesman of the Government in the House. He makes important policy announcements and answers questions on general policies and principles. He also speaks on behalf of his colleagues and the nation. He is no mere majority leader in the Lok Sabha: he is the leader of the nation, the Prime Minister of India. The Minister for Parliamentary Affairs fixes up the business of the House under the direction of the Prime Minister and in consultation with the Opposition leaders in the Lok Sabha. His is the duty also to assist the Speaker in maintaining the dignity and authority of the House.

He is the custodian of democratic spirit in Parliament and the Lok Sabha in particular. He maintains a cordial relationship with the Opposition and earns their esteem as the leader of the nation, much above petty party considerations. He seeks and secures the cooperation of the Opposition in numerous matters. He has to read the mood and mind of the Lok Sabha and with the grace of a great parliamentarian he bows before the sentiments of the House, intervenes in debates, makes promises, gives concession and appeases angry members. He earns accolade even when his party is condemned.

All his performances in the Lok Sabha, or in the Rajya Sabha, have also in view the audience outside Parliament. For, it is a function of the Prime Minister to influence public opinion in the country. He has always to keep in mind the future of the party, the elections being held almost all the year round, and the general elections to Parliament and the State Legislatures. Parliament is a stage where his performances, the performances of his party, and the performances of the other parties are eagerly watched nationally and internationally. He has also to shape and mould national and international public opinion to suit national objectives, policies, and interests and actions.

**Dissolution of the Lok Sabha**

It is the proud privilege of the Prime Minister to appeal to the people over the head of the Lok Sabha, particularly in times of war and emergency, in the name of the unity, security and stability of the Republic. He may pressurise factions within
his majority Parliamentary Party to obey the party line and induce or compel, coax or cajole, the Opposition to cooperate or even to applaud the performances of the Government he heads.

A vital aspect of this power of appeal to the people over the Lok Sabha is his power to advise the President to dissolve the Lok Sabha—a power within his exclusive preserve, although there is nothing to prevent him from consulting his ministerial colleagues on this issue. However, the power of dissolution may also be used for other purposes. But it is always a baton in the hands of a Prime Minister and an occasion for asking the people for a fresh mandate of power.

**THE LEADER OF THE GOVERNMENT**

In the scheme of the Constitution all roads lead to the Prime Minister.\(^{51}\) He is the soul of the Government, or as Laski would have suggested, he "is central to its formation, central to its life and central to its death".\(^{52}\) The Prime Minister is the leader of the Government. He is the pilot in the cock-pit of power. He is the captain of the team of his ministerial colleagues.

**Formation of the Council of Ministers**

The Prime Minister has the key-role in the formation of the Council of Ministers. A Minister can be appointed by the President only on the advice of the Prime Minister. The Prime Minister has a free hand in determining the size of the Council and its membership. He also with equal freedom determines the size and membership of the Cabinet. He also decides upon the allocation of work among the Ministers. His freedom in these matters depends on his prestige and personality and the other surrounding factors and personalities. But normally, a Prime Minister in India who is his own self enjoys a measure of autocratic power as is enjoyed by a British Prime Minister while in the process of making his Cabinet.\(^{53}\)

**Termination of Ministerial Office and Cabinet Reshuffle**

Like his liberty in making the Ministry and assigning work

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to the Ministers, the Prime Minister has the freedom of asking a Minister to resign or to move to a new Ministry or Department. The Prime Minister alone may advise the President to dismiss a Minister from office if the Minister does not comply with his wishes. The right of the Prime Minister to terminate the office of a Minister and reshuffle Cabinet is absolutely unquestioned and unfettered. Of course, there are always certain surrounding limitations, but these are lesser generally than in the case of constituting a Council of Ministers. And the need of the Prime Minister’s this power, as also his power of nominating Ministers, for maintaining the principle of collective ministerial responsibility was stated by Ambedkar as follows: 54

“Therefore, the Prime Minister is really the keystone of the arch of the Cabinet, and unless and until we create that office, and endow that office with authority to nominate and dismiss Ministers, there can be no collective responsibility.”

Chairman of the Cabinet

The Prime Minister is the chairman of the Cabinet, the Council of Ministers and quite a few important Cabinet committees. He is also the Chairman of a body like the National Development Council. By himself “the chairman of any committee attracts special kind of loyalty, engendered by the vague feeling that business is expedited and improved by order and that one must be prepared to suffer the chairman’s ruling for the sake of the collective enterprise”. 55 And the Prime Minister is a chairman possessed of immense prestige and power claiming allegiance from his colleagues in the Cabinet as the leader of his party, the Government, the Lok Sabha and the people. His august presence at the head of the table at any Cabinet or committee meeting itself begins to act as a catalysis to promote harmony, cohesion and unity. A consensus at a Cabinet meeting is not often an unalloyed expression of the Prime Minister’s views.

However, the Prime Minister must have very excellent conference manners as not to let his colleagues feel deprived of the

pride of having contributed to Cabinet decisions. He must be patient and receptive, without resigning and abdicating, leading a Cabinet meeting to decide matters as he likes rather than allowing the spectre of the feeling of imposing his decisions on his colleagues becloud the atmosphere. For, he is among friends and equals at such a meeting. Yet he is their leader and the leader of the nation, the Lok Sabha, his party and the people. The sphere of his responsibilities far exceed the total spheres of the respective responsibilities of all his ministerial colleagues. And nothing that is deemed a function of the Cabinet can be kept out of the realm of his stewardship.

Policy Role

The Prime Minister is the real architect of the policies of the Cabinet. Command as he does a total view of the entire national and international field of comprehensible public affairs and situated as he is in the heartland of political power, it becomes his natural responsibility to lead the Cabinet in performing its policy function. The policy role of the Prime Minister is the role of the Prince of Denmark in the Hamlet of Cabinet policy function. What Churchill said once of a British Prime Minister ought always to be said more appositely of the Indian Prime Minister:

"Everyone must recognise that the Prime Minister is pursuing a policy of a most decided character and of capital importance. He has his own strong view about what to do and about what is going to happen. He has his own standard of values, he has his own angle of vision…. Besides all this, he has the power to do what he thinks best…. He is willing to take the responsibility, he has the right to take the responsibility."[56]

Control Role

Then, the Prime Minister directs, controls and supervises the entire field of administration. The degree to which he may go into administrative details varies from keeping a particular portfolio under his direct charge and closely watching the working of a Ministry like the Ministry of Foreign Affairs or having a special relationship with a Ministry like the Ministry of Finance to taking a general interest in the affairs of a Depart-

ment. He is often consulted, at other times informed and rarely misled by the Minister at the head of, or in, a Ministry or Department. He has access to all materials and documents at the disposal of the administration, and he may have even his own informal links and avenues of unofficial or official information. A Prime Minister of superb intelligence and diligence and alert habits and with hawk eyes alone can perform his overseeing role effectively. To succeed in his task, he must be a master administrator, and his administrative excellence is a great national asset.

But any Prime Minister must leave a lot to his colleagues whom he must trust. For, it helps not only his own efficiency and effectiveness but also engenders allegiance and team spirit among the Ministers and tends to promote creativity, efficiency and responsibility in the administration in general. Yet the Prime Minister must keep the reins of the administration tightly together in his hands. It is necessary that he must not only be honest and efficient but also effective and strict. He must set the tone of administration as an incorruptible, competent and effective, yet humane, entity. The nature of his responsibility is reflected in what B. N. Kaul, a former Principal Private Secretary to the Prime Minister, said before the Public Accounts Committee of Parliament. He was asked “Cannot the Prime Minister sit in judgment over other Ministers?” Quick came the reply: “He can. Ultimately the Prime Minister is responsible”.

**Coordination Role**

The ultimate responsibility of the Prime Minister for the entire affairs of the state makes him, to borrow the expression of Morrison, “an eminently coordinating Minister”. And although there are other agencies, individuals and elements effecting coordination in Government and administration, the Prime Minister’s role is crucial. The Prime Minister has to sort out differences and harmonise the working of the different institutions and individuals engaged in public affairs at both policy and execution levels. He gives a direction to the activities of

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the whole of constitutional Government and administration in the country. He mediates and conciliates between the inevitable conflicts of the different Ministries and Departments. Gadgil observed:

"Two brass pots cannot touch each other without making some sound. Once a Minister assumes a position of power, he begins to think of himself as infallible and his opinions as if divinely inspired. In the circumstance, when a dispute arises between two Ministers, they go to the Prime Minister whose word is final."58

**Patronage and Awards**

Although the country does not have spoils system and the Union and the State Public Service Commissions and the various constitutional provisions regulating public employment cover a large number of public servants, the Prime Minister's power of patronage are extensive and important. This power of patronage is further reinforced by his control over transfers, posting and promotions. And added to these is also his role in the awards and decorations of different kinds instituted by the Union. And although in these matters the views of his colleagues are, in appropriate cases obtained, it is his choice in such a matter that is final.

**Action without Cabinet Approval**

The pre- eminent position of the Prime Minister is also reflected in his competence to bind the Cabinet and his party to a course of action without prior consultation with either. This is an incidence as well as a necessity. It is an incidence of his primacy as a leader and necessity arising out of emergencies or even political, economic and strategic considerations. The exact limit of this role of the Prime Minister must depend upon his personality and the situations and other personalities surrounding him. But his right to act in this regard has never been in doubt; a right which he can enforce by his power to make or unmake the Ministry or to dissolve the Lok Sabha, apart from the authority and influence of his office and the force of his personality. On July 30, 1956, while answering the criticisms of C. D. Desmukh that the two crucial decisions on the

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State of Bombay, which led to his resignation from the Cabinet, were not of the Cabinet but of the Prime Minister, Jawaharlal Nehru, explained in the Lok Sabha:

"I am the Prime Minister of India, I know something of democratic procedure, about the Prime Minister's duties, the Constitution of India and the Constitution of Britain. The Prime Minister is the linchpin of the Government and he can make any statement on behalf of the Government."59

Channel of Communication with the President

The Prime Minister, as the head of the Government, is the sole official link between the Government and the President, the head of the State. And although technically a decision made by him individually without reference to the Council of Ministers is not deemed superior to any such decision of any other individual Minister, (for the President may require his such a decision to be placed before the Council for consideration), the requirement of his being the sole official channel between the Council and the President places him in a position of pre-eminence his no Cabinet colleague can claim. It is improper for a Minister to seek to revise a version of a matter given by the Prime Minister to the President. The Constitution specifically recognises the position of the Prime Minister in this regard in article 78 which provides:

"It shall be the duty of the Prime Minister—
(a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;
(b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and
(c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."60

THE PRIME MINISTER'S SECRETARIAT

The tasks of the Prime Minister are Herculean and the demands on his time and energy are heavy. He has to attend

59 See The Lok Sabha Debates, July 30, 1956.
60 Italicics are mine.
to not only official business of the State but also to look to numerous, party, political, social and personal matters, at the back of most of which lie dull chores of reading papers, notes, letters, memoranda and giving replies. Then, there may be need also for getting information instantly or discussing certain details intimately before forming judgment. To assist him in these matters entry 30 to the First Schedule to the Government of India (Allocation of Business) Rules, 1961, as amended up-to-date, provides for a Prime Minister’s Secretariat, staffed by permanent officials and employees.

Principal Private Secretary to the Prime Minister

The Prime Minister’s Secretariat is headed by the Principal Private Secretary to the Prime Minister and there are other Secretaries, officers and employees. The Principal Private Secretary is a person who compares in importance and influence with the Secretary to the Cabinet in the Cabinet Secretariat. His is an office of great confidence, even perhaps of greater confidence than that of the Cabinet Secretary, and his invisible role in Government and administration in the country is always interesting and often mysterious, though still awaiting to be unravelled.

THE PRIME MINISTER IN PERSPECTIVE

The position of the Prime Minister is unique. It is a position built on the strategic location of the country; the great position of this vast and ancient land; the national tradition and the social ethos; the national and international events, complexities, problems and issues; the rise and growth of the service state; the growth of the executive power and importance in general; the national consensus on democratic socialism; the scheme of the Constitution; the general pattern of political power in the country; the predominance of a single political party; the position of the Prime Minister in his party; the power and prestige and opportunities of his office; his personality; other personalities, national and international, around him; and his or their leadership role; and his or their real performances.

A beacon light, the life and light of the land, and a luminary in the lands around, the Prime Minister claims a primacy all around and more immediately among his Cabinet colleagues.
Among them often he may be viewed as Morley's primus inter pares—a first among equals—and also occasionally as Harcourt's inter stellas luna minores—a moon among lesser stars—but having ever a tendency to shine forth as "a sun around which planets revolve". There may be morning mist; dusky dimness; passing clouds and storms; and eclipse, partial or full; an aphelion; or even nocturnal darkness. But the Prime Minister must eventually emerge brighter as a perihelion mid-day sun, a perennial source of full life, light and energy.

Of course, the Prime Minister is always sustained by, and himself sustains, the surrounding constellation of true and trusted colleagues. The unity and corporate character of the constellation, the solar system, the Cabinet, over which he presides is certainly secured, sustained and maintained by his pre-eminence. Yet if his colleagues in the Cabinet forsake his company, he must vanish into airy nothing. But they, too, must remember that they can oppose him only at their own peril. Normally, he may send any one of them into political wilderness from which only "exceptionally forceful or fortunate or political rogue elephants" or may re-enter the arena of ministerial power, although the obvious limits to this must be recognised in the case of a strong minister, particularly when there is a Deputy Prime Minister also in office.

Office, Personality and Reformation of the Prime Minister

Great, indeed, is the office of the Prime Minister and great ought its occupant also be. As the saying goes "some are born great, some are made great and greatness is thrust upon some", the greatness of the office and personality of the Prime Minister is in all probability an admixture of all these three varieties of greatness. The great office of the Prime Minister is made greater by an incumbent of great personality, but a part of its great-

64 Cf. Barker, Sir E.: Britain and the British People, 1943.
65 See Amery, L. S.: Thoughts on the Constitution, p. 64.
ness is always thrust upon it by the events, opportunities, agencies and individuals surrounding it.

The personality of the Prime Minister, or at least his potentialities, may be great and the office makes him greater, but part of his greatness is always thrust upon him by the surrounding situations, institutions, individuals and the people. The incumbent of any great public office makes it greater by his greatness, but a great public office also shapes the greatness of its incumbent. A Prime Minister may grow great also in office. Besides, the office of the Prime Minister is always growing and it must also make his authority increasingly greater.

Very surely, in this country, too, "the office of the Prime Minister is what its holder chooses to make it". 67 "Personality undoubtedly plays a great part in determining the power of Prime Minister". 68 For power the great personality of a Prime Minister counts. Yet decisive is his actual performance in office. Not words but deeds really matter. Even an humble looking, home spun, tiny built Lal Bahadur Sastri secured an all-time high Gallop Poll score of 97 per cent in 1965, a figure much above that of Indira Gandhi or even of Jawaharlal Nehru. 69 K. D. Malaviya correctly suggests: 70

"Any leader who develops a healthy political perspective and responds intelligently to the needs of society is entitled to adoration and support, which can by no means be attributed to personal factors, although individual charm and political demeanor must be considered as essential attributes of a leader."

Service to the society, then, is the sole determinant of the greatness of a Prime Minister. And in this sense Prime Ministership in India has a grand past, it has a glorious present, and it has a brilliant future. Yet it is the future of a leader, and of a political leader at that. As the saying goes, "uneasy lies the head that wears a crown", but uneasier must be the

67 See Lord Oxford and Asquith: Fifty Years of Parliament, 1928, Vol. II, p. 185. See also The Life of Sir William Harcourt, op. cit., where in treating the British Prime Minister as inter stellas luna minores, he concedes: "in practice the thing depends very much upon the character of the man."


69 See The Hindustan Times, New Delhi, Aug. 28, 1969.

70 The Patriot, New Delhi, Aug. 30, 1969.
head of an "uncrowned king". Leadership is not an achievement but an opportunity; not a peak but a precipice; not being but becoming. Leadership is not a single scintillating act, but an unbroken series of successes, and perhaps in a crescendo. Even a series of most spectacular ascensions may not survive a single serious setback. And every failing of a Prime Minister with most certainty saps his authority and influence. A country with no suitable alternative in sight may even long tolerate him but history may never forgive him. A Prime Minister ought to so conduct himself as not to let time ever condemn him and so strive as to let human history boldly inscribe his name in letters of gold.
CHAPTER 25

THE UNION CABINET AT WORK

In law the Government of India, or the Union Government, denotes the President, in fact it means the Cabinet. And the elements of cooperative federal set-up with a pronounced Central emphasis; Parliamentary form of Government; principle of Parliamentary sovereignty; objective of building a welfare, or socialistic, society; requirements of national planning, development and economic and fiscal policies; importance of defence and foreign affairs; constant complexities and complications in home affairs; inadequacies of the State Governments; and predominance of a single political party make the Union Cabinet even in the federal Indian polity a national body, the chief collegial executive of the nation. It is, as Ramsay Muir\(^1\) would have said “the steering-wheel of the ship of State”, “steering its course and determining its speed.”\(^2\)

FUNCTIONS OF THE CABINET

Constitutionally, the function of the Cabinet is to aid and advise the President in the exercise of his functions, for it is but the inner ring of the Council of Ministers. But in practice its functions are vast and varied, its tasks Titanic.\(^3\) For, in reality the Cabinet is the Government. And quite commendably the Committee on the Machinery of Government in England viewed the British Cabinet as the Government and conceived of its functions as

\[\text{"(a) the final determination of the policy to be submitted to Parliament;}\]
\[\text{(b) the supreme control of the national executive in accordance with the policy prescribed by Parliament;}\]
\[\text{(c) the continuous co-ordination and delimitation of the authorities of the several Departments of the State".}\]^4

\(^2\) Sharma, Sri Ram: *Parliamentary Government in India*, p. 50
\(^4\) Report of the Machinery of Government Committee ((Haldane Committee)), 1918, Cmd. 9230, p. 5.

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TRIPARTITE DIVISION OF CABINET FUNCTIONS

These threefold functions of the British Cabinet, it should seem, also realistically portray the functions of the Indian Cabinet, or for that matter of any other cabinet under the Parliamentary form of Government. The varied functions of the Cabinet under the Constitution of India may conveniently be conceived in the tripartite categories of (i) policy function; (ii) control function; and (iii) co-ordination function, each of which raises issues of diverse dimensions.

Policy Function

On sound theory, the fundamental function of Government is said to be to lay down policies. In order to achieving complete objectivity and totally eliminating subjective selves, so powerful and flexible a body ought always to concern itself with the general and not particulars. The Cabinet is the supreme deliberative body on policy questions. Policy determination is its primary function. It is "the magnet of policy", as Barker would have suggested. The issues which the Cabinet decides, whether national, international, economic, social or political, are the serious and vital issues in the life of the community. And they are decided on considerations of wide-ranging and far-extensive nature, which are intended to normally produce broad propositions which, apart from their theoretical basis, at the same time provide an answer to the problem in hand, maintain a consistent link with the past, and also provide an objective guide-line for the future.

Yet there is a common awareness that any policy decision is neither a glass-house product nor is it a power decotamination process. There is the political party, to which the Cabinet members belong, with its ideology, strategy and aspirations. Then, the Cabinet has to decide policies not merely on sound theoretical considerations but also on grounds of practical politics, pressure politics, power game, personal predilections and prejudices. Then, there are Cabinet Committees, Ministries and Departments. Besides, there are the ghosts of the permanent public services always haunting the Cabinet deliberations. And so is the shadow of the press. A policy decision of the Cabinet is basically a question of practical political power or

5 Barker, Sir E.: Britain and the British People, Oxford, 1942; p 54.
personal strategy for the most part, often purposively illuminated by ideological effulgence. The variables, agencies and vicissitudes, visible and invisible, involved in Cabinet policy decisions are often innumerable and the way it decides issues makes it look like a rubber stamp or a camouflage, making an even inside observer feel that policies are not framed by the Cabinet.\footnote{See Amery L. S.: Thoughts on the Constitution, Oxford, 1947.}

The Cabinet is plagued by \textit{ad hocism} and immediacy, and at best, it is a place where policies are first disclosed as a preliminary to being made public.

To say this is, however, not to cast any aspersions on this highest efficient part of constitutional Government in the country, but merely to dispel illusions from the minds of the devotees of saintly politics in this ancient land of religions, gospels, gods, apostles and saints. Cabinet policy decisions cannot possibly be different from the innumerable decisions in other areas of human activities. And apart from the sanctity or constancy of their ideological foundation, which too is constantly at a disadvantage in the face of pragmatism, there is most likely to be nothing sacrosanct or enduring about them. In fact, what really happens is that the Cabinet formally accepts collective responsibility for all political decisions.

Also, what matters are of broad policy and what of detailed administration is also not clear. Yet, it is assumed that the Cabinet decides policies and its execution is left to the other administrative agencies, and perhaps with some reason. For, the Cabinet has neither the time nor the energy nor skill, its committee system notwithstanding, to examine in detail the implications which its any decision may involve when put into action. Necessarily, the administrative agencies concerned are entrusted with further task of working out the details of the scheme for implementing a Cabinet decision. But this process is also a process of sharing power with the Cabinet colleagues who preside over specified areas of administration and allow them the pleasure of furthering Cabinet objectives. The permanent sector of administration is also directly drawn into the main stream of power politics by the method of leaving details to be worked out by bodies other than the Cabinet, apart from its indirect involvement at the policy formulation stage.

However, a significant aspect of the policy function of the
Cabinet is to formulate its decisions on all national and international issues in a form that can be publicly put on view in Parliament and rationally defended before the wider public at home and abroad. This also includes the question whether a decision is to be given legislative shape. For, legislation is not merely "a handmaiden of administration", as Jennings says, but also an instrument of publicity, a mantle for image-building, so vital in democratic party politics. It is even an alibi for failures in other crucial matters. And although it is quite true that a distinction between legislation and administration in the context of the policy function of the Cabinet is not called for, its legislative role, including its role in Ordinance making and in operating Emergency and Martial Law provisions, is vital. For, to use the words of Ilbert,

"To say that at present the Cabinet legislates with the advice of and consent of Parliament would hardly be an exaggeration".  

Control Function

The historic function of the Government is to govern. And the Cabinet is the apex executive organ of direction, control and supervision in the realm of public affairs in the light of certain broad principles. It leads, drives, regulates and oversees, although it does not have as a body any legal executive power. These powers constitutionally vest in the President and are exercisable by him either directly or through officers subordinate to him. Legal powers appertain to the various Ministries, Departments and a plethora of other subordinate administrative agencies.

The members of the Cabinet are, exceptions apart, Ministers responsible for the working of the Ministries, Departments or other administrative agencies assigned to them. Individual Ministers are encouraged to take decisions regarding most matters in the respective areas of their responsibility. But a Minister is expected to bring before the Cabinet matters which he deems to have wide political implications. He has the obli-

8 Ibid., 232.
gation as well as the right to consult the Cabinet on vital political issues, the precise nature of such an issue always depending on the personalities and other surrounding factors involved.

_The Prime Minister's Preserve:_ In certain cases of urgency a Minister is, however, expected to consult at least the Prime Minister and certain matters, by their very nature, are not disclosed to the Cabinet until the last moment, but are decided in consultation with, or in accordance with the direction of, the Prime Minister. For instance, foreign affairs and defence are two such matters. Consequently, unless a Prime Minister himself holds under his direct charge any of these two, he keeps a close watch on the progress of work in these two sectors. The Foreign Minister is in constant touch with the Prime Minister. Matters of internal security under the Home Ministry also claim special attention of the Prime Minister. Agriculture, Food and supplies and major developmental activities, too, fall under his domain. Then, matters like dissolution of the Lok Sabha and conferment of decorations are normally the preserves of the Prime Minister, or the Ministry concerned.

_Role of the Finance Ministry and the Budget:_ The financial policies and control and economic and banking policies and control of the Finance Ministry have their own specific contributions to make in this regard. The budgetary function of the Finance Ministry is a class by itself. Although the Finance Minister generally keeps in view the opinions of his Cabinet colleagues relating to the matters under their specific charge, the budget is a document whose secrecy he shares only with the Prime Minister. The Cabinet is made aware of its contents only on the day it is presented to Parliament, although thereafter the Cabinet has the liberty to discuss it in detail and even to have it modified under the smoke-screen of paying tribute to the wishes of Parliament or the people.

_Control of Civil Service:_ Direction, control and supervision of civil service in particular is also to a great extent a matter outside the purview of the Cabinet, although its general supervisory function in relation to the civil service is accepted in principle. The function falls under the specific responsibility of the individual Ministers. The respective roles of the
Home Ministry, Finance Ministry, Cabinet Secretariat and Prime Minister's Secretariat in this regard are also significant.

Control over Appointments: Appointments also do not normally come before the Cabinet for discussion. Some appointments are made in accordance with respective service rules, some are discussed and finalised by even the Cabinet Committees; and some are made by the Prime Minister or the concerned Ministry. However, certain major appointments are invariably reported to the Cabinet when it may have an opportunity to make its views felt for future guidance. It rarely goes to the extent of making changes in any decisions regarding appointments already taken.

Control over Administrative Legislation: The power of the administration to make subordinate laws is an ever expanding domain which vastly adds to the power and prestige and influence of the permanent part of the administration. The Cabinet leaves this whole sector to the respective Ministries and Departments. For, it has not the necessary time, energy and skill to even touch it, let aside control it.

Coordination Function

Coordination is the key to any collective cooperative enterprise, which is achievable ideologically and institutionally. The Government of a country is basically a vast collective or cooperative venture. The entire political process in a community is a single whole and the institutions and individuals involved in it are innumerable. The Cabinet, situated as it is in the centre of the political process, is the country's zenith coordinating agency. It gives unity to the scheme of constitutional Government and administration in the country. It coordinates through time and space. It relates ideas and actions. It unites institutions and individuals.

Given a sound ideological base, the Cabinet function of coordination has to begin with policy formulation, move on to legislation and then course down to day to day administration. The Cabinet and Parliament are mutually interlocked and the Cabinet intertwines the whole of the executive branch with the legislative branch of the state. And in a well-organised constitutional system a co-ordinated executive-legislative operation will,

ipso facto, establish a perfect rapport with the judiciary. Thus, although there may be, and indeed are, other co-ordinating agencies and techniques at work, the Cabinet retains its vital role in securing a harmonious working of all the public functionaries in the country.

It should seem, then, that the diversity of Cabinet business, the immensity of its tasks, the enormity of its power and the vastness of its opportunities demand of its members superb intelligence, endurance, skill and efficiency. And what honesty, sincerity, devotion and dedication could do for the lack of those qualities is most likely to turn into a babel of pious sentiments in the absence of clear ideological commitment, energetic leadership role and clean credibility card. Ideology, leadership and creatability can alone serve as parameters of the Cabinet in action.

CABINET MEETINGS

A collegiate body, the Cabinet transacts its business at meetings held once in a week at the Rashtrapati Bhavan where the Cabinet Secretariat is situated, although when Lal Bahadur Sastri was the Prime Minister the Cabinet used to meet by rotation at the residence of the different Cabinet Ministers. There may also be special Cabinet meetings in addition to the weekly meetings. Only the Cabinet Ministers attend the Cabinet meetings as of right, and Ministers of State by invitation. Deputy Ministers do not attend these meetings. But there is a practice of occasionally inviting even the State Chief Ministers to participate in Cabinet meetings. Specialists and civil servants may also be invited to explain certain matters at Cabinet meeting. The Cabinet Secretary also attends all Cabinet meetings.

PROCEDURE AND AGENDA

The Prime Minister presides over the Cabinet meetings and in his absence the senior-most Cabinet Minister takes the chair, provided there in no Deputy Prime Minister. A Cabinet meeting has before it an agenda prepared by the Cabinet Secretariat under the direction of the Prime Minister who may even permit at a Cabinet meeting discussions on an issue not included in the agenda.
The Consensus Method of Cabinet

The Cabinet forms a consensus on an issue rather than decides upon an issue, and after an informal discussion of an issue the Prime Minister sums up the consensus on it. For the most part the Cabinet records the decisions already taken by the Prime Minister or other Cabinet Ministers acting on their own responsibility or in consultation with the Prime Minister or takes note of the views of the Prime Minister or other senior Ministers. Matters are never put to vote, for to use the words of Morrison:

“That would be shocking. That would give the whole thing away. That would exhibit a disunity in the Cabinet”.

Discussions at Cabinet meetings are not recorded in detail. On an extremely secret matter even notes circulated at a Cabinet meeting and any scribblings on note papers by the Ministers are taken away by the Cabinet Secretary at the end of the meeting. Only rough minutes of the meetings are prepared by the Cabinet Secretary, which include the salient points stated by the members and the conclusions reached by them. A copy of the minutes

“Is sent to the each Minister within twenty-four hours. Any corrections and amendments have to be conveyed within twenty-four hours of the receipt of the report. The Prime Minister is the final authority as to whether the suggested corrections are to be accepted or not”.

Secrecy of Proceedings

Secrecy is, thus, the security thread of Cabinet proceedings. It is a “natural correlative of collective responsibility” of the Cabinet and is also a practical necessity based on the need of free discussions at Cabinet meetings without any fear of publicity. It has the moral check of the Oath of Secrecy taken by


13 Gadgil, N. V. : Government from Inside ; p. 141.

14 See Amery, L.S. : Thoughts on the Constitution ; p. 70.

15 See Keith, A.B. : The British Cabinet System ; p. 248.
a Minister and a legal sanction in the Official Secrets Act, 1920. The principle of secrecy covers not only the period when a Minister is in office, but also extends to his any speech, writing or the like even when he leaves his office.

But the exact nature of the application of the principle of secrecy after leaving ministerial office has to be determined with reference to each particular situation. For, a secret matter which may be deemed a threat to security today may be relished as delectable dish tomorrow. However, when a Minister resigns, rule 218 of the Rules of Procedure and Conduct of Business of the Lok Sabha provides as follows with regard to his statement in the House:

“(1) A Member who has resigned the office of Minister may, with consent of the Speaker, make a personal statement in explanation of his resignation.

(2) Such statement shall be made after questions and before the list of business for the day is entered upon.

(3) There shall be no debate on such statement, but after it has been made, a Minister may make a statement pertinent thereto”.

Besides, the invisible presence of the fourth estate at Cabinet meetings is an established fact. To import the words of Laski, “There are few Cabinet meetings in which the modern press is not a semi-participant and there are fewer cabinets still in which some members have not been in fairly confidential relations with one eminent journalist or another.”16 Thus there are bound to be leakages. Then, Lal Bahadur Sastri also established a system of press briefing after each Cabinet meeting, which is still continuing. After each Cabinet meeting the Cabinet Secretary releases to the Press Cabinet decisions which were not deemed of a strictly confidential nature.

CABINET COMMITTEES

The Cabinet is a heavily burdened body and in certain cases even its own size makes it an unsuitable forum for arriving at a sound solution to a problem. The result is the emergence of committee system in the working of the Cabinet. These Committees are intended to help the Cabinet in all the areas of its functions—policy function, control function and co-ordi-

nation function—but primarily in policy determination and action integration. They are also the agencies for sharing real power.

**NUMBER AND MEMBERSHIP OF THE COMMITTEES**

The number and membership of the Cabinet committees are, to a great extent, determined by the Prime Minister. These committees are both *ad hoc* and standing. One such *ad hoc* committee recently set up is the Administrative Reforms Committee. The membership of the Cabinet committees varies from 2 to 12, which includes even non-Cabinet Ministers. The Prime Minister and one or two other senior Ministers are included invariably in all the important committees. Each Cabinet committee has also a chairman. The Prime Minister is the chairman of all the committees of which he is a member, and in other cases a senior Cabinet member is made committee chairman.

**Standing Committees**

The number of standing committees also varies from time to time and so do their names and memberships. And as Chanda comments, "Appointments to these committees have been made more on personal considerations than on the consideration of bringing only the ministers concerned together in relevant committees."17 Some of the Major standing committees at present are: the Political Affairs Committee, the Economic Committee; the Foreign Affairs Committee, the Defence Committee, and the Parliamentary Affairs Committee. These standing committees have become vitally integral part of the Cabinet and administration.

**CABINET SECRETARIAT**

The Cabinet Secretariat is another instrument designed for facilitating the effective working of the Cabinet. In 1935, the Viceroy's Executive Council set up a sort of Secretariat and the Viceroy's Private Secretary was designated to act as the Secretary to the Council. When India achieved Independence on August 15, 1947, this functionary was rechristened as Cabinet Secretary and since then the Cabinet Secretariat has been functioning as a self-contained unit.

ORGANISATION OF THE SECRETARIAT

The Cabinet Secretariat is headed by the Cabinet Secretary. He is the seniormost member of the Indian Administrative Service and he is increasingly gaining in prestige and influence. The Cabinet Secretariat is located at Rashtrapati Bhavan and comprises three Departments: the Department of Cabinet Affairs; the Department of Personnel and Administrative Affairs; and the Department of Electronics.

The Department of Cabinet Affairs

Evidently, as the name suggests, the specific responsibility for all agenda and records of the Cabinet and Cabinet committee meetings rests with the Department of Cabinet Affairs of the Cabinet Secretariat. Its main functions are as follows:

i. Preparation of the agenda for a meeting of the Cabinet or a Cabinet committee in consultation with the Prime Minister or the Chairman, respectively;
ii. circulation of the papers required for such a meeting;
iii. issuing of summons for such a meeting; and
iv. preparation and maintenance of the records of the proceedings of such a meeting.

"CONDUCT OF GOVERNMENT BUSINESS"

The Cabinet is an extra-constitutional and deliberating body. Its decisions have to be actually given a formally binding shape and eventually put into effect.

Under the sub-heading “Conduct of Government Business” in Part V of the Constitution relating to the Union Government there are two articles—article 77 and article 78. Already article 78, which deals with the duty of the Prime Minister to inform the President of the affairs of the Union, has been dwelt upon in the previous chapter in the context of the role and responsibilities of the Prime Minister. Article 77, which carries the marginal note “Conduct of Business of the Government of India,” has basically two parts. The first part comprising clauses (1) and (2) of this article concerns the formal expression of all executive action of the Union Government and the mode and effect of authentication of any order or instrument made and executed in the name of the President of India. These two clauses are directory and not mandatory in nature. Then,
the second part has clause (3) of this article, which speaks of the rules to be framed by the President for the more convenient transaction of the business of the Central Government and the allocation among the Ministers of the said business. Precisely, it relates to administration. This article says:

“(1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.”

**EXPRESSION OF EXECUTIVE ACTION AND AUTHENTICATION OF ORDER ETC.**

The provisions of clauses (1) and (2) article of 77, which are by nature directory and not mandatory, concentrate on the formal expression and authentication of the executive actions of the Government of India. Any such act must be expressed to be taken in the name of the President of India and be authenticated in the manner prescribed by him. This article is, however, not intended to cover executive decisions of all the types. Most of the executive business of the Government must be carried on by notings and endorsements on files, personal discussions and telephonic or other messages. It is not also concerned with the performance of an executive action, but is merely confined to its formal expression.

Clause (1) of this article is confined to executive actions required to be expressed in the shape of a formal order or instrument. Generally, when an executive action affects an outsider or is to be officially notified or communicated, it should be normally expressed in a formal shape, *i.e.*, in the name of the President. Besides, this clause is wide enough to include even other constitutional or statutory powers vested in the President, even of a judicial or *quasi*-judicial character. The Constitution does not, however, require any set phrase or formula for compliance with article 77(1).

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Authentication of Orders and Instruments

Clause (2) of article 77 authorises the President to make rules prescribing the manner of authentication of an executive order or instrument of a formal nature. The President has made the Authentication (Orders and other Instruments) Rules, 1958. Specific authorisations have also been made to cover the cases of the Ministries of Defence and Railways. The usual requirement is that an order

"shall be authenticated by the signature of a Secretary, Special Secretary, Additional Secretary, Joint Secretary, Deputy Secretary, Under Secretary or Assistant Secretary to the Government of India."

The effect of authentication of an executive order or instrument is that it becomes immune from any challenge as to its authenticity in a court of law. But this immunity is confined to the form of this order and does not relate to the validity of its contents. It does not also cover a condition precedent for the making of an order nor the recital that such a condition has been complied with. It should, however, be noted that unless expressly required by a statute, there is no requirement to include in an order or instrument a recital as to the compliance with a condition precedent. But in the absence of such a recital the presumption in favour of the validity of the order or instrument cannot be claimed, although further proof may be adduced to satisfy the court as to the compliance with the condition precedent.

Evidently then, the provisions of clauses (1) and (2) of article 77 being of a directory and not a mandatory nature, non-compliance with their requirements does not make an executive order or instrument a nullity. It merely takes away the protective mantle of immunity with which compliance with their requirements clothes an executive order or instrument against a challenge in a court of law as to the authenticity of its form. And in that situation the officer or authority has to prove the fact that the order or instrument was really made by the President. This may be done, for example, by producing before the court the relevant Government document.

ADMINISTRATION

Clause (3) of article 77 authorises the President to make rules for the more convenient transaction of business of the Government of India and for the allocation of the said business among the Union Ministers. The Government of India (Allocation of Business) Rules, 1961, as amended from time to time now in force in the country have been framed by the President in pursuance of his powers under this clause. Under these Rules the Government of India functions through a number of Ministries, Departments, Secretariats and Directorates. In addition, there are subordinate and attached offices of the Government of India and other autonomous and semi-autonomous bodies and units of local-self government under its control. The number of these organs of administration is increasing every day and there seems to be no concerted and consistent effort to organise them on sound administrative principles with regard to their structures and functions and operations.

Ministries, Departments and Secretariats

The First Schedule to the Government of India (Allocation of Business) Rules, 1961, as amended up to January 1, 1974, lists the various Ministries, Departments, Secretariats as follows:

1. MINISTER OF DEFENCE:
   (i) Department of Defence Production, and (ii) Department of Defence Supplies.

2. MINISTRY OF EDUCATION AND SOCIAL WELFARE:
   (i) Department of Education, and (ii) Department of Social Welfare.

3. MINISTRY OF FOREIGN AFFAIRS.

4. MINISTRY OF FINANCE:
   (i) Department of Banking, (ii) Department of Economic Affairs, (iii) Department of Expenditure, and (iv) Department of Revenue and Insurance.

5. MINISTRY OF AGRICULTURE:
   (i) Department of Agriculture, (ii) Department of Food, (iii) Department of Community Development, (iv) Department of cooperation, and (v) Department of Agricultural Research.

6. MINISTRY OF COMMERCE:
   (i) Department of Internal Trade, and (ii) Department of Foreign Trade.

7. MINISTRY OF HEALTH & FAMILY PLANNING:
   (i) Department of Health, and (ii) Department of Family Planning.

8. MINISTRY OF HOME.

9. MINISTRY OF INDUSTRIAL DEVELOPMENT:
   (i) Department of Industrial Development.
10. MINISTRY OF HEAVY INDUSTRIES.
11. MINISTRY OF INFORMATION AND BROADCASTING.
12. MINISTRY OF IRRIGATION AND POWER
13. MINISTRY OF LABOUR AND REHABILITATION:
   (i) Department of Labour and Employment, and (ii) Department of Rehabili-
   tation.
14. MINISTRY OF LAW AND JUSTICE:
   (i) Department of Legal Affairs, (ii) Legislative Department, and (iii) Depart-
   ment of Justice.
15. MINISTRY OF PETROLEUM AND CHEMICALS:
   (i) Department of Petroleum, and (ii) Department of Chemicals.
16. MINISTRY OF PLANNING:
   (i) Planning Commission, and (ii) Department of Statistics.
17. MINISTRY OF RAILWAYS (RAILWAY BOARD).
18. MINISTRY OF SHIPPING AND TRANSPORT.
19. MINISTRY OF STEEL AND MINES:
   (i) Department of Steel, and (ii) Department of Mines.
20. MINISTRY OF TOURISM AND CIVIL AVIATION.
21. MINISTRY OF WORKS AND HOUSING.
22. DEPARTMENT OF ATOMIC ENERGY.
23. MINISTRY OF COMMUNICATION.
24. DEPARTMENT OF COMPANY AFFAIRS.
25. DEPARTMENT OF CULTURE.
26. DEPARTMENT OF PARLIAMENTARY AFFAIRS.
27. DEPARTMENT OF SCIENCE AND TECHNOLOGY.
28. DEPARTMENT OF SUPPLIES.
29. CABINET SECRETARIAT:
   (i) Department of Cabinet Affairs, (ii) Department of Electronics, and
   (iii) Department of Personnel and Administrative Reforms.
30. PRESIDENT’S SECRETARIAT.
31. PRIME MINISTER’S SECRETARIAT.

A Ministry is the highest organ of administration at the Union level. It is essentially a policy determining body and has a political chief who is usually a Cabinet Minister, although a Minister of State, but not a Deputy Minister, may also be given independent charge of a Ministry. A Ministry may also have Ministers of State and Deputy Ministers allocated to it. The permanent head of a Ministry is known as the Secretary to the Ministry, although he may carry sometimes the designation of Principal Secretary or Secretary-
General. A Ministry usually has Departments, or Divisions or Wings with the status of Department. A Department, Division or Wing may be placed under the charge of a Minister of State, or even of a Deputy Minister, though rarely. Sometimes, however, a Depart-
ment is constituted distinctly from the Ministries and is also awarded
the status of a Ministry. The permanent head of a Department is the secretary to the Department. Then there are further subdivisions of a Department into wings, unit, cells, and the like. A Ministry or a Department may sometimes consist of Board, such as the Railway Board, or the Board of Direct Taxes. And all the Ministries and Departments have, in addition to their permanent heads, other senior officers of the rank of Joint-Secretaries, Deputy Secretaries and Under Secretaries. Besides, there are specialists, experts and advisers.

**Attached and Sub-ordinate Offices**

The attached and subordinate offices of the Government of India are the operating units of the administration. They do not form part of the Central Secretariat which consists of the Ministries and the Departments, but are offices, as their names suggest, attached, or subordinate, to the concerned Ministry or Department. These attached and subordinate offices have diverse functions, and the officers managing these functions also carry different designations, such as Registrar, Controller, Director, and the like.

**Autonomous and Semi-autonomous Bodies**

Under the control of the Union Government there are quite a few autonomous or semi-autonomous bodies concerned with economic, educational and cultural activities. These are for the most part bodies set up under different statutes and are appended to the relevant Ministry or Department. And the Union Government does not owe any direct responsibility for their working from day-to-day, although it must be held ultimately responsible for their all activities.

**Public Corporation:** Public Corporations are a type of autonomous bodies intended to combine the elements of public ownership, public control, public accountability and business principles. They are a constitutional innovation and not part of the Government. Yet in their case also, the Central Government has the ultimate responsibility. However, the Union may share its power with two or more States in regard to a public corporation like the Damodar Valley Corporation.

**Units of Local Self-Government**

The Union is responsible for local-self government in cantonment areas as much as it is responsible for the overall administration of
such areas. The port authorities, like the Calcutta Port Commissioners and the Bombay Port Commissioners, are also traditionally treated as the units of local government under the control of the Central Government.

MINISTERS IN ACTION

The Office of a Minister is not a sinecure. A Minister is a tremendously burdened person with all the worries and anxieties of getting into, remaining in and climbing up the ladder of political offices. Yet the office of a Minister is a prize every politician seeks. The power, prestige, influence and opportunities that a ministerial office carries are immense indeed, and the dark crevices of ugly urges excepted, the psychological desire for ministerial office may be stated in the following words of Gladstone:

"The desire for office is the desire of ardent minds for a larger space and scope within which to serve the country, and for access to the commands of the powerful machinery for the information and practice which the public departments supply. He must be a very bad minister indeed who when in office does not do ten times the good to the country that he would do when out of office because he has helps and opportunities which multiply twenty-fold, as by a system of wheels and pulleys, his power for doing it".24

Such a view of the urge for a ministerial office and its mechanism and opportunities make it imperative that a Minister must have above all the service to his country at heart. A sterling character, sincerity, dedication and honesty are the minimum requirements for a ministerial office. A Minister must not only be honest but he must also appear to be honest. Energy, diligence, intelligence, credibility and comprehension are some other. Leadership, drive, creativity and efficiency are then the other qualities which a Minister needs for success in office. Added to these are his effectiveness of oratory, managerial abilities, and capacity to endear himself to his friends and colleagues. He must be a good judge of persons and have the capacity for winning friends and influencing people. He must also make himself acceptable to the Prime Minister by his loyalty, or even for indispensability as a factor in the party machine. And in private and public he must so conduct himself as not to let his words and deeds come in conflict with the duties and responsibilities of his office.

24 Quoted by Finer, H.: Governments of Greater European Powers, op. cit.; p. 156
It is hardly expected that a Minister shall have special skill for handling a particular portfolio. He is basically an amateur, a generalist, intended to take a wide and broad view of the matters he may have to face while in office. And this, possibly, is achieved best by looking at the matters by the light of definite ideological commitments that a Minister is expected to have. Necessarily, then, there is no specific harm arising out of the practice of transferring a Minister from one type of job to another. Rather it is beneficial, in so far as it prevents him from re-enacting the role of the permanent head of a Ministry or Department.

However, long apprenticeship is the rule for a ministerial appointment and this gives an incumbent to a ministerial office a degree of insight into the affairs of the Government. Besides, he may possess by his education and training some special skill or knowledge of the matter he may be required to deal with as Minister. He may also, as a Member of Parliament, develop particular interest in and gain specialised knowledge of the affairs of a Ministry or Department. Basically, however, his is a world of laymen. And both for efficiency and efficacy it is necessary "to have in administration a proper combination of experts and man of world." But this should not prevent him from being an able administrator. For a Minister who is able to give political leadership and is at the same time a successful administrator is an asset.

Ministers and Civil Servants

The Ministers are the birds of passage moving in and moving out at the will of the electors. The administration has to continuously serve the country efficiently and effectively. The former have their political base and their consequent principles, priorities and preoccupations. The latter has its service base with necessary techniques, schemes and activities. Ex-hypothese, the former are temporary, the latter is permanent and naturally demands permanent personnel, the permanent administrators, technicians and legions of officers and employees. Finer says:

"If the politician is the bearer of the final law of numbers, of the majority to decide upon what shall be done, then the career administrator is the bearer of the

law of science and reflection as an ingredient of the final will. The problem is to inject into the sovereign power of numbers that other kind of sovereignty—what nature has made of things and men. The two should meld, values being modified by science, and science being the servant of values:

A Minister at the head of a great Ministry or Department is expected to have in him something of the making of a Prime Minister and also the competence of an excellent administrator. He must be able to provide leadership to and secure loyalty from his subordinates. He must play decisive role in the formulation of policies, and direct, control and supervise the department in implementing those policies efficiently, effectively and with a will. He must secure intra-unit and inter-unit co-ordination within his department and also help promote co-ordination with the departments of his other colleagues. It is not necessary that he should go into the great and numerous details of the working of his department, but he must be able to breeze into his department an air that will make his presence felt by one and all working under him. In short, to quote Cornewell,

“It is not the business of a Cabinet Minister to work his Department. His business is to see that it is properly worked”. 27

A Minister finds himself temporarily presiding over a Ministry or Department which is a segment of the permanent administrative machine with its own built-in traditions, policies, loyalties and scheme of values, pride and prejudices, personal rivalries and aspirations. He is made responsible for the working of dozens of administrative agencies and scores of public personnel under his charge. Yet due to the sheer volume and variety of work, he is most likely not to have the adequate time and energy to deal thoroughly with even the most important matters in his department. He is obliged to lean heavily on his permanent subordinates, some of whom possess excellent abilities, training, skill and experience which they are legitimately proud of. The Minister then, however great his other abilities, including his administrative excellence, may be, unless fortified with a sound ideological frame and solid political support, is never likely to even tell emphatically the civil servants “what the public will not stand”, much less to make his department run according to his will.

Clear ideological commitment and firm party support, or at least

27 Quoted by Bagehot, W.: The English Constitution.
the support of the Prime Minister, are essential to make a Minister vigorously ride his office horse. In the absence of these he is most likely to take from his subordinates not only what is good for the people but also be willing to be used by them for their personal or sectional ends. In the absence of political strength, shining character may go to a degree to help a Minister. Administrative ability may also be helpful. But if a Minister happens to use his subordinates for his some personal or party gains, certainly he must be prepared to suffer the humiliation of serving, and not being served by, his subordinates. With his security of service, superior skill and ability, and considerable experience, a civil servant may even completely ignore a weak, inefficient and unconscionable Minister. An unscrupulous civil servant may even sell his master or the department to his enemies, both within his party and outside the party to the opposition parties and other interested elements. The absence of experience, skill or specialisation is no handicap to a Minister, provided he has ideology, honesty and credibility. For, normally even the permanent departmental head is not an expert in the sense of a technocrat or a professional. He is a generalist like a Minister himself. And even when a Minister has a technocrat as his permanent departmental head, or has to decide a matter upon the advice of technocrats, he has the great benefit of the fact that any two specialists, like any two watches, always tend to differ. The Minister has always to make a choice between the alternatives presented to him, and sometimes he may have to make a choice from a bewildering variety of possible courses and also often opposed to one another. So long as he reads these alternatives by the light of certain general principles and makes an intelligent choice, his conduct is above reproach.

It must, however, be admitted that in some crisis conditions or on some fundamental issues relating to essentially technical matters, the Minister has to depend on the ability, training, experience, skill and loyalty of his subordinates who, given their characteristic anonymity and impartiality, are potent instruments to be usefully employed, unless, of course, they happen to be utterly inefficient or thoroughly degenerate in a desperately dangerous pathological condition. In fact, a prudent Minister takes his permanent head of department as a trusted and loyal friend. Lord Hankey once remarked 29:

“The permanent head of a great department of state is on almost the same footing of intimacy with his political chiefs as they are with one another. Ministers talk before them with the same freedom as they do with their colleague. These men would sell their souls before they would sell their chiefs”.

A Minister without civil servant is, indeed, completely helpless. But a civil servant without a Minister is a thoroughly unruly horse. As the saying goes, the civil servants may run the country best “for six months”. But if left to themselves even after that, they will surely lead it to ruination. The great need for having a Minister at the head of a Ministry or Department is to bring permanent administration under public control.\textsuperscript{30} In order that the civil servant may be “on tap” and not “on top”, a Minister responsible to Parliament has to be at the top of a Ministry or Department and he is held individually, and also collectively along with his other ministerial colleagues, absolutely and irrevocably responsible for all that happens or may happen under him. The rule of \textit{anonymity} of the civil service is an apt ally of this principle of ministerial responsibility.

It is always necessary to remember that an essential ingredient of the Parliamentary, or Cabinet, form of Government is “the clear division between politicians and public servants...and the close relationship between policy and administration.”\textsuperscript{31} And an excellent statement of the role of the civil service under Cabinet system is to be found in the following statement of Warren Fisher: \textsuperscript{32}

“All determination of policy is the function of Ministers, and once a policy is determined it is the unquestioned and unquestionable business of the civil servants to strive to carry out that policy with precisely the same good will whether he agrees with it or not. That is axiomatic and will never be in dispute. At the same time it is the traditional duty of civil servants, while decisions are being formulated, to make available to their political chiefs all the information and experience at their disposal, and to do this without fear or favour, irrespective of whether the advice thus tendered may accord or not with the Minister’s initial view. The presentation to the Minister of relevant facts, the ascertainment and marshalling of which may often call into play the whole organisation of the department, demands of the civil servants the greatest care. The presentation of inferences from the fact equally demands from him all the wisdom and all the detachment he can command.”

\textsuperscript{31} Ibid., p. 133.
THE CABINET, PARLIAMENT AND THE PEOPLE

An offspring of convention but of a deliberate decision, the Cabinet is, extraordinary situations excepted, a committee of Parliament, or more specifically of the Lok Sabha. Yet by its nature, character and conduct it is an executive organ par excellence. The members of the Cabinet are normally the members of Parliament, a representative body of the people, and they are effectively collectively and severally responsible to the Lok Sabha and ultimately to the people, though technically they are also responsible to the President.

The essence of Parliamentary, or Cabinet, Government is a representative executive responsible to a representative legislature. The Cabinet, though itself an executive organ, is a bridge between the executive and Parliament, or, to borrow the classic expression of Bagehot, it is "a hyphen that joins, a buckle that fastens", the executive and legislative wings of the state. The Cabinet intertwines the executive and Parliament together, they are made inter-dependent.

CONTROL OF CABINET OVER PARLIAMENT

The executive and Parliament, thus, get intertwined, they interact, in the Republic of India. Yet the two remain distinct entities. The function of Parliament is not to govern the country but to call to account those who govern it. It is the function of the Cabinet, the apex collegial executive organ of the nation, the real Government of the realm, to govern the country, and to govern it responsibly. And possibly the Cabinet governs generally responsibly.

"Not when it submits to Parliament but when it takes effective measures to dominate."

Cabinet control over Parliament is now an established fact of the Constitution. But in controlling Parliament the Cabinet concentrates primarily on the Lok Sabha, for, constitutionally it is responsible only to that House of Parliament. However, this fact of control flows from objective socio-economic and techno-scientific conditions under which public authorities have to function now and which have generally caused an increase in the power and prestige of the executive. And

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the control takes many forms, such as control over the members of Parliament; control over its functions; and control over its time and procedure.

Control over Members of Parliament

The growth of modern party system has changed the whole perspective of Cabinet-Parliament inter-relation. The members of Parliament are usually the members of one or the other political party and so are the members of the Cabinet. The Cabinet is a body comprising the leading members of the political party that has majority in the Lok Sabha. The authority of the Cabinet is its majority in the Lok Sabha and the duty of the majority is to support and sustain the Cabinet. The members of the majority Parliamentary Party are the persons whom the party in power sets up as its candidates for contesting elections and supports them in the elections, and they are elected for the purpose of supporting the Government.

The Prime Minister is the leader of the majority Parliamentary Party and also the leader of his party outside Parliament. The other Cabinet members are normally persons with a respectable party stature. The Government may normally be assured of support from its followers in Parliament. Woe be to the member who refuses a three line whip or dares openly defy his party. For, he is sure to have a visitation of a disciplinary action of his party, even culminating in his expulsion from the party and eventual exile in political wilderness. Powers of patronage and other methods of coaxing or cajoling members may also be usefully employed. There are, however, limits to the loyalty of a parliamentarian to his support to his party Government and these are the limits which also limit the extent to which the Government can ignore the “sense of the House” and the general “public feeling” outside Parliament. Normally, thus, the Cabinet is the master of the Lok Sabha, although “there are always limits to its mastery of which it must take account.”

Power of Dissolution: Then, the President has been invested with the power to summon and prorogue Parliament and to dissolve the Lok Sabha, a power exercisable by him on the advice of the Prime Minister and the Cabinet. The power of even summoning and pro-

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Proroguing Parliament may be utilized occasionally for controlling Parliament, say, when Parliament may be prorogued for issuing a Presidential Ordinance or for a backstage management of a vacillating or jeopardised majority support. But the power of dissolution of the Lok Sabha is a real potential instrument for controlling members of the Lok Sabha, although this power is usable for other political purposes, too. To quote Anson, this power.

"...is a formidable disciplinary weapon in the hands of the Prime Minister and becomes more formidable as the rapidly changing opinions of the modern electorate make the prospect of a general election more unwelcome to the member who values his seat. The Prime Minister can always use this power as a threat and thus influence 'wavering' in an approaching party division or followers who are slack in attendance and support." 38

Control over Functions of Parliament

The traditional function of the legislature is to make laws, to give justiciable shape to general conduct norms, by laying down authoritative policies. They are its control of the purse and control of the executive. Theoretically, even today the legislature performs these functions. But practically, its function is now confined merely to criticising the Government, and that too with a view to primarily influencing public opinion outside the House. The policies of Parliament are the policies of the Cabinet and the laws are the laws proposed by the Government, which can be given even a retrospective effect to cover any past act of the Government. Of course, these laws are administered subject to constant Parliamentary "supervision and criticism," 39 but it is supervision and criticism that is severely circumscribed.

Economic, financial and fiscal questions have become so complex and varied that it has become almost impossible for such a body as the Lok Sabha to even reasonably discuss any such question in all its dimensions. The annual financial statement, the budget, is a government measure and so are other financial and Money Bills. They can be discussed and criticised but any change in them is foreclosed, unless, of course, gracefully accepted by the Cabinet as a homage to the sentiment of the House or feeling of the public. For, otherwise a change amounts to a defeat of the Government resulting in its.

38 See Anson: Law and Customs of the Constitution; p. 327.
resignation or dissolution of the Lok Sabha, unless the incident is treated as snap voting.

Control of Procedure and Business

The Rules of Procedure and Business in the Lok Sabha or the Rajya Sabha reflect an anxiety to ensure priority and speed to the business proposed by the Cabinet. The Cabinet has even such instruments as closure motions, Kangaroo voting and guillotine to bypass even a prescribed normal procedure for a Bill. The business of a House of Parliament for a day is also fixed in consultation with the Business Advisory Committee of the House and it is the function of the Minister for Parliamentary Affairs, who is a member of the Committee, to secure priority for the disposal of Government business.

The Minister for Parliamentary Affairs and the Whips

The Minister for Parliamentary Affairs is the executive agency of the Government in Parliament and he functions under the direction of the Prime Minister who is the leader of the majority Parliamentary Party and the Leader of the Lok Sabha. The Minister for Parliamentary Affairs is a member of the Business Advisory Committee of each House of Parliament. He is the Chief Government whip and has other whips to support him in managing the Government majority in both Houses of Parliament and for securing a smooth disposal of the Government business in Parliament. He is an official link between the Government and Parliament; an arm of the Cabinet to keep control over Parliament in its day-to-day working.

CONTROL OF CABINET BY PARLIAMENT

The Cabinet controls Parliament. Normally, it is the master of Parliament. But Parliament has also the power and the means to control the Cabinet. True, the control of Parliament over the Cabinet has always to reckon with the vital element of party system. But to suggest that Parliamentary control of the Cabinet is totally illusory is to miss the real purpose of Parliamentary Government. The Constitution makes the Council of Ministers collectively responsible to the Lok Sabha and the Ministers are also individually responsible to the House. This implies that the Minister must command the confidence of the House or quit. But the question of
confidence is a complex one, and defeat of the Government is only one aspect of this question, albeit a very significant aspect.

In Parliamentary Government the function of the majority is to govern and that of the minority to oppose. Both the Government and Opposition live by agreement. The Opposition cannot, unless it be a minority Government, hope to turn out a Government without a split in the majority Parliamentary Party and such an occasion is almost rare. But even the case of a minority Government or a split in the majority Parliamentary Party may not induce the Opposition to turn out the Government. For, the alternative may not be clear, palatable or conducive from the angle of its own power game. Then, the supporters of the Government, too, are not expected to be mere Parliamentary automatons. They are expected to contribute to the national well-being and play a constructive role in the governance of the country. Parliament, thus, turns into a constant critic of the Government.

Parliament as a Critic

Parliament is, indeed, a forum for a continuous and critical assessment of the performance of the Government and administration in the country. It does not create; it merely criticises. Parliamentary criticism keeps the Government and administration on a constant alert. Criticism in detail helps to secure concessions and redress of individual grievances without compromise on principles. But criticisms do not necessarily weaken the Government. For, some of the criticism are self-defending and some give the opportunity to the Government to defend itself and earn approval in general. A Government that can publicly announce its policies and justify them, or even win the approval of the Opposition, is a Government strengthened in the eyes of the nation and the world.

For an effective exercise of this function of criticism Parliament has potent instruments in its armoury. There are opportunities for debates on legislative and financial measures and proposals placed by the Government before a House, including the opening speech of the President and the demand for grants or supplementary grants.

Jennings, Sir I.: Cabinet Government op. cit.; p. 486
The Government may also decide to make a statement on any issue of public importance or a Minister also may make a statement explaining his resignation. Then, members may move a resolution relating to a matter of public importance; a motion relating to a matter of general public importance; and a motion for adjournment on a matter of urgent public importance. A notice for discussion on a matter of urgent public importance may also be given by the members.

Questions: A very significant instrument of control and criticism of the Government and administration is the power of the members to ask questions. And although question are to be within the limits laid down by the Rules of Procedure and Conduct of Business of a House and a Minister is not bound to answer a question or may decline to answer a question on grounds of public interest, their value is great. A question may be followed by supplementary questions.

Although interpellation is not permissible, there may be a demand for half-an-hour discussion on matters of public importance arising out of a question the answer to which requires elucidation. Then, a member may move a “motion for papers” for getting information from the Government on public matters.

Vote of Censure, Vote of No-confidence and Defeat of Government

By the various means available to them the members of Parliament may always expose the weakness of the Government, without necessarily weakening it, and may also succeed in securing redress of individual grievances and occasional concessions, or even the removal or resignation of a Minister, without defeating a Government or turning it out of office. The defeat of the Government is a serious matter for all.

The Government or a Minister may be defeated on any issue in the Lok Sabha. And unless the defeat is a result of snap voting, or the matter is deemed to be not vital, or the individual Minister concerned sacrificed, the government resigns. A defeat on a financial or Money Bill or the Budget or a demand for a grant is treated as a defeat on a vital issue, unless it is a defeat caused by snap voting. An amendment carried in the House in the opening speech of the President is also a defeat on a vital issue leading to the resignation of the Government. On other matters, the Government in resigning as a result of a defeat has a discretion.

S: CI-48
Then, a motion of censure may be moved against a Minister or the Ministry, and if carried in the Lok Sabha, either the Minister or the Ministry must go out. The Lok Sabha may also pass a vote of no-confidence against a Ministry, but not against a Minister, and the Ministry goes out. In all cases of defeat, however, a Ministry, instead of resigning may advise dissolution of the Lok Sabha and appeal to the electorate for a fresh mandate. But in opting for dissolution the Ministry is generally guided by the importance of the issue on which it has been defeated; the nature of the issue, i.e., its impact on popular feeling; the loss of its own prestige as a result of the defeat; the loss of its own strength as a result of the defeat; the threat to its own cohesion as a party; the possibility of its closing its ranks without dissolution; the general condition in the country, for example, instability, emergency, insurgency, or war; and the probability of its being returned to power after dissolution.

The Rajya Sabha

The Lok Sabha is the main forum of Parliamentary control of the Cabinet and it is to this House that the Ministers are collectively responsible. Yet the Rajya Sabha is also to be taken care of by the Cabinet. For, this House, except in matters expressly provided otherwise, enjoys co-equal powers with the Lok Sabha and has also some special functions. The instruments of usual Parliamentary control, such as debates and questions, are also available to it and it is also represented in Parliamentary commissions and committees.

The Rajya Sabha can effectively block any Public Bill, which is not a financial or Money Bill, or also negative a Constitution (Amendment) Bill. Actually in the case of the Constitution (Amendment) Bill abolishing the privy purse of the Princes, this House defeated the Bill, although by a tenuous majority. The need for managing the Rajya Sabha and also keeping it in mind in the Cabinet-Parliament interrelation is all the greater in view of the fact that there is a danger that a party, having a majority, even an overwhelming majority, in the Lok Sabha, may not have a majority or proportionate majority in the Rajya Sabha after the emergence of poly-centric party politics in the States.

Parliamentary Commissions and Committees

Parliament also sets up commissions and committees for various purposes. There are standing committees of Parliament. Then, there
may be *ad hoc* committees for purposes varying from examining a legislative proposal to making an enquiry into a particular administrative action or assessing the public opinion on a matter. Again, there are consultative committees attached to the different Ministries and Departments of the Government. These commissions and committees also are arms of Parliament for eliciting information from the Government and criticising and controlling the Government and administration in the country.

*Role of the Opposition*

Whatever the instruments and opportunities of controlling and criticising the Cabinet Parliament may have, the Opposition always spearheads the onslaught on the Government and administration of the day and makes a maximum use of those instruments and opportunities, further reinforced by such techniques as walk-outs, sit-ins, and the like. Its function by nature is to oppose, criticise and corner the Government. And depending on its own strength and its calculations of its own problems and prospects and the political and socio-economic problems and prospects in general, the Opposition is ever on an alert to catch the Government on the wrong foot, to throw it off the leg, and even to consign it to damnation for good.

It should appear, then, that the modalities of Cabinet-Parliament mutual control are apparently adequate for making each function normally and effectively within its bounds and to fruitfully co-operate with each other in the governance of the country, although their operations are subject to the numerous internal and external variables which go to influence the working of any political contrivance and may cause also imbalances in the Cabinet-Parliament mutual control equation. But normally, the Cabinet and Parliament should not prove political rivals in public affairs working at cross purposes and flying at each other’s throat, provided they clearly keep in mind the basic objective of Parliamentary Government stated by Ilbert as follows:

"Parliament does not govern. A strong Government tempered and controlled by constant, vigilant and representative criticism is the ideal at which parliamentary 'institutions' aim."42

THE PEOPLE

It seems that in representative and responsible Government the Cabinet has to carry conviction with Parliament and both Cabinet and Parliament must have credibility in the eyes of the people. To the Cabinet-Parliament interdependence the ubiquitous people add yet a third dimension, however ill-organised, illiterate, ill-fed, ill-clad, inert, and credulous the people may be. The Cabinet-Parliament mutual control equation is in fact a Cabinet-Parliament-people triangle. The Cabinet and Parliament must both play their pipes to the people, for the people are the sovereign, the master, who pay the pipers. And although the pipers may play a tune of their own and make the people even dance to their tune, they must make the people feel and believe that it is the tune ordered by the people themselves, or it would have been ordered by them, or at least it is needed for or by them.

The Cabinet-Parliament-people equation is by itself complex and it becomes further complicated because of the innumerable variables entering into or surrounding it at any time. For example, Cabinet-Parliament-people relation in normal times cannot be the same as in times of war, emergency or crisis. Again, it cannot be the same when there is a single party dominance and when there is a bi-party balance. Then, there may also be at any time at work in varying proportions and combinations factors like leadership; tradition of the nation; social ethos and political culture of the community; political and socio-economic formations; level of social, economic, educational and political development; international events, interests and involvements; internal events, acts, interests and involvements; and the parties and personalities concerned. And the only thing that can be said with a degree of certainty is that although a built-in tension may be assumed in any Cabinet-Parliament-people equation, they—the Cabinet, Parliament and the people—must work in harmony and unison for the peace, progress and prosperity of the Republic.

The Electorate and Mandate

Representative and responsible government involves both a daily accountability of the Government to Parliament and also a periodical accountability of the Government to the people, the electors. The electors have to be approached periodically for votes when the
Government is to render account for its deeds. And although there may be diverse and devious means of managing the electors, there are obvious limits to this. The widening gulf between the promises and performances of the rulers further distending the increasing gap between the people's expectations and their fulfilments is certain to create a yawning abyss between the two sides. The result is a weakening of the Government and its final exit. This may also erode the legitimacy of a socio-economic and political system itself.

*Mandate*: A party, a person, asking the electors for votes places before them more or less a definite programme of action. A party issues its manifesto outlining the aims and objectives it wishes to pursue, even indicating a broad outline of the programme of action to be adopted for achieving those objectives. It is an offer, a promise, a commitment, to the electors, and when they vote for the party they accept the offer. This implies a solemn contract between the party voted to power and the people. This is an authorisation by the people, the sovereign, to their representatives to pursue the promised objectives and execute the promised programmes. This is the *mandate* of the people to the Government.

This mandate has both positive and negative aspects. Positively, it means that the Government must strive its best to perform its commitment to the people, or else forfeit the confidence of the people and its own claim to be returned again to power. Negatively, it implies that the Government shall not ordinarily exceed the bounds of the commitments made in any vital matter. And if the Government ever during the term of its office finds itself faced with any vital issue for which it cannot reasonably be deemed to have been authorised by the electors, it must face the electors first for a fresh mandate to deal with the issue. This theory of mandate is useful in securing and sustaining a constant equilibrium between the needs of the people, opinion of the people and thinking of the public authorities, although "it must necessarily be vague and its operation a matter of dispute in*"\(^\text{42a}\) any given situation.

**EXECUTIVE ASCENDANCY**

The rise and growth of the service state, tremendous technological; and scientific developments; the increased interdependence of the

\(^{42a}\) Jennings, Sir I.: *Cabinet Government*, op. cit.; p. 505.
nations; the multiplying complexities of internal and external affairs; and the growth of party system have made executive primacy an established fact of the twentieth century constitutionalism. There has been to a great extent an increase in the functions of the executive because of a growth in the functions of the state in general. The executive has also secured for itself substantial footholds in the traditional domains of the legislature and the judiciary, including acquisition of powers in the shape of administrative legislation and administrative adjudication.

But in itself there is nothing bad in executive ascendency which is a necessary outcome of objective factors. What is required is to take note of the clear manifestations of this predominance and to indicate the broad conditions for harnessing the new accretions to the executive domain for the increasing well-being of the people. By way of sample, these manifestations may be noted here in relation to the Prime Minister, the Cabinet and the public servants.

**PRIME MINISTER’S DESPOTISM**

By virtue of his Himalayan position, the Prime Minister commands primacy all around. And this primacy often gives him the appearance of even a despot, a dictator. “The flexibility of the Cabinet system allows the Prime Minister to take upon himself a power not inferior to that of a dictator,” provided the Lok Sabha will stand by him, indeed a crucial proviso in normal times. But such normal times are normative times generally speaking. The Government has now always to act under crisis situations. And to this has to be added the conditions of war; one party predominance; inclusion of persons in the Ministry with no party or popular base; and commitments to building a new order of society. All these and many more factors combine to raise the Prime Minister much above the others around him, and specially in relation to his Cabinet colleagues. His powers, prestige and authority are ever increasing.

**The Prime Minister’s Government**

It often appears that the Prime Minister both reigns and rules the country with the advice of the Council of Ministers. The Government is his Government. Occasions there are which place the

43 See Morley, John: *Walpole*; p. 158.
Prime Minister in supreme command of his ministerial colleagues and his position as the First Minister of the Republic makes him the real master of the Cabinet. And here Churchill’s following words acquire a greater resonance:

"In any sphere of action there can be no comparison between the positions of number one and number two, three or four. The duties and problems of all persons other than number one are quite different and in many ways more difficult. It is always a misfortune when number two or three has to initiate a dominant plan or policy. He has to consider not only the merits of the policy, but the mind of his chief, not only what to advise, but what it is proper for him in his position to advise; not only what to do, but how to get agreed, and how to get it done. Moreover, number two, or three, will have to reckon with numbers four, five and six, or may be some bright outsider, number twenty. Ambition, not so much for vulgar ends, but for fame glints in every mind. There are always several points of view which may be right, and many which are plausible.

At the top there are great simplifications. An accepted leader has only to be sure of what it is best to do, or at least to have made up his mind about it. The loyalties which centre about number one are enormous. If he trips, he must be sustained. If he makes mistakes, they must be covered. If he sleeps, he must not be wantonly disturbed. If he is no good, he must be poleaxed. But this last extreme process cannot be carried out every day; and certainly not in the days just after he has been chosen."

Truly indeed, if a Prime Minister be an acknowledged leader, he may find great simplifications at the top and it is an advantage, too, for both him and the country. But the overwhelming disadvantage inherent in this situation is "That the Prime Minister is vested with formidable power and influence and unless he be a genuine democrat by nature, he is very likely to become a dictator". In fact, he must be a god among mortals, who successfully mans in a true democratic spirit the office of the Prime Minister with dedication, honesty, sincerity, grace, ease, efficiency and efficacy. And woe be to democracy in this land of Bhakti that he soon discovers, or is made to discover, his this godliness and turns into a living god among his mortal countrymen. In India the danger to democracy from personified gods is very great, indeed, against which the nation must guard itself. Ambedkar said:

44 Churchill, W.: Their Finest Hour; p. 15.
“This caution is far more necessary in the case of India than in the case of any other country. For, in India, Bhakti or what may be called the path of devotion or hero-worship, plays a great part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But in politics, Bhakti or hero-worship is a sure road to degradation and eventual dictatorship.”

But to become an acknowledged leader and to ever continue in that unquestioned position is one of the greatest ifs of human life and history. It depends on the myriads of imponderables and variables, and it must be only rarely in human history that a country finds such an acknowledged leader. Normally, the leadership of the Prime Minister is subject to numerous challenges and is built on essentially limiting factors. For example, the centrifugal character of the society, the compromise character of even a single predominant political party; the limitations of the socio-economic structure; other personalities and interests involved; and many other such elements may militate against the emergence and continuance of the unquestioned leadership of the Prime Minister.

The Prime Minister is not a modern oriental despot. He is not even a “Grand Vizier”47, as Gladstone would have testified. His powers are primarily his influence as a leader. Constitutionally, his decisions are not superior to that of his any other ministerial colleague. For, a decision reached by him individually, like that of other individual Ministers, may be required by the President to be placed before the Council of Ministers for consideration48. Consultation with the Cabinet colleagues may, thus, be a strategic advantage.

Then he may find it convenient or expedient to always keep his Cabinet colleagues informed of, or take them into confidence and consult them on, particularly thorny issues or issues with unforeseeable implications or outcome. The Prime Minister must carry his Cabinet colleagues with him, for, quite often they themselves may be political leaders of great standing or even some consequence in the country or in their home States. He may not find it possible to manage his party without their active co-operation in such a vast country.

The Prime Minister is necessarily ever apt to be powerful, but he can never opt for dictatorship. He has to be aware of the basic

48 Art. 78(c).
problems of the country; of the fetters of the socio-economic and political structures; and the evident foibles of the dictators in the lands around. Then by nature, character and conduct each Prime Minister is *sui-generis*. His own good sense and the objective realities surrounding him may reasonably be trusted to have a sobering influence on his any dark dictatorial delusion engendered in dangerous moments of treacherous exasperation or exuberance in this land committed to democratic socialism, to both *democracy* and *socialism*.

**DICTATORSHIP OF THE CABINET**

Alongside the Prime Minister's despotism questioning fingers are also raised at Cabinet dictatorship. It is pointed out that a Minister in office soon becomes a monarch sublimated, and with the party support and the support of his colleagues, he never looks back at his past. He often forgets that he is a people's representative and a human being with the feet of clay. For reasons of self-preservation and at their sublimated heights the Ministers form an unholy dictatorship of the Cabinet. The collective responsibility of the Cabinet is made a virtual citadel of Cabinet dictatorship. The Cabinet has become a master of Parliament and a master even of the people. To use the words of Keith:

"The position of the Cabinet towards Parliament has unquestionably come to assume a more or less dictatorial character."

*The Cabinet in Single Party Predominance*

More specifically, it is said that when either in principle or in practice a Cabinet is backed by a single party predominance, its dictatorship is axiomatic and at the zenith. And to a degree when the people do not have any alternative or a viable alternative, the Cabinet is bound to grow in might. It becomes the master of the legislature and autocratically rules the country where the people become the object of its policies and programmes and are never treated as the subjects or citizens.

That the Cabinet has grown and is growing in power and influence cannot be gainsaid, and that also the impact of a single party domi-

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nance on this growth and increase is crucial. Yet the Cabinet cannot have anything much dictatorial about it, wars, emergencies, crises and one party predominance notwithstanding, if a society has centripetal political and socio-economic elements and the single predominant party is itself a great awning under which different conflicting interests and personalities conveniently camp. And the Congress has always been and still is such a party. Crane comments: 51

"From the time of the first civil disobedience campaign the internal history of the Congress was the reconciliation of a multitude of special interests and different points of view."

**PREDOMINANCE OF PUBLIC SERVANTS**

Public servants, whether civil or military, are a formidable force in any state. Their numbers have enormously increased in recent years and are continuously increasing every day. There has been also a corresponding increase in their powers and opportunities to control and influence the life of the community. They are not only armed with wide legal powers of a discretionary nature but also reckon as vital political and social forces. The community has become heavily dependent upon them, whether they are military or civil, generalists or specialists, in every sphere because of the enormity and complexity of state functions in general now.

**Bureaucratic Triumph**

As a class the higher civil service has emerged as the new rulers of the society. It has the shield of anonymity and the advantage of upbringing, education, training, skill and experience. It has its own built-in scales of values, loyalties, preferences and prejudices. It is often the master of the political bosses in the absence of their clear commitments to fundamental ideological and general principles and because of their unconscionable conduct in public and private. And the unprecedented growth in the functions of the state in general and spectacular rise in administrative legislation and adjudication in particular have tended to make them the real rulers of the country with characteristic "vices of authority..., delays, corruption, roughness, and facility." 52


See Bacon, Francis: *Of Great Place*. 

52
Army Rule

Then, there is the impressive and insidious image in the minds of the common man of the discipline, competence and capability of the Armed Forces of the country. The military authorities are constitutionally made subordinate to the civil authorities, for, the President is the Commander-in-Chief of the Armed Forces of the country. Yet they retain their identity as a vigorous, vital and powerful, though loyal, disciplined and orderly, force in the socio-economic and political life of the community. But their loyalty, though unalloyed, needs ever to be commanded by the success, honesty and sincerity of the civil authorities.

The President, The Prime Minister and the Cabinet must always be able to command their confidence and earn their loyalty. They should only seek the help of the Armed Forces as national interests demand but not have the desperate feeling of delivering the nation up to them. Nor should the Army dream of staging a coup d’etat. For, either alternative is the death knell of the Constitution. Of course, either course is un-constitutional or extra-constitutional and equally unforeseeable, frightful and dangerous.

Clearly, the Constitution does not, then, envisage any kind of dictatorship within its scheme. The limits to the efficiency of the dictators in the other parts of the world arising out of the constraints of their respective socio-economic formations ought also to have a depressing prospect for a potential dictator or his admirers. In the open Indian society, with the existing socio-economic assumptions, the desirability of dictatorship is, thus, also questionable. The Constitution is, indeed, not a firman for constitutional dictatorship, whether personal, party or institutional.

The President cannot be a dictator. Dictator a Prime Minister cannot certainly be, nor can be Cabinet a dictator. Questions of Military rule and bureaucratic despotism are extra-constitutional questions. And Parliamentary form of Government rules out party dictatorship in an open society. War; Emergency; Martial Law; calling out of the Army in aid of the civil authorities; and increased reliance on the civil and other public services there may be, but dictatorship within the frame of the Constitution is simply out of the question. For, that will be a negation of the Constitution. Even a marionette President, a limp Prime Minister, a mute Cabinet, a
rump Parliament and a dumb electorate must exist at all times so long as this Constitution survives.

However, the distressing dilution of public purpose and sense of national direction; the intensifying erosion of social values, social sense and sense of service; the mounting socio-economic and political complications and problems; the continuing inability of the public leaders and public authorities to speedily and effectively answer these problems; the spiralling woes, discordance and discontent among the people; the growing alienation between the authorities and the citizens; the swirling waves of indiscipline; the increasing breakdowns in public and socio-economic services; and the agonising exasperation of the man in the street are at any time live bombs to finally blow off the entire politico-socio-economic fabric into shreds. They always invite a dictator. Besides, even the probable rise and eventual ride to power of a highly ideologically oriented, monolithic cadre based political party committed to a complete overthrow of the existing politico-socio-economic structure is also a pertinent issue in this context.

But these are issues too deep to be tinkered with in the available limited space. The only thing that may be suggested with any assurance of certainty is that they have highly dangerous, explosive and unpredictable possibilities which no law of a constitution can contain. For them answers may possibly be found in the current ideological commitments; political institutions and leadership; socio-economic assumptions and formations; vigour of public opinion, alertness of the opposition, vigilance of the individual, or in short, political culture of the community; and myriads of national and international institutions, personalities, interests, acts, events, developments and opportunities at work at the zero moment. But, then, from that moment the Constitution may possibly cease to exist. In the meanwhile, it may be confidently stated that the national objective of a democratic socialist, or socialist, society is attainable without ushering in a dictator.

In the open Indian society the national objective of a democratic socialist, or socialist, society demands an ideologically committed, dedicated, honest, sincere, powerful and competent Government capable of inspiring confidence, commanding loyalty and mobilizing the people. It demands a well-organised, devoted, disciplined, incorruptible, strong,
efficient, speedy and effective administration to provide services and deliver goods to the people. It demands, then, disciplined individuals, vigorous public opinion and vigilant people, for, eternal vigilance is, truly, the price of liberty. It also demands democratic, conscious and active political culture in the community.

These are great demands indeed, but demands desirable, possible and realisable within the frame of the Constitution. Powerful and competent Governments are not necessarily dictatorial, nor are dictatorial Governments necessarily powerful and competent. Discipline is not necessarily slavery, nor is slavery necessarily disciplined. The bases of dictatorship are autocratic arbitrariness, force and compulsion: the bases of democracy are responsible discretion, public opinion and consent. And free people are always conscious, responsible and disciplined. The Constitution of India envisages powerful and competent Government and administration and free people for securing and maintaining

"A social order in which justice, social, economic and political, shall inform all the institutions of the national life."^38

^38 Art 38.
CHAPTER 26

THE STATE EXECUTIVE

The State executive is a replica of the Union executive, a replica rather forged of lead than cast of steel. The founding fathers were committed to federalism and parliamentarism. But their federalism of December 9, 1946, for undivided India, was not their federalism on June 3, 1947, for India to be divided. And thereafter, their parliamentarism for the Union could not reasonably remain their parliamentarism for the States. Unity of India and not the Union of India, strength of the nation and not democracy in the realm, swayed their imagination in a country truncated and still bleeding after August 15, 1947. Murky memories of the past running back to centuries and the then agonising experiences intensified each moment made them aspire for a brave new India of tomorrow on the rallying theme of Unity of the Union. Nehru told the Constituent Assembly:

"In providing for a stable democratic machine, it is very important for us not to take any step which might tend towards loosening the fabric of India or loosening the governmental machinery and thus providing conflicts. We have passed through very grave times and we have survived them with a measure of success. We have still to pass through difficult times and I think we should always view things from this context of preserving the unity, stability and security of India and not to produce too many factors in our constitutional machinery which will tend to disrupt that unity by frequent recourse to vast elections which disturb people's minds and, at the same time, divert a great deal of our resources towards electoral machines rather than towards the reconstruction of the country."\(^1\)

THE GOVERNOR

The office of the Governor is an offspring of the supreme concern of the founding fathers for the unity, strength, stability and security of the nation and reflects most how constitutional law is the handmaid of constitutional realities. Though apparently a sinecure and signpost, it is potentially a service-centre and power-point. In the scheme of the Constitution the Governor has always been the constitutional head of the State and the alert "eyes and ears"\(^2\) of the

\(^1\) C.A.D., Vol. VIII ; p. 455. Italics are mine.

Union, and the working of the Constitution over these past years has now projected him also as a democratic lung of the State and a long arm of the Union. And article 153 of the Constitution, constituting the office of the Governor, now itself underscores the theme of Unity of the Union:

"There shall be a Governor for each State:
Provided that nothing in this article shall prevent the appointment of the same person as Governor of two or more States".3

QUALIFICATIONS AND APPOINTMENT OF THE GOVERNOR

Article 157 prescribes sensibly simple qualifications for appointment as Governor when it says: “No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty-five years.” This has been done in view of the fact that the appointment of a person as Governor is essentially a matter that will depend on a host of political considerations which the Union Government may have to take into account in any particular situation. Article 155, containing the provisions for the appointment of the Governor, is equally plainly phrased:

“The Governor of a State shall be appointed by the President by warrant under his hand and seal”.

The Governor an Appointee of the President

Under the Constitution, the Governor is an appointee of the President and this issue was viewed from all possible angles in the Constituent assembly. The methods of (i) direct election on the basis of adult suffrage; (ii) indirect election by a specifically constituted electoral college on the basis of adult suffrage; (iii) election by the members of the both Houses of the State Legislature or only of the Legislative Assembly by simple majority or by the system of proportional representation by means of the single transferable vote; (iv) selection by the President from a panel of names proposed by the both Houses of the State Legislature or only the Legislative Assembly; and (v) appointment by the President, were all considered by the Assembly. But eventually the idea of the appointment of the

3 Proviso inserted by the Constitution (Seventh Amendment) Act, 1956. Italics are mine.
Governor by President found favour with the founding fathers, for, they intended to have a united and strong India free from "a narrow provincial way of thinking and functioning in each state. An elected Governor would to some extent encourage that separatist provincial tendency more than otherwise. There will be far fewer common links with the centre." And added to this were the strains, implications and expenditure of time and money involved in having an elected Governor. Ambedkar found no objection in the Governor being a Presidential nominee as he was to be "purely ornamental." And Alladi Krishnaswamy Ayyar indicated the implications of party system and elections and felt that appointment of the Governor by the President was desirable.

"...in the interests of harmony, in the interests of good working, (and) in the interests of sounder relations between the Provincial Cabinet and the Governor..."

And it is just an extended application of the intendment of the makers of the Constitution that the convention of the Union consulting the Chief Minister of the State concerned before appointing a Governor to the State is to be viewed, although the claim of a Chief Minister to have a Governor from a panel of names suggested by him seems to be overstraining the issue. Similarly, the convention of having Governors from outside the State is also a healthy principle for keeping them above local politics; making them more dignified; giving them greater objectivity; and emphasising national unity. And it can be reasonably expected that any departure from this principle will be always a rare exception made in deference to a peculiar situation without in any way derogating from the validity of the present practice.

But all does not seem to be so rosy in the appointment of Governors. The Raj Bhavans are quite often used as resting oases, dumping grounds or police outposts for retired, recalcitrant or routed politicians. Ex-judges of the superior courts, senior and retired diplomats and civil servants and even academicians also have found resting places or police assignments in the Raj Bhavans. The

5 See The Statesman, Calcutta, March 20, 1969, which reported: "The West Bengal Government is understood to have forwarded to the centre a panel of three names for the choice of Governorship, says UNI." Then the State had a United Front Ministry headed by Ajoy Mukherjee.
appointment to the office of the Governor needs a greater caution in the changed context of political climate in the country. This caution is all the more necessary in the appointment of party men, because a Governor is now expected to function more impartially and independently than even a Judge or a Speaker. N. R. Deshpande pertinently points out:

"But how far party men, specially if they happen to be candidates defeated at parliamentary elections, can stand against Cabinets whether in the States or at the Centre, particularly against the latter, is highly problematical."

**Filling in of Casual Vacancies**

"The Constitution does not provide for Deputy Governor. Article 160, however, authorises the President to make such provision as he thinks fit for the discharge of the functions of the Governor of a State in any contingency not provided for in this Chapter". And the President has by Order provided that when the Governor of a State is not able to discharge the functions of his office for the specified reasons, the Chief Justice, or in his absence the senior-most Judge, of the High Court of the State shall act as Governor.

**TERMS AND CONDITIONS OF OFFICE OF THE GOVERNOR**

Every Governor or a person discharging the functions of the Governor is required to make the prescribed oath or affirmation. Article 159 says:

"Every Governor and every person discharging the functions of the Governor shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of the High Court exercising jurisdiction in relation to that State, or, in his absence, the senior-most Judge of that Court available, an oath or affirmation in the following form, that is to say:

'I, A. B., do solemnly affirm that I will faithfully execute the office of Governor (or discharge the functions of the Governor) of ............(name of the State) and will to the best of my ability preserve, protect and defend the Constitution and the laws and that I will devote myself to the service and well-being of the people of ............(name of the State)'."

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S : CI—49
A Governor holds office for a term of five years from the date on which he assumes the charge of his office, and, notwithstanding the expiry of his term, continues in office until his successor takes over. He is eligible for reappointment and may also be given a short extension. He holds office during the pleasure of the President, which implies that the President may at any time and on any grounds remove him from office. This places the Union in a greater control of the Governors, and it seems that instead of removing a Governor, the President may transfer him or also advise him to resign. A Governor may also himself tender his resignation by writing under his hand addressed to the President.\(^7\)

**Conditions of Office**

A Governor cannot be, or remain, a member of Parliament or a State Legislature. He cannot also hold any other office of profit. The Governor receives a salary of Rs. 5,500 a month and is also entitled to such other allowances and privileges as Parliament may determine. And when the same person is appointed as Governor of two or more States, his emoluments and allowances are allocated among the States in the manner prescribed by the President. But the emoluments, and allowances of a Governor cannot be varied to his disadvantage during the term of his office. The Governor is also entitled to the use of his official residences.\(^8\)

**Immunity of the Governor**

Article 361, which provides for the immunity of both the President and the Governors, reads as follows:

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

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61:

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State."

\(^7\) Art. 156.  
\(^8\) Art. 158.
(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office.

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

POWERS OF THE GOVERNOR

The Governor of a State is a significant repository of executive, legislative and judicial powers in relation to that State. He has also considerable financial powers. He has some other powers of a special or miscellaneous character under the Constitution itself. Then under numerous statutes, rules and regulations the Governor also comes to be invested with powers of diverse nature.

Executive Powers

The Governor has vested in him the executive power of the State. He has the administrative power of appointment, removal, dismissal and disciplinary control. He does not have any emergency power, but has a role when there is a breakdown of constitutional machinery in the State. He does not have any defence or diplomatic powers like those of the President. But unlike the President he has express discretionary power and some special responsibilities. Then, there are some miscellaneous powers in the nature of executive power.

State Executive Power: Article 154, investing the Governor with the executive power of the State, provides as follows:

"(1) 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 this Constitution.

(2) Nothing in this article shall—
(a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority, or
(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor."

Article 154 vests, in the Governor the executive power of the State, which he can exercise directly or through his subordinate officers, including a Minister, in accordance with the provisions of the Constitution. But the Governor cannot delegate to his subordinates powers which outside this article specifically vest in him. This article, does not, however, transfer to the Governor any powers conferred by any pre-Constitution law on any other authority. This article does not also take away the right of Parliament or the concerned State Legislature to confer on any authority subordinate to the Governor any power vested in the latter under this article alone, but not a power specifically vested in him under any other provision of the Constitution when, for example, under article 239 the President appoints the Governor as the Administrator of a Union Territory.

Administrative Powers: In so far as article 154 (1) makes the Governor the repository of the State executive power and authorises him to exercise this power either directly or through his subordinate officers, including the Ministers, it also installs him as the chief executive of the State. Then, within the terms of Article 166 (1) all executive actions of the State are to be expressed to be taken in the name of the Governor. He makes rules for authentication of orders and instruments made or executed in his name, and after authentication the validity of the order or instrument is not justiciable on the ground that it was not made by him. Contracts made in the exercise of the executive power of the State are also to be executed in the manner and by persons authorised by the Governor under article 299.

However, the technical position of the Governor as the chief executive of the State has to reckon with the logic of Parliamentary Government which the States have. The powers of the Governor are,

11 Art. 166 (2)
except for his any express discretionary powers, the functions of the Council of Ministers headed by the Chief Minister. Under article 166(3) the Governor has the rule making power for the more convenient transaction of the business of the State Government and for allocation of work among the Ministers, except any matter that falls in his discretion. Under the rules framed in the exercise of this power, the State Government functions through a number of Departments, which may be further divided into branches, wings or cells, having permanent heads in their Secretaries and political heads in the Ministers-in-Charge and constituting the State Secretariate. The Governor has, however, his own separate secretarial establishment located at his official residence. The real organs of administration are the State Departments and the Chief Minister the real chief executive, making the Governor generally a formal chief executive, except, of course, when the constitutional machinery of Government is scrapped under article 356.

**Appointing Powers:** The administrative powers of the Governor include his quite a few appointing powers, although the States do not have spoils system and the Governor’s role is rather formal. He appoints the Chief Minister and the other Ministers are appointed by him on the Chief Minister’s advice.\(^{12}\) He does not appoint High Court Judges but is required to be consulted by the President before their appointment.\(^{13}\) He, however, appoints the Advocate-General of the State,\(^{14}\) the district judges in consultation with the High Court concerned;\(^{15}\) and the other persons to the State judicial service in accordance with the rules.\(^{16}\) He also makes senior administrative and police appointments in the State. And his power to appoint is normally, except in the case of the persons in the judicial service of the State and holding any post inferior to that of a district judge, is normally further reinforced by his power of posting and promotion. The Chairman and the members of the State Public Service Commission are also appointed by him.\(^ {17}\) Then, the Governor has the power of appointment under different statutes relating to bodies or agencies under State control, including public corporations, autonomous, semiautonomous, educational and local-self institutions, and tribunals.

\(^{12}\) Art. 163 (1) \(^{13}\) Art. 2171 (1) \(^{14}\) Art. 165 (1) \\
\(^{15}\) Art. 233 (1) \(^{16}\) Art. 234 \(^{17}\) Art. 316 (1)
Power of Removal, Dismissal and Disciplinary Control: Generally speaking, the Governor has the power of removal, dismissal and disciplinary control in regard to all appointments made by him, excepting appointments made to the subordinate courts\(^{18}\) and the State Public Service Commission.\(^{19}\) He may, however, suspend the Chairman or any member of the State Public Service Commission in the prescribed cases.\(^{20}\) The Chief Minister and the other Ministers\(^{21}\) and the Advocate-General\(^{22}\) hold office during the pleasure of the Governor. Any other person holding a post under the State also holds his office during the pleasure of the Governor unless the Constitution provides otherwise.\(^{23}\) He has the specified disciplinary control over them, including the power to dismiss or remove them from office and reduce in rank.\(^{24}\)

Emergency Powers: Under article 356, on the receipt of any report from the Governor or otherwise, if the President is satisfied that there has been a breakdown of constitutional machinery in a State, he may take over the Government of the State and also vest in himself all the powers exercisable by the Governor under the Constitution. When article 356 applies, the Governor administers the State as an agent of the President and with the aid of the advisers appointed by the President. Then, under para 16(2) of Schedule VI the Governor of Assam may supersede the District Regional Councils and assume their powers to himself. Supersession of some local-self units under different statutes are also vested in the Governor.\(^{4}\)

Miscellaneous Powers: His miscellaneous powers in the nature of executive power are also to be taken note of. A High Court Judge makes the prescribed oath or affirmation before the Governor or a person appointed by him.\(^{25}\) He refers additional matters for the advice of the State Public Service Commission\(^{26}\) and also requests the Union Public Service Commission to serve, with the consent of the President, all or any needs of the State.\(^{27}\) His is the responsibility under article 324(6) to make available to the Election Commission or a Regional Election Commissioner necessary staff.

\(^{18}\) Art. 235  
\(^{19}\) Art. 317 (1) (3).  
\(^{20}\) Art. 317 (2)  
\(^{21}\) Art. 164 (1)  
\(^{22}\) Art. 165 (3)  
\(^{23}\) Art. 310  
\(^{24}\) Art. 311. See also the relevant statutes.  
\(^{25}\) Art. 320 (3)  
\(^{26}\) Art. 315 (4)  
\(^{27}\) Art. 315
He also reports to the President under para 3, Schedule V, on the administration of scheduled areas within his State. Then, under article 371C(2), the Governor of Manipur reports to the President on the administration of his State. Under Schedule VI, relating to the administration of tribal areas in Assam, the Governor of that State has quite a few miscellaneous powers, such as the extension of the jurisdiction of the High Court of Assam to such an area; nomination of some members to a District or Regional Council; direction for holding re-election to such a Council; and entrusting it with certain educational and developmental functions. Then, under para 2(6A) of this Schedule, he may extend the life of a District Council during the period of Emergency for one year at a time but not for more than six months beyond Emergency.

Discretionary Powers: The Governor has certain express discretionary powers. His Council of Ministers headed by the Chief Minister is to aid and advise him only in the exercise of his functions which are not in his discretion, and under clause (2) of article 163 he decides in discretion whether a matter is within his discretion. The Governor of Nagaland decides in his discretion whether a matter is his special responsibility within the terms of clause (1)(b) of article 371A, an article which gives him further discretionary power under clauses (1)(d) and (2)(b)(f). Then, under Schedule VI until the specified notification is given under para 18 of the Schedule, the Governor of Assam administers in discretion the tribal areas in Part B of the Schedule as an agent of the President, and under para 9(2) of the Schedule he decides in discretion any dispute relating to the share of a District Council to royalties from mines and minerals. Besides, when a Governor is appointed by the President to act as the Administrator of a neighbouring Union Territory under article 239, he acts independently of his Ministers in relation to that Territory.

Special Responsibilities: The Governor has also certain express functions which are his special responsibilities. The Governor of Andhra Pradesh under article 371(1) and the Governor of Manipur under article 371(1) may, by order of the President, be invested with

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special responsibility for the proper functioning of the specified committees of the Legislature to be constituted by the President by order within the terms of those articles. Under article 371(2), the President may by order also provide for the special responsibility of the Governor of Maharashtra or Gujarat in respect of the matters specified by the article. Then the Governor of Nagaland has special responsibility under article 371A(1)(b) with respect to law and order in Nagaland, although the President on receipt of a report from the Governor to that effect may terminate the responsibility at any time.

Legislative and Financial Powers

The Governor as the head of the State has considerable legislative and financial powers. His legislative powers may be said to be of two types: (i) those which are vested in him in relation to the legislative process in the State Legislature; and (ii) those which accrue to him separately from such process, *e.g.*, Ordinance or rule making power, or as an *interim* arrangement. Similarly, his financial powers may be also said to be of two types: (i) those which he exercises in relation to the financial powers of the State Legislature; and (ii) those which he enjoys distinctly from the financial power of the Legislature or exercises as an *interim* arrangement.

Legislative Powers: The Governor is an integral part of the State Legislature. In case he finds the Anglo-Indian Community not sufficiently represented in the State Legislative Assembly, he nominates to the Assembly "such number of members of the community as he considers appropriate". Where there is also a Legislative Council, the Governor nominates about one-sixth of its members from among "persons having special knowledge or practical experience in respect of such matters as...Literature, science, art, co-operative movement and social service". Members of State Legislature make an oath or affirmation before the Governor or his nominee. The Governor has the power of summoning, prorogation and dissolution in regard to the State Legislature. At any time he may address the State Legislature or send messages to it. Besides, he has the right to special address of the Legislature at its first session.

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29 Art. 168  30 Art. 333  31 Art. 171 (3) (e), (5).
20 Art. 188  32 Art. 174  34 Art. 175
after a general election to the Legislative Assembly and also at its first session each year. Under article 322(2), he also causes to be placed before the State Legislature the annual report of a State or Joint Public Service Commission along with an explanatory memorandum explaining the cases in which the Commission's recommendations could not be accepted.

