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# What is a Constitution?

The constitution of a nation is the Basic Law. It embodies the customs, mores , values, precedents, culture and so on . It is the Sacred Law that is the basis for the governance of the country. It established the political system; the institutions that make it; Legislature, Executive and Judiciary. All other institutions have to be compatible with the Constitution. Laws made and implemented should be in line with the Constitution.

Constitution also lays down what powers are available to the above mentioned institutions. It sets limits to the powers as well. The pattern of separation of powers among the three organs is also clearly demarcated in the Constitution- for example, in a parliamentary form , SOP is provided in a limited way. For example, India. In the US Constitution, it is stricter and more elaborate .

Constitution also empowers the citizens and others with a variety of rights embedded in it. There are many more rights outside the Constitution but their validity is judged by conformity to the Constitution. For example, the Criminal Law (Amendment) Act , 2013 protects women on a preferential basis but it does not violate right to equality as special treatment of women is legitimate under Art.15 of the Constitution. Right of Children to Free and Compulsory Education Act, 2009 is being taken up by a Constitution Bench of the apex court(2013) to ascertain whether the special rights conferred on the disadvantaged children are allowed by the Constitution or not.

In a democracy the purpose of a constitution is to prevent the government from abusing its power over the people of a nation. Therefore, judiciary is sanctioned by the Constitution to ensure rule of law and individual and collective rights.

Some Constitutions also imposed duties on the citizens- as in the erstwhile USSR and India since 1976, called Fundamental Duties. The objective is to build responsible citizenship.

The need for the Constitution arises because government is the only institution that has the legal right to force/coercion within a country and restrained use of force requires rules.

In most countries the constitution is a written document. India, the US, Australia, Canada and China and India and almost every other nation have a single written document. It means a body elected or nominated members meets for a prolonged period to deliberate with expert participation as to what should be the rules of governance .

If a country has a Constitution evolving out of conventions, laws , judicial verdicts and so on, it is known as 'unwritten'- for example, UK, New Zealand and Israel. The only reason for naming these constitutions as 'unwritten' is that a single body of experts was not set up to draft the Constitution like the Constituent Assembly of India which met from 1946 to 1949 to formulate the Constitution.

### **State**

The most commonly used definition of State is Max Weber's:It describes the State as a political organization with a centralized government that maintains a monopoly of the legitimate use of force within a certain territory. General categories of state institutions include administrative bureaucracies, legal systems, and military organizations.

According to the Oxford English Dictionary, a state is "an organized political community under one government".

States may be classified as sovereign if they are not dependent on, or subject to any other power or state. Other states are subject to external sovereignty or hegemony where ultimate sovereignty lies in another state. For example, a colony.

### **The state and government**

The concept of the state can be distinguished from the concept of government. That is, governments are the means through which state power is used. State is served by a continuous succession of different governments. State uses the instrument of Government to enforce its powers in the discharge of its duties.

Each successive government is composed of a specialized and privileged body of individuals, who monopolize political decision-making, and are separated by status and organization from the population as a whole. Their function is to enforce existing laws, legislate new ones, and arbitrate conflicts. In some societies, this group is often a self-perpetuating or hereditary class. In other societies, such as democracies, governments change on the basis of periodical elections.

States can also be distinguished from the concept of a "nation". Nation may refer to a community of people who share a common history , culture, some times ethnicity and so on. However, it can also refer to people who share a common territory and government (for example the inhabitants of a sovereign state) irrespective of their ethnic make-up; that is, a nation state

### **The state and civil society**

State is the political entity. Family is a private institution. All institutions that fall in between can be called civil society.

# **Constitution of India**

## **Outstanding features**

Indian Constitution was adopted on 26<sup>th</sup> November 1949 by the Constituent Assembly. It came into force on 26<sup>th</sup> January 1950. It has evolved over the last more than 63 years and is characterised by the following salient features:

### **Written Constitution**

Indian Constitution is a written Constitution. Written constitution is that which is drafted as a result of long process of discussion and deliberation by a representative body elected for this very purpose, for example Constituent Assembly of India( 1946-49); the Constituent Assembly of Nepal elected in 2008 with the mandate to draft and adopt a Constitution. An unwritten constitution, as in Britain, evolves from popular conventions, customs and traditions along with the social values and ideals. Israel also has an 'unwritten' Constitution- that is, there is no body like the Constituent Assembly that drafted it.

### **Drawn from many sources**

The Constituent Assembly, desirous of providing the best features in the Constitution, drew from many sources as shown below

#### **British Constitution**

- Parliamentary form of government
- Rule of law
- Procedure established by Law

#### **United States Constitution**

- Charter of Fundamental Rights
- Federal structure of government
- Electoral College to elect the President, though it is substantially different from the electoral college in India.
- Independence of the judiciary
- Judicial review

#### **Irish Constitution**

- Directive principles of state policy

## Australian Constitution

- Concurrent List
- Joint sitting of the Parliament

## French Constitution

- Ideals of Liberty, Equality and Fraternity

## Canadian Constitution

- A quasi-federal form of government —a federal system with a strong central government
- The idea of Residuary powers with Centre, in the federal distribution of powers

## Constitution of the Soviet Union

- Fundamental Duties(Art. 51-A) on the recommendations of Sardar Swaran Singh Committee 1976.

## Weimar Constitution

- Emergency Provision from Weimar Constitution of Germany. Weimar Constitution was the constitution that governed Germany during the Weimar Republic (1919–1933)

## **It is the most voluminous in the world**

Indian Constitution is the lengthiest in the world in terms of the number of articles. Originally, at the time of being adopted, it consisted of 395 articles but after 97 amendments(2013), it presently has about 450 articles. The 97<sup>th</sup> Amendment Act related to cooperatives added Art.43B in 2012. These are Articles are serialized into 25 Part. There are 12 Schedules to amplify and support the contents in the Articles. The reasons for the voluminous nature of the Constitution are

- There are detailed provisions for various aspects of administration in order to minimize conflict and confusion.
- Being a democratic country, there is a great need to lay down elaborately the rights of the individuals. There is a chapter on Fundamental Rights.
- A federal constitution has to detail the rights and jurisdictions of the centre and states. It is more so in India where much care is taken to spell out in detail the

powers of the states and centre. The idea is to prevent any constitutional conflicts and crisis in the working of the Constitution

- Since the Constitution draws from many Constitutions as shown above, it is bound to be lengthy.
- The size and diversity of the country with a pluralist tradition require that Constitution promote the same with detailed provisions. For example, language policy.
- Independent bodies Election Commission, Union Public Service Commission, Comptroller and Auditor General of India have been set up with elaborate provisions for powers, independence etc which are in other Constitutions not a part of the Constitution but only statutes.

### Parliamentary democracy

The Constitution of India adopts Parliamentary system of democracy in order to represent the pluralist tradition and interests of the country. In the parliamentary form, elected members of legislature provide the executive. That is, the Council of Ministers who make up the political executive are necessarily drawn from legislature in order to enforce the highest forms of popular accountability. The Council of Ministers is collectively responsible to the legislature. Council of Ministers enjoys power till they have support of the popular house, Lok Sabha of India. There are many devices in the Constitution and various statutes and rules with the Parliament holds the executive answerable. As a last resort, no-confidence motion is provided to vote out the council of ministers and either replace it with another party or coalition or have a general election to the Lok Sabha. Parliament has enormous power to make laws and amend the Constitution. But unlike in Britain where the Parliament can make any laws, in India, Parliamentary power is limited by the following: federalism gives some powers of legislation to Union and some to the states. Judicial review is another limitation. "Basic features" doctrine is one more limitation (Read ahead).

## Federal Polity with a Unitary Tilt

The Constitution contains all the basic features of a federation as shown below

- Sets up a dual polity- the Union Government and the State Governments
- Legislative, administrative and financial powers are divided between the two levels of government. All legislative powers are classified into three lists-the Union List, the State List and the Concurrent List. Subjects of national importance like banking, national security, currency, defence, railways, post and telegraph, foreign affairs, citizenship, etc have been given to the Union Parliament, being placed in the Union List. Items of provincial and regional importance like police, local self government, agriculture, law and order, health and entertainment have been given to the States, being a part of the State List. Neither can legislate on the other's List. However, under rare and special circumstances, Union Parliament can legislate on items in the State List. Concurrent List has subjects which are of common interest such as socio economic planning, marriage and divorce, adoption, succession, forests, transfer of property, preventive detention, education, civil and criminal law, etc. The Union Parliament and the State Legislatures enjoy co-equal powers to make laws in regard to the However, if there is a conflict between a Union law and a State law, the law made by the Union Parliament would prevail over the State law, according to the doctrine of federal supremacy.

- Each level of government being provided with its own sources of revenue
- Supremacy of the written Constitution
- Rigid constitution
- Independent judiciary to settle disputes among the federal units. Supreme Court under Art.131 has exclusive and original jurisdiction in federal matters

Even while the above listed essential features of federalism are found in the Indian Constitution, there is a strong unitary tilt. For example, states are not 'indestructible' as in the USA. Union Parliament can not only alter the area and boundaries of a state but can also abolish a state. The Parliament has the residuary powers- that is powers that may be left out of the three Lists detailed above. Emergency powers (Art.352 and 356) of the Union Government also turn the country into a unitary system.

Since 1992, with the making of the 73<sup>rd</sup> and 74<sup>th</sup> Amendment Acts related to Panchayatraj and Nagarapalika institutions respectively, Indian Constitution has added another tier to the federal system. However, powers and finances of the Panchayats are still left to the discretion of the state governments.