Assent to, and Reservation of Bills: Article 200 requires every Bill passed by the State Legislature to be presented before the Governor for his assent. He may assent to such a Bill; withhold his assent from the Bill; reserve the Bill for the consideration of the President; or he may return the Bill to the Legislature if it is not a Money Bill. He may also let a Bill lie in his table. However, he must reserve a Bill dealing with the specified matters for the consideration of the President and must give assent to a Bill which, after being returned to the Legislature, is duly repassed by that body.

Ordinance, Law, Order or Rule Making Power: Under article 218 the Governor has the power to promulgate Ordinances, in certain cases under the instructions of the President only, during the recess of the State Legislature. He may by a notification under article 237 apply the provisions of Chapter VI, Part VI, of the Constitution to certain classes of magistrates. Then, he has the power to modify certain enactments in application to the areas under Schedules V and VI. Under article 371 A (2) (c), the Governor of Nagaland by a notification applies the enactments of the State Legislature to the Tuensang district, with such modification as may be necessary. In addition, he has also extensive power of rule making under the Constitution and numerous enactments. In the case of rule making his power may be an interim power, an emergency or contingency power, or a regular power. In certain cases his rule making power is subject to consultation with prescribed bodies; the doing of an act precedent; or the prior or subsequent approval of the President. He himself gives prior or subsequent approval to certain rules and regulations framed by the specified authorities. However, all these rules have the force of law within the meaning of the article 13.

The Governor frames rules under article 166 relating to the conduct of the business of the State Government. Until the Legislature

35 Art. 176
makes law, he frames rules relating to the secretarial staff of the Legislature and frames rules in consultation with the Speaker and the Chairman of the Houses of the Legislature for communication between the Houses\textsuperscript{36}. Then, he gives approval to the rules framed by the High Court under article 227 (2) (3) regarding control of that Court over subordinate courts and scales of certain fees. He may require by rules that appointment of certain officers and servants of the High Court shall be made through the State Public Service Commission and approves the rules framed by the High Court relating to the salaries, allowances and leave and pensions of these officers and servants\textsuperscript{37}.

Again, he has the power to make rules regarding persons in the employment of the State until the State Legislature makes law in this behalf\textsuperscript{38}. He also makes rules relating to the number of members and conditions of their service and the strength and conditions of service of the staff of the State Public Service Commission\textsuperscript{39}. He may also by rule exclude certain matters for which the State Public Service Commission need not be consulted\textsuperscript{40}. The appropriate Governor has also wide rule making powers, including the power to annul, suspend or approve a rule, or even an enactment, made by other authorities, under article 371 A and Schedules V and VI. And crowning these all, he has numerous rule making powers under different statutes.

**Financial Power:** The financial powers of the Governor include the causing of the placing of the annual financial statement\textsuperscript{41} and any statement relating to supplementary, additional or excess grants\textsuperscript{42} before the Legislature. Any demand for a grant, any Money Bill or any amendment therein, but not a proposal for abolition or reduction of a tax; and any Bill involving expenditure from the State Consolidated Fund\textsuperscript{43} can be moved in the Legislature only on the recommendation of the Governor. Until the State Legislature makes law, he regulates by rule the custody of payments into and withdrawals from the State Consolidated Fund, Contingency Fund and Public Accounts\textsuperscript{44}. He causes the report of the Comptroller and

\textsuperscript{36} Arts. 187 (3), 208 (3) \hspace{1cm} \textsuperscript{37} Art. 299 (1) Prov., (2) Prov. \\
\textsuperscript{38} Art. 318 \hspace{1cm} \textsuperscript{39} Art. 320 (3) prov. \\
\textsuperscript{40} Art. 205 \hspace{1cm} \textsuperscript{40} Art. 203 (3), 207 (3). \\
\textsuperscript{41} Art. 309 \hspace{1cm} \textsuperscript{42} Art. 203 \\
\textsuperscript{43} Art. 283-
Auditor-General relating to the accounts of the State to be placed before the Legislature\textsuperscript{45}. The Governor of Assam also makes rules under Schedule VI for the management of District and Regional funds and determines the allocation of certain royalties from mines and minerals to a District Council\textsuperscript{46}.

**Judicial and Pardoning Powers**

The Governor is invested with both constitutional and statutory judicial powers and he acts in this regard as a tribunal. For example, under article 191 he decides upon the question of the subsequent disqualification of a member of the State Legislature in accordance with the opinion of the Election Commission. A significant element of the statutory judicial power of the Governor is his disciplinary power over certain State employees. Then he enjoys some judicial power also as the Chancellor of a University.

**Pardoning Power**: Pardoning power is eminently an aspect of the executive power and the Governor enjoys this power within the terms of article 161. This is in addition to his powers in this behalf under the I. P. C. and the Cr. P. C. The principles applicable to the pardoning power of the President under article 72\textsuperscript{47} apply *mutatis mutandis* also to his very wide pardoning power under article 161 which provides as follows:

"The Governor of a State shall have the power to grant pardons, reprieves, remissions or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends".

**POSITION OF THE GOVERNOR**

The first person in the State on the Warrant of Precedence, the Governor holds the highest public office in the State. Yet he is not an officer of the State Government. He is himself the State Government within the meaning of the General Clauses Act and is embraced within the meaning of the term "the State" under article 12 of the Constitutions. He is the head of the State and a reservoir of enormous-

\textsuperscript{45} Art. 151 (2) 
\textsuperscript{46} Sch. VI, paras 7 (2), 9 (2).
\textsuperscript{47} See above Chap. 24 for the President’s pardoning power.
and varied executive, legislative, financial and judicial powers. "He is the representative of the people as a whole of the State" and a constituent unit of the State Legislature. He is the chief executive of the State.

Though himself the State Government and the head of the State, the Governor is not the head of the State Government. Though a constituent unit of the State Legislature, he is not a person responsible to the Legislature nor is he its member. Though a representative of the whole people of the State, he is not an elected representative of theirs. But the essence of representative and responsible Government, however, is that the persons exercising the powers of the Government shall be responsible to an elected representative body of which they themselves are members.

The founding fathers generally envisaged responsible representative Government for the States, with necessary modifications to suit Indian conditions. This was the position initiated by May 30, 1947, memorandum of the Constitutional Adviser, B. N. Rau, on the principles of Provincial Constitution. This was the position accepted at a joint meeting of the Provincial Constitution Committee and the Union Constitution Committee on June 7, 1947. Again, this was also the position taken by Patel, the Chairman of the Provincial Constitution Committee, in presenting the model Provincial Constitution before the Constituent Assembly on July 15, 1947. And thereafter, there was no substantial change in this position till the Constitution finally emerged from the Assembly. Consequently, the Governor, an appointee of the President, though made a repository of all the necessary powers of the State Government, which gives him the look of an authority intended to run the Government even on his own, is not responsible for their exercise, except for the matters which are placed in his discretion. The powers of the Governor, except in so far as he is required to act in his discretion, are the responsibilities of the Council of Ministers headed by the Chief Minister, which is responsible collectively to the Legislative Assembly.

49 Art. 168
50 See Rao, B. Shiva : The Framing of India's Constitution, New Delhi, 1968 ; pp. 382-89.
The Governor and His Council of Ministers

Article 163 provides for a Council of Ministers with the Chief Minister at the head to *aid and advise* the Governor in the exercise of his functions. It is the Council of Ministers, or more specifically the Cabinet, that has real responsibility for the exercise of any power, not being a discretionary power, vested in the Governor. And it is the Council, and not the Governor, that is made responsible to the Legislative Assembly under article 164, although the Ministers are also declared under that article to hold office during the pleasure of the Governor. The Chief Minister, and not the Governor, is the head of the State Government. And in the Constituent Assembly, speaking on the proposal for having an appointed Governor, Ambedkar stated the position of the Governor as follows: 51

"According to the principles of the Constitution, he is required to follow the advice of his Ministers *in all matters*. If the Governor has no power of interference in the internal administration of a Ministry which has a majority, then it seems to me that the question whether he is elected or appointed is a wholly immaterial one".

*Ministers to Aid and Advise the Governor*: The constitutional provision is that the function of the Ministers is to *aid and advise* the Governor in the exercise of his functions, and clearly this "aid and advise clause" is permissive in character. But the discussions in the Constituent Assembly; the intention of the founding fathers; and the practice of other similar constitutions go to suggest that and this "aid and advise clause" is, indeed, an "euphemism", as Alladi Krishnaswami Ayyar said of it in the context of the President. It is a dignified, flexible and convenient expression to cover a whole range of "ifs" and "buts" and yet provide a firm basis for responsible and representative Government.

It may also be noted that there, indeed, was a proposal to have an Instrument of Instructions for the Governor which reflected this intention of the founding fathers, which was dropped because it was not considered necessary. It was made mandatory that there shall always be a Council of Ministers to aid and advise the Governor in the exercise of his functions, except when article 356 applied to a State or when the Governor was required to act in his

51 *C. A. D.*, Vol. VIII; p. 469
discretion, including when he was designated to act as the Administrator of an adjoining Union Territory.

It was clearly envisioned by the founding fathers that the administration of a State rested with the Council of Ministers headed by the Chief Minister, for the Council as a body was alone responsible to the Legislative Assembly. Significantly, the Chief Minister, and not the Governor, presides over the deliberations of the Council and what he communicates to the Governor under article 167 is the decisions, and not the recommendations, of Council. The Council is recognised by the Constitution as a decision making body and not as a recommendation making agency.

Then, under the rules framed for the more convenient transaction of State Government business, except for the business to be transacted by the Governor in his discretion, and allocation of work among Ministers, the State Government functions through a number of Departments placed under the charge of responsible Ministers. The Ministers preside over the operations of these administrative arms of the State Government and the Chief Minister heads the whole State Administration. The Chief Minister, thus, becomes the real chief executive, making the Governor only a formal chief executive of the State.

Account in this context has also to be taken of the evident difficulty of writing into the Constitution the conventions of the British Parliamentary system, particularly in the case of the Governor who was intended to be a significant unifying device in the Union. But it was hoped, and Patel specifically said so, that the broad conventions of responsible Government would grow up and govern the Governor-Minister relationship in the States, of course, with suitable modifications to meet peculiar national needs. And notwithstanding the continuing and confusing irritants, the crucial convention that seems to have come to be finally accepted and generally observed is this: Unless the Constitution provides otherwise expressly or by necessary implication, the Governor shall act only on the advice of his Ministers. And interestingly, this is a convention also recognised by the Supreme Court.

"Under article 53 (1) of our Constitution, the executive power of the Union is vested in the President but under article 75 (sic.) there is to be a Council of Ministers to aid and advise the President in the exercise of his functions. The Presidents has thus been made a formal constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of the States. The Governor...... occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government."

THE GOVERNOR AND HIS DISCRETIONARY POWER

The crux of the Governor-Minister relationship, then, is the question whether the Constitution expressly or by necessary implication excludes certain matters from the scope of the aid and advise clause in article 163(1), and if so, whether they are so vital as to leave the Ministers with merely the chaff of responsibility for running the State Government. And the first issue that falls for consideration in this regard is the nature and extent of the discretionary power of the Governor, for article 163(1) itself says :

"There shall be a Council of Ministers with the Chief Ministers at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion".

The Concept and Background of Discretionary Powers: Generally taken, a power is discretionary when the question of its exercise depends on the will of its wielder. The respository of such a power is, first, free to exercise it or not to exercise it. Secondly, while exercising it, he has freedom as to the procedure to be followed in its exercise; and finally, he has also the freedom in taking a decision one way or the other relating to a concrete situation. Precisely, the person with such a power has the liberty to determine whether to do or not to do a thing, and if to do, how to do and what to do. This concept of absolute discretion is, however, always limited in practice by objective norms, or situations or subjective habits, beliefs, thoughts and interests, and this is particularly so in the field of public law.

Historically speaking, Government began possibly as executive function and gradually surrounded itself with norms and conditions

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54 Italics are mine.
for the exercise of this function. But even now executive power is conceived in very broad terms to make it look like fundamentally discretionary power. In fact, the governance of a country as a whole is a matter of discretionary power vested in persons who are to observe the prescribed norms in deciding issues and taking actions.

The rule of law is the principle that fetters the procedure but does not affect the substance of power in totality. It simply prescribes that certain things are to be done by certain persons in a certain manner. It cannot bind the whole of the state and say that only certain things are to be done by it. It only requires that if done, a particular function shall be or should be done in a certain manner and by certain persons or authorities. Consequently, therefore, in the case of public authorities the question becomes significant whether the authority has a power and if so, it is discretionary, i.e., exercisable according to the free choice of the authority, though always limited by objective or subjective considerations.

In the particular context of the Indian situation, it may be recalled that the Government of India Act, 1935, conceived of the power of the Governor in three categories: (i) discretionary power; (ii) power exercisable in individual judgment; and (iii) other powers. In the case of his discretionary power the Governor was neither to consult his Ministers nor was he in any way bound by their advice. He was to act on his own responsibility for which he was accountable to the Governor-General and through him to the Secretary of State for India. For powers to be exercised in individual judgment, he was to consult the Ministers but was free to form his own judgment. And so far as his other powers, the remaining powers, were concerned, he was to follow the advice of the Ministers. And evidently, such a categorisation of the Governor’s powers was intended to secure the basic interests of the Empire.

The Governor’s Discretionary Power and the Constituent Assembly: It was in this specific background and the peculiar conditions arising out of the partition; the grave law and order problems then; the persisting centrifugal forces; and the commitment of the founding fathers to build a united and powerful country that the Constituent Assembly had to decide upon the question of the discretionary power of the Governor. And notably, beginning with
the May 30, 1947, memorandum of the Constitutional Adviser on the principles of the Provincial Constitution and ending with the final form of the Constitution, the founding fathers in unmistakable terms stood for some discretionary powers of the Governor, although at no time there seems to have been any clear agreement among them as to the precise nature and extent of this discretionary power.

Added to this was the psychological fact that the rankling memories of the members of the Constituent Assembly about discretionary powers of the colonial Governors always made them touchy and suspicious of any discretionary power of the Governor under the Constitution, although all agreed that the Parliamentary form of Government in the States could not be the same as that at the Centre. The persons primarily responsible for framing the Draft Constitution had always to take into account this sentiment of the Assembly in providing for the discretionary power of the Governor under the Constitution. Besides, the State leaders had to be assured that the Centre was not having designs against them or against State autonomy. And Ambedkar was so keen on dispelling the dark suspicions from the minds of the Assembly members that he at one point made a distinction between the duties of the Governor and his functions and felt that while the former involved discretion of the Governor, the latter did not imply any such discretion. He even categorically stated: 55

"The Governor has no functions which he is required to exercise either in his discretion or in his individual judgment."

Yet the word “discretion” stuck on in the context of the Governor-Minister relationship in sharp contrast from the President-Minister relationship. One may even be tempted to have a shrewd suspicion that this contrast reflects a political reality, and a personal equation. Patel, the Chairman of the Provincial Constitution Committee, was then at the head of the Home Ministry which dealt with the Units, and Nehru, the Chairman of Union Constitution Committee, was then the Prime Minister of the Union. Patel could desire plausibly to have a say in State affairs and Nehru could also legitimately wish


S: CI—50
to himself run the show at the Union. Then, there were the unsettling conditions consequent upon the partition and the serious law and order situation in the country. Added to these was the determination of all to strive for a powerful and united India. Consequently, when Kamath moved an amendment for the deletion of the word "discretion", the amendment was lost and Ambedkar himself, in defending its retention, said: 56

"The retention in, or the vesting the Governor with, certain discretionary powers is in no sense contrary to, or a negation of, responsible Government."

But it seems that even then, as ever, feelings must have been running very high against investing the Governor with any discretionary power whatever. For, T. T. Krishnamachari, a member of the Drafting Committee, had to assure,

"...there is no discretionary power at all vested in the Governor and we want the Governor to act in a manner which would mean that he will be taking the advice of his Ministers in all matters".57

Governor’s Discretionary Powers under the Constitution: It was in this unusual situation that the founding fathers had to insert the word "discretion" in the context of the Governor’s powers. And this should make intelligible some of the early decisions of the High Courts relating to the decretionary power of the Governor. The Calcutta High Court, in Sunil Kumar Bose v. The Chief Secretary, observed:

"The Governor under the present Constitution cannot act except in accordance with the advice of his ministers. Under the Government of India Act, 1935, the position was different. The Governor could do certain acts in his discretion, that is, without asking the advice of any minister; he could do certain acts in his individual capacity, that is, only after consulting his ministers but he was not bound when acting in his individual capacity to follow the advice of his ministers. Under the present Constitution, the power to act in his discretion or in his individual capacity has been taken away and the Governor, therefore, must act on the advice of his ministers. This is the constitutional position as explained to us by the Advocate-General and we accept this view".58

58 See A.I.R. 1952 Cal. 799, Italics are mine.
In *Varadaraja v. State*, the Travancore-Cochin High Court went a step further and felt that “retention of the words (in his discretion) in articles 163 and 166 may be said to be a drafting anomaly, as no Governor, except the Governor of Assam acting under Schedule VI, paras 9(2) and 18(3), has any authority to act in his discretion.” This, however, resulted possibly from the Courts reading the word “expressly” to modify the verb “required” into those two articles. This feeling seems to get more support from the judgment of the Assam High Court which said, in *Azad v. State of Assam*, that unless *expressly* required the Governor was not obliged to act in any matter in his discretion, although it should appear that the Court could have decided the case the way it decided, but more consistently, by saying that “the question whether any matter is in the discretion of a Governor is in the discretion of the Governor himself and the Court was precluded from enquiring into the matter”. But very clearly, the reading of the word “expressly” to modify the word “required” in articles 163(1) and 166(3) is to miss the entire massage of the caution and care taken by the founding fathers in making the Governor a vital element in the scheme of national unity.

*Express Discretionary Power*: That the Governor has express discretionary power under the Constitution none contests. What is pointed out, however, is that this express requirement is limited only to the Governor of Assam acting under Schedule VI, paras 9(2) and 18(3); the Governor of Nagaland exercising power under article 371A(b) proviso (d) (2) (b) (f); and at best a Governor designated to act as the Administrator of an adjoining Union Territory, or a Governor acting as an agent of the President in administering a State under President’s rule. And in that case the discretionary powers of the Governor are trifling, indeed.

But was this for paltry nothing that the Constituent Assembly witnessed one of the longest debates in its career on the question of the powers of the Governor and then decided ultimately to retain the word “discretion” in both articles 163 (1) (2) and 166 (3)? It should seem that there must have been, and must be, more than meets the eyes. “There are more things between heaven and earth,

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58a See A.I.R. 1953 T.C. 140.
58b See A.I.R. 1950 Ass. 619.
Horatio", one may feel inclined to echo, specially when clause (2) of article 163 conclusively lays down:

"If any question arises whether any matter is or is not as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion".

*Implied Discretionary Power*: Can it be said, then, that the Governor has also some implied discretionary powers? There is always a great temptation to answer in the affirmative, this is particularly so because of the provision that the Governor is the sole judge whether a matter is in his discretion; his link role between the State and the Centre; the requirement that he may report to the President for applying article 356; the provision for his acting as the agent of the President in a State under President’s rule under that article; the provision for his acting only on the instruction of the President for promulgating Ordinances in certain cases; his power to appoint the Chief Minister; his power to dismiss the Chief Minister and the other Ministers; his power to address and send messages to the State Legislature; his power to dissolve the Legislative Assembly; and his power to assent to Bills, including the power to reserve a Bill for the consideration of the President; his certain special responsibilities, whether expressly mentioned or inferred impliedly; and the requirement of his acting in certain cases only after being satisfied as to the existence of the specified precondition.

But on principle it is meet that there should not be any concept of implied discretionary power of the Governor in the scheme of the Constitution. For, not only that such a concept in the context of the Governor, as also of the President, is fraught with dangerous implications, but also that this is not in accord with the constitutional cases decided by the superior courts. The Governor has no implied discretionary power under the Constitution. And the powers which apparently raise the inference of his implied discretionary powers are his simple constitutional powers not calling for any special categorisation. This is so, even when article 163 (2) makes the Governor the final judge whether a power is his discretionary power or not. For, logically the provisions of this article are intended to affect the
exercise of the whole spectrum of his powers and do not call for a mere special categorisation of his certain powers as his implied discretionary powers.

It should seem that both clauses (1) and (2) of article 163 aim at authorising the Governor to take greater liberties than the President in the exercise of all his powers whatever. So far as he takes those liberties, his powers get transformed into situational functions, *i.e.*, the functions which derive their significance from the situations in which they may be, may have to be, or are, exercised. In the exercise of his any situational function, his sole guideline is the unity, stability and security of the nation, although the actual application of this principle in a particular situation may not be free from inevitable complications. To say this is, however, not to minimise the deep and varied implications of the powers on which the concept of implied discretionary powers of the Governor is sought to be based, but to provide an objective guideline for him in the exercise of his any constitutional power.

*The Union and the Governor's Discretionary Powers:* This view of the Governor's discretionary powers is also intended to emphasise the role of the Union in any situation where the Governor actually takes a greater liberty in regard to his any power; to make the responsibility of the Union in such a case patent, which is latent in the scheme of the Constitution. To begin with, there seems to be absolutely no doubt that when the Governor exercises any discretionary power expressly vested in him, he is responsible for its exercise to the President, and then, through the Union Ministers ultimately to the Union Parliament. Also when he administers a State under article 356 as an agent of the President or is designated to act as the Administrator of an adjoining Union Territory, his responsibility to the Union is clear. When he acts outside these spheres but in a matter for which he has been invested with express special responsibility, his responsibility to the Union is equally incontrovertible.

When, however, he takes what has been referred to above as greater liberties in regard to other powers, say, for example, the power to appoint a Chief Minister, the power to dismiss a Chief Minister and the other Ministers; the power to address the Legislature and send messages to it; the power to dissolve the Legislative Assembly; the
power to assent to a Bill, including the power to reverse a Bill for the consideration of the President; the power to ask for the instructions of the President before promulgating certain Ordinances; and the power to report to the President on the condition in his State, specially for the purpose of article 356, he ought to be held responsible to the Union.

In this manner alone can the Governor be saved from being made the centre of controversies that must inevitably follow his taking such greater liberties and the Union Government may be held responsible for his such actions. This is essential to keep the image of the Governor immaculate which is so essential for his proper functioning in the State and for securing and maintaining democratic spirit and political morality in the country in general. It is imperative that the Governor must not only act impartially but must also appear to act impartially.

*The Governor and His Special Responsibilities*

In looking at the other powers of the Governor, it is to be noted at the outset that the Constitution also makes him specially responsible for certain matters. The question of his special responsibility also constantly engaged the attention of and drew support from the founding fathers, although in this case also, as in the case of his discretionary power, there was divergence of opinion among them about the exact scope for its application. And notably, as the Constitution eventually emerged from the Constituent Assembly, there was no express provision for any special responsibility of the Governor. It was only in 1956 that the Constitution (Seventh) Amendment Act authorised the President under article 371 to confer by order special responsibilities on the Governor in respect of the specified matters.

Under clause (1) of article 371 the President may by an order confer upon the Governor and Andhra Pradesh any special responsibility "in order to secure the proper functioning of the regional committees of the State Legislature" to be constituted under that article; a responsibility that may also be conferred on the Governor of Manipur under article 371C (2). Then, under clause (2) of the article 371, the Governor of Maharashtra or Gujarat may be made by the President specially responsible for (a) the establishment of
separate development boards for the specified areas and the placing of the reports on the functioning of the boards to the concerned Legislatures; (b) the equitable allocation of development funds among those areas; and (c) an equitable arrangement for providing adequate technical and vocational education and employment opportunities under the State for persons of the said areas. The Governor of Nagaland has under article 371A (1) (b) "special responsibility with respect to law and order in the State." And although terminable by the President at any time in pursuance of a report from the Governor to the effect, this responsibility is to continue.

"for so long as in his opinion internal disturbances occurring in the Naga Hills—Tuensang Area immediately before the formation of that State continue therein or in any part thereof and in the discharge of his functions in relation thereto the Governor shall, after consulting the Council of Ministers, exercise his individual judgment as to the action to be taken."

Evidently, in the light of the provisions of the Government of India Act, 1935, relating to the special responsibilities of the Governor under that Act and also in view of what article 371A(1) (b) says about the exercise of the special responsibility of the Governor of Nagaland, any special responsibility of a Governor is not a discretionary power. It is a power exercisable in his individual judgment, i.e., after consulting the Ministers but not being in any manner bound by their advice. It is also clear that in case of the special responsibility of a Governor under article 371A(1) (b), it is for the Governor to finally and conclusively decide in his discretion whether a matter is his special responsibility within the meaning of that article. Then, it should also appear that except for these express special responsibilities of the Governor, there can be no concept of implied special responsibilities of the Governor, even when article 164(1) proviso requires in the specified States the appointment of Ministers in charge of Tribal Welfare and Schedule VI, para 14(7) speaks of placing a Minister in charge of the welfare of the autonomous districts and regions covered by that Schedule.

The Governor and the Choice of a Chief Minister

Clause (l) of article 164 empowers the Governor to appoint the Chief Minister. The Chief Minister is a person at the head of the Council of Minister whose members are appointed on his advice and
which is made by clause (2) of that article collectively responsible to the Legislative Assembly. This implies that the Chief Minister must be a person who commands, or can command, the confidence of the House. If, then, after a general election to a Legislative Assembly, the Governor finds a party, or a combination of parties that fought the election on a common platform, in absolute majority, however tenuous it may be, he should not find any difficulty in commissioning the leader of the majority Legislature Party as the Chief Minister. But if the majority Legislature Party has no acknowledged leader or it fails to elect its leader, the Governor’s task may not be easy. The expectation seems to be that he would start with the person who, in his opinion, is most likely to command confidence of the Legislative Assembly. But extreme caution is necessary, for the nomination of a person as a Chief Minister or even a rumour that a person may be so nominated, is always likely to tip the scale of power in his or in his group’s or party’s favour.

If, however, there is no clear absolute majority for a party or a pre-election combine of parties, the Governor’s choice of a Chief Minister may become attended with numerous variables, for, any move by the Governor is sure to have repercussions on the pattern of alignments of the members in the Legislative Assembly. The person first contacted may gain immediate advantage over his other rivals. The Governor must be extremely scrupulous, objective and neutral. He may begin with the leader of the largest single party, unless the outgoing Chief Minister, if any, advises him otherwise, whose advice he should normally follow.

But it is possible that, considering the test of the likelihood of a person to command confidence in the Legislature Assembly as the basic determinant of a Governor’s choice of a Chief Minister unless national unity and security is at stake, his choice in this situation may fall on another person or party. However, it seems that in making his choice in this situation, the Governor ought always to give due weight to a claim by a group of parties that may combine after a general election and he should not demur in accepting their claim unless (i) the outgoing Chief Minister, if any, on honest considerations advises otherwise; (ii) the claim to majority is patently untenable; (iii) the acceptance of the claim poses a clear and immediate threat to national unity and security.
Then, in the context of the menacingly mercurial and sordidly selfish multi-party and poly-centric State politics a highly acrobatic situation the Governor may be faced with in finding a Chief Minister when a Chief Minister in office loses his majority by defeat at the polls; or defections from, or split in, the party, or the parties or group, supporting him. An ideal solution in this situation would be to expect the Chief Minister defeated at the polls or on the floor of the Legislative Assembly to advise the Governor on the proper course of action to be taken. And unless such a Chief Minister advises dissolution of the Assembly or imposition of President’s rule after his defeat in a general election or his advise poses a threat to the unity and security of India, the Governor should act accordingly. If the Chief Minister does not come out with any advice, the Governor may begin with the party, group or combination of groups or parties or even a person having the largest following in the Legislative Assembly or is likely to earn the confidence of the Assembly.

If, however, a Chief Minister loses his majority not due to a defeat in a general election or a defeat on the floor of the Assembly, normally he should be willing to take responsibility for the action of the Governor and the latter ought to concede him this right unless, of course, the advice given poses a clear danger to national unity and security. This implies that such a Chief Minister may ask for prorogation of the Assembly if already in session; he may desire to buy time to gain support for summoning the Assembly if not in session; he may advise for the dissolution of the Assembly; and may also advise the Governor to recommend for President’s rule. But if such a Chief Minister declines to shoulder responsibility for the Governor’s action, the latter may himself decide upon the best course of action and try his best to have a viable Ministry as if the Chief Minister has been defeated on the floor of the Assembly.

But in spite of the numerous variables involved in the choice of a Chief Minister, particularly when a Chief Minister in office loses his majority, the power of the Governor to appoint a Chief Minister is not discretionary, notwithstanding the observations of Ambedkar to the contrary in the Constituent Assembly. First, because the Constitution does not call this power discretionary. Secondly, although in certain cases, depending upon political realities, the Governor is in a position to take greater liberties with this power, he must appoint some body as the Chief minister unless he decides to have President’s
rule. Thirdly, a Chief Minister appointed by the Governor must be in a position to command the confidence of the Legislative Assembly unless he is appointed for the ritual of merely facing the Assembly before it is dissolved or for subjecting the State to the trauma of article 356.

The Constitution conclusively lays down that unless there is President's rule the Governor must have a Chief Minister at the head of the Council of the Ministers and the Ministry must command the confidence of the Assembly. It must be admitted, however, that in certain cases of nominating a Chief Minister, specially when the Chief Minister in office loses majority, democracy in the State hangs by a very slender thread and the Governor may have a clear scope for choosing a Chief Minister with greater liberties. But these cases demand of him excellent fairness, objectivity and impartiality and do not call for characterising his power in this regard as discretionary.

Dismissal of a Chief Minister and the Other Ministers

The Ministers, says article 164(1), *inter alia*, "shall hold office during the pleasure of the President". But, then, article 164(2), makes the Ministry collectively responsible to the Legislative Assembly. The pleasure of the Governor is, thus, subject to the responsibility of the Ministry to the Assembly. A Chief Minister, or a Ministry, that enjoys the confidence of the Legislative Assembly cannot be removed from office unless his, or its, continuance in office poses a clear and immediate danger to the unity and security of the country. And what Ambedkar said in the context of the exercise of the "pleasure clause" of the President under article 75(2) seems to have a relevance only in the case of a particular Minister but not the Chief Minister or the Ministry, for the dismissal of a Chief Minister is an action against the whole Ministry. He surely had in mind the case of an individual Minister other than the person at the head of a Ministry when he said: "The two conditions that govern the tenure of a Minister in office are purity of administration and confidence of the House. But if the whole Ministry is corrupt and enjoys the confidence of the House, it cannot possibly be dismissed, although a Ministry not enjoying the confidence of the House and yet unwilling to face the electorate may validly be removed from office under the "pleasure

clause". So can a Ministry posing a clear and present threat to national unity and security.

A Chief Minister in office, who loses majority but is willing to take responsibility for the action of the Governor, should be allowed to continue in office till his minority position is patently established by his defeat in the Legislative Assembly, the more so when the Constitution says that not more than six months shall elapse between two sessions of the State Legislature. Such a Chief Minister may, however, advise the dissolution of the Assembly or invocation of President’s rule instead of resigning, and the Governor ought to follow his advice if national unity or security is not endangered by the proposed course of action. A Chief Minister in this situation ought not also lead, or let, the State to pose a grave law and order problem which may threaten national unity and security. He should take the earliest opportunity to face the Assembly or the electorate, and he must act reasonably and honestly. For otherwise, he is likely to open up the floodgate of highly unpredictable and dangerous precedents and consequences, such, for example, as mass agitations demanding the dismissal of the Chief Minister or the Ministry; or the dissolution of the Legislative Assembly; or eventually even the acceptance of such a demand by the concerned authorities.

But whatever may happen, and notwithstanding the judgment of the Calcutta High Court, in *M. P. Sharma v. P. C. Ghosh*, the power of the Governor to remove a Chief Minister or the Ministry, is not discretionary. For, the sole condition to determine the exercise of this power is whether or not the Chief Minister or the Ministry enjoys the confidence of the Legislative Assembly, although, of course, there is always present the elementary condition whether the continuance of a Chief Minister or a Ministry is a danger to national security and unity. But if the latter condition be the uppermost in the mind of a Governor at any time, he ought to recommend for President’s rule instead of himself dismissing the Ministry. Ambedkar felt that the power to remove a Ministry was not discretionary and said:

"I have no doubt that it is the intention of this Constitution that the Ministry shall hold office during such time as it holds the confidence of the majority. It is on this principle that the Constitution will work. The reason why we have not so-

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56e *C. A. D.*, Vol. VIII; p. 520. Italics are mine.
expressly stated it is because it has not been stated in that fashion or in those terms in any of the constitutions which lay down a Parliamentary system of Government. "During the pleasure" is always understood to mean that the pleasure shall not continue notwithstanding the fact that the Ministry has lost the confidence of the majority......and, therefore, it is unnecessary to differ from what I may say the stereotyped phraseology which is used in all responsible governments."

Unfortunately, however, the working of the Constitution over the past years has revealed some unhappy departures from the objective norms suggested above for appointing or dismissing a Chief Minister or a Ministry. These twin powers are sought to be sustained or supplemented by the power to summon or prorogue the Legislature or to dissolve the Legislative Assembly. The role of the Union in these matters has also been far from being defensible on too numerous an occasion. One may not derive much satisfaction from the way in which the Chief Minister of Bombay was appointed in 1952 and that of Madras in 1952 itself. The action of the Governor of Rajasthan in 1967 and that of the Governor of West Bengal in the same year in this regard are also extremely controversial. In fact, not quite often the Chief Ministers are mere nominees of the Prime Minister and they stay in office so long as they enjoy his approbation, although he himself has at times to accept a situation as a fait accompli. And the fact that these are continuing aberrations is extremely unbecoming of a country governed by so elaborate a Constitution as ours.88f

Power to Address the Legislature and Send It Messages

The Governor's power to address the Legislature or send messages to it cannot also be discretionary. An address of a special nature at the beginning of the first session of the Legislature after a general election, or at the beginning of the first session of the Legislature in each year, is essentially a statement of policy that the Ministry desires to pursue. It is commonly acknowledged that the Governor is merely a mouth-piece of his Ministry in reading out his address. Not a single word is his own.

One thing seems, however, plausible. A Governor may find such an address or any portion thereof extremely objectionable. He may then exert his best influence on the Ministry to make suitable amend-

88f See Chatterjee, Sibranjan, The Governor in the Indian Constitution, Calcutta, 1974, for the details of these and numerous such other incidents.
ments. But if the Ministry persists, it seems more in keeping with his status to read out the whole of the address, unless the address is a declaration of secession or is clearly seditious or the like. But in that eventuality, he may ask for President's rule. The Ministry for its part also must not involve the Governor in embarrassing controversies not in keeping with this constitutional headship of the State and his position as the Union representative. The Chief Minister may make a statement supplementing the address presented by the Governor at a suitable stage.

Power of Summoning, Prorogation and Dissolution

The Governor has also vested in him the power to summon and prorogue the State Legislature and dissolve the Legislative Assembly. But these powers are also not discretionary. The power to summon or prorogue the Legislature is the power to be validly exercised only on the advice of the Chief Minister, even if it is intended to strengthening the position of the Chief Minister, or bypassing an impasse created by an adjournment of the Legislative Assembly by the Speaker. If the Chief Minister and the Speaker in league choke the functioning of the State Legislature, the Governor may either recommend President's rule or wait for six months from the date of its adjournment when it must reassemble as the Constitution requires.

Dissolution: Dissolution of a Legislative Assembly by the Governor is also normally to be done on the advice of the Chief Minister, unless it is a case of dissolution advised by a Chief Minister immediately after a general election to the Assembly. In that case he may ignore the advice and may make efforts to secure a new viable Ministry. And the Assembly should be dissolved or President's rule invoked only when it is not possible to have such a Ministry. But if a Chief Minister is defeated in the Assembly or loses his majority at any time while he is in office, he is within his rights to advise dissolution without resigning and the Governor normally ought to follow this advice, and it is entirely for the Chief Minister to maintain parliamentary decorum. If, however, the Governor feels that the situation which may follow a dissolution would presently and clearly threaten national unity and security, he may not himself dissolve the Assembly but ask for President's rule. Thus, the Governor's power to dissolve the Legislative Assembly is also not discretionary.
Power to Assent to or Reserve Bills

Again the power of the Governor under article 200 to assent to a Bill; to withhold assent therefrom; or to return it to the Legislature for reconsideration, if it is not a Money Bill; or also to let it simply lie on his table cannot be said to be discretionary in nature. Such a power is normal in the case of a constitutional head of a State and for the Governor to withhold assent from a Bill or to return it, if it is not a Money Bill, to the Legislature is to invite a conflict with the Ministry. For, the Ministry must either accept the responsibility for such an action of the Governor or resign. Besides, the Governor is bound to assent to a Bill which when returned by him to the Legislature is repassed by that body.

Power to Reserve Bills: However, this article also authorises the Governor to reserve any Bill for the consideration of the President. And he must reserve a Bill for the consideration of the President if, in his opinion, it would so derogate from the powers of the High Court as to endanger its constitutional position, a requirement which has no room for any controversy. Then, Bills have also to be reserved for the consideration of the President under articles 31 (3), 31 A (1) proviso and 31C, but in these cases there are definite guidelines. The remainder of his power to reserve a Bill is to be construed as a requirement in keeping with his role as the representative of the Union in his State. And the question whether the Governor acts in discretion in this regard misses the mark in that the Governor does not decide upon the final question of assent but merely reserves it for the consideration of the President. This power of his is also not discretionary.

Power to Pass Certain Ordinances Only on Presidential Instructions

In issuing an Ordinance under article 213, the Governor is precluded from issuing an Ordinance for a purpose without instruction from the President if a Bill for the purpose would have required a prior Presidential approval for introduction into the Legislature; if the Governor would have reserved a Bill for that purpose for the consideration of the President; or if an Act of the Legislature for the purpose would have required Presidential assent for being brought into force. This requirement of article 213 also does not expect the
Governor to act in discretion but is an aspect of his position as a representative of the Union.

Power to Make Reports to the President

The Governor of Manipur is required under article like 371C(2) to make an annual report to the President; the Governor of Nagaland, may make a report under article 371A(1) (b) proviso second; or any Governor may make a report to the President on the conditions in his State, which may provide a basis for the application of article 356. Clearly this reporting function of the Governors is not discretionary. But it is a part of their position as the representative of the Union and they ought to be as neutral as a civil servant in preparing their any such report and drawing inferences.

An Act to be Done on Being Satisfied about Its Precondition

The Governor is required to take certain actions on being satisfied about the existence of the precondition or conditions for doing the act. Thus, for example, he must reserve a Bill under article 200 for the consideration of the President, if, in his opinion, the Bill is likely to endanger the constitutional position of the High Court. Eventually, such a requirement of self-satisfaction is an incidence of his position as a Union representative and is also hedged in by the specified objective norms. It cannot be a discretionary power of the Governor.

The Courts and Ministerial Advice

It may also be noted that a court of law is precluded from enquiring into whether any, and if so what, advice the Ministers tender to the Governor. This is to place the Governor-Minister relationship outside the sphere of justiciability, or so to say, treat it as a political issue reflecting its highly delicate and intricate nature. This also aims at ensuring executive privilege and secrecy. The provision in this behalf are contained in the following article 163(3):

"The question whether any, and if to what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

Conclusively, then, what has been said above of the Governor vis-à-vis his Council of Ministers with particular regard to his discretionary power readily brings out in bold relief his position eminently as the constitutional head of the State, without diminishing in any way his position as a Union representative. Notwithstanding
his discretionary power, special responsibilities, situational functions and his status as a Union representative, the Governor in relation to his Council of Ministers is essentially intended to act as a constitutional head of the State. He is normally bound to act only on the advice of his Ministers. And it is on this view of the matter that one may find any meaning whatever in a saying that the Governor is, as a Chief Minister once said, "nothing but an expensive irritant", or is a "figure-head", or is "a bird in a golden cage", or is "a rubber stamp", or is a "post box" between the Union and the State or the Cabinet and the State Gazette; or that his position is "ornamental", or that, as Vijaya Lakshmi Pandit who resigned as the Governor of Maharashtra suggested, the position has no attraction save that of salary, and that, too, without in any way accepting what it desires to convey. For, as Sri Prakasa, a former Governor himself, says,

"...it would indeed be a pity if any office is maintained in a democracy that serves no useful purpose and it will be a greater pity if the only thing that can induce a person to accept the office is its salary." 889

THE DUAL ROLE OF THE GOVERNOR

The supreme concern of the founding fathers for national unity, stability, security and strength; their unequivocal intendment of offering to the States only a suitably modified version of Parliamentary Government; their meticulous caution and care in shaping the office of the Governor; their clear view of his office as a link in the Union-State relations; the provision for the appointment of the Governor by the President and the requirement of his holding office during the President’s pleasure; the inclusion of the words "in his discretion" in articles 163(1) (2) and 166(3); the express exclusion of the courts from enquiring into the Governor-Minister relationship; and above all the provision for President’s rule in a State under article 356 do not, however, reflect the design of the Raj Bhavan as a "golden cage" in a State.

889 Sri Prakasa: State Governors in India; pp. 63-64. These words are reminiscent of what the first President, Rajendra Prasad, said of the role of the Indian President on Nov. 28, 1960, while laying down the foundation-stone of the Indian Law Institute. The President, inter alia, said "it was a pity that people in this country had got used to relying on precedents of England to such an extent that it seemed 'almost sacrilegious' to have a different interpretation even if conditions and circumstances in India might seem to require a different interpretation."
The amplitude, diversity, efficiency, and potentialities of the powers vested in the Governor; the prestige and authority of his office; the dignity and eminence of his personality; the confidence reposed in him by the Constitution and the Union; the predominance of the Union is the scheme of the Constitution; and his right to be informed of all the affairs relating to administration and legislation in his State assign him a place of pre-eminence in the scheme of State Government. And the festering fluidities in State politics; the experience of working the Constitution over all these past years; and the continuing unpredicabilities regarding his role in any specific future situation do not seem to suggest, as Alexandrowicz is inclined to feel, that the Governor has been reduced by convention to a mere constitutional head of the State with no real role to pay.\textsuperscript{58a} For, as Patel specifically pointed out in the Constituent Assembly there was no intention to import the conventions of the British Parliamentary system into the scheme of State Government without suitable modifications required by the peculiar Indian conditions.\textsuperscript{58b}

The Constitution envisages for the Governor a dual role in State Government, which he is bound by his oath of office, albeit morally, to "faithfully execute".\textsuperscript{58f} On the one hand, he is the head of the State, and on the other, he is the representative of the Union in the State. But these two aspects of the office of the Governor are but only the two sides of the same coin, although for convenience they may be viewed as two distinct, yet intricately intertwined, elements. The fact is that essentially the either element of his office receives a hue which but for the other would have most likely been quite different from what it has been now or may become any time in future. Yet it is better that the two should be viewed as distinctly as possible. For, in any given situation a viable fusion of the two may be highly problematical, making his office the most difficult in the scheme of the Constitution.

\textit{The Governor as the Head of the State}

The Governor is the head of the State within the terms of the Constitution and in this capacity the different aspects of his role

\textsuperscript{58a} See Alexandrowicz, C. H.: \textit{Constitutional Development in India}; op. cit.
\textsuperscript{58b} C.A.D., Vol. IV; pp. 579-80.
\textsuperscript{58f} See Art. 159.  
S: CI—51
may be stated as his (i) customary and constitutional roles; (ii) ceremonial and social roles; (iii) consultancy and catalytic roles; (iv) conscience and custodian roles; and (v) communication and link roles.

*Customary and Constitutional Roles*: Tradition has it that any human organisation must have a head, even if collegial and with only nominal or formal powers, and experience has proved its *raison d'être*. The provinces in India had since time immemorial some sort of heads differently designated at different times. Now the Governor is the head of the State, and his designation is a significant legacy of the British rule in this country.

Then, in responsible representative Government powers vest in the head of the state, which are exercisable by the Ministers responsible to the elected representative body of the people. The Governor of a State is the repository of the powers of all varieties necessary for running the State Government and the powers are exercisable normally on the advice of his Ministers, except in so far as he is required to act in his discretion. And although his certain powers, such as his power of appointing the Chief Minister and the other Ministers on the advice of the Chief Minister and his power of dissolving the Legislative Assembly, may become significant situational functions, by conducting himself impartially and objectively, he may always inculcate respect for constitutionalism in the country.

*Ceremonial and Social Roles*: The Governor has also many ceremonial and social functions to attend to. His ceremonial and social roles are not merely idle performances. His presence lends dignity and solemnity to an official or social function. It also goes to indicate official approbation or disapprobation of certain issues and actions. His social and ceremonial roles have also a useful communication function, for, even a Democratic Republic needs glitters and splendours. K. N. Katju, a former Governor, wrote:  

"It is said that every Governor of a State has to watch the course of political events and of administration in the State and keep the Central Government informed of what is happening there. That may be perfectly correct. But I think the Governor has much more to do. Governors are invited to social and ceremonial functions."

Consultancy and Catalytic Roles: Then he has the well-recognised consultancy role. He has Bagehot's celebrated "three rights: the right to be consulted, the right to encourage, and the right to warn". K. N. Katju wrote that the Governor "should have merely advisory functions". So said R. R. Diwarkar, another former Governor. Ambedkar pointedly referred in the Constituent Assembly to the duty of the Governor "to advise the Ministry, to warn the Ministry, to suggest to the Ministry an alternative and to ask for a reconsideration." At a recent Governors’ Conference Indira Gandhi also remarked:

"You can be the guide, philosopher and friend to your respective Governments, while also discharging your constitutional responsibilities".

Generally, an elderly person with varied experience in life, with a greater awareness of the Union's thinking on any particularly ticklish issue, and a broader national view of immediate issues faced by a State, the Governor, as a recluse from party politics, is eminently placed to play a catalytic role in State politics and Government. He ought to so inspire a sense of respect and confidence in his personality as to make all parties and interests look up to him "for disinterested advice and impartial support". K. N. Katju commented:

"I think that the Governor of a State under the Constitution can easily gain the respect and affection from the people under his care, if he himself leads an extremely dedicated life... From my experience I can say that the Governor should take no active interest in the day-to-day politics of the State, and should not interfere with what I may call service matters and should only be anxious by his advice and by his conduct and experience to assist the Chief Minister and his colleagues in removing all people's grievances and in bettering the administration".

And in order that he may enact his consultancy and catalytic roles effectively and faithfully he has under article 167(a)(b) the right to be informed of all the affairs relating to the administration and legislative proposals of the State. He may, if he cares to keep his eyes and ears open and be a close observer and good listener, come across news and views which should keep him well equipped in this regard.

59 See Bagehot W. : The English Constitution (World classics).
62 See his article in The Tribune, op. cit.
His greatest pleasure ought to lie in \textit{silently and unobtrusively} influencing the views and acts of his Ministry to make them conform to national objectives. And then under article 167(c) he has also the right to say, in the words of K. M. Munshi,\footnote{C.A.D., Vol. VIII; p. 54.}

"Here is a particular order. I feel that it is a matter of great importance. I want that by virtue of collective responsibility, all the Ministers must meet together and consider it...It is merely a matter of caution that a decision which, in the opinion of the constitutional head, is such as requires the \textit{imprimatur} of the whole Cabinet and not of a single Minister, should so receive it. Therefore, it is a safeguard, which preserves the collective responsibility".

\textit{Conscience and Custodian Roles} : The consultancy and catalytic roles of the Governor have, in the nature of things, to be performed away from the gaze of the public. And the extent of his success on that count must remain always a matter of speculation, for, he cannot possibly go to the people, although he may turn to the Union, for any support for his any consultancy move. There is, however, a limited scope, depending upon the surrounding circumstances, for him to even publicly give vent to his feelings over the failures and weaknesses of the State Government and administration. He, however, may expect a greater support from the Union in this regard, provided political situations favour him.

But although his conscience role is narrower than that of the President, the Governor has come to be to a considerable degree a custodian of constitutional Government and administration in his State and of the interests of the State in general.\footnote{See Sri Prakas: \textit{State Governors in India}, \textit{op. cit.}; p. 5.} The fact is that as a representative of the Union and of the people of the whole of the State, he has to be on a constant vigil to ensure that the Government and administration in a State is run in accordance with the provisions of the Constitution and to avoid as far as is within his powers the invocation of the President’s rule under article 356. And to this end his right to be informed of the affairs of the State administration and legislative proposals is vital. Ambedkar said:\footnote{Ibid.; p. 405.}

"The Governor is the representative of not of a party; he is the representative of the people as a whole of the State. It is in the name of the people that he carries on the administration. He must see that the administration is carried on at a level which is regarded as good, efficient and honest administration... It is to
enable the Governor to discharge his functions in respect of a good and pure administration that we propose to give the Governor the power to call for any information".

*Communication and Link Roles*: Communication within the State Government and administration is as much important as is communication between the State Government and the Union Government and between the rulers and the ruled generally in a country. The Governor can be very useful as a link between the Union and the State impressing upon each how the other is thinking or how far the other may go. He can effectively represent the case of his State to the Union and that of the Union to the State. And of equal significance may be his role in serving as a channel of communication between the rulers and the ruled by his immaculate conduct and integrity of character and inspiring in the people a faith in the legitimacy of the socio-economic and political foundations of the community.

*The Governor as a Representative of the Union*

In the Constituent Assembly Nehru thought of the Governor as a "link" in the Union—Unit relationship and Ambedkar also felt alike. Mahabir Tyagi spoke more explicitly, though not more accurately, of his role in this regard:

"These Governors are not there for nothing. After all we are to see that the policy of the Centre is carried out. We have to help the States linked together and the Governor is the agent or rather he is the agency which will press for and guard the Central policy. The Governor being the agency of the Centre is the only guarantee to integrate the various provinces or States. The Governor must remain the guardian of the Central policy on the one side, and the Constitution on the other".

But to suggest, however, that the Governor is a representative of the Union is not to say that he is an agent, or even a delegate, of the *Central Government*, except, of course, for a limited purpose when he administers a State under President's rule or acts as an Administrator of an adjoining Union Territory. For his status as an agent of the Centre decidedly derogates from his role as the head of the State under Parliamentary Government. T. T. Krishnamachari emphati-

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cally denied the role of the Governor as an agent of the Central Government. He said in the Constituent Assembly:

"I would at once disclaim all ideas...that we in this House want the future Governor, to be nominated by the President, to be in any sense an agent of the Central Government. I would like that point to be made very clear, because such an idea finds no place in the scheme of Government we envisage for the future".69a

Yet undeniably, the Governor is a representative of the Union and the different elements of this aspect of his office may conveniently be categorised as his (i) unity role (ii) image role (iii) sentinel role; (iv) reporting role and (v) agency role.

**Unity Role**: The primary responsibility of the Governor as a representative of the Union is to ensure the unity and integrity of the Union. This unity role has both a physical and a psychological aspect. He is to see that the territorial integrity of the Union is maintained and he is also to promote emotional integration within a State and throughout the nation. Sri Prakasa, a former Governor, suggests that

"the only official emblem today of the unity of the country is the Governor. I have a feeling that even the President is not so."69

**Image Role**: To play his unity and integration role meaningfully and effectively, the Governor must present before the people an immaculate image of himself and also of the Union Government and the Government and administration in general in the country. By character and conduct, by words and deeds, he must stand out as an ideal "human form."70 He must impress on all around him the objectivity, impartiality, sincerity, honesty, efficiency and effectiveness of his own and of the Government and administration in general in the land. He should not let any one feel that the Union is using him for partisan purposes. Nor should he let anyone develop any antipathy or hostility for the existing socio-economic and political system.

Besides, belong as he does to a State different from the one where he is posted as Governor, he ought to be able to better impress upon the people in the State about the people in his home State. He ought to be a trustee of the interests of the minorities. He ought also to hold out a better image of the Union before the people of the

69a C.A.D., Vol. VIII; p. 460.
69 Sri Prakasa: "Governor's Lot Worsening; Reappraisal Overdue" The Tribune, Candigrah, Apr. 17, 1969,
70 Cf. Sri Prakasa: State Governors in India, op. cit.; p. 5.
State in order that they may not lose faith in the sincerity and honesty of the Union. He ought to keep his office out of unsavoury controversies and must never get dragged into active party politics. If he decides or finds that his interests lie in active politics more, he ought to resign before soiling the image of his office.\textsuperscript{71} In the interests of national integration and security and democratic government and administration, the demand on his objectivity and impartiality is greater than that on even a Supreme Court Judge. For, he is like a fish in the political ocean renouncing even a drop of water, whereas the Judge functions by assumption outside the political arena.

\textit{Sentinel Role:} The constitutional and consultancy roles of the Governor demand of him absolute political neutrality. But this neutrality is not apathy or inertia. His custodian and unity roles expect of him alertness and agility. He must maintain a constant vigil to effectively discharge these roles. He has to watch whether the Constitution is being faithfully conformed to; the integrity of the Union is not being threatened; and the direction of the Union to the State is being sincerely observed by the State Government and administration. K. M. Munshi pointedly put that the Governor

"is the watchdog of Constitutional propriety and the link which binds the State to the Centre thus securing the constitutional unity of India".\textsuperscript{72}

For exercising his sentinel role successfully, the Governor has to keep himself wide awake to all the local, national and international developments. And he has specifically at his disposal under article 167 the right to be informed of the affairs of State administration and legislative proposals and also the competence to require a decision of an individual Minister, including that of a Chief Minister, to be submitted to the collective decision of the Council of Ministers. Then, he has the significant power of reserving certain measures under article 200 for the consideration of the President, and under article 213 he is to issue certain Ordinances only on instructions from the President. Of the need for the power of the Governor to reserve certain measures under article 200, Ambedkar spoke as follows, though not in quite a happy phraseology:

\textsuperscript{71} See the editorial "Impropriety Plus" in \textit{The Statesman} on the resignation of Kerala Governor in 1969 in the context of Indira Gandhi—Majority Desai contest for Prime Ministership.

\textsuperscript{72} See \textit{Kulpali’s Letter} No. 103, Bharatiya Vidya Bhavan, Bombay.
"The Provincial Governments are required to work in subordination to the Central Government, and, therefore, in order to see that they do act in subordination to the Central Government, the Governor will reserve certain things in order to give the President the opportunity to see that the rules under which the Provincial Governments are supposed to act according to the Constitution or in subordination to the Central Government are observed".\textsuperscript{73}

\textit{Reporting Role}: What the Governor watches, he records. He is a sensitive and faithful radar providing the Centre with continuous readings on the political weather in a State. This implies that he must observe things not only constantly and keenly but also objectively. He ought to be as astute and objective in observation as he ought to be neutral and impartial in drawing inferences. For, much depends on how he feels and acts or reacts in a \textit{difficult State} or in a \textit{difficult situation}. In reporting to the Union on the affairs of a State he ought to remember that democracy in the Units is as much his concern as is the integrity of the Union, although an emphasis on the latter seems to have, by assumption, always a priority. Sri Prakas said:

"A Governor's first duty is to know that he is the representative of the Centre, and that he must keep the Centre informed of the affairs of his State whenever he should feel that such things are going on which can endanger the unity of the country...In any case, whether right or wrong, the Governor must tell the Centre what his own reactions are over the events that he sees around him. It would be the Centre's duty to act or not to act in the peculiar circumstances as presented by the Governor."\textsuperscript{74}

\textit{Agency Role}: Then, the Governor, as a representative of the Union, has also to perform some functions as an agent of the Union. This happens when he administers a State under President's rule. In such a situation he is a mere agent of the Union. And though he still functions as the chief executive of the State in a narrow operational sense, his responsibility to, and the control over him by, the principal, the President, is absolute. The same principle applies when the President designates a Governor to act the Administrator in respect of an adjoining Union Territory which has no Legislature or Ministry.

Evidently, even this outline view of the dual role of the Governor as the head of the State and the representative of the Union should show that in the scheme of the Constitution the occupant of a Raj

\textsuperscript{73} C.A.D., Vol. VIII ; p. 546.
\textsuperscript{74} Sri Prakas: \textit{State Governors in India, op. cit.}, p. 5.
Bhavan is intended to be neither a constitutional robot nor a political policeman. In the changed context of multi-party and poly-centric political landscape, his "role has become vital to the democratic life in the country." In fact, the demand on the office of the Governor of a State is so unusual at present, particularly in difficult States, or in difficult times, that seldom can a Governor be expected to escape being made a centre of political controversies when he has to make any real choice in any situation. Regarding his role in the changed political context since Independence, Dharam Vira, once himself a centre of a stormy controversy as the Governor of West Bengal, feels:

"In the early period after independence, when there were one-party stable Governments all over the country, the responsibilities of the Governor were merely those of a constitutional head. But in the present context when political loyalties are shifting fast and when multi-party Governments and Governments different politically from that operating at the Centre are functioning, his responsibilities have greatly increased".

In this situation, there always seems to be an extraordinary demand on his personality. He ought to possess something of the objectivity and interests of an academician; the skill and precision of a technician; the acumen and astuteness of a politician; the perspicacity and comprehension of a statesman; the neutrality and anonymity of a civil servant; the zeal and sympathies of a social worker; the spirit and style of a player; and the integrity and renunciation of a saint. These are indeed qualities which can only exceptionally combine in a person whom only a political choice may most likely land in a Raj Bhavan. Yet the office of the Governor must remain for the most part what its holder may choose to make it. B. G. Kher, the then Chief Minister of Bombay, had to say even in the Constituent Assembly:

"A Governor can do a great deal of good if he is a good Governor, in spite of the very little power given to him under the Constitution we are framing".

It seems axiomatic that in the backdrop of the continuing multi-party and poly-centric political scene in the States, the Governor’s responsibilities must loom large in the operations of constitutional

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26 See "Interview with Dharam Vira," The Hindusthan Times, New Delhi, Oct. 11, 1969.
Government and administration in a State. In order that he may discharge these responsibilities sincerely and effectively and may serve the Constitution and the people faithfully and honestly, it is necessary, first, that the Governor should always act fairly, objectively and impartially in appointing or removing a Chief Minister and in any other matter relating to his State. Secondly, the dissolution of a State Legislative Assembly without the advice of the Chief Minister shall not be generally done. Thirdly, the Union shall generally observe strict neutrality, and if it feels inclined to interfere in national interest, it must clearly accept responsibility for its action. Fourthly, President's rule under article 356 should only be rarely invoked. And fifthly, the political parties, groups, interests and individuals involved in a situation would generally behave responsibly and have a broader and long term national perspective in view in regard to all matters they may find themselves confronted with.

And although in the light of the working of the Constitution over the past years these five-fold conditions may appear rather normative, if not utopian, they are certainly inherent in a secular view of the Constitution and are categorical imperatives in the interests of democracy in the States, territorial integrity of the country and emotional integration of the nation. For, in the scheme of the Constitution the office of the Governor of a State is distinctly designed as a complex computer in constitutional statics, a sensitive radar in constitutional dynamics and a sincere umpire in constitutional politics. The Governor has now come to occupy a crucial position in the working of constitutional Government in the States and the country in general and in ensuring the integrity, security and strength of the Union. And nothing must be done to impede him in sincerely, honestly and faithfully discharging the duties of his office; preserving, protecting and defending the Constitution and the laws to the best of his abilities; and devoting himself to the service and well-being of the people of his State or the nation in general. 78

THE STATE COUNCIL OF MINISTERS AND THE CHIEF MINISTER

The centre-piece of constitutional Government and administration in a State is the State Council of Ministers headed by the Chief

78 Cf. Art. 159.
Minister conceived by article 163(1) as a collegial executive and commonly characterised also as the State Government or the State Ministry. It is a committee of the concerned State Legislature, though constitutionally made responsible only to the Legislative Assembly of the State. The core of a State Council of Ministers is the State Cabinet, though nowhere recognised by the Constitution. It is this body that functions as the apex State executive organ and has come to be realistically referred to as the State Government or the Ministry. And a Chief Minister is the focus of the State Council of Ministers and the State cabinet, the real chief executive of his State.

CONSTITUTION OF A STATE COUNCIL OF MINISTERS

Article 163, the first article, relating to a State Council of Ministers provides:

"(1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

Read by the light *Sibnath Banerjee’s Case*, clause (1) of article 163 makes a State Council of Ministers a public body consisting of officers subordinate to the Governor with the function to aid and advise him, except in respect of matters within his discretion. Besides, the Governor is himself to decide under clause (2) of this article whether a matter falls within his discretion. Then under article 356, a State Council of Ministers may be dispensed with altogether. These, reinforced by other constitutional provisions and socio-economic and political situations, focus the essential constitutional contrast between the respective positions of the State Councils of Ministers and the Union Council of Ministers, although clause (3) of article 163 makes a State Council of Ministers a public body consisting of officers subordinate to the Governor with the function to aid and advise him, except in respect of matters within his discretion. Besides, the Governor is himself to decide under clause (2) of this article whether a matter falls within his discretion. Then under article 356, a State Council of Ministers may be dispensed with altogether. These, reinforced by other constitutional provisions and socio-economic and political situations, focus the essential constitutional contrast between the respective positions of the State Councils of Ministers and the Union Council of Ministers, although clause (3) of article
163 makes the advice of State Ministers to Governor, like that of the Union Ministers to the President, non-justiciable.

Then follows article 164 which says:

"(1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor:

Provided that in the States of Bihar, Madhya Pradesh and Orissa there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) Before a Minister enters upon his office, the Governor shall administer to him the oath of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

(5) The salaries and allowances of the Ministers shall be such as the Legislature of the State may from time to time by law determine and until the Legislature of the State so determines, shall be as specified in the Second Schedule".

Evidently, a mere glance at article 164 should prove that the provisions relating to a State Council of Ministers in this article are mutatis mutandis the same as those relating to the Union Council of Ministers, except that certain States are to have a Minister in charge of tribal welfare. Consequently, article 164 indicates only the constitutional surface layer of the much deeper political iceberg of the issues involved in induction into, continuation in, and dismissal from the office of the Chief Minister or any other Minister.

*The Chief Minister*

The Chief Minister heads the Council of Ministers in his State, which is constitutionally responsible to the State Legislative Assembly. This means that he must enjoy the support in the Assembly. It is not constitutionally necessary that he must be an elected member of the Assembly at the time of his becoming a Chief Minister but he must become a member of the State Legislature within six months from his becoming Chief Minister. Conventionally, it has also come
to be accepted that his membership of the State Legislature means his membership of the Legislative Assembly.

*Selection of a Chief Minister*: The selection of a Chief Minister is the primary step in the formation of a State Council of Ministers. The law of the Constitution is that the Governor appoints a Chief Minister within the terms of clause (1) of article 163. Yet the political fact in general is that State Chief Minister is the choice of the national party leaders of the majority Legislature Party in the State concerned. In a State where the ruling party at the Centre enjoys a majority, a State Chief Minister is not invariably a nominee of the Prime Minister, or a senior Cabinet Minister. The Governor does not normally seem to have a real choice to make.

It should be recognised, however, that there may be State Chief Ministers in their own right. This was the situation particularly immediately after Independence and may be an essential feature when the Prime Minister is weak or heads a coalition or minority Government. This may also be in the case of regional parties gaining power in a State or a State having a coalition or minority Government.

*The Other Ministers*

The requirement that there shall be a *Council of Ministers* in a State implies that there must be at least one more Minister than the Chief Minister. Thus, although there is an apparent floor limit on the size of a State Ministry, there is no such maximum limit.

*Number and Rank of Ministers*: The number of Ministers and their ranks are matters of convention and convenience. The States have Cabinet Ministers, Ministers of State, Deputy Ministers and in certain cases even Parliamentary Secretaries. Their number varies from State to State depending on the size of the State and political exigencies. But on the whole the State Councils of Ministers have been unduly large.

*Selection of Other Ministers*: The Governor constitutionally appoints a Minister on the advice of the Chief Minister, and the only constitutional limitation on the composition of a Council of Ministers is that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work. In the States politics being extremely fluid and
factional, Ministry-making is a highly complex and elusive task. Factions, wings and interests have to be considered and the advice and directives of the national leaders and national organs of the party have to be heeded to. A Chief Minister is unusually lucky if the finds a free hand in choosing his own colleagues. In fact, he has to run to the national leaders on each occasion relating to a definitive decision concerning his any colleague. It is much of horse-trading that is evident in Ministry-making in the States and disregard for constitutional propriety and constitutional spirit is commonly in sight.

Deputy Chief Ministers: Sometimes a State may have a Deputy Chief Minister, although the Constitution is silent on this issue. A Deputy Chief Minister is usually the result of a political compromise among different factions in the same party or among different parties coalescing to form a Ministry.

The State Cabinet

In selecting Ministers to constitute a State Council of Ministers, it has always to be kept in view that out of them a few chosen shall constitute the State Cabinet. A Deputy Chief Minister is always a Cabinet Minister. Ministers heading Home, Finance, Revenue, Education, Agriculture, Irrigation and Industry Departments are normally included in a State Cabinet. Then there may be other Cabinet Ministers. The Cabinet Ministers are important faction and party leaders, and although efforts are made to secure homogeneity and team-spirit among them, not unoften a State Cabinet is a multi-headed hydra of self-seeking leaders or ideologically heterogenous coalescing parties.

Inner or Kitchen Cabinet: It is usual for a State Chief Minister to gather round himself an intimate circle of Ministers or non-Ministers whom he consults on important issues even before these issues are placed before the State Cabinet for decision. This inner or kitchen cabinet is useful in evolving agreed course of action and meeting emergencies.

Coalition Government: In a State where no single party secures an absolute majority in the State Legislative Assembly, a coalition Government may be formed. In the States coalition Governments have now come to be accepted as normal feature, although efforts are
always made to secure a single party Government. Coalition Governments in States have usually suffered from squabbles and dissensions. But they do not seem to be infesting them more than single party Governments. For, factionalism is the rule of State politics.

**Minority Government**: It is also possible in a State that it may have a minority Government. Such a minority Government may be either of the single largest party or of a smaller party supported by the single largest party or a group of other parties. This minority Government is a weak Government, perhaps, even weaker than a coalition Government. And both, a coalition Government and a minority Government, ought to be taken as make-shift arrangements.

**Allocation of Work and Terms and Conditions of Ministerial Office**

Each Minister has normally a specific portfolio assigned to him, although there may be a Minister without portfolio. A Cabinet Minister holds independent charge of a Department, although two or more Departments may be placed under the charge of a single Minister. Even a Minister of State may sometimes be placed in independent charge of a Department. But usually, a Minister of State or a Deputy Minister is assigned to assist a Cabinet Minister.

**Oaths of Office and of Secrecy**: Before entering upon his office a Minister is administered the following oath of office by the Governor:

"I, A. B., do swear in the name of God solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will faithfully and conscientiously discharge my duties as a Minister for the State of.....and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or ill-will."

He is also administered at the same time an oath of secrecy in the following terms:

"I, A. B., do swear in the name of God solemnly affirm that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the State of.....except as may be required for the due discharge of my duties as such Minister"
Term of Office: A State Minister does not have any fixed term of office. Even when a Legislative Assembly is dissolved, he does not ipso facto cease to hold office.\textsuperscript{80} A Minister, however, ceases to hold office if he is not a member of the State Legislature for six consecutive months. But apart from this constitutional fetter, the question of the term of office of a Minister is entirely a political one.

Salaries and Allowances: The State Legislature concerned has been given the power under article 164(5) to determine a Minister's salaries and allowances from time to time and this implies an added control of the Legislature over the Ministers as an element of the principle of ministerial responsibility. A Minister cannot, however, draw any salary as a member of the State Legislature nor can he hold any other office of profit.

Rights, Immunities and Privileges: Under article 177, a Minister of a State has "the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly of the State or, in the case of a State having a Legislative Council, both Houses, and to speak in and otherwise to take part in the proceedings of any committee of the Legislature of which he may be named a member but shall not, by virtue of this article, be entitled to vote." He, however, does not enjoy any immunities like the Governor, although he has the privileges of the member of a State Legislature.

Ministerial Change

Changes in the ministerial offices may occur in a number of ways. This may be a result of the defeat of a party in power at the poll or a Minister's or a Ministry's defeat in the State Legislative Assembly or by a Cabinet reshuffle. A Minister may also be removed from his office or a vacancy in his office may occur due to his resignation or death. Besides, a change in the office of a Chief Minister automatically brings down the whole Ministry to an end.

Change of a Chief Minister: A change in the office of a Chief Minister is always a serious affair ending the life of the whole Ministry. A Chief Minister may be removed from his office or he may resign or die in office. But whatever be the case, his exit from office means the exit of the Ministry as a whole.

Ministerial Responsibility

The concept of ministerial responsibility applicable to the States is the same as that of the Union. The Ministers of a State are collectively responsible to the State Legislative Assembly and their responsibility is also individual. This individual responsibility is secured by providing that the other Ministers shall be appointed by the Governor on the advice of the Chief Minister and that all the Ministers, including of the Chief Minister, hold office during the pleasure of the Governor. But neither collective nor individual ministerial responsibility seems to have any meaningful existence in the States. Sri Ram Sharma says:

“Factions among State parliamentary parties have been a rule...Intrigues against other colleagues and the Chief Minister have followed factious struggles. In almost all the States these have been furthered by the rift between the head of the political parties in the State and the Chief Minister”.

The Central influence on these factious fights is merely skin-deep and sometimes these fights themselves reflect the internecine struggles of the top leadership in the country. Besides, Ministers in the State often seem to be oblivious of political propriety and it is not

“usual in our country to find a differing Minister’s views appearing in the daily paper on the morning after a Cabinet meeting”.

ROLE AND RESPONSIBILITIES OF THE CHIEF MINISTER

The focus of State politics and the hub of State Government and administration is the Chief Minister. He is conceived by the Constitution as a miniature Prime Minister in his State, and his leadership role in his State is of equal significance to the leadership role of the Prime Minister in the country. A Chief Minister is not uncommonly a leader of national standing who may even achieve international stature. Then, he is the leader of his State. Thirdly, he is the leader of his party at the State level. Fourthly, he is the leader of the State Government. And fifthly, he is the leader of the State Legislative Assembly.

Leadership Role of the Chief Minister

A National Leader: In many a way a Chief Minister claims the position of a national leader. This claim is at least definitely

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82 Kulapati’s Letter No. 103, Bhartiya Vidyabhavan, Bombay.
S: CI—52
recognised within the frame of his party. But even apart therefrom, he may claim national recognition or international eminence which significantly adds to his strength.

Leader of the State: Decidedly a Chief Minister is the recognised leader of his State. He must be able to command the confidence of the people of his State and enjoy their respect irrespective of his party label. People of his State look to him for leadership in difficult hours and expect of him a clear understanding of the problems of the State.

State Leader of His party: The strength of a Chief Minister really lies in the support he enjoys from his party at the State level. Even when he happens to be a nominee of the Central leaders, he must be able to bring the State party organisation within his control if he is to function effectively and efficiently. And the national leaders must be made to recognise him as the person who can manage State party affairs with tact and firmness and lead the party to victory at the polls.

Leader of the Legislative Assembly: The Chief Minister is the leader of the Legislative Assembly and with the help of the Whips he has to manage the Government majority. He has also to read the sentiments of not only his partymen but also of the House as a whole and even of the people outside. His performance in the State Legislature is keenly watched and the future of his party in the State depends much on how he carries himself in and outside the Legislature. He has also the competence to advise the Governor to dissolve the Legislative Assembly if he finds it necessary for any purpose.

Leader of the State Government: The Chief Minister heads the Council of Ministers and he must be able to provide necessary leadership to his colleagues and secure their loyalty. He should be able to keep within limits factious intrigues and struggles. He is the soul of the Cabinet and provides the motive power for its policy, control and coordination functions. Besides, he provides a vital channel of communication between the Union and his State at both official and party levels. The matters which constitutionally vest in the Governor are normally the responsibilities of the Ministers, and in most vital matters it is the Chief Minister who is expected to provide the real line of action. The Constitution under article 167 makes him the sole link between the Cabinet and the Governor and casts on him duties in the following terms:
"It shall be the duty of the Chief Minister of each state—

(a) to communicate to the Governor of the State all decisions of the Council of Ministers relating to the administration of the affairs of the State and 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 decision has been taken by a Minister but which has not been considered by the Council."

**Chief Minister’s Secretariat**

To facilitate an efficient discharge of his duties by a Chief Minister, a State may also have a Chief Minister’s Secretariat staffed by permanent officers and employees.

*Personal Secretary to the Chief Minister*: A Chief Minister’s Secretariat is headed by the Personal Secretary to the Chief Minister. But this officer does not seem to occupy a post which compares viably with the position and influence enjoyed by the Chief Secretary of the State.

In conclusion, it should be noted, however, that the significance of the office of the Chief Minister has in general been on decline. The general run of State and national politics has a tendency to turn him into an errand boy of the Prime Minister and an emissary of his State colleagues, and there seems to be no immediate prospect of salvaging him from this miserable situation. And yet much of the future health and well-being of national life depends upon how far a Chief Minister in made a real master of his own house, though firmly committed to national objectives. But only the unfathomable future holds an unpredictable solution to this conundrum, which can possibly be only political and not constitutional.

**THE STATE CABINET AT WORK**

The State Government in law means the Governor, but in fact it implies the State Cabinet. The State Cabinet is the central device of the ship of the State at the same time providing its motive power, regulating its speed and guiding its direction. Its burdens are heavy, and functions vital.
Function of the State Cabinet

The varied and numerous functions of the State Cabinet may be conveniently viewed from policy angle, control angle and co-ordination angle. The three broad divisions of its functions thus are: (i) policy functions (ii) control functions and (iii) co-ordination functions.

Policy Functions: Policy making is the primary function of the Cabinet in a State, the broad and basic issues of policy and principles to be pursued by the State administration. In its policy role a State Cabinet has necessarily to take account of the national policies, particularly in the major fields of planning, finance, agriculture, food and supplies and higher education. In fact, its policy role has to run subsidiary to the policy role of the Union Cabinet. Specially so in view of the fact that most of the money and essential commodities and services needed for State plans and policies are controlled by the Union. Then, the role of the Chief Minister, the contributions of the other policy making organs, such as, the Cabinet committees and the State Departments; and the pulls of many a public, private, political and party and administrative elements have also to be reckoned with. The result is that on the whole the State Cabinets have not been performing their policy role quite happily and ad hocism is more pronounced in their case.

Control Functions: Once a policy has been agreed upon by the State Cabinet, it has to be implemented by the State administration at different levels and through different agencies. The State Cabinet has to provide direction, supervision and control in the implementation of a Cabinet policy. But the mounting miseries of the masses; disquieting erosion of integrity of character, loss of sense of service and social sense; increasing depreciation in the leadership stock of the Chief Minister; growing unending squabbles in State politics and the disadvantages attached to an inert, yet high-browed, civil service make this element of control non-existent. The State administration trundles on creakily and at times one is left wondering whether it is at all moving or even does exist.

Then, the control functions of a State Cabinet is also subject to the other usual limitations. The control role of the Chief Minister; his special supervision of law and order if he himself is not in charge of the function; his special relation with the Finance Department;
the secrecy of the Budget; the control of the Finance Department over State public personnel; the liberties that individual Ministers take in managing their miniature empires; and the non-co-operative attitude of the officials and employees all tend to scuttle the control functions of the State Cabinet to an inconceivable degree.

**Co-ordination Functions:** To co-ordinate the agencies and operations of the policies and activities of the State Government and administration is another vital function of the State Cabinet; a function which is so essential for any organised action on even a very small scale. The Government and administration of a State is such a vast affair that without co-ordination no progress is possible. But in actual practice the self-interest game; the factious fights; the ideological recusancy of the party leaders and the auto-empire building designs of the permanent agencies; and personalities involved in administration make a mockery of co-ordination in the States. And added to these are the inefficiencies in really appreciating and successfully solving the secular problems of co-ordination. Utter confusion and chaos and inefficiency usually characterise the State administration.

**Cabinet Meetings**

The Cabinet in the States meets regularly once a week to transact its business. Then, there may be and are special meetings. A Cabinet meeting is attended by the State Cabinet Ministers and Ministers of State, but not a Deputy Minister, also normally attend such a meeting. Officers and experts are also invited occasionally, the Chief Secretary is always present and functions as the Cabinet Secretary. At such a meeting the Chief Minister presides and in his absence the Deputy Chief Minister, if any, or the senior-most Cabinet Minister presides.

**Agenda, Proceedings and Secrecy:** A Cabinet meeting has before it an Agenda prepared by the Chief Secretary in consultation with the Chief Minister. But the person presiding over a Cabinet Meeting may allow a matter not in the Agenda to be discussed in urgent cases. The tone of discussions at a State Cabinet meeting varies with the personality and influence of the Chief Ministers and the position and influence of the other Cabinet Ministers and the degree of factionalism in the party. Decisions are reached in the form of consensus and no
votes are taken. But the liberties which now an individual Minister takes in respect of matters in his charge and the extent to which he even ignores the Chief Minister and the factionalism in the Cabinet and the party makes a Cabinet meeting a merely recording and not a deciding device. Although, it must be admitted that at such a meeting a degree of inter-Departmental liaison, but sadly not co-ordination, is maintained.

No detailed records of the proceedings of a Cabinet meeting are maintained. Only rough minutes are prepared by the Chief Secretary and they are sent out to each Minister after a meeting for any rectification. The Ministers send back the papers with their suggestions within the specified time and the Chief Minister finally decides upon the inclusion of any suggested rectifications.

The proceedings of the Cabinet are expected to be strictly kept secret and confidential and the Ministers are bound to observe this principle. But leakages are more than normal. Then, there is the press which is also usually briefed after each Cabinet meeting on all major Cabinet decisions, except a decision which is deemed to be top-secret. But even these top-secrets are rarely leak-proof, and although their details may not become known, the secrecy of a State Cabinet meeting is not often illusory.

_Cabinet Committees and Cabinet Secretariat_

A State Cabinet constitutes both standing and _ad hoc_ committees to assist it in functions which are indeed many and varied. The number and membership of State Cabinet committees are matters of political expediency and even at times factional considerations and they vary greatly from State to State or time to time. The Chief Minister, if he is a member, is the chairman of a Cabinet committee, and in other cases a senior Cabinet member is made chairman. Cabinet committees are useful in policy formulation and co-ordination of policy and administration. In some cases they are more effective than even the parent body.

_Cabinet Secretariat and Chief Secretary_: The States do not maintain a separate secretarial establishment for State Cabinets. The State Chief Secretary, who is normally the senior most member of the I.A.S. cadre in the State, functions as the Cabinet Secretary and is privy to the Chief Minister. It is his responsibility to issue summons
for any meeting of the Cabinet or a Cabinet committee, to maintain records of such a meeting; to circulate among the members concerned the necessary papers for such a meeting; and to do other needful things in this regard. The role of the Chief Secretary of a State is significant in the working of the State Government and administration.

**CONDUCT OF GOVERNMENT BUSINESS**

Article 166 provides for the conduct of the business of a State Government. This article is followed by article 167 which provides for the duties of a Chief Minister to furnish the Governor with information relating to the affairs of the State; an article already taken care of in the context of the role and responsibilities of the Chief Minister. So far as article 166 itself is concerned, it has essentially two parts. In the first part, which comprises clauses (1) and (2) of the article, there are provisions for expression of the executive actions of a State Government and rules for the authentication of any executive order or instruments. Then, the second part, comprising clause (3) only, deals with the rules for the more convenient transaction of Government business and for the allocation of work among the Ministers. Article 166 says:

"(1) All the executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among the Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion".

**Expression of Executive Orders and Rules for Authentication**

Clause (1) of article 166 requires that all the executive orders of a State shall be expressed to be taken in the name of the Governor. Clause (2) of that article says that the Governor has the power to make rules for the authentication of an executive order or instrument of the State, and the validity of such an authenticated order or instrument cannot be questioned on the ground that it was not made by the
Governor. The languages of these two clauses being the same as that of clauses (1) and (2) of article 77 relating to the conduct of the business of the Union Government, they attract, mutatis mutandis, the principles applicable to the latter.

**Rules for Convenient Transaction of Business and Allocation of Work**

The Governor also makes rules under clause (3) of article 166 for the more convenient transaction of the business of the State Government and for the allocation of the said business among the Ministers in so far as a business does not come within his discretionary power. Each State has its own set of rules, but broadly, they follow the same principles and contain similar details. The rules list the various State Departments and Directorates and the work to be transacted by a Department and the Directorates. They also provide for matters on which inter-Departmental consultations are to be made and matters which are to be referred to the Governor. But as in the case of the Union, most of the work of a State Government remains a matter of informal procedure, though subject to departmental practice generally.

**STATE ADMINISTRATION**

Cabinets come and go, but the people must be served constantly and effectively. This is the function of the administration. The decisions of the Government are to be put into effect by securing legislative authorisation, first, if necessary and, then, bringing them into actual play. Policy decisions and legislative authorisation are meaningless without effective, efficient and disciplined and honest administration. The State administration comprises the State Secretariat Departments and Directorates, and a number of regional, local, autonomous and semi-autonomous bodies, including public corporations.

**Departments and Directorates**

Under the rules of business framed by the Governor under article 166 (3), a State Government functions through a number of Departments, constituting the State Secretariat. Each State has also a State Planning Board and a Chief Secretary. The State Departments have in the Ministers-in-Charge their respective political heads who
are normally Cabinet Ministers, including the Chief Minister, although a Department may be headed by even a Minister of State, but not a Deputy Minister, or two or more Departments may be placed under one Minister. A Department has also allocated to it Ministers of State and Deputy Ministers who enjoy powers specifically assigned to them within the Department.

The Secretary to a Department, who is now being increasingly designated also as Commissioner, is the permanent head of the Department. Besides, a Department has Additional, Joint, Deputy and Assistant Secretaries. A Department is divided into sections and wings and it may have boards, bureaus or cells. Attached to the Departments are the Directorates headed by officers having designations, such as, Directors, Commissioners or Controllers. The Directorates vary in importance and size depending upon their work assignment. But the theoretical basis of relationship between any Department and its any Directorate is that the former is policy making agency and the latter is policy executing organ.

Regional Administration

In official parlance regional administration of a State comprises divisional and district administrations. A State is divided into divisions, each comprising a number of districts and headed by a Divisional Commissioner whose functions are now primarily supervisory and adjudicatory. A district has a District Magistrate and Collector also called in certain cases Deputy Commissioner, and it is a key level of field administration. Other officers, some equal in rank to the District Magistrate and others subordinate to him, also operate at the District level. The system of having district planning boards is also spreading rapidly. A district is divided into subdivisions or taluks headed by a Sub-Divisional Officer or a Taluka Officer, as the case may be, and a sub-division has also sub-divisional level officers of the types the district has. Then there are development blocks headed by Block Development Officers, which are also staffed on the principles of the district administration. Then come revenue circles, police circles and police stations appropriately staffed.

Units of Local self-Government

Each State has also numerous units of the local self-government. There are urban local bodies, such as, municipal corporations,
municipalities, notified area authorities, improvement trusts, port commissioners and cantonment authorities. In certain big cities metropolitan authorities are also growing up. Then, there are units of panchayati raj in rural areas. The usual system is a three-tier one, with District units, village units and an intermediary tier at the subdivisional, taluk, or block level.

_Autonomous and Semi-autonomous Bodies_

Autonomous and semi-autonomous boards, commissions and institutions for a variety of purposes, including educational and cultural purposes, also function under varying degrees of control of a State Government. Most of these bodies are statutory bodies set up for specific purposes.

_Public Corporations_: Public corporations are also a kind of autonomous bodies with primarily economic activities, but there may be occasionally public corporations for some other purposes also. A public corporation is not a part of the State Government within the meaning of the Constitution, yet it is a public device intended to combine the elements of public ownership, public control, public accountability and business principles.

**MINISTERS IN ACTION**

A Cabinet Minister enters upon his office as Minister-in-Charge of a Department or two or more Departments unless he is a Minister without portfolio. A Minister of State may also be placed in the charge of a Department. Normally, a Minister of State or a Deputy Minister is allocated to work in a Department under Cabinet Minister. The least that is expected of a Minister is his honesty and integrity. Then his qualities of sincerity, hard-work, organisational skill and abilities and the capacity to win friends and influence people and his oratorial accomplishment are also great assets. His loyalty to the party and the leadership of the party is also a vital factor. But in fact, nothing perhaps counts in State politics and in a State Minister's office more than the faction support a Minister enjoys within the party. He must be a person with a definite wing or group label within the party. This helps him to remain in office and pursue sectional or personal interests. But this has resulted in a thorough degeneration of State politics and administration.
A Minister is normally hard-working or rather over-working. Yet his work in terms of benefits to the man in the street is almost non-existent, except in the form of personal favours which one is more inclined to regard in honest moments as simple grafts. A Minister has to attend to personal, social, political, public, governmental and administrative work of various kinds. His often an unhealthy attitude to go into the details of his daily work keeps him tied to his desk and routine at the cost of his role of making others work. And even when he makes others work, he makes them work mostly for his personal, group or party interests. This generates profane affiliations, attitudes and techniques of work in politics and administration.

Ministers and Civil Servants

In State Government and administration, the accepted norms of Minister-civil service relationship are conspicuous by their absence. The Minister is, even a Chief Minister or a senior Minister included, often incapable of or unable to provide the necessary leadership to his department. The reasons are many. In the first place, State politics in general is extremely fluid and highly unedifying to generate vigorous local leadership that can claim loyalty from the civil servants. The fact that All-India Services dominate the State administrative set-up may be another. Cases galore when the civil servants not only ignore their political bosses but often subvert their policies and programmes, even if, fortunately for the country, the bosses happen to have any.

Added to this is a vicious spoils game prevailing in the name of posting, transfer and promotion of civil servants. The growth of numerous new administrative agencies, commissions and inquiry and investigation proceedings is also an aspect to this game. The pernicious scramble for a perching place in the State Secretariat is proverbial. Posts in educational institutions, particularly higher educational institutions, and higher appointments in even business concerns are the frequent haunts of the Ministers' favourites. Besides, these educational and business units themselves go out of their way in making appointments which will strengthen their links with the ruling group or party in the State.

All these and almost a complete negation of ideological loyalty of a Minister and his least regard for a minimum standard of public,
political and social propriety or decency have made the State administration a cesspool of vice, corruption and inefficiency. And when this is viewed in the backdrop of mercurial ministerial changes, the picture that emerges is one of complete hopelessness and helplessness. The total disarray in State politics has wrought a havoc in State administration and has either smashed it into bits or reduced the leftovers to a pathological case of atony. The administrative base of State politics and Government has completely vanished and in this situation the hardships of the people become pathetic facts to be sullenly or supinely put up with.

THE STATE GOVERNMENT AND LEGISLATURE

Under responsible and representative Government the assumption is that "the executive has to act subject to the control of the legislature" and both the executive and the legislature have to act subject to the control of the people. The actuality is that the executive controls the legislature and the executive and the legislature collaborate in controlling the people. This is due, to a large degree, to the complexities of modern government consequent upon the changed conditions of modern industrial urban civilization and the growth of party system, causes which also explain the subordination of both the State executive and the State Legislature to the Union Government.

Cabinet Control of the Legislature

The State Cabinet has all the avenues open to it for controlling the State Legislature that are available to the Union Cabinet for controlling Parliament. But in the continuing single party predominance in the country, the State Cabinet has to reckon with the role of the higher party leadership and agencies, such as the Central Parliamentary Board, the Working Committee, the National Executive Council or Committee or the Polit Bureau, as the case may be. All the same, the State Cabinet control of the State Legislature is also three dimensional—control of personnel, control of functions and control of proceedings:

Control of Personnel: The majority Legislature Party comprises members of a party or parties nominated, supported and voted to power. They are in the Legislature to support the Government. The members of the Opposition also belong to different parties, excepting,
of course, a few independents. However, factional fights and crossing of floors are more nefarious and numerous in the State Legislatures. Even then the factions in a party tend more to treat their disputes as a "home affair", and do not usually like to thrash out a difference on the floor of the Assembly. For, the higher party leadership always frowns upon in-fights. Then, there is the power of dissolution. Notably, the clandestine methods of influencing a legislator's loyalty have powerful impacts on State politics. So have the overall performances of the party high commands in nominating party candidates in elections and managing the party affairs in general in the States. In the result, on the whole the State Cabinet control of the State Legislature in regard to the personnel is not in a sound position.

Control of functions: In all the three major areas of functions—legislation, finance and control and criticism of administration—the State Legislature is controlled by the Cabinet. Legislation is now the specific responsibility of the Government and never does a private member's Bill become enacted into a law. Annual financial statements, Money Bills and financial Bills are exclusively Government measures. Any change in them, unless the Government concedes it in the name of bowing to the sentiments of the House or the People, is deemed fatal to its existence and is, therefore, out of the question. Added to this is the growth of administrative legislation. Control of the administration is also not adequate. However, criticisms of the administration are louder, though less constructive, in the State Legislature.

Control of Proceedings: The Government's control over the proceedings in the Legislature is also pronounced. The rules of procedure favour the Government business in general. The business of a House is fixed for a day in consultation with the Chief Minister and the Government Chief Whip takes a leading role in the matter. Then, there are such instruments as closure motions, guillotines, and Kangaroo voting to expedite Government business.

The Government Chief Whip: The Chief Minister is the Leader of the Legislative Assembly and there is the Government Chief Whip, also sometimes referred to as the Minister for Parliamentary Affairs, and other Whips to manage the Government majority and to facilitate the smooth transaction of Government business in the State Legislature.
Control of Cabinet by the Legislature

Parliamentary Government means a government responsible to the legislature. The Ministers of a State are individually and collectively responsible to the State Legislative Assembly. This implies that they must enjoy the confidence of the Assembly and function subject to the constant control of the Legislature. The question of confidence is a complex issue and the element of legislative control has basically turned into legislative criticism and vigilance.

Legislative Vigilance: Control and criticism of the performances of the State Government is the basic role of the State Legislature. Its constant vigil keeps the Government on alert and also raises the stock of its credibility in the eyes of the people and the Union. For this purpose the Legislature makes use of the numerous opportunities for debates, such as, debates on the special address by the Governor, Bills and financial measures of Government, including the budget, and motions and resolutions, including an adjournment motion. The Government may make a statement. A resigning Minister may also make a statement. Then numerous reports are also placed before the Legislature. Information may also be asked for by asking for supplying informations.

Questions by the members of the Legislature are the most vital instrument of keeping vigilance on the Government’s performances. It is not that a Minister is bound to answer a question put to him, but he normally does answer a question unless he decides not to answer on the plea of public interest. These questions may cover any aspect of State administration and go a long way in securing concessions and redress of individual grievances. A question may be followed by supplementary question, although interpellation is not allowed.

Vote of No-confidence: If the Legislative Assembly feels that the Ministry is not working properly, it may pass a vote of no-confidence and cause the removal of the Ministry, although such a move may also be intended to express the displeasure of the Assembly or to secure some publicity gains. Votes of no-confidence can be moved only against the whole Ministry and not an individual Minister, although an individual Minister, like the Ministry, may be censured or defeated on any issue. The defeats and removals or resignations of State Governments are rather quite frequent and they prove the
extent to which a State Ministry depends upon the wind in the State Legislative Assembly. But the way the changes are taking place do not reflect the health and vigour of State politics in general which is in a pathetic pathological state.

The Legislative Council: Although a State Ministry is collectively responsible to the State Legislative Assembly, the role of the State Legislative Council, wherever it exists, is also not altogether negligible. With the intensification of poly-centric tendencies in State politics and the increasing infection of defections, the State Legislative Councils may gain a greater say in the legislative vigilance and control of the State administration.

The Committees and Commissions of the Legislature: A State Legislature has standing committees for various purposes and there may be consultative committees attached to the different State Departments. Ad hoc committees or commissions may also be set up as and when required, either for an internal purpose of a House, or for a joint purpose of the two Houses, or for any other purpose outside the State Legislature. These bodies are also instrumental in maintaining control and vigilance over the State administration.

Role of the Opposition: The Opposition has a vital role in the control of a State Ministry by the Legislature. The Opposition in the States makes not only the fullest use of all the normally available avenues of controlling the Government, but has also proved quite ingenious in devising new techniques of recording its protest against an action or inaction of the Government to which the floors of the State Legislatures are often mute witnesses. Also the opposition has not only fought its battle against the Government inside the Legislature but has carried issues to the streets in the form of processions, demonstrations, strikes, dharnas and gheraos and even boycotts. State Oppositions have invariably been more vocal but not necessarily more effective. They have been rather less responsible and constructive, reflecting to a degree, perhaps, the attitude of the State Governments themselves and the tenor of State politics in general.

THE GOVERNMENT AND THE PEOPLE

The State Ministry inextricably links the State executive and the State Legislature in a vital manner. Yet both the Ministry and
the Legislature have to keep in view the people, the electorate, to whom they owe ultimate responsibility. In essence, the State Ministry is a three-point plug for joining the State executive, the State Legislature and the State electorate. And the three have to keep in mind the Union Government, Parliament and the nation at large. What the Governments and the legislatures in the country do are not important for merely winning votes, but also for constantly building a healthy and vigorous public opinion and for securing public cooperation in planned national development.

The Government of a country is a single continuous process, with innumerable interdependent and intertwined agencies and acts and events. And the crux of the matter in this country is that for the most part the common man comes in closer and more constant contact with the State Government and administration than with the Union Government and administration. This makes an enormous claim on the efficiency, efficacy and honesty and sincerity of the State Government and administration, qualities which, for various reasons are ruefully absent. This has caused an ever increasing alienation between the Government and the people. There has been a complete breakdown of communication between the rulers and the ruled.

Misgovernment or No-Government

Parliament parleys, the Government governs, and the people prosper is the secular perspective of responsible representative Government and is the normative function of a viable Government-Parliament-People equation. But the fact is that although votes are cast, or secured, because they are necessary rituals, the nation is being increasingly engulfed by a vortex of maladies of innumerable varieties. Not only that conditions of acute scarcity prevail in the country but also that the demoralising and the degenerating effects of the prevailing conditions are extremely painful. The whole nation is sinking surely into a quagmire of misgovernment or no-government.
CHAPTER 27

LEGISLATIVE POWER

"The legislative power is the power to make laws and to alter them at discretion"¹; "to declare what the law shall be..."² It essentially consists in laying down legislative policies in the form of justiciable conduct norms.³ And in a sense legislation takes place at various levels of Government and administration in a country. For, public policies are formulated essentially by the executive which also in numerous cases gives them justiciable form on its own authority even without reference to the legislature. The judiciary also has a creative role in laying down justiciable public policies.

However, what happens in the case of the legislature is that its policy function in the form of prescribing justiciable norms is so articulate that the other two organs of Government, the executive and the judiciary, in performing this function have apparently been overshadowed by the legislature.⁴ It has generally come to be recognised that legislation is the function of the legislature. Yet, apart from the legislative leadership of the executive and the creative role of the judiciary, the executive has never ceased to enjoy the power to make laws on its own authority. The nature, scope and significance of executive or administrative legislation is of abiding interest in any constitutional system.

EXECUTIVE OR ADMINISTRATIVE LEGISLATION

It is significant that in the scheme of the Constitution of India executive or administrative legislation finds pride of place. The Constitution subscribes to the view that executive legislation is essential for maintaining the rule of law. For, laws first have to be made before the state may act in relation to its citizens in vital matters, and in certain cases the legislature may not be in position to make laws to cover a situation. Executive legislation is an instrument

¹ R. v. Burah (1878) 3 A.C. 889, 905. Italics are mine.
² Dash v. van Kiecek, (1811) 7 John s. 498. Italics are mine.

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for securing the rule of law and not for subverting it, as some may be inclined to suggest.\textsuperscript{5}

**Forms of Executive Legislation**

Articles 13(3)(a) and 366(10) recognise the various forms which executive legislation generally takes and accordingly the expressions "law" and "existing law", respectively, have been inclusively defined by them. For example, article 13(3)(a) says:

"'Law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law"\textsuperscript{6}.

Interspersing the Constitution are numerous express provisions which specifically authorise the executive to make laws. The executive in these cases directly derives its power to legislate from the Constitution itself as does the legislature. These law making powers of the executive, both the Union and the State, range from making laws pending legislation by the legislature concerned, or during its recess, to modifying a law passed by Parliament or a State Legislature, or even the Constitution, in application to certain areas. And all such laws passed by the executive on its own are as good as legislative enactments or constitutional amendments, as the case may be.

**LEGISLATIVE POWERS OF THE UNION EXECUTIVE**

Already, in the context of the legislative power of the President reference has been made to the numerous constitutional provisions which authorise the Union executive to make laws on its own authority, including the Ordinance making power of the President. The Ordinance making power of the President calls for some detailed examination. This power, though objected to by some members of the Constituent Assembly, was justified by Ambedkar in the following terms:

"It is not difficult to imagine cases where the power conferred by the ordinary law existing at any particular moment may be difficult to deal with a situation which may suddenly and immediately arise. The executive must have the power to deal with the situation. This is possible only if the President has the power to issue an Ordinance as the Executive cannot deal with the situation by resorting to the ordinary process of law making because the legislature is not in session."

\textsuperscript{6a}

\textsuperscript{5} See, for example, Hewart, Lord: *The New Despotism*, op. cit.

\textsuperscript{6} Italics are mine.

\textsuperscript{6a} C.A.D., Vol VIII ; p. 213.
Ordinance Making Power of the President

Article 123 invests the President with a vital Ordinance making power during the recess of Parliament. It says:

"(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

Explanation—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void".

The Ordinance making power of the President under article 123 is on the line of the Ordinance making power of the Governor-General under section 42 of the Government of India Act, 1935. The President may under this article “promulgate such Ordinances as the circumstances appear to him to require”. An Ordinance under this article may be promulgated by the President only when both Houses of Parliament are not in session. This implies that an Ordinance may be promulgated if only one House is in session, and a session refers to the period of time between the meetings of Parliament, whether after prorogation or dissolution. It is possible also to prorogue either House of Parliament or dissolve the Lok Sabha specifically for the purpose of promulgating an Ordinance, and an Ordinance may also be passed even after Parliament has been summoned to meet but has not actually met. Political morality is the lone limitation.

This article also requires the President to be “satisfied that circumstances exist which render it necessary for him to take immediate

7 See May, Sir, E.: Parliamentary Practice, 14th ed.
action." This satisfaction of the President is essentially subjective, and an Ordinance promulgated by the President contains a recitation to this effect. And it seems that this issue of satisfaction is non-justiciable. The court cannot also enter into the question whether an Ordinance has been made *mala fide*. It seems that the observations of the Supreme Court in this regard, in *Cooper v. Union of India*, ought to be treated as *obiter*. The Court said;

"The clause relating to the satisfaction is composite. The satisfaction relates to existence of the circumstances as well as the necessity to take immediate action on account of those circumstances. Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction depends is not declared final."

The Court may, however, examine whether an Ordinance passed by the President is within the legislative competence of Parliament, for, clause (3) of this article declares that an Ordinance under this article, making any provision which Parliament would not under this Constitution be competent to enact, shall be void. Besides, the principles relating to delegated legislation also apply to a Presidential Ordinance under this article, *mutatis mutandis*.

An Ordinance promulgated by the President has the same effect as a Parliamentary enactment. This implies that an Ordinance may have a retrospective effect or it may have the effect of amending or repealing any existing law. Any Presidential Ordinance has, however, to be placed before both Houses of Parliament, but this requirement is directory in nature. An Ordinance ceases to operate at the expiration of six weeks from the reassembly of Parliament which may also cause its expiration earlier if both of its Houses pass resolutions disapproving it before the expiration of this period. Where the two Houses of Parliament are summoned to reassemble on different dates, the period of six weeks is reckoned from the later of those dates, and when resolutions disapproving an Ordinance are passed by the two Houses on two different dates, the Ordinance expires on the passing of the second of those resolutions. The President may also at any time

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withdraw an Ordinance. But the expiry of an Ordinance does not *ipso facto* put an end to any right created or liability incurred within its terms while it was in force.\(^\text{14}\)

**LEGISLATIVE POWERS OF THE STATE EXECUTIVE**

Note of the varied legislative powers of the State executive has been taken in the context of the legislative power of the Governor. It is enough to indicate here in brief some implications of the Ordinance making power of the Governor.

*Ordinance Making Power of the Governor.*

The Governor of a State may also pass an Ordinance under article 213 which reads:

\(^{(1)}\) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if—

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless having been reserved for the consideration of the President, it had received the assent of the President.

\(^{(2)}\) An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance—

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor.

Explanation—Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void:

Provided that for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him”.

The principles relating to the Ordinance making power of the Governor under article 213 are, mutatis mutandis, the same as those relating to the Ordinance making power of the President under article 123. A Governor is competent to issue an Ordinance when the Legislative Assembly of a State is not in session, or when in a State having a bi-cameral Legislature, either House is not in session. Before promulgating an Ordinance the Governor is to be “satisfied that circumstances exist which render it necessary for him to take immediate action.”

A Governor’s Ordinance has the force of an enactment of the State Legislature and it is to be placed before the State Legislature after it reassembles. Such an Ordinance remains in force for six weeks after the reassembly of the State Legislature unless killed earlier by a resolution of the Legislature. The Governor also may withdraw an Ordinance at any time.

An Ordinance made by a Governor which is not within the Legislative competence of the State is void. However, if a Governor passes an Ordinance relating to a matter in the Concurrent List under a Presidential instruction, it is valid even when it is repugnant to any Parliamentary or existing law.

An interesting aspect of the Governor’s Ordinance making power is that he cannot promulgate any Ordinance without instructions from the President if—

“(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or
LEGISLATIVE POWER

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President."

DELEGATED OR CONDITIONAL LEGISLATION

To crown all the express constitutional provisions specifically investing the Union and State executive with diverse legislative powers, the executive and administration in this country also enjoy significant legislative power under the concept of what is commonly referred to as delegated legislation. This implies the power of the executive and the administration to legislate under the fiat of the legislature. The concept of delegated legislation now finds place, in one form or the other, in every constitutional system. Its necessity has come to be recognised everywhere as a means for saving the time of the legislature and relieving it in part of its enormous legislative load. It also provides flexibility, adaptability, expertise, speed, and opportunities for cooler reflection in law making.

In the Constitution of India, however, the expression "delegated legislation" is not to be met with. In interpreting the Constitution the superior courts have accepted the line of thinking adopted by the Privy Council in regard to the power of delegation of the Indian Legislatures before Independence. The Council never used the expression "delegated legislation", although it spoke of "conditional" legislation or "so-called legislative power" whenever it upheld a case which may commonly be characterised as a case of delegated legislation.

This terminological reservation of the Council, apart from the question of the status of the Indian Legislatures vis-a-vis the British Parliament, was grounded perhaps in a narrow pedantic view of the word "delegation" which the Council seems to have usually taken. For example, in R. v. Sibnath Banerjee,\(^\text{15}\) Lord Thankerton spoke of delegation as "a transfer of power or duty to the officer or authority defined......with a corresponding divestiture......of any responsibility in the matter" of the delegating authority.

However, after Independence the Supreme Court had for the first time to determine the question of delegated legislation in \textit{In re Delhi Laws Act},\(^\text{16}\) a Presidential Reference Case, necessitated by the decision


\(^{16}\) \textit{In re Delhi Laws Act}, (1951) S.C.R. 747.
of the Federal Court, in *Jatindra Nath Gupta v. Province of Bihar*,\(^{17}\) to the effect that the power to extend the operation of the Bihar Maintenance of Public Order Act, 1947, with specified modification was an essential legislative function and could not be delegated by the Legislature. The Federal Court felt that that was a case of *delegated*, and not *conditional*, legislation which was not permissible.

The President referred certain laws for the opinion of the Supreme Court and the following three questions were referred for the Court’s opinion:

i. “Was Sec. 7 of the Delhi Laws Act, 1912, (the Provincial Government’s power to extend the Act with modifications) or any of the provisions thereof and in what particular and particulars or to what extent *ultra vires* the Legislature which passed the said Act?”

ii. “Was the Ajmer-Merwara (Extension of Laws) Act, 1947, (Sec. 2 spoke of extension of enactments to Ajmer-Merwara) or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Legislature which passed the said Act.”

iii. “Is Sec. 2 of the Part C States (Extension of Laws) Act, 1950, (power to extend enactments to certain Part C States) or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* Parliament?”

All the Judges, except Bose J., delivered separate opinions which ran into some 370 pages of the Supreme Court Reports. Yet significantly, as Patanjali Sastri C. J. felt in *Kathi Ranig’s Case*\(^{18}\), “...it is difficult to say that any particular principle has been laid down by the majority which can be of assistance in the determination of other cases”. But Bose J., in *Rajarai Singh’s Case*,\(^{19}\) was of the opinion that from the principles of *Delhi Laws Act’s Case* “a plain pattern emerges having only narrow margin of doubt for future dispute”.

The view of the Supreme Court in both *Delhi Laws Act’s Case* and *Rajarai Singh’s Case*, however, seems to be clear. According to the Court delegated legislation is not permissible under the Constitution.

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19 *Rajarai Singh v. Chairman*, (1955) I.S.C.R. 290,
But conditional, subordinate, ancillary or subsidiary legislation is possible. The Court felt that the legislature in India cannot delegate its essential function to any authority. The essential legislative function is the determination of legislative policy in the form of a rule of conduct and the Court is to ascertain the legislative policy from the provisions of an impugned Act, including its preamble or the provisions of an Act it replaces.

The modification of an Act in its any essential particular so as to involve a change in the legislative policy is also a legislative function, although what constitutes an essential particular of any Act “cannot be enunciated in general terms”. The power to grant exemption from the operation of an Act without laying down policy guidelines is also outside permissible delegation, although a greater latitude in some taxing laws is permitted. Prescribing an offence or its punishment is also an essentially legislative act which cannot be delegated. So is the power to prescribe any special procedure for the trial of an offence. The power to impose a tax, including its assessment, is also essentially legislative in nature and cannot be delegated.

**Permissible Delegation**

On the basis of decided cases the following functions may be entrusted by the legislature to the executive or administration:

i. When a legislature lays down a policy and empowers a duly authorised officer to meet contingencies, there is no delegation of legislative authority, and therefore such authorisation is permissible.

ii. Once the essential legislative function is performed by the legislature by declaring the legislative policy, it is a matter within the discretion of the legislature, and not for the courts, to decide the limit of delegation or the possibility of providing a different standard.

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25 Rajnarain v. Chairman, op. cit.
iii. There may not be unconstitutional delegation in case of the usual removal of difficulty clause, although the Supreme Court’s observations, in *Jalan Trading Co.’s Case*, seems to cast a shadow of doubt on this proposition.

iv. Delegation of the power to extend the duration of an Act is valid.

v. The power to adapt a law or to apply a law to a new area may validly be delegated if it does not involve delegation of the power to modify the policy of the enactment in its any essential particular.

vi. The legislature after laying down the policy of legislation may validly authorise the executive or administration to make rules and regulations for filling in the details to carry out the purposes of legislation.

vii. A delegation of rule making power may not be unconstitutional if the rules framed are required to be placed before the concerned legislature which has the power to amend, modify or repeal them.

viii. Delegation of subsidiary and ancillary matters, even though not strictly within the scope of conditional legislation, may be permissible.

*Delegation of Tax Laws*: In the case of taxation, which is deemed to be essentially a legislative function, delegation is permissible, and that too even in a wider area. Venkatarama Aiyar J. said in *Banarasi Das v. State of M. P.*:

“Now authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine the details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like”.

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31 *Rajnarain Singh v. Chairman*, op. cit.


In *Liberty Cinema's Case*,\(^{36}\) the proposition was laid down that the determination of tax rate may be left by a statute to the discretion of a non-legislative body. In *Sarat Chandra's Case*,\(^ {37}\) it was held that even the power to grant exemptions in case of tax laws may be given to a non-legislative authority.

**Conditions for Valid Delegated Legislation**

Any conditional, subordinate, ancillary or subsidiary legislation to be valid must satisfy certain conditions. In the first place, it must be within the permissible limits of delegation as determined by the Supreme Court in the cases discussed above. Secondly, it must not be violative of any provisions of the Constitution, including the provisions relating to the competence of the concerned legislature. Thirdly, it must not be *ultra vires* the statute under which it is framed in matters of both substance and procedure. Fourthly, without express authorisation no such legislation should be made to have retrospective effect. And lastly, it must be published. Publication is essential for the valid operation of any such legislation.\(^{38}\)

**Validation of Ultra Vires Delegated Legislation**: When any conditional, subordinate, ancillary or subsidiary legislation is declared *ultra vires*, but not unconstitutional, it is possible for the competent legislature to validate it even retrospectively.\(^ {39}\) This includes the power to validate any executive order or irregularity relating to a matter within the competence of the concerned legislature.\(^ {40}\)

**Sub-delegated Legislation**

The principle is *delegatus potestas non delegare*, *i.e.*, power delegated cannot be sub-delegated. But this implies only a prohibition of sub-delegation without express authorisation to sub-delegate power, and significantly, the Constitution has also scope for sub-delegated legislation. The principles applicable to delegated legislation in general are also applicable to sub-delegated legislation. What is required in this case is that the statute permitting delegation must itself authorise sub-delegation and the delegate under the statute must

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exercise his power of sub-delegation strictly in terms of the statute.\textsuperscript{41} The delegate in sub-delegating power may, in consonance with the legislative policy, further canalise the power to be exercised by the sub-delegate,\textsuperscript{42} and the sub-delegate in the absence of any interdiction by the delegate or the statute is competent to pass either a specific order against an individual or a general order against a class of persons.\textsuperscript{43}

Thus, the position that seems to emerge is that in the scheme of the Constitution the expression delegated legislation has no place. What the Constitution permits is conditional, subordinate, ancillary or subsidiary legislation, although this terminological reservation should not lead to the conclusion that in practice delegated legislation under our constitutional system enjoys a smaller operational area than it normally claims for itself under any other constitutional system. It seems that the Supreme Court, in banishing the term "delegated legislation" from the Constitution, pays homage not only to the tradition of the Privy Council decisions relating to the power of the Indian Legislatures in this regard, but also apparently persists in feeling that there is something inherently unsavoury about delegated legislation. What has actually happened is that the attitude of the superior courts towards delegated legislation has resulted in a degree of uncertainty in law, for, the courts reserve to themselves the power to determine in each case as to what is legislative policy, or what is an essential feature of an Act, or what are the precise limits of permissible delegation.

\textbf{LEGISLATION BY THE LEGISLATURE}

Under the Indian constitutional system there is the ampest scope for executive or administrative legislation, including what is known as delegated or conditional legislation. And this in addition to the legislative leadership and role of the Union and State Cabinet in their respective spheres. Yet the legislatures in India—the Union Parliament and the State Legislatures—have for them vast legislative preserves, for, constitutionally legislation in their primary function.

\textsuperscript{43} \textit{Santosh Kumar v. State}, (1951) S.C.R. 303.
SOME GENERAL ASPECTS OF LEGISLATION
BY THE LEGISLATURE

Legislation being the prime constitutional responsibility of the legislatures in India, it may be more rewarding to look into the details of their legislative power after taking note of some principles relating to their legislative power in general.

Legislation in the Form of Acts and Statutes

Technically speaking, the legislature alone can pass statutes or Acts, i.e., justiciable conduct norms in the form of enactments. The executive and administration may issue ordinances, orders, rules, regulations, bye-laws, notices, schemes, and the like having the force of law. The judiciary may declare rules and principles of law. But only the Union Parliament and State Legislatures are competent to pass statutes or Acts which constitute the bulk of the law of the land.

But if on the one hand the legislatures have the exclusive competence to pass statutes or Acts, they can make laws only in the form of statutes or Acts and in accordance with the specified procedures. All that is done in Parliament and the State Legislatures does not make a law; only duly passed valid statutes or Acts make laws.

Legislative Resolutions: Strictly speaking, a resolution of either House or both Houses of Parliament or a State Legislature is not law, although it may have a binding force in some cases and may even be justiciable. But it may be more practical to conceive of law in a broad sense in certain cases to include within its ambit some of the resolutions which the Union Parliament or State Legislatures may pass. For example, the resolution of Parliament under article 123(2) (a) disapproving a Presidential Ordinance has the force of law. Similarly, resolutions of the concerned legislative body under articles 61(2) (a)(b)(4), 67(b), 90(c), 94(c), 169(1), 179(c), 213(2)(a), 249, 257, 312(1), 315(2), 152(1), 356(3)(4) and 368 have the same effect. Then, legislative resolutions approving, modifying or disapproving delegated legislation and those relating to legislative procedures have also the force of law.

Distribution of Legislative Powers
Between the Union and States

India is a federation. And a federation is above all a device for distributing powers between the Union and the Units. These powers may be of executive, judicial, financial or legislative nature. This makes one feel that there is even a division of sovereign power between the Union and the Units. For example, Acton said:

"Of all checks on democracy, federalism has been the most efficacious and the most congenial. The federal system limits and restrains the sovereign power by dividing it, and by assigning to the government only certain defined rights."43

Although one need not contribute to Acton’s above proposition, division of power between the national and regional governments is the *sine qua non* of a federation. The Constitution of India in Chapter I, Part XI, and in the Seventh Schedule deals with the distribution of legislative powers between the Union and the States. Besides, there are numerous other provisions in the Constitution which invest Parliament or the State Legislatures with powers to make laws.

*Plenary Legislative Power*

As both the Union Parliament and the State Legislatures derive their powers directly from the Constitution, subject to the Constitution, they all enjoy plenary powers within their respective spheres. From this a number of consequences follow:

i. The legislature may enact a temporary or permanent statute.

ii. It may legislate prospectively or retrospectively.

iii. It may legislate by reference, adoption or incorporation.

iv. Its power to modify or alter a law is co-extensive with its power to make a new law. It may override statutes, contracts and common law principles.

v. When it has the general power to legislate for a subject, it may legislate with respect to the part of the subject.

vi. It may legislate absolutely or conditionally.

vii. It may authorise the executive or the administration to frame conditional, subordinate, ancillary or subsidiary laws.

43 Acton, Lord: *Essays on Freedom and Power*; p. 163. Italics are mine.
viii. It may validate an unlawful executive order or delegated or conditional legislation relating to a matter within its competence.

ix. The validity of a legislative enactment is to be tested with reference to constitutional competence of the concerned legislature.

x. It has the power to put an end to the finality of a judicial decision relating to a matter within its competence or even to pass a validating Act to revive an Act declared void.

Presumption of Constitutionality

The courts in India may enquire into the constitutional competence of a legislative body and declare a statute passed by it ultra vires the Constitution. This flows from the principle of judicial review enshrined in the Constitution. But, there is always a presumption that the legislature is acting within its competence.

UNION-STATE LEGISLATIVE RELATIONS

Chapter I of Part XI of the Constitution of India, which is substantially based on the corresponding provisions of the Government of India Act, 1935, relates to the Union and State legislative relations. It deals with the distribution of legislative powers between the Union and the States and contains provisions for reconciling conflicts between the Union and the States in the legislative sphere.

TERRITORIAL EXTENT OF UNION AND STATE LEGISLATIVE POWERS

Article 245 delimites the territorial extent of the Union and State legislative powers. It reads:

“(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.”

Evidently, article 245 is founded on the doctrine of territorial nexus and enunciates it in the context of a federal set-up. The general principle is that every law must have a territorial base, although it may have an extra-territorial implication or even operation. And in a federation since both Central and regional governments exercise
plenary legislative powers within their respective spheres, it becomes necessary to define the territorial limits of their legislative powers.

_Territorial Extent of Union Legislation_

Clause (1) of article 245 says that subject to the provisions of the Constitution, Parliament shall have the power to make laws for the whole or any part of the territory of India. The territory of India for this purpose is to be ascertained with reference to article I of the Constitution. Clause (2) of this article, however, adds: "No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation." This extra-territorial operation of a national law is an aspect of state sovereignty and is found necessary for numerous purposes. For example, it provides an avenue of control by a state over its citizens abroad.

_Territorial Extent of State Legislation_

Clause (1) of article 245 also provides that subject to the provisions of the Constitution, "the Legislature of a State may make laws for the whole or any part of the State." It is possible, however, that a law made by a State may have impacts outside the boundaries of the State. But so long as the law satisfies the test of substantial or real territorial nexus, it shall not be invalid for such an impact outside the State boundaries.46

SUBJECT-MATTER OF UNION AND STATE LEGISLATION

Article 246 relates to the matters with respect to which the Union Parliament and the State Legislatures may make laws. This article lays down:

"(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List').

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the 'Concurrent List').

(3) Subject to clauses (1) and (2), the Legislature of a State has exclusive power to make laws for such State or any part thereof with respect to any

matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the ‘State List’).

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.”

Article 246 contains the principles of distribution of subject-matter of legislation between the Union and the States. The matters themselves are to be found in the three Lists contained in the Seventh Schedule to the Constitution. Precisely, article 246 relates to the powers of Parliament and the State Legislatures to legislate and the Seventh Schedule contains the fields or areas of their legislation. It may also be interesting to note in this context that in addition to article 246 and the Seventh Schedule, there are numerous other provisions interspersing the Constitution authorising Parliament or the State Legislatures to legislate with respect to specified matters, and a fuller view of their legislative powers implies a reference to those provisions as well.

**Subject-matter of Parliamentary Legislation under Article 246**

Clause (1) of article 246 empowers Parliament to exclusively make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, notwithstanding anything in clauses (2) and (3) of this article. Under clause (2) of this article, Parliament has power to make laws with respect to any of the matters enumerated in List III. And under clause (4) of this article, “Parliament has the power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.”

**Laws with Respect to:** The expression “laws with respect to” in article 246 is intended to invest Parliament, or a State Legislature, as the case may be, with wide powers of law making relating to a subject-matter coming within its competence.

**Non-obstante Clause:** The non-obstante clause used in the context of Parliament’s law making power is, however, an instrument of last resort. Only if a harmonious reconciliation between the entries to any of the Lists is not possible,

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"...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 resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship." 48

No theory of Implied Powers: In view of the exhaustive framing of the three Lists in the Seventh Schedule, the non-obstante clause or any other constitutional provision is not considered to import the doctrine of implied powers to strengthen the Union, or the States.

Subject-matter of State Legislation under Article 246

Clause (3) of article 246 says that subject to clauses (1) and (2) of this article, a State Legislature has the exclusive power to make laws for the State or its any part with respect to any of the matters enumerated in List II in the Seventh Schedule. Besides, subject to clause (1), a State Legislature is also competent under clause (2) of this article to make laws with respect to any matter in List III.

Other Areas of Parliamentary Legislation

Apart from article 246, there are also other constitutional provisions authorising Parliament to make laws with respect to matters specified by them. For example, articles 2, 3 and 4 empower Parliament to make laws with regard to the names, territories and boundaries of the States. Again, article 247 lays down:

"Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List."

Residuary Powers: Article 248 relates to the residuary powers of legislation and says:

"(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

Residuary power of legislations also vests in Parliament under article 248. Although this apparently enlarges the legislative field of Parliament, it should be remembered that the three Lists of our Constitution have been drawn as exhaustively as possible and, there-

48 The Central Provinces and Berar’s Case, A.I.R. 1939 F.C.I.
fore, the scope for the play of this article is very restricted and resort to it can be had only as a matter of last refuge. 49

Legislation for Implementing International Agreements: Then, Article 253 provides:

"Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

Article 253, which has an overriding effect over the other provisions of the Chapter relating to Union-State legislative relations, but not over any other provision of the Constitution, empowers Parliament to make laws for giving effect to any international agreement or treaty. 50

Power of Parliament to Legislate for State Matters: Parliament has also the power to legislate for matters contained in the State List under specified cases. One such situation is contemplated by clause (4) of article 246, reference to which has already been made above. Then there are others.

Parliament's powers to Legislate on State Matters in the National Interest: Parliament has the power to legislate in pursuance of a resolution by the Council of States for any matter in the State List in the "national interest", an expression of very wide import. Article 249 provides as follows in this behalf:

(1) "Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified there'in:

Provided that if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

50 In re Berubari Union, op. cit.
(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period."

Parliament's Power to Legislate on State Matters During Emergencies: Article 250 says:

"(1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period."

Article 250 empowers Parliament to make laws with respect to any matter in the State List for the whole or any part of India while a Proclamation of Emergency is in force. But this does not imply that the States become divested of the power to legislate for matters within their competence. Such a Parliamentary law ceases to be in force six months after the expiry of the Proclamation. This article has an overriding effect over the other provisions of the Chapter relating to the Union-State legislative relations but not the other provisions of the Constitution. It may also be noted that when there is a break-down of the Constitutional machinery in a State and article 356 is applied, Parliament becomes competent to legislate for State matters with regard to that State.

Parliamentary Legislation on State Matters by States' Consent: Parliament has also the power to legislate with respect to a State matter for two or more States if it is so authorised by the Legislatures of the States concerned. Such a Parliamentary law may be adopted subsequently by any other State after passing an appropriate resolution in the State Legislature, but it cannot be amended by any of the States covered by it. Article 252 makes the following provisions in this regard:

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51 The Inter-State Sales Tax Act is an apt example of Parliamentary legislation under this article.
"(1) 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, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) 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 any State to which it applies, be amended or repealed by an Act of the Legislature of that State."

Supremacy of the Union Laws

Although the three Lists in the Seventh Schedule have been drawn up extremely cautiously, neatly and exhaustively, the Constitution contemplates matters with respect to which and situations in which the Union and States enjoy concurrent legislative authority. Accordingly, articles 251 and 254 provide for curing any inconsistency between laws made by Parliament and laws made by the State Legislatures.

Article 251 is of a specific nature, which deals with inconsistency between a State law and a Union law arising out of Parliament's power to legislate with respect to State matters in the national interest under article 249 and under article 250 while a Proclamation of Emergency is in operation. This article 251 says:

"Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has the power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall, to the extent of repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative".

Then, article 254, which is of a more general character to cover any other case of inconsistency between the Union and State laws, provides:

"(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is
competent to enact or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

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, amending, varying or repealing the law so made by the Legislature of the State."

Article 256 declares the supremacy of the Union laws over the State laws in any case of conflict between them, although there is a feeling that this article covers only the Concurrent List. However, in deciding upon this issue of inconsistency, the court has to decide whether a law made by Parliament, which claims supremacy, is a valid law. Then, it has to be decided whether an impugned State law is repugnant to a Union law, and if so, to what extent. For, a State law is invalid only to the extent of its inconsistency with or repugnancy to a Union law and the doctrine of severability is applicable to such a case. But a State law, though repugnant to a Union law, may be saved if the former, having been reserved for the consideration of the President, has received his assent.

Test of Repugnancy or Inconsistency: The Supreme Court considered the test of repugnancy between a Union and a State law in numerous cases and the position in this regard was summarised by Subba Rao, J., in Deepchand v. State of U. P., as follows:

“Nicholas in his Australian Constitution, 2nd Edition, page 303, refers to three tests of inconsistency or repugnancy:

(1) There may be inconsistency in the actual terms of the competing statutes;
(2) Though there may not be direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise, their powers over the same subject-matter."

This Court, in *Ch. Tika Ramji v. State of U.P.*, accepted the said three rules, among others, as useful guide to test the question of repugnancy...

Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

(1) Whether there is direct conflict between the two provisions;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field."

**Control of the Union over State Legislation**

Any realistic view of the Union-State legislative relations must also take account of some other constitutional provisions which the Union may avail of in controlling State legislation. In the first place, an article like 304 (b) may provide that a Bill or an Amendment under that article may be moved in a State Legislature only with the previous sanction of the President, and although this requirement is procedural in nature, a non-compliance with it makes the subsequent Presidential assent imperative. The following provisions of article 255 may be noted in this regard.

"No Act of Parliament or of the Legislature of a State, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by the Constitution was not given, if assent to that Act was given—

(a) where the recommendation required was that of the Governor, either by the Governor or by the President;

(b) where the recommendation required was that of the Rajpramukha, either by the Rajpramukha or by the President;

(c) Where the recommendation or previous sanction required was that of the President, by the President."

Secondly, some articles, such as, articles 31, 31A, 31C, 288 and 360 require that a Bill passed by a State Legislature must receive the assent of the President before becoming a valid law, and the absence of Presidential assent to such a Bill is fatal.  

Thirdly, under article 200, the Governor of a State is required to reserve certain specified and other Bills for the consideration of the President and the President exercises his powers in relations to such Bills under article 201. And then, the Governor can pass certain Ordinances under article 213 only under instructions from the President.

Lastly, the Union has the constitutional powers under various articles, such as, articles 256, 257, 353 and 360 to issue certain directions to the States and it is likely that these directions may contain hints, or even direct suggestions, for the enactment of a particular law by a State Legislature. Then, there may be model laws formulated by the Union agencies for the guidance of or adoption by the States. And significantly, these formal constitutional avenues of control have be taken into account in the light of the numerous conscious and unconscious extra-constitutional and informal links between the Union and the States through which the former exercises its influence over the latter in all matters, including legislation.

A LOOK AT THE LISTS

Any general view of the Union-State legislative relations also calls for a look at the Lists in the Seventh Schedule to take note of their general characteristics, the broad principles for their interpretation and the major matters contained in them.

Essential Characteristics of the Lists

In the first place, the Lists are a marvel of draftsmanship. They are based on the principle of exhaustive enumeration and their supreme virtue lies in keeping the entries to the Lists almost absolutely free from the charge of overlapping. This has implied a very restricted scope for the application of article 248 vesting residuary powers in Parliament and also the minimization of the Union-State litigation with regard to their respective legislative fields.

Secondly, the Lists make a distinction between general subject of legislation and taxation. The taxing powers of the Union and the States are mutually exclusive and are contained in Lists I and II, respectively. The Concurrent List has no entry relating to taxation, although entry 35 to this List speaks of principles for levying taxes on mechanically propelled vehicles and entry 45 thereof concerns stamp
duties other than those collected by means of judicial stamps but not the rates of stamp duty.

Thirdly, certain legislative matters exclusively vest in Parliament, such, for example, as, those in entries 1 and 2 to List I. And on the same principle certain subjects have been assigned exclusively to the States, such as, entry 25 or entry 30 to List II.

Fourthly, there are subjects in the first instance exclusively belonging to the States, which become the subjects of exclusive Parliamentary legislation if a declaration is made by Parliament as provided in the relevant entries. Thus, for example, entry 23, List II, relates to regulation of mines and mineral development. Entry 54, List I, provides for a declaration by Parliament that to a specified extent this matter would be under the exclusive control of the Union.

Fifthly, a subject may belong to the States, but legislation on it is subject to the relevant entries relating to it in Lists I and III. Education is an instance to the point.

Sixthly, Parliament may have exclusive power to legislate over such part of a subject as is contained in List I, the another part of the same subject being exclusively given to the States. Entry 43, List I, and entry 32, List II, are apt instances.

Seventhly, certain powers of the State Legislatures in List II are subject to the concurrent legislative power of the Union in List III. Thus, entries 26 and 27, List II, are subject to entry 33, List III.

Eighthly, a power which is apparently exclusive may have to be treated as concurrent in part because of other entries. Such is the case, for example, with entry 18, List II, and entry 42, List III.

And lastly, but not least significantly, the overall tenor of the three Lists is that the Union has within its competence much wider and more vital legislative matters than the States.

General Principles for the Interpretation of the Lists

The broad principles for the interpretation of the Lists may also be noted:

(i) At the very outset, it is to be pointed out that the three Lists of the Seventh Schedule are based on the corresponding provisions of the Government of India Act of 1935,
and, therefore, the principles laid down with reference to that Act in this regard are also applicable under the present Constitution.

(ii) The entries to the Lists are not powers of legislation but fields of legislation.

(iii) The entries are mere legislative heads. They neither impose any implied restrictions nor do they prescribe any duty to exercise any legislative power.

(iv) The entries to the Lists should be given a liberal construction.

(v) A harmonious construction should be put on entries to two List which may appear conflicting. And in case such harmonisation is not possible, then only the non-obstante clause of article 246 (1) (2) should be applied.

(vi) The doctrine of pith and substance is applied to interpret any entry to a List.

(vii) The power to make a law with regard to a matter is interpreted to include incidental and ancillary powers to be exercised in the aid of the main matter. Thus, the power to legislate for a matter includes the power to prevent evasion of law and the power to provide for punishment.

(viii) The doctrine of incidental encroachment is applied to test the validity of the exercise of legislative power by a legislature under a List.

(ix) The doctrine of colourable legislation is applied to test the validity of a statute passed by a legislature in the exercise of its any power under any of the Lists.

(x) The words “that is to say” in any entry are taken to mean “as for example.”

(xi) A legislation may be upheld with reference to two or more entries.

(xii) Taxing powers are distinct from general powers.

(xiii) There is a distinction between a tax and a fee. In the case of the latter there is always a quid pro quo and fee may be levied as part of general power.

(xiv) The primary guide in determining the taxing competence of a legislature is the charging section and not the mode of assessment or the machinery provided for it.
(xv) The incidence of a tax neither determines its nature nor alters the legislative competence.

(xvi) The substance of a levy and not its form or name determines the nature of a tax.

(xvii) The same article may be made subject to two independent imposts.

Legislative Matters in the Lists

Apparently, List I—the Union List—contains matters of national interest, List II—the State List—contains matters of regional interest, and List III—the Concurrent List—has matters which may be of national significance but which may also need local adaptation.

List I—Union List: The Union List is the longest of three Lists and contains ninetyseven entries. This List has matters, such as, defence, army and the other armed forces of the Union; cantonments; military works, including declared industries; arms and ammunition; atomic energy; foreign affairs, including diplomatic representation, United Nations, international conferences, agreements and treaties; war and peace; foreign jurisdiction; citizenship; extradition; emigration and immigration; foreign travels, including foreign pilgrimage; piracy; railways; declared highways; declared inland shipping and navigation; maritime shipping and navigation; lighthouses; major ports; quarantine;airways, aircraft, air navigation and aerodromes; carriage by railway, sea or air; post and telegraphs, and the like; property of the Union; Courts of Wards for Princely estates; Union debt; currency and foreign exchange; foreign loan; Reserve Bank; postal savings; Government lotteries; foreign trade; inter-State trade; incorporation and regulation of trading corporations, excluding cooperatives; incorporation and regulation of non-trading inter-State corporations, excluding universities; bills of exchange and the like; insurance; stock exchanges and futures markets; patents, copyrights and the like; standards of weights and measures; standards of quality for goods; declared industries; declared oilfields and mineral oil; regulation of declared mines and mineral development; safety in mines and oilfields; inter-State rivers and river valleys; salt; opium; cinematograph films for exhibition; industrial disputes of Union employees; specified national institutions; specified or declared universities; declared or Union institutions for scientific, technical
or vocational education or training; standards for higher education; declared historical monuments; various Surveys of India; census; Union public services, union pensions; elections to Parliament and the Legislatures and Presidential or Vice-Presidential elections; salaries and allowances of members and officers of Parliament; privileges and immunities of Parliament and its members; emoluments, allowances and privileges of the President, Governors, Union Ministers and Comptroller and Auditor-General; Government audit and accounts; constitution and jurisdiction of the Supreme Court; constitution and jurisdiction of the High Courts; extension of a High Court’s jurisdiction to a Union Territory; extension of the jurisdiction of the State police; inter-State migration; preventive detention for the purposes of the Union; Central Bureau of Investigation; Union property; fees, inquiries, surveys, statistics, offences and jurisdiction of the court with regard to any matter in the Union List; and residuary matters.

Then the Union List has tax entries, such as, taxes on income other than agricultural income; duties of custom; duties of excise on specified goods; corporation tax; tax on capital gains, excluding agricultural land; estate duty, excluding agricultural land; succession duty, excluding agricultural land; terminal taxes on rail, sea and air traffic; certain stamp duties; and sales tax on newspapers; inter-State sales tax.

List II—State List: List II has sixtysix entries relating to matters, such as, public order; police; administration of justice; prisons; local government; public health; pilgrimage in the country; intoxicating liquors; relief of disabled and unemployed; burials and cremations; subject to Lists I and III, education; State libraries and museums; communications; agriculture and animal husbandry; pounds and cattle trespass; land; forests; protection of wildlife; fisheries; subject to List I, Courts of Wards; subject to List I, mines and minerals; subject to List I, industries; gas; subject to List III, trade and commerce; subject to List III, production and supply of goods; markets and fairs; weights and measures; money-lending; inns; subject to list I, universities and educational institutions; co-operatives or incorporated societies; dramatic performances, and cinemas subject to List I; betting and gambling; subject to List I, elections to the State Legislature; salaries and allowances of
the members and the officers of the State Legislature; powers, privileges and immunities of the State Legislature; salaries and allowances of a State minister; State public services; State pensions; State public debt; treasure trove; and fees, offences and jurisdiction of courts in respect of the matters in List II.

Tax entries in List II cover land revenue; agriculture income-tax; succession and estate duties on agricultural land; taxes on lands and buildings; taxes on mineral rights; excise duties on specified goods; taxes on entry of goods; taxes on electricity; sales tax; taxes on advertisements; taxes on road or inland waterway traffic; vehicles tax, subject to List III; taxes on animals and boats; taxes on profession and trade; capitation taxes; taxes on luxuries, amusement and gambling subject to List I; and stamp duty subject to List I.

List III—Concurrent List: The Concurrent List has only forty-seven entries relating to criminal law, criminal procedure; preventive detention for state security, public order and maintenance of essential supplies and services; inter-State transfer of property, excepting agricultural land; registration; contracts, excluding agricultural land; actionable wrongs; bankruptcy and insolvency; trusts; administrators-general and official trustees; evidence and oaths; civil procedure; contempt of court; vagrancy; lunacy; prevention of cruelty to animals; adulteration; subject to List I, drugs and poisons; economic and social planning; monopolies; trade unions and labour disputes; social security; labour welfare; labour training; professions; rehabilitation of displaced persons; charities; prevention and control of inter-State spread of epidemics; vital statistics, including birth and death registration; ports, subject to List I; inland shipping and navigation, subject to List I; production and supply of specified goods; price control; mechanically propelled vehicles; factories; boilers; electricity; newspapers, books and press; subject to List I, archaeological sites; evacuee property; acquisition and requisitioning of property; recovery in a State of public demand arising outside that State; subject to Lists I and II, stamp duties; enquires or statistics for List II or List III; and fees and jurisdiction of courts in respect of matters in List III.

Now, in conclusion it may be commented that this broad survey of the major aspects of the Union-State legislative relations leads
one to the sole irresistible inference that these relations are wholly
gereed to the objectives and modalities of a co-operative federation
like ours committed to achieve through planned development and
democratic process a socialistic society in which justice, social,
economic and political, shall reign supreme. And although one
may be left with a lingering feeling that there is a slant in favour of
the Union in designing the general pattern of the Union-State
legislative relations, much of the success of the Indian federation
must depend on the myriad of factors which influence in practice
the working of the federal institutions in any country. There is no
conclusive evidence to suggest that federalism in this country is, in
the legislative sphere, under eclipse.
CHAPTER 28
PARLIAMENT

Parliament is the supreme representative assembly of the people; the constitutional incarnation of the “People of India”; the legal repository of their ultimate authority. It is the highest organ of democracy in the land and the custodian of the liberties and well-being of the community. It is embraced within the term “the State” in article 12 of the Constitution and is the heart of constitutional Government and administration in the country. It is the national forum of public opinion and the biggest platform for party politics. It is a sensitive radar of national sentiments and a superb searchlight on official activities.

PARLIAMENTARY SOVEREIGNTY

A holy child of a historical chance; a monument to early socio-economic transformations; a brave ensign of political expediency; a recognised rule of common law; an article of an unwritten constitution; and the solid foundation of a flexible constitution, the principle of Parliamentary sovereignty is an element peculiar to the British Constitution. It is rather the whole of the British Constitution.¹ And quite early in 1589, of this aspect of the British Constitution, Smith wrote:

“The most high and absolute power of the realm of England consisteth in the Parliament.”²

“Of the power and jurisdiction of the Parliament for making of laws in proceeding by Bill,” said Coke, “it is so transcendent and absolute, as it cannot be confined either for persons or causes within any bounds”.³ Blackstone also echoed the same sentiments when he commented that Parliament “can, in short, do everything that is not naturally impossible”,⁴ which should show that De Lolme was, perhaps, being only exotic and not exact when he stated that “Parliament can do everything but make a woman a man, and a man a

¹ See Jennings, Sir I: The Law and the Constitution, op. cit.
² Smith: De Republica Aglorum; pp. 48, 49.
³ Coke: Institutes, 36.
⁴ Blackstone: Commentaries; pp. 160, 161. Italics are mine.
woman”. May was more accurate when he said that “The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction”. Still more precisely, Jennings pointed out that basically Parliamentary sovereignty implies that

“Parliament is not legally subject to any physical limitations.”

The sovereignty of Parliament is, then, legal sovereignty, or more precisely, legislative supremacy, stated by Dicey as follows:

“Parliament means...the King, the House of Lords, and the House of Commons, and these three bodies acting together may be aptly described as the ‘King in Parliament’, and constitute Parliament. The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”

In Great Britain, then, Parliamentary sovereignty means the power of the British Parliament to make or unmake any law, including any law of the British Constitution, whose validity cannot be questioned in a court of law. But in the absence of the British historical background and continuing environment in the land of its origin, any transplantation of the institution of Parliamentary sovereignty in a distant clime cannot reasonably be expected to retain its native ingredients in entirety. Even in some broad essentials it may have to make varying responses to the distinct conditions in different countries. Montesquieu said:

“Laws require to be so exactly adapted to the manner of the people for whom they are framed that it should be a great chance if those of one nation suited another”.

In general, the essence of Parliamentary sovereignty seems to consist in the constitutional primacy of Parliament and its concomitant is Parliamentary form of Government. This primacy involves the principal legislative role and the decisive constituent role of Parliament in the scheme of a constitution, which may display varying combinations, shades and gradations. The concept of

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8 See Montesquieu: *Spirit of the Laws*. 
Parliamentary sovereignty ought to be considered on the balance of a total view of all the constitutional authorities in a country. Not the fossil in the homeland, but its metamorphosis in a *newfoundland* should be the basis for an objective enquiry into the nature and operations of Parliamentary sovereignty in any land.

*A REPROSPECT OF PARLIAMENTARY SOVEREIGNTY IN INDIA*

Broadly the British Parliament is deemed sovereign not only in Great Britain but also in regard to all the colonial and territorial possessions of that country. Its sovereignty was first asserted in relation to India in the form of the Regulating Act, 1773. And thereafter although at all times of its history India under the British rule enjoyed a constitutional status distinct from the other colonial and territorial possessions of Great Britain, the question of the supremacy of the British Parliament over this country was never in doubt.

When the governance of this country was transferred from the East India Company to the British Crown in 1858, the Government of India Act, 1858, was passed by the British Parliament for regulating the affairs of the country. Then came the Indian Councils Act, 1861, which for the first time under British rule in this country aimed at associating *non-official and national elements* with governmental work. Interestingly, after a decade of the passing of the British North America Act, 1867, constituting the Dominion of Canada "under the Crown...with a constitution similar to that of the United Kingdom," the Privy Council spoke of the position of the Indian Legislature under the 1861 Act through Lord Selborne, in *R. v. Burah*, as follows:

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits, which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large and of the same nature, as those of Parliament itself."\(^{11}\)

This status of the Indian Legislature continued unaltered through all the successive Government of India Acts, including the Govern-

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\(^{9}\) See the Author's *From Raj to Republic*, op. cit.

\(^{10}\) See the Preamble, the Constitution of Canada (1867). Italics are mine.


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ment of India Act, 1935, passed from time to time by the British Parliament. After World War II the Cabinet Mission Plan of May 16, 1946, envisaged a complete transfer of power to the Indian people on the completion of the labour of a Constituent Assembly to be constituted within the terms of the Plan.

**Parliamentary Sovereignty and the Constituent Assembly**

A duly elected Constituent Assembly held its first sitting on December 9, 1946, although a section of its members chose to abstain from this meeting. The Objectives Resolution, the Indian Declaration of Independence, was moved in the Assembly after four days by Nehru, but it could be adopted only during the second session of the Assembly on January 22, 1947. The question of sovereignty of the Constituent Assembly then seems to lie in the twilight region of fact and law made hazier by the cross currents of motivated and sterile controversies raised around it. But there can be no shadow of doubt about its sovereign status after the passing of the Indian Independence Act, 1947, when India achieved independence after the midnight of August 14, 1947.

The Independence Act, *inter alia*, provided that (i) there shall be two independent Dominions of India and Pakistan from August 15, 1947; (ii) any provision of the Government of India Act, 1935, limiting the power of the Legislature of a Dominion shall be deemed as a law of that Legislature unless the Constituent Assembly provided otherwise; (iii) the Legislature of each of the new Dominions shall have full power to make laws for the Dominion, including a law having extra-territorial operation or being repugnant to any provision of an existing or future Act of the British Parliament or any other British law; (iv) the Constituent Assembly of each Dominion shall exercise all powers exercisable by the Legislature of the Dominion; (v) and the power of a Dominion Legislature for framing the Constitution of a Dominion shall be exercised by the Constituent Assembly of the Dominion.12

After Independence, then, the Constituent Assembly of India became a sovereign body exercising both constituent and legislative powers. And although under Mavalankar plan it came to hold

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12 *See the Author's From Raj to Republic, op. cit.*
separate sittings for Constitution making and transacting other legislative business, at both sets of its sittings, it functioned in sovereign capacity. Precisely, the Constituent Assembly had both the sovereign constituent and sovereign legislative competence. In this dual capacity it continued to function until the commencement of the Constitution on January 26, 1950, when it became transformed into the Provisional Parliament of India within the terms of the Constitution which abolished both the Government of India Act, 1935, and the Indian Independence Act, 1947.

And, perhaps, quite naturally, in this all sovereign Constituent Assembly the question of Parliamentary sovereignty under the Constitution was never made a direct issue of debate, although the Assembly discussed at length the Parliamentary form of Government adopted by it. However, in the context of the discussions relating to the fundamental right to property in article 31, Nehru considered it necessary to clearly state the position of Parliament in relation to the Supreme Court in the following classic words:

"No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there, it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament".\(^{13}\)

PARLIAMENTARY SOVEREIGNTY UNDER THE CONSTITUTION

The glorious Preamble to the Constitution speaks, inter alia, of the solemn resolve of the People of India to constitute India into a Sovereign, Democratic Republic. The Republic of India is, thus, sovereign. Yet the Constitution does not speak specifically of the sovereignty of any other element, instrument or organ of the Republic. In fact, in the enacted part of the Constitution the word "sovereignty" or its any other grammatical deflection does not occur at all.

Then, although some Supreme Court judgments contain references to the issue of sovereignty in the scheme of the Constitution in the context of particular fact-situations, they neither in reasoning nor in conclusion seem to have settled any final proposition in this regard for ready acceptance and general application. Although the superior

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\(^{13}\) C.A.D., Vol. IX ; pp. 1195-96. Italics are mine.
courts in the country have in general affirmed the position taken by the Privy Council, in *R. v. Burah*,\textsuperscript{14} on the status of the Legislature in India, their opinions and those of their individual judges on this issue, as can be gathered from their various judgments, display surprising differences, or even incompatibilities.

Take for instance, *A. K. Gopalan’s Case*,\textsuperscript{15} one of the earliest cases relating to the fundamental rights, which was decided by the Supreme Court. Of the five Judges deciding the case, Fazal Ali was clearly of the view that the "due process clause", at least the procedural due process, of the American Constitution was also incorporated in article 21 of the Indian Constitution, and necessarily the Indian Parliament could not be better situated than the American Congress. Patanjali Sastri J. seems to have worked out a theory of the sovereignty of the people in the scheme of the Constitution, for, in speaking of the nature and significance of the fundamental rights, he observed:

"There is no doubt that the people of India have in the exercise of their sovereign will as expressed in the Constitution adopted democratic ideals... and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution reserved to themselves certain fundamental rights so called, I apprehend, because they have been retained by the people and made paramount to the delegated power as in the American model".

Mukherjee J. stood for the sovereignty of the Constitution. He felt that in India the Constitution and not Parliament is sovereign and in sustaining this position, he explained:

"The Constitution of India is a written Constitution and though it has adopted many of the principles of the English Parliamentary system, it has not accepted the English doctrine of the absolute supremacy of Parliament in matters of legislation. In this respect it has followed the American Constitution and other systems modelled on it".

Das J. took a view of legislative supremacy in India in conformity with the tradition of *R. v. Burah*, a view with which Mahajan J. and Kania C. J. were also in broad agreement. Das J. said:

"Although our Constitution has imposed some limitations on the legislative authorities, yet subject to and outside such limitations our Constitution has left our Parliament and the State Legislatures supreme in their respective legislative fields. In the main, subject to the limitations I have mentioned, our Constitution has preferred the supremacy of the Legislature to that of the Judiciary".

\textsuperscript{14} *R. v. Burah*, op. cit.

\textsuperscript{15} *A. K. Gopalan v. State of Madras*, op. cit.
Kania C. J., however, stated his views on Parliamentary sovereignty in India more explicitly in *In re Delhi Laws Act's Case*\(^{16}\), which appear to place him closer to Mukherjea J. in *Gopalan's Case*, in the following words:

"The principal point of distinction between the British Parliament and the Indian Parliament is that the Indian Parliament is the creature of the Constitution of India and its powers, rights, privileges and obligations have to be found in the relevant articles of the Constitutions. It is not a sovereign body, uncontrolled with unlimited powers."

*In Shankariprasad v. Union of India*, the Supreme Court seems to have unanimously opted for the sovereignty of constituent power. Speaking of the amendability of the fundamental rights, the Court said that, in including these rights in the Constitution on the American model, the founding fathers

"must have had in mind...invasion of the rights of the subjects by the legislative and the executive organs of the State by means of laws and rules made in exercise of their legislative powers and not the abridgement or nullification of such rights by alterations of the Constitution in exercise of sovereign constituent power. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise must be difficult and rare. On the other hand, the terms of article 368 are perfectly general and empower Parliament to amend the Constitution without any exception."\(^{17}\)

These excerpts from the judgments delivered in the Supreme Court within two years from the commencement of the Constitution indicate at least four distinct strands of thinking on the question of sovereignty in the scheme of the Constitution. The first is that the people are sovereign; the second is that the Constitution is sovereign; the third is that the Legislatures, *i.e.*, Parliament and the State Legislatures, are supreme within their respective spheres subject to the limitations imposed by the Constitution; and the fourth is that sovereignty consists in the exercise of the constituent power to amend the Constitution, each of which needs some further scrutiny.

And for a clearer comprehension of the whole concept of Parliamentary sovereignty in the scheme of the Constitution it may be desirable also to add to these four, three more angles of thought, though not judicial, making them altogether seven. Thus, a fifth line of thinking is of a person like D. N. Banerjee who feels that "the Parliament of India is both a sovereign and a non-sovereign law-

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\(^{16}\) *In re Delhi Laws Act, op. cit.* Italicics are mine.

\(^{17}\) *Shankariprasad v. Union of India, op. cit.*
making body”, 18 and the sixth line is traceable to what Jawaharlal Nehru said on April 6, 1957, in his Presidential Address at the Third Annual General Meeting of the Indian Institute of Public Administration, New Delhi. He remarked:

“We have a Parliament which is sovereign, which is elected every five years, normally speaking”. 19

Then, the seventh strand is the strain of this book, which stands for the proposition that Parliamentary sovereignty in India implies Parliamentary *primacy* generally, whereas in England it means Parliamentary *supremacy*. The Parliament of India is sovereign, the sole sovereign authority in the constellation of the constituted authorities operating within the scheme of the written Constitution of India. Parliamentary sovereignty in India exists to the maximum possible extent conceivable within the terms of a written constitutional code, although the country has a most elaborate and written federal Constitution, with a Bill of Rights and judicial review. 20

*Sovereignty of the People and Parliamentary Sovereignty*

It is the people that must ever be deemed sovereign in modern constitutionalism. Anything and everything is done, and can now be done, in the name of the people. This is the greatest achievement of democracy and constitutionalism. And sovereignty of the people is now no longer mere political or popular sovereignty. It is a definite legal concept. Yet this ubiquitous people in action involves some agency process even during a revolution or in a direct democracy.

In the mother country subscribing to the principle of Parliamentary sovereignty the assumption always is that Parliament is not a body of *delegates* but that of *representatives*. It is the people incarnate; reincarnate, as it were, after each general election. And it is the people assembled in their Parliament that exercise sovereignty. Sovereignty of the people actualises itself through Parliamentary sovereignty.

The Parliament of India is the People of India: In the scheme of the Constitution of India Parliament is the highest representative body of the people. It is not a body of delegates, nor is it a delegate itself, notwithstanding what Sastri J. said in Gopalan's Case\(^{21}\) regarding delegation of power to the organs of the state by the people acting through the Constituent Assembly. Parliament is the heir to the Constituent Assembly of India, which was the people of India, with the supreme competence to make the Constitution and the laws.

Parliament, historically, politically, legally and factually, is the successor to and a continuation of the Constituent Assembly. It is a Constituent Assembly in perpetual session, so to say, reborn after each general election, with both constituent and law making powers. It is not in the nature of things to say, as was said in State of W. B. v. Union of India\(^{22}\), or was assumed in Golak Nath's Case,\(^{23}\) that the Constituent Assembly by using in the preamble the expression "We, the People of India", and having purported to act in their name must either be deemed to have transferred to the people of India the sovereignty that was transferred to the Assembly by the British Parliament or to have recognised the fact of its limited mandate for framing the Constitution, which having been done the residual sovereignty was passed on to the people. For, the expression "we, the People of India," in the Preamble is constitutive or at best cognitive and not translativive in nature. It is intended to make the people act through their Constituent Assembly.

Residuary Powers for Parliament: Unlike the Tenth Amendment of the American Constitution, article 248 of the Indian Constitution expressly vests residuary powers in the Parliament of India and not in the people of India. And there cannot also reasonably be a theory of certain reserve powers of the people in the form of fundamental or other constitutional rights.

Constituent Power for Parliament: In addition to the scattered powers of Parliament to amend the Constitution in specified respects, clause (1) of article 368 invests Parliament with the general power to amend the Constitution, albeit in accordance with the procedure laid down by clause (2) of that article.

No Device of Direct Democracy: The Constitution does not also have the devices of direct democracy, such as, referendum, initiative or recall, although Parliament itself may authorise a resort to any such device.

It should, thus, appear that the theory of sovereignty of the people does not detract from the operation of the principle of Parliamentary sovereignty in this country. The Parliament of India ought to be deemed the people of India, and in the scheme of the Constitution people's sovereignty actualises itself through Parliamentary sovereignty.

Supremacy of the Constitution and Parliamentary Sovereignty

It is axiomatic that as long as a constitution is it must reign supreme. It is the supreme law of the land. A constitution that is not supreme is no constitution at all. But to say that a constitution is supreme is not to say that it is sovereign unless it is taken also to convey the insinuation that a human agency like Parliament, the Supreme Court, or the constitution amending body, or even some combination of theirs, is sovereign under the constitution. For otherwise sovereignty of a constitution would mean the sovereignty of a written document, if any, or of a basic principle, albeit unwritten, which, in so far as it lays down any justiciable conduct norm, must itself be deemed subject to change by some human agency.

Constitutional Supremacy is Human Supremacy: The supremacy of a constitution is operationally at bottom the supremacy of a human agency, and not the supremacy of a written document or an unwritten basic principle. And the crux of sovereignty in action is to locate this human agency. The Constitution of U. K. is as much supreme as is the Constitution of U. S. A. or the Constitution of India. In the U. K. Constitution, notwithstanding anything, Parliament can do anything and everything, including what the Constitution shall be, but only by law. In the U. S. Constitution, notwithstanding anything to the contrary, the Supreme Court says what the Constitution, or the law, is, but only the Constitution amending authority can say anything and everything about what the Constitution shall be and Congress can say what certain laws shall be.

And notwithstanding anything in the Indian Constitution, the Supreme Court says what the Constitution or the law is, but only
Parliament can say what the Constitution shall be, or what certain laws shall be, of course, in accordance with the prescribed procedure which, too, it can change ultimately.

Constitutional Supremacy is not Judicial Supremacy: The Supremacy of a constitution means the supremacy of the authority that can alter the constitution and not the supremacy of the judiciary. For, the judiciary cannot alter the words of a constitution, although it may alter their meaning and that, too, it does not expressly profess to do.

Judicial review is not, ipso facto, in derogation of Parliamentary sovereignty, although in practice there may be difficulties in reconciling them within the scheme of a constitution. Parliamentary sovereignty and judicial review may exist happily and even may co-operate. For, the court has to say what the constitution is, or what the law has been or is and Parliament has to determine what the constitution, or a law or the Union laws, shall be.

It may be said, then, that in England Parliament is sovereign; in America sovereignty ought to go to the Constitution amending authority; and in India sovereignty should be deemed to accrue to Parliament. Sovereignty is saved in each case, as it were, by an implied non obstante clause, a transcendental clause, in the Constitution of each of them.

The "Subject to the Provisions of this Constitution" Clause: On this view of the matter an expression like "Subject to the provisions of this Constitution" preceding the substantive provisions vesting law making power in Parliament in article 245(1), or for that matter in any other article, may be deemed to be an application of the general principle that any authority under a constitution is subject to the constitution. And although this subsection may be of both substantive and procedural nature, the implied transcendental non obstante clause always operates to save the sovereignty of an authority under a constitution. Besides, as in article 245(1), a "subject to clause" may be not only restrictive but also expansive, and it may even be followed or supplemented by an expressed non obstante clause in certain cases.

Apprehension of Legislative Oppression: In Gopalan's Case23a it was urged on behalf of the petitioner that any concept of sovereign or plenary legislative power of Parliament is likely to lead to legislative tyranny. But this line of argument was completely misplaced, for,

apart from the fact that any power is liable to be abused by any authority, the control of the possibility of abuse of power vested in Parliament lies not in either subscribing to the principle of limited Parliamentary authority nor in the theory of expanded judicial review, but elsewhere. Das J. said in that case:

“Our protection against legislative tyranny, if any, lies in ultimate analysis in a free and intelligent public opinion which must eventually assert itself…”

“Legislative Supremacy within Specified Sphere” and Parliamentary Sovereignty

In Burah’s Case, Lord Selborne and in Gopalan’s Case, Das J. set up a view that within their specified limits the Legislatures in India are supreme and their legislative powers are plenary and of the nature as those of the British Parliament. This is a theory of mandated, or divided, sovereignty.

Mandated Sovereignty: In Burah’s Case a theory of mandated sovereignty may be intelligible, though not accurate, for it was decided much before India achieved Independence and then the British Parliament was sovereign in relation to India also. But in Gopalan’s Case which was decided after Independence, there cannot legitimately be injected any theory of mandated sovereignty.

Divided or Dual Sovereignty: It seems that also implicit in Gopalan’s Case is, perhaps, the concept of divided or dual sovereignty not often viewed favourably in a federal polity. But the whole concept of dual federalism has always been quixotic now totally “snuffed out” by the U. S. Supreme Court even from the American Constitution. What happens in a federation is a division of the powers of legislative, financial and executive, or even judicial, character between the Centre and the regions. Constituent power vests in one single authority which alone has any claim to sovereignty, and in India this power vests in Parliament.

Power of Amendment and Parliamentary Sovereignty

A country that has no written constitutional code calls for no distinction between constituent power and general law making power and the supremacy of the constitution and the laws is ensured by

constituting a supreme body to do anything or everything, but by law alone. In a country with a written constitutional code convenience commands a distinction between constituent and other law making powers and the supremacy of the constitution and the laws is secured by requiring some special procedure for constitutional amendment and allowing some scope for authoritative judicial interpretation of the constitution.

The Parliament of India has been made the repository of the constituent power in general under article 368(1), and this is in addition to its other specific constituent powers interspersing the whole of the Constitution. Its constituent powers are, however, subject to the procedural limitations prescribed by the Constitution, but these are the limitations which may also be changed by Parliament. Parliament is also the major legislative authority in the country, with the power to legislate during an Emergency even for a matter within the ambit of the State Legislatures, and as such, it has a reasonable claim to be treated as the sovereign authority in the scheme of the Constitution.

Parliament as Both Sovereign and Non-sovereign Authority

At times, however, it is suggested that “under the Constitution of India the Parliament of India is both a sovereign and a non-sovereign law-making body.” This is because it is pointed out that Parliament has both constituent and ordinary law making powers. In the exercise of the former even Parliament has to work under certain limitations laid down by the Constitution, and its ordinary law making power is not only hedged in by numerous constitutional conditions but is also subject to the requirement of judicial review. But evidently, this line of argument misses the key element of Parliamentary sovereignty in the scheme of the Constitution. For, Parliament is either sovereign, or non-sovereign, and if Parliament is not sovereign, some other authority has to be deemed as sovereign. It is more consistent to consider Parliament as sovereign because clause (1) of article 368 expressly vests in it the general power of amending the Constitution, and even a sovereign body need not perform only functions which are purely sovereign in nature.

Parliamentary Sovereignty not Hermaphroditic: Evidently, the concept of Parliamentary sovereignty is not hermaphroditic, although metamorphic it surely is. Simply because a body performs certain functions, including even the law making function, which may not reasonably be characterised as its sovereign functions, it cannot be classed as both sovereign and non-sovereign. Sovereignty is the crowning element of an authority, and if the authority possesses that element, it is sovereign and the fact that it may perform certain non-sovereign functions does not detract from its sovereign status.

Parliament As a Sovereign Body

The Parliament of India is sovereign in the scheme of the Constitution. When at the 1957 Annual General Meeting of the Indian Institute of Public Administration Nehru spoke of “Parliament which is sovereign”, he was not for the first time anointing Parliament with supreme competence, but was merely placing in bold relief something which is immanent in the Constitution of the Sovereign, Democratic Republic of India.

India is sovereign and somebody must exercise this sovereignty. In principle, the people of India are sovereign; a principle flowing as a corollary from the solemn resolution of the people of India in the Preamble to constitute India into a Sovereign, Democratic Republic. It is meet that in practice this sovereign authority be exercised by the highest representative body of the people, the Parliament of India. Constitutional democracy implies to a degree of legislative supremacy, or primacy, although in the ultimate analysis it may involve the supremacy of constituent competence. But in any case, if the people are sovereign, sovereignty must be exercisable by a body which represents the people’s will, and that is what a legislature generally is.

Logically, people’s sovereignty leads to legislative supremacy, although for operational purposes in the scheme of a written constitutional code for the sake of convenience and in recognition of human fallibilities and foibles the constitution may provide for suitable checks and balances, such, for example, as, a distinction between constituent power and other law making power; or the requirement of judicial review; or a division of powers between the Centre and the regions. This is an invaluable gift of modern constitutionalism that the people claim to be governed by themselves, which operationally implies by the representatives of their own choice, and here
lies the root of Parliamentary sovereignty which receives its hue from
the setting in which it thrives.

**British and Indian Parliamentary Sovereignty Species of the
Same Genus:** Essentially, the British Parliamentary sovereignty
and the Indian Parliamentary sovereignty are the species of the same
genus, although the both may have their own peculiarities arising out
of the different conditions under which they were conceived and born.
The British historical and the socio-economic setting and the British
political culture provide the former with attributes which cannot be
imagined for the latter. Yet this should not lead to the conclusion
that India does not have Parliamentary sovereignty nor that the variety
it has is in any way inferior to the British type. One ought always
to remember the immense difficulty of the founding fathers is incorpo-
rating the uncodified principle of British Parliamentary sovereignty
into the body of the written federal Indian Constitution.

Besides, if the history of modern constitutionalism is traceable to
the Glorious Revolution, that of modern federalism and written con-
stitutional codes can be said to begin only with the American Revolu-
tion. If federalism and written constitutional codes may assume
numerous varieties, slants and shades, there seems no reason why
Parliamentary sovereignty may not be taken to admit of diversities
within its fold. And if it be said that British Parliamentary sovereignty
is unique, *sui generis*, a type by itself, so is Indian Parliamentary
sovereignty, for above all political institutions are the products of
the objective socio-economic conditions surrounding them and an
excessive emphasis on the uniqueness of these institutions is fatal to
their any comparative study.

**Some Other Sustaining Elements of Indian Parliamentary
Sovereignty:** Again, there are still more elements which make
Parliamentary sovereignty in India appear more like Parliamentary
sovereignty in Britain.

**Power to Regulate Procedure:** Under article 118 each House of
Parliament has the power to regulate its own procedure, of course,
subject to the Constitution. Then, Parliament under article 119
regulates by law procedure in relation to financial business. And
although article 121 places a restriction on a discussion in any House
relating to the conduct of a superior court Judge, except for the
purpose of removing him from office, the fact that article 122
precludes the courts from enquiring into the proceedings of Parliament takes the sting out of this restriction.

Power to Extend Its Own Duration: Under article 82(2) proviso Parliament may extend its own duration when a Proclamation of Emergency is in force. It may also extend during such a Proclamation the duration of a State Legislative Assembly within the terms of article 172(1) proviso.

Parliamentary Privileges and Immunities: Then, under article 105 privileges and immunities of the members and Houses of Parliament are, broadly, the same as those of the British House of Commons at the commencement of the Constitution.

Power of Extra-territorial Legislation: Parliament, but not a State Legislature, has the power to make laws which may have extra-territorial impact. In addition, Parliament may legislate even against a rule or principle of the law of nations.

Expansion of Legislative Powers During Emergency: When a Proclamation of Emergency is in force, Parliament becomes the paramount legislative authority even in respect of State matters.

No Power to Bind Successor: Parliament has no power to bind its successor. That is, it cannot at any time legislate or exercise its constituent power in any manner that may absolutely preclude or fetter future Parliaments in exercising their powers.

No Arrogation by the Lower House: Parliamentary sovereignty means sovereignty of all the three units of Parliament—the President, the Council of States and the House of the People—taken together as a trinity. The theoretical or practical predominance of the House of the People does not involve the arrogation of Parliamentary sovereignty by this House alone. To all intents and purposes, Parliament is trinitarian and not unitarian.

PARLIAMENTARY SOVEREIGNTY GENERALLY IS PARLIAMENTARY PRIMACY

It is, however, imperative always to remember that the principle of Parliamentary sovereignty in general implies only the concept of Parliamentary primacy, a concept already explained earlier, although it might be said to have originated as the doctrine of Parliamentary supremacy. And then it is also preferable to note that even the
British doctrine of legal supremacy of Parliament is subject to a serious legal limitation in that the British Parliament can exercise its sovereignty through law and law alone. For the British Parliament to say even by law that it would do anything and everything but not by law would, indeed, be blowing the British Constitution to bits. Be it as it may, it is desirable to recognise that Parliamentary sovereignty in India can imply only legislative primacy of the Indian Parliament, although in Britain it may mean the legislative supremacy of the British Parliament, and this terminological exercise should go a long way in making the concept of Parliamentary sovereignty in India acceptable even to the constitutional dogmatists.

It is equally essential to remember that the principle of revolution through the constitution permeating the Indian constitutional system imperatively calls for a clear recognition of the existence of the concept of Parliamentary sovereignty in the scheme of the Constitution. Parliamentary sovereignty in Britain was conceived to sustain the then existing socio-economic formations, in India it is intended to build a new socio-economic order. The former was meant to be a device for conservation, the latter is an engine of change. Conceptually, the former is static and the latter dynamic.

British Parliamentary sovereignty is a pillar in constitutional statics and Indian Parliamentary sovereignty is a pulley in constitutional dynamics. And if the cherished objective of the founding fathers to achieve a socio-economic revolution through the Constitution is to be achieved, sovereignty of the Parliament of India must be regarded as a categorical constitutional imperative. Parliament alone can legitimately secure and sustain revolution through the Constitution. The other organs of state power must reconcile themselves to this constitutional primacy of Parliament, irrespective of any theoretical or practical objections to the acceptance of the principle of Parliamentary sovereignty in the scheme of the Constitution.

CONSTITUTION OF PARLIAMENT

The Parliament of India is trinitarian like the mother of Parliaments. It consists of the President, the Rajya Sabha (Council of States) and the Lok Sabha (House of the People). Article 79 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 States and the House of the People."

**BICAMERALISM**

In constituting the Parliament of India the founding fathers adopted the principle of bicameralism accepted by all living major constitutional systems. Even France, the celebrated homeland of the radical Abbe Sieyes, to whom "if a second chamber dissents from the first, it is mischievous, if it agrees with the first, it is superfluous," has a Second Chamber. After the abolition of its Legislative Council in 1951, New Zealand is, perhaps, the lone major exception at present to have a unicameral Legislature. Bicameralism, thus, survives as a historical fact if not as a historical necessity. And Churchill had this in mind when he said:

"Show me a powerful, successful democratic constitution of a great sovereign State which has adopted the principle of single Chamber Government".

Besides, obvious merits have been claimed for a Second Chamber. In the first place, it is pointed out that a Second Chamber, consist as it does of more elderly and experienced people, has utility as a revising Chamber, to give a second thought and a more incisive consideration to a measure considered by the popular Chamber. An Upper Chamber may also help in correcting technical and drafting errors escaping the attention of the Lower Chamber.

Secondly, in addition to taking a more balanced and detached view of a measure, a Second Chamber provides the necessary cooling off period to allow any hasty and volatile public opinion to crystallise into a firmer shape.27

Thirdly, if on the one hand, a Second Chamber injects an element of salutary delay in legislation, on the other, it may also expedite legislation by initiating and almost finally shaping a non-controversial measure and relieve the burden of the Lower Chamber.

Fourthly, an Upper Chamber may relieve the burden of the Lower Chamber by also discussing certain measures in a greater detail for which the Lower House may not have the necessary time or even equipment.

Fifthly, a Second Chamber is also a convenient device for sharing.

27 See C.A.D., Vol. IV; p. 927.
power in a country. It may also be used for numerous power games. Its members have also social roles.

Sixthly, a Second Chamber, normally being a permanent wing of the legislature, may operate in certain ways to control the executive and the administration at all times and to help them in meeting certain exigencies.

*The Upper House as a Federal Chamber*

Lastly, of all the merits claimed for a Second Chamber, its utility in a federation claims specific attention. It is generally recognised that an Upper House is a necessity under a federal system where the units qua units are represented and the Lower House represents the people. This provides not only a basis for representing the interests of the units but also a foundation for promoting national cohesion and checking centrifugal sentiments. In a federation, a Second Chamber may also be specifically entrusted with matters which affect the interests of the units.

However, in spite of the living tradition of the Second Chambers and the merits claimed for them, particularly under a federal set-up, the fact is that, barring the U.S. Senate, on the whole their significance is on the decline, in part also reflecting the decline of the legislatures in general. They exist more as a matter of inertia, homage to tradition and convenience in sharing power.

*QUALIFICATIONS AND DISQUALIFICATIONS OF MEMBERS*

Article 84 relates to the qualifications for members of Parliament and article 102 speaks of their disqualifications. And it may be more convenient to quote these two articles without either paraphrasing or elucidating them. Article 84 lays down:

“A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;”

28 “I, A.B., having been nominated as a candidate to fill a seat in the Council of States (or the House of the People) do swear in the name of God solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India.”

S: CI—56
(b) is, in the case of a seat in the Council of States, not less than thirty years of age and in the case of a seat in the House of the People, not less than twenty-five years of age; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament."

Then article 102 enjoins:

"(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India, the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that that he is a Minister either for the Union or for such State."

In addition to articles 84 and 102, Parliament under sections 3 and 4 of the Representation of the People Act, 1951, has laid down additional qualifications for membership of Parliament. Section 7 of the Act then lays down further disqualifications. Thus, for example, a person who has been convicted by a court in India for moral turpitude and sentenced to an imprisonment for two or more years cannot be a member of Parliament unless five years have elapsed since his release. The Election Commission has, however, the power to relax some of these disqualifications.

_Determination of the Question of Subsequent Disqualification_

If any member of Parliament becomes subject to any disqualification specified by article 102, the question is determined by the President in accordance with the opinion of the Election Commission.29 Article 103, relating to the determination of the subsequent disqualification of a member, lays down:

"(1) if any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in

clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final.

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion."

VACATION OF SEATS

Article 101, relating to the vacation of seats in Parliament, says:

"(1) No person shall be a member of both Houses of Parliament and provision shall be made by Parliament by law for the vacation by a person who is chosen a member of both Houses of his seat in one House or the other.

(2) No person shall be a member both of Parliament and of a House of the Legislature of a State and if a person is chosen a member both of Parliament and of a House of the Legislature of a State, then at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become vacant unless he has previously resigned his seat in the Legislature of the State.

(3) If a member of either House of Parliament—
   (a) becomes subject to any of the disqualifications mentioned in clause (1) of article 102, or
   (b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, as the case may be, his seat shall thereupon become vacant.

(4) If for a period of sixty days a member of either House of Parliament is absent from all meetings thereof, the House may declare his seat vacant:
   Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days."

Within the terms of article 101, a person can retain only one seat in either House of Parliament. He cannot also be a member of any State Legislature. Consequently, he must vacate any other seat excepting one in either House of Parliament. A vacancy may occur in Parliament also by the death or resignation of a member, or by his removal within the terms of article 101(4) by the House of which he is a member for a continuous absence for sixty days, or by the termination of his membership in accordance with article 101(3) (a).

Resignation

A member may resign within the terms of article 101(3) (b). Such a resignation is to be addressed to the Chairman or the Speaker, as the case may be. After the Constitution (Thirty-third Amendment)
Act, 1974, the presiding officer has now the authority to determine whether a member has tendered his resignation voluntarily or otherwise. He accepts only a voluntary resignation. The decision of the presiding officer may, however, be questioned in a court of law. This Amendment has attracted criticisms and its fuller implications only the future may reveal.

**SALARIES AND ALLOWANCES OF MEMBERS**

The members of Parliament are entitled to such salaries and allowances as Parliament may determine from time to time. At present they draw a salary of Rs. 500 *per mensem* and get specified allowances. They also enjoy residential and travelling facilities. Article 106 lays down:

“Members of either House of Parliament shall be entitled to receive such salaries and allowances as may from time to time be determined by Parliament by law and, until provision in that respect is made, salaries and allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Constituent Assembly of the Dominion of India”.

**THE LOK SABHA**

The Lok Sabha is the heart of Parliament. And although over a quite extensive area in legislative matters, including constituent competence, the Lok Sabha enjoys co-extensive powers with the Rajya Sabha, the Lok Sabha is the centre of gravity of the power and authority of the Parliament of India, for, ultimately it is the will of this House that normally prevails in all areas, except, of course, in the field of constituent power under article 368.

**COMPOSITION OF THE HOUSE**

Article 81 of the Constitution, relating to the composition of the Lok Sabha, reads, after the Constitution (Thirty-first Amendment) Act, 1974, as follows:

“(1) Subject to the provisions of Article 331, the House of the People shall consist of—

(a) not more than five hundred and twenty-five members chosen by direct election from territorial constituencies in the States, and

(b) not more than twenty members to represent the Union territories chosen in such manner as Parliament may by law provide.
(2) For the purposes of sub-clause (b) of clause (1),—

(a) there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and

(b) each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the State:

Provided that the provisions of sub-clause (a) of this clause shall not be applicable for the purpose of allotment of seats in the House of the People to any State so long as the population of the State does not exceed six millions.

(3) In this article, the expression 'population' means the population as ascertained at the last preceding census of which the relevant figures have been published.”

Then article 82 lays down:

“Upon the completion of each census, allocation of seats in the House of People to the States and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House.”

The Lok Sabha, after the Constitution (Thirty-first) Amendment Act, 1973, is to have a maximum of five hundred and twenty-five members, directly elected by a simple majority from single member territorial constituencies in the States. In rejecting the principle of proportional representation, Ambedkar explained in the Constituent Assembly:

“Proportional representation presupposes literacy on a large scale...I think, having regard to the extent of literacy in the country, such a presupposition would be utterly extravagant... Further, proportional representation is not suited to the form of Government which this Constitution lays down. Where there is a Parliamentary system of Government, you must necessarily have a party which is in majority and which is prepared to support the government. A disadvantage of the system of proportional representation is the fragmentation of the legislature into a number of small groups. If Parliament is divided into so many small groups, every time anything happened which displeased certain groups in Parliament, they would, on that occasion, withdraw their support from the Government with the result that the Government would fall to pieces.”

In addition to the seats for the States, the Union Territories are also to send not more than twenty representatives chosen in the manner prescribed by Parliament. Of the total seats allotted to the States and the Union Territories seats are reserved for the Scheduled Castes and Scheduled Tribes in proportion to their numbers in relation to the total population of the State concerned\(^{31}\). Then the President may also nominate two members to represent the Anglo-Indian community.\(^{32}\) Notably, after the Constitution (Thirty-fifth Amendment) Act, 1974, Sikkim, an Associate State, is also to send a representative to Parliament, elected on the basis of universal adult suffrage.

Delimitation of Constituencies

In allocating seats to the States, it is required that a parity on the basis of population is to be secured among the States and among the constituencies within a State. However, this principle of parity applies only to the States having a population of more than six millions and Kashmir has a fixed quota of six members. Parliament appoints by law a Delimitation Commission for determining the territorial area of a constituency, and although there may be occasional complaints of something in the nature of Gerrymandering, the Commission acts fairly and well.

**DURATION OF THE LOK SABHA**

Article 83(2) lays down:

"The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House:

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not exceeding in any case beyond a period of six months after the Proclamation has ceased to operate."

Within the terms of clause (2) of article 13 the Lok Sabha has a term of five years, although it may be dissolved by the President earlier in accordance in the provisions of article 85 (2) (b). Its term however, may also be extended.

\(^{31}\) Art. 330.

\(^{32}\) Art. 331.
Extension of the Term of Lok Sabha

The proviso to clause (2) of article 83 says that the term of the Lok Sabha may be extended by Parliament by law when a Proclamation of Emergency is in force. But such an extension cannot be made for more than one year at a time and in no case beyond six months after the Proclamation has ceased to operate.

THE SPEAKER

The Speaker is the guardian of Parliamentary propriety, decorum and decency in the Lok Sabha and custodian of the dignity and authority of the House. On the occasion of unveiling the portrait of the late V. J. Patel, the first Indian to preside over the Central Legislative Assembly, Nehru said in the Constituent Assembly on March 1, 1948:

"The Speaker represents the House. He represents the dignity of the House, the freedom of the House and because the House represents the nation, in a particular way, the Speaker becomes the symbol of the nation's freedom and liberty. Therefore, it is right that that should be an honoured position, a free position, and should be occupied always by men of outstanding ability and impartiality."

Election, Removal and Terms and Conditions of Office

The Speaker is elected by the House of the people from among its members by a simple majority.\(^3\) Once elected, he continues in office until his successor assumes office, and he does not vacate his office even when the Lok Sabha is dissolved till immediately before the first meeting of the House after re-election. He, however, ceases to hold office if he ceases to be a member of the House. He may also resign by sending in a letter of resignation to the Deputy Speaker.

Removal from Office: The Speaker may also be removed from office by a resolution of the Lok Sabha passed by a majority of all the members of the House. The resolution for such a removal is to be moved after at least fourteen days' notice of the intention to move it. The Speaker cannot preside while a resolution for his removal from office is under consideration. But he has the right to speak in, and otherwise to take part in the proceedings of, the House while such resolution is under consideration "and shall, notwithstanding anything in article 100, be entitled to vote only in the first

\(^3\) Art. 93.
instance on such resolution or on any other matter during such proceedings, but not in the case of an equality of votes."34 Only once in the past, while Mavalankar, the first Speaker of the Lok Sabha was in office, a notice for moving resolution for his removal was given. Nehru then condemned this move and no resolution was passed in the House.

*Emoluments and Privileges:* The Speaker is entitled to such salaries and allowances as may be determined by Parliament from time to time35. At present he receives a salary of Rs. 3,000 a month and is also entitled to other specified allowances. He enjoys all the privileges of a member of the House and none of his actions "for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court."36

*Powers and Functions of the Speaker*

The Speaker is the presiding officer of the Lok Sabha and his primary function is to maintain order in the House so that the business of the House may be transacted smoothly. It is for him to interpret the Rules of Procedure and Conduct of Business of the House and to give ruling on any disputed question. He, in consultation with the Leader of the House, determines the order of business of the House. He has the power to check disorder in the House; to direct expunction of any part of the proceedings of the House; and to order the Marshall to remove a disorderly and recalcitrant member from the House. He is also in a sense the guardian of the interests of the Opposition parties and groups.

He is the link between the House and any outside person or authority, including the President. All communications from and to the House flow through him. He authenticates a Bill passed by the House. He also certifies a Bill to be a Money Bill under article 110. He appoints quite a few committees of the Lok Sabha and also appoints their chairmen. He himself is the *ex-officio* chairman of some of these committees.

The Speaker has the power to adjourn the Lok Sabha or to suspend its meeting for want of quorum. He has administrative control over the secretarial staff of the Lok Sabha, including the Marshall

34 Art. 94, 96. 35 Art. 97. 36 Art. 122.
and the members of the watch and ward staff. He regulates the administration of visitors and Press correspondents to the House. And any summons, notice or warrant to a person committing a breach of privilege or contempt of the House is issued under his authority. He now also decides under article 101(3)(b) whether a member of the Lok Sabha has voluntarily resigned his seat. But his such a decision can be contested in a court of law.37

The office of the Speaker is one of great honour, dignity and authority. In the Warrant of Precedence his position is seventh alongside the Chief Justice of India. He functions under the Constitution and the Rules of Procedure and Conduct Business of the Lok Sabha. His rulings and directions are also treated as part of these Rules. But in his day-to-day working, he has much to decide that the letters of law do not cover. In this country the conventions relating to the Speaker in Great Britain have not been applied in totality. Mavlankar felt,

"...with the present state of political consciousness of public life in India, it is too much to expect that people with different ideologies will all respect the convention of not contesting the election of the Speaker, and it is this aspect which very seriously affects adoption in toto all British conventions..."38

The result has been that the Speakers in India have not displayed the neutrality which is proverbial of the British Speakers. But in spite of that the Speaker of the Lok Sabha has, by and large, played his role efficiently, effectively and impartially and has been able to command confidence and respect of all sections of the House.

The Deputy Speaker

The Deputy Speaker is elected in the manner of electing the Speaker and he vacates office in the manner of the latter. He is entitled to a salary of Rs. 1500 a month and to other admissible allowances. He has the privileges and immunities of a member of Parliament. His function is to preside over the proceedings of the Lok Sabha in the absence of the Speaker. If the office of the Speaker falls vacant, the duties are performed by the Deputy Speaker. And if the offices of both of them are vacant, the President appoints a member of the Lok Sabha for the purpose.39

39 Arts. 93-95, 97.
Panel of Chairmen

In case both the Speaker and Deputy Speaker are absent, a person from the panel of six Chairmen presides. The Speaker nominates all the members on the panel and usually irrespective of party considerations. Then, if even none of the Chairmen on the panel is available, the House elects one of its members to preside over its deliberations.

Secretariat

The Lok Sabha has within the terms of article 90 a Secretariat, headed by the Secretary General to the Lok Sabha and having other permanent officers and employees, which functions under the control and direction of the Speaker. The recruitment and terms and conditions of service of the officers and employees of the Secretariat are to be regulated by Parliamentary laws, and until such laws are passed, by rules made by the President in consultation with the Speaker.

Watch and Ward Staff

The Lok Sabha has also watch and ward staff headed by the Marshal. The function of the members of watch and ward is to assist the Speaker in maintaining law and order in the House.

POWERS AND FUNCTIONS OF THE LOK SABHA

Except for the matters specifically reserved by the Constitution for the Rajya Sabha, such as, the power to authorise Parliament to legislate for a State matter in the national interest or to resolve for the creation of a new All-India Service, the Lok Sabha has a decisive power in regard to all matters within the competence of Parliament. Thus, the Lok Sabha has constituent power and legislative power. It has primary responsibility for financial matters and its control over the executive and administration is intended to be very real in so far as the Council of Minister is collectively responsible to it alone.

The elected members of the Lok Sabha participate in the election of the President and the Vice President and the House has also a role in impeaching the President or removing the Vice-President. In the removal of the Supreme Court and High Court Judges, the Controller and Auditor-General, the Election Commissioner and the
members of the Public Service Commissions also this House shares-powers with the Rajya Sabha.

This House has also to approve or disapprove subordinate laws, the Presidential Ordinances and also the Proclamation of Emergency or a declaration of any other Emergency under the Constitution. Then reports of the several Central constitutional or statutory agencies are also placed before it for consideration.

POSITION OF THE LOK SABHA

Technically, Parliament means the President, the Rajya Sabha and the Lok Sabha, but practically it has come to mean only the Lok Sabha. This indicates the key position the Lok Sabha enjoys in the working of constitutional Government in the country. It should be remembered, however, that the respective roles of the other constituent units of Parliament have to be reckoned with, particularly when political situation may be fluid.

Thus, the Rajya Sabha being a coordinate body in certain matters, such as, an amendment of the Constitution, it may kill a measure proposed by the Lok Sabha. Then certain matters are specifically reserved for the Rajya Sabha only. And the Rajya Sabha, being a permanent body, it may, in an unusual situation, such as, when the Presidential election is to be held after the dissolution of the Lok Sabha, enjoy a definite advantage over the Lok Sabha. Yet, the fact remains that normally it is the Lok Sabha that is the focus of the Indian Parliament.

THE RAJYA SABHA

The Rajya Sabha is the Second Chamber of the Parliament of India and, as its name suggests, it aims at representing the States qua States, although the States are not equally represented in this House.

COMPOSITION

Article 80 deals with the composition of the Rajya Sabha. It provides:

"(1) The Council of States shall consist of—
(a) twelve members to be nominated by the President in accordance with the provisions of clause (3); and
(b) not more than two hundred and thirty-eight representatives of the States and of the Union territories."
(2) The allocation of seats in the Council of States to be filled by representatives of the States and of the Union territories shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.

(3) The members to be nominated by the President under sub-clause (a) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

   Literature, science, art and social service.

4) The representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(5) The representatives of the Union territories in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

In accordance with the provisions of article 80, the Rajya Sabha consists of the representatives of the States and of the Union Territories and the nominees of the President. Not more than two hundred and thirty-eight representatives of the States and the Union Territories can be sent to the Rajya Sabha. The allocation of seats to the States and the Union Territories has generally been made on the basis of their population and the number of seats to be filled in by each of them has been specified in the Fourth Schedule.

The representatives of the States are elected by their respective Legislative Assemblies in accordance with the system of proportional representation by means of the single transferable vote, and Parliament by law prescribes the mode of sending the representatives of the Union Territories. The President nominates twelve members to the Rajya Sabha from among persons having a special knowledge of or practical experience in matters, such as, literature, science, art and social service. And the Constitution (Thirty-fifth Amendment) Act, 1974, now adds one more member, elected by the Sikkim Legislative Assembly.

The composition of the Council of States has primarily been criticised in that that the units of the Union have no equal representation in this body and that, it is pointed out, goes against the principle of federalism. Perhaps, there may be a grain of truth in this line of criticism, but two points have to be kept in mind in this regard. In the first place, the peculiar historical setting in which the units of the Union were carved out could not reasonably permit equal representation for them all. Secondly, the mere unequal representation of the
units in a federal Chamber does not necessarily depart from the federal principle.

**DURATION**

Article 83 relates to the duration of Parliament. The Rajya Sabha is a permanent body, and it is not subject to dissolution. However, one-third of its members retire every second year in accordance with the law made by Parliament. This implies that the membership of the whole House gets renewed at an interval of every six years. Clause (1) of article 83 says:

"The Council of States shall not be subject to dissolution, but as nearly as possible, one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law."

**THE CHAIRMAN**

The Vice-President of India Acts as the *ex officio* Chairman of the Council of States. His salary and allowances are determined by Parliament and his immunities and privileges are those of a member of Parliament. When there is a vacancy in his office due to his death, resignation or removal or during any period he officiates as the President of India, the Deputy Chairman performs the functions of the office of the Chairman. If the offices of both the Chairman and the Deputy Chairman are vacant, the President appoints a member of the Council for the purpose.\(^{40}\)

The function of the Chairman is to preside over the proceedings of the Rajya Sabha and to maintain order in the House. And for maintaining order in the House, he has at his disposal the services of the Marshal and the members of watch and ward. He has also the power to adjourn the Rajya Sabha and suspend its meeting if there is no quorum. He is the channel of communication between the House and any other outside person or authority. He has also to decide under article 101 (3) (b) whether a member of the Rajya Sabha has tendered his resignation voluntarily, although his such a decision may be questioned in a court of law.\(^{41}\)

While presiding over the Rajya Sabha, the Chairman has only a casting vote. But in case a resolution for his removal is under

\(^{40}\) Arts. 89(1), 91, 97.

\(^{41}\) The Constitution (Thirty-third Amendment) Act, 1974.
consideration, he is precluded from presiding over the deliberations of the Rajya Sabha, but he has the right to speak in, and otherwise to take part in the proceedings of, the Council of States, while any resolution for removal from his office is under consideration in the Council, "but, notwithstanding anything in Article 100, shall not be entitled to vote at on such resolution or any other matter during such proceedings." 42

Deputy Chairman 43

The Rajya Sabha elects a Deputy Chairman to perform the functions of the Chairman in case of a vacancy in the office of the latter or his absence. The Deputy Chairman is entitled to the salary and allowances determined by Parliament and he enjoys the immunities and privileges of the members of Parliament. A vacancy in his office may occur due to his death, or resignation which he sends to the Chairman. He may also be removed from office by a resolution of the Rajya Sabha moved after fourteen days' notice of the intention to move the resolution and passed by a majority of all the then members of the House.

Panel of "Vice-Chairmen"

There is also a panel of four "Vice-Chairmen" formed by the Chairman, and in case both the Chairman and the Deputy Chairman are absent, a person from the panel presides. If in any case, when even such an empanelled member is not available, the House elects a person from amongst its members to preside over its sittings.

Secretariat

The Rajya Sabha has a Secretariat established within the terms of article 98. It has a Secretary to the Rajya Sabha and other officers and employees. They function under the direction and control of the Chairman of the Rajya Sabha and their recruitment and the terms and conditions of their service are determined in the manner of the officers and employees of the Lok Sabha Secretariat.

Watch and Ward Staff

The Chairman or in his absence any other person presiding over the deliberation of the Rajya Sabha may call in the aid of Marshal

42 Art. 92.
43 Arts. 89(2), 90, 97.
and other members of the watch and ward staff of the House for maintaining order in the House.

**POWERS AND FUNCTIONS OF THE RAJYA SABHA**

As a constituent unit of Parliament the Rajya Sabha participates in all the functions of Parliament, although the precise nature and degree of its participation may not be the same in all cases. In addition, as a federal Chamber, it has certain powers exclusively vested in it.

**Constituent Function**

Under article 368, the Raja Sabha enjoys co-equal constituent power with the Lok Sabha. And in fact, it successfully blocked the passage of an amendment relating to the privy purse of the Princes only recently, although this amendment was subsequently carried through but only after a fresh general election to the Lok Sabha.

**Legislative Function**

A legislative measure may originate in either House, provided it is not a Money or any other financial Bill. And either House may accept, reject or make amendments to a Bill initiated by the other House, although it must be admitted that in an eventual trial of strength the Rajya Sabha must give way to the Lok Sabha. For, any point of disagreement between the two Houses with regard to a Bill is finally resolved at a joint sitting at which decisions are taken in accordance with the majority vote and the Lok Sabha having more members than the Rajya Sabha, the former is in a permanent minority.

**Financial Functions**

Though originating in the Lok Sabha, a Money or financial Bill must be transmitted to the Rajya Sabha and the Rajya Sabha is competent to make recommendations within a period of fourteen days. Such a Bill is, however, finally passed in the form the Lok Sabha desires. Then, although the annual financial statement, the budget, is placed before both the Houses of Parliament simultaneously, it is the exclusive right of the House of the People to vote on the demands for grants.

**Control of the Executive**

The Council of Ministers is collectively responsible only to the Lok Sabha, but the Rajya Sabha provides some Ministers and has
always the right to criticise the Government and the administration, although it cannot bring about the downfall of a Ministry.

Some Other Functions

The Rajya Sabha also performs, along with the Lok Sabha, certain other functions. The elected members of the Rajya Sabha participate in the election of the President and the Vice-President. This role of electing the President may become vital if the Lok Sabha is dissolved when the Presidential election is held. The Rajya Sabha also participates in the impeachment of the President, and the Vice-President may be removed from office only by a resolution of the Rajya Sabha agreed to by the Lok Sabha. The Rajya Sabha has again a role in the removal of Supreme Court and High Court Judges, Comptroller and Auditor-General, the Chief Election Commissioner and the Members of the Union and State Public Service Commissions.

If any appointment is proposed to be taken out of the purview of the Union Public Service Commission, the concurrence of this House is also necessary. Then reports of the Union Public Service Commission, the Comptroller and Auditor-General, Commissioner for the Scheduled Castes and Tribes, the special officer for linguistic minorities, the Finance Commission, and the like are to be placed also before the Rajya Sabha. The Rajya Sabha also approves any Emergency measure, including any suspension of fundamental rights, and its approval is also required for giving effect to any subordinate legislation. Besides, the Rajya Sabha functions like the Lok Sabha as a forum of public opinion, although it draws less attention.

Exclusive Powers of the Rajya Sabha

The Rajya Sabha as the federal Chamber enjoys certain exclusive powers. Under article 249, it alone may declare by a resolution passed by two-thirds of its members present and voting that it is expedient and necessary for the Union to legislate with respect to a matter in the State List. Such a resolution has a life of one year, though renewable any number of times. Then, under article 312 the Rajya Sabha has the exclusive competence to authorise the creation of one or more All-India Services by a resolution passed by not less than two-thirds of its members present and voting.
POSITION OF THE RAJYA SABHA AS A SECOND CHAMBER

In the scheme of the Constitution the Rajya Sabha, then, occupies a position the founding fathers intended it to occupy. Gopalaswami Ayyanger pointed out in the Constituent Assembly: 44

"The most we expect the Second Chamber to do is perhaps to hold dignified debates on important issues and to delay legislation which might be the outcome of passions of the moment until the passions have subsided and calm consideration could be bestowed on the measures which will be before the Legislature; and we shall take care to provide in the Constitution that whenever on any important matter, particularly matters relating to finance, there is a conflict between the House of the People and the Council of States, it is the view of the House of the People that shall prevail. Therefore, what we really achieve by the existence of this Second Chamber is only an instrument by which we delay action which might be hastily conceived, and we also give an opportunity, perhaps to reasoned people who may not be in the thickest of the political fray, but who might be willing to participate in the debate with an amount of learning and importance which we do not obviously associate with a House of the People. That is all that is proposed in regard to this Second Chamber. I think, on the whole the balance of consideration is in favour of having such a Chamber and taking care to see that it does not prove a clog either to legislation or administration."

That the Rajya Sabha was intended to play only a secondary role in the working of Parliament, there is no doubt about it. But in the scheme of the Constitution a unique place has been carved out for it among the Second Chambers of the world. True, it is not as powerful as the Canadian Senate, not to speak of the American Senate, yet it is not a constitutional clog or superfluous.

On the whole, the Rajya Sabha has definitely provided additional political positions. Elected on the principle of proportional representation, it has reflected the respective strength of the political parties more realistically. It has also provided additional debating opportunities and assisted in the solution of the legislative time-table problems. And if it has not proved a dignified debating Chamber of the elders of the kind one would normally expect it to be, the blame for this may squarely be laid at the doors of the political parties. 45

The Rajya Sabha as a Federal Chamber

Then, the Rajya Sabha is also the repository of two exclusive powers as a federal Chamber: (i) the power to authorise Parliament to legislate on State matters and (ii) the power to authorise the creation

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of new All-India Services, in the national interests. And if it is said to have belied the expectations of acting as a federal Chamber, it should be remembered that it was intended to act as a Chamber of second thought rather than as a sentinel of State rights.  

CONFLICTS BETWEEN THE HOUSES OF PARLIAMENT

It seems almost an inevitable institutional vice that "when two institutions are placed side by side, it is easy for clashes to occur and feelings to run high." The Rajya Sabha has found occasions to come in conflict with the Lok Sabha in certain cases in the past.

First, during the Budget Session of 1953, when the Law Minister, who was a member of the Rajya Sabha, was asked by the Lok Sabha to appear before it to explain certain implications regarding the Income-Tax (Amendment) Bill, 1952, the Rajya Sabha resolved that he was "not to present himself in any capacity whatsoever in the House of the People." The Lok Sabha angrily questioned the propriety of such a resolution, as the Ministers were constitutionally responsible to it alone. Nehru, however, tactfully saved the situation from becoming an open competition between the two Houses. The same year, the question of inclusion of Rajya Sabha members in the Public Accounts Committee brought the Houses again into conflict. Eventually, seven members from the Rajya Sabha were included in the Committee on the assurance given by the Prime Minister that the Committee did not lose thereby its character as a Committee exclusively of the Lok Sabha.

Of a greater virulence was a furore raised over a reported public speech by N. C. Chatterjee, a member of the Lok Sabha, that "the Upper House, which is supposed to be a body of elders, seems to be behaving irresponsibly like a pack of urchins." The issue was raised as a question of privilege in the Rajya Sabha and the Chairman directed the Secretary to inquire about the matter. The Secretary wrote a letter to N.C. Chatterjee enquiring whether the report was correct. The Lok Sabha took this letter as involving a question of its own privilege. The issue was ultimately settled by agreeing that such questions were to be dealt with in accordance with the procedure agreed to by the Privileges Committees of the two Houses.

46 Loc. cit.
Often the disclosure of an important matter by a Minister first in the Rajya Sabha has also generated heat in the Lok Sabha. In 1963, a Lok Sabha member took exception to the discussion of the Railway and General Bugets in the Rajya Sabha first. When a member of the Rajya Sabha drew the Chairman’s attention to this matter, the latter felt that "under the Constitution there was no question of superiority of one House over the other."\(^4\)

Then only recently, a highly sensitive situation developed when the Rajya Sabha turned down a constitutional amendment relating to the privy purses of the Princes. And although, this amendment was eventually carried through after new general election to the Lok Sabha, it reflects the extent to which the Rajya Sabha may go in certain fluid political situations in opposing the Lok Sabha.

But is should be remembered that only a co-operation between the two Houses can make the governance of the country smooth, efficient and effective. The two Houses have their allotted spheres and status of equality in the scheme of the Constitution. Nehru explained in the Rajya Sabha on May 6, 1953.\(^4\)

"Under our Constitution Parliament consists of two Houses, each functioning in the allotted sphere laid down in that Constitution. We derive authority from that Constitution. Sometimes we refer back to the practice and conventions prevailing in the Houses of Parliament of the United Kingdom and even refer enormously to an Upper House and a Lower House. I do not think that is correct. Nor is it helpful always to refer back to the procedure of the British Parliament which has grown up in course of several hundred years... We have no such history behind us, though in making our Constitution we have profited by the experience of others.

Our guide must, therefore, be our own Constitution which has clearly specified the functions of the Council of States and the House of the People. To call either of these Houses an Upper House or a Lower House is not correct. Each House has full authority to regulate its own procedure within the limits of the Constitution. Neither House by itself constitutes Parliament. It is the two Houses together that are the Parliament of India."

**PARLIAMENTARY COMMITTEES**

Modern Government is Government by committees and commissions. The legislatures are large bodies of laymen, which are little suited to most of the work now expected of them. Committee

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\(^4\) See Rajya Sabha Debates, March 1963.

\(^4\) Rajya Sabha Debates, May 1953.
system is essential to make the legislatures work efficiently and effectively. It is a system also to share power more viably. The Cabinet itself is basically a committee of Parliament and so is the Council of Ministers. However, when reference is made generally to the committees of Parliament, one has in mind the various consultative, ad hoc and standing committees which function under the Parliamentary Rules, although they are nowhere recognised by the Constitution.

The consultative committees of Parliament are attached to the various Ministries. Ad hoc committees may be of a regular or incidental type, and they may be formed for various purposes, including investigations and inquiries. Under regular ad hoc committees come the Select Committees on Bills and the Joint Select Committees on Bills and Resolutions. The standing committees are also numerous. There are over a dozen standing committees of the Lok Sabha itself and the Rajya Sabha has also a few separate standing committees of its own. These committees may function through sub-committees. In this country, there is, however, no committee of the whole House.