### Rigid as well as Flexible

An amendment to the Constitution may become necessary for any reason like national security, social progress, national integration and so on. The method to amend the Constitution is rigid in a federal polity- that is a special and elaborate method is prescribed involving both the Union and the States. A flexible constitution is one that can be amended like an ordinary law – states are not involved. Indian Constitution is rigid as far as amendment to the federal features are concerned. It is flexible for all other features, that is a special majority in the Parliament is enough for the Amendment Bill to be passed. Jawaharlal Nehru, while justifying this nature of the Constitution, said, "Our Constitution is to be as solid and permanent as we can make it, yet there is no permanence in a constitution. There should be a certain amount of flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living vital organic people." 97 amendments have been made so far (2012)

### Welfare State

At the time of Independence India was an impoverished country. There was large scale poverty and deprivation. Historically inherited social divisions marked the society. Since markets were not well developed and many were outside the economic system, Government took upon itself the responsibility to provide welfare to the vast majority of vulnerable people. Constitution has many features that commit the country to a welfare State. The Preamble to the Constitution was amended in 1976 (Forty-second Amendment Act, 1976) to insert the goal of socialism. Directive Principles of State Policy (Part IV) aim at the establishment of a Welfare State in India. Progressive taxation, developmental interventions like the various flagship programmes of the government (MNREGS), nationalization of banks in 1969 and 1980, land reforms and various subsidies are meant to establish a welfare state. Affirmative action (positive discrimination) by the Government in favour of the socially marginalised like dalits is an important aspect of the welfare state.

## **Fundamental Rights**

As a hallmark of the democracy that the Constitution establishes, Fundamental Rights are provided in Part III to citizens (Art.15,16,19,29 and 30) and others. They are fundamental to the development of the individual and the society and so they are called Fundamental Rights. They are given extraordinary protection with the Supreme Court being made directly accessible under Art.32 and High Courts under Art.226 to issue writs to restore the Fundamental Rights in case they are violated.

- The Fundamental Rights of India conferred by the Constitution are broadly classified under the following groups:

- The Right to Equality;
- The Right to Freedom;
- The Right against Exploitation;
- The Right to Freedom of Religion;
- Cultural and Educational Rights; and
- The Right to Constitutional Remedies.

The Right to Property was deleted as a Fundamental Rights by the Forty-fourth Constitution Amendment Act, 1978 and is made into an ordinary Constitution right (Art.300A).

## **Directive Principles of State Policy**

Borrowed from the Irish Constitution, Directive Principles of State Policy constitute a distinctive feature of Indian Constitution. DPSPs are a set of social and economic obligations imposed on the Government- Union and State- to establish a welfare society. They are not justiciable (non-implementation of the DPSPs cannot be challenged in courts) but are fundamental to the governance of the country (Art.37). Democratic decentralization through local self government, equitable distribution of wealth, welfare of workers, uniform civil code, improvement in the health standards of the people , commitment to contribute to international peace are some of the obligations that the DPSPs sets for the Government. Many amendments to the Constitution as well as landmark judgements of the Supreme Court have contributed to the implementation of the Directive Principles. For example, 86<sup>th</sup> Amendment Acts 2002- RTE. National Urban

Health Mission(2013). Food Security Bill that was introduced in the Parliament in December 2011. Indexing the MGNREGA wages to CPI(AL) in 2012.

### **Secular polity**

A natural corollary of a pluralist and democratic Constitution is secularism which has the following meaning

- State has no official religion
- State and religion are separated
- State has an equi-distant policy towards all religions
- All individuals have the right to pursue the religion of their choice

Additionally, in India minorities- both religious and linguistic- are given special protection (Art.29 and 30) so as to preserve the diversity within unity.

### **Unified, hierarchical and independent judiciary**

Indian Constitution provides for a single integrated judiciary headed by the Supreme Court. Each state, or a group of them, has a High Court with administrative control over the subordinate judiciary (district and below) . It is unlike in the USA where there are two sets of courts- one for each state and one for federal laws and matters. In India, Supreme Court can be approached to challenge any verdict of the High Court and other courts. Such a system plays an important integrating role and maintains the unity of the country. Thus, it is said that the Supreme Court has a 'unifying effect' on the country.

The Constitution contains many provisions for an independent and impartial judiciary. For example, the judges of the Supreme Court and the State High Courts have security of service. Independence of judiciary ensures that there is no pressure on the judiciary to be biased. The judges can be objective and impartial.

## Judicial review

The laws made and enforced are reviewed by the judiciary for their legality and constitutionality. It protects the Constitution; prevents abuse of law; and empowers citizens. In the last more than 3 decades, review powers have assumed activist dimensions expanding the scope of citizen rights.