**THE COMMITTEE ON RULES**

The Committee on Rules consists of 16 members, including the Chairman, nominated by the Speaker who is its ex-officio Chairman. He may also invite other members to attend any particular sitting of the Committee. The function of the Committee is to recommend changes in the Rules of Procedure and Conduct of Business of the Lok Sabha. Recommendations of the Committee are laid on the table of the House by a member of the Committee. Within seven days thereof any member of the House may suggest any change which is referred to the Committee for consideration. The final report of the Committee is also laid on the table and a member of the Committee moves a motion that the House agrees to the report. If the motion is carried, the Rules of Procedure stand amended accordingly.

**THE BUSINESS ADVISORY COMMITTEE**

The Business Advisory Committee consists of 15 members nominated by the Speaker who himself is its Chairman. The function of the Committee is to recommend the time to be allotted for various
work in the House and the Speaker may assign to it any other function. The Leader of the House and the other Opposition Leaders play crucial role in the functioning the Committee and the Government Chief Whip is one of its members. Its report is placed before the House by the Chairman, which is approved by the House by a resolution.

THE COMMITTEE ON PRIVATE MEMBERS’ BILLS AND RESOLUTIONS

The Committee on Private Members’ Bills and Resolutions also consists of 15 members nominated by the Speaker for a period of one year and the Deputy Speaker is the Chairman of the Committee. The Committee has the power to examine every private member’s Bill seeking to amend the Constitution and to examine other private members’ Bills, to classify them according to their nature and urgency, and to recommend the time to be given to such Bills. The Speaker may also assign other powers and functions to the Committee. The report of the Committee is placed before the House which approves it by passing a resolution.

THE COMMITTEE ON ABSENCE OF MEMBERS

The Committee on Absence of Members from the sittings of the House is also a Committee of 15 members nominated by the Speaker who also nominates it Chairman. The functions of the Committee are to consider applications for leave of absence from members of Parliament; to examine every case where a member has absented himself for sixty or more days without permission; and to perform such other functions as the Speaker may assign to it.

THE COMMITTEE ON PETITIONS

The Committee of Petitions also consists of 15 members nominated by the Speaker. Its function is to examine every petition made to the Lok Sabha and referred to it for consideration and to report to the House measures which it considers appropriate in any case.

THE COMMITTEE OF PRIVILEGES

The Committee on Privileges is also nominated by the Speaker who also nominates its Chairman, but if the Deputy Speaker in its member, he is automatically made the Chairman. This Committee
also has 15 members. The function of Committee is to examine every question of breach of privilege referred to it by the House and to make recommendations as to the steps to be followed by the House in taking an action recommended by it.

THE COMMITTEE ON GOVERNMENT ASSURANCES

The Committee on Government Assurances is an Indian "innovation". They The Committee consists of 15 members, including the Chairman, all nominated by the Speaker. If, however, the Deputy Speaker is a member, he is to be appointed the Chairman. The functions of the Committee are to examine the assurances, promises or undertakings given by the Ministers on the floor of the House; to report whether such assurances, promises and undertakings have been implemented; and to report whether they have been implemented within the minimum necessary time.

THE HOUSE COMMITTEE

The House Committee consists of 12 members, including the Chairman, and the Speaker nominates them all for a period of one year. Its function is to advise upon all matters relating to the comfort and convenience of the members of the House, including allotment of residential accommodation and provision of allied facilities.

THE LIBRARY COMMITTEE

The Library Committee has the Deputy Speaker as its ex-officio Chairman, and eight other members, five from the Lok Sabha and three from the Rajya Sabha. The Speaker nominates the Lok Sabha members and he also nominates the Rajya Sabha members in consultation with the Chairman of the Rajya Sabha. Its functions are to consider matters relating to the Parliamentary Library and to make recommendations for improvements in library facilities.

THE GENERAL PURPOSES COMMITTEE

The General Purposes Committee consists of the Speaker as the ex-officio Chairman and the Deputy Speaker, Members of the Panel of Chairmen, Chairmen of all Parliamentary standing committees of the Lok Sabha, leaders of all the recognised parties and groups in the

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Lok Sabha and other members nominated by the Speaker. Its present strength is 20. Its function is to advise the Speaker on matters which do not fall within the purview of any other committee and which the Speaker refers to it from time to time.

**JOINT COMMITTEE ON SALARIES AND ALLOWANCES OF MEMBERS OF PARLIAMENT**

The Joint Committee on Salaries and Allowances of Members of Parliament has 20 members, 15 from the Lok Sabha nominated by the Speaker, and 5 from the Rajya Sabha nominated by Chairman of the Rajya Sabha. The function of the Committee is to consider and make recommendations for payment of salary, daily allowances and travelling allowances of the members of Parliament.

**THE COMMITTEE ON SUBORDINATE LEGISLATION**

The Committee on Subordinate Legislation has 15 members, including the Chairman and all of them are nominated by the Speaker for one year. No Minister can be a member of this Committee. All rules, regulations or orders framed by the executive or the administration are placed before the House and the committee considers them to determine

1. whether such a rule is in accordance with the objects of the Constitution or the parent Act;
2. whether it has a matter which ought to have been passed as an Act of Parliament;
3. whether it imposes any tax;
4. whether it directly or indirectly excludes the jurisdiction of the courts;
5. whether it gives retrospective effect to any matter without express constitutional or statutory authorization;
6. whether it involves any expenditure from the Consolidated Fund, Contingency Fund or public accounts of India;
7. whether it makes any abnormal or unexpected use of any power derived from the Constitution or the parent Act in pursuance of which it has been made;
8. whether there has been unjustifiable delay in publishing it or laying it before Parliament; and
9. whether for any reason in form or purport it needs any elucidation.
THE COMMITTEE ON PUBLIC UNDERTAKINGS

The Committee on Public Undertakings has 15 members, 10 from the Lok Sabha and 5 from the Rajya Sabha, elected on the principle of proportional representation by means of the single transferable vote, one-fifth of the members retiring every year by rotation. The Committee has specified powers in respect of specified public undertakings. Its functions are to

i. examine the reports and accounts of the specified undertakings;

ii. examine the reports of the Comptroller and Auditor-General on public undertakings;

iii. examine, in the context of autonomy and efficiency of public undertakings, whether they are being run on sound business principles and in conformity with prudent commercial practices; and

iv. perform such other functions vested in the public Accounts Committee and the Estimates Committee in relation to the specified undertakings but not covered by (i) (ii) and (iii) above and referred to it by the Speaker from time to time.

However, the committee is precluded from examining or investigating

(a) matters of major Government policy which are distinct from business or commercial functions of public undertakings;

(b) matters of day-to-day administration; and

(c) matters for which machinery is established by any special statute establishing a particular public undertaking.

THE ESTIMATES COMMITTEE

The Estimates Committee has a membership of 30, all elected from the Lok Sabha for a term of one year in accordance with the principle of proportional representation by means of the single transferable vote. The Committee is constituted on a notice for its election for the following year moved by the Chairman of the Committee, usually a fortnight before the end of its term, and at the commencement of a newly elected House a Minister moves the motion. The Chairman of the Committee is appointed by the Speaker, but if
the Deputy Speaker is one of its members, he is to be appointed its Chairman.

The function of the Estimates Committee is to examine such of the estimates as it considers proper or as may be referred to it by the Speaker and in general, its functions are

"(a) to report what economies, improvement in organisation, efficiency or administrative reform, consistent with the policy underlying the estimates, may be effected;
(b) to suggest alternative policies in order to bring about efficiency and economy in administration;
(c) to examine whether the money is well laid out within the limits of the policy implied in the estimates; and
(d) to suggest the form in which the estimates shall be presented to Parliament."

The Committee normally functions through sub-committees and on the whole while it "refrains even now from openly criticising the policy implicit in the estimates..., (its) contributions are tending to become more and more effective in economising national expenditure".

And although sometimes its members may feel happy in ruling out "the faint line between economy and efficiency,...of their growing competence and effectiveness as a control over Ministries there can be no doubt". Their "influence is now automatically reckoned with".

THE PUBLIC ACCOUNTS COMMITTEE

The Public Accounts Committee consists of 22 members, 15 from the Lok Sabha and 7 from the Rajya Sabha, elected annually on the principle of proportional representation by means of the single transferable vote. But no Minister can be a member of the Committee. The Chairman of the Committee is appointed by the Speaker, but in case the Deputy Speaker is its member, he is appointed Chairman.

The Committee functions through sub-committees and the Chairman plays a crucial role in its deliberations. The Committee is assisted by the Comptroller and Auditor-General of India whose

51 Rule 310, Rules of Procedure and Conduct of Business of the Lok Sabha.
52 Chanda, Asok: Indian Administration, op. cit.; p. 186.
54 Loc. cit.
report provides the basis for its work. And the Committee has, thus, a firmer basis and competent guidance for performing its functions more effectively.

The function of the Committee is to scrutinise the expenditure of the Government and other public accounts laid before Parliament. In scrutinising the accounts, it is the duty of the Committee to satisfy itself

(a) that the money shown in the accounts as having been spent was legally available for and applicable to the purposes to which it has been applied;

(b) that the expenditure conforms to the authority that governs it; and

(c) that every re-appropriation has been made in conformity with the rules laid down by the competent authority.

A significant aspect of the Committee’s function is to sally beyond the formality of the expenditure and to examine its “wisdom, faithfulness and economy”. Its antennae spread to “any waste, extravagance, lack of administrative controls and even to unsuitable organisation” in respect of a particular expenditure. The accounts of the nationalised industries also come within its purview.

Although by nature the functions of the Committee are of a post mortem character, it has on the whole performed its functions wisely and well and the mere fact of its existence has proved an effective check on financial waste and extravagance in Government.

It should seem, thus, that the number, functions and working of the standing committees of the Parliament of India are impressive, and they are particularly useful and effective in a country with one party predominance. They, to a degree, function in the role of the Opposition and their performance has generally been satisfactory.


CHAPTER 29

PARLIAMENT AT WORK

Parliament is the highest representative instrument of public power and the custodian of the peace, progress and good government in the Republic. It is the principal legislative organ in the land, the legislative arm of the Union and a repository of innumerable financial powers. It is the matrix of the Union, executive and an eternal sentinel of its performances, with an assortment of even administrative, judicial and miscellaneous functions. It is a crucible of public opinion and a barometer of public feelings. And above all, it is the wilder of constituent power.

PARLIAMENT IN SESSION

A “session” of Parliament refers to the period of time spanning over the first meeting of Parliament after it is summoned to meet and the last meeting after which it is prorogued, or the Lok Sabha is dissolved. During a session Parliament holds “sittings” interspersed by adjournments for hours, days, weeks, or sine die. The period during which Parliament is not in session is referred to as “recess.”

SUMMONING PROROGATION AND DISSOLUTION

The powers to summon and prorogue Parliament and to dissolve the Lok Sabha vest in the President and are normally exercisable on the advice of the Prime Minister who may also, if he considers desirable, consult his Cabinet colleagues. These are necessary powers of flexible and potent nature vested in the executive for working and managing Parliament effectively and usefully, though often liable to be misused for narrow party or personal ends.

Summoning of Parliament

The President is at liberty to determine the time and place of meeting of Parliament. It is possible to summon the two Houses of Parliament on two different dates and also to specify two different dates for their first meeting. The only restriction on the power of summoning Parliament is that six months shall not intervene between two sessions of Parliament. Article 85(1) says:

“The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.”
Prorogation

Under article 85(3) (a), the President has the power to “prorogue the Houses or either House” and such a prorogation may take place even when the Speaker, or the Chairman of the Rajya Sabha, adjourns the House concerned *sine die*.

Dissolution of the Lok Sabha

Article 85(2) (b) authorises the President to dissolve the Lok Sabha, and this dissolution may possibly take place even when the House has been adjourned *sine die*, or has been prorogued.

CONDUCT OF BUSINESS

The Parliament of India holds its meetings in the circular Parliament House adjacent to the Rashtrapati Bhavan. Every member, before taking his seat in either House, is required to subscribe to the prescribed oath or affirmation.

Oath or Affirmation by Members

Article 99 provides for the oath or affirmation by members of Parliament. It says:

"Every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation, according to the form set out for the purpose in the Third Schedule."

And the form of oath set out for the purpose in the Third Schedule is as follows:

"I, A. B., having been elected (or nominated) a member of the Council of States (or the House of the People) do *swear in the name of God* solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."

Voting and Quorum

Article 100 deals with voting and quorum in the Houses of Parliament, and has four clauses, the first two dealing with voting and the last two dealing with quorum.

Voting: Decisions in either House, or at a joint sitting of both Houses, of Parliament are made in accordance with the majority of votes of the members present and voting, with the presiding officer
having only a casting vote. And a House is competent to transact business notwithstanding any vacancy in its membership. The first two clauses of article 100 provide as follows in this regard:

"(1) Save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sittings of the Houses shall be determined by a majority of votes of members present and voting, other than the Speaker or person acting as Chairman or Speaker.

The Chairman or Speaker, or person acting as such, shall not vote in the first instance but shall have and exercise a casting vote in the case of an equality of votes.

(2) Either House of Parliament shall have power to act notwithstanding any vacancy is the membership thereof, and any proceedings in Parliament shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings."

Quorum: Attendance in Parliament is generally very thin, and sadly, even the requirement of quorum of one one-tenth of the total membership of each House has got to be secured not unoften by issuing whips. However, the last two clauses of article 100 relating to quorum lay down only as follows:

"(3) Until Parliament by law otherwise provides, the quorum to constitute a meeting of either House of Parliament shall be the one-tenth of the total number of members of the House.

(4) If at any time during a meeting of a House there is no quorum, it shall be the duty of the Chairman or the Speaker, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum."

Penalty for Unauthorised Sitting and Voting

Article 104 provides for penalty for sitting and voting in Parliament before subscribing to the prescribed oath or affirmation or when not qualified or disqualified. It says:

"If any person sits or votes as a member of either House of Parliament before he has complied with the requirements of article 99, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament, he is liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Union."

PRESIDENTIAL ADDRESS AND MESSAGES

The President specially addresses both Houses of Parliament together at the commencement of the first session after each general election to the Lok Sabha and also at the commencement of the first session of each year. Such an address contains the policy
announcement of the Ministry, and any amendment to the address moved and carried in the Lok Sabha amounts to the defeat of the Government on a vital issue obliging it to quit office. Besides, the President has the power to address either or both Houses of Parliament and send messages to them at any time he may think desirable.

**Special Address by the President**

Article 87 relates to the special address by the President, which may be quoted below without comments:

"(1) At the commencement of the first session after each general election to the House of the People and at the commencement of the first session of each year the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matter referred to in such address."

**Other Presidential Address and Messages**

Article 86 relating to the right of the President to address and send messages to Parliament may also be plainly reproduced as follows:

"(1) The President may address either House of Parliament or both Houses assembled together, and for that purpose require the attendance of members.

(2) The President may send messages to either House of Parliament, whether with respect to a Bill then pending in Parliament or otherwise, and a House to which any message is so sent shall with convenient despatch consider any matter required by the message to be taken into consideration."

**THE BUSINESS OF THE DAY**

Each House of Parliament has a Roll of Members which every member is to sign before he takes his seat in the House. And after the presiding officer takes his seat, instantly the *zero hour* begins unless the House has no quorum, or is not to be addressed by the President, or is not to concern itself with any special matter.

**Parliamentary Questions**

The first hour of every day in a House is devoted to questions, an hour of test and trial for both the Ministers and the members. A ten days’ written notice is required for an ordinary question and a three days’ notice for a short notice question. If oral answer to a question is sought, the question must have an asterisk mark, but a member can ask only three such questions on any day. A question
is addressed to the concerned Minister and is handed over along with the required notice to the Speaker who transmits it to the Minister if he does not disallow it for the specified or any other reason.

These questions are intended not only to elicit information from the Government but also to focus attention on an injustice, irregularity or failure of Government or even to suggest a particular course of action. The Minister, unless he decides to withhold information on grounds of public interest, must quench the questioner's thirst and of the other members. For, normally an evasive or unsatisfactory answer is bound to evoke supplementary questions which not only the original questioner but also any other member may raise, and eventually this may also lead to half-an-hour discussion or an adjournment motion. There is, however, no interpellation.

*Parliamentary Debates*

After the zero hour begins the business for the day, which provides occasions for discussions, divisions and votes. Tempers are frayed and even Parliamentary decorum is flouted on many an occasion in a House when the business for the day is on the anvil of the House. But on the whole the members of Parliament have acted in a manner worthy of the status of the highest representative body of the Republic. And the quality of discussions in Parliament has been normally satisfactory and they have generally served the purpose of educating the public.

Procedural rules provide for (i) discussions on Presidential address and massages; (ii) half-an-hour discussion on matters arising out of questions on Wednesdays and Fridays; (iii) debates on adjournment motions; (iv) consideration of resolutions; (v) discussions on no-confidence or censure motions; (vi) discussions is pursuance of substantive motions, specially those relating to (a) legislative business, and (b) financial business. The Government also may propose a discussion on any matter of national importance. Then, a Minister may on his own, particularly when he resigns, volunteer a statement, but no discussion on such a statement takes place.

*Points of Order*

A member may, at any stage when the House is transacting its business of the day, raise a point of order which may be intended to
elicit some information, to make a suggestion, or to draw attention to an irregularity or injustice. The general feeling seems to be that points of order are raised in Parliament much too frequently and often obstructively and obtusively.

**Closure Motions**

To expedite the transaction of the business of a House, a closure motion may be moved. Any member may move “that the question be now put.” The Speaker then puts the question unless he considers this course of action unjust, and if the House accepts it, the whole discussion on the concerned matter comes to an end. *Kangaroo voting* and guillotine are also permissible in Parliament.

**PARLIAMENTARY PROCEDURE GENERALLY**

Art. 118(1) authorises each House of Parliament to frame rules of procedure, subject to the provisions of the Constitution, and each House has framed it own Rules of Procedure and Conduct of Business. The last two clause of this article relate to the rules for joint sittings of the Houses of Parliament and read as follows:

“(3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make rules as to the procedure with respect to joint sittings of, and communication between, the Houses.

(4) At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by rules of procedure made under clause (3), shall preside.”

Article 119 speaks of the power of Parliament to regulate by law procedure in Parliament in relation to financial business and such a law prevails against any rule made under article 118. Then, articles 121 and 122, relating, respectively, to restriction on discussion in Parliament and exclusion of courts from enquiring into proceedings of Parliament, relate essentially to the area of court-legislature relationship in regard to privileges and will be dealt with accordingly later on. In between these two sets of articles is article 120, relating to the language to be used in Parliament, which may conveniently be reproduced below:

“(1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, business in Parliament shall be transacted in Hindi or in English.

Provided that the Chairman of the Council of States or Speaker of the House of the People, or person acting as such, as the case may be, may permit any member
who cannot adequately express himself in Hindi or in English to address the House in his mother tongue.

(2) Unless Parliament by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English were omitted therefrom."

And interestingly, not only has Parliament provided for the continued use of English in Parliament beyond this period of fifteen years but also most members find it useful and desirable to use English as an effective means of communication in its Chambers. The language issue still seems to be a sensitive issue in this country.

DEMOCRACY INCARNATE

Parliament is democracy incarnate, and Parliament in this sense is the Lok Sabha. Etymologically, historically, structurally and operationally and by nature, character and conduct Parliament is the highest actualisation of the ideal of "government of the people, by the people and for the people." Its mere existence, as much as its effect, is material to the democratic frame of Government in the country.

SOUL OF DEMOCRACY

Let the Presidency survive, the Ministry flourish and the judiciary thrive, but kill Parliament and find democracy dead as dodo in the land.

Mirror of Democratic Culture

And look at the composition of Parliament; the background of its members, their elections to Parliament; their behaviour on the floors of its Houses, they faithfully mirror the democratic tradition, ethos, spirit and culture of the nation.

DEVICE FOR SHARING POWER

Through Parliament alone the people come nearest to governing themselves by having apparently a decisive and recognised role in the actual governance of the country. It is a large and representative body of the people to accommodate many an eminent and public spirited person.

Sluice of Democracy

It is not only as a matter of principle that Parliament is conceived as a device for sharing power, but this course is also found expedient.

S: CI—58
The floor of a House provides an arena where swords are crossed without shedding a drop of blood and a person finds in the membership of a House a perching place wherefrom he can have a real taste of having a finger in the pie of governing the country, and derive some satisfaction by making contributions to the well-being of the nation or pulling wires or playing power game and thereby assuaging the risks of revolutions. For, the brain, brawn and bullion that may bring about a revolution may find themselves pacing the aisles of Parliament.

FORUM OF PUBLIC OPINION

Democracy is in the ultimate analysis government by public opinion. And to echo with Bagehot, the real function of Parliament is trinitarian: (i) "to express the mind of the people"; (ii) to make us "hear what otherwise we should not"; (iii) and to "teach the nation what it does not know."

Crucible of Public Opinion

Parliament is a melting pot where different shades of opinion in the country are put together and shaped into definite policies, programmes or justiciable conduct norms. It reflects the mind of the people, and a Government that can win the support of a whole House on any issue may reasonably and valiantly face the public at home and the peoples abroad. Besides, Parliament may focus attention on a burning issue and secure actions or concessions from the Government through questions, debates, adjournments, points of order and numerous such other devices.

Organ for Eliciting Information

Parliament is the most vital agency for eliciting information from the Government and administration. It thereby introduces a healthy element of public functions being performed under public gaze.

Agency for Disseminating Information and Educating People

What Parliament elicits from the Government gets automatically broadcast to the people outside Parliament. In addition to keeping people in know of the affairs of the Government and administration

of the country, this goes a long way in the formulation of public opinion both inside and outside the country.

**CONTROL OF THE EXECUTIVE AND ADMINISTRATION**

Bagehot observed incisively:

"The Legislature, chosen in name to make the laws, finds its principal business in making and keeping the executive."

And this is true of any legislature under Parliamentary form of Government even today. The Parliament of India provides the executive and controls and criticises its operations.

**PROVIDING THE EXECUTIVE**

The President is an integral part of Parliament, and Parliament is a vital part of the electoral college for his election. Then, exceptions apart, the Ministry, or the Cabinet, is its grand committee. The Ministers are the members of Parliament, and if they are not so at the time of their entering upon office, they must become members within six months or quit.

*Parliament as a Selection Ground*

Although it would not be true to say that Parliament makes or unmakes the Government at will, for, the party system and the general elections have their own dominant roles, the floor of a House or the chamber of a Parliamentary committee may provide a selection ground for a Minister. For, here a member may display his abilities, demonstrate his thrust, vigour and loyalty, and receive the notice of the party leaders, Parliament and the public, making his claims to a ministerial office more convincing.

**CONTROL OF THE EXECUTIVE**

The President may be impeached by Parliament and the Ministry is collectively responsible to it, and already, in the context of Cabinet-Parliament relationship the modalities and implications of the Cabinet-Parliament mutual control have been taken note of. And although Parliament cannot reasonably be expected to throw out a Ministry, it may always throw a Minister off his feet, and even out of his office by creating a pressure.

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Parliamentary Criticism

The control function of Parliament has, thus, essentially been reduced to its function of criticism. And by keeping constant vigil on the Government and criticising its actions or inactions, Parliament not only secures occasional concessions from the Government and ventilates public grievances, but also may activise it. Again, its role as a critic of the Government may result in the resignation, removal or change of portfolio of an individual Minister. A Ministry may also decide to seek an early electoral mandate, although it must always be remembered that the occasion for driving out a Ministry from office is always exceptional in nature.

CONTROL AND CRITICISM OF THE ADMINISTRATION

The administration, the modern leviathan, is put under public control and public gaze through the criticism and control of Parliament over it. The permanent administration is placed under public control by putting a popular Minister at the head of a department of the permanent administration. Yet a Minister in office is more of the administration than of the people. Parliament seeks to control the administration and maintains a vigil on it on behalf of the people through its various devices of control and criticism. Parliament is the hook in the nostrils of the modern leviathan, the permanent administration.

Control and Criticism of Public Servants

The control and criticism of Parliament relating to the public servants is also a factor to be reckoned with, although generally in principle criticism of a particular public servant on the floor of a House is not encouraged.

Control of Bureaucracy: In particular, Parliament is also an instrument for controlling the modern bureaucracy, and its tendencies, vices and vagaries. How far it succeeds in this task is a matter of varying circumstances and intensity, yet its very existence and the possibility of its acting tend to keep the bureaucracy alert and within reasonable bounds.

EXERCISE OF CONSTITUENT POWER

The supreme constitutional expression of the democratic system is found in the provision for amending the Constitution, to change
the Constitution at will through constitutional means. And after the Constitution (Twenty-fourth Amendment) Act, under clause (1) of article 368, Parliament is the repository of the general power of amending the Constitution in all respects, and the procedure and details of which and the other implications of Parliament's power to amend the Constitution shall be met with later in the chapter on the amendment of the Constitution.

LEGISLATION

Legislation is the historic task of Parliament. And in spite of the constraints arising out of executive ascendancy, leadership and legislation; judicial review and creativity; modern intricacies and technicalities of law; modernisation, industrialization, urbanisation and technological advancements; importance of international affairs; exigencies of internal affairs; complexities of financial affairs; demands for building a welfare or socialistic society; and the assumption of numerous other functions by Parliament, law making is still the principal function of Parliament. And it is a function which also operates as an element to control the executive and the administration.

THE REAL LAW MAKERS

Parliament has to pass numerous Acts or statutes, and each of them has its own story to tell of the manner in which it was conceived and the elements which shaped it and caused it to be placed before Parliament and finally witnessed its emergence in the form of a statue or Act. And this raises a crucial question: Who are the real law makers of the land? But as pointed out earlier, the executive on its own legislates as much as does the judiciary. The element of executive legislation has already been noted in some detail and that of judicial legislation will be taken due note of later in discussions relating to the judiciary. And it seems reasonable that the question of real law makers in the context of the legislative function of Parliament needs to be examined from other angles. This implies an examination of the assumptions, elements and agencies involved in the making of a law by Parliament, from its conception to its birth in the shape of an enactment.

Socio-Economic Foundation

Ultimately, all legal norms in a community are traceable to its socio-economic formations, physical or institutional and mental or
psychological, including religious forms and beliefs. But this raises the question of ultimate source of law; a question too deep to be dealt with even in its bare outline in a discussion essentially confined to the agency process involved in Parliamentary law making.

The People

As Jennings would have said,\(^3\) *vox populi* is the maker of the laws. And in a sense so it always is, provided it is remembered that the voice of the people is normally the voice of a party, a faction, a voluntary association, an interest group or a lobby. Public opinion is sectional opinion and even when it reaches a degree of generality, its articulation and crystallization is through an agency process which is essentially sectional. And invariably, the laws originating from this source are presented before Parliament by the Government or other members of Parliament, although the people have the right to directly present to the Lok Sabha a petition countersigned by a member of the House.

Individual Members of Parliament

Private members' Bills, as they are called, may also provide law for the country, but only rarely. For, if the matter covered by such a Bill be important, the Government cannot let the initiative lie with an individual member; and if the matter be not urgent or important, it has no claims to get enacted into a statute. Besides, a private member's Bill may also represent the interest of a section, group or party in the country.

The Government and Administration

For the most part it is true to say that the Government not only governs with the concurrence of Parliament but also legislates with its consent. The Cabinet, a member of the Government, a Ministry, a Department or any other public authority may decide to do a thing and feel the necessity of getting a new law inscribed on the statute book for the purpose. Besides, investigation, inquiry, or other public commissions or committees may come out with proposals for new legislation. Sometimes, legislative proposals may originate from the Government as part of its political propaganda or manoeuvres.

However, in all cases of Government legislation administration has a vital role to play.

Draftsmen

The one recognised area where administration plays a role in legislation is in the drafting of Bills. Legislation being a complex affair, the drafting of laws needs specialised skill and a Ministry or Department has always to rely on its expert draftsmen or the draftsmen in the Ministry of Law and Justice for finally shaping a Bill before its introduction in Parliament.

Parliament

After a Bill has been introduced in Parliament, there may then be amendments moved and carried, entailing a change in the final enactment. Normally, the Government does not favour such amendments. But concessions may be made in deference to the mood of Parliament or the sentiments of the people on the floor of a House or at the committee stage.

PROCEDURE IN PARLIAMENT

The notion that Parliament primarily legislates has a definite connotation in the sense, that in making a law it follows the prescribed detailed procedure for law making. And this procedural element is of no less significance than the element of the substantive power of Parliament to legislate.

Introduction of Bills: First Reading

A Bill, which is not a Money Bill or financial Bill coming under article 17 (1), but not any other financial Bill, may originate in either House of Parliament and the opening clause of article 107 says:

“(1) Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament”.

A member desiring to introduce a Bill must give the prescribed notice to the Speaker, or the Chairman, of his intention to move the Bill along with a copy of the Bill, the “Statement of Objects and Reasons,” and the specified financial memorandum. If the motion for introducing a Bill is opposed, the mover and one of the objectors
are allowed to make brief statements, but no further discussions are permissible. If the motion for introduction is carried, the Bill is published in the Gazette of India. There is, however, a provision for gazetting a Bill with the previous consent of the Speaker, or the Chairman, as the case may be, before its introduction in Parliament. This is the usual *First Reading* of a Bill.

**Consideration of Bills: Second Reading**

After a Bill has been introduced in a House and published in the Gazette, any of the following four motions may be adopted by the House, and at this stage principles of the Bill and its general provisions may be discussed, making it look like the *Second Reading* of a Bill. It may be moved that

i. the Bill be circulated for eliciting public opinion;
ii. it be referred to a Select Committee;
iii. it be referred to a Joint Select Committee; or
iv. it be taken into consideration.

*Eliciting Public Opinion:* When the motion for eliciting public opinion on a Bill is adopted, it may involve a sort of referendum, the lone simulacrum of a direct democratic device permissible in the scheme of the Constitution.

*Committee Report:* If a Bill is referred to a Select or a Joint Select Committee, the Committee makes inquiries and investigations, hears witnesses, examines documents and materials and submits its report to the House.

*Clause by Clause Consideration:* If the motion for the consideration of a Bill is adopted either initially or at any subsequent stage after eliciting public opinion or on receiving the report of a Select or Joint Select Committee, the Bill is discussed clause by clause and amendments moved and carried or rejected. It may be noted that when initially a motion is moved for the consideration of a Bill, the motion for eliciting public opinion or referring the Bill to a Select or Joint Select Committee may be moved and carried by way of an amendment to such a motion.

*Passage in the Originating House: Third Reading*

When a Bill has been considered clause by clause in the originating House and amendments adopted or rejected, the member in
charge moves that the Bill be passed, and this is the common Third Reading of a Bill. The House may accept this motion or reject it, which has the effect of passing or killing the Bill, and then it is transmitted to the other House.

Passage in the Other House

A Bill, not being a Money Bill, but not any other financial Bill, passed by one House has got to cover in the other House the stages it has undergone, or would have undergone, in the originating House and then finally passed by that House, with or without amendments agreed to by both the Houses, before being presented to the President for his assent. Article 107(2) says:

"Subject to the provisions of articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as agreed to by both Houses".

Resolution of Differences between the Houses

Except for Money Bills, the Constitution provides for a final resolution of differences between the Houses with regard to a Bill at a Joint sitting of the two Houses, where the Lok Sabha, being in numerical superiority, is intended to carry the day. Article 108 provides as follows:

"(1) If after a Bill has been passed by one House and transmitted to the other House—

(a) the Bill is rejected by the other House; or

(b) the Houses have finally disagreed as to the amendments to be made in the Bill; or

(c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it, the President may, unless the Bill has lapsed by reason of a dissolution of the House of the people, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill:

Provided that nothing in this clause shall apply to a Money Bill.

(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause (c) of that clause is prorogued or adjourned for more than four consecutive days.

(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with
the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.

(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses:

Provided that at a joint sitting—

(a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;

(b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed; and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein."

**EFFECT OF PROROGATION AND DISSOLUTION ON PENDING BILLS**

Clauses (3) to (5) of article 107 speak of the impact of prorogation of a House on a Bill pending before it and that of a dissolution of the Lok Sabha on a Bill pending in either House of Parliament.

**Impact of Prorogation of Houses**

Prorogation has no impact on a pending Bill. Article 107(3) says:

"A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses."

**Impact of Dissolution of the Lok Sabha**

The last two clauses of article 107 read as follows:

"(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the people.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of article 108, lapse on a dissolution of the House of the people."

**ASSENT TO BILLS**

All Bills, including Money Bills and other financial Bills, after being passed by Parliament are sent to the President for his assent.
He may assent to a Bill, may withhold his assent therefrom or let it lie on his table. Except for a Money Bill, the President may also return a Bill for reconsideration by Parliament. But if such a Bill is repassed by Parliament, he must give his assent. After a Bill receives Presidential assent, it becomes an Act and is published in the Gazette of India. Article 111 relating to Presidential assent to the Bills passed by Parliament lays down as follows:

"When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom."

TRANSACTION OF FINANCIAL BUSINESS

Like legislation transaction of financial business in Parliament has the twin aspects of laying down policy in justiciable terms and exercising control over the executive and administration. And the constitutional provisions in this regard are founded on five cardinal principles. First, all financial measures, whether Money Bills or other financial Bills, including the annual financial statement (the budget), originate from the Government. Secondly, there can be no taxation without Parliamentary authorisation. Thirdly, any expenditure of public money must also, at one stage or the other, be authorised by Parliament. Fourthly, in financial matters it is the voice of the Lok Sabha that prevails. And fifthly, Parliament is expected not only to periodically authorise public receipts and expenditure but also to keep a continuous watch on all the financial operations of the Government.

MONEY BILLS AND OTHER FINANCIAL BILLS

The Constitution makes a distinction between a Money Bill and any other financial Bill. Broadly speaking, any Bill which seeks to deal with public revenue or public expenditure is a financial Bill and a Money Bill is a species of financial Bills, as specified by the
Constitution and conclusively certified by the Speaker as such. The Speaker, however, certifies only a Bill which solely deals with any or all of the matters in article 110(1) which defines a Money Bill. Any other financial Bill covered by clause (1) or clause (3) of article 117 does not require his certificate.

**Definition of “Money Bill”**

The first clause of article 110 defines a Money Bill as follows:

“(1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:—

(a) the imposition, abolition, remission, alteration or regulation of any tax;
(b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;
(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;
(d) the appropriation of moneys out of the Consolidated Fund of India;
(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;
(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or
(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).”

But, as clause (2) of article 110 says,

“A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.”

However, if a dispute arises whether a Bill is a Money Bill, the Speaker’s decision is final. The last two clauses of article 110 provide:

“(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under article 109, and when it is presented to the President for assent under article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill.”
PROCEDURE FOR MONEY AND FINANCIAL BILLS

Money Bills and other financial Bills have for them special procedures laid down by the Constitution in consideration of their special nature, although in matters not otherwise prescribed by the Constitution, or a law made by Parliament for the purpose, they follow the course of any other Bill in Parliament, including the resolution of any differences between the two Houses regarding a financial Bill but not a Money Bill.

Parliamentary Procedure for Money Bills

A Money Bill cannot be introduced in the Rajya Sabha. But such a Bill is transmitted to that House for it recommendations after it has been passed by the Lok Sabha, and it is deemed to have been passed by Parliament only in the form the Lok Sabha originally passed it or subsequently agreed to. Article 109 says:

"(1) A Money Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People."

Special Provisions Relating to Financial Bills Generally

Article 117 makes special provisions relating to financial Bills generally for their introduction in or passing by Parliament. It says:
(1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States:

Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill.

THE ANNUAL FINANCIAL STATEMENT:

THE BUDGET

Every year the President causes to be placed before both the Houses of Parliament the annual financial statement, or the budget, in respect of “the estimated receipts and expenditure of the Government of India for that year.” The first clause of article 112 lays down:

“The President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year, in this Part referred to as the ‘annual financial statement’.”

The presentation of the budget by the Finance Minister customarily on the last day of February simultaneously in both the Houses of Parliament is a great event every year. For, the budget is not a mere statement of the estimates of revenue and expenditure for the next financial year, but also a fiscal instrument of wider socio-political implications for regulating the whole range of economic activities in the country.

Apart from the estimated expenditure for a coming financial year, the budget, thus, contains the ways and means to raise the revenue for the year. It also presents an analysis of the actual receipts and expenditure during the closing year together with the causes for any deficit or surplus during the year and an explanation of the economic
policy and programmes of the Government during the coming year. The presentation of the budget is preceded by a few days by a statement by the Finance Minister on the general economic affairs of the nation, and the Railway Budget is presented separately before the General Budget. And there is also a scope for performance budgeting without infringing constitutional provisions.

Estimates of Expenditure

The estimates of expenditure for any financial year are required to be shown separately as “expenditure charged on the Consolidated Fund of India” and “expenditure proposed to be made from the Consolidated Fund of India”, also referred to as non-votable and votable expenditure, respectively. There is also the requirement to “distinguish expenditure or revenue account from other expenditure,” and this provides opportunity for separate revenue and capital budgeting. Clause (2) of article 112 says:

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

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

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India,

and shall distinguish expenditure on revenue account from other expenditure.”

Expenditure charged on the Consolidated Fund: The Constitution in clause (3) of article 112 specifies the expenditure to be charged on the Consolidated Fund of India. This clause reads:

“The following expenditure shall be expenditure charged on the Consolidated Fund of India:—

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

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

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

(d) (i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court,

(ii) the pensions payable to or in respect of Judges of the Federal Court,

(iii) the pensions payable to or in respect of Judges of any High Court which exercises jurisdiction in relation to any area included in the
territory of India or which at any time before the commencement of this Constitution exercised jurisdiction in relation to any area included in a Governor's Province of the Dominion of India.

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

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

(g) any other expenditure declared by this Constitution or by Parliament by law to be so charged."

Procedure in Parliament Concerning the Estimates

In Parliament separate time is allotted for the discussion of the budget and usually sittings of a House during such discussions is well attended. The estimates of expenditure are treated for this purpose as non-votable and votable.

Non-votable and Votable Expenditure: The part of the estimates of expenditure, which is charged on the Consolidated Fund of India, is not submitted to the vote of Parliament, although it may be discussed in a House. The rest of the estimates is treated as votable and submitted to the Lok Sabha in the form of demands for grants.

Demands for Grants: The votable part of the estimates of expenditure is presented in the form of demands for grants to the Lok Sabha. A demand for grant can be made only on the recommendation of the President, and it is customary to present separate demands for grants for the different Ministries. The House has the power to accept, reject or reduce any demand for grant, but it cannot increase any such demand.

In the first instance a general discussion takes place on the budget. Then, at the second stage a detailed discussion relating to every demand for grant is held during which members may move cut motions. There may be a motion for an "Economy Cut," by a specified amount which involves a general claim for economy in expenditure; a "Disapproval of Policy Cut" by rupee one only expressing disapprobation of the policy underlying the demand for grant; and a "Token Cut" of rupees one hundred seeking to ventilate grievances. These cut motions provide ample opportunity for debating the policies, programmes and actions of the Government. Article 113 relating to procedure in Parliament as regards estimates provides:

"(1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament, but
nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and the House of the People shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the President.”

Appropriation and Finance Bills

After the demands for grants have been passed in the Lok Sabha an Appropriation Bill providing for drawing money from the Consolidated Fund of India for meeting both the non-votable and votable expenditure have to be passed by Parliament in the prescribed manner. Article 114 requires as follows:

“(1) As soon as may be after the grants under article 113 have been made by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of India of all moneys required to meet—

(a) the grants so made by the House of the People; and

(b) the expenditure charged on the Consolidated Fund of India but not exceeding in any case the amount shown in the statement previously laid before Parliament.

(2) No amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of India, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of articles 115 and 116, no money shall be withdrawn from the Consolidated Fund of India except under appropriation made by law passed in accordance with the provisions of this article.

Finance Bill: Whereas an Appropriation Bill aims at drawing money from the Consolidated Fund, a Finance Bill provides for raising funds for meeting the non-votable and votable expenditure. It is a Bill that contains provisions for taxation during the coming financial year.

Supplementary, Additional or Excess Grants

The Constitution also provides for supplementary, additional or excess grants to meet any insufficiency of grants made in any annual financial statement, and the procedure for such grants is the same as that for the original grants. Article 115 says:

(1) The President shall—

(a) if the amount authorised by any law made in accordance with the provisions of article 114 to be expended for a particular service for the
current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplemenary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year, cause to be laid before both the Houses of Parliament another statement showing the estimated amount of that expenditure or cause to be presented to the House of the People a demand for such excess, as the case may be.

(2) The provisions of articles 112, 113 and 114 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the consolidated Fund of India to meet such expenditure or grant,

**Votes on Account, Votes of Credit and Exceptional Grants**

Then the Lok Sabha has also the power to provide money for expenditure by the Government by votes on account, votes of credit or excess grants in accordance with article 116 which says:

(1) Notwithstanding anything in the foregoing provisions of this Chapter, the House of the People shall have power—

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 113 for the voting of such grant and the passing of the law in accordance with the provisions of article 114 in relation to that expenditure;

(b) to make a grant for meeting an unexpected demand upon the resources of India when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement;

(c) to make an exceptional grant which forms no part of the current service of any financial year,

and Parliament shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of India for the purposes for which the said grants are made.

(2) The provisions of articles 113 and 114 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure.
ROLES OF THE COMPTROLLER AND AUDITOR GENERAL
AND THE FINANCIAL COMMITTEES OF PARLIAMENT

In exercising a continuous control over Government revenue raising and spending activities Parliament has the assistance of the Comptroller and Auditor-General and its Estimates and Public Accounts Committees, whose respective roles have already been taken note of at appropriate places. The Parliamentary Committee on Public Undertakings also makes contribution in this regard in its own humble way.

MISCELLANEOUS FUNCTIONS

Parliament has also a number of functions of a miscellaneous nature, such as, its role in electing the President and the Vice-President, its role in removing the President and the Vice-President, the Supreme Court and High Court Judges, the Comptroller and Auditor-General, the Election Commissioner, and the Chairmen and the members of the Public Service Commissions; and its power to discuss certain reports, such as, the report of the Finance Commission, the Union Public Service Commission, or the Comptroller and Auditor-General. The Presidential Ordinances and subordinate and ancillary rules, regulations and bye-laws made by the Union are also placed before it. Then, there is its role during Emergencies.

EMERGENCY PROVISIONS

When the President issues a Proclamation of Emergency under article 352, it has to be placed before Parliament and it cannot continue in force beyond two months from the date of its promulgation unless Parliament approves it by a resolution passed in each House. Similarly, any Proclamation under article 356, relating to the failure of constitutional machinery in a State, and a Proclamation under article 360, relating to financial emergency, has to be placed before Parliament and its approval secured.

THE OPPOSITION

The Opposition is the salt and the sinews of Parliament. Under Parliamentary Government the majority has the right and the duty to rule and the minority has the right and the obligation to oppose. Both the Government and the Opposition are essential ingredients of Parliament. They both live by consent, claim to represent the
people, swear allegiance to the Constitution and consider themselves the custodians of the peace, progress and good government in the Republic.

PURPOSE OF THE OPPOSITION

The Government governs and the Opposition opposes, and the presumption is that they may change places on the morrow. The Opposition is the alternative, or potential, Government, and the Opposition that is not a potential or alternative Government not only loses its edge but also tends to become irresponsible. Politics never forgives impotency. The Government intends to continue governing and is never willing to change its place. The Opposition considers it its lot to oppose and always wills to power; to change its place with the Government. The primary purpose of the Opposition is to become the Government for effectuating its own policies and programmes. And as it cannot secure this on the floor of the Lok Sabha by defeating the Government, it always carries its appeal to the electorate outside the House.

Winning over the Electors

Inside Parliament the Opposition opposes to expose the weakness of the Government, to influence Government decisions, to wrest occasional concessions from it or to secure modifications or even a change in its policies. But the Opposition always has in mind the millions of uncommitted electors outside Parliament, who alone can vote it to power. The purpose of the Opposition, then, is to influence the opinion of the electors and win their support. All its efforts inside and outside Parliament are geared to this sole end.

ORGANISATION OF THE OPPOSITION

Strictly speaking, "the Opposition" does not exist in the Parliament of India, although there are Opposition groups and independent opposition members. Ever since Independence, the Congress has continuously occupied the treasury benches, and independents apart, the Opposition groups have been ideologically too divergent, organisationally too disparate, numerically too small and operationally too scattered to claim the status of "the Opposition". Even when the Congress got split up and the country had the taste of a minority
Government at the Centre, the Opposition groups could not combine to form a pouncing phalanx.

Leader of the Opposition

There is no Leader of the Opposition in Parliament. In each House every Opposition group has its own leader. These group leaders hardly provide the people the image of an alternative Prime Minister.

Shadow Cabinet

The organised Opposition has not only the Leader of the Opposition, the alternative Prime Minister, but also a Shadow Cabinet, the future Government. But the Opposition groups in Parliament have not even a joint consultative machinery. What happens is that the group leaders confabulate occasionally on specific issues and thereby a semblance of some sort of concerted move by the Opposition groups may be in evidence in some matters in Parliament.

Party Level Organisation

Barring the independent opposition members, all the Opposition groups in Parliament have their party level oraganisations, such as, the National Executive Councils, Polit Bureaus, Parliamentary Boards and also regional and local units, and these party level organisations vary from one party to another. But generally even the party level organisations of the Opposition groups have not been in a happy form, although a party like the C. P. I. or the C. P. I. (M) may pride itself at the cohesion and discipline in its party cadre.

METHODS OF THE OPPOSITION

In exposing and embarrassing the Government and carrying its appeal to the electors, the Opposition works incessantly inside and outside Parliament. And this results in a constant flow of propaganda; an enormous publicity of public affairs; and the eventual public education. Friedrich says:

"Parliaments and parliamentarians appear as integrating agencies through which the policy of the government and the claims of the various interest groups are expounded to the larger public with a view to discovering a suitable balance. There can be little doubt that this educational function is highly significant."25

**Opposition Inside**

The Opposition is fully aware that exceptions apart, it cannot drive out the Government. It can expose and embarrass and even compel the Government to modify, delay, change or withdraw its any proposal, policy or programme. It is a constant critic of the Government. And under the present party system, although it cannot turn the Government out, it may have the satisfaction of making a Minister resign or have him removed or transferred from his office. For, the Government also has in mind always the reaction of the general public to its any action or inaction.

To secure these ends and the primary purpose of converting the electorate to its own point of view, the Opposition makes the fullest use of all the opportunities to ask questions, elicit information, hold debates, raise points of order, propose adjournments and move no-confidence motions. By words and votes it always tries to record its protest to what the Government proposes to do or does not intend to do. It has also open to it the methods of walk-outs, sit-ins, and the other like instruments to record its protest.

**Opposition Outside**

As the Opposition groups are also parties operating outside Parliament, they carry their opposition outside through the press, processions, meetings, posters, pamphlets, strikes, dharnas, demonstrations and gheraos, anti-corruption and dehoarding drives, and numerous social, economic, cultural and educational activities. And although some of these methods are not too healthy for orderly life in the community, considering the limited strength of the Opposition parties and the fact that even the ruling party or its factions are increasingly taking resort to some of these less laudable devices, they cannot altogether be regarded reprehensible, although the degree to which they are at times carried sure needs to be condemned.

The ruling party at the Centre has also to reckon with the “faction or wing opposition” from within the party; “conscientious objectors” inside and outside the party; and “spontaneous on the spot or protracted sectoral” outbursts in the country. Then, under the federal set-up, the State Governments, particularly those controlled by a party or parties other than the ruling party at the Centre, are also found peculiarly inertly or tensely pitched against the Centre.
Cooperation by the Opposition

The assumption is that the Government is responsible Government and the Opposition is responsible Opposition. There may be and are moments and matters in the life of a nation which cast an obligation on the Opposition to cooperate with the Government. Theoretically, viable Parliamentary Government is possible only when both the Government and the Opposition are more or less agreed on the fundamental socio-economic issues. For, both seek to represent the people and secure the well-being of the community. And significantly, in spite of the glaring divergences among the Opposition groups in Parliament, they have found it possible not only to cooperate among themselves but also to cooperate with the Government.

The process of cooperation between the Government and the Opposition is both continuous and occasional. It is continuous in the Opposition agreeing to facilitate the transaction of Government business in Parliament and the Government consenting to being assailed and criticised. For, the Government may always stifle the Opposition and the Opposition may always make the life of the Government miserable. Then, the Prime Minister may on the floor of the Lok Sabha ask for the support of the Opposition groups on an issue of national importance, particularly in a matter relating to defence or foreign affairs. Conference of Opposition leaders may also be called by the Prime Minister and they may be taken into confidence on a vital national question. The Opposition groups are also represented in Parliamentary delegations, or on Parliamentary committees or commissions, whether standing, ad hoc, advisory, or inquisitional. And to crown these all, there may be an excruciating national crisis calling for a national Government of all the parties, or a minority Government supported by a conglomeration of parties, in Parliament.

Evidently, then, it would be thoroughly heretical to harp with Tierney that the duty of the Opposition is to propose nothing, to oppose everything and to turn out the Government. For, given the modern party system, rarely can a Government be expected to be driven out; opposition to everything will make the Opposition ridiculous or scare away the electors; and its policy to propose nothing would make it appear as wanting in constructive and positive policies and programme in this age of the service state. The fact is
that under Parliamentary Government in an open society both the Government and the Opposition are not only divisive but also integrative. They have not only to coexist but also to cooperate. They need each other for personal catharsis, mutual flagellation, party propaganda, political manoeuvres, strategic alibis and public edification.

THE OPPOSITION IN PERSPECTIVE

Generally speaking, barring the cases of one party or partyless democracies, Parliamentary Government presupposes a strong and vigorous Opposition. And this implies that normally the political parties occupying the treasury and opposition benches should be potentially capable of changing their places. Parliamentary Government does not seem to countenance a single party predominance nor is multi-party system its favourite ally. Almost equally balanced “bi-partism,” having a core of consensus on socio-economic foundations can best sustain a viable Parliamentary system in a liberal democracy. But unhappily it is this base that the Indian political system lacks.

In the first place, the Opposition parties and groups present an unbelievable ideological heterogeneity and a bewildering pattern of “split politics”, further bedevilled by unprincipled factions and defections, making it appear almost impossible for any, some or all of them providing, or emerging as, a solid front against the Government. The history of the Opposition since Independence has been a history of splits, splinters, factions, defections, dismays, demonstrations, insurgencies and failures, though punctuated with occasional mergers, alliances and flukes.

The Opposition has not, even in the most propitious circumstances favouring its growth, been able to give the country an alternative Government, although in some of the States it has been able to provide make-shift arrangements. The country is not only vast but also varied. And a party or a combination of parties that seeks to stand against the ruling party ought to display a deeper ideological allegiance, greater organisational skill, better individual talents, longer patience and tremendous sacrifice. But sadly, these are the elements which, isolated, limited and individual cases apart, are not generally to be met with. The common man has no choice but to put up with political corruption or to turn away from it in disgust or dejection; or to become self-seeking, inert, apathetic or insurgent.
The Opposition groups do not seem to have built for themselves any solid base in any sector of the society. And given the pre-Independence halo of the ruling party; its astute utilisation of men, materials and events; the assumptions of money politics, politics of violence; and the aberrations of power game, the Opposition appears to be in the shambles. And in the absence of an effective Opposition, the ruling party must of necessity remain the busiest with all the possible means of aggrandising personal, factional, group and party interests, turning the whole political system into a cesspool of all vices that mankind may conceive of in the absence of a profound ideology.

True, to a degree the absence of a united and powerful Opposition has been off-set occasionally by factious tendencies and effervescences, pricks of individual conscience and demands of practical politics within the fold of the ruling party. But not only that these elements have their inherent limitations, they are also prone to breed deleterious by-products. And a single party predominance has resulted in unprincipled and purposeless domination.

*The Opposition Under Uni-party Predominance*

Conceptually, in a people’s or liberal democracy a single party predominance may be operationally efficient, viable and desirable if it has profound commitment to ideology and principles; powerful, perciplent and perseverant leadership; and disciplined cadre, or solid mass support. Normally, however, Parliamentary Government assumes that the Government of today is the Opposition of tomorrow. Ruefully, this assumption has only a dim and distant possibility of being actualised, and a hope may seem to lie in the resurrection of the ruling party with at least its pre-Independence image. But at the moment the country is suffering, the ruling party is phlegmatic and the Opposition groups are anaemic. And is there a salvation in sight? Only a prescient may presage, the little man has only to persevere.

*PARLIAMENTARY PRIVILEGE*

Craystalling in course of the historic struggle of the mother of Parliaments to establish its supremacy, and, possibly, also linked with its status as the High Court of Parliament, Parliamentary privilege now in relation to any legislature generally may be said to refer to
"...the sum of the peculiar rights enjoyed by each House collectively..., and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals."

Objectively speaking, then, it is not the historicity of Parliamentary privilege but its peculiarity and necessity that are material to its concept. Parliamentary privilege in general may be said to refer to the totality of the peculiar rights pertaining to a Legislature, its either House and its any committee collectively and its members and other specified persons individually, which are deemed essential for the proper discharge of their functions.

In case of the British Parliament, privilege may be considered as part of "the law and custom of Parliament"; a branch of the law of the land, depending on the definition of the expression "law of the land", but distinct from the common or statute law administered in the courts, and may be said to be analogous to royal prerogatives or constitutional conventions. In the case of a legislature in a country with a written constitutional code, privilege must be regarded as part of its law of the constitution, and as such, of the law of the land, though not necessarily administrable in the courts. For, privilege is peculiar to the legislature; it is in excess of the rights of the other bodies or individuals in the land.

In determining the precise nature and scope of Parliamentary privilege in this country, it seems desirable to note that replying to the critics of the article of the Draft Constitution, relating to Parliamentary privilege, seeking to legislate by reference, Alladi Krishnaswamy Aiyer said:

"It is common knowledge that the widest privileges are exercised by members of Parliament in England. The present Legislatures in India, according to judicial verdict, have no right to punish for contempt. The British Parliament has such power. The Dominion Parliaments too have such power. Should we not have that power?... If you have the time and leisure to formulate all the privileges in a compendious form, it will be well and good. The committee appointed by the Speaker has found it extremely difficult.... The other point is that there is nothing to prevent Parliament from setting up the proper machinery for formulating privileges... This is only a temporary measure... Under the circumstances far from this article being framed in a spirit of servility or slavery or subjection to

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4 May, E.: Parliamentary Practice, op. cit.; p. 3.
5 Coke, E.: 4 Institutes 15.
6 See Jennings, I.: The Law and the Constitution, op. cit.; p. 112.
Britain, it is framed in a spirit of self-assertion and an assertion that our country and our Parliament are as great as the Parliament of Great Britain."8

That the desire to invest the Indian Parliament with the widest possible privileges, including the privilege to punish for contempt of itself, and the drafting difficulty in actualising this desire made the founding fathers take resort to legislation by reference in dealing with Parliamentary privilege, is also evident from the following observations of Ambedkar:

"If we were only concerned with...freedom of speech and immunity from arrest, these matters could have been very easily mentioned in the article itself and we would have had no occasion to refer to the House of Commons. But the privileges which we speak of in relation to Parliament are much wider... The privileges of Parliament extend, for instance, to the rights of Parliament as against the public. Secondly, they also extend to rights against the individual members. For instance, under the House of Commons' powers and privileges it is open to Parliament to convict any citizen for contempt of Parliament and when such privilege is exercised the jurisdiction of the court is ousted... Then again, it is open to Parliament to take action against any individual member of Parliament for anything that has been done by him which brings Parliament into disgrace. These are very grave matters—e.g., to commit to prison. The right to lock up a citizen for what Parliament regards as contempt of itself is not an easy matter to define. Nor is it easy to say what are the acts and deeds of individual members which bring Parliament into disrepute."9

In consequence, article 105, concerning the "Powers, privileges etc. of the Houses of Parliament and of the members and committees thereof", has come to read as follows:

"(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.
(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.
(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House 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.
(4) The provisions of clauses (1) (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take

9 C.A.D., Vol. VIII ; p. 582.
part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament."

Within the terms of article 105, Parliament, its either House and its any committee collectively and individually its any member or any other person entitled to take part in the proceedings of a House or its any committee are entitled to privileges. These privileges are either expressly given by the first two clauses of this article or are, in accordance with provisions of its clause (3), those that were enjoyed by the British House of Commons and its members and committees at the commencement of the Constitution.

Besides, in ascertaining the scope of Parliamentary privilege, it may also be found necessary to refer to some other articles of the Constitution, such, for example, as, articles 118 and 119 relating to rules of procedure and regulation by law of procedure in financial business, respectively, article 121 relating to restrictions on discussions in Parliament, or article 122 excluding courts from enquiring into proceedings in Parliament. And it seems more convenient to look upon them in two groups as privileges enjoyed by a member of Parliament and any other person, entitled to them individually, and those appertaining to Parliament, its either House and its any committee collectively.

**PRIVILEGES OF MEMBERS AND ANY OTHER PERSON INDIVIDUALLY**

It is interesting that article 105 makes no distinction between a member of Parliament and any other person, who by virtue of clause (3) of this article becomes entitled to Parliamentary privilege, for the purpose of conferring on them privileges and immunities. Thus, a Minister, who is not a member of Parliament, or the Attorney-General for India, participating in the proceedings of Parliament or its any committee within the terms of article 80, is entitled to the same privileges as an elected or nominated member of Parliament.

**Freedom of Speech**

To begin with, the most valuable privilege of an individual member of Parliament, or any other person entitled to privileges, is the freedom of speech which he enjoys by virtue of the "freedom of speech in Parliament" guaranteed by clause (1) of article 105, although this freedom is "Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure
of Parliament.” This “freedom of speech” of a member, or any other entitled person, is in excess of the “freedom of speech” enjoyed by him under article 19 (1) (a) as a citizen of India.

“Freedom of Speech” in Articles 105 (1) and 19 (1) (a) : Not only that the “freedom of speech” in article 105 (1) is in excess of the “freedom of speech” in article 19 (1) (a), but also that they have two distinct meanings in those two articles. In the former the expression “freedom of speech” does not include the freedom of publication but in the latter it does. This makes the freedoms under articles 105 (1) and 19 (1) (a) mutually exclusive, and in case of any conflict between them, the former being of a particular nature prevails over the latter which is of a general character.10

“Subject to Clause” of Article 105 (1) : The freedom of speech under article 105 (1) has been expressly made “Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament,” and evidently, this “subject to clause” is applicable to the freedom contained only in clause (1) of article 105 and is not intended to cast a shadow on the other provisions of this article as contained in its clause (2) to (4).

The Lok Sabha Rules 352 to 356 impose certain restrictions on the freedom of speech in the House and the Rajya Sabha has similar Rules. Then an apt example of constitutional restriction is found in article 121 which says:

“No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.”

But this “subject to clause” does not provide an opportunity to the court to interfere with the freedom enjoyed by a member under article 105 (1). For, article 122 precludes a court from enquiring into the proceedings of Parliament and any remedy for violating this restriction clause lies with Parliament itself and not in a court of law.11

Immunity for Things Said or Votes Given in Parliament : By virtue of clause (2) of article 105 a member, or a person entitled to privileges, is not liable to any proceedings in any court in respect of anything said, but not everything done, or any vote given by him in Parliament or its any committee, even if any such thing is published

by or under the authority of a House. 12 This immunity of a member, or a person, extends even to a publication by any other person, provided the member, or the person, did not connive at, or in any way assist in, the publication by such other person.

It should be noted that article 105 (1) applies exclusively to freedom of speech only in Parliament. Consequently, a speech by a member outside Parliament is not protected by this article. A communication from a member to a Minister is also not privileged, nor is a communication by a constituent to a member. Any publication by or at the instance of a member even of things said or done by him in Parliament is outside the purview of this article and does not enjoy any immunity. 13

*Freedom from Arrest*

On the analogy of the privilege of the members of the British House of Commons and in accordance with article 105 (3) and section 135A of the C.P.C., a member of Parliament in India enjoys the freedom from arrest in civil cases during a session or meeting of a House or a committee of Parliament and fourteen days before and after such a session or meeting. 14

For criminal matters, including preventive detention, 15 a member may be arrested outside Parliament and information of his arrest, and subsequent release, must be sent to the Speaker or the Chairman, as the case may be. For the arrest of a member for such matters from within the premises of Parliament previous consent of the Speaker or the Chairman, as the case may be, is required and such consent is normally never withheld. And it should be noted that although a detenu member has no right to attend meetings of Parliament, he has a right of correspondence with the Speaker or the Chairman, as the case may be. 16

*Freedom from Serving as Jurors or Witnesses*

Within the terms of article 105(3) and like a member of the House of Commons, a member of Parliament is exempt from serving as a

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14 In case of the members of the House of Commons, the immunity applies to forty days before and after such a session or meeting.
juror or assessor in courts. He cannot also, except with the leave of the House concerned, be summoned to give evidence as a witness while the House is in session. And the Rajya Sabha has ruled that a member cannot be questioned in any court or any place outside Parliament for any disclosure made by him in Parliament.\(^{17}\)

**PRIVILEGES OF PARLIAMENT, A HOUSE OR A COMMITTEE COLLECTIVELY**

Under the Constitution the privileges of Parliament are also the privileges of a Parliamentary committee, and the privileges enjoyed by the Lok Sabha and the Rajya Sabha are identical.

**Control over Term and Composition**

The Constitution contains express provisions for most matters relating to the term and composition of Parliament. Yet interstitially and also by virtue of some express provisions Parliament has some control over these matters. For example, while a Proclamation of Emergency is in force, Parliament may by law extend its own term beyond five years. Although its total number of membership is fixed by the Constitution, allocation of seats among the units is within its purview. Then, the Constitution itself lays down certain qualifications and disqualifications for the members of Parliament, but Parliament is competent to prescribe for them additional qualifications and disqualifications. The question of subsequent disqualification of a member is determined by the President, but the President himself is an integral part of Parliament. For the determination of election disputes also the Constitution has specific provisions, but Parliament may by law regulate certain matters in this behalf.

**Expulsion of Members**: On the analogy of the power of the House of Commons and in accordance with article 105(3), either House of Parliament has the power to expel a member. This expulsion may be for breach of a privilege or a commission of contempt of Parliament. A seat in a House may also be declared vacant by the House for an unauthorised absence by a member for sixty days.

**Regulation of Proceedings**

Like the House of Commons, Parliament has the right to regulate its proceedings without interference from any outside person or

\(^{17}\) See *Rajya Sabha Deb.*, December 20, 1968.
authority, although in a particular case it may be difficult to determine what constitutes "proceedings in Parliament." According to May,\textsuperscript{18} a proceeding in Parliament

"Covers both the asking of question and the giving written notice of such question, and includes everything said or done by a Member in the exercise of his functions as a member of a committee of either House, as well as everything said or done in either House in the transaction of Parliamentary business".

Rules of Procedure: Each House of Parliament is competent to frame its own rules of procedure in accordance with article 118 to regulate its conduct of business.

Regulation of Debates and Order of Business: A House of Parliament is competent to regulate by rule, or otherwise, the debates in the House and determine the order of its business.

Exclusion of Strangers and Secret Sessions: Although a sitting of a House is open to outsiders and their entry is regulated by rules, a House may, like the British House of Commons, at any time exclude any stranger or all outsiders from its any sitting. A House may also at any time decide to hold a secret session.

Disciplinary Control over Members: Each House has full disciplinary control over its members in line with the control exercisable by the British House of Commons over its members. A member may be suspended, removed by force, or even expelled from a House for disorderly or unbecoming conduct, or he may be admonished, reprimanded or imprisoned for a breach of privilege or contempt, and no remedy is available in a court of law.\textsuperscript{18a}

Power to Hold Inquiries: Parliament or its either House may institute any inquiry or investigation in the manner the British House of Commons can do. At such an enquiry witnesses may be summoned and documents and materials examined. And the proceedings of such an inquiry also are protected like the proceedings in a House of Parliament or its any committee,\textsuperscript{18b}

Courts not to Enquire into Proceedings of Parliament: Article 122 specifically provides that the courts are not competent to enquire into the validity of proceedings in Parliament, such, for example, as, the Speaker disallowing a question of which notice has already been

\textsuperscript{18} May, Sir E. : Parliamentary Practice, op. cit.; p. 62.
\textsuperscript{18a} Rajnarain v. Atma Ram, A. I. R. 1954 All. 319.
given; presentation in a House of even un *ultra vires* Bill; the moving by a member of a resolution in a House; and the presentation of a Bill to the President for his assent. But a ruling by the Speaker contrary to the Constitution and the laws may be declared null and void, although the court may hold a particular constitutional or legal requirement merely directory in nature. Thus, a Money Bill cannot be questioned on the ground of irregularity of procedure, for, the procedure has been held to be of a directory nature. Besides, this article also declares the officers of Parliament immune from court proceedings for anything done by them in the exercise of their any constitutional power. It says:

"(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this 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."

### Right of Publication

Each House of Parliament has the right to publish its proceedings. And, as clause (2) of article 105, *inter alia*, provides, no person is liable in a court of law

"in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings."

**Power to prohibit Publication:** The right to publish or authorise publication of proceedings includes the right to prohibit publication of proceedings and this is in accordance with the privilege of the House of Commons.

**Press Coverage of Proceedings:** What article 105(2) protects is "publication by or under the authority of a House" and not all publications. Consequently, any newspaper, periodical, pamphlet

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or book publishing any proceeding of Parliament is not constitutionally immune from court proceedings, and it has to seek protection under the principle of faithful reporting or reproduction. It must also show that it has not been published in violation of the right of a House to prohibit the publication of its any proceeding.  

Power to Punish for Breach of Privilege
and for Contempt

The power of Parliament to punish for breach of privilege and for contempt of itself is the cornerstone of Parliamentary privilege. In consonance with the power of the British House of Commons and by virtue of article 105(3), Parliament or its either House has generally the power to punish for breach of privilege and for contempt of itself. And although May, unlike many others,\(^{26a}\) considers the power to punish for contempt as *not necessary*, he felt that

"......the main value of the power lay in upholding the dignity of Parliament and defending it against disrespect and affronts which could not be brought or could be brought only by implication under the head of any of the specific privileges..."\(^{27}\)

"Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such House in the discharge of his duty or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt, even though there is no precedent of the offence".\(^{28}\)

Persons Liable to Punishment: Generally speaking, any person whether a member of Parliament or an outsider, including any authority or artificial person, is liable to be punished for a breach of privilege or contempt. The power of a House to punish its members seems to be absolute. Its power to punish a member of the House, or of a State Legislature, is in serious doubt, although the concerned presiding officers or the Privileges Committees may opt for joint consultations and appropriate action. And so far as an outside person or authority is concerned, the position still seems to be nebulous, although *normally* any person committing a breach of

\(^{26}\) Ibid.

\(^{26a}\) For example, Anson in his *Law and Custom of the Constitution* says that the power to punish for contempt "finds a surer basis in the necessity of such a power for the maintenance of the dignity of the House......" See also Keir and Lawson: *Cases in Constitutional Law*.

\(^{27}\) May, Sir E.: *Parliamentary Practice, op. cit.*; pp. 90-91.

\(^{28}\) Ibid.; p. 109.
privilege or contempt may be regarded as liable for punishment by either House of Parliament.

*Forms of Punishment:* Any person, including a member of a House, may be admonished, reprimanded or imprisoned for committing a breach of privilege or contempt. However, a person cannot be kept imprisoned beyond a session of Parliament, although a House may prescribe any shorter period of imprisonment which may be rigorous or simple. A fine may, possibly, also be imposed on a juristic person, although the British House of Commons has no such power. In addition, a member of a House may be suspended or expelled from the House by way of punishment. Thus, for example Mudgal, a member of the Lok Sabha, was found by the Privileges Committee of the House to have acted in derogation of the dignity of the House by putting questions and proposing amendments to Bills in exchange for money received by him, and a resolution was moved for his expulsion from the House. But as the member resigned his seat in the House, the resolution was duly amended only to note that Mudgal deserved expulsion.

*Procedure:* On reference by a member, or *suo motu*, the Speaker or the Chairman, as the case may be, refers the question of a breach of privilege or contempt to the Committee on Privileges. The Committee decides whether a breach of privilege or contempt has been committed and also recommends the action to be taken in the case. For holding an inquiry or meting punishment, Parliament has the right to seek the assistance of any person or authority in the land, and it seems that the Speaker or the Chairman may issue a general warrant for the purpose, although this warrant has been held by concession to be subject to article 22(2) relating to fundamental rights. It may also be noted that a prorogation of the House dealing with a privilege question makes the issue lapse, although when the House is reconvened in session it may take up the matter afresh. However, a dissolution of the Lok Sabha has the effect of putting a privilege question pending before it to rest for all times to come.


31 Thus a conflict between the Madras Legislature and the Madras High Court relating to the privilege of the Legislature arising out of certain remarks passed against the Madras Law Minister by a Judge of the High Court was resolved in September 1960 by proroguing the Legislature.
Evidently, Parliamentary privilege is intended to serve as a bastion and not as an arsenal. And significantly, in spite of clause(3) of article 105 providing for the same privileges for the Parliament of India as those enjoyed by the British House of Commons at the commencement of the Constitution in matters not otherwise covered by the first two clauses of this article, the Parliament of India has shown a remarkable degree of restraint on questions of privilege and nothing has happened in Parliament-Court relations regarding privileges in India which may seem reminiscent of the nineteenth century House of Commons-Court conflict concerning the privileges in England.

Yet, when the problem of privileges is viewed in the context of the State Legislatures also, one may not get much consolation from how Parliament-Court relations have been working in this area, for, in certain cases the courts and State Legislatures have not found it possible to look upon privileges in a happy harmonious form. And consequently, generally the attitude of the courts towards Parliamentary privilege has to be considered not only in the narrow context of Parliament-Court equation but also in the wider perspective of Legislature-Court relations in this regard, specially because the Constitution speaks in identical terms of the privileges of Parliament and of the State Legislatures.

Interestingly, the storm-centre of legislature-judicature controversies relating to privileges has been the power of Parliament, or a State Legislature, to punish an outsider for the breach of privilege or contempt of itself. And the first ever case in this regard that came before the Supreme Court was Gunupati Reddy’s Case. In this case the person arrested under a warrant of the Speaker was directed to be released by the Supreme Court on the Attorney-General conceding that the person had not been produced before a magistrate within twentyfour hours of his arrest as required by article 22(2) relating to fundamental rights.

Then came Sharma’s Case. In this case, The Searchlight, a Patna English daily, reported, inter alia, a part of the proceedings which had been ordered to be expunged by the Speaker, Bihar Legislative Assembly, and the House served on the editor of the daily a notice to

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show cause why action should not be taken against him for a breach of the privilege of the House to prohibit publication of its proceedings. The editor then moved the Supreme Court under article 32 claiming the fundamental right of publication under article 19(1)(a) and questioning the existence of the privilege of the House to prohibit publication of its proceedings.

The Supreme Court by a majority of four to one, Subba Rao J. dissenting, held that as the House of Commons had the power to prohibit publication of proceedings, a Legislature in India under article 192(3), or for that matter Parliament under article 105(3), also possessed that privilege. It was held also that the "subject to clause" of clause (1) of article 192 did not govern its clauses (2), (3) or (4) and Subba Rao J. agreed to this proposition. The Court concluded that the fundamental right under article 19(1)(a) did not control the provisions of article 192 in any manner and accordingly dismissed the petition. And it seems that the Court took a highly propitious position.

The Sharma Case was followed by Blitz Case,34 when the Speaker of the Lok Sabha, for the first time in the history of the House, summoned the editor of the Blitz, a Bombay English weekly, to the bar of the House and reprimanded him for having ridiculed a member of the House for his speech in the House and subsequently aggravating his offence by ridiculing the whole House, its Privileges Committee and the Speaker. The editor, before coming to the bar of the House, had tried to avoid the Speaker’s warrant by making a petition to the Supreme Court alleging infringement of his fundamental rights, but the Court rejected his petition and rightly reaffirmed the position it had taken earlier in Sharma’s Case.

Keshav Singh’s Case

But then came the President’s Reference No. 1 of 1964,35 commonly known as Keshav Singh’s Case, in the context of the U.P. Legislative Assembly and the Allahabad High Court controversy relating to privileges, which "may be regarded as the high water-mark of legislative-judiciary conflict in a privilege matter..."36 and whose events are of an intensely histrionic character worth noting at some length.

In 1964, the U.P. Legislative Assembly found one Keshav Singh guilty of contempt of itself and he was brought to the bar of the House on March 14 that year under the custody of the Marshall. He was reprimanded for that offence. He was further sentenced by the House to seven days' imprisonment for a second contempt for having written a letter to the Speaker in an extremely discourteous, intemperate and unparliamentary tone and also behaving disrespectfully towards the House inside its chamber, and was sent to the Lucknow District Jail to undergo the sentence.

Five days later on March 19, 1964, at 2 p.m., on behalf of Keshav Singh, Advocate Soloman presented a petition under section 491 of the Cr. P.C. to the Lucknow Bench of the Allahabad High Court, comprising Beg and Sahgal J.J., impleading the Speaker of the Assembly, the Chief Minister of U. P. and the Superintendent of the Lucknow Jail. It was submitted that the detention being illegal, Keshav Singh be set at liberty and pending the final disposal of his case, he be released on bail. At 3 p.m. on March 21, 1964, the Court, after the petition was amended on the suggestion of the Court by adding article 226, passed an order releasing Keshav Singh on bail.

In the meantime, the U.P. Legislative Assembly had received a notice of breach of privilege of the House committed by Beg and Sahgal J.J., Advocate Soloman and Keshav Singh, and on March 21, 1964, itself the House found them guilty and resolved that Keshav Singh be immediately taken into custody and the two Judges and the Advocate be taken into custody and produced before the House, and accordingly warrants were issued against them. The Judges then made petitions under article 226 to the Allahabad High Court on March 23, 1964, challenging the constitutionality of the March 21 resolution of the Assembly. The petitions were heard by a special bench of twentyeight Judges of the Court, which passed stay orders till the disposal of the petition. A similar order on a similar petition by Advocate Soloman was also passed by a twentythree member bench of the Court.

On March 25, 1964, the Assembly clarified its March 21 resolution by saying that it intended that the said Judges and the Advocate were to appear before the House to offer explanation. This clarificatory resolution was referred by the Speaker the same day to the Privileges Committee of the House and in pursuance of its decision the warrants were withdrawn. On the day following, the Committee
considered the question at length and decided that the said three persons be called before it to offer explanation. Accordingly, notices were sent to them, but the same day the President’s Reference was made to the Supreme Court.

The two Judges, for their part, submitted petitions to the Allahabad High Court challenging the validity of the notices and a special bench of twentythree Judges of the Court issued an *interim* order on March 27, 1974, prohibiting the Speaker and the Privileges Committee from proceeding with the impugned March 21 resolution and stayed the operation of the notices. The Assembly, for its own part, decided that in view of the President’s Reference the notices be withdrawn and the said Judges and the Advocate and Keshav Singh need not appear before the Privileges Committee.

*Questions Referred to the Supreme Court*: The following questions were referred to the Supreme Court for its opinion:

“(1) Whether...it was competent for the Lucknow Bench to entertain and deal with the petition of Mr. Keshav Singh...; (2) Whether...Mr. Keshav Singh by causing the petition to be presented..., Mr. B. Soloman, Advocate, by presenting the said petition and the...Judges by entertaining and dealing with the said petition and ordering the release of Mr. Keshav Singh on bail...committed contempt of the Legislative Assembly...; (3) Whether...it was competent for the Legislative Assembly...to direct the production of the...Judges and...Advocate...or to call for their explanation...; (4) Whether...it was competent for the Full Bench of the High Court...to entertain and deal with the petitions of the...Judges and...Advocate, and to pass interim orders...; and (5) Whether, a Judge of a High Court who entertains or deals with a petition challenging any...decision of a Legislature imposing any penalty on the petitioner or issuing any process against the petitioner for its contempt or for infringement of its privileges...or who passes any order on such petition commits contempt...and whether the said Legislature is competent to take proceedings against such a Judge...”

*The Opinion of the Supreme Court*: At the hearing of the President’s Reference the U.P. Assembly filed appearance by making its stand clear that this action did not amount to submitting to the jurisdiction of the Court and the Supreme Court duly recognised the stance. But the Court by a majority of six to one, Sarkar J. dissenting,
delivered its opinion in a manner that ran skew to the principles of Parliamentary privilege established by *Sharma's Case*. The majority, after extensive references to the origin of Parliamentary privilege in England, felt that the power to punish for contempt by a general warrant for anything said outside Parliament did not belong to the British House of Commons and even if it did, it belonged to it as a constituent unit of the High Court of Parliament of England and was based on comity, presumption or agreement. This power could not be claimed under the scheme of the Constitution by a State Legislature, or Parliament, in view of the existence of the fundamental rights, including the right to remedy under article 226, and the provision of judicial review. The Court also felt, that the observation in *Sharma's Case* that the question of applicability of article 21 to a privilege case in *Reddy's Case* did not represent the considered opinion of the Court, was also not correct.

However, the opinion of the Supreme Court is not law and in spite of this majority opinion in *Kesha Singh's Case* when the Allahabad High Court finally disposed of this on March 21, 1964, the petition of Keshav Singh, it seemed to respect the power of the Legislature, or of Parliament, to punish an outsider for contempt of itself by an unspeaking warrant. The Assam High Court later, in *Phukan v. Mahendra Mohan*,97 felt that a House of a Legislature was competent to initiate contempt proceedings against an outsider and was the final judge whether contempt has been committed, although the courts may not look with favour on Parliament's claim to a new or an unheard of privilege.

It seems, thus, that Parliament or a State Legislature is generally recognised to have the power to punish for contempt of itself by a general warrant. The superior courts may be approached under article 32 or 226, as the case may be, by an aggrieved person without raising a question of further contempt by him, his counsel or the Judges entertaining the petition. It also seems that the court may issue rule *nisi*. The concerned legislative body may file a return without in any way raising the inference of its having thereby submitted to the jurisdiction of the court, and this should satisfy the court which would not then, in all probability, proceed further with the matter.

FUNDAMENTAL RIGHTS AND PRIVILEGES

It seems that in most cases relating to legislature-adjudicature controversies relating to Parliamentary privilege, the question of fundamental rights has been raised. In Reddy's Case, it was held by concession that article 22 (2) applied to the warrants issued by the Speaker of the Lok Sabha. And although in Sharma's Case the Supreme Court regarded this as not a considered view of the Court and found that articles 19(1)(a) and 105 were mutually exclusive, it found occasion to say that the rules of a House of Parliament may be treated as providing for "procedure established by law" within the meaning of article 21. In Keshav Singh's Case the Supreme Court clearly suggested that excepting article 19 (1)(a), other relevant articles relating to fundamental rights may be applicable to cases under article 105 or 194. It seems at least reasonable to feel, then, that article 32 is available even in cases under articles 105 and 194 and to expect that the courts would not normally treat these two articles on Parliamentary privilege subject to the chapter on fundamental rights in the Constitution.

CODIFICATION OF PRIVILEGES

Whether one agrees with Seervai that article 105(3) is of a transient character or not, beginning with the observations of Subba Rao J. in Sharma's Case and culminating in the 1961 Delhi seminar on "Privileges of Parliament and the Press" organised by the Indian Federation of Working Journalists, there seems to be a constant claim for codifying Parliamentary privileges in India. The Press generally has made loud claims for such a codification. But codification seems to provide no answer to the present difficulties. The real solution seems to lie in the judicious exercise of the supreme sense of restraint and propriety and decency which is expected of one and all under Parliamentary Government, and not to use, abuse, misuse, stifle or evade Parliamentary privileges for political or ulterior ends. It may be noted that even the Select Committee of the British House of Commons, appointed on July 5, 1966, to review the law of Parliamentary privilege, did not consider it desirable that the categories

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39 The Times of India, Nov. 4 and 5, 1961.
of matters which constituted contempt should be codified, although the Committee suggested some measures for streamlining contempt proceedings.

PARLIAMENTARY DECLINE

Parliaments the world over are generally said to be on decline, and this, to a large degree, is attributed to the global complexities and exigencies of the present industrial, technological and urban age. There is for certain an element of truth in this saying which is equally valid in the case of the Parliament of India. But if by saying that Parliaments are on decline today, it is meant to suggest that there ever was a golden age in which they really ruled the nations of the earth, it essentially betrays not only an oblivion of historical sense but also the absence of a proper understanding of the nature of Parliamentary Government. Parliaments are not intended to govern, but merely to intelligently criticise and keep a constant vigil on the Governments. It is true that the days of Marathon debates and splendid speeches are gone for good and Parliaments have got to act more in a business-like manner. But today, as ever, Parliamentary debates never decide a nation’s destiny; they merely focus attention on national issues of the day. Even today on occasions of sufficient national importance, the speeches in a Parliament are appealing and captivating. And party and ideological affinities notwithstanding, members do rise above their narrow grooves and reflect the national sentiments and aspirations on these occasions.

Of the Parliament of India in particular, it may be said that the members by their backgrounds, qualifications and avocations may not be said to fully reflect the various shades of life and opinion in the nation. And the present system of elections by simple majority from single member constituencies; the influence of party politics; the respective roles of money politics and the politics of violence; the general social, educational, ethical and economic conditions in the country; and the political culture of the people generally may be said to further distort the real representative character of Parliament. But Parliament, it has to be remembered, is not intended to be a mere ideal mirror but also a functional institution. And although there is much scope for improving its present representative character and the quality of its members, the responsibility for which to a large extent must rest
immediately with the political parties and eventually with the people at large, Parliament has generally been true to its claim to be the highest representative body of the people.

Not unfrequently it is also pointed out that the elected representatives of the people do not take their Parliamentary work seriously, particularly because of the awareness of the stranglehold of party mechanism on Parliamentary decisions and also partly because of their own preoccupations with personal, sectional or party ends. And *prima facie* the normally poor attendance of the members and Ministers in Parliament is an affirmative indicator of this indictment. It seems possible and desirable that a member ought to be able to devote more time to his work in Parliament and also serve his personal and sectional or party wishes and ambitions by working harder and more sincerely; thereby retrieving Parliament from being treated as an "all-India club," a "talking shop," a gossip grove, a lively lobby, a lavish lounge or a breezy balcony.

A speck on Parliament at work also seems to be the absence of an awareness of the need for maintaining Parliamentary decorum and propriety in a House for not only a smooth and orderly transaction of the business of a day but also for having a wider edificatory value for the people outside the House. Those who claim to represent the people ought also to present themselves before the people by words and deeds, by character and conduct, as generally the persons whom an individual elector may seek to emulate in his personal and public life. These representatives ought to be ideal without making the people idolators or iconoclasts. Parliamentary proceedings in India have not been paragons of Parliamentary propriety.

Then the predominance of a single political party also dampens Parliamentary virtue to a degree. If, on the one hand, the loose texture of the single dominant party provides room for healthy intra-party dissent, it also breeds sordid factionalism and vitiates political life at large. This predominance has tended to make the executive less responsible and responsive in real terms and has generally made the whole executive and administration more impervious and imperious and less effective and efficient. Often Parliament, a brave watch-dog of public affairs, turns out to be a puny barking-dog while the executive royally rides past Parliament on the elephant of massive party majority. Even the genuine democratic spirit of the top party
leaders appears, then, like the condescending smile of the king in the howdah.

The Opposition is terribly weak and divided. And oppressed by its feeling of weakness and frustration, it makes not the even use of the Parliamentary devices of adjournment, censure and no-confidence motions, debates, points of order and Parliamentary privilege. It has become accustomed merely to record its protests in every possible manner inside and outside Parliament, without caring much for long term interests and objectives of the nation. And unless the Opposition rises above its present pathological weakness and frustration; or the ruling party shines forth in pristine glory; or a new partyless democracy emerges, (any of which appears utopian at this stage) Parliament may not be expected to come out in its true form. Yet Parliament must, in the interests of the people, be able to function effectively, for, as Nehru said in the Lok Sabha in 1951,40

"after all, the responsibility for the Government of India, for the advancement of India, lies on this and future Parliaments of India and if this Parliament or future Parliaments of India do not come up to our expectations, then it will bode India no good."

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40 See Lok Sabha Deb. on the Constitution (First Amendment) Act, 1951.
CHAPTER 30

THE STATE LEGISLATURE

An emblem of the colourful diversity in the country; a regional representative arm of the people of India; an additional forum of democracy; a participant in the Constitution amending process; an authority with plenary legislative competence within its own sphere; the hallmark of federalism; and the foundation and sentinel of constitutional State Government and efficient administration, the Legislature of a State has been conceived by the Constitution to function as a miniature Parliament in the State.

STATUS AND CONSTITUTION OF STATE LEGISLATURE

The Legislature of a State is not subordinate to, nor is it a delegate or an agent of, the Union Parliament.¹ Within the sphere of its competence, its powers are of the same nature and ambit as the powers of the Union Parliament, and here lies the key to the federal principle in the scheme of the Constitution. The State Legislatures, more than any other institution, symbolise the federal essence of division of powers between the Union and the units. Federalism in India, or for that matter in any other country, is inconceivable without the State Legislatures.

CONSTITUTION OF LEGISLATURES

Article 168, relating to constitution of State Legislatures, reads:

“(1) For every State there shall be a Legislature which shall consist of the Governor, and—

(a) In the States of Andhra Pradesh, Bihar, Madhya Pradesh, Madras, Maharashtra, Mysore, Punjab, Uttar Pradesh, and West Bengal, two Houses;

(b) in other States, one House.

(2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly and where there is only one House, it shall be known as the Legislative Assembly.”

Article 168 provides, then, for both bi-cameral and uni-cameral Legislatures for the States. Where the Legislature is bi-cameral its

two Houses are known as the Legislative Council (Vidhan Parishad) and the Legislative Assembly (Vidhan Sabha), and where the Legislature is uni-cameral, its House is known as the Legislative Assembly (Vidhan Sabha).

**Bicameralism in the States**

In the Constituent Assembly the concept of bi-cameralism for the States was at such a serious discount that the Provincial (now State) representatives were left to settle the issue separately in each case. The Draft Constitution had even left the manner of election to the Vidhan Parishad to be decided by the Constituent Assembly, which made Rajendra Prasad say:

"I confess a sense of disappointment at the Drafting Committee not being able to find a solution for this question. (Hear, hear.) It is an important matter in the Constitution that the composition of the Chambers of the Legislature should be laid down definitely."

In the result, the powers of the Vidhan Parishads and their role in the States came to be much less significant than those of the Rajya Sabha at the Centre. And added to this is the fact that a Vidhan Parishad has no role as a federal Chamber. However, some of the other advantages, like the advantage of having elderly and more experienced persons associated with the Government, the opportunity for cooler and maturer debates and the possibility of introducing a salutary delay in legislation, may also be claimed for a Vidhan Parishad. But at best it provides only a few more political perching places and expands the scope of manoeuvrability in State politics.

Its insignificance is also reflected in the constitutional provision for abolishing or creating it in any State. And now increasingly more and more States are coming to have uni-cameral Legislatures. Article 169 says in this behalf as follows:

"(1) Notwithstanding anything in article 168, Parliament may by law provide for the Legislative Council of a State having such a Council or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting.

(2) Any law referred to in clause (1) shall contain such provisions for the amendment of the Constitution as may be necessary to give effect to the provisions

of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary.

(3) No such law as aforesaid shall be deemed to be an amendment of the Constitution for the purposes of Article 368."

**QUALIFICATIONS AND DISQUALIFICATIONS OF THE MEMBERS OF LEGISLATURE**

As in the case of the Union Parliament, the Constitution provides in identical terms for the qualifications and disqualifications of the members of the State Legislatures by article 173 and 191, respectively, and further authorises Parliament to legislate on these matters.

**Determination of Subsequent Disqualification**

The question of subsequent disqualification of a member of a State Legislature is decided by the Governor in accordance with article 192 which says:

"(1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion."

**COMPOSITION AND DURATION OF THE HOUSES OF LEGISLATURE**

The Constitution merely provides for the maximum and minimum strength of the members of the Houses of the State Legislatures, whose actual strength varies from State to State, depending upon the size and population of the State.

**Composition of the Vidhan Sabhas**

A Vidhan Sabha is a popularly elected Chamber on the basis of universal adult franchise, and article 170 says that its maximum membership shall not exceed five hundred and the minimum shall not be below sixty. This article provides as follows:

"(1) Subject to the provisions of article 333, the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State.

(2) For the purpose of clause (1), each State shall be divided into territorial constituencies in such manner that the ratio between the population of each

\^a See Appendix I.
constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State.

Explanation.—In this clause, the expression 'population' means the population as ascertained at the last preceding census of which the relevant figures have been published.

(3) Upon the completion of each census, the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies shall be re-adjusted by such authority and in such manner as Parliament may by law determine:

Provided that such re-adjustment shall not affect representation in the Legislative Assembly until the dissolution of the existing Assembly.”

Composition of the Vidhan Parishads

A Vidhan Parishad comprises members who are nominated, indirectly elected and elected from special constituencies in accordance with article 171 which also limits its membership to one-third of the total membership of the concerned Legislative Assembly and fixes its minimum strength at forty. This article reads:

“(1) The total number of members in the Legislative Council of a State having such a Council shall not exceed one-third of the total number of members in the Legislative Assembly of that State:

Provided that the total number of members in the Legislative Council of a State shall in no case be less than forty.

(2) Until Parliament by law otherwise provides, the composition of the Legislative Council in a State shall be as provided in clause (3).

(3) Of the total number of members of the Legislative Council of a State—

(a) as nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities in the State as Parliament may by law specify;

(b) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in the territory of India or have been for at least three years in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university;

(c) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament;

(d) as nearly as may be, one-third shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly;

(e) the remainder shall be nominated by the Governor in accordance with the provisions of clause (5).
(4) The member to be elected under sub-clauses (a), (b) and (c) of clause (3) shall be chosen in such territorial constituencies as may be prescribed by or under any law made by Parliament, and the elections under the said sub-clauses and under sub-clause (d) of the said clause shall be held in accordance with the system of proportional representation by means of the single transferable vote.

(5) The member to be nominated by the Governor under sub-clause (e) of clause (3) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:

Literature, science, art, co-operative movement and social service.

Duration of a State Legislature

A Vidhan Sabha has a term of five years, which may be extended by Parliament by the specified period while a Proclamation of Emergency is in force, and it may be dissolved earlier. A Vidhan Parishad is not subject to dissolution, but one-third of its members retire every second year. Article 172 lays down as follows in this regard:

“(1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly:

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not exceeding in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.”

Casual Vacancies

A seat in a House of a State Legislature falls vacant due to the death of a member or his expulsion by the House for a breach of privilege or contempt under article 194. A seat may also fall vacant for incurring subsequent disqualifications, or recusancy under article 190, or if a member resigns in writing to the Speaker or the Chairman, as the case may be, within the terms of the same article. The provisions of this article are identical with those of article 101 relating to Parliament, and any casual vacancy in a State Legislature is also filled in by holding a by-election.

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Salaries and Allowances of Members

Of the salaries and allowances of the members of a State Legislature, article 195 provides as follows:

"Members of the Legislative Assembly and the Legislative Council of a State shall be entitled to receive such salaries and allowances as may from time to time be determined, by the Legislature of the State by law, and until provision in that respect is so made, salaries and allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Legislative Assembly of the corresponding Province."

Officers of a State Legislature

The constitutional provisions, contained in articles 178 to 189 relating to the officers of a State Legislature, are, mutatis mutandis, the same as those for the officers of the Union Parliament. A Vidhan Sabha has a Speaker, a Deputy Speaker and a panel of Chairmen, and notably the Speakers in the States have shown more political proneness. A Vidhan Parishad has a Chairman, a Deputy Chairman and a panel of "Vice-Chairmen". Each House of a State Legislature has its own Secretariat headed by the Secretary to the House and watch and ward staff headed by the Marshall, and control of the Secretariat and watch and ward staff vests in the Speaker or the Chairman, as the case may be.

COMMITTEES OF A STATE LEGISLATURE

Under the rules of State Legislatures standing, ad hoc, consultative, advisory and inquisitorial committees are formed and function in the States more or less on the lines of the committees of the Union Parliament, though less effectively. Their number and size vary from State to State and from time to time in the same State, but some committees, such as, the Public Accounts Committee, the Estimates Committee, the Privileges Committee, the Committee on Subordinate Legislation, and the like, are to be found in all the States.

Regional Committees

Then, notably by virtue of the provisions of articles 371, 371B and 371C, the States of Andhra Pradesh, Assam and Manipur, respectively, are to have committees of their respective Legislative Assemblies.

8 The W. Bengal incident of 1967, the Punjab incident of 1968 and the Madras incident of 1973 are significant indicators.
consisting of the members of the specified areas and with such functions as the President may by order determine.

THE STATE LEGISLATURE AT WORK

A State Legislature at work presents a faithful reproduction of Parliament at work, except that the Second Chamber of the former is more of a nonentity than that of the latter and the former leads a more variegated and chequered, but a less dignified and orderly, life than the latter.

THE LEGISLATURE IN SESSION

The Legislature of a State holds its sessions in the State capital, although it may be summoned by the Governor to meet anywhere specified in the summons, and its most important session is the Budget session.

Summoning, Prorogation and Dissolution

Article 174 relates to the summoning and prorogation of the Legislature of a State and the dissolution of its Legislative Assembly. It reads:

"(1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The Governor may from time to time—
(a) prorogue the House or, either House;
(b) dissolve the Legislative Assembly."

Conduct of Business

Before a member takes his seat in a House of the Legislature of a State he is required by article 188 to take an oath in the form set out in the Third Schedule. And article 193 provides for a penalty of rupees five hundred a day if a member sits or votes without taking the oath or if he is otherwise disqualified or not qualified for the purpose. The form of oath is as follows:

"I, A.B., having been elected (nominated) a member of the Legislative Assembly (Legislative Council), do swear in the name of God that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and territorial integrity of India and that I will faithfully discharge the duty upon which I am about to enter."
Voting and Quorum: All questions in a House are decided in accordance with the majority opinion, unless the Constitution requires a special majority for any purpose, and a House is competent to transact any business even if there is any vacancy in its membership. The quorum for a meeting of a House is “ten members or one-tenth of the total number of members of the House, whichever is greater”, and the presiding officer has the power to suspend or adjourn a House if there is no quorum.

Governor’s Address and Messages

The Governor has the right to address a House of the Legislature or its both House jointly and he may at any time send messages to a House or both Houses. The Governor also has the right of special address to the Legislature at the first session after a general election to the Legislative Assembly and at the commencement of the first session of the Legislature every year.

Procedure Generally

Subject to the provisions of the Constitution, each House of the Legislature of a State has the power to frame rules for regulating the conduct of business in the House, and the Legislature may also by law regulate the conduct of financial business. Of the language to be used in the Legislature of a State, article 210 says:

“(1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, business in the Legislature of a State shall be transacted in the official language or languages of the State or in Hindi or in English:

Provided that the Speaker of the Legislative Assembly or Chairman of the Legislative Council, or person acting as such, as the case may be, may permit any member who cannot adequately express himself in any of the languages aforesaid to address the House in his mother-tongue.

(2) Unless the Legislature of the State by law otherwise provides, this article shall, after the expiration of fifteen years from the commencement of this Constitution, have effect as if the words “or in English” were omitted:

Provided that in relation to the Legislature of the State of Himachal Pradesh this clause shall have effect as if for the words ‘fifteen years’ occurring therein, he words ‘twenty-five years’ occur.”

CONTROL OF THE EXECUTIVE

Like Parliament the primary function of the Legislature of a State is to control the executive by keeping a constant watch on its opera-

\[\text{Art. 189.} \quad \text{Art. 175} \quad \text{Art. 176.} \quad \text{Arts. 201 and 209.}\]
tions and criticising its activities. The Ministry in a State is responsible to the Legislative Assembly of the State, and it has often been made to bow out of office in deference to the will of the members of the Assembly.

Control of Bureaucracy

Legislative control of the executive also includes control over bureaucracy, but generally the State Legislatures have not proved their mettle on this score.

LEGISLATION

Legislation in the Legislature of a State broadly follows the pattern of legislation in Parliament. A Bill, not being a Money Bill under article 198 or a financial Bill under article 207, may originate in either House of a State Legislature. It has to undergo all the stages it may be expected to undergo in the Houses of Parliament, before being presented to the Governor for his assent. The effect of a prorogation or dissolution on such a Bill is exactly the same as that on a Bill pending in Parliament arising out of such a course of action.\(^8\)

Differences between the Houses

However, for ironing out the differences between the Houses of a State Legislature, relating to a Bill other than a Money Bill, there is no constitutional requirement for a joint sitting of the Houses. Article 197 instead provides as follows:

"(1) If after a Bill has been passed by the Legislative Assembly of a State having a Legislative Council and transmitted to the Legislative Council—

(a) the Bill is rejected by the Council; or

(b) more than three months elapse from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree;

the Legislative Assembly may, subject to the rules regulating its procedure, pass the Bill again in the same or subsequent session with or without such amendments, if any, as have been made, suggested or agreed to by the Legislative Council and then transmit the Bill so passed to the Legislative Council.

(2) If after a Bill has been so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council—

(a) the Bill is rejected by the Council; or
(b) more than one month elapses from the date on which the Bill is laid before the Council without the Bill being passed by the Council; or
(c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree;

the Bill shall be deemed to have been passed by the Houses of the Legislature of the State in the form in which it was passed by the Legislative Assembly for the second time with such amendments, if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly,

(3) Nothing in this article shall apply to a Money Bill."

Assent to Bills

Once the Legislature of a State passes a Bill, it is presented to the Governor for his assent, and apart from the requirement that the Governor may, or must, as the case may be, reserve certain Bills for the consideration of the President, his powers in this regard are the same as those of the President. Article 200 says:

"When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:

Provided that the Governor may, as soon as possible after presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will consider the Bill or any specified provision thereof, and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the House or Houses shall consider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom:

Provided further that the Governor 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 High Court as to endanger the position which that Court is by this Constitution designed to fill."

Bill Reserved for Consideration of the President: A Bill reserved for the consideration of the President is transmitted to him as soon as possible, and of his powers in regard to such a reserved Bill, article 201 says as follows:

"When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom:

Provided that, where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to the House or, as the case may be, the Houses of the
Legislature of the State together with such a message as is mentioned in the first proviso to article 200 and, when a Bill is so returned, the House or Houses shall consider it accordingly within a period of six months from the date of receipt of such message and, if it is again passed by the House or Houses with or without amendment, it shall be presented again to the President for his consideration."

**TRANSACTION OF FINANCIAL BUSINESS**

The principles and practices governing the transaction of financial business of the Union are also generally applicable to the States. Article 199 defines Money Bills in the case of State Legislatures in terms similar to those of article 110 relating to Money Bills in the context of the Union Parliament, and article 198 lays down the same procedure for Money Bills in a State Legislature as that of article 109 for the Union Parliament. The special provisions as to financial Bills in the case of a State Legislature are also the same as those in the case of the Union Parliament.

*The Annual Financial Statement:*

*The Budget*

The constitutional provisions for the annual financial statement, the budget, of a State, including its procedure in the Legislature of the State, are the same as those of the Union, and a State budget is presented before the State Legislature earlier than the presentation of the Union budget before the Union Parliament.

*Finance and Appropriation Bills:* Finance Bills, comprising State taxation proposals, and Appropriation Bills, containing provisions for withdrawing money from the State Consolidated Fund, have also to be presented before, and passed by, the Legislature of the State following the passing of the State budget.

*Supplementary, Additional or Excess Grants and Votes on Account, Votes of Credit and Exceptional Grants:* In the case of the Legislature of a State also article 205 provides for supplementary, additional or excess grants and article 206 for votes on account, votes of credit and exceptional grants in terms identical with those of articles 115 and 116, respectively, relating to these matters in the context of the Parliament of India.

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9 Art. 207.  
10 Arts. 202, 203.  
11 Art. 204.
 Roles of the Financial Committees and Comptroller and Auditor-General

The Legislature of a State controls the purse not only through its control over the financial measures placed before it for being enacted into laws, but also maintains a continuous watch on all the financial operations of the State Government through its Estimates and Public Accounts Committees, although these Committees seem to function less vigorously than their Parliamentary counterparts. Then, the functioning of the Comptroller and Auditor-General through the office of the Accountant-General of the State is also notable in this regard.

PARTICIPATION IN CONSTITUENT FUNCTION

The Legislative Assembly of a State resolves in the first instance for the abolition or creation of the Legislative Council in the State, before Parliament puts by law a final seal on such a proposal. Then, certain amendments under article 368 require ratification by the Legislatures of not less than one-half of the States in the specified manner.

CERTAIN MISCELLNEOUS FUNCTIONS

Like Parliament the Legislature of a State has also quite a few miscellaneous functions. For example, the report of the State Public Service Commission and the report of the Comptroller and Auditor-General relating to the accounts of the State are placed before it for consideration. Then, the elected members of the Legislative Assembly of a State participate in the election of the President of India.

THE OPPOSITION

Much of all that has been said about the Opposition in Parliament applies also to the Opposition in the State Legislatures. Additionally, it may be noted that the Opposition groups in the State Legislatures have proved more vociferous and ingenious in recording their protests, and they have generally tended to be less orderly and responsible. The Opposition groups, further strengthened by factionalism in the ruling party, have sometimes forced the Ministry in a State also to resign, and factionalism in State politics is proverbially at its worst.
Then, majority, coalition or minority Governments of a party or parties other than the ruling party at the Centre, even with the support of the latter, have occasionally moved into the State Secretariats. And interestingly, it is even found that a regional party may as much monopolise power in a State as the present ruling party has done at the Centre.

**LEGISLATIVE DECLINE**

To the numerous points raised in the context of Parliamentary decline, the first point that may be added in the context of the decline of the Legislatures is that generally the Legislature of a State is less orderly and dignified in its daily working and the quality and tone of its debates are less edifying than those of Parliament. Then, the State Legislatures have always to function under the shadow of Parliamentary sovereignty and the Legislature of a State may temporarily be suspended or may altogether be pole-axed under article 356 when President’s rule is imposed in the State.
CHAPTER 31

JUDICIAL POWER

Generally speaking, judicial power may be said to consist in the conclusively settling of controversies by public authorities in a judicial manner within the terms of law. In Huddart, Parker & Co. v. Moorehead, Griffith C. J. said that judicial power is

"The power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take an action."

THE NATURE OF JUDICIAL DECISION MAKING

Yet, "judicial power" has ever remained a "definitional puzzle". Historically, the judicial function is a specialised area of the executive or administrative function, which has come to acquire a halo of its own. The Constitution of India speaks of "administration of justice", and Hidayatullah J., in H. S. Sugar Mills v. Shyamsundar, viewed the judiciary as an instrument of government. The judiciary is an arm of the state with its peculiar aura of detachment and with its power of interpreting the laws in the course of settling a controversy in a judicial manner.

In settling a controversy, a lis, a proposition and an opposition, the judiciary but makes a decision. And in making a decision it has to ascertain not only which view of a particular fact-situation is true, but also to determine what legal rules and principles are to apply to the fact-situation. It has to make a choice of both facts and law. It has to weigh the evidence and apply the law. And the question arises whether in arriving at its decisions the judiciary merely declares the laws or also creates the laws; whether the judicial function is declaratory or creative in nature.


2 Entry 3, List II, Schedule VII. Italics are mine. See also State of Bombay v- Narottamdas, (1954) S. C. R. 51.

DECLARATORY THEORY OF JUDICIAL FUNCTION

The declaratory theory reflects the traditional view of judicial function, and Bacon\(^4\) said: "Judges ought to remember that their office is *jus dicere* and not *jus dare*, to interpret law and not make law." To Hamilton,\(^5\) "the proper province of courts" was "the interpretation of the law." "To declare what the law is or has been is a judicial power."\(^6\) Judges generally prefer this declaratory theory,\(^7\) and the Constitution of India also adheres to this view in so far as it provides by article 141 that

"The law declared by the Supreme Court shall be binding on all courts within the territory of India."\(^8\)

CREATIVE THEORY OF JUDICIAL FUNCTION

The dogma of a judicial office still seems to be that a judge merely declares the law, but the fact is that in deciding a case, he never acts, as Kantorowicz says, as "an automaton, a sort of judicial slot-machine".\(^9\) Even when a court claims to declare a law it fills it with a new meaning; a new content. A person like Gray may go to the extent of saying that all laws are essentially made by the judges,\(^10\) and judicial creativity may now be regarded as a commonly accepted creed.\(^11\)

But whether a court declares a law or creates a law, in settling a controversy it makes a decision. What distinguishes a judicial decision from other decisions is the manner of making a decision.\(^12\) And although the statement may appear tautological, it is more in the nature of things to suggest that the judiciary decides controversies in a judicial manner. In settling controversies in a judicial manner, the judiciary administers justice according to law. And for a proper understanding of judicial function it is necessary to have a broad view of the nature of justice according to law.

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\(^4\) Bacon: "Of Judicature," *Essays*.

\(^5\) Hamilton: *The Federalist*, No. LXXVIII.

\(^6\) *Das v. Van Kleeck*, (1811) 7 Johns. 498.


\(^8\) Italics are mine.


THE NATURE OF JUSTICE ACCORDING TO LAW

The concept of justice according to law is multi-dimensional and it has crystallised into now generally accepted certain basic elements through the course of human history. Yet, it ought always to be remembered that any discussion relating to the nature of justice according to law cannot reasonably claim a finality for itself. It must always remain tentative. And the broad basic elements of justice according to law referred to below are merely intended to indicate some of the manifestations of its form rather than to exhaustively state its nature.

JUDICIAL INDEPENDENCE

The degree of independence enjoyed by a person called upon to decide a controversy may, in a sense, be said to be a measure of the development of human civilization. Judicial independence is a parameter of justice according to law in any political community.\(^{13}\) In principle, all that survives even today as the crystal core of the theory of separation of powers is judicial independence, and in practice, judicial independence has a firmer base in the necessity of securing certain results from the work of a certain group of persons.\(^{12a}\)

Judicial independence involves both psychology and ecology; both a state of mind and certain conditions of work. Judicial independence has both psychological and institutional manifestations, and the purpose of its institutional manifestations is essentially to fortify its psychological working. In the result, the judiciary, although an arm of the state, is deemed to stand between the state and the people\(^{14}\), or more accurately between the executive and the people. The judge is a public functionary, but he is considered to function outside the general fold of the public servants in a country. This assumption also holds good in the scheme of the Constitution of India, and this is clearly the first manifestation of the institutional aspect of judicial independence.

The second institutional aspect of judicial independence, which also obtains in this country, is to be found in the organisation of the

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\(^{12a}\) Cf. Wallas, Graham: *Our Social Heritage*; p. 1.

judiciary itself. For, although the judicial organisation is scalar, the concept of subordination in judicial hierarchy is distinct from that in any other organisation. A judge, wherever placed in a judicial hierarchy, is to make a decision according to the dictates of his own reason and not under the direction of a superior. What a superior court may, even by a writ of mandamus, direct a subordinate court to do is to decide an issue according to law.

Then, the third, fourth and fifth institutional aspects of judicial independence may be stated as the elements of "security of tenure", "sumptuous emoluments" and "adequate retirement benefits", respectively. Each of these has further ramifications. For example, the element of security of service may raise the questions of the number of persons to be appointed, mode of appointment, prescribed qualifications for appointment, scope for promotion and transfer, manner of removal, and the like. And it seems desirable to consider these three elements in their diverse aspects with the specific reference to the provisions of the Constitution in this regard relating to the superior court—the Supreme Court and High Court—Judges.

The Number of Superior Court Judges

Parliament has the power to increase by law the original number of seven Judges of the Supreme Court fixed by the Constitution, and the President determines the number of Judges to be appointed to a High Court which may have additional Judges also. Normally, there may not be much to say against these provisions, but occasions may arise when in the case of a conflict between the judiciary and the legislature or the judiciary and the executive, the legislature and the executive may use these provisions for deluging the Supreme Court with Judges amenable to their views.

Appointment of Judges

Every Supreme Court Judge is appointed by the President in consultation with such Supreme Court and High Court Judges as he may think fit. But in the appointment of a Judge other than the Chief Justice of the Court, the Chief Justice must be consulted. Similarly, the President appoints every High Court Judge in consultation with the Chief Justice of India, the concerned Governor, and the Chief Justice of the High Court in case of a Judge other than the-
Chief Justice. The President exercises his power on the advice of his Ministers responsible to the Lok Sabha, and in principle there may not be any serious objection to the procedure for appointing superior court Judges. But unhappily, the Law Commission had to say that the appointment in practice bears the brutal bruises of personal, political, communal and parochial considerations. In fact, persons of certain groups of families, and their relations and friends, provide most of the superior court Judges in the country.

Appointment of Chief Justice: Then, the question of appointment of the Chief Justice of India or the Chief Justice of a High Court has also to be taken note of. Normally, the principle of seniority applies. But the Law Commission itself disfavoured this rule, and in a sense paved the way for what happened recently when this rule was shelved in appointing the Chief Justice of India, in protest against which three Judges of the Supreme Court resigned. And it seems that unless this incident be treated as a rare exception, it is likely to cause an uncertainty in the minds of the Judges of the superior courts and of the public in general.

Qualifications for Appointment

True, the Constitution prescribes sufficiently high qualifications for appointment to the superior courts, but this has not deterred the executive in India from making unholy use of these hallowed provisions. For, not unoften unwholesome considerations of party, community, region, personal relation, and the like prove really decisive in the appointment of the superior court Judges.

Promotion and Transfer

The scope for promotion in the scheme of the judiciary in the country is tremendous, indeed. A munsiff in an obscure mofussil town may look forward to sitting on the Supreme Court bench. In a way this provides work incentive. But this also opens up the floodgate for the persons in the judicial service seeking executive favour, and only the saints and valiants can survive the designs of the real rogues in Government and administration. Then, the requirement of transferring a High Court Judge may have both its good and bad uses.

16 Idem.
Emoluments

The salaries and allowances of the superior court Judges are fixed by the Constitution, which are charged upon the Consolidated Fund of the Union or a State, as the case may be. Parliament may by law change the allowances and privileges enjoyed by the Judges, but such a change cannot adversely affect a Judge while he is in office. However, while a Financial Emergency is proclaimed, the economic axe may also fall on the salary and allowances of the Judges. And although the salaries and allowances of the superior court Judges are not negligible, it is now generally recognised that they are increasingly proving less attractive to the talented members of the bar and the society generally.

Terms of Office

A fairly high retiring age has been fixed by the Constitution for the superior court Judges. A Supreme Court Judge holds office until he attains the age of sixtyfive years and a High Court Judge continues in office till sixytwo years of age. Besides, a retired Supreme Court Judge may be requested to sit and act as a Judge of that Court in specified cases and a retired High Court Judge may also be requested to attend a sitting of a High Court. This requirement is, however, a double edged sword, which, on the one hand, provides an avenue for utilising the best judicial talent, but also, on the other, opens a backdoor for either favouring a retired Judge or using him for favouring the establishment.

Removal of Judges

The permanence of the tenure of office of a superior court Judge is further strengthened by a special procedure for his removal only "on the ground of proved misbehaviour or incapacity." A Supreme Court or High Court Judge may be removed by the President in pursuance of an address by each House of Parliament supported by not less than a majority of the total members of the House and a majority of not less than two-thirds of its members present and voting in support of the address. And significantly, none of the superior court Judges has thus far been removed from office, although in certain cases they have chosen to resign.
Retirement Benefits

A Judge of a superior court is entitled to the specified pension. It is generally felt that the amount paid as pension to him is not adequate to immunise him from the flickering expectations of securing post-retirement jobs either under the Government or in the private sector. This situation becomes particularly pressing because there is no prohibition on a retiring Judge from accepting any service under the State, although there are certain restrictions on his practising legal profession.

Restrictions on Post-retirement Practice

A Judge of the Supreme Court cannot practise law or plead or act before any court or authority in India after retirement from his office, and a permanent High Court Judge is precluded after retirement from practising or pleading before any court or authority in India except the Supreme Court or the other High Courts. But the Constitution does not prohibit a superior court Judge from accepting any employment under the state or in any other sector of the society. Notably, whereas the restrictions on practice have generally given good results, the absence of prohibition on post-retirement employment has not unoften bred unhealthy trends. It is desirable that the retirement benefits of a Judge should be increased to offset any impact on his independent working in conscious or unconscious expectation of a post-retirement job.

Superior Court Establishments

As an aid to the independence of the superior courts the Constitution also provides that the Chief Justice of the Supreme Court, or that of a High Court, or a Judge or officer authorised by him shall make all appointments of the officers and employees of the Court, although the President or the Governor, as the case may be, may specify the posts which are to be filled in after consultation with the relevant Public Service Commission. The Chief Justice or a Judge or officer authorised by him has also the rule making power relating to the conditions of service of such officers and employees, but the President’s or the Governor’s sanction, as the case may be, is required for the rules relating to their salaries, allowances, leave or pensions. Besides, the administrative expenses of a superior court are charged on the concerned Consolidated Fund.
In the context of some of these constitutional guarantees for securing the independence of the superior courts, it may be also noted that the subordinate judiciary in the country, even after the latest Criminal Procedure Code, is more open to executive influence. And the factors which are generally held out as favouring the independence of the superior courts are not found operative in the case of the subordinate judiciary.

However, although independence of the judiciary is neither the caprice of a court nor the idiosyncrasy of a judge, it must essentially be looked upon as a specialised area of the general human desire for liberty. It has to be admitted that mere institutional guarantees, whether in the case of the superior courts or the subordinate judiciary, cannot secure the independence of the judiciary, which is ultimately an attribute of human mind and an element of human character and conduct. A society otherwise stinking with hopelessness, corruption, vices and servility cannot indeed expect of its judges independence befitting a judiciary in a liberal democracy.

**JUDICIAL IMMUNITY**

Judicial independence has also the rampart of judicial immunity raised round it. A judge is not liable for anything done in his official capacity. He is immune from any action for defamation. It is a kind of special privilege for the smooth performance of the functions of the judiciary. A judge is above any action even if a decision given by him is proved to be "malicious or corrupt". Immunity is enjoyed not only by the judges, but also the other persons taking part in a judicial proceeding or executing a judicial order.

Our Constitution provides that the conduct of a Supreme Court, or a High Court judge, in the discharge of his duty cannot be discussed in Parliament, or a State Legislature, except for the purpose of presenting an address to the President for the removal of such a Judge. And the courts have the power to punish a person for contempt.

Two points are striking in this connection. On the one hand, this special privilege is guaranteed to the judiciary for creating conditions for its impartial and independent working, and on the other, this special privilege also furthers the prestige of the judiciary.

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JUDICIAL IMPARTIALITY

“The essence of a judge’s office is that he shall be impartial.” This impartiality has both institutional expressions and psychological assumptions. In any organised system of justice a person is not allowed to be a judge in his own case “because his interests will certainly bias his judgment.” And these interests may be of three kinds: (i) pecuniary or direct; (ii) personal; and (iii) official.

It is to be noted that the aforesaid elements of impartiality do not, however, embrace the psychological element of objectivity underlying a judicial decision. The technique of impersonal legal thinking makes the ingredient of impartiality in the administration of justice according to law basically a psychological element, characterised by a particular mode of cognising facts. But impartiality of a judge does not mean that he is shut in a glass-house. He has to make a choice. He must choose and “choose well.” Impartiality is gained by objectifying not his own personal convictions, but by materialising the aspirations, convictions and philosophies of the men and women of his time.

JUDICIAL INTEGRITY

A judge is to administer justice honestly and faithfully. He is not to consider anybody his friend or foe. He is not to take any benefits from any party to a case. It may be pointed out that there was a time when the judges received gifts from the parties and also had their shares in the fines imposed on the offenders. But these are inconceivable anathema to-day.

Then, there are other subtle influences which may disturb the integrity of the judiciary. In the first place, a judge’s zeal in the implementation of the dead letters of a law may differ from the community’s sense of justice. Secondly, there are numerous factors, such as, the peculiar social background of a judge or his personal convictions or perjudices, which, directly or indirectly, influence his decisions. It is therefore, expected that a judge must not only have a sterling character and excellent morale but also wide sympathies for the mores of his time.

EQUALITY AND GENERALITY

If judicial independence is the keystone, equality before law is the cornerstone of justice according to law. In 420 B.C., Pericles said that "all men are equal in the sight of law." Hobbes also was of the opinion that "justice be equally administered to all degrees of people." And both, it may be noted, had in mind mere procedural equality in the administration of justice.

The concept of equality in the eye of law came to include at least two elements after the English, American and French Revolutions. In the first place, it means equality of treatment, and in the second, equality of status. But, in effect, it meant that legal equality is compatible with material or economic inequalities, and Dicey stated this principle of equality before law as the second element of his concept of the rule of law only as equality before the adjudicatory forums.

The concept of equality in the eye of law also involves a concept of generality of law. It was Rousseau who first said that the law must be general because it is the general will which is the sovereign law making authority. But generality of law does not mean universality of law, because the universal law can exist only as an idea. Again, generality does not indicate that all laws are equally applicable to all the members of the public. It rather simply means that a law is referable to the interests of the public generally.

Pollock considered equality and generality as the normal and necessary marks of justice administered according to law and, in effect, they together have the same meaning as the expression "equal protection of the laws" in the Constitution of the United States and the Constitution of India. Broadly speaking, equal protection of the laws implies like treatment of the likes, and admits of a reasonable classification on the basis of an intelligible differentia and a reasonable nexus between the classification made and the purpose of legislation. It thus interpreted also includes equality before adjudicatory forums.

23 Art. XIV, Sec. 1, Constitution of the United States.
CERTAINTY AND PREDICTABILITY

For working a scheme of justice according to law "it is often more important that a rule should be definite, certain, known and permanent than it should be ideally just,"25 because it is this element of certainty which makes a distinction between administering an abstract principle of justice and administering a scheme of legal rights and obligations. As life becomes more complex and situations become more diverse, the necessity for fixed and known rules becomes more pressing.

The element of certainty also implies an element of predictability. The element of predictability is necessary to guide an individual in his daily life, and to ensure him legal liberty which may broadly be conceived as the liberty to act in conformity with the prescribed norms of conduct. It is, however, not necessary that this predictability should be within the reach of any man in the street, but it is essential that persons who have acquired the technique of legal thinking should be able to foresee with reasonable certainty the conclusions which may be drawn relating to a particular case.

Although justice according to law implies the administration of certain and predictable legal norms, it does not require that the entire judicial process should operate as a legal slot-machine. A total exclusion of judicial discretion by legal principles is impossible in any system.26 "Discretion always remains, because it is inherent in the very nature of the judicial function."27

CONSISTENCY AND CONTINUITY

Consistency is another essential aspect of justice according to law. Robson says that consistency implies "a reasoned relation, in the first place, between decisions for the same class of cases at different points of time, in the second place, between different classes of cases at the same point of time, and in the third place, between different classes of cases at different points of time."28 Thus, consistency implies compatibility between one judicial decision and another

26 Salmond: *Jurisprudence*, op. cit.; p. 44.
irrespective of the time, place and persons involved, and compatibility through time is continuity. The doctrine of *stare decisis* is an offshoot of this element of consistency and continuity. But the element of consistency and continuity does not rule out the scope for a review of an earlier judicial decision in response to changed social needs.

**THE REQUIREMENT TO ACT ONLY WHEN MOVED**

Another attribute of the administration of justice according to law is that a judge is to act only when moved by a party. This is probably an institutional expression of the principle of impartiality. There must be a *lis*, a proposition and an opposition, before a judge. Gray tells us that "a judge of an organised body is a man appointed by that body to determine duties and corresponding rights upon the application of person claiming those rights."29

**THE OBLIGATION TO ACT PERSONALLY**

Justice according to law leaves no scope for a judge to delegate his functions. He is to apply his mind to the case in hand and make up his own mind in coming to a decision. Delegation is strictly prohibited. Normally, in other areas of governmental operations, there is ample scope for delegation of authority. But the responsibility of a judge to decide a case can neither be delegated nor abdicated. A superior court may send a direction for retrial, but this direction is never intended to dictate the subordinate court's judgment.

**AUDIATUR ET ALTERA PARS**

*Audiatur et altera pars* or *audi alteram partem* rule is another basic ingredient of justice according to law. It means that a person must first be heard before being condemned, *i.e.*, he must be given an opportunity to represent his case before a decision is taken concerning him. He must be heard. This rule of being heard implies at least four elements. In the first place, a person must have sufficient notice. Secondly, he must be given sufficient opportunity to present his case. Thirdly, he must be allowed to adduce evidence in his defence. And fourthly, he must be allowed to examine the document and materials brought before the court to sustain the case against

him. It should be noted, however, that the exact scope of these four elements and the other elements involved in *audi alteram purum* rule may vary according to time, place, class of cases or class of persons.

**PROCEEDINGS MUST BE PUBLIC**

A significant aspect of justice according to law is that a judicial proceeding must be held in public under the gaze of public view. This requirement is found necessary to dispel doubts about the impartiality and independence of the judicial system in a country. It makes, so to say, justice appear truly even. And besides, publicity of judicial proceedings also tends to make the judiciary more alert in the discharge of its duties.

**THE REQUIREMENT TO CONFINE TO THE CASE IN HAND**

A case must be decided on its merits. An adjudicatory agency must confine itself to the decision of a particular controversy before it. It considers only such issue or issues as are necessary and refuses to consider all other issues which are not helpful to settle the case in hand. Thus, even if a law disturbs a provision of the fundamental rights in the Constitution, the superior courts would not declare it invalid, unless the question of its invalidity is raised and its decision is found necessary in the course of a case where an infringement of such a right is alleged by a person claiming the right.  

**THE OBLIGATION TO DECIDE ON THE BASIS OF EVIDENCE**

The essence of justice according to law demands that a judge is not only to confine himself to the controversy presented to him for decision, but also to decide on the basis of only certain evidence. It is absolutely binding on a judge to decide a case on the basis of materials placed before him. He is precluded from acting on secret reports. The rules of evidence are rooted in the belief that the proof of only certain facts in a certain manner can produce justice.

**THE REQUIREMENT OF A REASONED DECISION**

The last, but not the least significant, requirement of justice according to law is a definitive reasoned decision which, so far as the

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91 Robson, W.A.: *Justice and Administrative Law, op. cit.*; p. 79.
court making the decision is concerned, sets a legal controversy at rest.\textsuperscript{32} The element of objectivity in law demands that the process of forming a judgment should be capable of being stated in verifiable terms.\textsuperscript{33} The element of objectivity is an element of justifiability which can be sustained by a statement of reasons for a conclusion arrived at. The demand for a reasoned decision is imperative not because a judicial decision thereby becomes infallible, but because, as Popper would say, it becomes falsifiable.\textsuperscript{34} Without reasons, as Carr said,

"students cannot learn the law, practitioners cannot find arguments, parties cannot feel that their cases have had serious attention, and Courts of appeal have nothing to upset or confirm."\textsuperscript{35}

\textbf{GENERAL OBSERVATIONS}

Clearly the concept of justice according to law has nothing mythical or transcendental about it. It consists of certain recognised elements which have through centuries crystallised in their current form.\textsuperscript{36} The three majors tendencies noticeable in the process of crystallisation of the current conception of justice according to law are: (i) the progressive substitution of defined "artificial reason" for the indefinite natural reason; (ii) the gradual transformation of the impalpable judicial spirit into tangible judicial institutions; and (iii) the scientific preference for falsifiable justifiability to unverifiable objectivity.

Justice according to law is, thus, a process rather than product. It is not a court-room magic cant, but an objective decision making technique of a specialised nature which has come to be considered necessary for maintaining the rule of law. It is the manner of making a decision and not the authority making a decision that makes a decision judicial in nature,\textsuperscript{37} and it is in this light that the machinery of justice in the scheme of the Constitution has to be viewed generally.

\textsuperscript{34} \textit{Ibid}; p. 218.
Chapter 32

THE MACHINERY OF JUSTICE

The Constitution contemplates a unified scheme of the administration of justice according to law in the Republic, with the Supreme Court at the apex and the High Courts in the States, constituting the superior courts, having original, appellate, tribunal and other specified functions. Besides, there are subordinate courts and tribunals. Then, any realistic view of the machinery of justice also involves a glance at the bar and the "baton", the legal practitioners and the police, in the country. And of this unitarian system of judiciary in the federal Indian polity, Ambedkar observed as follows in the Constituent Assembly:

"The Indian federation, though a dual polity, has no dual judiciary at all. The High Courts and the Supreme Court form one single integrated judiciary having jurisdiction and providing remedies in all cases under the Constitutional law, the Civil Law or the Criminal law. This is done to eliminate all diversities in a remedial procedure."

THE SUPREME COURT

Historically speaking, a Supreme Court of Judicature at Fort William (Calcutta) came to be established by a Royal Charter under the Regulating Act, 1793, and subsequently, such Courts were also established for Bombay and Madras. They had reasonably wide powers and appeals from their decisions could be taken to the King-in-Council in England. These Court came to be replaced by the High Courts set up under the High Courts Act, 1861, and appeals from the decisions of the High Court were to be made to the Privy Council in England. This continued to be the position when a Federal Court also came to be constituted under the Government of India Act, 1935. But even then appeals in certain matters had be made only to the Privy Council, and it was only after Independence in 1957 that the jurisdiction of the Privy Council came to abolished and the Federal Court became the highest court in the land. When the Constitution was inaugurated on January 26, 1950, the Federal Court was succeeded by a Supreme Court, with enormously increased powers.

1 C.A.D., Vol. VII; p. 36.
powers and symbolising the hope of the founding fathers that the Court will not only “carry forward the high tradition of the Privy Council”, but also

“...evolve a jurisprudence suited to the genius of the people and the conditions of our country. The Court will occupy a position of unique importance and the verdict of history would largely depend upon the independence, the ability and the learning which they would bring to bear upon their task”

**CONSTITUTION OF THE COURT**

Article 124(1) establishes the Supreme Court of India consisting of the Chief Justice of India and other puisne Judges. It says:

“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”.

**Number of Judges**

Article 124(1) provides for a Chief Justice and not more than seven other Judges for the Supreme Court. But it recognises the power of Parliament to increase this number without any limits, and incidentally, this is a power which may be used also for eventually subduing the Court in any conflict between the Court and Parliament or the Government. To cope with the increasing burden of work, the number of Supreme Court Judges was raised first in 1956 and again in 1960, which now stands at thirteen.

**Appointment of Judges**

Every Supreme Court Judge is “appointed by the President by warrant under his hand and seal in consultation with such of the Judges of the Supreme Court and of the High Court” as he may consider necessary. But the Chief Justice of India must be consulted in the appointment of any puisne Judge of the Supreme Court. This requirement of consultation was intended to be a limitation on the appointing power of the President, and although it has not proved wholly effective, in the Constituent Assembly Ambedkar properly pointed out

“...that in the circumstances we live today, where the sense of responsibility has not grown..., it would be dangerous to leave the appointments to be made by


\[3\] Art. 124(2).
the President without any kind of reservation or limitation. Similarly,...to make every appointment which the Executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision... The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter... It does not also import the influence of the Legislature. The provision...is that there should be consultation of persons who are ex hypothesi well qualified to give proper advice in matters of this sort”

Qualifications: The Constitution prescribes very high qualifications for appointment as a Supreme Court Judge. This is intended not only to secure the services of the best available judicial talents but also to check the executive misuse of appointing power. Article 124(3) says:

“A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—

(a) has been for as least five years a Judge of a High Court or of two or more such Courts; or
(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
(c) is, in the opinion of the President, a distinguished jurist.

Explanation I—In this clause ‘High Court’ means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

Explanation II—In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included”.

The requirement of article 124(3) is that only an Indian citizen who has been a High Court Judge for five years or a High Court advocate for ten years, or is a distinguished jurist in the opinion of the President is eligible to be appointed a Supreme Court Judge. In practice however, although normally only eligible High Court Judges are promoted to the Supreme Court bench, extraneous considerations have not been found to be totally excluded from the appointment of Supreme Court Judges.

Appointment of Ad hoc and Retired Judges: If there is no quorum to hold or continue any session of the Supreme Court at any time, the Chief Justice may, with the approval of the President and in consultation with the Chief Justice of the High Court concerned,

4 C.A.D., Vol. VIII; p. 258.
5 Art. 127.
6 Art. 128.
request a High Court Judge eligible to be appointed as a Supreme Court Judge to attend as an *ad hoc* Judge the sittings of the Supreme Court. Again, at any time the Chief Justice of India, with the consent of the President of India, may request any willing Supreme Court Judge, or an ex-High Court Judge qualified for being a Supreme Court Judge, to sit and act as a Supreme Court Judge. And, evidently these provisions are intended to protect the Court from being paralysed in an unforeseeable situation.

*Appointment of the Chief or Acting Chief Justice of India:* The Chief Justice of India is required to be appointed by the President in the manner of appointing any other Judge of the Supreme Court and his qualifications are to be same as those of his brother Judges. In practice, generally the senior-most Supreme Court Judge is appointed Chief Justice, although only recently, but only once, this rule of seniority has been violated. Sadly, this led even to resignation by three Supreme Court Judges in protest, but interestingly this course of action had been supported in principle earlier by the Law Commission. With regard to the appointment of an acting Chief Justice article 126 says:

"When the office of the Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose".

*Terms and Conditions of Office*

Within the terms of article 124(6), before entering upon his office, every Judge of the Supreme Court takes before the President, or a person authorised by him, the following oath of office set out in the Third Schedule:

"I, A. B., having been appointed Chief Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor General of India) do swear in the name of God solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgement perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."

Tenure of Office

A Supreme Court Judge holds "office until he attains the age of sixty-five years", and his age is determined in accordance with the provisions of article 124(2A) which lays down:

However, as the second proviso to article 124(2) says,

"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".

"(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from office in the manner provided in clause (4)".

Removal of a Judge: A Judge of the Supreme Court may be removed by the President only "on the ground of proved misbehaviour or incapacity", either of which has not been defined by the Constitution, after each House of Parliament passes in the same session an address for the purpose by a majority of its total membership and also by at least two-thirds majority of its members present and voting. And although no Judge has thus far been removed from office, the provisions of clauses (4) and (5) of article 124 in this regard merit to be quoted below:

"(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4)."

Prohibition of Practice after Relinquishing Office: After relinquishing office a Supreme Court Judge is precluded from pleading or acting before any court or authority in India, although there is no bar to his holding a post under the state or in private sector. Article 124(7) says:

"No person who has held office as a Judge of the Supreme Court shall plead or act before any authority within the territory of India".

Salaries and Allowances of the Judges

The Chief Justice of the Supreme Court draws a monthly salary of rupees five thousand and the other Judges get rupees four thousand

* Art. 124(2).
a month each. In addition, a Judge is also entitled to such allowances, privileges, leave and pension as Parliament may from time to time determine, but these cannot be varied to his disadvantage while he is in office. However, the emoluments of even a Supreme Court Judge may be subjected to a cut while a Financial Emergency is in force.

ESTABLISHMENT AND RULES OF THE COURT

The Supreme Court has a Registrar and other officers and employees appointed within the terms of the Constitution and all its administrative expenses are charged upon the Consolidated Fund of India. Article 146 provides as follows in this regard:

“(1) 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:

Provided 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.

(2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose:

Provided 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.

(3) The administrative expenses of the Supreme 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 India, and any fees or moneys taken by the Court shall form part of that Fund.”

Rules of the Court

The Supreme Court has the power to make rules relating to persons practising before it or matters to be heard and decided by it. These rules may include provisions for the constitution of a bench of the Court for hearing a matter and the Chief Justice plays a key role in the allocation of work to its different benches. However, a case involving an interpretation of the Constitution or a Presidential reference under article 143 must be heard by at least five Judges of the Court. A decision or opinion of the Court is formed with the

9 Art. 125 and Sch. II. 10 Art. 360.
concurrency of a majority of the Judges hearing a matter, and its all
decisions or opinions must be pronounced in open Court, although
there may also be summary orders in chamber in certain cases.
Article 145 lays down as follows:

"(1) Subject to the provisions of any law made by Parliament, the Supreme
Court may from time to time, with the approval of the President, make rules for
regulating generally the practice and procedure of the Court including—
(a) rules as to the persons practising before the Court;
(b) rules as to the procedure for hearing appeals and other matters pertaining
to appeals including the time within which appeals to the Court are to be
entered;
(c) rules as to the proceedings in the Court for the enforcement of the rights
conferred by Part III;
(d) rules as to the entertainment of appeals under sub-clause (c) of clause (1)
of article 134;
(e) rules as to the conditions subject to which any judgment pronounced or
order made by the Court may be reviewed and the procedure for such
review including the time within which applications for such review are
to be entered;
(f) rules as to the costs of and incidental to any proceedings in the Court
and as to the fees to be charged in respect of proceedings therein;
(g) rules as to the granting of bail;
(h) rules as to stay of proceedings;
(i) rules providing for the summary determination of any appeal which
appears to be frivolous or vexatious or brought for the purpose of delay;
(j) rules as to the procedure for inquiries referred to in clause (1) of
article 317.

(2) Subject to the provisions of clause (3), rules made under this article may
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.

(3) The minimum number of Judges who are to sit 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 article 143 shall
be five:

Provided that, where the Court hearing an appeal under any of the provisions of
this chapter other than article 132 consists of less than five Judges and in the course
of the hearing of the appeal the Court is satisfied that the appeal involves a substn-
tial question of law as to the interpretation of the Constitution the determination of
which is necessary for the disposal of the appeal, such Court shall refer the question
for opinion to a Court constituted as required by this clause for the purpose of
deciding any case involving such a question and shall on receipt of the opinion
dispose of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court,
and no report shall be made under article 143 save in accordance with an opinion
also delivered in open Court.
(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of a case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion."

**JURISDICTION AND FUNCTIONS OF THE SUPREME COURT**

The permanent seat of the Supreme Court is in Delhi, but the Chief Justice of India may, with the approval of the President of India, appoint other place or places for its sittings from time to time. And as the apex judicial organ of the Republic its writ runs throughout the territory of India. It is a court of record with both original and appellate jurisdictions. Besides, it has also an advisory role and some other adjudicatory and arbitral functions, including the function to act as a tribunal, and the power to review its own decisions. Then, its jurisdiction may also be enlarged by Parliament within the terms of the Constitution.

**The Supreme Court as a Court of Record**

By virtue of article 129, the Supreme Court is court of record. This primarily implies, first, that the records the Court are preserved and they deserve full faith and credit in any proceedings before any other court or authority, and secondly that the Court is competent to punish for contempt of itself. Article 129 reads:

"The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

**The Power to Punish for Contempt**: The power to punish for contempt of itself is a necessary and wide power to maintain the efficiency, independence and dignity of the judiciary. Yet it is a power to be used sparingly, cautiously and judiciously. And Ambedkar, defending the express inclusion of this power in article 129, said in the Constituent Assembly that

"The power to punish for contempt was derived largely from Common Law; in this country we felt it better to state the whole position in the statute (sic.) itself."

Generally, anything that goes to obstruct the course of justice and tends to undermine the prestige and authority of the judiciary

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11 Art. 130.
constitutes contempt of the court. But any bona fide criticism of
the judiciary is outside the purview of contempt proceedings. The
Supreme Court observed in *The Times of India Case*:\textsuperscript{13}

"No objection could have been taken to the article, had it merely preached to
the Courts...the sermon of divine detachment. But when it proceeded to attribute
improper motives to the Judges, it not only transgressed the limits of fair and bona
fide criticism but had a clear tendency to effect the dignity and prestige of this
Court. The article in question was thus a gross contempt of court."

*Original Jurisdiction of the Supreme Court*

The original jurisdiction of the Supreme Court extends to its
concurrent power to enforce fundamental rights under article 32 and
its to exclusive power to determine inter-Governmental disputes under
article 131. And as the role of the Supreme Court as the protector
and guarantor of fundamental right and the implications of its
exercise of powers under article 32 vis-a-vis article 226 relating to
the High Courts have already been accounted for in the discussions
relating to fundamental rights, only confinement to the determination
of inter-Governmental disputes under article 131 is called for here.

*Jurisdiction in Inter-Government Disputes* : Under article 131, the
Supreme Court, as a federal court, has exclusive jurisdiction over any
dispute between the Governments in the federal polity of India,
involving "any question (whether of law or fact) on which the
existence or extent of any legal right depends." Thus, a disputed
question not relatable to any legal right is outside the ambit of this
article. Besides, any dispute arising out of any pre-Constitution treaty,
agreement, sanad, and the like is expressly excluded by this article
from the jurisdiction of the Supreme Court. Article 131 provides as
follows:

"Subject to the provisions of this Constitution, the Supreme Court shall, to
the exclusion of any other court, have original jurisdiction 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 States on the other ; or
(c) between two or more States,
if and in so far as the dispute involves any question (whether of law or fact) on
which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out
of any treaty, agreement, covenant, engagement, sanad or other similar instrument

\textsuperscript{13} *In re the Times of India*, (1953) S.C.R. 215:
which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute”.

Appellate Jurisdiction

As the supreme adjudicatory forum in the land, the Supreme Court is primarily a court of appeal in constitutional, civil, criminal or other matters and as a successor to the powers of the Federal Court under the Government of India Act, 1935. Then, it has the discretionary power of extra-ordinary and plenary nature to grant special leave to appeal under article 136. And these appellate powers, coupled with the power of review, are intended to reach injustice anywhere and in any form, provided it is an injustice in law and not in mere ethics or morals.

Appeal in Constitutional Matters: Article 132 lays down:

“(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, 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.

(2) Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.

(3) Where such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground.

Explanation.—For the purposes of this article, the expression ‘final order’ includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case”.

Article 132 lays down that an appeal may be made to the Supreme Court against any judgment, decree or final order of a High Court in a civil, criminal or other proceeding if the High Court certifies that the case involves a substantial question of law requiring an interpretation of the Constitution. If the High Court refuses to give such a certificate, the Supreme Court may grant a special leave to appeal under the article. For an appeal to the Supreme Court under article 132, the nature of an impugned proceeding before a High Court is immaterial. The proceeding may be original, appellate, revisional or review; or it may be civil, criminal or any other proceeding. There is no reason to narrowly interpret the expression “other
proceeding” under this article. This expression has been deliberately introduced in article 132 by the framers of the Constitution. It did not occur in the corresponding section 205 of the Government of India Act, 1935. Thus, this expression includes all proceedings before a High Court acting as a tribunal.\textsuperscript{14} If a case involves a constitutional question, a right of appeal to the Supreme Court of the widest amplitude has been contemplated under article 132.\textsuperscript{15} Thus, any order of a High Court, which finally determines a question in a dispute before it, is appealable under article 132, provided it involves a substantial question of law as to the interpretation of the Constitution. And, as article 147 says,

“In this Chapter and in Chapter V of Part VI references to any substantial question of law as to the interpretation of this Constitution shall be construed as including references to any substantial question of law as to the interpretation of the Government of India Act, 1935, (including any enactment amending or supplementing that Act), or of any Order in Council or order made thereunder, or of the Indian Independence Act, 1947, or of any order made thereunder”.

Article 132 is wide enough to cover any judgment, decree or final order of a High Court in respect of any proceeding. A judgment is a judicial decision given on the merits of a lis before a court, and does not include any interlocutory order.\textsuperscript{16} “Judgment” for the purpose of article 132 has a meaning different from its definition in the C.P.C.\textsuperscript{17} A decree, however, includes both a preliminary and a final decree, because certain questions may be finally determined even by a preliminary decree.\textsuperscript{18} The question whether an order is final for the purpose of an appeal to the Supreme Court is tested with reference to the fact whether it finally determines the rights of the parties to a proceeding before a High Court.\textsuperscript{19} A final order includes an order deciding an issue which, if decided in favour of an appellant, would finally dispose of the case.

For an appeal under article 132 the initial ground for appeal must involve a substantial question of law requiring an interpretation of the Constitution. Such a question does not mean a question of

\textsuperscript{14} Allenberry v. I.T.O., A.I.R. 1956 Pat. 175.
\textsuperscript{16} Amin Brothers v. Dominion of India, A.I.R. 1950 F.C. 77.
\textsuperscript{17} Inda Devi v. Board of Revenue, A.I.R. 1957 All. 116.
\textsuperscript{18} Ganesh v. Muralidhar, A.I.R. 1956 M.B. 151.
general importance, but an issue of constitutional law which is surrounded by a divergence of opinions or by a novelty of situation and it may be founded even on a finding of a court or tribunal subordinate to the High Court concerned. Even questions of fact, such as, whether a person has been given a reasonable opportunity of defending himself within the meaning of article 311(2) of the Constitution, may be inextricably intertwined with the nature and scope of the protection under that article, and the Supreme Court may allow an appeal under Article 132.

Irrespective of the fact whether an appeal under this article is under a certificate or in pursuance of a special leave, a party may urge at the hearing of an appeal under this article any other ground with the leave of the Supreme Court. Thus, in effect, although this article permits appeals to the Supreme Court in cases involving an interpretation of the Constitution, the Supreme Court may allow the scope of the appeal to be widened in suitable cases. Normally, such an extended scope for appeal is not allowed, but if there is a grave miscarriage of justice, the Supreme Court allows grounds other than a constitutional ground to be urged before it. But if a completely novel plea, which was never raised before the High Court, is raised, it will not be entertained by the Supreme Court. Even in respect of constitutional grounds, if a certificate for appeal, or special leave to appeal, is given on the question of the interpretation of a particular provision of the Constitution, leave of the Supreme Court must be obtained for raising a question involving the interpretation of any of its other provisions.

It is, thus, obvious that once a major question of constitutional law requires interpretation by the Supreme Court, it shall not hesitate to entertain an appeal from any final decision of a High Court, and give appropriate relief to the appellant. The article does not specify the nature of relief, but the Supreme Court, as an appellate authority,

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20 Jang Bahadur v. Principal, A.I.R. 1951 Pop. 61,
may declare a law void; elucidate the meaning of a constitutional provision; remand a case for further evidence or for retrial by the High Court in the light of its decision on the impugned constitutional issue; or decide the case itself. The Supreme Court may award costs and give such other relief as it deems proper.

**Appeal in Civil Matters**: The original clause (1) of article 133 of the Constitution, relating to appeals in civil matters has now been replaced by the Constitution (Thirtieth Amendment) Act, 1972, to remove the pecuniary limitation on civil appeals to the Supreme Court and also to streamline the other requirements of civil appeals to the Court. And although this Amendment does not cover certain pending proceedings expressly specified by it, the principles of law otherwise applicable to the original article 133 are also, *mutatis mutandis*, available in the case of the amended article 133 which now reads:

“(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the case involves a substantial question of law of general importance; and

(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

(2) Notwithstanding anything in article 132, any party appealing to the Supreme Court may urge as one of the grounds of appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order or one Judge of a High Court.”

Article 133 provides for appeal to the Supreme Court “from any judgment, decree or final order in a civil proceeding of a High Court” if the High Court certifies that the matter involves a substantial question of law of general importance and that the question needs to be decided by the Supreme Court. And the expression “judgment, decree or final order”, in this article has the same meaning as it has in article 132, except that, the Explanation in that article does not govern the interpretation of the expression “final order” in this article\(^{28}\). An order of a single High Court Judge is

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also expressly made non-appealable under this article, although that is appealable under article 132. However, even under this article it may be urged as one of the grounds for appeal “that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.”

Although this article permits appeals only in civil proceedings, it has been given an extended meaning, and, therefore, it is not limited to a judgment, decree, or final order arising only out of a suit. But the proceedings must be civil in nature. It has been held that a proceeding under article 226 for a writ to quash an order referring an industrial dispute to an industrial tribunal; or an order of a regional transport authority regarding a stage coach permit; or an order of a Board of Revenue in relation to an ejectment proceeding is a civil proceeding on the ground that the proceeding involves an assertion or enforcement of a civil right. Similarly, an appeal under this article may be allowed against a decision of a High Court under article 227 of the Constitution. In addition, a statute may declare a proceeding to be a civil proceeding for the purpose of an appeal to the Supreme Court. For the purpose of this article a proceeding before a High Court is, however, not deemed to be a civil proceeding where the High Court acts as a persona designata.

In granting a certificate for the purpose of appeal under article 133 the High Court has to be satisfied, first, “that the matter involves a substantial question of law of general importance”, and secondly, “that in the opinion of the High Court the said question needs to be decided by the Supreme Court”. These twin conditions are conjunctively, and not disjunctively, used in this article and they must both be fulfilled before a High Court may grant a certificate of fitness for appeal.

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36 Sec. 160A, the Representation of the People Act, 1950. See also Kishore v. Raghunath, A.I.R. 1960 Ori. 1.
Law here means not only a statute law but law in general, and a question of law, therefore, is to be conceived as a question contradistinguished from that of fact. Although questions of law and of fact may be sometimes difficult to disentangle, a working proposition is sought to have been built by insisting on an appeal on grounds of law as opposed to grounds of fact. Care must, however, be taken in distinguishing an issue of law from an issue of fact, as there is no China Wall between them, and there is a group of issues which is an admixture of both fact and law. Thus, factual inferences from given facts raise questions of fact, but the proper legal effect of proved facts raises a legal question.

Again, whether a fact has been proved is a question of fact, but whether a particular decision is justified by the facts proved before a court is a question of law. Admissibility of evidence may be a question of fact, but if it substantially affects the finding, it may be a question of law as well. Mixed questions of law and fact are more numerous and intricate than pure questions of law or those of fact. For example, the existence of a custom is a question of fact, but the inference as to the existence of a custom from a set of proved facts is a question of law, and, therefore, whether a custom has been sufficiently established is a mixed question of law and fact. For the purpose of an appeal to the Supreme Court a mixed question of law and fact is also considered to be a question of law.

The High Court concerned must also certify that the case involves not only a question of law, but a substantial question of law. The word “substantial” implies, for example, that there may be some doubt or difference of opinion, or that there is some room

64 Bibhhabati v. Ramendra (1946-47), 51 C.W.N. (P.C.) 98.
for a difference of opinion on a question of law decided by a High Court\(^{48}\), even if it has been decided by the High Court for the first time\(^{49}\). But although it may not possibly be stated with precision what is a substantial question of law for the purpose of this article, it is now expressly required that the substantial question of law must be not only important but it must be of “general importance”. And the mere existence of a divergence of opinion on any question of law is not a ground for giving a certificate of fitness\(^{50}\), unless it is also one of general importance. The fitness of a case has to be determined with reference to the impact of the question raised on the general public, but a mere passing observation made by a High Court while directing a re-trial, without deciding any issue, cannot be said to give rise to a question of public importance\(^{51}\). Then, it is further required that in the opinion of the High Court the substantial question of law of general importance “needs to be decided by the Supreme Court”. This requirement makes the power of certification by a High Court under article 133(1) discretionary in nature, for the High Court has to form an opinion whether even a substantial question of law of general importance raised in a case needs to be decided by the Supreme Court. However, certificate of fitness, as the law stands today, may be given in respect of a matter within the jurisdiction of a tribunal\(^{52}\) or a court\(^{53}\).

A certificate must contain the reasons for its grant, but the grant of a certificate by the High Court for an appeal under article 133(1) is, however, not conclusive\(^{54}\). And the Supreme Court, while admitting an appeal under this article, is not precluded from entertaining preliminary objections\(^{55}\) and refusing to admit an appeal in spite of the certificate\(^{56}\). This does not, however, debar an appellant from urging any alternative ground\(^{57}\) to establish before the Supreme Court his claim to appeal under article 133(1), as a certificate is not allowed to

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48 Subbarao v. Raju, A.I.R. 1951 Mad. 959.
stand in the way of the exercise of the Supreme Court's discretion as to the matter in respect of which an appeal may be allowed under this article. But the Supreme Court does not allow to raise before it a question which was never urged before the High Court; or which requires to be proved by receiving further evidence; or allow the appellant to change his case. However, in a case where the High Court refuses to grant a certificate, the only remedy is to obtain a special leave of the Supreme Court under article 136(1).

In an appeal under article 133, the Supreme Court is ordinarily reluctant to interfere with the findings of fact by the courts below and the more so with any concurrent finding of fact by two or more such courts. This reluctance of the Supreme Court to interfere with the findings of fact is more pronounced when appeals under article 133 come to it after a proceeding under article 226 or 227 against a decision of a tribunal. But the Supreme Court will, however, interfere with any finding of fact if there is a substantial failure or justice or the finding is wholly unsupported by any evidence on the record. In the case of divergent views on any evidentiary fact expressed by the courts below, the Supreme Court may even allow the appellant to place before it the entire evidence of the case in support of his appeal.

**Appeal in Criminal Matters**: Article 134, concerning criminal appeals to the Supreme Court, provides:

"(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court within the territory of India if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or

(b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

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(c) certifies that the case is a fit one for appeal to the Supreme Court:

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may be law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law."

Appeals to the Supreme Court under article 134 cover certain criminal proceedings before a High Court. A criminal proceeding, however, is not confined to the proceedings for offences under the I. P. C. 67, but includes any proceeding, not being a proceeding under a military law 68, which, if pursued to its conclusion, may result in the conviction of an accused person and the imposition of some punishment 69. And it seems that the view of the Nagpur High Court 70, that a proceeding for the contempt of court is sui generis, is not tenable, and such a proceeding may be civil 71 or criminal 72, depending upon the nature of the judicial forum to which it relates.

Under article 134 an appeal lies to the Supreme Court from any judgment, final order or sentence passed by a High Court in a criminal proceeding if the High Court reverses an order of acquittal of an accused person and sentences him to death; or withdraws to itself any case from a subordinate court 73 and convicts an accused person and sentences him to death. In any other criminal proceeding before it a High Court may certify the case as being a fit one for appeal to the Supreme Court subject to such rules as may be made by the Supreme Court or the High Court concerned. In addition, Parliament may also provide for appeals to the Supreme Court in respect of any criminal proceeding before a High Court not covered by the provisions of article 134(1).

A judgment or final order 74 has the same meaning in article 134 as it has in article 133. The condition for the exercise of the discretionary

power to grant a certificate of fitness under article 134 is the importance of the questions raised in an application and this importance may be judged with reference to the general public or the applicant. And a High Court is solely concerned with a question of law or principle of law, relating to a case, the application of which has caused a miscarriage of justice.\textsuperscript{75} A certificate of fitness is granted only when a case raises legal complexities requiring an authoritative interpretation by the Supreme Court, and not only questions of fact\textsuperscript{76}. Because, if a High Court has any doubt about a question of fact, the benefit of doubt must go to the accused.\textsuperscript{77} A certificate should not be granted, unless there are exceptional and special circumstances\textsuperscript{78}, and the case of each accused person involved in a case must be examined by the High Court concerned to assess whether the issue of a certificate is warranted by the special circumstances surrounding his case.\textsuperscript{79}

A certificate of fitness must state the reasons for granting it, so that the Supreme Court may be in a position to know the nature of the High Court’s difficulty and the legal questions of outstanding complexity, or of importance, which require the attention of the Supreme Court.\textsuperscript{80} But the grant of a certificate of fitness by a High Court does not conclusively establish the right to appeal under article 134(1)(c) to the Supreme Court, and the latter may dismiss an appeal or treat it as a special appeal under article 136(1),\textsuperscript{81} and may also dismiss such a special appeal in limine.\textsuperscript{82} If, however, a High Court refuses to grant a certificate of fitness, the only course open to the aggrieved person is to seek a special leave to appeal under article 136(1).\textsuperscript{83}

Appeals under sub-clauses (a) and (b) of article 134(1) are distinguished from those under its sub-clause (c). Under the former two sub-clauses the Supreme Court forms its own conclusion as to the

\textsuperscript{75} Ramakantha v. State, A.I.R. 1957 Ori. 10.
\textsuperscript{76} Sidheswar v. State of West Bengal, A.I.R. 1958 S.C. 143.
\textsuperscript{78} Sidheswar v. State of West Bengal, A.I.R. 1958 S.C. 143.
\textsuperscript{82} Haripada v. State of West Bengal, (1956) S.C.R. 639.
guilt of the accused person upon a reappraisal of the evidence, but no such reappraisal is considered a necessary part of an appeal under the latter.\textsuperscript{84} Thus, in an appeal under article 134(1)(c), the Supreme Court declines to act as a third court of fact and to set aside a concurrent finding of fact by the courts below, unless some exceptional circumstances "call for an interference with such a finding."\textsuperscript{86} Where a finding of fact is not concurrent, the Supreme Court may examine the evidence to ascertain whether the High Court erred in disagreeing with a finding of fact by the trial court.\textsuperscript{87} It would not, however, allow a question of fact, which needs fresh investigation, to be raised before it for the first time.\textsuperscript{88} But if an accused person had been adjudged guilty by the courts below on the basis of an admission by him, which in fact did not exist, the Supreme Court may direct his proper re-trial, after excluding the alleged admission.\textsuperscript{89}

\textit{Powers as a Successor Court:} Then, notably the Supreme Court has also succeeded to the jurisdiction and powers of the Federal Court, constituted under the Government of India Act, 1935, within the terms of article 135 which says:

"Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law."

\textit{Special Leave to Appeal by the Supreme Court}

The crowning constitutional provision investing the Supreme Court with appellate jurisdiction is to be come across in article 136 which has no corresponding section relating to the Federal Court under the Government of India Act, 1935. This article reads:

"(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India."

\textsuperscript{87} Narayandas v. State of West Bengal, A.I.R. 1959 S.C. 1118.
(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

The power of the Supreme Court to grant special leave to appeal is discretionary, plenary and reserve in nature, directly extending to "any judgment, decree, determination, sentence or order in any cause or matter" of any court or tribunal, except a court or tribunal specifically constituted for the Armed Forces. It is a power which arms the Supreme Court as the highest judicial organ of the Republic to do justice to any case, excepting a case before a court martial.

It is implied in the concept of such a power that the circumstances for its exercise cannot be exhaustively defined, and any violation of a legal norm or principle, which causes a substantial and grave injustice, may attract its exercise. There is no limiting phrase or formula in article 136(1) itself, although the Supreme Court has subjected itself to certain self-limitations. It has, thus, been held by the Supreme Court, in Dhakeshwari Cotton Mills v. Commissioner of Income-Tax, that the discretion under article 136 is to be exercised sparingly and in exceptional cases only. The Court observed:

"It is not possible to define with any precision the limitations on the exercise of discretionary jurisdiction vested in the Supreme Court by...article 136. The limitations, whatever they be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly, and with caution and only in special and extraordinary situations. Beyond that, it is not possible to fetter the exercise of this power by any set formula or rule. All that can be said is that the Constitution having trusted the wisdom and good sense of the...Supreme Court..., that itself is a sufficient safeguard and guarantee that the power will only be used to advance the principles which govern the exercise of overriding constitutional powers."

However, in the exercise of its plenary power under article 136(1), the Supreme Court will not assume jurisdiction unwarranted by the provisions of the Constitution, nor will it provide a relief not contemplated by the Constitution, for, either course would, in effect, amount to legislation and not adjudication. But it ought to be noted that in the case of such a power the line of demarcation between the

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legislative and adjudicative effect of a decision is hard to draw with any precision, and in any event, the line must stand where the Supreme Court determines it to lie.

By virtue of the power under article 136(1), the Supreme Court may grant a special leave to appeal against any judgment, decree, determination, sentence or order. It follows, therefore, that for an appeal under this article a decree or order need not be final, although the Supreme Court is reluctant to interfere with an interlocutory order of a court or tribunal. It does not hesitate to interfere with even such an interlocutory order if there are exceptional and unusual features warranting an interference by it. Thus, when a High Court, on an application under article 226, made an interim order, directing the parties to maintain the status quo ante and the petitioner was directed by an executive authority to be put in the possession of the property in dispute under a misconceived interpretation of the order and the High Court refused to grant an interim stay of the direction of the executive authority, the Supreme Court granted leave under article 136(1), quashed the interlocutory order of the High Court and also sealed the fate of the application before the High Court by concluding that there were no merits in the application.\(^4\)

An appeal under article 136(1) may arise out of “any cause or matter” whether of a civil, criminal or any other nature. The expression “any cause or matter” is of very wide import, and it includes any type of judicial proceeding before any authority, excepting a court martial.\(^5\) And the existence of an alternative remedy is per se not a bar to the exercise of the jurisdiction of Supreme Court under article 136(1), although the existence of such as alternative remedy may operate as an inducement to refuse a special leave or even revoke a leave already granted.\(^6\) If an appellant fails to avail himself of the opportunity offered by an alternative remedy like that of a statutory appeal, a special leave may not be granted.\(^7\) But if there are exceptional circumstances, such as a breach of a legal principle,\(^8\) or the existence of an issue which could not have been

settled by a resort to the available remedy,\textsuperscript{99} the Supreme Court does not hesitate to grant a special leave under article 136(1).

A special leave is, however, not granted, where the question to be decided is hypothetical\textsuperscript{100}; or has become stale\textsuperscript{101}; or has to be determined on empirical considerations, and not on objective data\textsuperscript{102}; or has taken an academic shape because of, say, the relief claimed having become nugatory owing to subsequent events, although in the last case leave may be granted if there is anything in the impugned order which affects the appellant substantially.\textsuperscript{103} Delay in filing an application may be a ground for refusing a special leave, but the Supreme Court has the power to condone any delay.\textsuperscript{104} An application for the condonation of a delay would not, however, be granted without hearing the respondent.\textsuperscript{105}

In an appeal under article 136 an appellant may rely upon any ground which might have been available to him the case of a regular appeal.\textsuperscript{106} The Supreme Court will not, however, allow a party to set up a case not made in his pleading and not allowed to be argued by the High Court concerned.\textsuperscript{107} It is also not willing to allow the raising of a point not raised before the High Court, unless it is a pure question of law\textsuperscript{108}; and a new plea requiring further evidence is also not admitted,\textsuperscript{109} unless the circumstances of a case are exceptional.\textsuperscript{110}

In hearing an appeal under article 136(1) the Supreme Court ordinarily does not sit as a court of fact and is unwilling to examine the evidence tendered in a case,\textsuperscript{111} unless there is a miscarriage of justice in which case instead of remanding the matter to the court or tribunal below for reconsideration, the Supreme Court may itself hear

\textsuperscript{102} India Bank v. Employees, A.I.R. 1960 S.C. 653.
\textsuperscript{103} Commissioner v. Radhey Shyam, A.I.R. 1957 S.C. 304.
\textsuperscript{110} Ramal v. Ramnath, 1952 S.C. (Special Application 476/61).
the matter and dispose it of. The Supreme Court does not also interfere with the findings of fact, unless they are perverse, or are not supported by any evidence on the record, or are based on a combination of admissible and inadmissible evidence. Again, the Supreme Court does interfere with a finding of fact based on materials completely irrelevant to a case, or a mixture of relevant and irrelevant materials, when the impact of the irrelevant material on the mind of the adjudicatory agency cannot be assessed. However, when a finding of fact is arbitrary or has been arrived at in violation of a legal principle, or is such as no person acting judicially and properly instructed as to the relevant law could have reached, the Supreme Court may readily intervene. If the courts or tribunals below speak in two voices and give inconsistent and conflicting findings of fact or a finding is based upon a view of the facts, which cannot be reasonably entertained by a reasonable and unbiased mind, the Supreme Court also casts off its hesitation to interfere with a finding of fact.

Again, the Supreme Court would not interfere under article 136(1) if there have been mistakes of a mere technical nature made by the courts below, or if such courts have taken a view of the evidence different from the one which the Supreme Court would have taken. But even in such a case if in substance there has not been a fair and proper trial, the Supreme Court is willing to intervene under this article. In short, once the Supreme Court is satisfied that an appellant has been given a raw deal by a court or tribunal below, it does not allow a technical hurdle to debar it from giving him a fair deal. And in such a case no distinction is made between a proceeding before a court and that before a tribunal if the existence

of special circumstances justify an interference by the Supreme Court.

Tribunals under Article 136(1): The jurisdiction of the Supreme Court under article 136(1) extends equally to all courts and tribunals in the land, and the word “tribunal” in this article is intended to include any organ of public justice, which is not a court or court martial, with the obligation to decide a matter judicially. Broadly, therefore, the adjudicatory agencies covered by article 136(1) are the same as those under article 32 against whom writs in the nature of certiorari and prohibition may issue, although the grounds for interfering under the former may be different from those for issuing the said writs under the latter.

Although both the courts and tribunals are treated evenly for the exercise of jurisdiction under article 136(1), the Supreme Court is generally more reluctant to interfere with the decisions, specially the findings of fact, of a tribunal. And regarding the grounds for interfering with the findings of a tribunal, the Supreme Court, in Calcutta Tramways’ Case, observed that

“...wide and undefinable with exactitude as the powers of the Supreme Court are,...generally the necessary pre-requisites for the Court’s interference to set right decisions arrived at by a Tribunal...can be classified under the following categories, namely, (i) where the Tribunal acts in excess of the jurisdiction conferred upon it under the statute or regulation; (ii) where there is an apparent error on the face of the decision; and (iii) where the Tribunal has erroneously applied well accepted principles of jurisdiction.”

Advisory Function

Of the advisory function of the Supreme Court, article 143 says as follows:

“(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may notwithstanding anything in the proviso to article 131 refer a dispute of any kind mentioned in the same proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.”

The President has been empowered by article 143 to consult the Supreme Court within the terms of the article. Under clause(1) of this article, he may refer any question of law or fact which has arisen, or is likely to arise, to the Supreme Court for opinion if he feels that the question is of such a nature and of such public importance that it is expedient to obtain the Court’s opinion. And apparently there seems to be no limit on this power of the President, although over the past years this power has been exercised sparingly and only some six references have been made to the Court, the latest being the 1974 Reference regarding Presidential election.

The Supreme Court gives the widest possible hearing to a Presidential Reference and reports its opinion to him. The Court, however, seems to have an option to report or not to report its opinion to the President, for, article 143(1) says in this regard that “the Court may... report to the President its opinion...”. But not only that the Court has never in the past declined to report its opinion in any Presidential Reference, but also it seems that the word “may” may mean “shall” in certain cases. Thus, for example, a matter pending before a legislature or a court may also be referred by the President to the Supreme Court, and apparently the Court would not decline to report its opinion with regard to it.\(^ {124a} \)

Then, under clause (2) of article 143 any matter arising out of a pre-Constitution treaty, agreement, sanad, or the like, excluded from the original jurisdiction of the Supreme Court by virtue of the proviso to article 131, may also be referred by the President to the Supreme Court for opinion. The Court is bound in this case to report its opinion to the President after such hearing as it may consider necessary.

**Tribunal and Other Functions of the Supreme Court**

The Constitution also contemplates some other situations for the exercise of powers by the Supreme Court. For example, under article 171 the Supreme Court decides as a *persona designata*, as a tribunal, any disputed matter relating to the election of the President or the Vice-President. Then, Parliament in exercise of its power to extend the jurisdiction of the Supreme Court under article 138(1), has made the Supreme Court a court of reference under the Income-Tax Act.

\(^ {124a} \) See Mukherjee, P.B.: *Critical Problems of the Indian Constitution*, *op. cit.*

*S: CI—64*
The Doctrine of Stare Decisis and the Power to Review Decisions

The doctrine of *stare decisis*, the practice of following precedents, is considered essential for promoting continuity and predictability in the administration of justice according to law. It is an important principle of social policy well recognised and respected in the scheme of the Constitution and its one major expression is to be found in article 141 which projects the judicial supremacy of the Supreme Court by providing as follows:

"The law declared by the Supreme Court shall be binding on all courts within the territory of India."

What is to be followed, however, under the doctrine of *stare decisis* is the *ratio decidendi* of a case, which may not always be easy to locate, particularly when two or more judges hear a case and deliver separate judgments. And it is the *ratio decidendi* that is deemed to contain a declaration of law by the Supreme Court, although its any *obiter dicta* also deserves utmost respect. Then, the opinion of the Court in the exercise of its advisory function under article 143 is also, strictly speaking, not law for the purpose of article 141, yet is it treated as law. And then the Supreme Court has itself sounded a note of caution:

"No doubt, the law declared by this Court binds courts in India, but it should always be remembered that this Court does not enact."124

*Power to Review Decisions*: Another aspect of the doctrine of *stare decisis* is that the decision of a court is binding on itself and it must follow its decisions in future cases. Yet the courts have to deal with living and dynamic facts of life and a blind observance of this rule may make justice according to law a callous or cynical mockery, specially in the sphere of constitutional law. Douglas says:

"So far as constitutional law is concerned, *stare decisis* must give way before the dynamic component of history."127

Consequently, to avoid undue harships, the courts generally tend to distinguish a case in hand from a case decided earlier, even when they consider themselves inflexibly bound by the doctrine of *stare decisis*. In certain cases, it is assumed that a court has the inherent

power to review its own decisions to give justice to a case, and this assumption holds good in the case of the High Courts. The Constitution, however, expressly authorises the Supreme Court to review its own decisions within the terms of article 137 which says:

"Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have the power to review any judgment pronounced or order made by it."

The power of the Supreme Court to review its own judgment or orders under article 137 is wide and sweeping, subject only to any law made by Parliament, which has not yet been made, or rules made by the Court itself, which have been duly made. And starting with Sholapur Spinning Mills' Case, marching through Bengal Immunity's Case, overreaching in Golaknath's Case and also recognising in Keshavanand's Case, the Supreme Court has always stood for what it felt in Bengal Immunity's Case, that,

"There is nothing in this Constitution which prevents the Supreme Court from departing from a previous decision of it, if it is convinced of its error and its beneficial effect on the general interests of the public."\(^{128}\)

And although on principle there may not be much to be said against the power of review, after what has happened over the years in litigations before the Supreme Court, specially what occurred in Golaknath's Case and how the doctrine of prospective overruling was inducted therein, the apprehension expressed by B.P. Sinha J., in Bengal Immunity's Case, seems, to acquire a prophetic ring. He observed in that case:

"Under the Constitution and even otherwise, this Court is naturally looked upon by the country as the custodian of law and the Constitution, and if this Court were to review its previous decisions simply on the ground that another view is possible, the litigant public may be encouraged to think that it is always worthwhile taking a chance with the highest Court in the land,"\(^{129}\)

**Enforcement of Decisions**

Operationally, the judicial supremacy of the Supreme Court is sought to be secured not only by providing that laws declared by it shall be binding on all courts in the land and also investing it with the power to review its own decisions, but also by providing by article 142 as follows:

"(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause


\(^{129}\) Ibid., p. 839.
or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in a manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, on the investigation or punishment of any contempt of itself.”

Then, there is article 144 which says:
“All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court of India.”

**Enlargement of Jurisdiction**

The constitutional provisions relating to the powers and functions of the Supreme Court are commensurate with its status as the supreme judicial forum in the land, and the Constitution further contemplates certain situations under which Parliament may invest it with more powers. First, in this regard is article 138 which provides:

“(1) The Supreme Court shall have further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.

(2) The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.”

Then, comes article 139 which says:

“Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for any purposes other than those mentioned in clause (2) of article 32.

And lastly, article 140 lays down:

“Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.”

**Exclusion of Jurisdiction**

Wide and ample though the powers and functions of the Supreme Court are, it is competent to exercise only specified powers. The Court is a creature of the Constitution, and apart from the inherent limitations arising from it status as a court of established law and not
a fountain of abstract justice or a forum of everyday politics, the Constitution expressly takes away certain matters from its jurisdiction or, for that matter, also from the jurisdiction of any other court.

Thus, for example, any ministerial advice to the President and the Governor under articles 74 and 163, respectively, is outside the purview of the courts. Then, the courts are precluded from inquiring into the proceedings of Parliament and of the State Legislatures by articles 122 and 212, respectively. Again, article 312A(3) excludes the jurisdiction of the courts from certain matters relating to certain services, and article 329 bars the jurisdiction of the courts in electoral matters. Then Parliament may by law provide under article 262(2) that the Supreme Court or any other court shall not have jurisdiction in any dispute relating to inter-state rivers or river valleys. And specifically in the context of the Supreme Court, it may also be noted that the Court's jurisdiction in inter-Governmental disputes under article 131 is not only limited to their legal rights but is also subject to the other provisions of the Constitution, which implies, for instance, that a matter referred to the Finance Commission under article 280 or a dispute relating to certain expenses under article 257, 258 or 290 is outside the ken of the Court. Besides, the proviso to article 131 itself places pre-Constitution treaties, agreements, sanads, and the like outside the jurisdiction of the Court and article 363 places any pre-Constitution treaty, agreement, sanad, or the like with a Ruler of a Princely State outside the purview of the Supreme Court or any other court. However, unless expressly provided by the Constitution or necessarily follows by implication from any constitutional provision, the jurisdiction of the Supreme Court or the High Courts cannot be fettered or ousted by legislation, and an amendment of the Constitution shall be needed for the purpose.

ROLE OF THE SUPREME COURT

The Supreme Court is the keystone of the judicial arch. It is the apex judicial organ of the Republic and is a court record. It has original concurrent jurisdiction to enforce fundamental rights and exclusive original jurisdiction to adjudicate upon inter-Governmental disputes relating to their legal rights. It is the highest court of appeal, with jurisdiction in constitutional, civil, criminal and other proceedings and the power to grant special leave to appeal from any judgment,
determination or order of any court or tribunal. It has an advisory function too, and it also functions as a tribunal for deciding any dispute relating to the election of the President or Vice-President and enjoys an extended jurisdiction as a court of reference under a statute like the Income-Tax Act.

The judicial supremacy of the Supreme Court in the land is patent. Its multi-faced role in the working of the Constitution is unique and more crucial than that of the highest court in any other country. In the scheme of the Constitution the vital aspects of its operations may be viewed as its (i) role as the soul of the administration of justice; (ii) role as the protector of fundamental rights; (iii) role as a federal court; (iv) role as the highest appellate court; (v) role as a consultant; (vi) role as the custodian of the Constitution; and (vii) role as an organ of public policy. And although these different roles of the Supreme Court may conveniently be considered distinctly, they are, in fact, intricately interwoven and delicately shade into one another.

**Role as the Soul of Administration of Justice**

The Supreme Court is the soul of the administration of justice according to law in the land. And although, ruefully, it has been reduced to a judicial forum for the opulent and the elite, it has remained central to the administration of justice. It imparts it unity, vitality, purity, dignity, direction, life and light.

**Role as the Protector of Fundamental Rights**

The Supreme Court is the protector and guarantor of fundamental rights, and any person may directly move the Court under article 32 in case of a breach of his any fundamental right and may claim relief *ex debito justitiae*. And the numerous implications of this right and also the role of the Supreme Court in interpreting and enforcing the fundamental rights have already been accounted for at length. It is usually recognised that although property cases predominate in this context before the Supreme Court making the chapter on fundamental rights look like a charter of vested interests, the Court has for its part, in spite of occasional aberrations, stood for expanding the operational area of the fundamental rights and the domain of legal liberty in general.
Role as a Federal Court

As a federal court the Supreme Court has held the balance between the Union and the States evenly. In exercising its exclusive jurisdiction under article 31 over inter-Governmental disputes; or in interpreting the constitutional provisions relating to the Union-State legislative, administrative and financial relations; or in interpreting the Lists in the Seventh Schedule, the Supreme Court has always upheld the federal scheme of the Constitution. The Court has also explicitly observed that in interpreting the provisions of the Constitution the federal scheme of the Constitution has always to be kept in mind. And although because of the usual Central bias in the Indian federal set-up and the exhaustive enumeration of the subject-matter of legislation in the Lists, the Supreme Court has not been able to more federalise the Indian federation, by holding the doctrine of residuary power in the Constitution as an instrument of last resort and also by developing a theory of liberal interpretation of the Lists, it has generally defended State rights.

Role as the Highest Appellate Court

The details of the role of the Supreme Court as the highest court of appeal in constitutional, civil, criminal and other proceedings noted earlier should go to show that the Court, armed with the plenary reserve power to grant special leave to appeal coupled with the power to review its own decisions, has, although ever maintaining its character as a court of law, never hesitated in demonstrating that the function of the judiciary is after all to administer justice. As the highest court of appeal it has not converted itself into a court of equity, yet it has not also allowed the administration of justice according to law to turn into the wooden head of Phaedrus.

Role as a Consultant

The function of the Supreme Court as an adviser to the President on questions of public importance, whether of law or fact, is intended to secure the rule of law and promote cooperation between the judiciary and the executive. It is also aimed at avoiding embarrassing situations arising out of any difficult or vital legislative or executive action which may, at one stage or the other, be brought before the Supreme Court by an aggrieved or interested member of the public or a public authority. By nature, the consultancy role of the Supreme
Court is of a preventive and palliative character, which explains how in certain difficult Presidential References, the Court has allowed itself to even by-pass the real points of controversy. But in spite of its limitations, inherent or self-imposed, the advisory role of the Supreme Court has always proved useful through all these years of working the Constitution.

Role as the Custodian of the Constitution

The Supreme Court is the guardian and custodian of the Constitution and the laws. Laws declared by it are binding on all courts in the country and all civil and judicial authorities are to act in aid of this Court. The Supreme Court has to judge the validity of a statute or any other law on the touchstone of the Constitution. Its power of judicial review extends not only to testing the constitutionality of an amendment or a statute, but also the validity of a statutory instrument or an executive or administrative exercise of a constitutional or statutory power. The power of judicial review vested in the Supreme Court, which has been further elucidated later, wraps it with a unique judicial supremacy. And this judicial supremacy of the Supreme Court casts on it the burden of so interpreting the Constitution and the laws as to secure the application of laws in particular cases without injuring the interests of the community in general.

Role as an Organ of Public Policy

The Supreme Court is an organ of the state. It is an organ of public power. And, in spite of the fact that it merely interprets the Constitution and the laws and does not enact, it is an organ of public policy. It is not only the custodian of the Constitution and the laws of the land but also of the mores of the time. In making particular decisions, specially those involving interpretation of the Constitution, the Supreme Court plays eminently policy and social roles which have been more fully unfolded in subsequent pages.

The position of the Supreme Court is unique, its existence essential and operations crucial in the scheme of the Constitution. Over the past years the Court has admirably enacted its multi-dimensional role. And generally, in spite of occasional detractions, it has adequately responded with honour, restraint and placidity to the ever changing public needs. It has converted itself neither into a
conservative Bastille nor into a third chamber. Nor has it become a revolutionary vanguard. It occupies the position of supreme judicial authority and dignity and shines forth in the highest traditions of judicial independence, impartiality and integrity.

THE HIGH COURTS

The High Courts came to be established for the first time in the country under the High Courts Act, 1861, in succession to the Supreme Courts in the three presidency towns of Calcutta, Bombay and Madras, constituted under the Regulating Act, 1773. Subsequently, other High Courts were also set up in the country, eventually giving each Province in British India a separate High Court. Now, the Constitution contemplates a High Court for each State, although the High Court of one State may be authorised to act as a High Court in respect of another State or a Union Territory. In certain Union Territories there are Judicial Commissioners who have the status of a High Court for exercising powers under the Constitution.

CONSTITUTION OF HIGH COURTS

A High Court consists of a Chief Justice and such other Judges as the President may from time to time determine. A High Court Judge is appointed by the President in consultation with the Chief Justice of India and the Governor of the State concerned. In the case of the appointment of a Judge other than the Chief Justice of a High Court, the Chief Justice concerned must also be consulted. A Judge of a High Court is appointed from among such citizens of India as have held a judicial post in India for ten years or practiced as an advocate of a High Court for the same period. The President may also appoint additional or acting Judges to cope with arrears of work in any High Court. Such a Judge is appointed for a period not exceeding two years and must possess the requisite qualifications for being appointed as a permanent High Court Judge. The President has also the power to appoint an acting Chief Justice of a High Court for filling in a casual vacancy in the office of the Chief Justice of the High Court; and he may, in consultation with the Chief Justice

130 Arts. 214, 230, 231.
131 The Judicial Commissioners’ Courts (Declaration as High Courts) Act, 1950.
of the Supreme Court, transfer a Judge from one High Court to another.\textsuperscript{132}

Before entering upon his office a High Court Judge subscribes to the prescribed oath. He enjoys salaries, allowances, rights and privileges as specified in Schedule II to the Constitution, which may be varied only in the manner laid down for varying the salaries, allowances, privileges and other rights of a Supreme Court Judge. A High Court Judge holds office until he attains the age of 62 years and any doubt or dispute relating to his age is to be determined by the President in consultation with the Chief Justice of India within the terms of article 217(3). However, a High Court Judge may resign his office or may be removed in the manner provided for the removal of a Supreme Court Judge. A permanent High Court Judge on his retirement from service cannot plead or act before any court or authority, excepting the Supreme Court or any other High Court. He is, however, qualified for holding any post under the control of the Central or a State Government. It may also be noted that the provisions regarding the officers, employees and establishment of a High Court are, mutatis mutandis, the same as those of the Supreme Court in that behalf.\textsuperscript{133}

\textbf{JURISDICTION AND FUNCTIONS}

Normally, a High Court has its seat in the State capital, although it may have its benches or its seat in any other place within the State. A High Court is a court of record and has the competence to punish for contempt of itself.\textsuperscript{134} And the Constitution recognises all the powers and functions which a High Court existing at the time of the commencement of the Constitution would have been competent to exercise. But nothing in a pre- Constitution law can operate as a restriction on the exercise of its original jurisdiction in revenue matters after the Constitution came into force.\textsuperscript{135} There still persists, however, a distinction between the presidency High Courts of Bombay, Calcutta and Madras and the other High Courts in the country, as the former exercise certain criminal and civil jurisdictions in respect of the presidency towns, which are not available to the latter.

\textsuperscript{132} Arts. 216, 217, 222-224A.  \textsuperscript{133} Arts. 217-221, 229.

\textsuperscript{134} Art. 215

\textsuperscript{135} Art. 225.
A High Court exercises original and appellate jurisdictions in accordance with the provisions of the Constitution and the numerous statutes, both Central and State, including the C.P.C. and the Cr.P.C. In addition, in a large number of matters the Court acts as a tribunal of original, revisional, appellate or referential jurisdiction. The most important constitutional powers of a High Court are derived from article 226 of the Constitution, in relation to any matter, authority or person within its jurisdiction; from article 227, in relation to all the courts and tribunals subordinate to it; and from article 228, in respect of a substantial question of law involving the interpretation of the Constitution.

The Extra-ordinary Writ Jurisdiction

The soul of the constitutional powers of a High Court; the Kohinoor in the jurisdictional crown of the Court, the glory of the sceptre of its authority, is its immensely wide and flexible power under article 226 which provides:

"(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(1A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(2) The power conferred on a High Court by clause (1) or clause (1A) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32."

The power of a High Court under article 226 is limited to the area of its territorial jurisdiction in civil or criminal cases, but its writ runs against a person or authority situated outside its territorial jurisdiction if a cause of action arises within its jurisdictional limits. Article 226 operates to protect a fundamental right as well as any

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136 Adapted from the Author’s Justice by Tribunals, Calcutta, 1973.
other legal right for which there is no other efficient remedy.\textsuperscript{138} A High Court, has, thus a concurrent jurisdiction for protecting fundamental rights. It has now also come to be recognised that in a sense it is a co-ordinate jurisdiction, because the decision of a High Court under article 226 operates as a res judicata to an application under article 32 before the Supreme Court, unless the application raises issues not decided by the High Court.\textsuperscript{139} In spite of a contrary view expressed by certain commentators on our Constitution,\textsuperscript{140} it seems that the Supreme Court’s proposition, that if an application is dismissed under article 226 on merits, it must operate as a res judicata in respect of an application on the same grounds under article 32, is a practical proposition of great convenience. But considering the legal mazes and tangles which our Constitution has produced over the past years, any legal practitioner of average intelligence may always find a new issue to kill this plea of res judicata.

A proceeding under article 226 being of an extra-ordinary nature,\textsuperscript{141} the High Courts are naturally reluctant to interfere in a matter which has an effective alternative remedy. But as one of the purposes of article 226 is to enforce fundamental rights, once it is proved that a fundamental right has been infringed, an application under this article is granted even when there is an alternative remedy available.\textsuperscript{142} When a plea relating to the infringement of a fundamental right is not raised, relief under article 226 is, however, discretionary,\textsuperscript{143} and may be refused when there is an alternative remedy.\textsuperscript{144} But the mere existence of an adequate alternative remedy cannot operate as an absolute bar to the exercise of power under article 226.\textsuperscript{145} Where, for example, an alternative remedy is onerous or dilatory, relief under this article may be granted.\textsuperscript{146} Article 226 is couched in such a comprehensive phraseology that it can reach


\textsuperscript{143} Veluswami v. Raja, A.I.R. 1959, S.C. 442.


injustice in any form\textsuperscript{147}, provided it is an injustice giving rise to an illegality, and not to a mere moral or social injustice.

At times, it appears that the exercise of jurisdiction under article 266 is dependent on the exhaustion of any other statutory or legal remedy available to a petitioner, but in fact, this proposition is a rule of policy and convenience rather than a rule of law\textsuperscript{148}. The question whether an alternative remedy is adequate and effective is a question of fact and it is determined with reference to each case\textsuperscript{149}, because the circumstances which justify the exercise of a discretionary power of a court cannot be exhaustively enumerated\textsuperscript{150}. Acquiescence,\textsuperscript{151} delay\textsuperscript{152}, and suppression or misstatement\textsuperscript{153} of facts may form grounds for refusing relief under article 226, but a mere non-exercise of a fundamental right is not an acquiescence\textsuperscript{154}, and a delay may be condoned on sufficient grounds\textsuperscript{155}. In fact, these grounds for refusing a relief under this article are applied in consideration of the facts of each particular case.

A proceeding under article 226 is of an extra-ordinary nature, and it is not deemed to be a suit requiring notice to the state under section 80 of the C.P.C., although it is considered an original proceeding\textsuperscript{156}. As article 226 is designed to operate as a summary jurisdiction for giving relief in cases where other courts or tribunals are not competent to afford any adequate or efficient remedy, the High Courts do not generally investigate questions of fact under this article. But if a case for the infringement of a fundamental right is \textit{prima facie} established, it becomes a duty of the High Court to enforce the right even if it involves an investigation of a question of fact\textsuperscript{157}. But if a petition is made under this article on a ground other than a breach of a fundamental right, the High Court does not investigate questions of

\textsuperscript{147} Dwarakanath v. Income-Tax Officer, (1955) 2 S.C.R. 868.
\textsuperscript{150} Vankateshwaran v. Ramchand, A.I.R. 1951 S.C. 1506.
\textsuperscript{152} Shrinivas v. Election Tribunal, A.I.R. 1955 All. 251.
\textsuperscript{154} In re Kerala Education Bill, A.I.R. 1958 S.C. 965.
\textsuperscript{157} Rasid Ahmad v. Municipal Board, (1950) S.C.R. 566.
fact\textsuperscript{168}, unless there has been a grave miscarriage of justice\textsuperscript{169}. If a High Court finds that there has been an infringement of a fundamental right, it may also receive further evidence\textsuperscript{160}. But beyond the sphere of fundamental rights, as a proceeding under this article is not deemed to be a suit, further evidence is normally not received\textsuperscript{161}, and the points raised in a petition have to be supported by affidavit alone.

The amplitude of the High Courts' jurisdiction under article 226 as to the relief to be given is obvious from the fact that they are competent under this article to issue any direction order or writ, including writs in the nature of habeas corpus, quo warranto, mandamus, certiorari and prohibition.\textsuperscript{162} The powers of the High Courts are very wide and are not limited to the corresponding English writs of habeas corpus, mandamus, quo warranto, certiorari and prohibition, but also extend to such declaratory or other relief as the circumstances of a case may demand\textsuperscript{163}. In addition, it should be noted that as the High Courts are to issue writs in the nature of the aforesaid English writs, their powers in this regard are not hemmed in by the technicalities of the English writs\textsuperscript{164}.

An order passed by a High Court under article 226 may be reviewed by the Court, as such a power is inherent in every court of plenary jurisdiction to prevent a miscarriage of justice\textsuperscript{165}. A decision of a High Court under article 226 is appealable to the Supreme Court under article 132, if it raises a question of the interpretation of the Constitution\textsuperscript{166} or by a special leave under article 136.\textsuperscript{167} A High Court's decision under article 226 is also appealable to the Supreme Court under article 133 or 134, because the prevailing view is that for the purpose of such an appeal a proceeding under article 226 may be either civil\textsuperscript{168} or criminal\textsuperscript{169}, depending upon the nature of the

\textsuperscript{169} D. N. Banerjee v. P. R. Mukherjee, (1953) S.C.A. 303.
subject-matter to which it relates. In addition, as in certain High Courts a petition under article 226 is heard by a single Judge, a Letters Patent appeal to a division bench of the same High Court is also allowed.\footnote{Aidal Singh v. Karan Singh, A.I.R. 1957 All. 414; Budge Budge Municipality v. Mongru, (1952-53) 57 C.W.N. 25; Ramayya v. State of Madras, A.I.R. 1952 Mad. 300.}

Power of Superintendence

Article 227, relating to the power of superintendence of a High Court over all courts and tribunals within its jurisdiction, provides:

\begin{enumerate}
\item Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.
\item Without prejudice to the generality of the foregoing provision, the High Court may—
\begin{enumerate}
\item call for returns from such courts;
\item make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and
\item prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.
\end{enumerate}
\item The High Court may 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:
\end{enumerate}

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.”

Article 227 invests the High Courts with the power of superintendence over the courts and tribunals within their respective jurisdictions, except the courts and tribunals constituted specifically for the Armed Forces of the country, which has both administrative and judicial aspects. On the administrative side, this power includes the power to (i) call for returns from the courts; (ii) issue general rules and prescribe forms for them; (iii) prescribe forms in which books, entries and accounts for them are to be maintained; and (iv) settle fees payable to the sheriff, clerks and legal practitioners. However, any such prescribed rule, form or fee requires the previous approval of Governor concerned.

On the judicial side, the writ jurisdiction under article 226 and the superintending power under article 227 are separate and indepen-
dent. It is possible, therefore, to invoke both the articles in the same petition, and the dismissal of an application under the one does not ipso facto bar an application under the other and the remedy under the latter may be of a more positive nature. It is well established now that the power of superintendence under article 227 includes the power of judicial revision, and such a power of revision is wider than that enjoyed by a High Court under section 115 of the C. P. C. Thus, acting under this article, the Calcutta High Court set aside an order of a judge of the Court of Small Causes under the Rent Control Act, 1956, which was passed without authority, although such a course of action was not open to it under section 115 of the C.P.C. For an appeal to the Supreme Court against an order of a High Court under article 227, the legal position is the same as that of an appeal against a High Court's order under article 226.

**Determination of Constitutional Questions**

Within the territorial limits of its jurisdiction, a High Court is the centralised agency for determining any substantial question of law involving interpretation of the Constitution. Article 228 lays down as follows in this regard:

"If the High Court is satisfied that a case pending in a court subordinate to it involves a 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 a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment."

Article 228 empowers a High Court to withdraw to itself any case pending before a court subordinate to it, but not a tribunal, which, in the opinion of the High Court, involves a substantial question of

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law as to the interpretation of the Constitution and whose determination is necessary for the disposal of the pending case. The reference of such a question may be made to the High Court either by the subordinate court or by a party to the case. 178

The High Court, then, proceeds to hear the reference in the manner of hearing a *lis*. It may, on such a reference, either itself dispose of the case or merely determine the impugned constitutional question and send back the case for disposal by the subordinate court. And in exercising its power to interpret the Constitution, a High Court under this article generally follows the principles guiding the Supreme Court in interpreting the Constitution under article 132 179.

**WRITS IN THE NATURE OF QUO WARRANTO, HABEAS CORPUS, CERTIORARI, PROHIBITION AND MANDAMUS**

For the effective exercise of powers by the Supreme Court and the High Courts under article 32 and article 226, respectively, and to render justice in a summary manner, they have been authorised to frame their orders and directions to suit the needs of a case. These two articles specifically place at the disposal of these Courts the power to issue writs *in the nature of quo warranto, habeas corpus, certiorari, prohibition and mandamus*. These instruments in the arsenal of the Courts are intended to reach injustice in any form, provided it has a legal basis, and any technicality attached to these writs, including the fact that a proper writ has not been prayed for, cannot stand in the way of giving justice in a case. These writs are rather the broad indications of the directions the Courts may issue, and they are not meant to fetter their powers to do justice to a case.

**Quo Warranto**

*Quo warranto*, literally, means "by what warrant or authority". It issues to test the validity of the claim which a person asserts to an office or franchise. A *quo warranto* proceeding is always deemed to be a civil proceeding 180.


S: CI—65
Parties to Quo Warranto Proceedings: An application questioning an individual's title to a public office or franchise may be made by any person, provided he is not a man of straw acting for another person\(^{181}\). But the mere fact, that the expenses for a *quo warranto* application are being met by a person other than the petitioner, is not a ground for throwing out the application\(^{182}\). In a *quo warranto* proceeding it is immaterial whether an applicant's fundamental or legal right has been infringed\(^{183}\), because this proceeding is to clarify in the public interest the legal position relating to a person enjoying an office or franchise\(^{184}\).

The proper respondent to an application for *quo warranto* is the alleged usurper of a public office. But if an application seeks a declaration against a third party, who made the appointment, or approved the same, he also must be impleaded. A misjoinder of a party is not, but a non-joinder of the proper party is, fatal to such an application\(^{185}\).

Conditions for Granting the Writ: In *Anant Behari v. Ram Sahay*\(^{186}\), the conditions for the issue of the writ of *quo warranto* were precisely stated, and these have been re-affirmed by the superior courts in subsequent decisions.\(^{187}\) In the first place, the office must originate from some provision of the Constitution, a statute or a statutory instrument. Secondly, the office must be of a public nature, *i.e.*, the duties or functions attached to the office must be of a public nature. Thirdly, the office must be of a substantive character, *i.e.*, it must be of a permanent character not terminable at will. Fourthly, the alleged usurper must be in actual possession of the office or have asserted his claim to it. And to these may be added the further logical requirement that the respondent must not have a legal title to the office, *i.e.*, he must be a usurper.

Scope of Inquiry in Quo Warranto Proceedings: The proceeding for the issue of *quo warranto* is of a strictly limited nature. The scope of inquiry in such a proceeding is seriously circumscribed by the

\(^{182}\) *Mohichandra v. Secretary, L.G.S.*, A.I.R. 1953 Ass. 12.
\(^{185}\) *Amanendra v. Narendra*, (1951-52) 56 C.W.N. 449.
fact that a supervisory jurisdiction is not intended to be a substitute for an appeal. However, it appears from the various cases decided by the superior courts that even in a proceeding for *quo warranto*, the court may enter into a detailed examination of a controverted subject-matter if the circumstances of a case demand\(^{188}\), particularly when a breach of a fundamental right is alleged. In addition, to determine the validity of an appointment or an election, the court may have to determine the validity of the law concerned\(^{189}\).

**Nature of Relief and Further Remedies:** *Quo warranto* is a discretionary remedy, and it issues in the form of an order to throw out the usurper from a public office\(^{190}\). In certain cases, however, in a *quo warranto* proceeding the respondent may be restrained from discharging the functions of his office\(^{191}\). The court may also declare a public office vacant\(^{192}\). Costs in a *quo warranto* proceeding are in the discretion of the court.

The order of a court in such a proceeding being of a civil nature, an appeal from the decision of a High Court under article 226 may be made to the Supreme Court under article 133, and the latter may also grant a special leave to appeal under article 136 of the Constitution. There is, however, a general decline in the use of this writ, and it is yielding ground to *certiorari* and *mandamus*.

**Habeas Corpus**

The expression "*habeas corpus*", literally, means "to have the body", and the writ of *habeas corpus* may issue in many forms\(^{193}\). Its most efficient and popular form is an order calling upon a person having the custody of another person to present before the court the body of the detained person and show the cause of his detention, so that the legality of the detention may be tested. Proceedings for *habeas corpus* may be civil or criminal, depending on the nature of the cause for which the person concerned might have been detained\(^{194}\).

193 Blackstone: Commentaries, Book III; p. 131.
Parties to Habeas Corpus Proceedings: Any person put under restraint, whether by incarceration or otherwise, has the right to move the Supreme Court or the High Court for the issue of a writ in the nature of *habeas corpus*. If the person detained is unable to make an affidavit, a person related to him, or interested in him, may make an application in his behalf. In case of children, minors or lunatics, the person legally entitled to the custody of such persons may alone move the court, but if no such legal custodian exists, or he is incapable of making such a move, a person interested in the welfare of the child, minor, or lunatic is competent to file an application for *habeas corpus*.  

The proper respondents to a *habeas corpus* petition are the persons at whose instance the alleged illegal detention was initiated and is being continued, including the person who, for the time being, has the actual custody of the detained person. The word “custody” in this context includes the release of a detained person on bail. Possibly, a respondent need not be only a public authority if the application for this purpose is made under article 226 of the Constitution, as the scope of *habeas corpus* under this article is not narrower than its scope under the Cr. P. C.  

Conditions for Granting Habeas Corpus Petitions: The existing constitutional remedy of *habeas corpus* is free from the restrictions from which its statutory predecessor suffered. In a *habeas corpus* proceeding, the occasion for interfering with the detention of a person arises if the law of his detention is itself invalid; the legally established procedure for his detention is not complied with; the detention order is not made by a competent authority; the competent authority issues the order *mala fide*; or the order is not applicable to the detained person. The material point of time for determining the illegality of a detention is, however, the time when return to the rule nisi is filed by the respondent, and not the date of filing the *habeas corpus* application.  

Scope of Inquiry in Habeas Corpus Proceedings: A *habeas corpus* proceeding is not meant to be a substitute for an appeal, and, therefore, it is necessarily of a summary character. The scope of inquiry

in such a proceeding is limited to matters which are essential for arriving at a decision of the issues which may properly be urged in a habeas corpus petition. The supervisory court is unwilling to go beyond the facts on the record of the case or in the affidavit filed by the parties. But as the purpose of the writ of habeas corpus is to test the legality of a person’s detention in a summary manner, the respondent is not allowed to raise technical issues.\textsuperscript{199} It appears that as the supervisory courts are not quite unwilling to receive further evidence under article 32 or 226 when a petition alleges a breach of a fundamental right,\textsuperscript{200} they may, in appropriate cases, receive further evidence also to dispose of a habeas corpus petition.

\textit{Nature of Relief and Further Remedies}: A writ in the nature of habeas corpus is in the discretion of the court, but when there is a breach of a fundamental right, it may be claimed \textit{ex debito justitiae}. The only objective of habeas corpus being the termination of an illegal detention, it cannot be used for giving any other relief. The court may, however, release a person on bail if it finds that there has been an undue delay in putting him on trial.\textsuperscript{201} It is also possible to make an appeal to the Supreme Court against the order passed by a High Court on a habeas corpus petition. As a habeas corpus proceeding may be civil or criminal, appeal lies to the Supreme Court under article 133 or 134, as the case may be. If a petition for habeas corpus raises a constitutional question, an appeal may be made under article 132, and the Supreme Court may also allow special appeal under article 136 of the Constitution.

\textit{Certiorari and Prohibition}

The word “certiorari” means “to be informed”, and the writ of “certiorari” as a method of judicial remedy was developed to contain inferior courts within their proper bounds. Halsbury speaks of six different purposes for which the writ could issue originally,\textsuperscript{202} but the most common is certiorari only in the form of an order that issues to quash the proceedings before, or an order of, an inferior court or tribunal. Prohibition also is one of the oldest writs and its operation was originally limited to ecclesiastical courts, but was subsequently


\textsuperscript{201} Sandal v. District Magistrate, A.I.R. 1956 All. 409.

extended to cover proceedings pending before any inferior court or tribunal.

Locus Standi in Certiorari and Prohibition: The test for the issue of certiorari and prohibition is whether the applicant is the aggrieved party and his right has been injured. If, therefore, the applicant has a legal right, whether fundamental or not, which has been interfered with, he can claim these writs *ex debito justitiae*. If, however, the defect in the jurisdiction of a tribunal is patent, or apparent on the face of the proceedings, there are decided cases which show that even a complete stranger to the proceedings may apply for certiorari, or prohibition, but in such a case these writs lie in the discretion of the court and cannot be claimed as a matter of right.

It must also be borne in mind that the writ of certiorari or prohibition is restricted to the control of the proceedings of a judicial nature exercised by a public body within the meaning of article 12, and the court issuing these writs must be a court superior to the adjudicatory authority against whom they issue. The authority dealing with the impugned judicial proceeding is the proper respondent. But if the writ of certiorari is prayed for in a case where a tribunal or court has ceased to function, the writ lies against the person who has the custody of the records of the case.

Grounds for the Issue of Certiorari and Prohibition: The writs of certiorari and prohibition have a common objective of restraining a court or tribunal from exercising its jurisdiction in an unlawful manner. There is, however, a fundamental distinction between the two. Prohibition issues only when any part of an impugned proceeding is pending before an adjudicatory body. But if a matter has been finally settled and no proceeding in this respect is pending, the only remedy is by way of certiorari. Certiorari may issue even at a stage when prohibition issues, and certiorari and prohibition may issue simultaneously to supplement each other. But prohibition alone issues “quousque”.

A writ of certiorari issues from a superior court to an inferior court or tribunal having the legal obligation to determine in a judicial manner a question affecting the interest, or right, of a person, if the

adjudicatory authority, in deciding the question, acts without or in excess of jurisdiction; commits an error of law apparent on the face of the record; violates a principle of natural justice; falls a prey to a fraud; or infringes a fundamental right or a mandatory provision of the Constitution. Broadly speaking, a writ of prohibition issues on the grounds which apply to a writ of certiorari, but as prohibition issues only when a proceeding is pending before a tribunal, the grounds for the issue of certiorari are necessarily modified in their application to prohibition.

Absence or Excess of Jurisdiction: The words “absence”, “excess”, “want” and “lack” of jurisdiction are used inter-changeably to denote those jurisdictional defects which strike at the very root of the jurisdiction of a tribunal or court and vitiate its proceedings. It is a fundamental rule that the decision of a court or tribunal without jurisdiction is a nullity, and obviously if the law giving jurisdiction is void, or a tribunal is not properly constituted, it cannot be said to have a legal and valid jurisdiction.

Besides, as the Supreme Court has said, want of jurisdiction may also arise from the nature of the subject-matter; or the absence of some essential preliminary condition for the exercise of jurisdiction; or the existence of some questions collateral to the subject-matter of a case, also known as jurisdiction facts or questions, which are precedent to the assumption of jurisdiction. When extraneous considerations are decisive in an order of an adjudicatory body, such an order is also said to be without jurisdiction.

The French make a distinction between absence or excess of jurisdiction and abuse of jurisdiction. In the Italian legal system also a distinction between excess and abuse of jurisdiction is made. But in this country no such distinction is recognised for the issue of certiorari, although cases may not be found wanting where the expression “abuse of power” has been used.

Errors Apparent on the Face of the Record: The question is now well settled that errors apparent on the face of the record attract

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certiorari. Errors in this context denote errors of law^{211}, but an error of law does not include any and every error of law, which a court of appeal can rectify^{212}. An error of law not resulting in substantial injustice is unlikely to be noticed by the court of review^{213}. It is also certain that an error of fact, which is not a jurisdictional fact, cannot be made a ground for the issue of certiorari. But the question whether an error is of law or of fact has no definite answer^{214}.

As the court of review also insists that the error must be apparent and on the face of the record, both the words “apparent” and “record” claim some attention. Some early decisions took a narrow view of the word “record”, but the Supreme Court has ruled that this word may be of wider import^{215}. The basic point is that no part of the record can be withheld by the tribunal against which certiorari issues^{216}.

An exhaustive test of an apparent error is neither possible nor desirable. An apparent error is taken to denote an error which is demonstrable with reference to the records before the court of review^{217}. But an error may not give itself away quite easily, and may require interpretation, inference and arguments with reference to the record.

Violation of Natural Justice: What goes by the name of natural justice is not an absolute or immutable standard of justice. It denotes certain procedural requirements. Thus, the principles of natural justice form part of the law of procedure and do not pretend to provide any substantive form of justice, which is usually associated with the theory of natural law.

In consideration of the constitution of the courts and tribunals and the nature of their functions, the precise requirements of natural justice vary, however, from one forum to another. In any case, as the rules of natural justice have come to be recognised in this country, they may be broadly stated to be founded on two basic concepts:

first, that no person can be judge in his own case; and secondly, that the parties affected by the decisions of an adjudicatory authority must be given a reasonable hearing.

When it is said that no person can be a judge in his own case, it is a way of expressing the requirement that a judicial authority must act fairly, objectively and without any bias\textsuperscript{218}. This principle is violated when a tribunal has one or more of the three kinds of interests which are fatal to its decisions. In the first place, a judge may have a pecuniary interest in the case. Secondly, he may have personal bias for or against a party due to blood, marriage, friendly or professional ties, or he may be personally biased against a party because of any event taking place before or during a proceeding before him\textsuperscript{219}. The third type of bias may be called official bias. Whereas the first type disqualifies wholly, the second and third disqualify in the light of the circumstances surrounding a particular case. For, in considering these latter two types of bias as disqualification, the real test seems to be whether the alleged bias is likely to produce in the minds of the parties, or the general public, a reasonable doubt about fairness in the administration of justice\textsuperscript{220}.

The second concept of natural justice has also been stated as the *audiatur et altera par* or the *audi alteram partem* rule. It enjoins that a tribunal shall not make a decision adverse to a person without hearing him\textsuperscript{221}. The first requirement of this rule is that adequate\textsuperscript{222} and definite\textsuperscript{223} notice must be given to the person likely to be affected by a judicial decision. The second requirement is that the person whose right is likely to be affected must be given a reasonable opportunity of being heard in his defence. The nature of hearing, however, must depend on the facts and circumstances of each case\textsuperscript{224}. Thirdly, the *audi alteram partem* rule also requires that when a law requires that the person constituting a tribunal shall apply his mind to the facts and materials of the case before him, he cannot delegate his duty of hearing the case.

\textsuperscript{220} De Smith, S.A.: Judicial Review of Administration Action, op. cit.; p. 149.
\textsuperscript{222} Lakshminarain v. Puri, A.I.R. 1954 Cal. 335.
\textsuperscript{223} Lalita Prasad v. I.G. of Police, A.I.R. 1954 All, 438.
Both certiorari and prohibition are equally effective in ensuring compliance with the rules of natural justice. But prohibition may also be used to have the combined effect of certiorari and mandamus. This adaptation of prohibition does not depart from the well-settled rule that prohibition issues only when a violation of natural justice has actually taken place.\footnote{Abdul Rahim v. J.A. Pinto and Others, A.I R. 1951 Hyd. 11.}

Fraud: Fraud played upon a tribunal also vitiates the proceedings before it. Such cases are rather rare. An alleged fraud must, however, be clear and manifest. And must be shown to have been instrumental in obtaining the impugned order.\footnote{R. v. Ashford, ex parte Richley (No. 2), (1956) 1 Q.B. 167.}

Contravention of a Fundamental Right or the Constitution: In this country provisions of the Constitution, particularly those relating to the fundamental rights, may provide additional grounds for the issue of certiorari or prohibition. It may be that an order which vitiates a proceeding before a tribunal is unconstitutional\footnote{Bidi Supply Co. v. Union of India, (1956) S.C.R. 267}, or the decision of a tribunal affects a fundamental right\footnote{Himmatlal v. State of M.P., (1954) S.C.R. 1122.} or violates a mandatory provision\footnote{Bengal Immunity Co. v. State of Bihar, (1955) 2 S.C.R. 603.} of the Constitution, opening thereby the path for issuing certiorari or prohibition, as the case may require.

Nature of Relief and Further Remedies: When a person, whose any legal right or interest has been infringed and who has not disentitled himself to the relief by his own conduct, makes a petition for certiorari or prohibition, the writ is granted \textit{ex debito justitiae}. But when a stranger makes such a petition, the relief is in the discretion of the court. Certiorari issues to quash a decision, or a part of it, of an inferior court or tribunal on any of the aforesaid grounds. In addition, it issues to quash decisions which are manifestly unjust or illogical. Prohibition forbids the continuance of an illegal proceeding before an inferior tribunal or a court. It may also require an inferior adjudicatory body to mend its way before proceeding further in a matter. In certiorari and prohibition proceedings the court of review is also competent to declare a law invalid.

In the proceedings for certiorari and prohibition, costs are in the discretion of the court, which are awarded not against the inferior
tribunal, but the parties initiating and continuing the proceedings before the tribunal\textsuperscript{230}. If, however, an allegation of misconduct is made against a tribunal itself and is successfully established, costs may also be awarded against the tribunal\textsuperscript{231}. As proceedings for certiorari or prohibition may be civil or criminal, depending upon the nature of the proceedings before the inferior tribunals or courts, an appeal against an order of a High Court in certiorari and prohibition proceedings lies to the Supreme Court under articles 132 to 136 of the Constitution, whichever is applicable to a particular case.

\textbf{Mandamus}

Like \textit{quo warranto}, \textit{habeas corpus} and \textit{certiorari}, \textit{mandamus} is also a Latin word which, literally, means "we command", and originally it appears to have been in use in various types of ancient royal orders. But this use has, probably, no connection with the modern judicial writ of \textit{mandamus}, and now \textit{mandamus} proceeding is always deemed to be a civil proceeding.

\textit{Parties to Mandamus Proceedings}: It is now well settled that only a person whose right has been tampered with may apply for a writ of \textit{mandamus}. If an individual, who is either a member of an association or a shareholder in a company, prays for \textit{mandamus} in respect of an order affecting the association or the company, he must also establish that his right as an individual member or shareholder has been infringed by the impugned order\textsuperscript{232}. An association or an institution may, however, be represented by persons having due authority to represent that body in law courts\textsuperscript{233}.

\textit{Mandamus} lies against any person, including an unincorporated body, and the only requirement is that such a person must be a public person for which it is not necessary, however, that the agency must have been set up under a statute\textsuperscript{234}. It is sufficient if the agency is required to carry out measures of a public nature\textsuperscript{235}. \textit{Mandamus} lies against a private person also, if he acts in collusion with a public

\textsuperscript{234} \textit{Singh v. Board of Secondary Education}, (1960-61) 65 C.W.N. 1132.
agency\textsuperscript{236}. The usual practice is to implead as respondents all persons who are required to comply with directions under a writ of mandamus\textsuperscript{237}, but not a mere ministerial functionary bound to obey the orders of a superior authority.

Conditions for the Grant of Mandamus: It is now firmly settled that mandamus issues to enforce the performance of a mandatory\textsuperscript{238} public duty\textsuperscript{239}, whether positive or negative. Before issuing mandamus the court, however, must satisfy itself that the obligation subsisted when the aggrieved person demanded its exercise\textsuperscript{240}. It follows, therefore, that there must be a distinct demand for the performance of a duty, unless, of course, the circumstances of a case make this demand an idle ceremony\textsuperscript{241}. Mandamus also issues to enforce private rights, when such rights are withheld by public authorities\textsuperscript{242} or are affected by duties of public nature. Such a right must, however, be grounded in law\textsuperscript{243}.

Duty, Power and Discretion: For the purpose of mandamus, a legal obligation is distinguished from a legal power, on the one hand, and a legal discretion, on the other. Obligation is distinguished from power by saying that power by itself does not import any obligation. Power may be permissive only; obligation is always mandatory. The line between power and obligation drawn for the purpose of mandamus has, however, no fixity about it.

If, again, there is a legal power which invests an agency with absolute discretion to take an action, the general principle is that such a discretionary power is outside the review jurisdiction of the courts, although it is possible for the law making authority to provide for appeals, revisions or reviews, whether judicial or administrative, to muzzle an arbitrary use of any such power. Once, however, such a power is put into operation, it would move into the ken of the court of review, because the exercise of the

\textsuperscript{236} Sohanlal v. Union of India, A.I.R. 1957 S.C. 529.

\textsuperscript{237} Makhan v. Chatterjee, A.I.R. 1954 Cal. 208.

\textsuperscript{238} Sohanlal v. Union of India, A.I.R. 1957 S.C. 529.


\textsuperscript{240} Venugopal v. Vijayawada Municipality, A.I.R. 1956 A.P. 832.


\textsuperscript{242} Sankar Lal v. Municipal Commissioners, A.I.R. 1939 Bom. 31.

power may attract the various grounds which justify the issue of mandamus.  

**Failure to Exercise Power:** Failure to perform an obligation may arise from an express refusal or may be inferred from the conduct of an authority. When there is an obligation to perform a function, the responsibility for the function cannot be abdicated. Such an abdication is, for example, inferred when an authority misconstrues the scope of its obligation.

**Ultra Vires Exercise of Power:** Mandamus issues to control an *ultra vires* exercise of power. In fact, the various types of *ultra vires* actions which mandamus seeks to control under diverse situations give rise to the complexities surrounding the use of this writ in the field of public law. When powers are defined under a law, the first requirement is that such a definition should be under a valid law. If a law is invalid, the exercise of any power under it would attract the doctrine of *ultra vires*, and the writ of *mandamus* would issue to interdict the enforcement of the law.

Then, it is possible that a statute is valid, but the subordinate law under it is *ultra vires*. It is also possible that the exercise of a lawful power, by the mode of its exercise, may subject an agency to the doctrine of *ultra vires*. This happens when, say, the agency may impose an *ultra vires* condition on a licence or a permit. An order may also be *ultra vires* in situations similar to those arising under the doctrine of want or excess of jurisdiction for the issue of the writ of *certiorari*.

**Abuse of Power:** A distinction is sometimes made between excess or *ultra vires* exercise of power and abuse of power. An excess exercise of power is the usurpation of power, whereas abuse of power is the use of power for an ulterior purpose, or with an ulterior motive. The concept of abuse of power in the context of *mandamus* is significant, as the assumption on which the court of review issues *mandamus* is that all powers of public agencies are liable to be abused. In *In re Banwarilal Roy*, abuse of power was spoken of as

the use of power for an ulterior purpose. Although motive for an action is considered not germane to establish a *mala fide* use of power, it is possible to enquire into official motive for an action in certain cases for the issue of *mandamus*. An inquiry into the motive for an action may become of practical significance when the authority, competent to take an action, has also the power to determine conclusively the purpose behind the action.

An abuse of power also occurs when an authority acts upon extraneous considerations or decides a point other than the one referred to it for decision. The decision of a matter on irrelevant considerations, or in disregard of relevant considerations, is also an abuse of the power to decide the matter, and hence it attracts *mandamus*. It may also be pointed out that power must only be not abused, but it must also be used reasonably, and power not reasonably used is in essence an abuse of power. If, then, abuse of power, or use of power not reasonably, is established, *mandamus* can reach all colourable actions, whether administrative or judicial.

**Nature of Relief and Further Remedies:** *Mandamus* is a command directing a respondent to do an act in accordance with law or to forbear from doing an act against law. When the direction is to do act in accordance with the provisions of a law, it may, in effect, at times mean a direction to perform a particular act in a particular manner. *Mandamus*, however, cannot be used as a substitute for an appeal, and where the exercise of a power is within the jurisdiction of an authority, it cannot command the cancellation of an erroneous order of an inferior tribunal or authority, or supplant its order with an order of the court of review. It can only direct the exercise of a power in accordance with the law and circumstances of the case.

Sometimes, the courts of review have also directed the consideration of an application on its merits. In a proceeding for a writ of *mandamus* there also seems to be some scope for the scrutiny of

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individual cases on merits by the court of review itself\textsuperscript{257}. The court may declare by \textit{mandamus} that a law is \textit{ultra vires}\textsuperscript{258} or an order is illegal. Costs in the proceedings for \textit{mandamus} are in the discretion of the court, and the conduct of the petitioner may be an important factor in awarding costs\textsuperscript{259}. As \textit{mandamus} is treated as a civil proceeding, appeals against the decisions of a High Court in this behalf may be made to the Supreme Court under articles 132, 133 or 136 of the Constitution, as the case may be.

**THE SUBORDINATE COURTS**

The subordinate courts in this country have evolved through the centuries of the British rule in India, and this has allowed for a degree of variation from one part of the country to the other. Even after Independence these variations have continued in certain cases either as a historical legacy or as a deliberate recognition of their necessity. And most of the judicial work of the country is performed by these diverse subordinate courts. They are the backbone of administration of justice according to law in the land.

Broadly speaking, the subordinate courts in the country may be categorised as the civil courts subject to the Civil Procedure Code and the criminal courts coming within the ambit of the Code of Criminal Procedure. The civil courts comprise the District, Additional District, Joint District and Assistant District Judges; subordinate judges and munsifs. The presidency towns of Calcutta, Bombay and Madras have Chief City Civil Judges and other City Civil Judges. Then, there are Provincial and Presidency Small Cause Courts.

The Criminal Courts under the Code of Criminal Procedure, besides the High Courts and any other specially constituted court are: “(i) Court of Session; (ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates; (iii) Judicial Magistrates of the second class; and (iv) Executive Magistrates”\textsuperscript{260}. A Sessions Court has a Sessions Judge and Additional and Assistant Sessions Judges. Each district has a Chief Judicial Magistrate, a Sub-division has a Sub-divisional Judicial Magistrate and there are other Judicial Magistrates. A metropolitan area has a Chief

\textsuperscript{257} Khirode Chandra v. District Magistrate, A.I.R. 1956 Cal. 96.
\textsuperscript{258} Motilal v. State of U.P., A.I.R. 1951, All 257.
\textsuperscript{260} Sec. 6, The Code of Criminal Procedure, 1974 (Act 2 of 1974).
Metropolitan Magistrate, an Additional Chief Metropolitan Magistrate and other Metropolitan Magistrates. And the Executive Magistrates are classed as District Magistrates, Sub-divisional Magistrates and Subordinate Magistrates. Then, there may be special Metropolitan or Executive Magistrates under the Code.

**CONSTITUTIONAL PROVISIONS RELATING TO SUBORDINATE COURTS**

The Constitution says that a District Judge shall be appointed by the Governor of the State concerned in consultation with the High Court of the State, and the posting and promotion of a District Judge is also to be made in the like manner. Promotion cannot, however, be claimed as matter of right, and the word “posting” does not include the word “transfer”. The Constitution further says that a person who is not already in the service of the Union or a State can be eligible for appointment as a District Judge only if he has been an advocate or pleader for seven years at the time of his appointment and his appointment is recommended by the High Court concerned.

A State Government is, however, competent to authorise a District Magistrate to act as an Assistant Sessions Judge, with the consent of the High Court concerned. The Constitution uses the expression “District Judge” in a wide sense to include a Judge of a City Civil Court: Additional, Joint or Assistant District Judges, the Chief Judge of a Small Causes Court, a Chief or an Additional Chief Presidency Magistrate and Sessions, Additional or Assistant Sessions Judges. The expression also denotes both permanent and officiating incumbents to the aforesaid posts. So far as the appointment to any other post in the Judicial Service of a State is concerned, the Constitution requires such an appointment to be made by the Governor of the State in accordance with the rules framed by him in consultation with the State Public Service Commission and the High Court. The expression “Judicial Service”

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261 Art. 233 (1).
263 Art. 233 (2).
264 *In re Palanisami*, I.L.R. 1957 Mad. 597.
265 Art. 236 (a).
267 Art. 234.
in this context means a service consisting exclusively of persons intended to fill the post of a District Judge and other civil judicial posts inferior to the post of District Judge, and the word "appointment" includes an appointment by promotion.

**High Court's Control over Subordinate Courts**

The Constitution empowers the High Court of the State concerned to exercise administrative control over the District Judges and other members of the State Judicial Service. In the case of the latter, this administrative control includes their posting, promotion and leave. This, however, does not deprive a District Judge or any other person belonging to the State Judicial Service of his "any right of appeal which he may have under the law regulating the conditions of his service" or authorise the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed by any law. Thus, under our Constitution disciplinary control over the District Judges and other judicial officers subordinate to him, including the power to institute inquiries into their conduct, vests in the High Court concerned, and the State Government has no authority in the matter. Significantly, the Constitution also says that any constitutional provision or rules relating to the State Judicial Service may, by a notification in the Official Gazette of the State concerned, be extended to any class of magistrates.

**THE TRIBUNALS**

Tribunals occupy a place of pride in the scheme of the Constitution, although the country has a unified administration of justice. They are recognised by articles 136 and 227 of the Constitution and their nature and significance were fully unfolded, in *Bharat Bank's Case*, by the Supreme Court. Tribunals in general may be said to comprise any organ of public justice that is not a court nor is a court

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268 Art. 236 (6)
271 Art. 325.
273 Art. 237.
274 *Bharat Bank v. Employees*, op. cit.

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or tribunal exclusively meant for the armed forces, and they comprise even a court, including a High Court or the Supreme Court, acting as a persona designata. This new judiciary is a commodious modern functional annexe to the structure of judicial administration in this, as in any other, country.

THE BAR

The bar as much as the bench is vital in the administration of justice in the country. The Constitution recognises in article 22(1) the right to consult and be defended in criminal cases by legal practitioners, and the right to be represented by legal practitioners is also recognised before civil and other judicial forums, although in the case of certain tribunals consent of the other party or the tribunal may be necessary. The legal practitioners in this country are subject to the Advocates Act, and they are organised into associations at various levels in accordance with the Act. The bar is also a socio-political element of importance in the life of the nation.

THE POLICE

In the protection of the life, liberty and property of the citizens, in the maintenance of the peace and law and order, and in the field of preventive and punitive criminal justice, the role of the police is crucial. Each State or Union Territory has its own police force, and then the Union has its own police force, such as, the C. R. P. and the C. B. I. The police is a significant social and political element in the country, and on its proper working depends, to a large degree, the faith the common man may have in the political system of his day.

375 See the Author’s Justice by Tribunals, op. cit.
CHAPTER 33

THE COURTS CONSTITUTION AND PEOPLE

The universally acknowledged function of the courts is to render justice according to law, which they constantly profess to perform: yet in truth, they ever tend only to administer law according to justice. The letters of the laws the courts purport to apply to the facts of a case: yet in reality, they read the laws by the light of justice. Rather they read into the laws the spirit of justice, which they consider warranted by the reason of a case, and the facts of a case also they glean for the purpose rendering justice. The laws are what the judges say they are: "the constitution is what the judges say it is."

JUDICIAL REVIEW

The rule of law claims the courts as the custodians of the legality of particular acts, private or public: the logic of life casts the judges in the role of the apostles of justice, positive or normative. The essential necessity of legality and justice of public acts, the acts of public authorities or persons in authority, is the firm foundation of the complex concept of judicial review. And although etymologically, the word "review" simply means "to view again", in public law the expression "judicial review" has become a term of art.

MEANING AND FORMS OF JUDICIAL REVIEW

Judicial review in general means the power of the courts to pronounce upon the validity of the acts of public authorities, including a court or a legislature. Within the fold of this wide sense judicial review comes to take several particular shapes and in one form or another it exists in all civil societies. In the first place, there may be a judicial review of a judicial act itself. Secondly, there may be a judicial review of executive or administrative acts generally, or administrative or executive legislation or adjudication particularly. And these two are to be met with in varying degrees in all countries subject to the rule of law. Then, there is the most specialised form of judicial review, the judicial review of enactments, which is found

in some countries having written constitutional codes and has practically come to arrogate to itself the general meaning of the term "judicial review". "Judicial review of enactments" has become synonymous with "judicial review" simpliciter.

Judicial Review of Enactments

Judicial review commonly refers to the competence of the courts to declare a statute ultra vires the Constitution. Generally speaking, it seems that judicial review is based on three presumptions which, though apparently distinct, have come to be traditionally and constitutionally intertwined in certain countries. The first presumption, which has a logical validity, is that the Constitution is the supreme law of the land. The second is that the judiciary is the final interpreter of the Constitution, and the third is that the judiciary has the solemn responsibility for maintaining the supremacy of the Constitution, the presumptions which seem, ipso facto, linked neither with each other nor singly nor jointly with the first.

And historically speaking, it is interesting that judicial review for the first time formed part of the constitutional system of an independent country with a colonial tradition. In the U. S. A., fighting for its independence from Britain, both the British Parliament and the British executive were suspects, and the U. S. A. has always been considered the classic wonderland of Herbert Spencer's Man versus the State. Naturally, it came to have a Constitution founded on the theory of separation of powers and the Judges from Marshall to Warren have consistently strived for building a Third Chamber of the Supreme Court in that country. And significantly, almost in the manner of the declaration of a constitutional revolution, Marshall C. J., in Marbury v. Madison\(^2\), observed:

"Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation...It is emphatically the province and duty of the judicial department to say what the law is...If, then, the courts are to regard the Constitution, and the Constitution is superior to an ordinary act of the Legislature, the Constitution and not such ordinary act, must govern the case to which they both apply......A law repugnant to the Constitution is void."

Judicial Review and Federalism: The Marshallian logic of written constitutions running paramount to the legislative enactments and

\(^2\) Marbury v. Madison, (1803) 1 Cr. 137. Italicis are mine.
thereby authorising the judiciary to declare a statute void for inconsistency with the Constitution is further sought to be strengthened by suggesting that a federal system also demands judicial review. But the fact is that merely because the Constitution of the U. S. A. marks the beginning of the modern written constitutional codes and modern federalism and Marshall C. J. achieved a constitutional revolution by propounding his concept of judicial review, judicial review cannot be deemed to be integral either to a written constitution or to a federal system. Judicial supremacy in the American style is not a categorical imperative in the scheme of a written constitution, whether unitary or federal.

JUDICIAL REVIEW IN INDIA

This country has a long tradition of judicial review. The Privy Council, and later the Federal Court, also could declare an enactment of an Indian Legislature void for inconsistency with a law made by the British Parliament. And that the founding fathers intended the principle of judicial review to play a distinct role in the working of the Constitution is evident from what Alladi Krishnaswami Aiyer said in the Constituent Assembly in the context of the power of the Supreme Court to interpret the Constitution. He felt,

"the future evolution of the Constitution will...depend to a large extent upon the work of the Supreme Court...From time to time, in the interpretation of the Constitution, the Supreme Court will be confronted with apparently contradictory forces... While its functions may be one of interpreting the Constitution...it cannot...ignore the social, economic and political tendencies of the times... It has to keep a poise between the seemingly contradictory forces."

CONSTITUTIONAL PROVISIONS AUTHORISING JUDICIAL REVIEW

It is commonly suggested that the Constitution expressly provides for judicial review. But the fact seems to be that neither the expression "judicial review" nor an express provision empowering a court to declare a statute invalid for inconsistency with the Constitution is to be met with in the Constitution. What has happened is that the Constitution expressly says, for example, in article 13, that certain laws shall be void for inconsistency with the Constitution, and also expressly invests the superior courts with the power to interpret the Constitution. And the power to declare a law ultra vires the

Constitution is a power assumed in the name of, and derived from the power of, interpreting the Constitution; a power claimed in the American strain of *Marbury v. Madison* and the Indian tradition of the Privy Council and subsequently, also of the Federal Court. Kania C. J. pointedly put in *A. K. Gopalan’s Case*:

"The inclusion of article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid."

**Courts Competent to Exercise the Power of Judicial Review**

As the power to determine the constitutionality of an enactment is derived from the express power of a court to interpret the Constitution, only a court competent to interpret the Constitution can declare a statute invalid. Although the question of constitutionality of a statute *may be raised* before any court and in any proceeding whatever, only a court competent to interpret the Constitution *can determine* this issue of constitutionality. Consequently, the Supreme Court and the High Courts only are competent to pronounce upon the validity of a statute under the relevant provisions of the Constitution. For, they alone have the competence to interpret the Constitution. And it is always preferable to view the system of judicial review in this country in the light of the exercise of the power of declaring an enactment void by the Supreme Court.

**SCOPE OF JUDICIAL REVIEW**

The Supreme Court, or a High Court, has the competence to declare an enactment *ultra vires* the Constitution; "to lay the Article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former". In *Gopalan’s Case*, the first ever case before the Supreme Court under article 32, challenging the validity of an enactment, the Preventive Detention Act, 1950, now defunct, Mukherjea J. found it the solemn obligation of the Court to declare a law invalid for unconstitutionality. He said:

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"Where there is limitation on the legislative power, the Court must on a complaint being made to it, scrutinise and ascertain whether such limitation has been transgressed and if there has been any transgression the Court will courageously declare the law unconstitutional, for the Court is bound by its oath to uphold the Constitution."

Requirements for the Exercise of the Power of Judicial Review

The power and the duty of judicial review does not come into play unless certain preconditions are satisfied. Some of these requirements are inherent in the nature of the judicial function itself and some others arise out of the express or implied constitutional interdictions or self-imposed judicial limitations.

The Question of Invalidity of a Statute Must Arise in the Course of a Real Adversary Proceeding: To begin with, the principle is that the question of the vires of an enactment cannot be a hypothetical or academic question. And except in the case of a Presidential Reference, it must be raised only in the course of a proper lis, a controversy, a proposition and an opposition, for the disposal of which the determination of the question of the constitutionality of the impugned statute is necessary.7

The Question Must be Raised by the Proper Person: The party raising the question of invalidity of a statute must show that he has personal interest or has suffered personal injury on which the lis is founded. The mere fact that an impugned statute affects a person as a member of the general public or that the operation of a statute would bring injury to the petitioner is not enough to warrant the exercise of the power of judicial review.8

The Question should be Raised at the Proper Stage: The question of unconstitutionality of a statute is normally expected to be raised at the proper stage, i.e., at the earliest available stage for challenging the validity of the impugned enactment. However, this requirement is not so fundamental as the two earlier requirements.9

The Challenge Must be Specific and Pleading Adequate: The challenge to the constitutionality of an enactment must be specific

and not general. The grounds for the challenge must be adequately stated and duly supported by evidence\textsuperscript{10} or affidavit.\textsuperscript{11}

The Question of Constitutionality Must be Substantial: The power of the superior courts to pronounce upon the validity of a statute is confined only to the cases which raise any substantial question of law as to the interpretation of the Constitution. And although what constitutes a substantial question of law as to the interpretation of the Constitution may be itself a controversial question, a superior court cannot transgress this limitation on its power of judicial review.\textsuperscript{12}

The Question Must be Necessary: The determination of the question of constitutionality of a statute must be absolutely necessary for the disposal of the case and the court would not normally propound general and broad propositions which are not wholly required to settle the case in hand.\textsuperscript{13}

The Question Must be Justiciable and within Jurisdiction: An issue raised before a court must be justiciable. The question of justiciability may be inherent, implied, or intrinsic, or prescribed, express or extrinsic. Thus, for example, a court may not feel inclined to interfere with what has commonly come to be called as “political questions.” Then, the Constitution may expressly debar the Supreme Court or the other courts from adjudicating upon certain matters which have already been listed earlier. It is also possible that an intrinsic limitation may find express constitutional recognition as in articles 74 and 163 which exclude ministerial advice from the purview of the courts. But it should be clearly noted that in the absence of the courts’ willingness to observe the first set of limitations and the constitutional provisions embodying the second group of constraints, no enactment can operate as excluding directly or indirectly the power of judicial review of the superior courts.\textsuperscript{14}

Application of the Principles of Delay, Estoppel, Acquiescence, Waiver, and the Like: Sometimes, the principles of delay, estoppel, acquiescence, \textit{res judicata} or even waiver may operate to make a


court disinclined to give relief in a case. But mere non-exercise of a right does not make the right lapse, and these principles are no absolute bars to the exercise of the power of judicial review. For, lapse of time does not cure unconstitutionality and in certain cases even the doctrine of prospective overruling may be inducted to cure an unconstitutionality.\textsuperscript{15}

*Judicial Review Embraces both Enactments and Amendments*

Once these prerequisites, which essentially operate as limitations, are satisfied the superior courts do not hesitate to exercise their power of judicial review whose extent and intensity are unique in the scheme of the Constitution. The courts in the country have successfully claimed the power of determining the validity of both enactments and amendments, a power unparalleled in any other constitutional system.

*Judicial Review of Amendments. In Golaknath’s Case*\textsuperscript{16} by a tenuous majority of six to five, the Supreme Court asserted the right to pronounce upon the validity of a constitutional amendment and imported the doctrine of prospective overruling in the realm of constitutional changes. Even after the Constitution (Twenty-fourth Amendment) Act, the power to declare the validity of a constitutional amendment has been reaffirmed by the Supreme Court in *Keshavanand’s Case*.\textsuperscript{17} And unless article 368 be suitably amended to exclude the jurisdiction of the courts from reviewing the constitutionality of an amendment or any amendment itself provides for such an exclusion or the Supreme Court reviews its decisions in the aforesaid two cases, the power to review the *vires* of a constitutional amendment seems destined to be a valid law of the Constitution, although not necessarily a valuable law.

*Application of the Rules of Statutory Construction*

The superior courts in this country constantly proclaim that in interpreting the Constitution and the laws they adhere to the general rules of interpreting enactments and prefer the principle of literal interpretation for the purpose. In effect, it is pointed out that the courts do not presume a conflict between the Constitution and a

\textsuperscript{15} *I. C. Golaknath v. State of Punjab*, op. cit.  
\textsuperscript{16} *Idem.*  
\textsuperscript{17} *Keshavanand Bharathi v. State of Kerala*, op. cit.
statute and the rule of harmonious construction provides the dominant theme of their decisions relating to the constitutionality of statutes.

Besides, the general principles, maxims, presumptions and aids deployed in construing the Constitution and the laws are normally said to be geared to effectuating the will of the legislature and the courts display an awowed disinclination to be guided by any supposed spirit or presumed theory underlying the Constitution. They also do not claim to question the motive or wisdom of a legislative measure but only seek to examine the orbit of the competence of the legislative authority. And then, there is the presumption that the legislature is deemed to act within its competence unless this presumption is prima facie unwarranted or is displaced by further proof.

And, to a degree, it is not untrue to say that not unoften the superior courts take a pedestrian view of their power of judicial review in a legion of litigations. Yet power by nature has an inherent plastic expansivity even in the scheme of a constitution and even in the context of a court. Its pedestrian or Pegasean tendency at any moment is a mere reflection of the concomitant objective realities rather than an expression of its intrinsic qualities. And even in literally interpreting the Constitution and the laws, the courts have not abdicated their role as the defender of the Constitution. In the result, as Jackson would have said, over the past years.

"The Constitution has gone through several cycles of interpretation, each of which is related to the political and economic conditions of the period".18

In the scheme of the Constitution, the superior courts have assumed the power of judicial review of statutes and even amendments. And even when professedly literally interpreting such words as "restriction" in article 19 and "deprivation" or "compensation" in article 31, the superior courts engendered a situation in which a word like "compensation" had to be eventually obliterated from article 31. And the variable uses of such expressions as "reasonable" and "public purpose" in judicial pronouncements in furthering the domain of judicial review has always been accepted even by the judiciary itself.

The judiciary has also added to its power of judicial review by the application of such seemingly simple and apparently innocuous propositions as, that in considering the vires of a statute it is not its form

18 See Jackson: The Supreme Court, 1955; p. 23.
but substance that is material, or that what cannot be done directly, cannot also be done indirectly, or that which ought not to be swallowed cannot also be nibbled at. Precisely, the principle of true character of enactments\textsuperscript{19}, the doctrine of colourable legislation\textsuperscript{20}, and the rule against gradual encroachment\textsuperscript{21} have all been applied to expand the power of judicial review. The power to review its own decisions and the power of the President to consult the Supreme Court have also their own contributions in this context.

The Rules of Liberal and Progressive Interpretation

In exercising their power of judicial review the superior courts have ever assumed that the Constitution is “a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be”\textsuperscript{22}. And for the purpose of comprehending the scope of judicial review in the scheme of the Constitution it is not important whether the liberal or progressive rule of construction is used for upholding or killing a statute for inconsistency with the Constitution. For, the crux of the matter is not whether a particular statute is saved or condemned but whether the courts have the power so to do, and if so, on what grounds and to what extent.

Judicial review is to be really viewed as a vital factor in the power-equation ensconced in the scheme of the Constitution. And in secular constitutionalism it is immaterial whether this power is used at a particular moment for furthering certain socio-economic objectives. The fundamental question always in this context is whether the court or the legislature should lead ‘the nation to achieve socio-economic transformations under democracies, liberal, developing or people’s.

It seems that once it is accepted in the scheme of a constitution that the judiciary can pronounce upon the vires of legislative enactments, there seems to be no reasonable means to limit this power of the judiciary in terms of law, any constitutional exclusion of the jurisdiction of the courts from certain matters notwithstanding. For, the basic question in that case would arise whether the judiciary is to-


operate as an organ of public power in the realm of public policy decisions.

Policy Considerations in Judicial Review

The steel structure of judicial creativity rears its head as the stuccoed reinforced concrete frame of judicial review. The power of judicial review is the supreme expression of judicial policy role. Directly or indirectly, willingly or unwillingly, consciously or unconsciously, incessantly or intermittently, mediately or immediately, expressly or impliedly, coolly or huffily, actively or inertly, the exercise of the power of judicial review is the exercise of the power of public policy making. Even in the absence of such mercurial expressions as "reasonable classification" in article 14, "reasonable restrictions" in article 19, "personal liberty" in article 21, or "public purpose" in article 31, a court exercising the power of judicial review in the scheme of the Constitution would be constantly handing down mere policy decisions. And in fact, even the pure interpretative function is more than sheer legalism. Kania C. J. on January 25, 1950, at the inaugural session of the Supreme Court, observed:

"The duty of interpreting the Constitution falls on the Supreme Court. The Supreme Court will declare and interpret the law of the land and with the high traditions of the judiciary in this country, we are convinced that the work will be done in no spirit of formal or barren legalism."

Social Questions in Judicial Policy Decisions: Modern legislation is par excellence economic and social legislation. It is geared to furthering the socio-economic objectives of the nation. Laws have now positive contents and positive objects. The courts may be called upon to determine what is living, minimum or fair wage, or what is fair price. In pronouncing upon the constitutionality of a law dealing with socio-economic issues, the

"courts have necessarily to approach it from the point of view of furthering the social interest which it is the purpose of the legislation to promote, for, the courts are not, in these matters, functioning as it were in vacua, but as parts of a society which is trying, by enacted law, to solve its problems and achieve social concord and peaceful adjustment and thus furthering the material progress of the community as a whole."

It should be noted, however, that although the policy role of the judiciary implies an element of social role, the latter may not, and

often does not, have a place of pride in judicial decisions. The fact is that the social role of the judiciary is a contrivance conceived for roping in the ravaging public policy rampage of the judiciary, whereas the effort should really have been to make the judiciary meticulously practise what it loudly professes; to make it merely declare and administer laws, and not make and unmake laws.

Declaration of Unconstitutionality and its Effect

In the exercise of the power of judicial review a competent court declares a statute or an amendment invalid only to the extent of its inconsistency with the Constitution, the supreme law of the land, although the Constitution may be made to mean in a particular case what the court may desire it to mean. It is not the whole of the statute that is to be struck down unless the whole of it is bad, but only its such part or parts as are repugnant to the Constitution, and for this purpose the doctrine of severability is applied. This doctrine means that if only a part of an impugned statute is ultra vires the Constitution and the repugnant part may be taken away without vitally affecting the statute, the statute must be left to stand and only the repugnant part be severed off. But if the repugnant part cannot be so safely disjointed, the whole of the statute must be put to an end. The doctrine of prospective overruling may also be applied in appropriate cases.

Effect of Declaring Invalidity: A law declared invalid is inoperative and it cannot create any rights or obligations. And in so far as such a law is not saved by the doctrine of eclipse, as being either a pre-Constitution law or even because of a recognition of a distinction between a limitation on power and want of power, it cannot be revived even after a subsequent constitutional amendment, for, such a law is void ab initio. An invalid law covered by the doctrine of eclipse may, however, be revived by a subsequent constitutional amendment. It is also possible for the competent legislature to pass a new statute curing the invalidity of a statute and declare that acts done under the previous statute shall be deemed to have been done under the subsequent statute. But the fate of a constitutional amendment declared invalid by the courts is extremely uncertain in any case whatever.
THE EXECUTIVE, LEGISLATURE AND ADJUDICATURE

An essential unity of nature, powers, functions and purpose underlines all the organs of public power in a community of persons. And the executive, the legislature and the adjudicature, the three major departments of public power, are also impregnated with the theme of this underlying unity. In fact, they are the manifestations of a single entity, public power, in a country, and their functional differentiation is a differentiation in the manner of doing things rather than in the substance of the things done. They are all organs of public power, perform public functions and participate in public policy decisions and policy operations.

However, in policy decisions the factual primacy of the executive is patent in democracies and dictatorships alike. In democracies, liberal, developing or people’s, the legislature claims for itself primacy in hammering out public policies in the shape of justiciable norms, and the judiciary is entrusted with the task of administering justice according to justiciable norms, according to law, fairly, objectively and independently. But judicial independence or objectivity is intended to aid the common ends of the community, whether in the form of rendering justice to a particular individual or in the shape of furthering evidently common interests. And any failure to accept the policy lead of the executive and the legislative primacy of the legislature is most likely to lead to bizarre consequences. As Nehru said in the Constituent Assembly,

"one is the method of changing the Constitution. The other is...that the executive, which is the appointing authority of the judiciary, begins to appoint judges of its own liking for getting decisions in its own favour..."23

THE CONCEPT OF COMMITTED JUDICIARY

Perhaps, the strangest consequence of the inability to appreciate the respective roles of the executive, the legislature and the judiciary is found in the claim for a committed judiciary. In a people’s democracy this claim is said to have a solid ideological basis, but in liberal democracies it finds only insipid expressions. If by a committed judiciary is meant to suggest that all the organs of the state—the executive, the legislature and the adjudicature ought to have commitment to the same board socio-economic and political

assumptions, there is in principle nothing to be said against it, specially in a people’s or developing democracy.

But, then, it has to be remembered that Government remains for the most part Government of men even under the Government of the laws. And it is the obligation of the judiciary to see that the men in Government, including even the judges themselves, do not make the governance of a country a personal affair. There are always innumerable instances of personal use or abuse of public offices in any form of Government and the judiciary is expected to stand as an abiter in such cases. And although it is always desirable that in general policy matters the judiciary must accept the lead role of the executive and the legislative supremacy of the legislature, in the administration of particular justice it must enjoy independence and impartiality commensurate with the need to maintain both individual dignity and national unity.

The executive, the legislature and the adjudicature are intended to co-operate in the scheme of the Constitution in the perspective of the Directive Principles and they all alike are committed to those Principles and the Constitution in general. That the executive and the legislature have not been able to work in co-operation with the judiciary is evidenced by the numerous constitutional amendments and Parliamentary privilege cases. The judiciary has not by its numerous acts either helped its own cause or the cause of the public at large. The executive and the legislature have also not been acting with discretion and often use the judiciary and law and justice for ulterior ends. And unhappily, some judicial-executive-legislative conflicts remind more of the early competitive federalism of the U.S.A. or of the nineteenth century conflicts between the courts and Parliament in England than of the scheme of the co-operative federalism enshrined in the Constitution of this country.

The fact seems to be that if the executive wishes that the judiciary should accept in policy lead, it must have to its credit successful policy leads; if the legislature wants the judiciary to recognise its legislative supremacy, it must prove its efficiency and present itself as an orderly and dignified assembly of the people’s representatives; and if the judiciary seeks the co-operation of the executive and the legislature, it must, without losing its independence, impartiality, integrity and dignity, act within the perspective of the Directive Principles. The executive is to lead, the legislature is to legislate and the judiciary
is to adjudicate. But they all must co-operate in achieving common national objectives, the dignity and authority of each being sustained not only by constitutional provisions but also by actual performances.

THE PEOPLE AND THE COURTS

The function of the judiciary is after all to administer justice. The courts of law are the courts of justice. The “little man” turns to the courts not to learn law but to secure justice, not to test the constitutionality of an enactment but to have his injury healed. He desires the judge to act fairly, impartially, independently and honestly. He does not like the judges to be used against him either by private persons or persons in authority. He is more interested in clean and competent courts than in committed and creative courts.

A CASE FOR CLEAN COURTS

In the tiny world of the little man the pride of place belongs to the clean and competent courts and not committed courts, committed whether to an ideology, a party, a public organ or itself. He has his committed representatives in Government and Parliament, and little does he desire the law courts to harbour a host of some more committed persons. For, if his representatives in Government and Parliament constantly fail him, the courts cannot ultimately save him.

Law suits are not substitutes for social actions. Litigation is a luxury the little man can ill afford. The paraphernalia of law courts always bewilder him. He does not visualise the judiciary to lead a social revolution in the scheme of the Constitution. He only desires to feel that the bench, the bar and the “baton” do not appear to constantly conspire in private to deprive him of what he has learnt over the years, or is constantly reminded, in public to consider as justice according to his common sense. He wants to live in peace and work for his prosperity and remain loyal to his country.

He is always given to follow, ready to work, willing to believe, and prone to loyalty. What he desires of a public authority is not to tax his faith, capacity, credulity and loyalty to the breaking point of his tremendous patience. And when the judiciary in a country is in a thorough disarray and law and order is in the shambles, his

See the observations of Taft C. J. in Ex parte Crossman, (1924) 267 U.S. 87.
patience reaches the tether's end more readily than when his leaders and representatives prove to him the most pernicious.

He cannot command, but he does always desire that the law courts would be left alone by all, the executive, the legislature, the administrator, the police, the politicians, the leaders, the lawyers, the litigants, the academicians, the jurists, and even the judges, to render him justice according to law. He needs as simple, inexpensive, competent, clean and accessible administration of justice as can possibly be conceived in this crises laden techno-industrial urban civilisation, in order that he may not suffer a complete breakdown of confidence. And even in a minimum realisation of this demand lies, perhaps, the highest fulfilment of the system of justice according to law in this ancient land of Dharma.\(^3\)

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\(^3\) The word "Dharma" here has not been used in the narrow sense of religion, but in the widest possible sense conveyed by its etymological root.

S : CI—67
CHAPTER 34

SPECIAL UNITS AND AREAS

A remarkable feature of the Constitution is the degree to which it has, within its scheme, admitted diversities in the governance of the country, the diversities which exist as historical, political, social, cultural, and even economic necessities and lend a peculiar richness to the Union. Federalism itself is a method of securing unity in diversity. In addition, the Constitution has special provisions relating to certain States and special territorial units known as the Union Territories or Tribal or Scheduled Areas.

THE STATE OF JAMMU AND KASHMIR

Of the special units and areas, the State of Jammu and Kashmir, although a constituent unit of the Union of India, is a class by itself. And what history contrived as a chance and politics recognised as an improvisation still continues to exist in the scheme of the Constitution as a practical necessity and also carries a claim of sacrosanctity in principle.¹

Part VI of the Constitution, relating to the State executive, Legislature and adjudicature, by “Definition” in its article 152 excludes the State of Jammu and Kashmir from its purview. And article 308 in Part XIV of the Constitution, relating to the services under the Union and the States, likewise says:

“In this part, unless the context otherwise requires, the expression ‘State’ does not include the State of Jammu and Kashmir.”

THE CONSTITUTION OF JAMMU AND KASHMIR

The State of Jammu and Kashmir has its own separate Constitution framed by its own Constituent Assembly, which broadly provides for a form of Government similar to that in any other State in India. Under the amended section 2 of that Constitution any reference to the Governor in the State means a reference to the Sadar-i-Riyasat in that Constitution. The State has also a Legislature and a Council of Ministers headed by the Chief Minister, who may, for the internal purposes of the State, be referred to as the Wazir-e-Azam,¹ and the

¹ See the Author’s From Raj to Republic, op. cit.
¹a Refer to the recent Indira Gandhi—Abdulla Agreement.
Ministry is collectively responsible to the Legislative Assembly. And at the apex of the State judiciary is the Jammu and Kashmir High Court, appeals against whose decisions may be taken to the Supreme Court of India. There has been a recent agreement between the Union and the State which further clarifies the special status of the State without in any way vitally departing from its present position.\(^b\)

**APPLICATION OF THE CONSTITUTION OF INDIA TO JAMMU AND KASHMIR**

On the whole, the State of Jammu and Kashmir enjoys greater autonomy within the Union than do the other constituent States, and the Constitution of India applies to that State only within the terms of the Presidential Constitution (Application to Jammu and Kashmir) Order, 1954, as amended from time to time, issued under article 370 which provides:

"(1) Notwithstanding anything in this Constitution,—

(a) the provisions of article 238\(^a\) shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for the State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation\(^b\)—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja’s Proclamation, dated the fifth day of March, 1948;"

\(^{1b}\) Ibid.

\(^{2}\) This article 238, which related to the States in Part B of the First Schedule, has now been omitted by the Constitution (Seventh Amendment) Act, 1956.

\(^{3}\) This Explanation, by virtue of the Presidential Order, 1952, now reads as follows:

"Explanation.—For the purposes of this article, the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of the Ministers of the State for the time being in office."
(c) the provisions of article 1 and of this article shall apply in relation to
that State;

(d) such of the other provisions of this Constitution shall apply in relation
to that State subject to such exceptions and modifications as the President
may by order specify:

Provided that no such order which relates to the matters specified
in the Instrument of Accession of the State referred to in paragraph
(i) of sub-clause (b) shall be issued except in consultation with the
Government of the State:

Provided further that no such order which relates to matters other
than those referred to in the last preceding proviso shall be issued except
with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in para-
graph (ii) of sub-clause (b) of clause (1) or the second proviso to sub-clause (d) of
that clause be given before the Constituent Assembly for framing the Constitution
of the State is convened, it shall be placed before such Assembly for such decision
as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the
President may, by public notification, declare that this article shall cease to be
operative or shall be operative only with such exceptions and modifications and
from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State
referred to in clause (2) shall be necessary before the President issues such a
notification."

SPECIAL PROVISIONS RELATING TO SOME
OTHER STATES

A cluster of articles, beginning with article 371 and now extending
up to article 371C, contains special provisions with regard to some
other States of the Union in consideration of their peculiar needs.
Such States are the States of Andhra Pradesh, Maharashtra, Gujarat,
Nagaland, Assam and Manipur.

SPECIAL PROVISIONS WITH REGARD TO ANDHRA PRADESH,
MAHARASHTRA AND GUJARAT

Article 371, which makes special provisions with regard to the
States of Andhra Pradesh, Maharashtra and Gujarat for the purpose
of constituting regional committees of the Legislative Assembly of
Andhra Pradesh and development boards for certain areas in
Maharashtra and Gujarat and provides for the special responsibilities
of the Governors concerned for such committees or boards and
certain other matters, lays down as follows:
“(1) Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Andhra Pradesh, provide for the constitution and functions of regional committees of the Legislative Assembly of the State, for the modifications to be made in the rules of business of the Government and in the rules of the procedure of the Legislative Assembly of the State and for any special responsibility of the Governor in order to secure the proper functioning of the regional committees.

(2) Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Maharashtra or Gujarat, provide for any special responsibility of the Governor for—

(a) the establishment of separate development boards for Vidarbha, Marathawada, and the rest of Maharashtra, Saurashtra, Kutch and the rest of Gujarat with the provision that a report on the working of each of these boards will be placed before the State Legislative Assembly;

(b) the equitable allocation of funds for developmental expenditure over the said areas, subject to the requirements of the State as a whole; and

(c) an equitable arrangement providing adequate facilities for technical education and vocational training, and adequate opportunities for employment in services under the control of the State Government, in respect of all the said areas, subject to the requirements of the State as a whole.”

SPECIAL PROVISIONS FOR NAGALAND

Article 371A, laying down the special provisions for Nagaland, reads:

“(1) Notwithstanding anything in this Constitution,—

(a) no Act of Parliament in respect of—

(i) religious or social practices of the Nagas,
(ii) Naga customary law and procedure,
(iii) administration of civil and criminal justice involving decisions according to Naga customary law,
(iv) ownership and transfer of land and its resources,

shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides;

(b) the Governor of Nagaland shall have special responsibility with respect to law and order in the State of Nagaland for so long as in his opinion internal disturbances occurring in the Naga Hills-Tuensang Area immediately before the formation of that State continue therein or in any part thereof and in the discharge of his functions in relation thereto the Governor shall, after consulting the Council of Ministers, exercise his individual judgment as to the action to be taken:

Provided that if any question arises whether any matter is or is not a matter as respects which the Governor under this sub-clause required to act in the exercise of his individual judgment, the decision of the
Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in the exercise of his individual judgment:

Provided further that if the President on receipt of a report from the Governor or otherwise is satisfied that it is no longer necessary for the Governor to have special responsibility with respect to law and order in the State of Nagaland, he may by order direct that the Governor shall cease to have such responsibility with effect from such date as may be specified in the order;

(c) in making his recommendation with respect to any demand for a grant, the Governor of Nagaland shall ensure that any money provided by the Government of India out of the Consolidated Fund of India for any specific service or purpose is included in the demand for a grant relating to that service or purpose and not in any other demand;

(d) as from such date as the Governor of Nagaland may by public notification in this behalf specify, there shall be established a regional council for the Tuensang district consisting of thirty-five members and the Governor shall in his discretion make rules providing for—

(i) the composition of the regional council and the manner in which the members of the regional council shall be chosen;

Provided that the Deputy Commissioner of the Tuensang district shall be the Chairman *ex officio* of the regional council and the Vice-Chairman of the regional council shall be elected by the members thereof from amongst themselves;

(ii) the qualifications for being chosen as, and for being, members of the regional council;

(iii) the term of office of, and the salaries and allowances, if any, to be paid to members of, the regional council;

(iv) the procedure and conduct of business of the regional council;

(v) the appointment of officers and staff of the regional council and their conditions of service; and

(vi) any other matter in respect of which it is necessary to make rules for the constitution and proper functioning of the regional council.

(2) Notwithstanding anything in this Constitution, for a period of ten years from the date of the formation of the State of Nagaland or for such further period as the Governor may, on the recommendation of the regional council, by public notification specify in this behalf,—

(a) the administration of the Tuensang district shall be carried on by the Governor;

(b) where any money is provided by the Government of India to the Government of Nagaland to meet the requirements of the State of Nagaland as a whole, the Governor shall in his discretion arrange for an equitable allocation of that money between the Tuensang district and the rest of the State.
(c) no Act of the Legislature of Nagaland shall apply to the Tuensang district unless the Governor, on the recommendation of the regional council, by public notification so directs and the Governor in giving such direction with respect to any such Act may direct that the Act shall, in its application to the Tuensang district or any part thereof, have effect subject to such exceptions or modifications as the Governor may specify on the recommendation of the regional council:

Provided that any direction given under this sub-clause may be given so as to have retrospective effect;

(d) the Governor may make regulations for the peace, progress and good government of the Tuensang district and any regulations so made may repeal or amend with retrospective effect, if necessary, any Act of Parliament or any other law which is for the time being applicable to that district;

(e) (i) one of the members representing the Tuensang district in the Legislative Assembly of Nagaland shall be appointed Minister for Tuensang affairs by the Governor on the advice of the Chief Minister and the Chief Minister in tendering his advice shall act on the recommendation of the majority of the members as aforesaid;

(ii) the Minister for Tuensang affairs shall deal with, and have direct access to the Governor on, all matters relating to the Tuensang district but he shall keep the Chief Minister informed about the same;

(f) notwithstanding anything in the foregoing provisions of this clause, the final decision on all matters relating to the Tuensang district shall be made by the Governor in his discretion;

(g) in articles 54 and 55 and clause (4) of article 80, references to the elected members of the Legislative Assembly of a State or to each such member shall include references to the member or members of the Legislative Assembly of Nagaland elected by the regional council established under this article;

(h) in Article 170—

(i) clause (1) shall, in relation to the Legislative Assembly of Nagaland, have effect as if for the word 'sixty', the words 'forty-six' had been substituted;

(ii) in the said clause, the reference to direct election from territorial constituencies in the State shall include election by the members of the regional council established under this article;

(iii) in clauses (2) and (3), references to territorial constituencies shall mean references to territorial constituencies in the Kohima and Mokokchung districts.

(3) If any difficulty arises in giving effect to any of the foregoing provisions of this article, the President may by order do anything (including any adaptation or modification of any other article) which appears to him to be necessary for the purpose of removing that difficulty:
Provided that no such order shall be made after the expiration of three years from the date of the formation of the State of Nagaland.

Explanation.—In this article, the Kohima, Mokokchung and Tuensang districts shall have the same meanings as in the State of Nagaland Act, 1962.”

**SPECIAL PROVISIONS FOR ASSAM**

Article 371B, containing the special provisions relating to Assam, provides as follows:

“Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Assam, provide for the constitution and functions of a committee of the Legislative Assembly of the State consisting of members of that Assembly elected from the tribal areas specified in Part A of the table appended to Paragraph 20 of the Sixth Schedule and such number of other members of that Assembly as may be specified in the order and for modifications to be made in the rules of procedure of that Assembly for the constitution and proper functioning of such committee.”

**SPECIAL PROVISIONS FOR MANIPUR**

Article 371C makes special provisions for Manipur and says:

“(1) Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Manipur, provide for the constitution and functions of a committee of the Legislative Assembly of the State consisting of members of that Assembly elected from the Hill Areas of that State, for the modifications to be made in the rules of business of the Government and in the rules of procedure of the Legislative Assembly of the State and for any special responsibility of the Governor in order to secure the proper functioning of such committee.

(2) The Governor shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Hill Areas in the State of Manipur and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said areas.

Explanation.—In this article, the expression ‘Hill Areas’ means such areas as the President may, by order, declare to be Hill Areas.”

**THE HIMALAYAN STATE OF SIKKIM**

The timely termination of the anachronic protectorate position and the simultaneous recognition of an appropriate “Associate State” status of the Himalayan State of Sikkim by the Constitution (Thirty-fifth Amendment) Act, 1974, was a historic constitutional innovation. It may only be noted here that the relations of India with Sikkim were governed by the Indo-Sikkim Treaty of 1950, and Sikkim was governed under the Government of Sikkim Act, 1974, an Act which
had also a provision for securing Sikkim’s participation in the political and economic institutions of India.

On May 11, 1974, the Sikkim Assembly resolved within the terms of the Government of Sikkim Act that the Government of India take immediate steps for Sikkim’s participation in the political and economic institutions of India and this resolution was followed by persistent requests by Sikkim urging upon India to adopt suitable measures in this regard. Accordingly, on September 3, 1974, the Constitution (Thirty-fifth Amendment) Bill, 1974, was introduced in Parliament and was carried by an unprecedented majority in both the Houses of Parliament to become the Constitution (Thirty-fifth Amendment) Act, 1974.

The Thirty-fifth Amendment Act added a new article 2A and a new Schedule Ten to the Constitution of India and accorded the status of an “Associate State” to Sikkim, without in any way affecting its internal autonomy or altering the terms of the Indo-Sikkim Treaty, 1950. This Amendment merely provided that Sikkim would have the right to send a representative to the Lok Sabha, elected by the Sikkim people on the basis of universal adult suffrage by a simple majority, and a representative to the Rajya Sabha, elected by the Sikkim Assembly on the basis of a simple majority. These representatives were fully entitled to take part in all the proceedings and voting in Parliament. They could not, however, participate in the elections of the President and the Vice-President of India. Notably, also the matters contained in Schedule Ten were not justiciable.

But it soon transpired that the chogyal, the Sikkim Ruler, would not accept his new constitutional status and came in direct conflict with his ministry. This led to the holding of a referendum in that land to ascertain whether the people wanted complete merger as a constituent unit of the Union of India. There was an overwhelming support for merger and the Government of India then came out with the Constitution (Thirty-eighth Amendment) Bill, 1975, which has now become the Constitution (Thirty-eighth Amendment) Act, 1975. Under the provisions of this Amendment Sikkim is now a full-fledged unit of the Union of India with a Governor and a Council of Ministers headed by the Chief Minister, although it has certain special features, such as, the parity of certain ethnic groups in the State Legislature and the like.
THE UNION TERRITORIES

The Union Territories are such smaller areas of the Union as are directly governed within the terms of Part VIII of the Constitution for historical or political reasons, by the President through administrators appointed by him, who even carry designations, such as, Lt. Governors or Commissioners. A Governor of a State may also be appointed as the Administrator of an adjoining territory. The expression “Union Territory” includes an acquired Territory. But although a Union Territory is directly governed by the President, the Government of a Union Territory, which means the President, is not deemed part of the Union Government or the Government of India. A Union Territory retains its distinct identity and is treated as a State for certain purposes, say, for any internal territorial adjustment. Article 239 provides as follows in this behalf:

“(1) Save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.

(2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the Administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such Administrator independently of his Council of Ministers.”

LEGISLATURE AND COUNCIL OF MINISTERS FOR A UNION TERRITORY

Parliament may by law create a Legislature and provide for a Council of Ministers headed by the Chief Minister for a Union Territory, and quite a few Union Territories have their Legislatures and Councils of Ministers. And although when a Union Territory comes to have a Legislature and a Council of Ministers and its Government functions generally in the manner of a State Government, Parliament even then retains the paramount power of legislation with respect to that Territory under List II. Article 239A lays down as follows in this regard:

“(1) Parliament may by law create for any of the Union territories of Tripura, Goa, Daman and Diu, Pondicherry and Mizoram—

(a) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union territory, or

See Appendix I for a list of the Union Territories.

(b) a Council of Ministers,

or both with such constitution, powers and functions, in each case, as may be specified in the law.

(2) Any such law as is referred to clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution.

**Power of the Administrator to Promulgate Ordinances During Recess of Legislature**

Article 239B, authorising the administrator of a Union Territory to promulgate Ordinances during the recess of the Legislature of the Territory, reads:

“(1) If at any time, except when the Legislature of a Union territory referred to in clause (1) of article 239A is in session, the administrator thereof is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:

Provided that no such Ordinance shall be promulgated by the administrator except after obtaining instruction from the President in that behalf:

Provided further that whenever the said Legislature is dissolved, or its functioning remains suspended on account of any action taken under any such law as is referred to in clause (1) of Article 239A, the administrator shall not promulgate any Ordinance during the period of such dissolution or suspension.

(2) An Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the Union territory which has been duly enacted after complying with the provisions in that behalf contained in any such law as is referred to in clause (1) of Article 239A, but every such Ordinance—

(a) shall be laid before the Legislature of the Union territory and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature or if, before the expiration of that period, a resolution disapproving it is passed by the Legislature, upon the passing of the resolution; and

(b) may be withdrawn at any time by the administrator after obtaining instructions from the President in that behalf.

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the Union territory made after complying with the provisions in that behalf contained in any such law as is referred to in clause (1) of Article 239A, it shall be void.”

**Presidential Regulations for Union Territories**

Article 240 authorises the President to make regulations for certain Union Territories and reads:
“(1) The President may make regulations for the peace, progress and good government of the Union territory of—

(a) the Andaman and Nicobar Islands; (b) the Laccadive, Minicoy and Aminidive Islands; (c) Dadra and Nagar Haveli; (d) Goa, Daman and Diu; (e) Pondicherry; (f) Mizoram; (g) Arunachal Pradesh.

Provided that when any body is created under Article 239A to function as a Legislature for the Union territory of Goa, Daman and Diu, Pondicherry or Mizoram, the President shall not make any regulation for the peace, progress and good government of that Union territory with effect from the date appointed for the first meeting of the Legislature.

Provided further that whenever the body functioning as a Legislature for the Union territory of Goa, Daman and Diu, Pondicherry or Mizoram is dissolved, or the functioning of that body as such Legislature remains suspended on account of any action taken under any such law as is referred to in clause (1) of Article 239A, the President may, during the period of such dissolution or suspension, make regulations for the peace, progress and good Government of that Union territory.

(2) Any regulation so made may repeal or amend any Act made by Parliament or any other law which is for the time being applicable to the Union territory and, when promulgated by the President, shall have the same force and effect as an Act of Parliament which applies to that territory.”

HIGH COURTS FOR UNION TERRITORIES

Article 241, relating to the High Courts for the Union Territories, says:

“(1) Parliament may by law constitute a High Court for a Union territory or declare any court in any such territory to be a High Court for all or any of the purposes of this Constitution.

(2) The provisions of Chapter V of Part VI shall apply in relation to every High Court referred to in clause (1) as they apply in relation to a High Court referred to in Article 214 subject to such modifications or exceptions as Parliament may by law provide.

(3) Subject to the provisions of the Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by or under this Constitution, every High Court exercising jurisdiction immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, in relation to any Union territory shall continue to exercise such jurisdiction in relation to that territory after such commencement.

(4) Nothing in this article derogates from the power of Parliament to extend or exclude the jurisdiction of a High Court for a State to, or from, any Union territory or part thereof.”

THE SCHEDULED AND TRIBAL AREAS

The Scheduled Areas, Tribal Areas and Scheduled Tribes refer to the areas and tribes recognised as such within the terms of the Cons-
titution. These Scheduled and Tribal Areas are interspersed throughout the country. And even when such an Area forms a part of a State or a Union Territory, it is governed in accordance with the provisions of Part X of the Constitution, which has only two articles—article 244, relating to the administration of such Areas, and article 244A, providing for the constitution of an autonomous tribal State comprising certain areas of Assam. And two such States, the States of Nagaland and Meghalaya, have been carved out of Assam, which now enjoy full-fledged State-hood, and the twin articles of this Part of the Constitution are plain enough to be reproduced without comments.

Article 244 says6:

“(1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the State of Assam.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam.”

And, then, article 244A provides;

“(1) Notwithstanding anything in this Constitution, Parliament may, by law, form within the State of Assam an autonomous State comprising (whether wholly or in part) all or any of the tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule and create therefor—

(a) a body, whether elected or partly nominated and partly elected, as a Legislature for the autonomous State, or

(b) a Council of Ministers,

or both with such constitution, powers and functions, in each case, as may be specified in the law.

(2) Any such law as is referred to in clause (1) may in particular—

(a) specify the matters enumerated in the State List or the Concurrent List with respect to which the Legislature of the autonomous State shall have powers to make laws for the whole or any part thereof, whether to the exclusion of the Legislature of the State of Assam or otherwise;

(b) define the matters with respect to which the executive power of the autonomous State shall extend;

(c) provide that any tax levied by the State of Assam shall be assigned to the autonomous State in so far the proceeds thereof are attributable to the autonomous State;

(d) provide that any reference to a State in any article of this Constitution shall be construed as including a reference to the autonomous State; and

(e) make such supplemental, incidental and consequential provisions as may be deemed necessary.

6 See Appendices II and III for the provisions of Schedules V and VI, respectively.
(3) An amendment of any such law as aforesaid in so far as it relates to any of the matters specified in sub-clause (a) or sub-clause (b) of clause (2) shall have no effect unless the amendment is passed in each House of Parliament by not less than two-thirds of the members present and voting.

(4) Any such law as is referred to in this article shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution."
CHAPTER 35

THE SERVICES

Administration is the core of the state and the services constitute the administration. The state today is the service state. The services, civil or military, general or technical, are the sinews of the service state and the civil service is central to the scheme of public services in democracies, liberal or people's, developed or developing, and of the civil servants under Parliamentary Government, Chamberlain had to say:

"I have a shrewd suspicion that you could do without us. But I have an absolute conviction that we could not do without you."

SERVICE CATEGORIES

It is common to classify the public services for various purposes. A broad demarcation is made between civil and military services. Then the bureaucrat or the generalist may be distinguished from the technocrat or specialist. A classification within a country on the basis of levels of Government or administration or at the same level of Government or administration on the basis of functions is also usual.

THE ALL-INDIA SERVICES

The Constitution of India recognises a distinction between civil and military personnel and also between Central and State services. It also speaks of all-India services of whom article 312 speaks as follows:

"(1) Notwithstanding anything in Part XI, if the Council of States has declared by resolution supported by not less than two thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services common to the Union and the States, and, subject to the other provisions of this Chapter, regulate the recruitment of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article."

The necessity and value of all-India services were recognised by the Constituent Assembly itself. And although certain reservations were aired about their impact on State autonomy, it was generally agreed
that they are necessary for efficiency in services and unity and security of the nation as also for coordination and cooperation between the Union and the States. Patel wrote to Nehru in a letter on April 12, 1948:

"In consultation with, and with the unanimous support of, Provincial Governments (now State Governments) we have evolved two new services to take the place of the Indian Civil Service and the Indian Police, viz., the Indian Administrative Service and the Indian Police Service...I need hardly emphasise that an efficient, disciplined and contented service, assured of its prospects as a result of diligent and honest work, is a *sine qua non* of sound administration under a democratic regime even more than under an authoritarian rule. The service must be above party and we should ensure that political considerations, either in its recruitment or in its discipline and control, are reduced to the minimum...In an all-India service, it is obvious, recruitment, discipline and control, etc. have to be tackled on the basis of uniformity and under the direction of the Central Government which is the recruiting agency... Any pricking of conscience on the score of provincial (now State) autonomy is therefore out of place... I am also convinced... that it would be a grave mistake to leave these matters to be regulated either by central or provincial (now State) legislation. Constitutional guarantees and safeguards are the best medium of providing for these services and are likely to prove more lasting."

And the fact seems to be that although the all-India services have not fulfilled all the expectations and are facing additional strains of prevailing diffused multi-party State politics and generally factional and confusing political scene and also the other socio-economic ills of the community, by and large, they have proved useful. There have always been claims for creating new cadres of all-India services, although only a few new ones have actually come into being. And clearly, the all-India services have a future, provided they are duly toned up.

**ROLE OF THE CIVIL SERVICE**

In the state at work, whether democratic or authoritarian, parliamentary or presidential, developed or developing, the civil service, even in the limited sense of the upper strata of the permanent generalist administrators, plays a pivotal role. The variety of functions performed by the members of the civil service, particularly in a service state or a developing or planned society, place it in a crucial position of not only preserving the realm but also securing national progress and social change. And the different aspects of its

1 Quoted by Rao, B. Shiva: *The Framing of India's Constitution*, op. cit., p. 715.
role may conveniently be classed as its policy role, ministration role and social role.

POLICY ROLE

Although it is generally recognized that it is for the political leaders to determine national goals and formulate policies, it is no longer denied that the civil servant makes vital contributions in this process of policy formulation. He not only collects the necessary data for formulating realistic and meaningful policies, but in fact also influences to a great extent the actual decision making with regard to a policy. Then, where a policy implementation needs legal sanction, he hammers out the policy into a legal shape to be passed as legislative enactments or executive legislation. He also watches the progress of a policy at work and may suggest modifications or even suspension.

MINISTRATION ROLE

The civil servant has to carry on the day-to-day administrative work in the community. He provides the necessary legal and administrative infra-structure both for national preservation and social action. He has also to run new and necessary services of all kinds, including economic, educational, cultural and social, which the modern service state, particularly in a developing, welfare, socialist or planned society, is increasingly assuming everyday.

SOCIAL ROLE

The civil service is not only a political but also a social force. By virtue of his education, training, economic position, public power and prestige the civil servant in a vital manner affects the attitudes and values of the community. Consciously or unconsciously, the man in the street is always imbibing the cultural and social traits of the civil service. And besides, the behaviour pattern of the civil service may be very crucial in not only promoting the legitimacy of the realm but also mobilizing the people for developmental work and social change.

INGREDIENTS OF GOOD SERVICES

The swarms of officers and men in the permanent public services are a sine qua non of the state. In their competence, contentment, continuity, devotion, discipline, integrity, enterprise, objectivity and

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their responsible, representative and responsive character lies the preservation and progress of the realm. Each of them is expected to make the maximum contribution, commensurate with his station and responsibilities, to the national well-being. And for securing the maximisation of each one's performance and rendering by each one the best account of oneself, certain psychological, ecological, social, cultural, economic, political, administrative, organisational, functional and operational conditions have now come to be generally considered essential.

**SERVICE ABOVE SELF**

The services ought ever to remember that their function is to serve and not to govern, to administer goods and services and not to rule and command the people. The positive state needs them more as arms of social action than as mere instruments of social control. Their claim to existence must constantly be backed by their continuous ministration to the positive ends of the community. It is the sense of selfless service that must sustain their right to public offices.

The services must be intensely and constantly aware of their responsibilities. Intense devotion to duty, due discharge of responsibilities, must characterise the incumbents to public offices. And although the sense of selfless service in the services needs always to be sustained by honest, vigorous and purposive politics; clean, disciplined and diligent society; and other objective conditions that enter into the generation and preservation of a particular psychological trait, "service above self" alone can be the motto of the services.

**LOYALTY AND DISCIPLINE**

The sense of service implies the sense of loyalty, discipline and obedience. The public servants are the loyal servants of the realm. Loyalty in a wider sense involves loyalty to the ideals and objectives to which the community is devoted and in a narrow sense it implies loyalty to the individuals or institutions under whom one may be working for the time being. Loyalty in the wider sense requires that the community is wedded to certain more or less well-defined ideals and goals which its political and social leaders are committed to pursue and in the narrow sense demands of the services that they

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1a See the observations of Kamath and Subbarayan in the Constituent Assembly, C.A.D. Vol. IX; pp. 585, 962.
shall be disciplined and obedient and would execute superior orders with zeal and will.

The question of loyalty and discipline, thus, raises the vital question of relation between the services and the political and social leaders, and it is generally expected of the services that they shall accept the lead given by the political and social leaders of the community. However, it is essential to note that the sense of loyalty claimed here is not necessarily the same as the claim for "committed services."

LEADERSHIP AND ENTERPRISE

If it is required that the public servants shall be loyal, disciplined and obedient, it is also expected of them, specially those occupying the higher echelons of the services, that they shall possess and display adequate qualities of leadership and enterprise. Their position in the life of the community and in the hierarchy of the administration is such that they ought to be able not only to obey but also to command, not only to be led but also to lead.

SKILL AND EFFICIENCY

The services must possess adequate skill and efficiency and speed. They ought to be result oriented. The services rendered by the state are now economic, social and technical in nature and only skilled personnel can adequately discharge their responsibilities. By judicious recruitment and by out-service and in-service training it should be possible to find and place the right man in the right place.

FUNCTIONAL ORGANISATION

Using the word "functional" in a broad sense it may be suggested that, without in anyway contributing to the bureaucracy versus technocracy controversy, it is essential that the services should be generally organised functionally, because this is the age of specialisation. And this implies also that the line of responsibility in an organisation should be clearly defined.

RESPONSIVENESS AND REPRESENTATIVENESS

This is the age of "rule of the people, by the people and for the people" and even "with the people." It is required then that consistently with the efficiency of the services and security of the nation
the services shall be constantly responsive to the needs of the people. It is also required that the services shall not only be representative in character but also be characterised by associational administration.

**REALISM AND RATIONALISM**

In spite of the requirement of responsiveness and representativeness, however, the services are expected to have a greater degree of realism and rationalism than the political and social leaders of the community. The former by their skill, training, position, experience and knowledge are intended to be more realistic and rational in their approach to a public issue, although this realism or rationalism does not necessarily imply conservatism.

**CONTINUITY AND CONSISTENCY**

Without being conservative, it is expected of the services to maintain continuity and consistency. This applies both to personnel and policies. Continuity or consistency is neither inimical to efficiency nor to progress. It is essential for the orderly, peaceful and harmonious working of a community. It is also required to sustain the faith of the people in the legitimacy of the socio-economic and political formations of their time.

**OBJECTIVITY AND IMPARTIALITY**

Public servants have also to be objective and impartial in their approach to an issue, objective or individual. They have to serve without swerving. The element of objectivity and impartiality in the services is necessary for both the efficiency of the services and also the integrity of the nation.

**INTEGRITY AND CONTENTMENT**

The services should possess sterling character and be contented on all counts. They should be honest in their approach to any issue and be satisfied with the conditions of their services. Even though working in the privacy of their office walls, they should not appear behaving as members of the under-world and their attitude should never be agitational. For this, of course, they need good remuneration and service conditions, including security of tenure, and other ecological elements. But nothing whatever can ever condone their corruption and agitation.
NEUTRALITY AND ANONYMITY

A public servant, particularly under parliamentary system, is also expected to be neutral and anonymous. He does his duties in silence and yet sincerely with all that is within his powers to achieve the best results. However, neutrality is not his passivity and anonymity his secretiveness. He places before the political leaders in power all his views on a matter, but the decisions, even if they are in conformity with or in pursuance of his views, are the decisions of the political masters. He does not seek publicity for himself.

IMMUNITY AND GUARANTEE

In order that public servants may perform their duties efficiently and honestly, they are generally wrapped with certain immunities and guarantees of various forms, such as, immunity from certain suits and proceedings and guarantees of service conditions. And although it is difficult to state with precision what immunities and guarantees are really indispensable in a particular situation, it is generally recognised that immunities and guarantees in one from or another are necessary for a proper discharge of their duties.

CONSTITUTIONAL GUARANTEES TO PUBLIC SERVANTS

The Constitution of India carries special guarantees for public servants, which they enjoy in addition to those enjoyable by them as the citizens of this country. Thus, the recruitment and service conditions of the public servants in the country are subject to not only numerous rules, regulations, resolutions, orders, enactments but also provisions of Part XIV and other relevant provisions of the Constitution. These rules and principles are generally designed to secure the services of the best person for the right job and to ensure his efficiency, impartiality, neutrality and integrity in the performance of his work. And historically speaking, the existing law relating to the public servants in the country may be traced back to the earliest days of the East India Company.

It seems that there was in existence a body of rules, essentially in the nature of administrative instructions, governing the conditions of service of the employees of the Company and disciplinary

proceedings against them. These rules continued to be in force by virtue of section 130 C, Government of India Act 1915. This Act was amended in 1919, and a new section 96 B(2) authorised the Secretary of State for India to frame rules in modification or supersession of the rules applicable to the officers in the service of a Local Government (now a State Government) or the Central Government in this country. In December, 1920 the Secretary of State framed rules applicable to all officers in the All-India, Provincial and Subordinate Services. These rules also covered an officer holding any special post. The rules framed in 1920 were amended from time to time and were issued in a consolidated form in June 1924. These rules were replaced by the Civil Services (Governors' Provinces) Classification Rules, and Civil Services (Governors' Provinces) Discipline Rules, 1926, which in turn were substituted by the Civil Services (Classification, Control and Appeal) Rules framed by the Secretary of State in 1930. These 1930 Rules, as amended from time to time, are still in force by virtue of Article 313 of the Constitution. In application to the officers of the Central Government, the Civil Service (Classification, Control, and Appeal) Rules, 1930, exclude certain categories of persons, including the Railway servants. Then, the Central Government has framed All-India Service (Discipline and Appeal) Rules, 1955, within the terms of article 309 which provides as follows:

"Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the officers of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

THE DOCTRINE OF PLEASURE

Clause (1) of article 310 lays down that subject to any other express provision of the Constitution, any person who is a member of defence services or occupies a civil post under the Union holds
his office during the pleasure of the President, and a person in the
civil employment of a State holds office during the pleasure of the
Governor of the State. This article 310 reads:

"(1) Except as expressly provided by this Constitution, every person who is
a member of a defence service or of a civil service of the Union or of an all-India
service or holds any post connected with defence or any civil post under the Union,
holds office during the pleasure of the President, and every person who is a member
of a civil service of a State or holds any civil post under a State holds office during
the pleasure of the Governor of the State.

(2) Notwithstanding that a person holding a civil post under the Union or
a State holds office during the pleasure of the President or, as the case may be, of
the Governor of the State, any contract under which a person, not being a member
of a defence service or of an all-India service or of a civil service of the Union or a
State, is appointed under this Constitution to hold such a post may, if the President
or the Governor, as the case may be, deems it necessary in order to secure the
service of the person having special qualifications, provide for the payment to him
of compensation, if before the expiration of an agreed period that post in abolished
or he is, for reasons not connected with any misconduct on his part, required to
vacate that post."

One may look back to the Government of India Act, 1833,
section 74, which provided that a person in the employment of the
East India Company held office during the pleasure of the British
Crown. Persons not directly appointed by the Monarch, however,
held their posts during the pleasure of the Court of Directors.
Subsequently, when the Crown took over the responsibility for
governing this country, the Government of India Act, 1858, conferred
on the Secretary of State for India all powers exercised by the
Court of Directors till then, including the powers relating to the
servants of the Company.\(^3\)

As noted above, the Government of India Act, 1915, which was in
the nature of a consolidating statute, continued the operation of the
then existing laws relating to the civil servants. The pleasure clause
in relation to civil servants was continued even under the 1919
amendment of the aforesaid Act. But this amendment also added
that a person in the civil employment of the Government could not
be dismissed by an authority subordinate to the appointing authority.\(^4\)

The Government of India Act, 1935, further reinforced the protection
given to the civil servants by requiring that a civil servant could not

\(^3\) Secs. 3, 37, the Government of India Act, 1858.
\(^4\) Secs. 96-96B, the Government of India Act, 1915.
be dismissed from service or reduced in rank without being given a reasonable opportunity of showing cause against the proposed action.\(^5\) After Independence the pleasure clause came to be incorporated in Article 310 and the protections under Article 311 of the Constitution of India which came into force on January 26, 1950.

The pleasure of the President or of a Governor in article 310(1) of the Constitution does not imply that the article is applicable only to a person who is dismissed by the President or a Governor personally. In view of the fact that the words “President” and “Governor” indicate the Central Government and the State Government, respectively, and the executive power of the Union or a State is\(^6\) exercisable by the President or the Governor, as the case may be, either directly or through officers subordinate to him,\(^7\) the pleasure clause is attracted whenever a person in the Union or State employment is dismissed by a competent authority.\(^8\) The pleasure clause, in effect, means the pleasure of the Government concerned, and implies that there are no limitations as to the grounds on which the services of a public servant may be terminated.\(^9\)

**PROTECTION TO PERSONS IN CIVIL EMPLOYMENT**

In application to a person holding a civil post under the Central Government or a State Government, the doctrine of pleasure in article 310(1) is subject to the procedural requirements laid down by article 311 which says:

“(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

\(^5\) Sec. 240(3), the Government of India Act, 1935.  
\(^6\) Sec. 3(8) (b) (60) (c), the General Clauses Act, 1897.  
\(^7\) Arts. 53(1), 154(1), Constitution of India.  
Provided that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

The purpose of article 311 is to afford merely procedural, as distinguished from substantive, protection in the matter of certain disciplinary actions against a person who holds a civil post during the pleasure of the Government. The expression "civil post" means a post not for the defence purposes. This article thus protects members of the police force, but does not cover civilians holding posts connected with defence. It does not also cover a person holding a post under a statutory body like the Life Insurance Corporation. The effective test for determining whether a person holds a civil post under the Government is to find out if the post is held under the administrative control of the Government. This article does not, however, make a distinction between a person holding a permanent and a person holding a temporary civil post.

**Conditions Necessary to Attract Article 311**

The conditions necessary to attract article 311 are, in the first place, that the proposed action against the government servant is intended to be made on the ground that the person misbehaved, or acted inefficiently or negligently, or on some such ground which is incapable of being explained; and secondly, that the intended

action against the government servant entails evil consequences on him. The test of penal consequence is of basic importance, and therefore, even if a termination of service, or reduction in rank, takes place in consequence of allegations or charges against a government servant, he is not entitled to the benefit of article 311 unless it can be shown that he has been visited with evil consequences. Evil consequences do not, however, include all adverse effects on the interests of the government servant, but denote only the interests which are founded on legal rights. Again, article 311 is not attracted if a government servant is subjected to a penalty other than that of dismissal or removal from service or reduction in rank.

But the expression used in an impugned order is not conclusive on the point whether an order is penal in nature, and the circumstances of each case are exploratory to determine if an order has penal consequences on the applicant. The Supreme Court, in Parshotam v. Union of India laid down that the decisive factor for the application of article 311 is not the word used in an order terminating the services of a government servant, but the impact of the order on the person concerned. It may, however, be noted that for obtaining relief under article 311, the onus of proof lies on the person who claims protection under the article.

It should be noted that under departmental rules a distinction is drawn between dismissal and removal from service. Removal from service does not per se operate as a bar to future employment, but dismissal ordinarily debars future employment. For the purpose of article 311 no such distinction is recognised and removal means removal from the post or office held by a person for the time being. To attract article 311 the termination of service must

25 Rule 49, the Civil Services (Classification, Control And Appeal) Rules, 1930.
be against the will of the civil servant, and such a termination must have penal consequences on him. Thus, when a person is compulsorily retired from service after the completion of twenty-five years, but before the age of superannuation, without losing any of the benefits accruing to him for his past services, article 311 is not attracted, even though the order of compulsory retirement may be based on the findings of an inquiry into charges brought against him. An order of retirement in pursuance of a policy of retrenchment, or other similar reasons, on payment of proportionate pension does not bring into operation article 311 if the retired person has no vested right to continue in office up to a certain age. Where there is no age limit fixed in law for retirement and the Government has the power of retiring a civil servant at any time, article 311 may come into operation if the retirement entails a loss of pension or any other benefit. If, however, the termination of service is in accordance with the terms of a contract, or conditions of service, this article does not come into operation. But, contracting out any provision of the Constitution, including article 311, while entering Government service is not permissible.

So far as reduction in rank is concerned, this also requires two elements: (i) a degradation in rank or status; and (ii) a penal consequence. Degradation in rank takes place when a government servant is reduced to a lower post or rank, or a lower pay scale. To determine the penal consequences of an order reducing in rank the test applied is the same as the one applied to an order for dismissal or removal from service. Thus, there is no reduction in rank when a person is reverted from a higher officiating post to his substantive post, even if the order of reversion be founded on his misconduct, or inefficiency. But if an officer has right to

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hold a higher post by reason of his seniority in service, his reversal to his substantive post from the officiating higher post is a reduction in rank within the meaning of article 311. But a mere reversion from a temporary higher appointment to one's substantive post does not, however, constitute reduction in rank unless it also entails penal consequences.

The Nature and Extent of Protection under Article 311

Article 311 carries two procedural conditions subject to which the pleasure under article 310 may be exercised. In the first place, article 311 (1) lays down that the holder of a civil post under the Union or a State cannot be dismissed or removed from service by an authority subordinate to the appointing authority for the post. The word "subordinate" denotes subordination in rank and not in function. The expression "appointing authority" means the authority making appointment of the person to the post to which the removal or the dismissal order relates. Such an authority may be other than the authority who made the order of initial appointment of the person concerned. In case, however, where a new appointment is a mere transfer from one department to another, the appointing authority is the person who made the initial appointment. It is the fact of appointing and not the power to appoint that is decisive in determining who an appointing authority is. Thus, if a person is appointed by an authority superior to the authority who might have appointed the person under departmental rules, the person can be dismissed or removed only by the superior authority who in fact made the appointment. For ascertaining who is the actual appointing authority in respect of a particular person, the formal document on the basis of which the person is holding his post must be looked into.

In effect, therefore, article 311 (1) implies that, subject to rules
made in this behalf, a punishment other than that of dismissal, or
removal from service may be imposed by an authority subordinate
to the appointing authority. But the appointing authority or
his superior authority, alone is competent to impose a penalty of
dismissal or removal from service. It should also be noted that the
order of removal or dismissal by the competent authority may
follow any other punishment imposed by a subordinate authority,
and a mere termination of service does not amount to dismissal or
removal from a post. It is not necessary, however, that a dismissal
or removal order must be passed by the appointing authority himself
or his direct superior. Any authority not inferior to the appointing
authority in rank or grade may pass the order of removal or dismis-

The appointing authority is also not competent to delegate his power of removal or dismissal to a subordinate authority unless the Constitution itself permits such delegation.\textsuperscript{54} But this does not imply that the authority competent to dismiss or remove the holder of a civil post cannot call in the assistance of some subordinate authority in the course of the exercise of his power. He may, therefore, ask a subordinate officer to hold an enquiry into the charges against the person concerned, provided he himself shoulders the ultimate responsibility determining the guilt and for passing the removal or dismissal order.\textsuperscript{55}

On the same principle, it is also possible for the Government to set up a statutory commission or tribunal for investigating charges against the holders of civil posts, but the final order of dismissal or removal from service must in each case be passed by the competent authority.\textsuperscript{56} Although an inquiry may be made by an authority other than the competent authority, the order initiating the inquiry must be made by the latter.\textsuperscript{57} The competent authority himself must issue the notice to show cause against the proposed order of removal or dismissal,\textsuperscript{58} and he must apply his mind to the cause shown for determining the primary question of guilt of the person concerned as well as the nature of punishment to be imposed. He must look into the findings of the inquiry officer with an open mind.\textsuperscript{59} In delegating the power of holding an inquiry, care must, however, be taken not to select the officer on whose allegations the holder of a civil post is being proceeded against, although it is possible that the authority issuing a show case notice may himself hold the inquiry.\textsuperscript{60}

Secondly, article 311 (2) requires that a person holding a civil post cannot be dismissed or removed from service or reduced in rank, unless there has been an inquiry into his guilt "in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is

\textsuperscript{54} Mahadev v. Chatterjee, A.I.R. 1954 Pat. 285.
\textsuperscript{58} Garewal v. State of Punjab, A.I.R. 1959 S.C. 512
proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry." Obviously, this procedural safeguard is limited to cases removal or dismissal from service or reduction in rank. To attract this safeguard, there must be a penal element in the removal or dismissal from service or reduction in rank. It is now a well settled principle that, irrespective of the fact whether a government servant holds a civil post by virtue of a service contract or under service rules, article 311 (2) comes into operation as soon as it is proposed to dismiss or remove him from service or reduce him in rank. But in the case of a person who has no vested right to a civil post held by him, such as, a person appointed in a probationary or officiating capacity, a mere termination of his service or reversion to his substantive post will not, *prima facie*, attract article 311 (2).

The reasonable opportunity of being heard under article 311 (2) means, in the first place, a reasonable opportunity of rebutting the charges brought against a civil servant, and secondly, an opportunity of showing cause against the proposed punishment entailing his removal or dismissal from service or reduction in rank. This proposition was settled by the Supreme Court in *Khemchand’s Case*. By a subsequent amendment of the Constitution, the phraseology of article 311(2) has, however, been altered to state unequivocally the requirement of giving opportunity for showing cause twice in a proceedings for dismissing or removing a civil servant from service or reducing him in rank. The courts have the jurisdiction to determine the reasonableness of the opportunity given to a civil servant for rebutting the charges levelled against him or showing cause against the punishment awarded. It should be noted, however, that article 311 (2) does not guarantee any specific mode of inquiry under a statute or service rules, and the precise nature of the reasonableness of the opportunity to show cause in an inquiry will have to be determined with reference to each case.

63 Constitution (Fifteenth Amendment) Act, 1963.
65 *Idem.*
Decided cases go to show that "reasonable opportunity" at the inquiry stage implies framing of charges against the person concerned; communicating to him those charges; giving him an opportunity of answering the charges; giving him an opportunity for defending himself; and coming to the finding of guilt or innocence on the basis of the facts and materials placed before the inquiry authority. In short, the inquiry officer must conduct the enquiry in conformity with the rules of natural justice. Stating broadly and without intending to be exhaustive, the Supreme Court observed "that the rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witness examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them".

The enquiry officer is not bound by the Evidence Act, and therefore, he need not allow an elaborate examination of a witness in conformity with the Act. In a case where the civil servant declines to participate in the proceeding, the inquiry officer may act on materials placed before him by the Government. But the inquiry officer cannot act on evidence taken by some other person. The fact that a delinquent officer has a right of being heard, does not necessarily give him a right to personal hearing or a right to be represented by a legal practitioner. But in a case where the person concerned desires to be heard in person, his request ought to be complied with, and legal representation should be allowed in consideration of the circumstances surrounding a particular case. The inquiry officer may refuse to call a witness, but such a refusal must be based on recognised judicial principles.

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74 Nripendranath v. Chief Secretary, A.I.R. 1961 Cal. 1.
After an inquiry has been completed, the inquiry officer is required to record his definite findings in respect of the charges brought against the delinquent officer. The authority competent to award punishment considers the findings and forms his own judgment as to the question of the guilt of the officer and the nature of punishment proposed to be inflicted upon him.\(^{76}\) If he decides to act in accordance with the findings of the inquiry officer, a copy of the findings must be given to the delinquent officer.\(^{77}\) The notice to show cause against the quantum of punishment need not specifically state that the findings of the inquiry authority have been accepted by the disciplinary authority. But where the disciplinary authority differs with the findings of the inquiry authority, he must succinctly state his grounds, so as to offer the accused officer a reasonable opportunity of showing cause in pursuance of the notice proposing the punishment.\(^{78}\) In any case, the delinquent officer must be given a reasonable opportunity to show cause against the proposed punishment.

A notice to show cause must clearly state the nature of punishment proposed to be inflicted, but the authority may award a punishment lighter than the one stated in the notice, although a graver punishment cannot be inflicted on the basis of a notice for lesser punishment. There is, however, no bar to issuing a fresh notice proposing a heavier punishment at any time before the final order of punishment.\(^{79}\) The accused person is precluded from basing his submissions at the second stage on evidence not tendered at the first stage. The authority awarding punishment is also interdicted from taking into account any fresh material for determining the quantum of punishment against the accused person. This proposition, however, is not applicable to the service record of the accused officer. The accused officer may rely upon this service record to plead that he should be awarded lighter punishment. The disciplinary authority may also rely upon the service record of the accused officer to award enhanced punishment, but in such a case he must communicate to the officer the new factor on which he proposes to rely in determining the quantum of punishment.\(^{80}\) At the second stage, the delinquent


\(^{77}\) Hukumchand v. Union of India, A.I.R. 1959 S.C. 536.

\(^{78}\) State of Assam and Another v. Bimal Kumar, (1964) S.C.A. 293.


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officer may plead that the findings against him were arrived at by the inquiry officer in violation of the principles of natural justice or that his findings were based on no evidence, or on incredible evidence. He may also contend that the findings against him do not justify the quantum of proposed punishment.\(^{81}\)

Once the opportunity to show cause has been given in conformity with article 311 (2), the constitutional requirement is satisfied and the failure of the accused person to participate in the proceeding does not vitiate the proceeding.\(^{82}\) In such a case the inquiry officer is competent to proceed \textit{ex parte}.\(^{83}\) It should also be noted that a departmental inquiry under article 311(2) may be initiated in lieu of or in addition to criminal proceedings against a government servant. Even if a criminal proceeding ends in the favour of the government servant, its findings are not conclusive in a departmental proceeding\(^{84}\) and the person concerned may be penalised in the departmental proceeding. On the same principle, it is possible to initiate a departmental proceeding against the government servant after a criminal proceeding has terminated in his favour.\(^{85}\) It is also possible to prosecute a government servant under a criminal charge, after he has been dismissed in pursuance of a departmental proceeding.\(^{86}\) Obviously, the principle of \textit{res judicata} is not applicable to a departmental proceeding.\(^{87}\) In certain cases, even if a departmental proceeding has been quashed by an order of a court of law, fresh departmental proceedings may be started on the same grounds. If the order of the law court is, however, based on the merits of the case, no fresh departmental proceeding may be started; but if the order is based on a breach of the procedural requirements of article 311 (2), it is possible to start a fresh proceeding against the delinquent officer.\(^{88}\)

\textit{Restrictions on the Protection Under Article 311 (2)}: The operation of the procedural safeguards of Article 311 (2) is subject to certain


restrictions. Where a disciplinary action is based on the conviction of a delinquent officer on a criminal charge, the opportunity to show cause need not be given to him before imposing a departmental penalty. But if the conviction is subsequently set aside, the person concerned has a right to have his departmental punishment annulled. In addition, the authority awarding punishment need not hold an inquiry against a delinquent officer if he is of the opinion that such an action is impracticable. The authority must record his reasons for not holding the inquiry. The decision of the authority not to hold an inquiry cannot, however, be questioned in a court of law. A departmental inquiry need not also be held into the charges against a civil servant if the President, or the Governor, is satisfied that in the interest of the security of the state such an inquiry should not be held. The President, or the Governor, is not required to assign any reason for such a decision, and his decision is not justiciable. It should also be noted that the satisfaction of the President, or the Governor, does not imply his personal satisfaction.

The Value of Protection Under Article 311: Apparently, article 311 provides procedural safeguards to civil servants. So long as the procedural requirements under article 311 are complied with the nature of the charge or the substance of the grounds for disciplinary action against a government servant cannot be inquired into by the courts. But a disciplinary action may, however, be based on grounds which can be challenged as unconstitutional. A disciplinary action may involve a contravention of "the equality before the law" or "the equal protection of the laws" clause of article 14 of the Constitution. Again, a disciplinary proceeding may be vitiated because it may be grounded on facts inconsistent with the requirements of article 16 of the Constitution. Similarly, a disciplinary order is invalid if it is formed on grounds which constitute

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89 Article 311(2), Provisos (a)(b)(c), Constitution of India.
unreasonable restrictions on freedoms guaranteed under article 19 of the Constitution. In such cases, a disciplinary proceeding on the same grounds cannot be started again. Besides, once a departmental proceeding against a government servant has been quashed even on any other ground, the Government may choose not to proceed further in the matter. It may also be pointed out that as is the case of State of Bihar v. Abdul Majid, quashing of a disciplinary order for contravention of article 311 may entitle a government servant to recover damages from the state.

The impact of quashing a disciplinary order may also be more direct. Thus, in a case where a civil servant was entitled to hold a higher post by virtue of his seniority in service and he was appointed in officiating capacity to the higher post, his subsequent reversion to his substantive post was held to be a reduction in rank within the meaning of article 311(2). The effect of this decision was to allow the officer to continue to officiate in the higher post. In addition, the court may issue mandamus restraining a disciplinary authority from giving effect to an order passed in contravention of article 311(2). The relief under article 311 may, thus, become substantive in certain cases.

It should also be noted that the guarantees under article 311 enjoy a sanctity which cannot be tampered with by service contracts or service rules. It is, therefore, necessary that departmental rules providing for imposition of penalties on persons in civil employment must be in conformity with article 311. A departmental service rule may also be challenged on other constitutional grounds. The power of rule making relating to services under article 309 is subject to the other provisions of the Constitution, and a service rule in contravention of any provision of the Constitution is void and inoperative. The service rules in contravention of the fundamental rights of civil servants must, however, be looked upon in the light of the interest of the services under the state, and it is possible to interpret in relation to civil servants the general restrictions running with the various fundamental rights in a manner that would abridge their fundamental rights on grounds having a direct, proximate and

rational nexus with the interests of public services. The precise nature of restrictions which a service rule framed under article 309 may impose will, however, have to be determined in each case with reference to the conditions surrounding the rule. In effect, thus, article 309 of the constitution is subject to both articles 310 and 311, and article 310 (1) is itself subject to article 311.

PUBLIC SERVICE COMMISSIONS

It was the Government of India Act, 1919, that for the first time statutorily provided for a Public Service Commission. But it was not until 1926 that a Central Public Service Commission came to be set up after the recommendations of the Lee Commission which said:

"Wherever democratic institutions exist, experience has shown that to secure an efficient civil service it is essential to protect it as far as possible from political or personal influences and give it that position of stability and security which is vital to its successful working as the impartial and efficient instrument by which governments, of whatever political complexion, may give effect to their policies."

Then in 1930, Madras came to have a Provincial Public Service Commission. And when the Government of India Act, 1935, was passed, it made provisions for a Federal Public Service Commission and a Public Service Commission for each Province which, along with two or more Provinces, could opt for a joint Public Service Commission also. Thus, the Constituent Assembly had before it a well-recognised tradition of Public Service Commissions and the provisions of the Constitution relating to them are based on the corresponding provisions of the 1935 Act.

THE UNION AND STATE PUBLIC SERVICE COMMISSIONS

Article 315 of the Constitution provides that "there shall be a Public Service Commission for the Union and a Public Service Commission for each State." If, however, the Legislatures of two or more States pass a resolution to have a joint Commission to serve the needs of those States, "Parliament may by law provide for the appointment of" such a Commission and such a law may also contain necessary incidental and consequential provisions in this regard. Besides, on the request of the Governor of a State, the Union Public

102 See the Report of the Royal Commission on Superior Service in India, 1924.
Service Commission may, with the approval of the President, cater to "all or any of the needs of the State."

Appointment and Terms of Office of the Chairman and the Other Members of the Commissions

The President appoints the Chairman and the other members of the Union or a Joint Public Service Commission. The power of appointment in the case of a State Public Service Commission vests in the Governor concerned. And any casual vacancy in the office of the Chairman of a Commission is filled in by the appointing authority from among its members. The Constitution prescribes no qualifications for the members of the Public Service Commissions but only requires

"That as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State..."

A member of a Commission holds office for six years or until he attains the age of sixty-five years in the case of the Union Commission and sixty years in the case of a State or Joint Commission, whichever is earlier, although he may resign by writing to the appointing authority. And on the expiration of his term, he is ineligible for reappointment to his office.

Removal and Suspension: Within the terms of article 317 a member of a Commission may be removed or suspended from his office. The President alone is competent to remove a member of any Commission from his office on the ground of proved misbehaviour after the Supreme Court has held an inquiry in accordance with the rules framed under article 145 and reported to the President on a reference made to it by him. Misbehaviour includes any concern with or interest in "any contract or agreement made by or on behalf of the Government of India or the Government of a State" or participation "in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member in common with the other members of an incorporated company". On such a reference being made to Supreme Court, the President in the case of the Union or a Joint Commission and the Governor in the case of the

103 Art. 316
State Commission may suspend the member concerned till he is cleared by the Court or removed from his office by the President. However,

"...the President may by order remove from office the Chairman or any other member of a Public Service Commission if the Chairman or such other member, as the case may be—

(a) is adjudged an insolvent; or
(b) engages during his term of office in any paid employment outside the duties of his office; or
(c) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body". 104

Regulations as to Conditions of Service of Members and Staff: The President in the case of the Union or a Joint Commission and the Governor in the case of a State Commission by regulations may

"(a) determine the number of members of the Commission and their conditions of service; and
(b) make provision with respect to the number of members of the staff of the Commission and their conditions of service:

Provided that the conditions of service of a member of a Public Service Commission shall not be varied to his disadvantage after his appointment." 106

Restrictions on Employment after Ceasing to be Members: 106 The Chairman of the Union Commission is ineligible for any further appointment under the Union or a State, and any other member of the Commission in also so ineligible, except that he may be appointed as the Chairman of the Union or a State Commission. Again, the Chairman of a State Commission may be appointed as the Chairman of any other State Commission or as the Chairman or a member of the Union Commission, but he cannot hold any other post under the Union or a State. Then, any other member of a State Commission may be appointed as the Chairman or any other member of the Union Commission or as the Chairman of any State Commission, but is ineligible for any other office under the Union or a State.

Powers and Functions of the Commissions

The powers of the Commissions are advisory in nature. They hold examinations and conduct interviews for making recommendations for appointments to the various services and also play an advisory role in disciplinary and some other matters. Article 320 provides as follows:

104 Art. 316(3)  106 Art. 318  106 Art. 319.
“(1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted —

(a) on all matters relating to methods of recruitment to civil services and for civil posts;

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

(d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made of as respects the manner in which effect may be given to the provisions or article 335.
(5) All regulations made under the proviso to clause (3) by the President or the Governor of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid."

Extension of Functions: By the appropriate legislative authority the functions of a Public Service Commission may be extended within the terms of article 321 which says:

"An Act made by Parliament or, as the case may be, the Legislature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of any local authority or other body corporate constituted by law or of any public institution."

Report of the Commissions

To make the Public Service Commission function effectively, although by nature of its function is advisory, article 323 of the Constitution provides that the Union Public Service Commission shall annually present to the President a report on the work done by it. A copy of such a report, together with a memorandum explaining the cases in which the recommendations of the Commission were not accepted and stating the reasons for such non-acceptance, is placed before each House of Parliament. Similarly, the annual report of a State Public Service Commission or a Joint Public Service Commission is presented to the concerned Governor or the Governors, as the case may be, who together with a memorandum of the aforesaid nature causes it to be placed before the State Legislature concerned.

Expenses of the Commissions

The expenses of the Commissions are charged on the respective Consolidated Funds in accordance with the provisions of article 322 which lays down:

"The expenses of the Union or a State Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the Consolidated Fund of India or, as the case may be, the Consolidated Fund of the State."
An Assessment

Clearly, by constitution, powers and functions the Public Service Commissions in the country have been designed to work independently for securing the efficiency of the services. But not only there is a growing tendency to withdraw matters from the purview of the Public Service Commissions, but also there is evidence of political and other influences entering into the decision-making process of the Commissions. Besides, there is also an increasing tendency of making ad hoc appointments and ignoring the recommendations of the Commissions. However, on the whole generally speaking, the Union Public Service Commission functions more independently and effectively than the State Public Service Commissions.

THE MASTER AND THE SERVANT

The function of the public servants is to serve the public, the people, the masses, the common man or woman in the street, his real master in this democratic age. Yet, consciously or unconsciously not unoften, particularly in a poor and illiterate society, he enthralls his master and turns him into a chattel. By his education, economic position, social status and political power he fills the rank of a class that considers itself superior to the masses which are treated more as objects than subjects. The public servants forget their roots, their pasts and their obligations and proliferate and congregate as an elitist social, economic and political force and flourish and brandish the banner of high browed officialdom.

THE BUREAUCRATIC BANE

Thus, bureaucracy is born with all its banal traits of sham educational and cultural superiority, high browed behaviour, social prudery, political conservatism, administrative lethargy, and crude contempt for the commoners. The instrument of social action, the permanent administration, the permanent public servant, becomes a killer clog in the wheel of social progress. And in one form or another to a degree this bureaucratic vice is to be noticed in all communities.

Bureaucracy versus Technocracy

The needs of this age of specialisation and of the service state and the awareness of the banes of bureaucracy as also the emergence
of new service ranks have led to the demand for substituting the
generalist administrators with the specialists in the particular fields
of public services. Thus, for example, it is said that only a medical
man should be the permanent head of the health department in a
Government. There is to a great extent a force and logic in this
demand and the Fulton Committee Report rightly observes:
“...In short, the Civil Service is not a place for the amateur. It must be staffed by
men and women who are truly professional.”

Yet there is nothing to prevent a technocrat from turning into
a bureaucrat or a generalist from turning into a professional
administrator. A man of agricultural service may develop all the
banal traits of a bureaucrat and a general administrator may
cultivate all the qualities of a specialist. The fact seems to be that
depending upon the objective socio-economic and political condi-
tions in a society, the generalists and the specialists alike tend to be
contaminated with bureaucratic and corrupt practices unless there
are positive and constant social and political checks. What is
needed is that the services should not only be professionalised but
also be imbued with a sense of selfless service to the public.

Civil versus Military Personnel

At times it is suggested that military personnel at certain key
points or military rule in general may be a cure for the ills of
an ailing civil service. But it seems that military rule whether
partial or complete is a negation of the rule of law and democracy
and constitutionalism. It can be a medicine and not food. It can
be tolerated only as a temporary shock treatment and not as a
permanent solution. The solution seems to lie in vigorous and
purposive politics and healthy and disciplined society that will
make the best use of the instruments of civil administration to
achieve the socio-economic objectives of the community.

COMMitted SERVICES

To make them faithfully discharge their duties the public services
ought to have full faith in the broad national objectives and ideals
as also in the competence and capability of then national leaders to
achieve those objectives and ideals. This is allegiance to the country

and the Constitution. The commitment of the public services in this limited sense is always expected of them and is not incompatible with the need for their neutrality.

However, it seems that the concept of committed services carries a more pregnant meaning. It is often used to secure the conformity of the services to a line of action being pursued by a party or by its leaders at all costs and involves a sacrifice of other qualities of good services. The commitment which is claimed of the services may not unoften imply the demand on them to perpetuate the rule or misrule of a party or its leader or leaders. But, then, this is perversion, and in an open society none expects the services to be so used by a party or a person or persons in power.

*The Need for Honest and Efficient Services*

What the common man needs is honest and efficient services. The services have to be result oriented, incorruptible and easily accessible. They ought to know their real master, the people, and must learn to behave as true and faithful servants. They ought to consider their high positions only as excellent opportunities for greater services to the public. Their real worth lies in serving the nation, and not in ruling the country; in administering goods and services, and not in governing the people.
PART FIVE

FINANCE TRADE PROPERTY AND SUITS
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CHAPTER 36

FINANCE

At all times in human history the state has claimed for itself the right to a share in a person’s earning. This is broadly referred to as the taxing power of the state, and is deemed to be a self-contained element of state power. With the march of time two things have, however, happened to this taxing power. In the first place, with the growth of democracy and representative institutions the dictum “no taxation without representation” has become a basic organising article of a state system. And secondly, with the rise of industrial urban civilization taxation is no longer a mere revenue raising operation, but raises a large number of complex financial issues and delicate economic, social and political problems.

NO TAXATION EXCEPT BY AUTHORITY OF LAW

Obviously, there can be no fundamental constitutional or any other right not to be taxed, and the Constitution of India stands by this proposition. What it secures under article 265 is as follows:

“No tax shall be levied or collected except by authority of law.”

The protection of article 265 is available to any person, citizen or alien, natural or juristic, once it is shown that he has been subjected to the taxing power of the state. The state in this context has the same wide meaning as it has under article 12.

TAX, DUTY, SURCHARGE, CESS, FEE

Although technically speaking, a distinction is drawn between tax, on the one hand, and duty, surcharge, cess or fee, on the other, for the purpose of article 265 no such distinction is recognised. Tax in this article includes any impost, whether described as tax, duty, surcharge, cess or fee.\(^1\) This view of tax in article 265 is clearly in consonance with the provisions of article 365(28) which says:

“‘taxation’ includes the imposition of any tax or impost, whether general or local or special, and ‘tax’ shall be construed accordingly.”

“Levied or Collected”

The words “levied or collected” in article 265 are intended to cover the entire taxing operations of the state. This article applies to the whole process of taxation, commencing from the taxing enactment to the taking away of the impost from the pocket of a person. Consequently, no element of taxing operation is outside the purview of article 265.²

“Authority of Law”

What article 265 requires is that no tax shall be levied or collected except by authority of law. This means that every taxing operation must be covered by a valid law. Not only that a tax should be levied under the authority of law, it must also be collected in strict conformity with the law. “Law” in this context means statute law. It, however, also includes subordinate legislation concerning the mode of assessment or collection. But no subordinate legislation can, in the absence of statutory authorisation, by itself impose any tax, duty, surcharge, cess or fee.³ The competent legislature may, however, validate even retrospectively any subordinate legislation offending article 265. Besides, this article does not operate as a bar to retrospective legislation for the purpose of taxation. Nor does it debar double taxation.

Valid Law: The validity of a taxing law is to be tested with reference to the competence of the concerned legislature to levy the impugned tax and this competence is to be judged with reference to the point of time the law was passed by the legislature.⁴ The taxing law must not also violate any other mandatory provision of the Constitution. It is also possible to challenge such a law on the ground that it is in substance a confiscatory and not a taxing law.

Remedy

When a tax is levied or collected under an ultra vires law or without the authority of law, the concerned High Court may be approached under article 226 for appropriate orders. Any tax collected under an ultra vires statute is refundable under the direction

of the Court. It should be noted that although article 265 itself does not confer any fundamental right, an impugned tax may violate a fundamental right under Part III of the Constitution. In such a case, a petition under article 32 is also maintainable in the Supreme Court. And in all appropriate cases appeals against the decisions of High Court under article 226 may be taken to the Supreme Court under the relevant articles.

CONSOLIDATED FUNDS, PUBLIC ACCOUNTS AND CONTINGENCY FUNDS

All moneys received by the Union or a State are put in the Consolidated Fund, public account or Contingency Fund of the Union or the concerned State, as the case may be.

CONSOLIDATED FUNDS

Article 266 (1) provides that "all revenues received by the Government or India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled 'the Consolidated Fund of India'." This does not, however, include any duties and taxes or part of any duties or taxes, which are assignable to the States under the Constitution, or any money that may form part of the Contingency Fund of India.

This article further says that "all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayments of loans shall form one consolidated fund to be entitled 'the Consolidated Fund of the State'." The Consolidated Fund of a State also does not include any tax levied for the purpose a local authority or any money which forms part of the Contingency Fund of the State.

Control of Consolidated Fund

Clause (3) of article 266 requires that appropriation of any money out of the Consolidated Fund of India or of a State can be only "in accordance with law and for the purposes and in the manner pro-


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vided in this Constitution.” This requirement of clause (3) places the Consolidated Fund under the control of the concerned legislature. The Union Parliament under article 110 and the State Legislatures under article 199 exercise control over the Union and the State Consolidated Funds, respectively. Then, there is article 283 which by its clause (1) provides that the custody of the Consolidated Fund of India and other matters with regard to this Fund shall be regulated by rules made by the President until legislation in that behalf is passed by Parliament, and clause (2) of this article makes similar provisions with regard to the Consolidated Fund of a State.

PUBLIC ACCOUNTS

Article 266 (2) says that all other public moneys received by the Government of India shall be credited to the public account of India. Similarly, all other public moneys received by a State are to be credited to the public account of the State. Besides, there is article 284 which says:

“All moneys received by or deposited with—
(a) any officer or employee in connection with the affairs of the Union or of a State in his capacity as such, other than revenues or public moneys raised or received by the Government of India or the Government of the State, as the case may be, or
(b) any court within the territory of India to the credit of any cause, matter, account or persons,
shall be paid into the public account of India or the public account of the State, as the case may be.”

Control of Public Accounts

The control of Parliament over the public account of India and that of a State Legislature over the public account of the State is exercisable within the terms of articles 110, 199 and 283, as the case may be. The extent of control exercised by a legislature over the public account is the same as that exercised by it over the Consolidated Fund.

CONTINGENCY FUNDS

As any withdrawal of money from Consolidated Fund is hedged in with numerous technical formalities and the Governments may need money speedily for unforeseen events, the Constitution provides for the establishment of Contingency Funds by the appropriate legislative
bodies under article 267. It is, however, to be noted that the control over Contingency Fund by Parliament or the State Legislature is not confined to the provisions of this article alone, but also spills over to those of articles 110, 199 and 280, as the case may be.

Parliament has the power to establish the Contingency Fund of India and to provide for payments into it such amounts as it may determine by law. This Fund is placed at the disposal of the President for making advances for the purpose of meeting any unforeseen public expenditure until Parliament authorises such expenditure in accordance with the provisions of the Constitution.

Similarly, a State Legislature has the power to establish by law a Contingency Fund for the State and place it at the disposal of the Governor for the purpose of making advances to meet any unforeseen public expenditure.

REVENUE ALLOCATION BETWEEN THE UNION AND THE STATES

Federalism being a device for distributing powers and functions between the central and regional governments, a division of taxing power between these governments is but a necessary corollary. The object of dividing taxing power is to secure adequate resources for each of them and provide necessary and desired freedom and flexibility in their efficient operations consistently with the needs of national unity and security. Although in real practice this objective is rarely realised, the Constitution of India makes a bold effort to deal in detail with many of the issues involved in this situation.

The power of the Union or of a State to levy a tax is to be determined with reference to the Seventh Schedule to the Constitution. The tax entries are treated separately from the other general entries to a List. And unless it can be shown that a tax figures as a specific entry to a List in this Schedule, the concerned legislature cannot claim to impose it as an incidence of any other entry to the List or with reference to the doctrine of residuary powers unless, as in the case of entry 97 to List I, such a power is specifically mentioned.7

In other respects, however, the rules of interpretation relating to the other entries to the Lists in the Seventh Schedule apply,

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mutatis mutandis, to the tax entries as well. Thus, tax entries are also
liberally construed and the doctrines of harmonious construction
and pith and substance also apply to them.\textsuperscript{8} The competent
legislature has the power to make retrospective tax laws\textsuperscript{9} and provide
for all matters relating to the collection, refund, or penalty for
evasion, of a tax levied by it.\textsuperscript{10}

**DISTINCTION BETWEEN TAX AND FEE**

Usually no distinction is drawn between a tax and a fee when the
state exercises its taxing power. However, the constitutional system
of India admits of such a distinction for the purpose of determining
the ambit of the taxing power of the Union and State Governments.
And in the Seventh Schedule to the Constitution, in each of the three
Lists there is an entry—entry 96 to List I, entry 66 to List II and
entry 47 to List III—which in identical terms speaks of

"Fees in respect of any of the matters in this List, but not including fees taken
in any court."

In *Jagannath v. State of Orissa*,\textsuperscript{11} the Supreme Court made a
distinction between a tax and a fee. A tax, according to the Court,
is a compulsory impost by a public authority for public purposes in
general without reference to any specific object of expenditure or
any special benefit to the tax payer. A fee, on the other hand, is a
payment made for some special service rendered to the payer. The
nomenclature of an impost, however, is not decisive. The fact that
a levy which is really a fee is not in proportion to the quantum of
service or benefit given to a person is also not necessarily material in
this context,\textsuperscript{12} although in *Durga Das' Case*\textsuperscript{13} a municipal rickshaw
licence fee much in excess of municipal expenses incurred for rendering
services to the rickshaw owners and pullers was held to be invalid for
not satisfying the test of *quid pro quo*. It seems that the fundamental
ingredient of a fee is that it is a charge for a service rendered or

1962 S.C. 123.

\textsuperscript{9} Chotabhai Jethabhai v. Union of India, A.I.R. 1962 S.C. 1006.

\textsuperscript{10} Board of Revenue v. Jhaver, A.I.R. 1968 S.C. 59; Punjab Industries v. Com.,

\textsuperscript{11} Jagannath v. State or Orissa, A.I.R. 1954 S.C. 400. See also Ratilal v. State


benefit given. Precisely, a fee is a service charge and has two elements: (i) a payment made by a person for some service, or benefit, rendered to him; and (ii) its proceeds are kept apart and do not get merged with the general revenue fund of the authority levying it.

The practical significance of the distinction between a tax and a fee arises from the fact that although Parliament or a State Legislature cannot levy a tax outside the specific entries to the concerned List, it may levy a fee with respect to any other entry to such a List. Besides, Parliament may also levy a fee in the exercise of its residuary power within the terms of article 248 and entry 97 to List I in the Seventh Schedule to the Constitution.

THE TAX ENTRIES IN THE SEVENTH SCHEDULE

Tax entries are found in all the three Lists in the Seventh Schedule to the Constitution. Entries 82 to 92A to List I—Union List—contain matters with respect to which the Union Parliament may levy taxes. Entries 45 to 60 to List II—State List—authorise the State Legislatures to levy taxes. Both Parliament and the State Legislatures are competent to levy taxes under entries 34, 44 and 47 to List III—Concurrent List—in respect of matters contained in them.

There is, however, entry 97 to List I which, inter alia, authorises Parliament to legislate for any tax not mentioned in either List II or List III. The impact of this entry is that whereas a State Legislature can levy taxes with reference to the relevant entries to List II and List III, Parliament becomes invested with the additional power to impose a tax relating to any residuary matter not contained in Lists II and III.

In the context of the taxing power of the States it is also to be noted that although a tax may fall in the Union List, its continued levy after the commencement of the Constitution by a State or a local body is permissible within the terms of article 277.

The Tax Entries to List I—Union List

Entries 82 to 92A and entry 97 provide for the matters in respect of which the Union has been invested with the power to levy taxes.

82. Taxes on income other than agricultural income: The Constitution does not define the word ‘income’. But it has been given the broadest meaning\textsuperscript{16} to include any profit or gain which is actually received. Besides, article 366(29) says that “‘tax on income’ includes a tax in the nature of an excess profits tax”. The Union is competent to levy tax on any income other than agricultural income.

83. Duties of customs, including export duties: The Centre alone has the power to imposes customs duties, \textit{i.e.}, duties on imports into, and exports from, the country.

84. Duties of excise on tobacco and other goods manufactured or produced in India, except (a) alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in paragraph of this entry: The term “duties of excise” is of a broad and flexible connotation and is used to denote primarily any levy upon a manufacturer or producer in respect of the goods manufactured or produced by him. It is, thus, a tax upon manufacture or production of goods. “But it is not easy to decide in a particular case whether a particular levy is a levy in respect of manufacture or production of goods.”\textsuperscript{17} In any case, it is treated as distinct from sales tax which is a tax on sale of goods.

The Union has been empowered to levy excise duties on tobacco and other goods manufactured or produced in India, except alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics. It may, however, tax medicinal and toilet preparations containing alcohol, opium, Indian hemp and other narcotic drugs and narcotics.

85. Corporation tax: The Union may levy a tax on the income of the companies in the exercise of its power under this entry. Article 366 (6) says:

“‘corporation tax’ means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled:

(a) that is not chargeable in respect of agricultural income;

(b) that no deduction in respect of the tax paid by companies is, by any enactments which may apply to the tax, authorised to be made from dividends payable by the companies to individuals;


that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income-tax the total income of individuals receiving such dividends, or in computing the Indian income-tax payable by, or refundable to, such individuals;"

86. **Taxes on capital value of assets, exclusive of agricultural land, of individuals and companies**; **taxes on the capital of companies**: This entry authorises the Union to levy wealth tax on individuals and companies. But agricultural land is outside the purview of this entry. However, even land lying unused in a residential area, though capable of agricultural use, may be taxed by the Union. An individual in this context includes an association of individuals, such as, a Hindu undivided family. It should also be noted that there is a distinction between tax on lands and buildings on the basis of their capital value leviable within the terms of entry 19, List 11, and a tax levied under this entry.

87. **Estate duty in respect of property other than agricultural land**: Estate duty on any property other than agricultural land can be levied by the Union. Article 366 (9) lays down:

"'estate duty' means a duty to be assessed on or by reference to the principal value, ascertained in accordance with such rules as may be prescribed by or under laws made by Parliament or the Legislature of a State relating to the duty of property passing upon death or deemed, under the provisions of the said laws, so to pass;"

88. **Duties in respect of succession to property other than agricultural land**: The Union may levy a duty on succession to any property other than agricultural land. The common element between estate and succession duty is the event of the death of a person. But whereas estate duty has reference to the value of the property constituting the estate of a deceased, succession duty takes into account the extent or the benefit derived by his successor. Precisely, estate duty falls upon property of a person after his demise, succession duty falls upon the person who takes this property after such demise.

89. **Terminal taxes on goods or passengers carried by rail, sea or air; taxes on railway fares and freights**: The Union has also the power to levy terminal taxes on rail, sea and air borne goods or

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21 In re duty on Non-agricultural Property, A.I.R. 1944 F.C.
passengers. This tax in leviable at any rail, sea or air terminus only, but the Union may tax both the entry and departure of goods and passengers in respect of any such terminal point. It may also be noted that terminal taxes on goods and passengers carried by road or inland waterways come within the taxing power of the States within the terms of entry 56, List II.

90. Taxes other than stamp duties on transactions in stock exchanges and futures markets: Under entry 90 the Union may lave any tax other than stamp duties on any transaction in stock exchanges or futures markets.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts: The Union also determines the stamp duties payable in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, insurance policies, transfer of shares, debentures, proxies and receipts.

92. Taxes on the sale or purchase of newspapers and on advertisements published therein: Taxation of sale or purchase of goods generally vests in the States. But in consonance with Parliament's exclusive competence to legislate for matters relating to fundamental rights and in view of the recognition of the need for maintaining the freedom of the press, the power to levy any tax on the sale and purchase of newspapers and any advertisement in them has been vested in the Union alone.

92A. Taxes on the sale and purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce: Like taxes on the sale or purchase of newspapers the levying of tax on the sale and purchase of goods in the course of inter-State trade and commerce comes within the competence of the Union only.

97. Any other matter not enumerated in List II or List III, including any tax not mentioned is either of those Lists: By virtue of this entry the Union becomes invested with the residuary power to levy any tax which does not fall within the ambit of either List II or List III. This entry is in line with article 248 which makes the Union the repository of residuary powers.

22 C.A.D., Vol. IX; p. 1182.
The Tax Entries to List II—State List

Entries 45 to 63 to List II—State List—contain the matters with respect to which the States may levy taxes.

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues: The States alone can levy land revenue. This power includes assessment and collection of revenue, maintenance of land records, power to conduct surveys for revenue purposes and records of rights, and alienation of revenues. Land revenue in this context does not mean rent for land but is in the nature of a tax. The expression “land records” is also to be construed in a broad sense.

46. Taxes on agricultural income: While the levying of income-tax generally comes within the competence of the Union, levying of agricultural income-tax comes within the ambit of the taxing power of the States. “Agricultural income” says article 366 (1), “means agricultural income as defined for the purposes of the enactments relating to Indian income-tax”. Consequently, it is for Parliament to define the expression “agricultural income” and the State Legislatures cannot extent their jurisdiction by widely defining this expression, although a Bill to modify the meaning of agricultural income cannot be moved in Parliament without the President’s recommendation. The Union may also levy a surcharge on agricultural income-tax for the purposes of the Union. However, it is to be noted that although there is a difference between agriculture and forestry for the purposes of entries 14 and 19, List II, in this entry the agricultural income would include income from forestry unless Parliament defines this expression otherwise.

47. Duties in respect of succession to agricultural land: The States have the power to levy duties in respect of succession to agricultural land, and the expression succession duty has the same meaning here as in entry 88, List I. The levying of estate duty in respect of

26 Art. 274 (1).
27 Benoy Kumar’s Case, op. cit.
agricultural land is also within the competence of the States, and the distinction between succession duty and estate duty for the purpose of List II is the same as that for List I.

49. Taxes on lands and buildings: This entry empowers the States to levy taxes on lands and buildings without any limitation. Consequently, such a tax may be levied with reference to the annual valuation or lands of buildings or their use.\(^{28}\) Besides, the word "lands" in the entry has been interpreted to include all lands, whether agricultural or not.\(^{29}\)

50. Taxes on mineral rights subject to any limitation imposed by Parliament by law relating to mineral development: It is also competent for the States to levy taxes on mineral rights. But this power is subject to any limitations which Parliament may impose by law relating to mineral development.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India: (a) alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry: A State may levy duties of excise on certain goods manufactured or produced within its jurisdiction, including countervailing duties at the same or lower rates on similar goods manufactured or produced in any other part in the country. These excisable goods are: alcoholic liquors for human consumption and opium, Indian hemp, and other narcotic drugs and narcotics. But medicinal and toilet preparations containing alcohol, opium, Indian hemp and other narcotic drugs and narcotics do not fall within the ambit of this entry. It is of interest to note that as entries 51 and 54, List II, separately speak of excise duties and sales tax, respectively, it is competent for the States to levy both excise duties and sales tax on the same goods.\(^{30}\)

52. Taxes on the entry of goods into a local area for consumption, use or sale therein: The States are authorised to levy taxes on the entry of goods into a local area for consumption, use or sale therein.

\(^{30}\) Shivdayal v. S.T. Com., A.I.R. 1951 All. 858.
Such a tax is commonly known as octroi duty which is to be distinguished from a terminal tax which the Union may levy under entry 89, List I. A tax under entry 52, List II, must satisfy two essential conditions; first, that it is a tax on the entry of goods into a definite local area; and secondly, that the goods must enter the area for the purposes of consumption, use or sale therein. Once these two elements are found in a tax, it is immaterial whether it is termed a tax or a cess.

The expression "local area" in the context of entry 52 had raised some initial difficulties of interpretation. But now it is finally settled that this expression refers to "an area administered by a local body like a municipality, a district board, a local board, a union board, or panchayat, or the like." The requirement, that a tax under this entry must be only on the goods entering into a local area for consumption, use or sale therein had also raised some questions of interpretation, some of which have now been set at rest by the Supreme Court. Consumption, thus, includes consumption by a producer or consumption in part or whole even outside local limits. Besides, once sale of goods has been completed within a local area, their resale outside the area is immaterial. In effect, what this entry interdicts is the taxing of goods in transit, i.e., goods merely passing through a local area.

53. Taxes on the consumption and sale of electricity: A State may levy taxes on the consumption or sale of electricity. The word "consumption" not being limited in any way, it also authorises imposition of duty on the consumption of electricity by the producer himself.

54. Taxes on the sale and purchase of goods other than newspapers, subject to the provisions of entry 92A of List I: The States may levy taxes on the sale or purchase of goods other than newspapers. But when a sale takes place in the course of inter-State trade or commerce, the levy of a tax on such a sale comes within the purview of entry 92A, List I. The tax authorised by entry 54 is commonly referred to as sales tax. This tax may be imposed on the buyer or seller. And it

34 Burmah-Shell's Case, op. cit.
is not necessary that to make this tax valid the person first paying the tax must be able to shift its incidence to another person. 35 This tax is a tax on the occasion of sale. It is the event of sale or purchase that is material. But it is competent for the State to impose a tax on the proceeds of a sale. It may also be imposed on the gross receipts or turnover of a dealer from the sale of specified commodities. 36

The expression “sale of goods” in this entry has been held to have the same meaning as it has in the Sale of Goods Act, but it is the meaning in the Act that stood at the time the Constitution came into operation. It is not necessary that the meaning of this expression in entry 52 should always be linked up with the meaning it may have at all future moments in the Sale of Goods Act. 37 Consequently, this expression has now come to acquire a fixed meaning for the purpose of entry 52. It has three basic ingredients. First, there must be an agreement for transferring title to goods. Secondly, there must be a money consideration for such agreement. And thirdly, there must be actual transfer of property in goods in pursuance of such agreement.

It has, thus, been held that a mere agreement of sale is not taxable under this entry. So it is an involuntary sale. 38 Hire-purchase agreements, before ripening into sale; 39 forward contracts; 40 supply of labour and work 41 do not also constitute sale of goods within the meaning of this entry. Similarly, when a hotelier charges a consolidated amount inclusive of food, and allows no rebate for food not taken, the amount thus received by him is service charge and there is no sale of food for the purpose of this entry. 42

55. Taxes on advertisements other than those published in newspapers: The levying of taxes on advertisements other than those published in newspapers is within the competence of the States.

56. **Taxes on goods and passengers carried by road or on inland waterways**: The States may levy taxes on goods and passengers carried by road or on inland waterways. It is a tax on the event of physical carriage of goods or passenger through the specified means through, or within, the limits of the jurisdiction of a State, and has no reference to the purpose of travel or carriage.\(^{43}\) Such a tax may be levied with reference to fares or freights\(^{44}\) or the distance of travel or carriage.\(^{45}\) It may be levied on the producer, owner or carrier,\(^ {46}\) and it is imposable individually or collectively.\(^ {47}\)

57. **Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including trams, subject to the provisions of entry 31 of List III**: Vehicles, whether mechanically propelled or not, meant for use on roads, including trams, fall within the power of the States for levying taxes. However, this power of the States is subject to the exercise of powers by the Union and the States in respect of “Ports other than those declared by or under law made by Parliament or existing law to be major ports” within the terms of entry 31, List III.

58. **Taxes on animals and boats**: The States have the power to levy taxes on animals and boats.

59. **Tolls**: Under this entry the States may levy tolls which may be of various kinds not limited to any particular type.\(^ {48}\) Within the terms of this entry the term “tolls” is to be broadly interpreted to include payments realised for some benefit, such as, the use of markets or bridges or a temporary use of any land.\(^ {49}\)

60. **Taxes on profession, trades, callings and employments**: The States may levy taxes on professions, trades, callings and employments of persons, whether natural or juristic. The expression “professions, trades, callings and employments” has been liberally construed to include any recognised means of earning livelihood. However, pension


\(^{47}\) *P. Barua’s Case*, op. cit.


receipts are not taxable as earnings from employment. But such a tax may be levied on the commodity of trade or earnings from professions, trades, callings and employments. It may also be determined with reference to total business turnover.

Evidently, a tax under this entry partakes of the nature of income-tax, and this fact has been recognised by article 276 of the Constitution which declares that a tax under this entry shall not be treated as income-tax. However, this article also provides that such a tax shall not exceed Rs. 250 per annum in respect of any person, although, such a tax, if in force at the time of the commencement of the Constitution even in excess of this amount, is to remain in force until Parliament provides by law otherwise.

61. Capitation tax: Capitation tax is a tax levied on each human head or person without reference to his property, profession or income. And the States are entitled to levy such a tax under this entry.

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling: The States may also levy taxes on luxuries, including any tax on entertainments, amusements, betting and gambling. The word “luxury” in this entry refers to goods of luxury, such as, tobacco or cosmetics. Entertainments and amusements have been interpreted to include theatrical and dramatic performance, cinemas and sports. Betting and gambling include a wagering contract, but not a forward contract.

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty: The State are competent to levy stamp duty in respect of documents other than the documents dealt with above in entry 91, List I. The occasion for levy of the duty of stamp is the execution of a document and not the transaction contained in the document.

In addition to the powers given to the States under the aforesaid entries to List II, there is article 277 of the Constitution which says

that until Parliament otherwise provides, a State is competent to levy a tax with regard to any matter if it was levying such a tax at the time of the commencement of the Constitution, even if such a matter figures in the Union List.

**The Tax Entries to List III—Concurrent List**

The Concurrent List has only the following two entries which relate to taxation:

35. *Mechanically propelled vehicles, including the principles on which taxes on vehicles are to be levied*: Whereas entry 57, List II, provides for the levying of taxes on vehicles, whether mechanically propelled or not suitable for use on roads, this entry, *inter alia*, speaks of principles on which taxes on mechanically propelled vehicle are to be levied. The word "principles" in this context refers to the rules laid down for guidance in the matter of taxation.  

44. *Stamp duties other than duties and fees collected by means of judicial stamp*: The Union is competent to levy stamp duties in respect of documents specified in entry 91, List I. Under entry 63, List II, the States have the power to determine the rates of a stamp duty in regard to documents excepting those covered by entry 91, List I. Entry 44 to the Concurrent List provides for stamp duties other than duties and fees collected by means of judicial stamps. This entry does not, however, include rates of stamp duty.

**PRINCIPLES FOR APPROPRIATION OF TAX PROCEEDS**

The fact that the Union or a State has the power to levy a tax under List I or List II, as the case may be, does in no way imply that the proceeds of such a tax are to be appropriated by the Government levying or collecting the tax. This has been done to secure functional-financial compatibility with regard to the Union and the States. The Supreme Court observed in *In re Sea Customs Act*:

"Realising the limitations of the financial resources of the States and the growing needs of the community in a welfare State, the Constitution has made...provisions empowering Parliament to set aside a portion of its revenues...for the benefit of the States, not in stated proportions but according to their needs... The resources of the Union Government are not meant exclusively for the benefit of the Union activities. In other words, the Union and the States together form one organic...

whole for the purposes of utilisation of the resources of the territories of India as a whole".  

This has led to the constitutional recognition of a distinction between the power to levy or collect a tax and the power to appropriate the proceeds of the tax. This differentiation results in different categories of tax proceeds, each of which needs a separate treatment.

Exclusively Union Taxes: The proceeds of only a few tax entries to List I—Union List—are to be exclusively appropriated by the Union. Proceeds of customs duties, corporation tax, taxes on capital value of assets of individuals and companies as well as any fees in respect of any matter in the Union List are to be exclusively appropriated by the Union. Any proceeds from a surcharge levied within the terms of article 271 for the purposes of the Union also form part of the Consolidated Fund of India. Besides, the Union also receives certain non-tax revenues from its trading, commercial or other economic activities.

Exclusively State Taxes: Proceeds of all the taxes leviable by the States under List II—State List—including any fee charged by them in regard to any matter in this List, are to be appropriated by them. However, if any such tax or fee is specifically assigned to a local authority by any State, the proceeds of such a tax or fee do not form part of the Consolidated Fund of the State. The States also enjoy non-tax revenues derived from their commercial and economic operations.

Duties Levied by the Union but Collected and Appropriated by the States: Article 268 provides that the Union shall levy stamp duties and duties of excise on medicinal and toilet preparations as contained in the Union List, and it is also to collect these duties leviable within any Union Territory. However, these duties, if levied within any State, are to be collected by the State and their proceeds do not form part of the Consolidated Fund of India, but are assigned to the State.

Taxes Levied and Collected by the Union but Assigned to the States: Article 269 specifies the taxes which are to be levied and collected by the Union, but are to be assigned to the States. It also lays down the principles on which this assignment is to be made.

In re Sea Customs Act, A.I.R. 1963 S.C. 1760. Italics are mine.
The duties and taxes to be levied and collected by the Union but assignable to the States are as follows:

“(a) duties in respect of succession to property other than agricultural land;

(b) estate duty in respect of property other than agricultural land;

(c) terminal taxes on goods or passengers carried by railway, sea or air;

(d) taxes on railway fares and freights;

(e) taxes other than stamp duties on transactions in stock exchanges and futures markets;

(f) taxes on the sale or purchase of newspapers and on advertisements published therein;

(g) taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce”.

The net proceeds in any financial year of any of the aforesaid taxes or duties, not attributable to the Union Territories, do not form part of the Consolidated Fund of the Union. They are assigned to the States in accordance with the principles laid down by Parliament. Parliament also formulates the principles to determine when a sale may be said to take place in the course of inter-State trade or commerce.

*Taxes Levied and Collected by the Union and Distributed between the Union and the States* : Then, there is article 270 which requires that taxes on income other than agricultural income are to be levied and collected by the Union, but are to be shared by the Union and the States in accordance with the provisions of its clause (2). However, the expression “taxes on income” in this article does not include corporation tax.

Clause (2) of this article says that the prescribed percentage of the net proceeds in any financial year of taxes on income other than agricultural income, excepting “the proceeds attributable to the Union territories or to taxes payable in regard to Union emoluments, shall not form part of the Consolidated Fund of India.” It is to be assigned to the States and distributed among them in the prescribed manner. “For the purposes of clause (2), in each financial year
such percentage as may be prescribed of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Union emoluments shall be deemed to represent proceeds attributable to Union territories.” And the expression “Union emoluments” includes all emoluments and pensions payable out of the Consolidated Fund of India in regard to which income-tax is chargeable.

In this article “prescribed percentage” or “prescribed manner” means the percentage or the manner, as the case may be, prescribed by an order of the President until the constitution of Finance Commission. After the constitution of Finance Commission the President is to prescribe the percentage or manner by an order after considering the recommendations of the Commission.

_Taxes Levied and Collected by the Union but Which may be Shared with the States:_ Union duties of excise, except excise duties on medicinal and toilet preparations, as contained in the Union List, are to be levied and collected by the Union. But Parliament may provide that a sum equal to a part or the whole of the net proceeds of any such duty levied within a State all be paid to that State out of the Consolidated Fund of India. And all such sums are to be distributed among the States in accordance with the principles laid down by Parliament.

_Calculation of “Net Proceeds”:_ It is to be noted that for the calculation of the net proceeds of any assignable tax contained in articles 269, 270 and 272 the principles laid down by article 279 are to be followed. Article 279 says that the expression “net proceeds” means the proceeds of a tax reduced by the cost of collection ascertained and certified by the Comptroller and Auditor-General of India whose certificate is final in this regard. However, subject to this and any other express provision in this regard, clause (2) of article 279 authorises Parliament or the President, as the case may be, to

“provide for the manner in which the proceeds are to be calculated, for the time from or at which and the manner in which any payments are to be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.”

_Surcharge for the Purposes of the Union:_ Parliament may, however, impose a surcharge for the purposes of the Union on any tax or duty referred to in articles 269 and 270. The entire proceeds of any such surcharge form part of the Consolidated Fund of India.
Taxes on Profession, Trades, Callings and Employments: Article 276 declares that the States may levy a tax up to the limit specified by the article on any profession, trade, calling or employment and such a levy is not to be deemed to be a tax on income. This power of the States is not in derogation of the power of Parliament to levy income-tax in regard to these matters.

Savings: In addition, there is article 277 which lays down:

"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."

Prior Presidential Recommendation for Introducing Bills Affecting Certain Taxes: To protect the interests of the States in regard to certain taxes article 274 requires prior recommendation of the President for introducing a Bill or amendment in either House of Parliament, which imposes or varies any tax or duty in which the States are interested. Clause (2) of this article says:

"In this article, the expression ‘Tax or duty in which States are interested’ means—

(a) a tax or duty the whole or part of the net proceeds whereof are assigned to any State; or

(b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State."

This article also requires such prior recommendation for any Bill or amendment which seeks to vary the meaning of the expression “agricultural income”; affects the principles on which moneys are, or may be, distributed to the States under articles 268-270 and 272; or imposes any surcharge for the purposes of the Union under article 271.

RESTRICTIONS ON TAXING POWER

Article 265 requires that no tax can be levied or collected except by the authority of law. Again, neither the Union nor the States can overstep the bounds set by the relevant entries of the concerned List in Schedule VII. A tax must not also transgress the provisions of article 13; the equal protection clause of article 14; and the
relevant restriction clause in relation to article 19 (1) (g). It must also conform to the requirements of article 27 which forbids the imposition of a tax the proceeds of which are to be specifically appropriated for meeting the expenses of, or for the promotion of, any particular religion or religious denomination. Then, apart from these general limitations on the taxing powers of the Union and the States, there are other specific constitutional restrictions on their taxing powers.

The Doctrine of Immunity of Instrumentalities

The doctrine of immunity of instrumentalities originated in the United States as a corollary to its concept of dual federalism, and it has very wide ramifications. But this doctrine seems to be of practical necessity in all federations and exists in all federations, although with considerable variations. It particularly operates in the field of inter-Governmental taxation. In the U.S.A., in *McCulloch v. Maryland*, the Federation was declared immune from State taxes. Likewise, in *Collector v. Day*, the States were declared immune from Federal taxes. In the Constitution of India, this principle finds specific expression in articles 285 and 289.

Exemption of Union Property from State Taxes: Article 285 requires that except in so far as Parliament may provide otherwise, the property of the Union shall be exempt from all taxes impose by any State or by any authority within the State. The expression "property" in this context has been used in a very general sense to give the widest possible effect to the provisions of this article. Clause (2) of this article, however, provides that unless Parliament legislates to the contrary, any authority in any State is not precluded "from levying any tax on any property of the Union if such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State." Besides, the exemption from taxation under this article does not apply to an incorporated company or a corporation which is not a part of the Union, but is itself a distinct legal entity.

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59 *Collector v. Day*, 11 Wall., 113 (1875).
61 *Idem.*
Exemption of Property and Income of a State from Union Taxes: Article 289, clause (1), makes the property and income of a State exempt from Union taxes. The Union may, however, impose within the terms of clause (2) of this article any tax in respect of any property on income from a trade or business carried on by any State. The impact of this clause (2) is that whereas even the Union’s trading and business activities are exempt from State taxes, the States’ such activities come within the taxing power of the Union. However, in accordance with clause (3) of this article Parliament may declare any trade or business carried on by any State Government “to be incidental to the ordinary functions of Government”, thereby excluding it from the ambit of clause (2) of this article.

Some Specific Restrictions on States’ Taxing Power

Articles 286, 287 and 288 carry some specific restrictions on the States’ power of taxation. Of these, as articles 287 and 288, because of their phraseology, partake of the nature of the aforesaid articles 285 and 289, relating to the doctrine of immunity of instrumentalities, they need to be accounted for first.

Exemption from State Taxes on Electricity: Article 287 says that the States are not competent to impose a tax on the consumption or sale of electricity consumed by the Government of India or the Indian railways or a railway company. Parliament may, however, authorise the imposition of such a tax by any State. But a law authorising, or making, such imposition must provide that the price of electricity sold to the Government of India or the railways “shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity”.

Exemption in Respect of Taxes on Water or Electricity in Certain Cases: Similarly, unless the President authorises by order to the contrary, no tax is imposable within the terms of any pre-Constitution State law in respect of any water or electricity of any authority established by an existing law or a Parliamentary law regarding inter-State rivers or river valleys. A post-Constitution State law may, however, impose such a tax, but it must receive the assent of the President for being effective. Even a rule under the law for determining the rates or other incidents of the tax requires the previous consent of the President for being framed.
Restrictions on the Taxation of Certain Sales or Purchases: Article 286 contains certain restrictions on the power of the States to tax certain sales or purchase taking place outside the State or in the course of import into and export from India. It is for Parliament to formulate by law the principles for determining when a sale or purchase takes place outside a State or in the course of export or import of goods. Besides, a State law imposing a tax on the sale or purchase of goods declared by Parliament to be of special importance in inter-State trade or commerce, is required to be "subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

GRANTS-IN-AID

To secure functional-financial viability and a supple and flexible financial relation between the Union and the States the Constitution provides within the terms of articles 273, 275 and 282 for a scheme of grants-in-aid. Such grants may be given by the Union to the States and by both the Union and the States for any public purpose.

Grants-in-aid in lieu of Export Duty on Jute: Prescribed amounts as grants-in-aid were to be paid to the States of Assam, Bihar, Orissa and West Bengal within the terms of article 273 for ten years from the commencement of the Constitution. These amounts were to be paid "in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products to those States". Any payable sum under this article was to be prescribed by the President until the constitution of Finance Commission and after the constitution of the Commission also by him after considering the recommendations of the Commission. Although even now export duty on jute and jute products is being imposed by the Union, no payments are made any longer to the States on this account.

Grants-in-aid from the Union to Certain States: Article 275 says that Parliament may provide for the payment out of the Consolidated Fund of India of such sums as it may determine as grants-in-aid to the States. Parliament is at liberty to determine to what States grants are to be paid and what sums are to be paid to them. Until provision is made by Parliament, this article authorises the President to exercise this power of Parliament. But after the constitution of
Finance Commission the President has to take into account the recommendations of the Commission while exercising this power.

This article, however, requires certain mandatory payments to be made to the States. In the first place, if a State undertakes any development scheme with the approval of the Union for promoting the welfare of the Scheduled Tribes or for raising the level of administration of the Scheduled Areas in the State, the Union must pay to the State all capital and recurring sums necessary for the purpose. Secondly, the Union must also pay, subject to the provisions of clause (1A) of this article, as grants-in-aid to the State of Assam “sums, capital and recurring, equivalent to—

(a) the average excess of expenditure over the revenues during the two years immediately preceding the commencement of this Constitution in respect of the administration of tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule; and

(b) the costs of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of the said areas to that of the administration of the rest of the areas of that State”.

Union or State Expenditure for Public Purposes: The provisions of article 282 are very significant in the context of grants-in-aid. This article says that the Union or a State may make any grant for any public purpose, although such a purpose may not be within the legislative competence of Parliament or the State Legislature, as the case may be. Consequently, the only limits on the spending power of the Union or a State under this article is set by the expression “public purpose.” Once the precondition of public purpose is satisfied, the Union or a State may ignore the division of powers and functions in the Seventh Schedule for the purpose of incurring any expenditure.

In recent years, the Union is increasingly making use of this article for reaching out to the functions which come within the legislative competence of the States, thereby projecting a crucial element of financial control over the States. Similarly, a State Government tends to control local and other public authorities within its jurisdiction.

CERTAIN FINANCIAL ADJUSTMENTS AND PAYMENTS

Articles 290 and 290A are in the nature of miscellaneous financial provisions. Article 290 provides for adjustments in respect of certain
expenses and pensions and Article 290A relates to annual contributions to certain Devaswom Funds. Thus, Article 290 says:

"Where under the provisions of this Constitution the expenses of any court or Commission, or the pension payable in respect of a person who has served before the commencement of this Constitution under the Crown in India or after such commencement in connection with the affairs of the Union or of a State are charged on the Consolidated Fund of India or the Consolidated Fund of a State, then, if—

(a) in the case of a charge on the Consolidated Fund of India, the court or Commission serves any of the separate needs of a State or the person has served wholly or in part in connection with the affairs of a State; or

(b) in the case of a charge on the Consolidated Fund of a State the court or Commission serves any of the separate needs of the Union or another State, or the person has served wholly or in part in connection with the affairs of the Union or another State,

there shall be charged on and paid out of the Consolidated Fund of the State or, as the case may be, the Consolidated Fund of India or the Consolidated Fund of the other State, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India."

Then, article 290A reads:

"A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom Fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Tamil Nadu every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the 1st day of November, 1956, from the State of Travancore-Cochin."

BORROWING

Articles 292 and 293 provide for borrowing by the Union and the States, respectively. But unlike taxes and grants-in-aid they do not speak of both principle and power but only of the power to borrow when necessity is felt.

Borrowing by the Union: Article 292 extends the executive power of the Union to include also the power of "borrowing upon the security of the Consolidated Fund of India." Parliament is competent, however, to lay down any limitation on this power, which are to be observed by the executive in the exercise of its borrowing power.
Borrowing by the States: Clause (1) of article 293 says that "the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State" and within such limits as the Legislature of the State may fix from time to time. Thus, the borrowing power of the States is confined within the territory of India.

Clause (2) of this article authorises the Union to give advances or loans to a State or give guarantees in respect of any loan taken by the latter. But this advance or guarantee must be within the limits, if any, set by Parliament by law. Clause (3) requires that a State is not competent to borrow without the consent of the Union if the former has any outstanding loan due to the latter or has an outstanding loan guaranteed by the latter. While giving such consent by virtue of clause (4), the Union is also authorised to impose any conditions it may think fit for the purpose.

FINANCE COMMISSION

"Finance Commission", says article 264, "means a Finance Commission constituted under article 280." The purpose of such a Commission is to have a periodical assessment of the financial needs of the States and to secure for them adequate revenue resources for their efficient functioning. The Commission is expected to function independently and objectively, although it is a body constituted by the Union.

Composition and Functions of Finance Commission: According to Article 280 (1), the appointment of the First Finance Commission was to be after two years from the commencement of the Constitution. Thereafter, it is to be appointed "at the expiration of every fifth year or at such earlier time as the President considers necessary". It is not a permanent body and goes out of existence as soon as it submits its report to the President. The Commission consists of a Chairman and four other members, appointed by the President by a notification in the Gazette of India.

Under clause (2) of article 280, Parliament by law determines the qualifications of the members of the Commission and the mode of their selection, and it has passed the Finance Commission (Miscellaneous Provisions) Act, 1951, to regulate these matters. The Act requires
that the Chairman of the Commission is to be a person who has experience in public affairs and its other four members should be persons who are existing or ex Judges of High Courts or are qualified to be High Court Judges or have special knowledge of finance or accounts of government or administration or economics. An undischarged insolvent, or a person of unsound mind or a person convicted of an offence involving moral turpitude is not qualified to be a member of the Commission.

Under clause (4) of this article, the Commission is competent to determine its own procedure and its members also enjoy "such powers in the performance of their functions as Parliament may by law confer on them." So far as the functions of the Commission are concerned, clause (3) of article 280 lays down:

"It shall be the duty of the Commission to make recommendations to the President as to—

(a) The distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter 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;

(c) any other matter referred to the Commission by the President in the interests of sound finance."

The Commission makes intensive and extensive inquiries and gives hearings to Governments involved before submitting its report. The Commission submits its report to the President containing its recommendations with regard to the matters referred to it. Then, article 281 requires:

"The President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament."

Since the commencement of the Constitution six Finance Commissions have been constituted, all of which have completed their onerous work admirably. And although any recommendation of the Commission is not constitutionally binding upon the Government, in practice, its every recommendation is almost treated as mandatory. For, any attempt at departing from such a recommendation may land the Union Government in the centre of unsavoury, and even stormy, political pressures and controversies.
Evidently, then, the Constitution seeks elaborately to provide reasonable solutions to the complex Union-State financial relations and problems. By themselves they seem adequate to maintain national unity and State autonomy, without hampering planned economic growth. But ulterior factors seem to tilt the balance of financial power unduly in favour of the Union. And it seems that in the interest of sound federal finance a more rationalised sharing of taxes between the Union and the States and a greater emphasis on untied Union grants within the frame of the existing constitutional provisions are necessary. Besides, it is also desirable that the States should make a greater revenue-effort and also more meticulously observe the sound canons of public finance and general economy. But in any case, it has to be remembered with Wheare that

"there is and can be no final solution to the problem of the allocation of financial resources in a federal system. There can only be adjustments and re-allocations in the light of changing conditions."

CHAPTER 37

TRADE COMMERCE AND INTERCOURSE

Political unity and political freedom are meaningless without economic unity and economic freedom. And in an open society freedom of trade, commerce and intercourse is a vital ingredient of national economic unity and individual economic freedom. Yet like any other freedom this freedom also needs of necessity corresponding controls and federalism implies a constant recognition of unity in diversities. It is in this spirit that Part XIII of the Constitution, relating to "Trade Commerce and Intercourse within the Territory of India", is to be viewed, whose substantive article 301 may be said to be directly originating from section 92 of the Australian Constitution, although with some significant differences.

FREEDOM OF TRADE, COMMERCE AND INTERCOURSE

Article 301, relating to freedom of trade, commerce and intercourse, reads:

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

Nature of the Right to Freedom of Trade, Commerce and Intercourse

The freedom of trade, commerce and intercourse granted by article 301 is not a fundamental freedom. It is a constitutional right which depends for its enforcement not on article 321 but on article 226 and the other relevant articles in this regard. Yet it is to be viewed as of no less significance than the fundamental right to practise any profession or to carry on any occupation, trade or business under article 19(1) (g).

Article 301 and Article 19(1) (g): Apparently, there is degree of overlapping between the provisions of article 301 and article 19(1)(g), and their satisfactory relation as yet stands unexplained. It seems,

1 Ram Chandra v. State of Orissa, A.I.R. 1956 S.C. 298,
however, that with regard to trade, commerce and intercourse article 301 confers a wider right, though not fundamental, and the emphasis in this article seems to be “on the movement aspect of trade, which is of the very essence of all trade and is its integral part”.\textsuperscript{2}

\textit{Ambit of the Right to Freedom of Trade, Commerce and Intercourse}

Article 301 protects all legitimate trading and commercial activities and it deliberately uses the word “intercourse” to give the right guaranteed by it the widest possible meaning.\textsuperscript{3} But evidently, article 301 does not cover a \textit{res extra commercium} or inherently vicious and pernicious activities, such as, trafficking in women, committing crimes or gambling.\textsuperscript{4}

The freedom granted by this article is the freedom enjoyable “throughout the territory of India”, and it covers not only inter-State but also intra-State trade, commerce and intercourse.\textsuperscript{5} And this freedom means freedom from all impediments, except regulatory and compensatory measures and those provided by the other articles of Part XIII of the Constitution itself.

\textit{Impediments Impinging Directly and Immediately:} Nothing can be regarded as violating the right under article 301 unless it \textit{directly and immediately} impinges upon the freedom granted by this article.\textsuperscript{6} An impediment which is remote or a measure which is regulatory or compensatory in character, whether legislative or executive, does not attract this article.\textsuperscript{7}

\textit{Taxation and Freedom of Trade:} Once the test of direct and immediate impediment is satisfied article 301 equally applies to both fiscal and non-fiscal measures.\textsuperscript{8} And in the case of fiscal measures also regulatory and compensatory measures fall outside the purview of this article.\textsuperscript{9}

\textsuperscript{3} Chobe v. Palnikar, A.I.R. 1954 Hyd. 207.
\textsuperscript{6} Idem.
RESTRICTIONS ON THE FREEDOM UNDER
ARTICLE 301

The freedom of trade, commerce and intercourse granted by article 301 is not only subject to what were called by the Supreme Court in *Automobile Transport's Case*\(^\text{10}\) as regulatory and compensatory measures of fiscal or non-fiscal nature, but this article itself expressly makes the protection enjoyable under its umbrella “subject to the other provisions of this Part”. And these “other provisions of this Part”, covering articles 302 to 307, clearly run as restrictions on the substantive freedom under article 301.

*Power of Parliament to Impose Restrictions on Trade, Commerce and Intercourse: Article 302*

There is, thus, article 302 which authorises Parliament to impose restrictions on the freedom of trade, commerce and intercourse, whether intra or inter State, in the public interest. It says:

“Parliament may by law impose such restrictions on the freedom of trade, commerce and intercourse between one State and another or within any part of the territory of India as may be required in the public interest.”

*Restrictions on Union and State Legislative Power Relating to Trade and Commerce: Article 303*

The power of Parliament to legislate for imposing restrictions under article 302 on the freedom of trade and commerce under article 301 is subject to the limitation of clause (1) of article 303, which forbids both Parliament and the State Legislatures to mete out a preferential or discriminatory treatment to one State over another in the exercise of its any power relating to trade and commerce in the Seventh Schedule. However, clause (2) of this article somewhat softens the rigours of this requirement in relation to Parliament in so far as it confers on that body the power of making preferential or discriminatory laws on the ground that such a law is intended to deal “with a situation arising from scarcity of goods in any part of the territory of India”. This article 303 reads as follows:

“(1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the

making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary so to do for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India."

Power of the States to Impose Restrictions: Article 304

Article 304, which authorises the State Legislatures to impose certain restrictions on the freedom of trade, commerce and intercourse, provides as follows:

"Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce and intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

Regional economic variations and a desire to protect the States' economic interests, with widely varying levels of economic development, lie at the root of article 304, concerning the States' right to impose restrictions on the freedom of trade, commerce and intercourse, which carries twofold provisions. In the first place, it authorises a State Legislature to impose a tax which it is otherwise competent to impose on goods imported into the State if such a tax is imposed on similar goods manufactured and produced in that State and the effect of the tax does not prove discriminatory between the home product and the imported material. But it is immaterial whether similar goods are actually being produced in the taxing State.

12 Idem.
Secondly, with the previous approval of the President a State Legislature may impose in the public interest reasonable restrictions on trade, commerce or intercourse with or within the State. Any such restriction has, thus, to satisfy both the tests of "public interest" and "reasonableness." Clearly, then, the courts have the final say in the matter and it has been held in *Tika Ramji's Case*\(^\text{14}\) that the test of reasonableness in articles 19 (6) and 304 (b) is the same.

**Saving of Existing Laws**

Any pre-Constitution law, even though violative of the right to freedom of trade, commerce and intercourse under article 301, continues to be valid as long as the President does not by order direct otherwise. Such a law includes an enactment existing at the time of the commencement of the Constitution, but put into effect only after such commencement,\(^\text{15}\) although it is doubtful whether it would include a rule made after such commencement under a pre-Constitution statute.\(^\text{16}\) Besides, any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, relating to, and the power of Parliament or a State Legislature to legislate for, the carrying on by the State of any trading, business or industrial activity to the complete or partial exclusion of the citizens or any other person, remain untrammelled by the provisions of article 301. Article 305 lays down as follows in this regard:

"Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may otherwise direct; and nothing in article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub-clause (ii) of clause (6) of article 19."

**AUTHORITY FOR EFFECTUATING ARTICLES 301 TO 304**

Article 307 empowers Parliament to appoint appropriate authority for enforcing the provisions of articles 301 to 304. It says:

"Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary."

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Parliament has been authorised by article 307 to appoint any authority with necessary powers, functions, including judicial functions, for realising the objectives of the right to freedom of trade, commerce and intercourse. And in fact, one such authority, the Inter-State Transport Commission, has been set up under section 63A (1) (2) of the Motor Vehicles Act.
CHAPTER 38

PROPERTY AND CONTRACTS

Chapter III of Part XII of the Constitution, which has some seven articles, carries the heading “Property, Contracts, Rights, Liabilities, Obligations and Suits.” The first two of these seven articles—articles 294 and 295 deal with what is known as state succession in the law of nations. The next article 296 relates to the vesting of property in the state as bona vacantia. Then, comes article 297 which again relates to an aspect of the law of nations, concerning territorial waters and continental shelf. Articles 298 and 299 relate, respectively, to the power of the state to carry on trade, own property and make contracts and to the procedure of making contracts. And the last of these seven articles—article 300—deals with suits and proceedings against Governments and has been more conveniently accounted for in the next chapter of this work.

SUCCESSION

The law relating to state succession is an area of the law of nations and what the Constitution does in this behalf is merely to state this law in the specific Indian context without in any manner intending to depart from the settled principles of the law of nations. Article 294 says:

“As from the commencement of this Constitution—

(a) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor’s Province shall vest respectively in the Union and the corresponding State, and

(b) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor’s Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State,

subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.
After the commencement of the Constitution, within the terms of article 294, the Government of India succeeded to all the property and assets vested in His Majesty for the purposes of the Indian Dominion and the States succeeded to all the property and assets vested in His Majesty for the purposes of the corresponding Provinces. Similarly, the Union and the States also succeeded to all the rights, liabilities and obligations, whether contractual or otherwise, of the Indian Dominion and the corresponding Provinces, respectively. However, nothing in article 294 is intended to fetter the competence of Parliament or a State Legislature.¹ And the rule of international law, that a successor state is competent to repudiate any liability or obligation of the predecessor state, also applies to cases under this article.²

Article 295, covering succession in other cases to which also the above principles of succession in general and international law apply, lays down as follows:

"(a) As from the commencement of this Constitution—

(a) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

(b) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities and obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List,

subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject as aforesaid, the Government of each State in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1)."³

ESCHEAT, LAPSE OR BONA VACANTIA

Article 296 recognises the general principle of law relating to escheat, lapse or bona vacantia, that in case succession to any movable or immovable property, whether of a natural or juristic person, fails for want of a legal heir, the property reverts to the state as the ultimate owner of all property within its jurisdiction. Property under this article vests in the Union or the State, depending upon the situs of the property. This rule of situs, however, has to yield to the rule of user in case a property is in actual possession or use of a Government at the time of vesting. Article 296 provides as follows in this regard:

“Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union:

Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or that State.

Explanation.—In this article, the expressions ‘Ruler’ and ‘Indian State’ have the same meaning as in article 363.”

THINGS OF VALUE UNDERLYING THE OCEAN

All lands, minerals and other things of value underlying the ocean within territorial waters or continental shelf vest in the Union by virtue of article 297. This does not, probably, detract from the right of a littoral State to the contiguous territorial waters, for, what belong to the Union are the things of value underlying the territorial waters and not the territorial waters as such. Article 297 reads as follows:

“All lands, minerals and other things of value underlying the ocean within the territorial waters or continental shelf shall vest in the Union and be held for the purposes of the Union.

8 Susai v. Director of Fisheries, (1965) II M.L.J. 35.
RIGHT TO CARRY TRADE, OWN PROPERTY AND MAKE CONTRACTS

In consonance with the spirit of this age of positive state and also with a view to arming the executive with untrammelled powers to pursue economic activities, article 298 provides as follows:

"The executive powers of the Union and each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose:

Provided that—

(a) the said executive power of the Union shall, in so far as such trade or business or purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and

(b) the said executive power of each State shall, so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament."

By virtue of article 298, the Union and the State executives are competent to (i) carry on any trade or business; (ii) acquire, hold and dispose of property; and (iii) make contracts for any purpose, irrespective of the fact whether the Union Parliament or a State Legislature has the competence to make laws for the matter or not. Besides, no legislation is necessary in these three-fold directions as a precondition to executive action with regard to them.\(^5\) If, however, any such matter is outside the competence of Parliament, the Union executive can exercise its power with regard to it only subject to legislation by the State Legislatures. Similarly, if such a matter is outside the purview of the State Legislatures, the State executive may pursue it only subject to legislation by Parliament.

CONTRACTS

Contracts with the State are a class by themselves, for, the state, or Government, can act only through its agents. It demands, therefore, a twofold protection. The state needs protection and so does the private person entering into a contract with the state, because officials acting on behalf of the state may flood the state with individual claims or may frustrate the claims of individuals against the state.\(^6\) It is with this end in view that article 299 provides as follows:


“(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force nor shall any person making or executing any such contract or assurance on behalf of any of them shall be personally liable in respect thereof.”

Article 299 relating to Government contracts is mandatory in character and has two parts. In its first part, it prescribes the formalities which must be observed in order to enforce such contracts and in the second part, it provides personal immunity to the President, Governors and other officials entering into such contracts.

Formalities of Contracts

There are three requirements which a Government contract must satisfy. In the first place, it must be a contract entered into on behalf of the President or the Governor, as the case may be. Secondly, it must be executed by a person duly authorised by the President or the Governor concerned. This authorisation may, however, be of general or special nature and may require proof. Then thirdly, such a contract must be expressed to be made by the President or the Governor, as the case may be. And from the use of the words “executed” and “expressed” in this context an inference also flows that a Government contract must be in writing, although the particular form in which this writing be has not been specified by the Constitution. It is possible, therefore, that a contract by tender duly accepted by an authorised person on behalf of the President, or a Governor, may be in a perfectly good order.

Any contract which is not in writing and fails to comply with any or all of the three conditions above is void ab initio and cannot be enforceable even after subsequent ratification by the Government. But on equitable principle the Government may be sued to compen

7 Chaturbhuj v. Moreswar, op. cit.
sate for any benefit derived even under a void contract within the terms of section 70 of the Indian Contract Act.\(^9\) Again, even such a void contract is valid for collateral purposes.\(^{10}\) Besides, such a void contract, if otherwise valid within the terms of the Indian Contract Act, may lead to a suit against the official making the contract in his personal capacity.\(^{11}\)

**Service Contracts**: Service under the Union or a State is always subject to the "doctrine of pleasure" incorporated in article 310 of the Constitution. Normally, unless an appointment is made by a formal contract, a service contract need not comply with the requirements of article 299, and it falls outside its purview.\(^{12}\)

**Personal Immunity for Contracts**

Article 299 by its clause (2) also provides that the President or the Governor, as the case may be, and any other person acting on his behalf are personally not liable for any contract validly entered into by them. This immunity is purely personal and only for valid contracts and does not operate to bar the enforcement of a valid contract against the Union or the State, as the case may be.\(^{13}\)

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CHAPTER 39

SUITs AND LIABILITY

In the individual-state equation in the scheme of a constitution the issue of State liability figures as a complex factor. For, the state, or the government, has always to act through officials who are not only likely to make mistakes but also liable to misuse their powers. And yet some state functions in all social systems by nature demand special immunities for the state or the persons performing those functions. Consequently, in any country the law relating to state liability is never in a happy frame, and in India it is in a specially unsavoury situation.

SUITs AND PROCEEDINGS AGAINST GOVERNMENT

Article 300 of the Constitution recognises the corporate capacity of the Union and the States and provides that the Union and the States may sue or be sued in their respective names as juristic personalities.\(^1\) Parliament or the Legislature of a State may, however, make appropriate laws for such suits or proceedings. But so long as no such legislation is framed the Union or a State may sue or be sued in relation to its affairs only in cases in which the Dominion of India or the corresponding Province or the Indian State, as the case might be, could sue or be sued before the Constitution became operative. This article, thus, essentially recognises the historical position of state liability in India existing in pre-Constitution days.\(^2\) It merely lays down as follows:

"(1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of power conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution—

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and


(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

CONTRACTUAL LIABILITY

Subject to any statutory limitations, the liability of the state for a contract, made in conformity with the triple requirements of article 299, is like that of any other individual. The President or the concerned Governor or officer is not personally liable for such a contract. A contract not conforming to the requirements of article 299 is void ab initio and cannot be enforced by or against the state and even a subsequent ratification cannot revivify it. But if a contract is otherwise valid, though not in conformity with article 299, the official concerned may be sued in his personal capacity. Again, if the state derives any benefit from a contract made not in conformity with article 299, it may be made liable under section 70 of the Indian Contract Act.\(^3\) Besides, the arrears of salary and allowances are recoverable from the state by an ordinary action.\(^4\) It seems, thus, that the law relating to the contractual liability of the state is amply clear and satisfactory.

TORTIOUS LIABILITY

In sharp contrast from the law relating to the contractual liability of the state the law of its tortious liability is extremely nebulous, as it still clings to the quaint dichotomy of sovereign and non-sovereign state functions pronounced in 1861, in \textit{P. and O. Steam Navigation Co. v. Secy. of State,}\(^5\) by the Bombay High Court. Even today, as the Supreme Court stated in \textit{Vidyawati’s Case,}\(^6\) the question has to be asked:

“Would such a suit lie against the East India Company, had the case arisen prior to 1858 ?”

In determining the liability of the state in tort, then, it has to be found, first, whether an act is sovereign or non-sovereign. There is no

\(^3\) See above Chapter 38 for case laws.


\(^6\) \textit{Vidyawati’s Case, op. cit.}
conclusive test to make such a distinction and the courts have generally followed the individual case approach. Broadly speaking, all commercial activities of the State would be non-sovereign functions. But, then, there may be others. For example, the driving back of a jeep by a state employee from a garage after repair is not a sovereign function. But the seizing and depositing of articles in malkhana under statutory authority is a sovereign function. However, once the court finds that a function is non-sovereign in character, the state is liable for the tortious acts of its agents in the same manner and to the same extent as a private person.

STATUTORY LIMITATIONS OR IMMUNITIES

Apart from the immunity claimed by the state in India in the name of sovereign functions, there are other statutory limitations on, or immunities from, suits against the state or its officers. Thus, for example, sections 80 and 82 of the C. P. C. prescribes certain procedural limitations subject to which alone the state or its any officer may be made liable in a court of law. Then, a statute may carry a standard immunity clause by providing that no suits or proceedings shall lie against any person for anything done by him under the Act in good faith. Again, when martial law is in force, it may lead to the subsequent passing of an Act of Indemnity.

Whether a Statute is Binding upon the State

An aspect of the statutory limitation or immunisation of state liability is the question whether a statute binds the state. In Director of Rationing’s Case it was held that the State was not bound by its own enactments unless an enactment expressly provided otherwise. But subsequently, the Supreme Court reviewed its ruling in this case and stated, in Superintendent and Legal Remembrancer, W. B. v. Corporation of Calcutta, that a statute equally applies to the state and citizens unless expressly or by necessary implication it excludes

7 Idem.
9 Vidyawati’s Case, op. cit.
the state from its purview. And this position has been reiterated by the Court in *Union v. Jubbi*.^{12}

**ACT OF STATE AND STATE LIABILITY**

The concept of Act of State is essentially narrow in the scheme of the Constitution. In consonance with the practice in the common law world, an Act of State in India refers to such sovereign action of the State in relation to other states or their subjects for which it cannot be made liable in its own law courts. This doctrine of Act of State in relation to foreign countries or foreigners was accepted in India as early as 1859, in *Secretary of State v. Kamachee Boyee*^{13}, and is still operative in the scheme of the Constitution.^{14} The plea of Act of State is, however, not available to the state in India in relation to its subjects.^{15} Necessarily, therefore, the concept of Act of State does not hinder the right of a citizen to obtain relief from the state within the frame of the Constitution.

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^{12} *Union of India v. Jubbi*, A.I.R. 1968 S.C. 360

^{13} *Secretary of State v. Kamachee Boyee*, (1859) 13 Moor P.C. 22.


PART SIX

PSEPHOLOGY AND PTEROLOGY
CHAPTER 40
FRANCHISE AND ELECTIONS

Universal adult franchise and free periodical elections are the hallowed hallmarks of secular democracies. A community constantly commanding these political opportunities and consciously, responsibly and vigorously availing itself of them for the realisation of just common causes is a free fraternity of equal human beings; a marvel of mankind. And significantly, the Constitution of India envisages both universal adult suffrage and free periodical elections.

SUFFRAGE

In providing for universal adult suffrage for the illiterate, ill-fed, ill-clad, teeming millions of this country the founding fathers performed a great act of faith. Although the right to vote is not a fundamental right and "a vote by itself does not represent very much to a person who is down and out, to a person, let us say, who is starving and hungry", time has proved the wisdom of providing for universal adult suffrage as an instrument of people's power even in this land of haunting illiteracy, stark affliction and sore poverty. Whenever the people have been allowed vote freely, free from sordid money power, satanic politics of violence and subtle demagogic influence, they have made a most judicious use of their voting right. A people illiterate and poor is not necessarily a people unwise and unconscionable.

Adult suffrage has been provided for elections to the House of the People and the State Legislative Assemblies by article 326 which reads:

"The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election."

1 Nehru, Jawaharlal, Inaugural Address, Seminar on Parliamentary Democracy on Feb. 25, 1956, New Delhi.
Within the terms of article 326 every Indian citizen who is twenty-one years of age is an elector for the Lok Sabha and the Vidhan Sabha elections unless he is disqualified otherwise by the Constitution or any enactment. Section 16 of the Representation of the People Act, 1950, and sections 62 and 141 of the Representation of the People Act, 1951, contain certain disqualifications for voting. A person ordinarily resident in a constituency within the meaning of sections 19 and 20 of the Representation of the People Act, 1950, is competent to vote in the constituency. But he is disqualified for voting:

"(i) if he is of unsound mind and stands so declared by a competent Court;

(ii) if he is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections;

(iii) if he is not registered in the electoral roll of a constituency in accordance with s. 19 of the Representation of the People Act, 1950;

(iv) if he is confined in prison, or is in the lawful custody of the police, otherwise than under a law of preventive detention;

(v) if a person votes at more than one constituency, his votes in all such constituencies shall be void;

(vi) if a person is, after the commencement of the Representation of the People Act, 1951,—(a) convicted under s. 171E or s. 171F of the I. P. C., or under s. 125, s. 135 or s. 136(2)(a) of the R. P. A., 1951, or (b) found guilty of any 'corrupt practice' upon trial of an election petition under Part VI of the R. P. A., 1951,—shall be disqualified for voting at any election for a period of six years from the date of such conviction or the date from which such finding takes place."

**Single General Electoral Roll**

The Constitution does not provide for any separate electorate system. Article 325, providing for a single general electoral roll for a territorial constituency, says:

"There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them."

**ELECTION**

The word "election" does not denote merely casting of votes but is a convenient compendious expression to include a number of inter-
related operations required to elect a representative. In the first place, it includes the delimitation of territorial, or other, constituencies. Territorial constituencies, which are single member constituencies in this country, are delimited by a Delimitation Commission formed under Parliamentary law. The Commission holds public hearings, and its recommendations are given effect to by a Presidential Order. Normally, there are no grave complaints of Gerrymandering.

Then, electoral rolls have to be prepared and kept up-to-date. This involves preparation of preliminary rolls, their publication, hearing of objections, rectification of the rolls and their final publication. Ordinarily, there do not seem to be serious gaps in these processes to cast a reflection on fair and free elections in the country.

Dates for elections have to be announced; nominations filed, scrutinised and finalised; and election symbols allotted. Apart from the advantage derived from timing elections to suit the persons in power and the vice of party and factional wranglings in setting up candidates, there is generally a fair practice of filing nominations and finalising them. But, then, come election campaigns by the parties and their candidates, and the demon of corrupt election practices, armed with the power of money and violence and also other allurements, stalks unabashed, not because the law has loopholes but because the lure of office blinds the visions of the parties and their candidates.

**Voting by Secret Ballot**

Voting is by secret ballot and polling booths are set up in normally convenient places in all the constituencies. But what have led to a complete distortion of this secret ballot system are the politics of violence and power and money politics. Impersonation, intimidation and other unconscionable acts are on an increase these days and peaceful, honest voting is becoming a matter of history. However, votes are eventually counted at a centralised place and election results are announced, but in the process of counting votes also sometimes there may be found a canker in the core

**ELECTION COMMISSION**

Free and fair elections imply an impartial and independent agency for the superintendence, direction and control of the elections.

S: Cl—73
In the Constituent Assembly there was even a proposal to give a fundamental right footing to such an agency, for, as Ambedkar said:

"Many people felt that if the elections were conducted under the auspices of the executive authority and if the executive authority did have power, as it must have, of transferring officers from one area to another with the object of gaining support for a particular candidate...that will certainly vitiate free elections which we all wanted."

The agency contemplated by the Constitution under article 324 for securing free and fair elections is the Election Commission, and although the Commission was ultimately not included in the chapter on fundamental rights, all care was taken to guard it against the executive's influence. The Election Commission is to consist of the Chief Election Commissioner and such other Election Commissioners as the President may determine. When there are two or more Commissioners, the Chief Election Commissioner acts as the Chairman, and they are all appointed by the President, subject to any law made by Parliament. The Election Commission consists at present of only the Chief Election Commissioner, and although the Constitution prescribes no qualifications for him, in practice only a senior member of the civil service is appointed to hold the office. There is also a provision for appointing Regional Commissioners, and the President, or the Governor, is required to place at the disposal of the Election Commissioner or Regional Commissioners staff necessary for the due discharge of their functions.

The terms and conditions of service of the Chief Election Commissioner and the other Commissioners and Regional Commissioners are determined, subject to any Parliamentary law, by the President. But the Chief Election Commissioner can be removed from his office only in the manner of removing a Supreme Court Judge and the conditions of his service cannot be varied to his disadvantage after his appointment. Any other Election Commissioner or a Regional Commissioner may be removed by the President only on the recommendation of the Chief Election Commissioner.

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1 C.A.D., vol. IV ; p. 973.
2 Art. 324(2) (4) (6).
3 Art. 324(5).
Functions of the Commission

Article 324(1) says:

"The superintendence, direction and control of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as Election Commission)."

By virtue of the authority vested in it by clause(1) of article 324, the Election Commission is deeply involved in all the operations, excepting the delimitation of constituencies and determination of election disputes, relating to elections to Parliament and the State Legislatures and elections to the offices of President and Vice-President. It has not only administrative but also quite a few judicial functions.⁵ And the Commission has been admirably performing all its functions in spite of the tremendous difficulties, natural and artificial, in the world's largest democracy.

LEGISLATION BY PARLIAMENT AND STATE LEGISLATURES

Parliament and the State Legislatures have been authorised by articles 327 and 328, respectively, to make laws with regard to elections. Article 327 says:

"Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament, or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses."

Then, articles 328 lays down:

"Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses."

ADJUDICATION OF ELECTION DISPUTES

Article 329 ousts the jurisdiction of the courts from election affairs in very comprehensive terms. It reads:

⁵ See the Author's Justic by Tribunals, op. cit.
"Notwithstanding anything in this Constitution—

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328, shall not be called in question in any court;

(b) no election to either House of Parliament or to the House 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."

Because of the provisions of article 329 quite a lot of election matters are decided by the Election Commission and other competent authorities acting as tribunals. The Supreme Court decides as a tribunal any Joubt or dispute relating to Presidencial or Vice-Presidential election. And although previously election tribunals had been specifically constituted for deciding disputes relating to elections to Parliament and the State Legislatures, at present the High Court concerned decides such a dispute acting as a tribunal. This has been done with a view to expediting disposal of such a dispute and to a degree this objective has been fulfilled.

ELECTORAL REFORMS

Of late, there have been loud complaints of unfair elections and consequent demands for electoral reforms of diverse nature, including a demand for introducing the system of proportional representation in elections to Parliament and the State Legislatures and the lowering of voting age to eighteen years. And it seems that to a great extent both the complaints and the demands have a substance. Unconscionable election practices are rising rapidly and the vices of power and money politics and politics of violence are increasing in a crescendo, which if allowed to go unchecked are sure to destroy the democratic essence of the Constitution.

But it is equally certain that no legal reforms can alter the course of political culture of a community. Electoral evils in any community lie more in the region of its political culture than in the realm of its election laws. The prevailing electoral vices have to be fought on social and political planes. The parties and their leaders ought to make an all-out effort to save democracy from its onrushing

See the Author’s Justice by Tribunals, op. cit.
doom in the country. This is, however, not to suggest that there is no room for reforms in electoral laws, but these reforms are likely to have only marginal effect.

Evidently, the introduction of proportional representation to replace the present scheme of election by simple majority is likely to lead to a general political confusion and instability in the country. However, there seems to be a definite case for conferring voting right on persons who have attained the age of 18 years instead of 21 years as at present prescribed by the Constitution, even if it may imply a decline in the political significance of a vote or voter and an increase in the power of political parties.\[7\]

CHAPTER 41
PARTIES AND FACTIONS

A political party is a voluntary association of like-minded persons professing to pursue public good through the instrumentalities of public power. In fact, modern governments, democratic or dictatorial, are usually party governments, except, of course, in the case of a military coup or any other ad hoc arrangement or a condition of personal or partyless government. Democracies in general, whether parliamentary or presidential, people’s or liberal, developing or developed, are now not only indirect or representative in character but also party governments in substance.¹

And Lincoln’s “government of the people, by the people and for the people” has at best always been “a government of the people, by a (the) party and for the people, and also with the people”, as B. C. Roy once supplemented; and at worst it is a “government of the party, by the party and for the party in the name of the people.”¹ᵃ

Political parties lend the motive power to a politically organising or organised community; pin-point focal public issues; mobilise the masses around them; harness the ambitions and capabilities of individuals and groups; provide personnel for the various organs of public power: and execute their public policies and programmes through numerous devices. “They both differentiate and integrate”² and thereby oil the multi-wheeled state chariot and also lead it in defined directions. And, perhaps,

“Only a system of highly organised parties can secure that those who win votes by what they promise shall lose them by what they fail to do.”²ᵃ

But interestingly, no constitution, excepting commonly the constitution of a people’s democracy or rarely even the constitution of a developing democracy, expressly recognises the crucial role of a political party or parties. And significantly, the Constitution of India also does not speak of political parties, although they find some mention in electoral laws and may eventually get indirect

¹ Beeker, Carl: New Liberty for Old, New Haven, 1941; p. 106.
constitutional recognition if the proposed constitutional amendment relating to defections gets incorporated in the Constitution.

OPERATIONAL PARTY CONSTRUCTS

Generally speaking, mind may conveniently conceive of four broad kinds of operational party constructs—unipartism, bipartism, multipartism and sanspartism. And they four may reflect either legal or factual situations or both. The may also present diverse shifting or transient or intermediary or varying patterns.

UNIPARTISM

Unipartism may exist as a legally recognised system as in a people’s, or even a developing, democracy where no other political party is allowed to function. Any other political party may exist only as an illegal, underground, rebel or insurgent organisation. In such a case the relation between the party and the government may present diverse patterns. In one case the party may play the dominant role and in another the government. There may be cases of the same persons holding key party and government posts. Then, unipartism may also exist as a matter of fact. That is the case of a country where a single political party predominates the political stage and other numerous smaller parties exist as pigmies.

BIPARTISM

In countries where liberal democracy has a traditional hold normally bipartism prevails as a matter of fact. Bipartism does not rule out the existence of one or more other smaller parties. But it implies in general that a country has two more or less equally powerful and balanced parties—one in power and the other in opposition—so evenly poised that none can afford to remain in perpetual power.

MULTIPARTISM

In multipartism the scene is generally characterised by kaleidoscopic changes in parties in power. Even when a country has a number of parties, unless this kaleidoscopic character is visible, it would not be proper to characterise it as having a multiparty formation. It is possible, however, that in a federation at the level of the units all the tendencies of multipartism may be noticeable, whereas at the federal level unipartism or bipartism may have a firm sway.
SANSPARTISM

Sanspartism may represent political ideality, spontaneity, fluidity or reality. Apart from its charm as an idea or its spell as a spontaneity or fluidity, it is possible that a country may decline to give legal status or recognition to the activities of political parties, even when such parties may not altogether be banned as illegal associations.

PARTY IDEALS, ORGANISATIONS AND FUNCTIONS

As the objective of a party is to capture the organs of public power, continue in their control and effectuate through them its policies and programmes, it has certain ideas or ideals for which it stands and works as a body. It may be incorporated or unincorporated and it may have constitutional status or legal recognition. It builds territorial or functional units and has normally youth, students’, teachers’, peasants’, trade union wings or associates. And its functions are not only always strictly political in nature but also take social, cultural, educational or even economic hues. But all its efforts are ultimately geared to winning and retaining political power.

Cadre-based Versus Mass-based Parties

The need for the operational efficacy of the parties has given rise to the question whether they should be cadre-based or mass-based. In a people’s democracy the sole ruling political party is normally cadre-based. That is, it has thoroughly screened, strictly disciplined and highly committed party workers, and its membership is very restricted. In a liberal democracy, although a party normally has a body of dedicated and committed workers, it generally follows an open door policy of membership. The former type is known as a cadre-based and the latter as a mass-based party. In an open society mass-based parties are a usual feature, although even in this society there may be some cadre-based parties. But it seems that an admixture of cadre and mass bases is more viable for a party in an open society or a liberal democracy.

SOME CHARACTERISTICS OF THE INDIAN PARTY SYSTEM

Even a casual observer of the Indian party system is most likely to be struck by the diversities of the Indian political parties, span as
they do from the extreme right to the extreme left, from the highly cadre-based to the fluidly mass-based, from the highly affluent to the extremely penurious, from the national to the regional parties. Diversity is, thus, the first hallmark of the Indian party system. Yet this should not prove as a blinker for noticing some common traits of the Indian parties in general.

Secondly, the country is characterised by a single party predominance, although it displays potentialities for a multiparty system. Thirdly, Political parties in general evince less ideological cohesion in words and deeds, although there may be some political parties, particularly those on the left, which pay a greater homage to their ideologies. Fourthly, all political parties normally also tend to resolve around certain personalities, although there may be some parties with no demi-gods.

Fifthly, party leadership in all cases is usually elitistic. Sixthly, the leadership is not only elitistic but is also professional. That is, persons normally with no other economic avocations run the party affairs. Seventhly, depending upon local and decisional situations, all parties are bedevilled by casteism, parochialism, linguisism and factionalism. Eighthly, all the parties have to taste the bitter fruits of defections and splits. Ninthly, all parties, as a matter of convenience, find themselves entering into electoral or other alliances, at times indefensible in accordance with strict principles or ideology.

Tenthly, in the open Indian society with Parliamentary Government mass contact or mass base is sought by even a party which may be highly cadre-based. Eleventhly, organisationally all parties have territorial and functional units. And they all have wings and associates as youth, students’, teachers’, pleasan’s and trade union organisations. Twelfthly, all parties make functional forays in social, cultural, educational and even economic preserves. And lastly, but not least significantly, of late parties in general have been betraying insidious ambivalence towards violence in politics, although any rare exception apart all stand committed to capturing political power through booths and ballots and not by bayonets and bullets.

GLIMPSES OF SOME MAJOR PARTIES

In spite of the predominance of a single political party, India displays a rich panorama of diverse political parties. But a bare look at them is likely to merely lead to confusing visions unless the
mind is trained to receive and arrange their pictures in more or less specified galleries. It seems reasonably advisable to arrange the entire gamut of them in two broad categories: national or all-India and regional or State parties. And instead of the test applied by the Election Commission to determine the national or regional status of a party on the basis of votes polled by it at a national general election, the better test here seems to be to take the character and conduct of a party into account and classify it accordingly.

SOME NATIONAL OR ALL-INDIA PARTIES

A party is a national or all-India party if it claims to be a national or all-India party and by its character and conduct it substantiates its claims. The question whether it has polled a specified percentage of vote at a national general election may prove to be very ticklish. For, a party may not have faith in elections or it may boycott elections sometimes. Some such parties are the Jana Sangh, the Bhartiya Lok Dal, the Muslim League, the Congress (O), the Congress (R), the Socialist Party, the Socialist Unity Centre, the Revolutionary Socialist Party, the Communist Party of India, the Communist Party of India (Marxist), the Communist Party of India (Marxist-Leninist), the Revolutionary Communist Party of India, the Forward Bloc, the Forward Bloc (Marxist), and the Workers Party of India.

And without going into the details of their origins, organisations, ideals, plans, programmes and policies, from operational point of view they may be spoken of as the parties of the right from the Jan Sangh to the Congress (O). The Congress (R) is a party in the centre or rather on the left of the centre. The parties from the C. P. I. to the Workers Party may be called to be the leftist parties and all of them, excepting the Forward Bloc, are the votaries of the Marxist tradition. Yet sometimes the ideological differences among them are practically and operationally at great variance from one another. But ideologies do not bar them from any mariage de convenance. However, with rare exceptions, all the parties, including the parties on the left, are fully committed to capturing power through constitutional means.

SOME REGIONAL OR STATE PARTIES

A regional or State party has its operations in, or is avowedly confined to, a region or State. Mention in this regard may be made
of the D. M. K., the Anna D. M. K., the Akali Dal, the Kishan Majdoor Loka Paksha, the Bangla Congress, the Kerala Congress, and the like. Interestingly, a party like the D. M. K. or Akali Dal stands for the rights of a region or State and in origin it might have even a secessionist bias. But at the moment no regional or State party has a secessionist plank. Then, the parties like K. M. L. P., Bengla Congress or Kerala Congress are the factious fruits of the Congress (O) or Congress (R) and even a party like the D. M. K. may have to reckon with its breakaways getting organised into the Anna D. M. K.

FACTIONS

A faction is an operational instrument of perverse feuds within the fold of a party. Feed as it does on the sinister vices of casteism, parochialism, linguistic jingoism, and unscrupulous egotism, it is no mere pressure group, forum or wing inside a party, claiming to influence party policies, programmes, decisions or actions on ideological, or even pragmatic considerations, in the interest of the general public. It is a hideous hydra of self-seeking politicians envenoming the vigorous and healthy political life of a community. Factions in general, as Hobbes would have said, are as "worms in the entrails" of a party.

The Indian party system is intensely faction ridden, and factionalism is a function of diverse unholy factors. In the first place, an absence of, or looseness of, ideological cohesion in parties makes factionalism an order of the day. Secondly, idle and professional politicians value nothing more than being in power. Thirdly, public offices have come to be treated not as opportunities for public service but for personal gain. Fourthly, the indefensible acts of persons in authority and the numerous dark designs whereby they rise to, and remain in, power encourages the "have-nots" in a party to deploy all devices to grab power. Fifthly, the general absent of a sense of decency and morality in public life has goaded factionalism to come out with all its fangs.

Sixthly, the predominance of a single party and the frustrations of the opposition elements deepens factional fights. Seventhly, the elitistic character of party leadership also accentuates factionalism. Eighthly, the general economic ditress, unemployment and absence of

*See Hobbes: Leviathan, op. cit.*
meaningful avocations additionally feed the faction feuds of the political war lords. Ninthly, the general breakdown of consensus on a party or national level on basic public issues further encourages factionalism. Tenthly, money and violence have their own contributions to make in this regard.

And then, there may be many more reasons for factionalism in Indian politics. But one thing seems certain that at the root of this vice lies not an iota of principle or ideology. Factionalism in India is a naked and shameless display of the sordid ambitions and designs of the political leaders in the country. And it appears that unless there is a distinct improvement in the socio-economic conditions of the country and toning up of public life in general, factionalism would continue to sap the vitality of political life of the nation in general and the political parties in particular.
CHAPTER 42

INTEREST GROUPS AND PRESSURE UNITS

The science of politics comprehends within its ambit all elements of public power, and within the fold of a community human sociability finds its usual expression in the form of groups life. Society is commonly pluralistic and politics in one form or another is bound to be pluralistic in the sense that it has to reckon with the plethora of forces operating in a community at any point of time or space.

In fact, at times agencies and elements which are either avowedly administrative in nature or non-political in objective so influence the political life of a community that a question is often posed: "Who are the real rulers of the land?" And the expressions "interest groups" and "pressure units" are intended here to embrace within them all the agencies and elements which, though not avowedly political in nature, enter vitally into the political life of a community and sometimes even choke or supersede the normal channels of political decision making.

INTEREST GROUPS

An interest group may be broadly conceived as a voluntary or non-voluntary, statutory, incorporated or unincorporated, association of persons, which purports to be non-political in nature and aims at servicing and furthering the interests of its members. Thus, a family may function as an interest group. Professional associations; students', teachers', employees', employers' and peasants' unions; business houses and business combines; and even relief and recreation clubs and cultural and educational units may and do have their preserves in the political life of a nation.

Professional Associations

Professional associations may be of numerous kinds. For example, there may be a medical association or a nurses' association or an advocates' association with statutory footing and with power of registration, discipline and control over all the members of the association. Then, an association like that of chartered accountants or cost accountants may also have statutory basis and competence to
conduct examinations and confer degrees. Further more, an association of engineers may only be an association registered as a voluntary society and conducting recognised examinations. What happens in the case of such associations is that they in the process of performing their other functions and in the name of protecting the interests of their members operate as powerful organs of public opinion and vitally enter into the political decision making process of a country.

Teachers' Associations: A teachers' association is a peculiar hybrid of professional, political and employee or trade union organisations. It seeks to achieve the betterment of all concerned, the institutions, members, students, the profession and the nation.

However, what affects the life of the community most in the case of these professional associations is the trade union activities of them all, whose members by their social economic and professional positions are capable of holding the community to ransom. Besides, they are prone to penetration and control by political parties. And sometimes, as in the case of teachers associations, they may operate as the wings or associates of different political parties.

Students' and Youth Unions

Students' unions these days are generally the student wings of the political parties in the country. Even an alumni association may have its highly tensile political overtones. Then, youth organisations may be formed by the political parties as sister units of students' unions. In fact, the student and youth organisations in the country have to all intents and purposes become thoroughly political in nature in not that they no longer profess to look to the special interests of their members but in the sense that they have lost fast their identity as specialised interest groups of a voluntary nature.

Peasants' Organisations

The vast mass of peasantry in the country consists of small landholders and share-croppers who are part peasants and cultivators and part farm labourers. The peasants' organisations in the country are mere wings of political parties. They are hybrid and heterogeneous combines of farm labourers, small farmers and share-croppers, and this makes them function less effectively. In fact, both the farm workers and the farmers are equally ill organised in the country to operate as powerful political forces.
Employees' and Labour Unions

Employees' unions, labour unions or trade unions have also fast shed their character as voluntary associations of workers and have turned into powerful engines of political parties. In fact, some political parties have to lean heavily on them and the strength of the former without taking into account their base in the latter may be negligible. Trade unionism has become for the most part party politics in the name of the working classes. Besides, employees of different categories, say, for example, those of the supervisory and managerial categories and those of the clerical or mechanical categories, often form separate units to protect one group of workers from another group of higher or lower grade staff.

Service Associations: The state is one of the biggest employers these days, and the army of public servants of various units, agencies, areas and avocations have their own associations. These are in name associations, but in political game they are no less active and even more effective than trade unions. Although their existence may not raise controversies, their operations often cause eyebrows to be raised, particularly when they tend to act under direct party guidance or control.

Employers' Associations

Employers' and mill-owners' associations, and chambers of commerce have the triple objective of protecting their members from the onslaughts of the employees' unions, furthering the general interests and profitability of their members, and influencing the course of political decisions to allow, and expand the operations of private sector economy. They often provide funds and platform to the political parties and their leaders.

Business Houses and Business Combines

Big business units and houses and national and international business combines are vital factors to be reckoned with in the political life of a community, and no government can reasonably afford to ignore them. Apart from their open or secret donations to party funds, they are, by virtue of their strategic control over the economic life of a community, often a state within, or a state above, the state. In a mixed economy, even a mixed company is a big political factor.
Multi-national Companies: Multi-national companies, i.e., companies having shareholders from two or more countries are now vast economic empires spreading their antennae to strategic economic points throughout the world. They not only act as strangleholds on the national governments, but also operate as vehicles of particular economic and social systems. Foreign economic collaboration, whether at private or public level, is an aspect of this multi-national company problem. In a sense, these companies are the sinews of sophisticated financial imperialism armed with their technical skill and secrets in this age of science and technology.

Cultural and Educational Units

Cultural and educational units are vital elements in the political life of a community. They operate locally, nationally and internationally. They act as vehicles of thought and behaviour. They provide the training and equipment for the men who operate the political machine in a country. Sometimes, such a cultural or educational unit may and does function as a forum, platform or wing of a particular social system or even a particular political party.

Charitable and Recreation Agencies

National and international charitable, relief, social and recreational associations, organisations and clubs have also their political roles. They may be under the actual control of a particular party or may act as the arms of a particular social system. Then, their operations may have many subtler social, psychological and economic elements to inject into the political life of a community.

PRESSURE UNITS

The expression “pressure units” has been used here to denote all other agencies or elements, not covered by the expression “interest groups”, which, by virtue of their position and functions, reach out of their avowed areas of activities and operate to secure political decisions of their preference. In this sense, then, even interest groups are a kind of pressure formation, and sometimes both of these groups of agencies and elements function so vigorously as to make one feel that the entire political process in a country is nothing but a pressure process. However, under pressure units mention may be made of such diverse elements as the different departments, levels and
units of governments; the armed and police forces, particularly their head quarter and intelligence units, public sector units; news agencies and media; international and foreign elements; and lobbyists and liaison men at large.

**Government Units and Personnel**

At any level of Government its different departments, units and branches often act as self-contained tiny empires. The person manning such a unit may be found acting as a little emperor. These units and individuals may and do operate as cross-currents and pressure elements inside and outside the Government.

**Regional and Local Government Units**

In a federation the units may feel or find themselves pitched against the Union and the local administration may be in a constant state of tension in relation to the units of a federation or the national government.

**Armed and Police Forces**

The influence of the army and police units in the political decisions and operations of a country is well recognised, although in the scheme of a constitution the armed and police forces are always treated as subordinate to the civil authorities and they are always expected to be highly disciplined and meticulously neutral. Their headquarter organisations, and secret intelligence units which may operate at both national and international levels, often over-stretch their dragnets and interfere with, or control, national and international political activities and events to the extent of even notoriety.

**Autonomous and Public Sector Units**

Now the increase in the number of autonomous unit and public sector undertakings dealing with the ever increasing economic activities of the state are adding a new dimension to the political life of a country. They are significant pressure element.

**News Agencies and Media**

News agencies and media, whether owned and controlled by the state or not, are the powerful organs of public opinion at both national and international levels. They are sometimes under the
direct control of the government or some may be run privately. Even a political party now owns or controls some newspapers and periodicals. There may be vast private news empires or tightly controlled government news media. But in all cases, these news media crucially affect political decision making and trend in a country.

Lobbyists and Liaison Men

Then, there are lobbies protecting the interest of various groups of private individuals, business or professional units or public and private employees. Liaison men also are to be found galore who specialise in securing decisions from public agencies favourable to their clientele.

International and Foreign Elements, Foreign Governments, Representatives and Agencies

Although theoretically a state is sovereign with external independence, in practice its decisions are influenced by the views of allies or benefactors. Again, there are international or foreign visitors, representative and agencies, overtly or covertly, trying to influence a course of action or decision in a country.

In conclusion, then, it may be said that whatever the social system, as the proper organs of political power in a country are actually run by men and women who have not only their other elements of social and private life to cope with but who also have their feet of clay, the political system of a country is always bound to be of an extremely complex character and the governance of a country can never be a plain unitarian affair. A community has a whole life to live and a whole life to lead and so have the members of the community, and politics is but a public approach to this problem of living or leading a whole life. Any simplistic view of it is least likely to promote its clear comprehension.
PART SEVEN

ECLIPSE AND CHANGE
CHAPTER 43

EMERGENCY

In this crisis laden technological urban age, a constitution that does not provide, expressly or impliedly, for emergencies is foredoomed. What the Constitution of India does is to make express provisions for meeting emergencies, which are cushioned by the built-in mechanism of the entire Constitution to absorb the shocks of any emergency and fortified by the war and defence powers of the Union and the law and order powers of the States.

These emergency provisions constitute Part XVIII of the Constitution and they contemplate three types of emergencies: (i) Proclamation of Emergency under article 352; (ii) Proclamation of the Failure of Constitutional Machinery in a State; and (iii) Proclamation of Financial Emergency. And significantly, the operation of one type of emergency provisions does not preclude the simultaneous application of the provisions relating to any other type of emergency.

PROCLAMATION OF EMERGENCY

"'Proclamation of Emergency'", says article 366 (10), "means a Proclamation issued under clause (1) of article 352". And article 352 lays down:

"(1) 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.

(2) A Proclamation issued under clause (1)—

(a) may be revoked by a subsequent Proclamation;
(b) shall be laid before each House of Parliament;
(c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House
of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof".1

Within the terms of clause (1) of article 352, the President has the power to issue a Proclamation of Emergency if he is satisfied that a grave emergency exist due to war, external aggression or internal disturbance, which threatens the security of India or its any part. For issuing a Proclamation it is not necessary however, that a state of war, external aggression or internal disturbance must actually exist. And it may issue even if the President is satisfied about an imminent danger of it. And the satisfaction of the President in any such situation is his subjective satisfaction which cannot possibly be questioned in a court of law,2 and it is not necessary to recite the fact of his satisfaction in any Proclamation.3

A proclamation issued under article 352(1) applies equally to the whole of the territory of India and there is no provision for declaring emergency only in a part of the country. A Proclamation under this article may be revoked by a subsequent Proclamation. It has also to be placed before each House of Parliament and unless Parliament approves by resolutions of both the Houses, it ceases to operate after two months from the date of issue. If, however, a Proclamation is made when the Lok Sabha has been dissolved, or is dissolved without approving it within two months from the date of its issue, a resolution of the Rajya Sabha only can keep it alive till thirty days after a reconstituted Lok Sabha holds its first sitting.

1 In its application to the State of Jammu and Kashmir to,Article 352, the following new clause shall be added :—

"(4) No Proclamation of Emergency made on grounds only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except as respects Article 354) unless it is made at the request or with the concurrence of the Government of that State"; Constitution (J. & K.) Order, 1954, Para 13.


EMERGENCY AND INDIVIDUAL RIGHTS

Necessity knows no law. It has its own law of compulsion. Wars and emergencies cannot contemplate rights and remedies of normal times. Scrutton L. J. said in Ronnfeldt’s Case.4

"It had been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles of Magna Carta."

When a Proclamation of Emergency under article 352(1) issues, article 358 and 359 contemplate certain constraints on the fundamental rights, but on no other legal and constitutional rights of an individual. The provisions of articles 358 and 359 apply only in the case of a Proclamation of Emergency and not when a Proclamation as to the Failure of Constitutional Machinery in a State under article 356, or that as to Financial Emergency under article 360, is made.

Suspension of the Provisions of Article 19

Article 358 provides:

"While a Proclamation of Emergency is in operation nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would not but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

The effect of the provisions of article 358 is that no sooner a Proclamation of Emergency issues than the provisions of article 19 become inoperative automatically. This implies that as soon as a Proclamation of Emergency issues and as long as it lasts the state comes to enjoy additional legislative and executive powers which are bridled in normal times by the requirements of article 19.

However, it is possible to question even during an Emergency the validity of a pre-Proclamation law on the ground of its contravention of article 19 if the President does not expressly by an order under article 359 debars the enforcement of article 19 itself.5 Any law made in the exercise of these additional powers becomes void to the extent of its repugnancy as soon as the Proclamation ceases to operate.

4 Ronnfeldt v. Philips (1918) 35 T.L.R. 47.
But any action taken in pursuance of such a law, or otherwise, during the period of Emergency is immune from challenge in a court of law on the ground of its infringement of article 19.  

Suspension of Enforcement of Fundamental Rights

Then, article 359 says:

"(1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament."

Whereas article 358 suspends automatically the provisions of article 19 itself when an Emergency is proclaimed, article 359 contemplates the suspension of the enforcement of any fundamental right in a law court within the terms of a Presidential order issued under this article. Such an order is to specify the rights whose enforcement is barred and may also specify the period, not exceeding the period of Emergency, during which the enforcement is to remain suspended. The order may cover even a pending proceeding, and it may apply to the whole or any part of the country or to all or any class of persons. Such an order must, however, be placed before each House of Parliament, as soon as possible, although the validity of the order cannot be questioned in a court of law.

Evidently, it should seem that the constitutional requirement relating to the suspension of article 19 or that relating to the suspension of enforcement of any fundamental right during an Emergency is a necessary requirement in the interest of national security. However, the possibility of any misuse of an emergency power, like that of any other power may pose a question mark, but it must be considered a mark which has no answer in the law of the Constitution and public opinion alone can prevent any misuse of any public power.

7 Idem.
EMERGENCY AND STATE RIGHTS

Whether one subscribes to the concept of “state rights” or not, federalism involves the existence of national and regional governments which derive their powers and functions from the same organic instrument. The powers and functions of the Union and the States in India are derived from the Constitution of India. And in normal times the States are in law to function coordinately with the Union in respect of the powers they derive from the Constitution.

When, however, a Proclamation of Emergency is made under article 352(1), the Union is intended to function as a unitary state to the extent the real needs of a situation may demand. During the period of Emergency it is not that the constitutional Government and administration in the States is scrapped, but only the Union becomes invested with the additional overriding powers in relation to the matters entrusted by the Constitution of the exclusive care of the States.

Extension of the Union Executive and Legislative Authority

As soon as a Proclamation of Emergency is made, the Union executive gets the extended power to completely control the State executive and the former may issue any direction as to the exercise of any power by the latter. Similarly, Parliament acquires the enlarged competence to make any law with regard to any matter outside the Union List and this includes the authority to confer any power upon the Union or its officers or authorities with regard to such a matter. In consequence, the State executive and Legislature become subordinated to the Union executive and Parliament, respectively. Article 353 requires in this behalf as follows:

“While a Proclamation of Emergency is in operation, then—

(a) Notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised;

(b) the power of Parliament to make laws with respect to any matter shall include the power to make laws conferring powers and imposing duties, or authorising the conferring of power and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List.”
Presidential Order Relating to Distribution of Revenues

Then, article 354 lays down:

"(1) The President may, while a Proclamation of Emergency is in operation, by order direct that all or any of the provisions of articles 268 to 279 shall for such period, not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit.

(2) Every order made under clause (1) shall, as soon as may be after it is made, be placed before each House of Parliament."

Within the terms of article 354, the President may by an order specify the modifications and exceptions subject to which the constitutional provisions relating to the distribution to revenues between the Union and the States, as contained in articles 268 to 279, are to apply while a Proclamation of Emergency is in force. Such an order must be placed, as soon as possible, before each House of Parliament, and it remains in force for a period specified therein but not beyond the close of the financial year during which the Proclamation ceases to be effective.

In the context of the powers and functions of the States during the operation of a Proclamation of Emergency, the impact of the constitutional provisions relating to the extension of the executive and legislative powers of the Union and the modification or suspension of the provisions relating to the distribution of revenues between the Union and the States during this period is far reaching, indeed. If the Union decides, it may function as a unitary Government with the States merely functioning as local bodies. But the experience of the Proclamations made thus far goes to show that the Union has not been in undue haste or huff to encroach upon State rights. The Union has also displayed reasonable caution and care in making any Proclamation of Emergency over the past years, although it may be arguable whether it has been equally honest and sincere in continuing the operation of a particular Proclamation in the country.

PROVISIONS AS TO THE PROTECTION OF THE STATES
AND THE FAILURE OF THEIR CONSTITUTIONAL MACHINERY

The Union of India has the solemn obligation cast on it by article 355 of the Constitution

"to protect every State against external aggression and internal disturbance and
to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution."

The Union’s obligation to protect a State from external aggression or internal disturbance and secure the governance of a State in accordance with the provisions of the Constitution is non-justiciable and the former alone is the sole judge as to nature and extent of the threat posed by an aggression or internal disturbance and the manner in which it is to be met. The Union is competent within the terms of article 355 to deploy its armed forces to repel any external aggression on a State or to quell any internal disturbance within it even without the request from, or concurrence of, the State.

PROCLAMATION AS TO THE FAILURE OF CONSTITUTIONAL MACHINERY IN A STATE

The Union Government is also the sole judge to determine whether the Government of a State may be said to be running in conformity with the provisions of the Constitution or not. And it has been armed with very wide powers under article 356 to secure the carrying on of the Government of a State in accordance with the requirements of the Constitution. This article 3569 provides:

"(1) If the President on receipt of a report from the Governor of a State, or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (3):

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of State, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People."

Article 356 says that if the President is satisfied on a report from the Governor of a State or otherwise that the State cannot be governed in accordance with the provisions of this Constitution, he may make a Proclamation to that effect and the President’s satisfaction is purely subjective and non-justiciable. By that Proclamation the President may assume any or all powers of the State Government;

any or all powers of the Governor of the State; and any or all powers of any other authority in the State, excepting the State Legislature or the High Court. The Proclamation may further provide that the powers of the Legislature shall be exercisable by or -under the authority of Parliament, and may also make other necessary or desirable incidental and consequential provisions. But nothing in such a Proclamation may be directed against, or affect the powers of, the High Court.

A Proclamation under this article applies to the whole of the State, but within its terms the President is competent to adopt one course of action or another. For example, the State Legislative Assembly may only be suspended instead of being dissolved. Such a Proclamation may be revoked or varied by a subsequent Proclamation. It must, however, be placed before each House of Parliament and ceases to operate after two months unless approved by resolutions of the both Houses. A Proclamation approved by resolutions of both Houses of Parliament remains in force for a period of six months after the passing of the second of these resolutions, and although the Houses by resolutions may extend its life for six months at a time, it cannot remain in force for more than three years at any time. If, however, a Proclamation is issued when the Lok Sabha has been dissolved or is dissolved without passing the resolution of approval and the Rajya Sabha passes a resolution approving it, it remains in operation only for thirty days after the reconstituted Lok Sabha holds its first sitting unless the House passes a resolution approving its continuance. And this principle also applies even when the Houses reaffirm their resolve to extend the life of a Proclamation beyond a period of first six months.

Exercise of Legislative Power When Article 356 Applies

In case a Proclamation as to the breakdown of constitutional machinery in a State provides that the power of the Legislature of the State is to be exercised by or under the authority of Parliament, Parliament may authorise the President to himself exercise, or delegate the exercise of, the power of law making with regard to any matter for that State. Besides, the law making power in this regard includes the power of imposing duties on, or vesting authority in, the Union or its any officer relating to any such matter.
And, pending Parliamentary approval, the President may authorise expenditure from the State Consolidated Fund if the Lok Sabha is not in session. However, any law made in this behalf can, unless repealed or re-enacted earlier by the state Legislature, remain effective only for a year after the Proclamation ceases to operate. But this requirement does not operate to nullify any action taken under any such law. Article 357 provides as follows for this purpose:

"(1) When by a Proclamation issued under clause (1) of article 356 it has been declared that the power of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent—

(a) for Parliament to confer on the President the power of the Legislature of the State to make laws and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any authority to be specified by him is that behalf;

(b) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a), to make laws conferring power and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;

(c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament.

(2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of Proclamation under article 356, have been competent to make shall, to the extent of incompetency, cease to have effect on the expiration of one year after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period, unless the provisions which shall so cease to have effect are sooner repealed or re-enacted with or without modification by Act of the appropriate Legislature."

Clearly and conclusively, under articles 356 and 357 the Union has been armed with very wide powers of far-reaching implications to supersede wholly or partially constitutional Government in a State. And although the necessity of the powers in the peculiar Indian context may not be gainsaid, their actual application is always fraught with possibilities of abuse and dangerous consequences. In fact, the power of supersession has been used often on quaint, quizzical and inexplicable grounds and rather too frequently and with no happy consequences.

The weapon of last resort has become the instrument of random recourse making a mockery of State rights and federalism. And so
much squalor, stench and unh Holiness now surround the operations of articles 356 and 357 that the following sentiments expressed by Ambedkar in the Constituent Assembly sound completely hollow and meaningless:

“In fact, I share the sentiment expressed...yesterday that the proper thing we ought to expect is that such articles will never be called into operation and that they would remain a dead-letter. If, at all they are brought into operation, I hope the President who is endowed with this power will take proper precautions before actually suspending administration in the Provinces.”

PROCLAMATION OF FINANCIAL EMERGENCY

The President may make a Proclamation of Financial Emergency within the terms of article 360 if he is satisfied that a situation has arisen which threatens the financial stability or credit of India or its any part. The President’s satisfaction in this case also is wholly subjective and non-justiciable. A Proclamation of Financial Emergency unlike a Proclamation of Emergency under article 352(1) may relate to the whole or any part of the country, but the provisions relating to the duration and Parliamentary approval of both these Proclamations are the same. And although no Financial Emergency has thus far been declared, the powers under this article are very far-reaching and involve grave impact on State rights and federalism.

While a Proclamation of Financial Emergency remains in force, the Union is competent to issue to a State directions to observe specified canons of financial propriety and any other necessary direction. Such a direction may also include a provision for the reduction of the salaries and allowances of persons serving in connection with the affairs of a State or a requirement of reserving all State Money and Financial Bills for the President’s consideration. During this period the President may also direct the reduction of the salaries and allowances of any person serving in connection with the affairs of the Union, including those of a Supreme Court or High Court Judge.

It may be of interest to quote below what article 360 itself has to say in this regard.

“(1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

11 C.A.D., Vol. IX; p. 177
ages and generations which preceded it."³ And Nehru observed in
the Constituent Assembly.⁴

“We shall frame the Constitution and it will be a good Constitution. But does
any one in this House imagine that when a Free India emerges, it will be bound
down by anything that even this House might lay down for it? A Free India will
see the bursting forth of the energy of a mighty nation. What it will do and what
it will not, I do not know. But I do know that it will not consent to be bound
down by anything. Some people imagine that what we do now may not be
touched for twenty years. That seems to me a complete misapprehension...This
House cannot bind down the next generation of the people who will succeed us in
this task”.

And that the founding fathers did not claim any finality or
sacrosanctity for any provision of the Constitution is clear from
the following observations of Ambedkar⁵:

“The Assembly has not only refrained from putting a seal of finality and
infallibility upon this Constitution by denying the people the right to amend the
Constitution...but has provided for a facile procedure for amending the Constitution
...(And) those who are dissatisfied with the Constitution have only to obtain a two-
thirds majority and if they cannot obtain a two-thirds majority in the Parliament
elected on adult franchise in their favour, their dissatisfaction with the Constitution
cannot be deemed to be shared by the general public.”

Change a constitution, then, must. And it is always better if it
changes more easily through well-recognised processes accepted within
the scheme of a constitution. For,

“Upon its existence and truthfulness, i.e., its correspondence with real and
natural conditions, depends the question as to whether the State shall develop with
peaceful continuity or shall suffer alterations of stagnation, retrogression and
revolution.”⁶

MEANING AND METHODS OF AMENDMENT

A derivative from the Latin ‘emendare’, etymologically the word
“amendment” may be taken to mean a change for improvement.
And any deliberate change by a human agency, unless perverse, may
reasonably be expected to effect an improvement. But the crux of
the matter is the individual conception of improvement. Wanchoo
J. remarked in Golak Nath’s Case⁷:

³ See Paine, Thomas: The Rights of Man.
⁴ C.A.D., January 22, 1947.
⁵ C.A.D. Vol. IX; p. 976.
University, Michigan Legal Studies, 1942, p. xiii.
"To say that amendment in law means a change which results in improvement would make amendments impossible, for what is improvement of an existing law is a matter of opinion and what, for example, the Legislature may consider an improvement may not be so considered by other".

It is also not prudent to construe the word "amendment" narrowly to connote merely minor changes. For, it would raise the crucial issue: What changes are minor? And

"the result would be that every amendment made in the Constitution would provide a harvest of legal wrangles so much so that Parliament may never know what provisions can be amended and what cannot."  

It seems more reasonable to broadly treat "amendment" as a term of art to connote any legally recognised means of changing a constitution or a law. In the scheme of a constitution, the power of amendment implies the exercise of the constituent power of the state. And as Finer says: "to amend is to deconstitute and reconstitute."  

The power of amendment is the legal power of effecting a change. Amendment is a legally recognised mode of change.

Constitutionally speaking, amendment is the legally recognised means of changing a constitution. And generally, within the scheme of a constitution, it is possible to speak of indirect or informal amendment and direct or formal amendment. Indirect or informal amendment includes the growth or change of a constitution by convention, judicial interpretation and ordinary legislation. Direct or formal amendment refers to a change within the terms of the specified express provisions of a constitution. And the great value of the latter lies in that this alone can delete, alter or add any word or expression in a constitution. Livingston says:

"The formal procedure of amendment is of greater importance than the informal process...While changing conventions, new legislative Acts, new interpretations may effect serious changes in the constitutional structure, the formal amendment is superior to these all; it may override any of the others and none of the others may override it."  

AMENDMENT OF THE INDIAN CONSTITUTION

The Constitution of India admits of both indirect or informal and direct or formal amendments. In fact, the diversity of amendatory

8 Ibid., p. 1681, per Wanchoo J.
process, both indirect and direct, place the Constitution in a unique position. “This variety in the amending process is wise but it is rarely found.”\(^{11}\) It is an excellent example of an effort at a judicious blending of flexibility and rigidity\(^{12}\) in the scheme of the Constitution.

Although a flexible constitution is not a necessary guarantee against revolutions,\(^{13}\) it is certainly an efficient safety valve. And although flexibility is not a mere function of a facile express amendatory process in the scheme of a constitution and depends more on the willingness of countenancing, and the capacity for effecting, basic institutional changes in a community,\(^{14}\) the fact is that the Constitution of India is reasonably flexible, the reservations of Jennings notwithstanding.\(^{15}\) Even its working over the past years has shown its flexible character in spite of Golak Nath’s Case.\(^{16}\) And that it was intended to be so by the founding fathers is evident from what Nehru said in the Constituent Assembly

“...that while we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop a nation’s growth, the growth of a living and vital people. Therefore it has to be flexible.”\(^{17}\)

**INDIRECT AMENDMENT**

Uses, customs and conventions have gone a long way in contributing to the growth of the Constitution. And in certain cases, a convention like that of the practice of the President, or a Governor, of acting only on the advice of the Ministers, has meant a material modification of far-reaching implications. Conventions both add and subtract, they also modify and smoothen, although they cannot alter a word of the Constitution. Then, depending upon real circumstances, certain provisions of the Constitution may fall into desuetude or certain others may get exceptionally invigorated.

\(^{11}\) Wheare, K.C. : *Modern Constitutions*, op. cit. ; p. 143.  
\(^{13}\) Friedrich, C.J. : *Constitutional Government and Democracy*, op. cit. ; p. 142.  
\(^{14}\) Livingston, W.S. : *Federalism and Constitutional Change*, op. cit. ; p. 198.  
\(^{15}\) See Jenning, Sir I : *Some characteristics of the Indian Constitution*, op. cit.  
\(^{16}\) *Golak Nath’s Case*, op. cit.  
\(^{17}\) *C.A.D. Vol. VII* ; pp. 322-23.
Judicial interpretations have generally played a vital role in operating the Constitution. In fact, judicial creativity has been so active in this country that the meanings of the Constitutional provisions are almost unintelligible except without reference to the constitutional cases decided by the superior courts. And although the courts have not always conformed to the normal expectations of the legislatures or the people, their role in the working of the Constitution and their contribution to its growth have really been crucial. It should be remembered, however, that the courts like conventions cannot change the letters of the Constitution. They only interpret the Constitution and do not write or rewrite its provisions. And this role of interpretation is significant, for, as the Supreme Court said in *Akadasi's Case*,

"The task of construing important constitutional provisions like 19(6) cannot always be accomplished by treating the said problem as a mere exercise in grammar. In interpreting such a provision, it is essential to bear in mind the political or economic philosophy underlying the provision in question, and that would necessarily involve the adoption of a liberal and not a literal and mechanical approach to the problem."  

Ordinary legislation has a number of functions in changing the Constitution. In the first place, an enactment, even without an express authorisation may have the effect of filling in gaps in, or enlarging the operations or implications of, any constitutional provision. Secondly, an enactment even though going against an express provision of the Constitution, may remain on the statute book for want of challenge in a judicial forum and may modify or affect the operations of the Constitution. Then, as an enactment like the General Clauses Act is applicable in interpreting the Constitution, a change in the Act may have an impact on the meaning of an expression in the Constitution.

**DIRECT AMENDMENT**

The methods of direct amendment recognised by the Constitution are also many. In the first place, the President was authorised by article 392, under the usual "removal of difficulties clause," to make such order as he considered necessary for giving effect to the provisions of the Constitution until the first meeting of the duly constituted Parliament. Secondly, he may by order, issued within the

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terms of article 370, modify the provisions of the Constitution in application to the State of Jammu and Kashmir. Thirdly, he may by order, or even regulation, provide for certain matters as authorised by the Constitution, pending legislation by Parliament, or otherwise. Fifthly, in some cases the appropriate Governor also enjoys such order or regulation making power. Sixthly, the President may, perhaps, by Ordinance effectuate a change in the Constitution in cases where Parliament is competent to change it in the manner of an ordinary legislation and the change is not deemed an amendment within the meaning of article 368.

Seventhly, Parliament may change the Constitution in the manner of passing an ordinary enactment and such a change is not deemed an amendment of the Constitution for the purposes of article 368. Thus, for example, the admission, establishment, and changes in the boundaries and names of the States and provisions for necessary consequential and incidental matters, covered by articles 2 to 4; abolition of the Legislative Council in a State under 169(1); and amendment of Schedules V and VI, relating to the administration of Scheduled and Tribal Areas, may be made by Parliament in the manner of ordinary legislation.

Eighthly, there are a number of articles which expressly authorise Parliament to legislate for supplementing or modifying the relevant constitutional provisions. Mention in this regard may be made of the constitutional provisions relating to citizenship, number of Supreme Court Judges and the jurisdiction of the Supreme Court and the High Courts. Such provisions are galore and include articles 11, 59(3), 65(3), 73(2), 75(6), 97, 98(2)(3), 100(3), 105(3), 106, 118(2), 120(2), 124(1), 125(2), 133(3), 135, 137, 142(1), 146(2), 148(3), 149, 158(3), 164(5), 171(2) 186, 187(2), 189(3), 194(3), 208(1)(2), 210(2), 221(2), 225, 229(2), 230(1), 331(1), 239(1), 239A, 241(1)-(4), 275(2), 283(1)(2), 285(1), 287, 289(2), 300(1), 309, 313, 343(3), 345 and 348(1). Ninthly, it is also of interest to note that under some of these articles the Legislature of a State also legislates interstitially to supplement the relevant constitutional provisions.

Lastly, but most significantly, there is the crowning article 368 which contains special provisions for amending the Constitution. This article also has two part. In the first part, only a special majority is required for making an amendment. Its second part
requires in addition ratification of the specified amendments by at least one-half of the States. It is this article that has, over the past years, been the centre of many a controversy relating to constitutional amendments in this country. And its operations have raised a few issues which are yet to be finally settled.

AMENDMENT UNDER ARTICLE 368

Part XX of the Constitution, carrying the heading "Amendment of the Constitution", has only one article—article 368—which as originally enacted bore a marginal heading "Procedure for amendment of the Constitution" and read as follows:

"An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.

Provided that if such amendment seeks to make any change in—
(a) article 54, article 55, article 73, article 162 or article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
(c) any of the Lists of the Seventh Schedule, or
(d) the representation of the States in Parliament, or
(e) the provisions of this article,
the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

Although the original article 368 bore the marginal heading, "Procedure for amendment of the Constitution", it was felt that basically the article provided for the power to amend the Constitution within its terms in all respects. And the Supreme Court, in Shankari Prasad v. Union of India, had the occasion to examine the nature and scope of this article. The Court unanimously held that within the terms of article 368, any provision of the Constitution could be amended, although it felt that with regard to procedure the article could not be treated as a complete code and had to be supplemented with the procedural rules or practices of Parliament relating

to ordinary enactments. Later, in *Sajjan Singh's Case*,\(^{20}\) by a majority of 3 to 2 the propositions settled in *Shankari Prasad's Case*\(^{21}\) were upheld, but the minority judgment perhaps forebode the shape of things to come about.

**Golak Nath's Case**\(^{22}\)

Then, the Supreme Court by a majority of 6 to 5 handed down its decision in *I. C. Golak Nath v. State of Punjab*, in 1967. The Court overruled its decisions in *Shankari Prasad's Case* and *Sajjan Singh's Case* and picking up the thread of the minority judgment in the latter case and traversing through many a winding legal mazes came to the conclusion that article 368 was not substantive but procedural in nature; an amendment was law within the meaning of article 13; and the fundamental rights in Part III of the Constitution could not be amended within the terms of this article. Needless to say that this decision raised a storm of controversies. And one has an uncomfortable feeling that the case reflected a fluid political situation rather than a clear legal position.

**ARTICLE 368 AFTER**

**THE CONSTITUTION (TWENTY-FOURTH AMENDMENT) ACT, 1971**

To set at rest the controversies raised by *Golak Nath's Case* the Constitution (Twenty-fourth Amendment) Act, 1971, was passed which made the marginal heading of article 368 read: "Power of Parliament to amend the Constitution and procedure therefor", and made other changes then deemed necessary and desirable to make article 368 now read as follows:

1. Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
2. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the


\(^{21}\) Shankari Prasad's Case, op. cit.

Bill and the repon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) article 54, article 55, article 73, article 162 or article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
(c) any of the Lists in the Seventh Schedule, or
(d) the representation of the States in Parliament, or
(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in article 13 shall apply to any amendment under this article."

_Keshavanand v. State of Kerala_

The question of the validity of the Constitution (Twenty-fourth Amendment) Act, 1971, along with that of the 25th and 29th Amendments, was settled by the Supreme Court in Keshavanand's Case. The matter was heard by a full Bench of thirteen Judges, and although the judgments delivered in the case are more voluminous than luminous, the broad conclusions arrived at by a majority of 9 to 4 may be stated as follows:

(i) The majority decision in Golak Nath's Case is not correct.

(ii) Article 368 even before the 24th Amendment contained both the power and the procedure for amending the Constitution.

(iii) The power of amendment under article 368 is plenary in nature and includes the power to amend the fundamental rights in Part III of the Constitution.

(iv) The power of amendment under article 368 does not include, however, the power to destroy any basic feature of the Constitution. But the Court did not enumerate the basic features, nor did it provide any guide-line for determining a basic feature.

(v) "Law" under article 13 does not include an amendment under article 368.

(vi) The 24th Amendment is valid.

(vii) The 25th Amendment is valid, excepting the concluding clause of its section 3, namely, "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy."

(viii) The Constitution 29th Amendment is valid.

THE NATURE, SCOPE AND OPERATION OF ARTICLE 368 TODAY

It is now well settled that in character article 368 is both substantive and procedural. It speaks in its clause (1) of the plenary power of Parliament to amend any provision of the Constitution in exercise of its constituent power and in accordance with the procedure laid down by its clause (2). The article thus concedes not only a distinction between the power of and procedure for amendment, but also recognises a distinction between ordinary law making power and constituent power. And significantly, it also conceives amendment in a broader sense by putting wider a meaning on the word "amend" when it speaks of the power of Parliament to "amend by way of addition, variation or repeal any provision of this Constitution".

PROCEDURE FOR AMENDMENT

The principle laid down above by the Supreme Court in, Shankari Prasad's Case, that article 368 is not to be treated as a complete code with regard to the procedure for amendment of the Constitution is a valid principle even today. And the stages in passing an amendment may be stated in the following terms:

Introduction, Consideration and Passing in Parliament

First, a Bill proposing an amendment to the Constitution is to be moved in either House of Parliament. The rules of a House relating to the introduction of other Bills apply to an amendment Bill and even the provisions of article 117 requiring prior recommendation of the President for introducing a Money Bill has been made applicable to an amendment Bill. Consideration of the Bill and its passing in the House of its introduction constitute the next stages. And in these cases also the rules relating to other Bills apply mutatis mutandis to an amendment Bill. Then, a Bill
passed in one House has to be similarly passed by the other House. And there is possibly no question of deciding a disputed issue between the Houses at their joint sessions. Each House is apparently the master of itself so far as amendment is concerned.

**Special Majority:** Article 368 (2) requires an amendment Bill to be passed by the total membership of a House and by not less than two-thirds of the member of the House present and voting. This is a dual requirement of majority, namely, it must be a majority of the total membership of the House and also a two-thirds majority of the members present and voting. And this requirement of dual majority has to be satisfied now under the rules of Parliament at all effective stages of consideration of an amendment Bill and not merely at the time of final passing of the Bill by a House. These stages do not include, however, a motion that the Bill be referred to a Select or Joint Select Committee and the moving or disposing of an amendment to the Bill.

**Requirement of Ratification**

The proviso to clause (2) of article 368 imposes a further requirement of ratification by the Legislatures of one-half of the States if an amendment Bill relates to any matter specified by it. These entrenched provisions relate to: (i) the manner of electing the President—articles 54 and 55; (ii) the extent of the Union and State executive powers—articles 73 and 162; (iii) the Supreme Court—Chapter IV of Part V; (iv) the High Courts for the States—Chapter V of part VI; (v) the High Courts for the Union Territories—article 241; (vi) the Union-State Legislative Relations—Chapter I of Part XI; (vii) the distribution of power between the Union and the States—the three Lists in the Seventh Schedule; (viii) the representation of the States in Parliament; and (ix) the power of and procedure for amending the Constitution—article 368.

An amendment Bill passed by Parliament relating to any of the aforesaid matters is to be sent to the States for ratification although it is not clear what constitutional provisions are to be considered as the provisions relating to the representation of the States in Parliament. The ratification resolutions of a State Legislature are passed by a simple majority of each House of the State Legislature. Such a resolution has no prescribed form, nor does it need for its validity the
assent of the Governor. A resolution once passed by a House cannot be rescinded by it at any subsequent stage. But there is no time-limit within which a State Legislature is to signify its ratification.

Presidential Assent

An amendment Bill passed by Parliament, and duly ratified in the specified cases, is to be presented to the President for his assent. The President is now bound to give his assent to such a Bill, although he may make a delay in signifying his assent.

The expression, "this Constitution shall stand amended": After the President gives his assent to an amendment Bill the Constitution gets amended accordingly. Article 368(2) lays down in this regard that after the President has given his assent to an amendment Bill "this Constitution shall stand amended in accordance with the terms of the Bill." And the effect of the expression "this Constitution shall stand amended" is that an amendment duly assented to by the President automatically becomes a part of the Constitution like any other part.

LIMITATIONS ON AMENDING POWER

The phraseology of article 368(1) is plainly plenary in import and admits of no limitations. In Keshavanand's Case the issue of implied or inherent limitations was urged before the Supreme Court by the petitioner's counsel. But although the Court did not express its opinion on this issue, it came out with a majority view of 9 to 4 that under article 368 the basic features of the Constitution could not be amended. Evidently, this fetters the power of Parliament to amend the Constitution at the moment.

JUDICIAL REVIEW OF AMENDMENTS

Although it is firmly established that an amendment under article 368 is not law within the meaning of article 13, the Supreme Court, in the above case of Keshavanand v. State of Kerala, not only said that a basic feature of the Constitution could not be amended, it also reserved to itself the power to determine what is a basic feature. And in fact, it struck down the concluding part of section 3 of the 25th Amendment. Consequently, whether one likes it or not,

the superior courts in the country are competent to determine what is a basic feature of the Constitution and to adjudge whether an amendment violates the principle that such a feature cannot be amended.

_A Case for Review_

Evidently, the power of judicial review in relation to amendments under article 368 is still an established law of the land. But it is a power which is hardly necessary or justifiable. It seems desirable that the Supreme Court should review its decision in the above _Keshavanand's Case_ and allow Parliament a free and unfettered power of amendment under article 368 to let it usher in an era of justice, social, economic and political. The uncertainty surrounding article 368 must be put an end to.

_A Suggestion for Amendment_

In case no such review be forthcoming, Parliament may consider the adding of a new clause, clause (4), to article 368 as follows, although the big question in this regard may also remain whether the Supreme Court will countenance such an amendment:

“No amendment made under this article shall be called in question in any court on any ground whatever.”

_A CRITIQUE OF THE AMENDMENTS MADE THUS FAR_

Hidayatullah C. J. once remarked that the amendments in this country have been mainly made for overriding or bypassing court decisions, and no doubt there is an element of truth in his remark. But at the same time it has to be admitted that such amendments have for the most part been made to pursue the objectives of a social revolution as enjoined by the Directive Principles, although one may feel disappointed at the manner in which they have been actually applied from day-to-day. For, the goal of social revolution, justice, social, economic and political is far, far from being realised.

Then, it is said that we have too many and two frequent amendments made, the latest being the Thirty-sixth Amendment admitting Sikkim as the twenty-second State of the Union. But frequency of amendments is itself no vice, unless it shows lack of sincerity in operating them or smacks of propagandist or partisan
legislation or smells as a political myopia or a constitutional *alibi* for administrative, economic and social failures. For, the Constitution is for the community and not the community for the Constitution, and frequent amendments are not necessarily bad although too frequent amendments ought to be avoided as far as practicable. The phenomenon of frequent amendments, says Livingston,

"does not imply a lesser respect for law and order or even for the constitutional document itself; it merely means that the constitution and the law are called upon to respond to the purposes...they are designed to serve and that this response must be immediate and direct. The constitution becomes a tool to be used as needed rather than as an idol to be worshipped from afar."

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CHAPTER 45

SUNSHINE AND SHADOWS

Napoleon is said to have once commented to his counsellor, Talleyrand, that a "constitution ought to be short and clear", which the counsellor is credited with having countered by saying: "No Sire, it ought to be long and obscure!" And it may, perhaps, be fancied that the Sire was sublimating the Constitution of the United States and the counsellor was presaging the Constitution of India. But without adding an iota to their own value or validity these remarks in a way may, verily, be regarded as reflecting some triumphs and tragedies of mankind: A thesis is as true as its antithesis, truth though must a single whole be; men ever tend to disagree on vital issues, although rational beings they are claimed to be; man cannot rise above his own experience, a conscious being though he is said to be; it is man that always matters, though surroundings may have a meaning to him; and man learns little from history, history though he may read many times over.

Historically speaking, the Constitution of the U. S. A. is one of the earliest of the modern constitutions. And it is a marvel of brevity and lucidity. But it could not wish away the conflagration of a civil war in the U. S. A., nor could it keep the country away from a World War. It could not prevent the assassination of Lincoln or Kennedy; the scandal of Watergate; the onslaughts of economic cycles and political centralisation; and the outbursts of disintegrating social elements. The rise of the Presidency, the decline of Congress and the arrogation of the Supreme Court have all occurred within its frame. Yet it is a Constitution living and growing, growing more through conventions and interpretations than through amendments, in response to the changing needs of the American people. In fact, America, the American Constitution and the American people have got so transformed over the past centuries that the founding fathers would scarce recognise them if they were reborn today. But assuredly, the secret of the growth and greatness of America lies not in its brief and simple Constitution but in the work-propensity and perseverance of the American people, of course, sustained by its vast natural resources.
The Constitution of India is one of the latest of the modern constitutions. And although it has undergone some three dozen amendments; gathered round itself some thousand constitutional cases and has many a time even relied on emergency crutches in the brief spell of a quarter century, it has survived four external wars; many an internal upheaval; untold economic hardships; unimaginable political improprieties; and unpredictable social strains. Yet the Constitution of India not only exists but lives and grows and quiet flow the Ganga and the Cauvery.

Yet there is a lurking feeling whether the Constitution, an obvious structural palimpsest of the 1935 Government of India Act, even if a theoretical innovation and a functional revolution, has become with the people an article of faith. Certainly, no human formation, social, economic or political, can endure long unless its claim to legitimacy is based on the people's faith, or reason. And faith is ultimately a function of solid deeds not empty words. But the difference between promise and performance, expectation and actualisation, is distressingly growing abysmal. Persons in power have become callously accustomed to obliterating the line between good and bad, right and wrong, as a matter of convenience, little realising that a single act of vice at the top breeds thousand vices below. And people in general have started speaking of even the gravest unconscionable acts with dangerous casualness and shocking approval, never thinking that such mental attitude and social behaviour are terribly gangrenous.

And added to these are the untold economic miseries of the masses further accentuated by the unabashed sectional affluence and "conspicuous waste". The little man may have, then, little season to be proud of the Constitution. Radhakrishnan said:

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

A Constitution is but a frame, an element of human surrounding, and the Constitution of India but provides a marvellous scheme to the people of India for pursuing the objective of their fullest self reali-

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1 Radhakrishnan S.S.: Address at the Seminar on Parliamentary Democracy, New Delhi, Feb 9, 1956.
sation. There is, first, the Preamble, the shining jewel in the constitutional arch of the nation, radiantly illuminating the eternal human values of justice, equality, liberty and fraternity. Yet ruefully, these are the values found most wanting in the day-to-day working of the community. And still more ruefully, they are the values which the community is least striving to cultivate in its everyday life.

Then, there are the lofty Directive Principles with their concrete, though necessarily broad, outlines of a just social order; a blue-print for economic democracy; "an epitome of national conscience"; and a charter of socio-economic revolution. And already the achievement of a socialistic pattern of society through a democratic planned process has managed to emerge, more or less, as a national consensus, making the solemn resolution of the people in the Preamble, to constitute India into a Sovereign Democratic Republic, to resound as their solemn determination to rebuild India as a Socialistic Sovereign Democratic Republic. For its part, the Congress also resolved two decades ago at Avadi as follows:*

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

But are we really even inching onward, much less marching forward, in pursuance of our solemn resolve? Where is Gandhi’s "India of My Dreams."** What socialistic pattern permits the ever widening chasm between the lowliest and the loftiest, that we are witnessing in this country? Socialism is certainly not renunciation, nor is it sharing of poverty. But certainly it has a deep commitment to equality in economic matters and it can never tolerate the pampering of sectional affluence and waste. What prevents, then, the people in authority from minimising the yawning gap between the national minimum and the national maximum even without increasing the national average, particularly in economic matters? What prevents them from channelising the available production capacities to the production of mere essentials? What deters them from swooping

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* See the Avadi Resolution of the Congress, 1955.
** See the Author's From Raj to Republic for a picture of Gandhian "Dreams".

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down upon collossal public and private wastes and extravagances? What makes them onlookers on stinking corruption? Is this so because these people are themselves the stenchingly entrenched and privileged sections of the society? Nehru himself wrote:

"Increase of production is essential, but obviously by itself it does not take us far and may even add to the complexity of our problems. An attempt to preserve old established privileges and vested interests acts at the very root of planning. Real planning must recognize that no such interests can be allowed to come in the way of any scheme designed to further the well-being of the community as a whole."

True, there have been explosions on all fronts, population, promises, expectations, demands, wastes, irresponsibilities and even corruptions and vices, except those in the areas of perseverance, performance and production. But where is the incentive for the common man to be honest and hard-working? Man still more readily follows an example than a precept. The little man is bewildered at the devastating scenes of crumbling values of yore and the falling idols of his dreams. He has no ideal to stand for, no example to follow, no character to emulate. The nation, why even the mankind, is a family, and the elders, the persons atop, must behave in the manner as they wish the men below to behave.

It seems that even when performance has improved and production has increased, the old entrenched privileges have joined hands with the newly secured gains of the socially, economically and politically powerful elements to throttle the new-born political democracy of independent India, without even making the country economically self-reliant. Political democracy without economic and social democracy is a cruel joke in the life of a community. And consequently, the political democracy also that the Constitution has ushered in is in a shambles. And assuredly the sovereign independence of a country can be but a political sham in the absence of its economic strength.

Rights, constitutional, fundamental and others, the people do have. There are also reasonable restraints prescribed. "No realistic attempt to define rights of citizens indeed fails to include qualifications." And the right to liberty is precious because it "permits the full

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development of the personality of every citizen". Yet these rights and liberties are mere words without the material conditions necessary for their realisation. The everyday problems of the common man are basically economic. And he cannot have faith in a scheme of rights, that gives him access to the courts of law if he can afford the cost of litigation, but holds out no hope to provide for his bare daily necessities. Radhakrishnan once wrote:

"For the vast majority of human beings the main anxieties are economic rather than political. Political freedom is mainly a means to a better life. The right to work, the right to a living wage, the right to care and maintenance in infancy, old age, and ill health, are more important to the ordinary man than the right to vote or freedom of speech and assembly."

Although "the number of rights cases brought before the High Courts and the Supreme Court" may appear to a person like Granville Austin as testifying "to the value of the (Fundamental) Rights," one may feel more inclined to transpose the sentiments of Ivor Jennings with regard to the American Bill of Rights to the Indian situation and suggest that the fundamental rights in India are increasingly becoming a rampart of vested interests. For, rights in the ultimate analysis rest upon the material well-being, the social attitude and the political culture of a community. The Supreme Court said:

"Rights are enforced not by courts alone, and remedies are not the source of rights."

The Constitution also envisages co-operative federalism for the country which has, both structurally and operationally, more or less, acquitted itself well even during the gravest national emergencies and crises. And any cry against the so-called centralising trend in the country has to be viewed not only in the wider global context of centripetalism in all federations and the national objective of planned progress, but also in the light of the following observations of Appleby:

"No other large and important national government...is so dependent as India on theoretically subordinate but actually rather distinct units responsible to a

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7 Austin, Granville : *The Indian Constitution*, *Cornerstone of a Nation*, op. cit.; p. 114.


different political control, for so much of the administration of what are recognised as national programmes of great importance to the nation.

The power that is exercised organically in New Delhi is the uncertain and discontinuous power of prestige. It is influence rather than power. Its method is making plans, issuing pronouncements, holding conferences. Any real power in most of the development field is the personal power of particular leaders and the informal, extra-constitutional, extra-administrative power of a dominant party..."10

The Union has got to be strong for accomplishing the tremendous tasks the nation faces. And with regard to its power to issue directions to the State Governments in certain matters vis-à-vis its legislative responsibilities in social and economic fields particularly, Ambedkar had raised some vital questions as follows in the Constituent Assembly itself, which even now pose challenges, the constitutional provisions to issue directives notwithstanding :11

"Is it desirable that these legislations by the Central Government be mere paper legislations...? It is logical, is it fair, that the Centre on which responsibility has been cast by the Constitution in the matter of untouchability should merely pass a law and sit with folded hands waiting and watching...? Should it allow the States the liberty to do what they liked with the legislation made by Parliament...? I think it is a crying situation which ought to be rectified."

And of even the extra-ordinary and overriding competence of the Union during an emergency, Ambedkar gave a reasonably correct assessment in the Constituent Assembly, although he himself was conscious of the possibilities of the misuse of such a power, the possibilities which have sometimes become stark actualities in our time. He said in the Assembly :12

"There can be no doubt that in the opinion of the vast majority of the people, the residual loyalty of the citizen in any emergency must lie to the Centre and not to the constituent States. For, it is only the Centre which can work for a common purpose and for the general interests of the country as a whole. Herein lies the justification for giving to the Centre certain overriding powers to be used in an emergency. And after all what is the obligation imposed upon the constituent States by these emergency powers? No more than this, that in an emergency, they should take into consideration alongside their own local interests, the opinion and interests of the nation as a whole."

The Union’s exclusive initiative and dominant role in changing the Constitutional provisions are also to be viewed in the light of its

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enormous legislative responsibilities and the national expectations. The amendments to the Constitution thus far made do not betray much of hasty legislation, myopic politics or propaganda technique. Nor do they seem to have any unsettling or regressive impact on the constitutional system. An amending process is at the same time a safety valve and a corrective device, and the Union has not as yet displayed a pronounced tendency to misutilise it.

The strength of the Union should not, however, ipso facto, lead to the imbecility of the units. And there are areas and events which cast a sad reflection on the Union-State relations. Personal and party considerations often envenom Union-State relations sapping the vitality of the State Governments. In certain cases, the abject dependence of a State Government on the Union cries out for its immediate ending not in the interest of State autonomy only but also in the interest of national character and administrative efficiency. It seems always desirable that the persons entrusted with running State Governments should be the State leaders in their own rights. It is better that a Chief Minister lives as an honourable rag-picker in his State than plays the pitiable role of New Delhi’s errand boy. And even a Raj Bhavan should be on a more even keel.

In any event, however, even where the Constitution seemingly betrays a suspicion of power 13, the Government of the Union has got to be powerful. For, the modern state has to shoulder tremendous burdens; and power in general, in any human formation, social, economic or political, has a tendency to turn pyramidal. And the power of the Union Government under the Parliamentary Government that the country has implies the power of the Union Cabinet which is the central key-device of the space-ship of the state providing its motive power, guiding its course, and regulating its speed, with the Prime Minister in the control-cabin. The Prime Minister has got to be Herculean to squarely face the Titanic national tasks. If the Prime Minister is not strong, the centre of gravity in Government will only shift somewhere else, the Presidency or the party or its any leader, which is not intended by the Constitution.

But, then, the Cabinet also has got to be “a team and not a chorus with a leader.” The Prime Minister ought to act as a leader in

the company of his colleagues and not as an emperor surrounded by a bevy of civil servants. But sometimes one has a feeling that all is not well with the Union Cabinet and its key-figure, the Prime Minister. This engenders deleterious impacts on the general administration and betrays the absence of a sense of constitutional propriety and goes to add a greater force to the following argument of Ambedkar for including in the Constitution certain provisions in relation to administration, even if those provisions themselves may not appear at the moment of much use in maintaining the health and vigour of the administration:

"While everybody recognises the necessity of the diffusion of constitutional morality for the peaceful working of a democratic constitution, there are two things inter-connected with it which are not, unfortunately, generally recognised. One is that the form of administration has a close connection with the form of the Constitution. The form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form, by merely changing the form of administration and to make it inconsistent and opposed to the spirit of the Constitution."

The fact seems to be that in certain cases, particularly in the States, the relation between the political and permanent parts of the administration has been so distressing that the Constitution has really got distorted. Not only has the administration become more corrupt and inefficient, but also it has become more apathetic and arrogant. At times, one is left wondering whether there is any government or administration in an area or for a matter. For, as Gorwala points out:

"Bad government and good administration, for example, are at best a temporary combination. The interplay between the two being continuous and unremitting, the quality of the administration is bound to be affected by that of the Government."

The administrative movement from bureaucracy to administrocracy or technocracy is meaningless to the millions. Even the administration of goods and services is fast turning into devices for social control and self-service. There is a growing alienation between the public and the organs of public power when the need is for their closer

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co-operation and greater involvement. The people are treated as masses, the public as objects. Even Myrdal points out:

"When it comes to public policy, the masses of the people in the underdeveloped world are the objects of policies but hardly anywhere its subjects."  

Not only the executive and the administration, but the legislatures also do not appear to be in a happy state. By and large, Parliament has maintained its dignity and authority as the supreme representative organ of the Republic. But the State Legislatures hardly present scenes to be prided at. There is, thus, much scope for improving the representative character of Parliament and the State Legislatures and making them work more effectively as organs for

"carrying on of popular education and propaganda and integration and coordination of conflicting interests and viewpoints."

A word may also be added about the judiciary, specially the superior courts. The function of the judiciary is after all to administer justice and it is well recognised that even the ordinary procedural rules may be bypassed in the interest of justice itself. Yet it is ever imperative that justice in the courts ought to have a mechanical precision. And federalism, Parliamentary Government, and the case for a social revolution within the frame of the Constitution having been firmly established in the country, the Supreme Court has to decide for itself whether it is desirous or capable of playing a role as an instrument of social revolution or is willing to recognise the principle of Parliamentary sovereignty. There seems to be no third course open to it. It is always preferable that

"The major instrumentalities of the State must work in comity and avoid a collision course ensuring the ultimate authority and continuous control of the people of India through the House of elected members."  

Then, representative democracy, based on periodic elections and universal adult suffrage, the Constitution gives to the country. "The decisive safeguard against the abuse of political power is the institution of periodical elections."  

"The real backbone of an elective

19 Shamsher Singh's Case, op. cit. Per Ayer and Bhagwati JJ.
system is the cautious, steadfast men and women of common-sense who can see the forest rather than the trees.”21 But elections in the country are under the distressing shadows of unconscionable practices and the democratic process is under severe strains. For, democracy also assumes a degree of operational freedom that, apart from social and economic constraints, is terribly being interfered with in plain political terms by the instruments of power, money and violence. Constitutional democracy, thus, appears fast turning into constitutional chimera. Morgenthau points out:

“The freedom of the governed to control and replace the rulers and the limitations upon the rulers’ freedom to govern are the two sides of the same coin, the latter being a function of the former. Without that freedom of the governed, democracy loses its substance; for it no longer provides the people with the freedom of choosing rulers and, through them, policies. A democracy which loses that freedom can only survive as the occasional plebiscitarian approval of the personnel and the policies of the government.”22

Perhaps, to a large extent, the blame for choking the normal process of constitutional democracy in the land lies squarely on the political parties whose looseness of moral, ideological and operational fabric places the entire political system in the country in stark nakedness and presents it with black prospects. And added to it is the fact of a single party predominance. Even partylessness appears by far preferable to the present riotous party system. And without in any manner subscribing to the idea of sanspartism, one has a feeling that, perhaps, Gandhi had foreseen this situation when he wrote as follows after independence:

“India having attained political independence through means devised by the Indian National Congress, the Congress in its present shape and form, i.e., as a propaganda vehicle and parliamentary machine, has outlived its use.”23

Assuredly, a community of persons gets politically organised for self-preservation and plenary progress. And in the life of a nation politics by itself is not a pejorative nor is ambition an anathema. Politics aims at harnessing the whole of the power of the community for the crystallisation and realisation of just common objectives and annealing individual ambitions to fit into this grand process. And

blessed is the land that has true national politics and honest individual ambitions.

But, unfortunately, it appears that our national politics has lost its high purpose of channelising all the power of the community for securing and maintaining a just social order through a democratic planned progress and has become a paying profession for some and a pitiable pastime for others. And an individual’s ambition has degenerated into a despicable desire for office and power and loathsome lust for loaves and fishes.

Consequently, this vast ancient land with its enormous human and material resources and tremendous potentialities is fast turning into a perpetual swamp of multiplying vices, inequities, wants, scarcities, controls, corruptions, indisciplines, irresponsibilities, inefficiencies, weaknesses, failures, pruderies, supineness, lies, falsehoods, purposelessness, factionalism, casteism, parochialism, linguism, violence, and money power, treacherously swallowing up the hapless little man. And involve as they do his total sacrifice at the altar of incoherent gains, occasional effervescences of internal or external flukes are no consolation to him unless they be treated as opportunities creating vast funds of goodwill and legitimacy and for mobilising the enormous human energy and skill for securing and maintaining individual weal and common good.

The nation needs a “total revolution”\(^{24}\) of a sort that is possibly realisable within the frame of the Constitution. The salvation of the little man and this vast land demands dedicated commitment to certain rational ideals and principles; clear-cut common objectives; long-term, intelligible policies; selfless, sincere leadership; far-sighted, creative statesmanship; ingenious, honest politician; incorruptible, powerful government; ever alert and truly representative legislature; well-organised party system (or thorough partylessness); vigilant public opinion; discerning electorate; independent and impartial judiciary; neutral and efficient administrator; realistic and progressive elite; cool and precise technologist; concerted effective social efforts; and disciplined individual perseverance, whereby the

\(^{24}\) The Author is indebted to Jayaprakash Narayan for the current currency of the term “total revolution.” But this does not necessarily involve his subscribing to the content of the term as being propounded or worked out by the latter.
dignity and well-being of the individual shall be maintained; the national integrity and progress shall be secured; and a just social order shall be realised; and whereby the nation shall rise from strength to strength to rediscover its soul\(^{25}\), and

"This ancient land attain its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind."\(^{26}\)

And it is the solemn obligation of the noble, kind, brave, true, honest, intelligent, diligent, good and sincere sons and daughters of this ancient land, though now lying in dust low and soiled as the teeming millions, to strive consistently and constantly for the salvation of the individual, the nation and the world. Listen, then! O, listen to the sacred call of Swami Vivekananda, the glorious spirit of young Bharat:

"Let us all work hard, my brethren, this is no time for sleep. On our work depends the coming of the India of the future. She is there ready waiting. She is only sleeping. Arise, and awake, and see her seated here, on her eternal throne, rejuvenated, more glorious than she ever was—this motherland of ours."\(^{27}\)

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\(^{25}\) नायामात्रा कल्हीनेन लम्बते।

The weak do not realise the soul—*The Upanishad.*

\(^{26}\) *See the Objectives Resolution, op. cit.*

\(^{27}\) *See Thus Spake Vivekananda*, enlarged edn. by Swami Sudhasatwananda Madras, 1963; p. 40.
APPENDICES
### APPENDIX I : THE UNITS OF THE UNION

<table>
<thead>
<tr>
<th>Name</th>
<th>Capital</th>
<th>Area (Sq. Km.) Approx.</th>
<th>Population*</th>
<th>Representation in Parliament</th>
<th>Strength of Legislature</th>
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<td>Rajya Sabha</td>
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**UNION TERRITORIES**

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<tr>
<th>Name</th>
<th>Capital</th>
<th>Area (Sq. Km.)</th>
<th>Population*</th>
<th>Representation</th>
<th>Strength of Legislature</th>
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<tr>
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* Population as in 1971.

Legislative Assembly: 47
Metropolitan Council: 30
Legislative Assembly: 33
APPENDIX II

FIFTH AND SIXTH SCHEDULES

FIFTH SCHEDULE

Provisions as to the Administration and Control of Scheduled Areas and Scheduled Tribes

PART A

GENERAL

1. Interpretation.—In this Schedule, unless the context otherwise requires, the expression “State” does not include the State of Assam.

2. Executive power of State in Scheduled Areas.—Subject to the provisions of this Schedule, the executive power of a State extends to the Scheduled Areas therein.

3. Report by the Governor to the President regarding the administration of Scheduled Areas.—The Governor of each State having Scheduled Areas therein shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said areas.

PART B

ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES

4. Tribes Advisory Council.—(1) There shall be established in each State having Scheduled Areas therein and, if the President so directs, also in any State having Scheduled Tribes but not Scheduled Areas therein, a Tribes Advisory Council consisting of not more than twenty members of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in Legislative Assembly of the State:

Provided that if the number of representatives of the Scheduled Tribes in the Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of tribes.

(2) It shall be the duty of the Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor.

(3) The Governor may make rule prescribing or regulating, as the case may be,—

(a) the number of members of the Council, the mode of their
appointment and the appointment of the Chairman of the Council and of the officers and servants thereof:
(b) the conduct of its meeting and its procedure in general; and
(c) all other incidental matters.

5. Law applicable to Scheduled Areas.—(1) Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) The Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may—
(a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;
(b) regulate the allotment of land to members of the Scheduled Tribes in such area;
(c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

(5) No regulation shall be made under this paragraph unless the Governor making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.

PART C
SCHEDULED AREAS

6. Scheduled Areas.—(1) In this Constitution, the expression "Scheduled Areas" means areas as the President may by order declare to be Scheduled Areas.

(2) The President may at any time by order—
(a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area;
(b) alter, but only by way of rectification of boundaries, any Scheduled areas;

c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area;

and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order.

PART D
AMENDMENT OF THE SCHEDULE

7. Amendment of the Schedule.—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

SIXTH SCHEDULE

Provisions as to the Administration of Tribal Areas in the States of Assam and Meghalaya and in the Union Territory of Mizoram.

1. Autonomous Districts and Autonomous Regions.—
(1) Subject to the provisions of this paragraph, the tribal areas in each item of Parts I and II and in Part III of the table appended to Paragraph 20 of this Schedule shall be an autonomous district.

(2) If there are different Scheduled Tribes in an autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions.

(3) The Governor may, by public notification,—
(a) include any area in any of the Parts of the said table,
(b) exclude any area from any of the Parts of the said table,
(c) create a new autonomous district,
(d) increase the area of any autonomous district,
(e) diminish the area of any autonomous district,
(f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,

(ff) alter the name of any autonomous district,

(g) define the boundaries of any autonomous district;

Provided that no order shall be made by the Governor under clauses (c), (d), (e) and (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule.

Provided further that any order made by the Governor under this sub-paragraph may contain such incidental and consequential provisions (including any amendment of paragraph 20 and of any item in any of the Parts of the said table) as appear to the Governor to be necessary for giving effect to the provisions of the order.

2. Constitution of District Councils and Regional Councils.—

(1) There shall be a district Council for each autonomous district consisting of not more than thirty members, of whom not more than four persons shall be nominated by the governor and the rest shall be elected on the basis of adult suffrage.

(2) There shall be a separate Regional Council for each area constituted an autonomous region under sub-paragraph (2) of Paragraph 1 of this Schedule.

(3) Each district Council and each Regional Council shall be a body corporate by the name respectively of “the District Council of (name of district)” and “the Regional Council of (name of Region),” shall have perpetual succession and a common seal and shall by the said name sue and be sued.

(4) Subject to the provisions of this Schedule, the administration of an autonomous district shall, in so far as it is not vested under this Schedule in any Regional Council within such district, be vested in the District Council for such district and the administration of an autonomous region shall be vested in the regional Council for such region.

(5) In an autonomous district with Regional Councils, the District Council shall have only such powers with respect to the areas under the authority of the Regional Council as may be delegated to it by the Regional Council in addition to the powers conferred on it by this Schedule with respect to such areas.

(6) The Governor shall make rules for the first constitution of District Councils and Regional Councils in consultation with the existing tribal Councils or other representative tribal organisations within the autonomous districts or regions concerned, and such rules shall provide for—

(a) the composition of the District Councils and Regional Councils and the allocation of seats therein;
(b) the delimitation of territorial constituencies for the purpose of elections to those Councils;

(c) the qualifications for voting at such elections and the preparation of electoral rolls therefor;

(d) the qualifications for being elected at such elections as members of such Councils;

(e) the term of office of members of Regional Councils;

(f) any other matter relating to or connected with elections or nominations to such Councils;

(g) the procedure and the conduct of business including the power to act notwithstanding any vacancy;

(h) the appointment of officers and staff of the District and Regional Councils.

(6-A) The elected members of the District Council shall hold office for a term of five years from the date appointed for the first meeting of the Council after the general elections to the Council, unless the District Council is sooner dissolved under Paragraph 16 and a nominated member shall hold office at the pleasure of the Governor:

Provided that the said period of five years may, while a Proclamation of Emergency is in operation or if circumstances exist which, in the opinion of the Governor, render the holding of elections impracticable, be extended by the Governor for a period not exceeding one year at a time and in any case where a Proclamation of Emergency is in operation not extending beyond a period of six months after the Proclamation has ceased to operate:

Provided further that a member elected to fill a casual vacancy shall hold office only for the remainder of the term of office of the member whom he replaces.

(7) The District or the Regional Council may after its first constitution make rules with the approval of the Governor with regard to the matters specified in sub-paragraph (6) of this paragraph and may also make rules with like approval regulating—

(a) the formation of subordinate local Councils or Boards and procedure and the conduct of their business; and

(b) generally, all matters relating to the transaction of business pertaining to the administration of the district or region, as the case may be:

Provided that until rules are made by the District or the Regional Council under sub-paragraph the rules made by the Governor under sub-paragraph (6) of this paragraph shall have effect in respect of elections to, the officers and staff of, and the procedure and the conduct of business in, each such Council:

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3. Powers of the District Councils and Regional Councils to make laws.—(1) The Regional Council for an autonomous region in respect of all areas within such region and the District Council for an autonomous district in respect of all areas within the district except those which are under the authority of Regional Councils, if any, within the district shall have power to make laws with respect to—

(a) the allotment, occupation or use, or the setting apart, of land, other than any land which is reserved forest, for the purposes of agriculture or grazing or for residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town:

Provided that nothing in such laws shall prevent the compulsory acquisition of any land, whether occupied or unoccupied, for public purposes by the Government of the State concerned in accordance with the law for the time being in force authorising such acquisition;

(b) the management of any forest not being a reserved forest;

(c) the use of any canal or water-course for the purpose of agriculture;

(d) the regulation of the practice of jhum or other forms of cultivation:

(e) the establishment of village or town committees or councils and their powers:

(f) any other matter relating to village or town administration, including village or town police and public health and sanitation;

(g) the appointment of succession of Chiefs or Headmen;

(h) the inheritance of property;

(i) marriage and divorce;

(j) social customs.

(2) In this paragraph, a "reserved forest" means any area which is a reserved forest under the Assam Forest Regulation, 1891, or under any other law for the time being in force in the area in question.

(3) All laws made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

4. Administration of justice in autonomous districts and autonomous regions.—(1) The Regional and the District Council for an autonomous district in respect of areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute village councils
or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provision of sub-paragraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any court in the State, and may appoint suitable persons to be member of such village councils or presiding officers of such courts, and may also appoint such officers as may be necessary for the administration of the laws made under Paragraph 3 of this Schedule.

(2) Notwithstanding anything in this Constitution, the Regional Council for an autonomous region or any court constituted in that behalf by the Regional Council or, if in respect of any area within an autonomous district there is no Regional Council, the District Council for such district, or any court constituted in that behalf by the District Council, shall exercise the powers of a court of appeal in respect of all suits and cases triable by a village council or court constituted under sub-paragraph (1) of this paragraph within such region or area, as the case may be, other than those to which the provisions of sub-paragraph (1) of Paragraph 5 of this Schedule apply, and no other court except the High Court and the Supreme Court shall have jurisdiction over such suits or cases.

(3) The High Court shall have and exercise such jurisdiction over the suits and cases to which the provisions of sub-paragraph (2) of this paragraph apply as the Governor may from time to time by order specify.

(4) A Regional Council or District Council, as the case may be may with the previous approval of the Governor make rules regulating—

(a) the constitution of village councils and courts and the powers to be exercised by them under this paragraph;

(b) the procedure to be followed by village councils or courts in the trial of suits and cases under sub-paragraph (1) of this paragraph;

(c) the procedure to be followed by the Regional or District Council or any court constituted by such Council in appeals and other proceedings under sub-paragraph (2) of this paragraph;

(d) the enforcement of decisions and orders of such Councils and courts;

(e) all other ancillary matters for the carrying out of the provisions of sub-paragraphs (1) and (2) of this paragraph.

(5) On and from such date as the President may, after consulting the Government of the State concerned, by notification appoint in this behalf, this paragraph shall have effect in relation to such autonomous district or region as may be specified in the notification, as if—
(i) in sub-paragraph (1), for the words "between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of Paragraph 5 of this Schedule apply," the words "not being suits and cases of the nature referred to in sub-paragraph (1) of Paragraph 5 of this Schedule, which the Governor may specify in this behalf," had been substituted:

(ii) sub-paragraphs (2) and (3) had been omitted.

(iii) in sub-paragraph (4)—

(a) for the words "A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating," the words "The Governor may make rules regulating" had been substituted; and

(b) for clause (a), the following clause had been substituted namely:

"(a) the constitution of village councils and courts, the powers to be exercised by them under this paragraph and the courts to which appeals from the decisions of village councils and courts shall lie";

(c) for clause (c), the following clause had been substituted, namely:

"(c) the transfer of appeals and other proceedings pending before the Regional or District Council or any court constituted by such Council immediately before the date appointed by the President under sub-paragraph (5)"; and

(d) in clause (e), for the words, brackets and figures "sub-paragraphs (1) and (2)," the word, brackets and figure "sub-paragraph (1)" had been substituted.

5. Conferment of powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, on the Regional and District Councils and on certain courts and officers for the trial of certain suits, cases and offences.—(1) The Governor may for the trial of suits or cases arising out of any law in force in any autonomous district or region being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable to such district or region, confer on the District Council or the Regional Council having authority over such district or region or on courts constituted by such District Council or on any officer appointed in that behalf by the Governor, such powers under the Code of Civil Procedure, 1908, or, as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate,
and thereupon the said Council, court or officer shall try the suits, cases or offences in exercise of the powers so conferred.

(2) The Governor may withdraw or modify any of the powers conferred on a District Council, Regional Council, court or officer under sub-paragraph (1) of this paragraph.

(3) Save as expressly provided in this paragraph, the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

(4) On and from the date appointed by the President under sub-paragraph (5) of Paragraph 4 in relation to any autonomous district or autonomous region, nothing contained in this paragraph shall, in its application to that district or region, be deemed to authorise the Governor to confer on the District Council or Regional Council or on courts constituted by the District Council any of the powers referred to in sub-paragraph (1) of this paragraph.

6. Powers of the District Council to establish primary schools, etc.—(1) The District Council for an autonomous district may establish, construct, or manage primary schools, dispensaries, marks, cattle pounds, ferries, fisheries, roads, road transport and waterways in the district and may, with the previous approval of the Governor, make regulations for the regulation and control thereof and, in particular, may prescribe the language and the manner in which primary education shall be imparted in the primary schools in the district.

(2) The Governor may, with the consent of any District Council, entrust either conditionally or unconditionally to that Council or to its officers functions in relation to agriculture, animal husbandry, community projects, co-operative societies, social welfare, village planning or any other matter to which the executive power of the State extends.

7. District and Regional Funds.—(1) There shall be constituted for each autonomous district, a District Fund and for each autonomous region, a Regional Fund to which shall be credited all moneys received respectively by the District Council for that district and the Regional Council for that region in the course of the administration of such district or region, as the case may be, in accordance with the provisions of this Constitution.

(2) The Governor may make rules for the management of the District Fund, or, as the case may be, the Regional Fund and for the procedure to be followed in respect of payment of money into the said Fund, the withdrawal of moneys therefrom, the custody of moneys therein and any other matter connected with or ancillary to the matters aforesaid.
(3) The accounts of the District Council or, as the case may be, the Regional Council shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President prescribe.

(4) The Comptroller and Auditor-General shall cause the accounts of the District and Regional Councils to be audited in such manner as he may think fit, and the reports of the Comptroller and Auditor-General relating to such accounts shall be submitted to the Governor who shall cause them to be laid before the Council.

8. Powers to assess and collect land revenue and to impose taxes.—(1) The Regional Council for an autonomous region in respect of all lands within such region and the District Council for an autonomous district in respect of all lands within the district except those which are in the areas under the authority of Regional Councils, if any, within the district, shall have the power to assess and collect revenue in respect of such lands in accordance with the principles for the time being followed by the Government of the State in assessing lands for the purpose of land revenue in the State of Assam generally.

(2) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of all areas in the district except those which are under the authority of Regional Councils, if any, within the district, shall have power to levy and collect taxes on lands and buildings, and tolls on persons resident within such areas.

(3) The District Council for an autonomous district shall have the power to levy and collect all or any of the following taxes within such district, that is to say—

(a) taxes on professions, trades, callings and employments;
(b) taxes on animals, vehicles and boats;
(c) taxes on the entry of goods into a market for sale therein, and tolls on passengers and goods carried in ferries; and
(d) taxes for the maintenance of schools, dispensaries or roads.

(4) A Regional Council or District Council, as the case may be, may make regulations to provide for the levy and collection of any of the taxes specified in sub-paragraphs (2) and (3) of this paragraph. And every such regulation shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

9. Licences or leases for the purpose of prospecting for, or extraction of, minerals.—(1) Such share of the royalties accruing each year from licences or leases for the purpose of prospecting for, or the extraction of, minerals granted by the Government of the State in respect of any area within an autonomous district as may be agreed upon between the Government of the State and the District Council of such district shall be made over to that District Council.
(2) If any dispute arises as to the share of such royalties to be made over to a District Council, it shall be referred to the Governor for determination and the amount determined by the Governor in his discretion shall be deemed to be the amount payable under subparagraph (1) of this paragraph to the District Council and the decision of the Governor shall be final.

10. Power of District Council to make regulations for the control of money-lending and trading by non-tribals.—(1) The District Council of an autonomous district may make regulations for the regulation and control of money-lending within the district by persons other than Scheduled Tribes resident in the district.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may—

(a) prescribe that no one except the holder of a licence issued in that behalf shall carry on the business of money-lending;

(b) prescribe the maximum rate of interest which may be charged or be recovered by a money-lender;

(c) provide for the maintenance of accounts by money-lenders and for the inspection of such accounts by officers appointed in that behalf by the District Council;

(d) prescribe that no person who is not a member of the Scheduled Tribes resident in the district shall carry on wholesale or retail business in any commodity except under a licence issued in that behalf by the District Council:

Provided that no regulations may be made under this paragraph unless they are passed by a majority of not less than three-fourths of the total membership of the District Council:

Provided further that it shall not be competent under any such regulations to refuse the grant of a licence to a money-lender or a trader who has been carrying on business within the district since before the time of the making of such regulations.

(3) All regulations made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

11. Publication of laws, rules and regulations made under the Schedule.—All laws, rules and regulations made under this Schedule by a District Council or a Regional Council shall be published forthwith in the Official Gazette of the State and shall on such publication have the force of law.


(a) no Act of the Legislature of the State of Assam in respect of any of the matters specified in Paragraph 3 of this
Schedule and matters with respect to which a District Council or a Regional Council may make laws, and no Act of the Legislature of the State of Assam prohibiting or restricting the consumption of any non-distilled alcoholic liquor shall apply to any autonomous district or autonomous region unless in either case the District Council for such district or having jurisdiction over such region by public notification so directs, and the District Council in giving such direction with respect to any Act may direct that the Act shall in its application to such district or region or any part thereof have effect subject to such exceptions or modifications as it thinks fit;

(b) the Governor may, by public notification, direct that any Act of Parliament or of the Legislature of the State of Assam to which the provisions of clause (a) of this sub-paragraph do not apply shall not apply to an autonomous district or an autonomous region in the State, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification.

(2) Any direction given under sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.


(a) if any provision of a law made by a District or Regional Council in the State of Meghalaya with respect to any matter specified in sub-paragraph (1) of paragraph 3 of this Schedule or if any provision of any regulation made by a District Council or a Regional Council in that State under paragraph 8 or paragraph 10 of this Schedule, is repugnant to any provision of a law made by the Legislature of the State of Meghalaya with respect to that matter, then, the law or regulation made by the District Council or, as the case may be, the Regional Council whether made before or after the law made by the Legislature of the State of Meghalaya, shall, to the extent of repugnancy, be void and the law made by the Legislature of the State of Meghalaya shall prevail;

(b) the President may, with respect to any Act of Parliament, by notification, direct that it shall not apply to any autonomous district or an autonomous region in the State of Meghalaya, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification and any such direction may be given to have retrospective effect.
12-B. Application of Acts of Parliament and other Acts to autonomous districts and autonomous regions in the Union territory of Mizoram. Notwithstanding in this Constitution, the President may with respect to any Act of Parliament and the Administrator may with respect to any other Act, by notification, direct that it shall not apply to an autonomous district or an autonomous region in the Union of Mizoram or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification and any such direction may be given so as to have retrospective effect.

13. Estimated receipts and expenditure pertaining to autonomous districts to be shown separately in the annual financial statement.—The estimated receipts and expenditure pertaining to an autonomous district which are to be credited to, or is to be made from, the Consolidated fund of the State shall be first placed before the District Council for discussion and then after such discussion be shown separately in the annual financial statement of the State to be laid before the Legislature of the State under Article 202.

14. Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions.—(1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (c), (d), (e) and (f) of sub-paragraph (3) of Paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—

(a) the provision of educational and medical facilities and communications in such districts and regions;

(b) the need for any new or special legislation in respect of such districts and regions; and

(c) the administration of the laws, rules and regulations made by the District and Regional Councils;

and define the procedure to be followed by such Commission.

(2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of State.

(3) Allocating the business of the Government of the State among his Ministers, the Governor may place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State.
15. Annulment or suspension of acts and resolutions of District and Regional Councils. (1) If at any time the Governor is satisfied that an act or resolution of a district or a Regional Council is likely to endanger the safety of India or is likely to be prejudicial to Public order, he may annul or suspend such act or resolution and take such steps as he may consider necessary (including the suspension of the Council and the assumption to himself of all or any of the powers vested in or exercisable by the Council) to prevent the commission or continuance of such act, or the giving of effect to such resolution.

(2) Any order made by the Governor under sub-paragraph (1) of this paragraph together with the reasons therefor shall be laid before the Legislature of the State as soon as possible and the order shall, unless revoked by the Legislature of the State, continue in force for a period of twelve months from the date on which it was so made:

Provided that if and so often as a resolution approving the continuance in force of such order is passed by the Legislature of the State, the order shall unless cancelled by the Governor continue in force for a further period of twelve months from the date on which under this paragraph it would otherwise have ceased to operate.

16. Dissolution of a District or a Regional Council.—(1) The Governor may on the recommendation of a Commission appointed under Paragraph 14 of this Schedule by public notification order the dissolution of a District or a Regional Council and—

(a) direct that a fresh general election shall be held immediately for the reconstitution of the Council, or

(b) subject to the previous approval of the Legislature of the State assume the administration of the area under the authority of such Council himself or place the administration of such area under the Commission appointed under the said paragraph or any other body considered suitable by him for a period not exceeding twelve months:

Provided that when an order under clause (a) of this paragraph has been made, the Governor may take the action referred to in clause (b) of this paragraph with regard to the administration of the area in question pending the reconstitution of the Council on fresh general election:

Provided further that no action shall be taken under clause (b) of this paragraph without giving the District or the Regional Council, as the case may be, an opportunity of placing its view before the Legislature of the State.

(2) If at any time the Governor is satisfied that a situation has arisen in which the administration of an autonomous district or region cannot be carried on in accordance with the provisions of this Schedule, he may, by public notification, assume to himself all or any
of the functions or powers vested in or exercisable by the District Council or, as the cause may be, the Regional Council and declare that such functions or powers shall be exercisable by such person or authority as he may specify in this behalf, for a period not exceeding six months:

Provided that the Governor may by a further order or orders extend the operation of the initial order by a period not exceeding six months on each occasion.

(3) Every order made under sub-paragraph (2) of this paragraph with the reasons therefor shall be laid before the Legislature of the State and shall cease to operate at the expiration of thirty days from the date on which the State Legislature first sits after the issue of the order, unless, before the expiry of that period it has been approved by the State Legislature.

17. Exclusion of areas from autonomous districts in forming constituencies in such districts—For the purposes of elections to the Legislative Assembly of Assam or Meghalaya, the Governor may by order declare that any area within an autonomous district in the State of Assam or Meghalaya, as the case may be shall not form part of any constituency to fill a seat or seats in the Assembly reserved for any such district but shall form part of a constituency to fill a seat or seats in the Assembly not so reserved to be specified in the order.

18. [Omitted by Act 81 of 1971]

19. Transitional provisions—(1) As soon as possible after the commencement of this Constitution the Governor shall take steps for the constitution of a District Council for each autonomous district in the State under this Schedule and, until a District Council is so constituted for an autonomous district, the administration of such district shall be vested in the Governor and the following provisions shall apply to the administration of the areas within such district instead of the foregoing provisions of this Schedule, namely:

(a) no Act of Parliament or of the Legislature of the State shall apply to any such area unless the Governor by public notification so directs; and the Governor in giving such a direction with respect to any Act may direct that the Act shall, in its application to the area or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit;

(b) the Governor may make regulations for the peace and good government of any such area and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to such area.

(2) Any direction given by the Governor under clause (a) of sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.
(3) All regulations made under clause (b) of sub-paragraph (1) of this paragraph shall be submitted forthwith to the President, and, until assented to by him, shall have no effect.

20. Tribal areas.—(1) The areas specified in Parts I, II and III of the table below shall retrospectively be the tribal areas within the State of Assam, the State of Meghalaya and the Union territory of Mizoram.

(2) Any reference in the table below to any district shall be construed as a reference to the territories comprised within the autonomous district of the name existing immediately before the day appointed under clause (b) of Section 2 of the North-Eastern Areas (Reorganisation) Act. 1971:

Provided that for the purposes of clauses (e) and (f) of sub-paragraph (1) of paragraph 3, paragraph 4, paragraph 5, paragraph 6, sub-paragraph (2), clauses (a), (b) and (d) of sub-paragraph (3) and sub-paragraph (4) of paragraph 8 and clause (d) of sub-paragraph (2) of paragraph 10 of this Schedule, no part of the area comprised within the municipality of Shillong shall be deemed to be within the United Khasi-Jaintia Hills District.

TABLE

PART I

1. The North Cachar Hills District
2. The Mikir Hills District.

PART II

1. The United Khasi—Jaintia Hills District.
2. The Jowai District.
3. The Garo Hills District.

PART III

The Mizo District

20-A. Interpretation—Subject to any express provision made in this behalf, the provisions of this Schedule shall, in their application to the Union territory of Mizoram, have effect—

(1) as if references to the Governor and Government of the State were references to the Administrator of the Union territory appointed under article 239 and references to State (except in the expression "Government of the State") were references to the Union territory of Mizoram;

(2) as if—

(a) in sub-paragraph (3) of paragraph 1,
(i) after clause (g), the following clause had been inserted, namely:—

"(h) divide any autonomous region into two or more autonomous regions and define the boundaries thereof."

(ii) the first proviso had been omitted;

(b) in sub-paragraph (5) of paragraph 4 the provision for consultation with the Government of the State concerned had been omitted;

(c) in sub-paragraph (2) of paragraph 9, the words "in his discretion" had been omitted;

(d) paragraph 13 had been omitted;

(e) sub-paragraph (2) and (3) of paragraph 14 had been omitted;

(f) sub-paragraph (2) (including the proviso thereto) of paragraph 15 had been omitted;

(g) in paragraph 16,—

(i) in sub-paragraph (1), in clause (d), the words "subject to the previous approval of the Legislature of the State" and the second proviso to that sub-paragraph had been omitted;

(ii) sub-paragraph (3) had been omitted."

21. Amendment of the Schedule—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.
APPENDIX III

SEVENTH SCHEDULE

List I—Union List

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

2. Naval, military and air forces: any other armed forces of the Union.

3. Delimitation cantonment areas, local self-government in such areas, the constitution and power within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

4. Naval, military and air force works.

5. Arms, firearms, ammunition and explosives.

6. Atomic energy and mineral resources necessary for its production.

7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

8. Central Bureau of Intelligence and Investigation.

9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.

10. Foreign affairs; all matters which bring the Union into relation with any foreign country.

11. Diplomatic, consular and trade representation.


13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

14. Entering into treaties and agreements with foreign countries and implementing of treaties agreement and conventions with foreign countries.

15. War and peace.

16. Foreign jurisdiction.

17. Citizenship, naturalisation and aliens.

18. Extradition.

19. Admission into, and emigration and expulsion from, India; passports and visas.

20. Pilgrimages to places outside India.

21. Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.
22. Railways.

23. Highway declared by or under law made by Parliament to be national highways.

24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.

25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulations of such education and training provided by States and other agencies.

26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

29. Airways; aircraft and air navigation: provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

32. Property of the Union and the revenue therefrom, but as regards property situated in a State subject to legislation by the State, save in so far as Parliament by law otherwise provides.

33. [Omitted by the Constitution (Seventh Amendment) Act, 1956, S. 26]

34. Courts of Wards for the estates of Rulers of Indian States.

35. Public debt of the Union.


37. Foreign loans.

38. Reserve Bank of India.


40. Lotteries organised by the Government of India or the Government of a State.

41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.

42. Inter-State trade and commerce.
43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

45. Banking.

46. Bills of exchange, cheques, promissory notes and other like instruments.

47. Insurance.

48. Stock exchanges and futures markets.

49. Patents, inventions and designs, copyright; trade-marks and merchandise marks.

50. Establishment of standards of weight and measure.

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

53. Regulation and development of oilfields and mineral oil resources, petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

55. Regulation of labour and safety in mines and oilfields.

56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

57. Fishing and fisheries beyond territorial waters.

58. Manufacture, supply and distribution of salt by Union agencies; regulation and control of manufacture, supply and distribution of salt by other agencies.

59. Cultivation, manufacture, and sale for export, of opium.

60. Sanctioning of cinematograph films for exhibition.

61. Industrial disputes concerning Union employees.

62. The Institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

63. The institutions known at the commencement of this Constitution as the Benaras Hindu University, the Aligarh Muslim
University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institution of national importance.

65. 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 or technical assistance in the investigation or detection of crime.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

67. Ancient and historical monuments and records, and archaeological sites and remains declared by or under law made by Parliament to be of national importance.

68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India. Meteorological organisation.

69. Census.

70. Union public services; all-India services; Union Public Service Commission.

71. Union pensions, that is to say, pensions payable by Government of India or out of the Consolidated Fund of India.

72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission.

73. Salaries and allowances of members of Parliament, the Chairman of the Council of States and the Speaker of the House of the People.

74. Powers, privileges and immunities of each House of Parliament and of the members and the Committees of each House; enforcement of attendance of persons for giving evidence or producing documents before committees of parliament or commissions appointed by Parliament.

75. Emoluments, allowances, privileges, and rights in respects of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of Comptroller and Auditor-General.

76. Audit of the accounts of the Union and of the States.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.

78. Constitution and organisation (including vacations) of the
High Courts except provisions as to Officers and Servants of High Courts; persons entitled to practise before the High Courts.

79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory.

80. Extension of the powers and jurisdiction of member of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

81. Inter-State migration; inter-State quarantine.

82. Taxes on income other than agricultural income.

83. Duties of customs including export duties.

84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

85. Corporation Tax

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

87. Estate duty in respect of property other than agricultural land.

88. Duties in respect of succession to property other than agricultural land.

89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.

90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

93. Offences against laws with respect to any of the matters in this List.
94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.

95. Jurisdiction and power of all Courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.

96. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

List II—State List

1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power).

2. Police, including railway and village police.

3. Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court, officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other State for the use of prisons and other institutions.

5. Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

6. Public health and sanitation; hospitals and dispensaries.

7. Pilgrimages, other than pilgrimages to places outside India.

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

9. Relief of the disabled and unemployable.

10. Burials and burial grounds; cremations and cremation grounds.

11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and Entry 26 of List III.

12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.

13. Communication, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways, ropeways; inland waterways and traffic thereon subject
to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

14. Agricultural, including agricultural education and research, protection against pests and prevention of plant diseases.

15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.


17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provision of Entry 56 of List I.

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.


20. Protection of wild animals and birds.


22. Courts of wards subject to the provisions of Entry 34 of List I; encumbered and attached estates.

23. Regulation of mines and mineral development subject to the provisions of List I; with respect to regulation and development under the control of the Union.

24. Industries subject to the provisions of Entries 7 and 52 of List I.

25. Gas and gas-works.

26. Trade and commerce within the State subject to the provisions of Entry 33 of List III.

27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List III.


29. Weights and measures except establishment of standards.

30. Money-lending and money-lenders; relief of agricultural indebtedness.

31. Inns and inn-keepers.

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

33. Theatres and dramatic performances, cinemas subject to the provisions of Entry 60 of List I; sports, entertainments and amusements.

34. Betting and gambling.
35. Works, lands and buildings vested in or in the possession of the State.
37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.
38. Salaries and allowances of the members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.
39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof and, if there is a Legislative Council, of the Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.
40. Salaries and allowances of Ministers for the State.
41. State public services; State Public Service Commission.
42. State pensions, that is to say, pensions payable by State or out of the Consolidated Fund of the State.
43. Public debt of the State.
44. Treasure trove.
45. Land revenue including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.
46. Taxes on agricultural income.
47. Duties in respect of succession to agricultural land.
49. Taxes on lands and buildings.
50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.
51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:
   (a) alcoholic liquors for human consumption;
   (b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.
52. Taxes on the entry of goods into a local area for consumption, use or sale therein.
53. Taxes on the consumption or sale of electricity.
54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I.

55. Taxes on advertisements other than advertisements published in the newspapers.

56. Taxes on goods and passengers carried by road or on inland waterways.

57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of Entry 35 of List III.

58. Taxes on animals and boats.

59. Tolls.

60. Taxes on professions, trades, callings and employments.

61. Capitation taxes.

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

64. Offences against laws with respect to any of the matters in this List.

65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

66. Fees in respect of any of the matters in this List, but not including fees taken in any court.

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**List III—Concurrent List**

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.\(^1\)

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of

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\(^1\) In its application to the State of Jammu and Kashmir, for Entry 1, the following entry shall be *substituted*, namely:—

"1. Criminal law (excluding offences against laws with respect to any of the matters specified in List I and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power) in so far as such criminal law relates to offences against laws with respect to any of the matters specified in this list:” Constitution (J & K) Order, 1954, Para 22.
supplies and services essential to the community; persons subjected to such detention.

4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in Entry 3 of this List.

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

6. Transfer of property other than agricultural land; registration of deeds and documents.

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

8. Actionable wrongs.


10. Trust and Trustees.

11. Administrators-general and official trustees.

12. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.

13. Civil Procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

14. Contempt of court, but not including contempt of the Supreme Court.

15. Vagrancy; nomadic and migratory tribes.

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.

17. Prevention of cruelty to animals.

18. Adulteration of foodstuffs and other goods.

19. Drugs and poisons, subject to the provisions of Entry 59 of List I with respect to opium.

20. Economic and social planning.

21. Commercial and industrial monopolies, combines and trusts.

22. Trade unions; industrial and labour disputes.

23. Social security and social insurance; employment and unemployment.

24. Welfare of labour including conditions of work, provident funds, employer’s liability, workmen’s compensation, invalidity and old age pensions and maternity benefits.

25. Vocational and technical training of labour.

26. Legal, medical and other professions.
27. Relief and rehabilitation of persons displaced from their original place of residence by reasons of the setting up of the Dominions of India and Pakistan.

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animal or plants.

30. Vital statistics including registration of births and deaths.

31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

33. Trade and commerce in, and the productions, supply and distribution of,—

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, and cotton seed; and

(e) raw jute.

34. Price control.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

36. Factories.

37. Boilers.

38. Electricity.


40. Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance.

41. Archaeological sites and remains other than those [declaring agricultural land] declared by law to be evacuee property.

42. Acquisition and requisitioning of property.

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such arrears, arising outside that State.
APPENDIX III

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.²

46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

47. Fees in respect of any of the matters in this List, but not including fees taken in any court.

¹ In its application to the State of Jammu and Kashmir, in Entry 45 for the words and figures "List II or List III" this list shall be substituted: Constitution (J & K) Order, 1954, Para 22.
APPENDIX IV

A GLANCE AT GRIEVANCE MAN

The grievance man, or more popularly known as ombudsman, is Swedish in origin, and the Swedish ombudsman for civil affairs dates back to the year 1713, when a functionary known as Hogste Ombundsmannen was instituted to replace the Justitiekansler with power to watch the observance of laws and constitution by public officials. In 1719, however, the functionary was again redesignated as Justitiekansler with extended powers, and it was not until the 1809 Constitution that the modern ombudsman came to be instituted. This Constitution, which is still in force, recognised the office of Justitiekansler as a Crown appointee, although it guaranteed him a degree of independence within the structure of Crown offices. A new post of Justitieombudsman was created. The incumbent to this post was to be elected by Parliament and his function was to prevent the abuse of power by public officials, particularly the exercise of undue influence by the Crown over the judiciary. When we speak of ombudsman today, we generally mean the Justitieombudsman. Sweden has also a Militieombudsman, appointed for the first time in 1915.

The role of the Justitieombudsman in preventing the abuse of power by public officers has come to be recognised throughout the world, and there seems to be currently a movement for the institution of this functionary in other countries also. Both Finland and Denmark have instituted Ombudsman on the Swedish model. In the common law world New Zealand was the first country to have established a corresponding functionary, known as the Parliamentary Commissioner. Now England has also installed a Parliamentary Commissioner.

Notice may also be taken of a similar functionary, called the Procurator General, in the U.S.S.R. The responsibility of the Procurator General is in theory much wider than the responsibility of the Swedish ombudsman. He is appointed by the Supreme Soviet of the U.S.S.R. and has supreme supervisory power for securing observance of law by all ministries and institutions subordinate to them, as well as by the officials and citizens. Below the Procurator General are procurators of Union Republics, Territories, Regions, Autonomous Republics, and Autonomous Regions, appointed by him. With his approval the procurators of the Union Republics appoint procurators for national areas, districts and cities. The Procurator General and the procurators under him operate independently of the other organs of the state.

In India, we have functionaries called the Attorney-General for the Union and the Advocate General for each State. The Attorney-General is appointed by the President, and an Advocate-General is appointed by the Governor of the State concerned. Besides, there
are public prosecutors and standing counsels appointed by the State Governments. These functionaries are, however, under the direct control of the Governments concerned, and their functions are mainly advisory. In partial acceptance of the recommendations of the Santhanam Committee, vigilance commissioners have also been appointed for the Union and the different States.\(^1\) But these commissioners are also the appointees of the Governments concerned, and their powers relate to conducting such inquiries as may be entrusted to them by the Governments.

Recently, the Administrative Reforms Committee has recommended the appointment of a Lokpal for the Union, and a Lokayukt for each State, with functions similar to the Swedish ombudsman\(^2\), which has, been criticised as going against of the spirit of Constitution in certain quarters\(^3\). But the idea seems be have secured a firm foothold in this country. There is already a Lokpal Bill pending in Parliament. Among the States Bihar took the lead by establishing the office of Lokayukt under the Lokayukt Ordinance, 1973, and now this functionary operates under a State enactment. Some other States like Rajasthan, U. P., Tamil Nadu, Maharashtra and Gujarat have now followed the suit. However, the success of the institution of Lokpal and Lokayukts in this vast country teeming with ill-organised, illiterate, ill-fed and ill-clad millions is a question only for the future to decide, although there seems no harm in having them.

It seems better that the office of the Attorney-General may be also made to correspond to the office of the Comptroller and Auditor-General in respect of immunities, privileges, independence and powers. And like the latter, who has under him, the Accountant Generals for the States, the former also should have control over the Advocate-Generals of the States, and through them he should have the power to control all the public prosecutors in the country. Broadly speaking, the powers of the Attorney-General should be made similar to the powers of the Procurator General in the U.S.S.R.

\(^1\) See Report of the Committee on Prevention of Corruption (Santhanam Committee), Government of India, New Delhi, 1964.


\(^3\) See Mukherjee, P. B : Judicial Power and Judicial Institutions of the Indian Constitution, Setalvad Memorial Lectures (1966), Bombay University—(unpublished).
APPENDIX V

THE PURNA SWARAJ PLEDGE OF THE CONGRESS

We believe that it is the inalienable right of the Indian people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth. We believe also that if any government deprives a people of these rights and oppresses them, the people have a right further to alter it or to abolish it. The British Government in India has not only deprived the Indian people of their freedom but has based itself on the exploitation of the masses, and has ruined India economically, politically, culturally and spiritually. We believe therefore that India must sever the British connection and attain purna swaraj or complete independence.

India has been ruined economically. The revenue derived from our people is out of all proportion to our income. Our average income is seven pice (less than two pence) per day, and of the heavy taxes we pay, 20% are raised from the land revenue derived from the peasantry and 3% from the Salt Tax, which falls most heavily on the poor.

Village industries, such as hand spinning, have been destroyed leaving the peasantry idle for at least four months of the year and dulling their intellect for want of handicrafts, and nothing has been substituted, as in other countries, for the crafts thus destroyed.

Customs and currency have been so manipulated as to heap further burdens on the peasantry. British manufactured goods constitute the bulk of our imports. Customs duties betray clear partiality for British manufactures and revenue from them is used not to lessen the burden on the masses but for sustaining a highly extravagant administration. Still more arbitrary has been the manipulation of the exchange rate which has resulted in millions being drained away from the country.

Politically, India’s Status has never been so reduced as under the British regime. No reforms have given real political power to the people. Tallest of us have to bend before foreign authority. The rights of free expression of opinion and free association have been denied to us, and many of our countrymen are compelled to live in exile abroad and cannot return to their homes. All administrative talent is killed, and the masses have to be satisfied with petty village offices and clerkships.

Culturally, the system of education has torn us from our moorings, and our training has made us hug the very chains that bind us.

Spiritually, compulsory disarmament has made us unmanly, and the presence of an alien army of occupation, employed with deadly effect to crush in us the spirit of resistance has made us think that we cannot look after ourselves or put up a defence against foreign aggression, or even defend our homes and families from the attacks of thieves, robbers, and miscreants.

1 This pledge used to be taken on January twenty-six every year from 1930 to 1950.
APPENDIX V

We hold it to be a crime against man and God to submit any longer to a rule that has caused this four-fold disaster to our country. We recognise, however, that the most effective way of gaining our freedom is not through violence. We will therefore prepare ourselves by withdrawing, so far as we can, from all voluntary association from the British Government, and prepare for civil disobedience, including non-payment of taxes. We are convinced that if we can withdraw our voluntary help and stop payment of taxes without doing violence, even under provocation, the end of this inhuman rule is assured. We therefore hereby solemnly resolve to carry out the Congress instructions issued from time to time for the purpose of establishing purna swaraj.
SELECT BIBLIOGRAPHY

I: OFFICIAL PUBLICATIONS

India

Constituent Assembly Debates, Vols. II, IV, VII, IX, X.
Constitution of India (Draft).
Constitution of India (1950).
Constitution of India (As modified up to June 1975).
Debates of the Lok Sabha and Rajya Sabha (1950 to 1975).
Gazette of India, various issues.
India Code.
First Five Year Plan (1952).
Second Five Year Plan (1956).
Third Five Year Plan (1961).
Fourth Five Year Plan (1969).
An Approach to the Fifth Five Year Plan (1973).
Report of the Administrative Reforms Committee:
Reports of the Election Commission:
  First General Elections (1951-52).
  Second General Elections (1957).
  Third General Elections (1962).
  Fourth General Elections (1968).
  Fifth General Elections (Union) (1971).
Reports of the Finance Commission:
  First Finance Commission (1952).
Reports of the Union Public Service Commission (1950-1974).

England

Report of the Committee on Civil Service (Fulton Committee), London.

I. L. O.


II: BOOKS AND PAMPHLETS

Amery, L. S.: Thoughts on the Constitution.
Appleby, Paul H.; Policy and Administration, Alabama, 1949.
Aristotle: Politics.
Bacon: Essays.
Barker, E. : Principles of Social and Political Theory, Oxf. U. P., 1951,
Blackstone : Commentaries.
Blant, E. : The Indian Civil Service, 1937.
Bracton : De Legibus.
Coke : Institutes.
Corwin, E. S. : The Constitution and What it Means Today, 12th ed.,
S : CI—79


Gadgil, N.V. : *Government from India*.


SELECT BIBLIOGRAPHY

Inside Lok Sabha, 1955.
Parliamentary Government.
Muir, R.: How Britain is Governed.


Nayar, Kuldip: *Between the Lines*, Delhi, 1969.

Nehru, Jawaharlal: *The Discovery of India.*

*The Unity of India.*


*Social Control through Law*, New Haven, 1921.


Sharma, Sri Ram : *Parliamentary Government of India*.
                      (ed.) *Party-Building in a New Nation : The Indian National Congress*,
                      Chicago, 1967.
                      *Modern Constitutions*.
                      Sydney, 1962.

III : JOURNALS AND NEWSPAPERS


"Is the President of India a Mere Constitutional Head?" *S. C. J.*, 1961.


Bhargava, G. S.: "India is a Multi-Lingual Nation, Not a Multi-National State", *Economic Weekly*, No. 8, 1956, p. 4.


Mavalankar, G. V.: “Parliamentary and Social Democracy in India,”

Vol. XXX, No. 3; p. 265.

“Mahatma Gandhi, Political Philosopher,” I. J. Pol. Sc., Vol. 21;
p. 77.

Mukherjee, T. B.: “Supreme Court as Guardian of the Constitution


p. 51.

Narain, Iqbal: “Federalism in the New Constitution,” Modern
Review, Vol. 93, No. 6; p. 442.

p. 184.

LXXXXIV; p. 445.

Narayan, Jayaprakash: “Decentralised Democracy—Theory and

Vol. 23; p. 638.

Panikkar, K. M.: “The Citizen and the State,” Eastern Economist,
Vol. 36; pp. 571, 605.

Prasad, Rajendra: “The New Constitution,” Parliamentary Affairs,
London, Vol. 5; p. 420.

Ramchandran, V. G.: “Sir Ivor Jennings on the Indian Constitu-
tion,” A. I. R., Sept. 1957; p. 76.

“Sovereignty in the Indian Republic” A. I. R., 1956; p. 49.


p. 91.


Robson, W. A.: “India Revisited”, Political Quarterly, London,
March 1960; p. 422.

Vol. 21; p. 347.


*The Hindu*, Madras, various issues.

*The Hindustan Standard*, various issues.

*The Hindustan Times*, various issues.

*The Times of India*, various issues.

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