## Universal adult franchise

The Constitution provides for Universal Adult Franchise. The citizens of India who are 18 years of age and above have been granted the right to vote irrespective of any qualification pertaining to education, possession of property or payment of income tax. To bring the Scheduled Castes and Tribes at par with the other communities of the country, some seats have been reserved for them in the Union Parliament, State Legislatures and local bodies in accordance with their population. There are reserved parliamentary and assembly constituencies from where only the members of the Scheduled Castes or Tribes can contest elections. Rajya Sabha in 2010 passed Constitution Amendment(108<sup>th</sup>) Bill to give reservation to women in the popular Houses of Union and State legislatures. Representation of People's Act was amended by the Parliament in 2010 to allow voting rights for Non-Resident Indians (NRIs)

## Basic Features

Since 1973, as a result of the Keshavananda Bharati case verdict of the Supreme Court, the doctrine of basic features was introduced into India's Constitutional jurisprudence under which certain features of the Constitution may be pronounced 'basic' by the apex court and kept out of the reach of Parliament's amendment power which is found in Art.368.

# PREAMBLE

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

**JUSTICE**, social, economic and political;

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

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

**FRATERNITY** assuring the dignity of the individual and the unity and integrity 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 Constitution (42<sup>nd</sup> Amendment) Act 1976 introduced three words - socialist, secular and integrity- into the Preamble. A committee under the chairmanship of Sardar Swaran Singh recommended that this amendment be enacted.

Preamble contains the essence of the Constitution- its values and goals. It is a microcosm of the Constitution and has the following significance

- It categorically says that people of the country are sovereign
- it has many of the 'basic features' of the Constitution
- if there is any lack of clarity in the Constitution, the judiciary turns to the Preamble in its interpretation of the relevant provisions

The Supreme Court, in the Berubari case (1960) ruled that Preamble is not a part of the Constitution but in the Keshavananda Bharati case in 1973 reversed its earlier verdict and ruled that Preamble is a part of the Constitution. Though it is not counted as a Part, it is an organic part of the Constitution.(Remember Part I of the Constitution is Union and its Territory) Preamble is not enforceable. However, the Preambulary values are found in many Parliamentary and state laws and if they are violated, punishment is meted out. For example, laws related to secularism, elections , social justice and so on.

According to the Supreme Court, In the Keshavananda Bharati case 1993, Preamble cannot be amended. Amendment, when it means abridgement, is not allowed. That is, Preamble can be enriched but not restricted.

## Preambular values

### Sovereignty

Sovereignty is a characteristic of governments of all independent countries. It means that there is no authority above the government either outside or inside the country. Government itself is the choice of the people expressed through periodical elections, in democratic countries. Even if a country were not democratic, its sovereignty is undeniable. Sovereignty is the modern notion of supreme political authority within a territory. According to the Preamble of the Constitution, people of India are sovereign. That is, Preamble establishes popular sovereignty which means that no law or rule is legitimate unless it rests directly or indirectly on the consent of the people. All modern democracies are based on popular sovereignty. According to some constitutional experts, the word 'people' in the Preamble means representatives of the people in the Parliament and thus implies parliamentary sovereignty in an indirect democracy like ours. However, Indian parliament is not sovereign as ours is a federal country where the powers of Parliament are restricted and shared with the states. Indian parliament is not sovereign also for the reason that the laws it makes are subject to judicial review. Whether the laws made by the Parliament are constitutionally compatible or not is ruled by the judiciary.

Supreme Court, by virtue of its powers to uphold the Constitution, imposed limitations on the powers of the Parliament to amend the Constitution in the form of 'basic features' (Keshavananda Bharati case 1973) in which the Court held that Parliament could amend any part of the Indian Constitution except the 'basic features'. Thus, Indian Parliament is not sovereign but has enormous powers.

### Socialism

The word 'socialist' was added to the Preamble by the 42<sup>nd</sup> Amendment Act in 1976. Socialism means ownership of productive forces by the Government so that they benefit people equitably. Private ownership can deepen inequalities and create and perpetuate divisions. Public ownership and control can reduce the disparities and ensure equitable enjoyment of resources. That is, disparities in socialist society are not as steep as they are in market societies. Distributive justice is a part of the socialist societies.

Since 1991, there is a new direction to Indian economic system towards greater role for markets in economic development and retreat of state. It has triggered a debate as to whether the Constitutional goal of socialism is being implemented or not. However, the basis for the new economic policy centered around liberalization of economy is to generate wealth which in turn can be distributed to all sections. Markets have proven their value as wealth generators. Government continues to play an active role in social security and distributive justice. There is a campaign for compassionate capitalism in the wake of the global economic turmoil since 2009.

Thus, while India continues to strive for the Preambular value of socialism, the method of achieving the goal is modified towards market forces playing a greater role in the economy.

In 2010, Supreme Court dismissed a petition filed by an NGO arguing for the removal of the word 'socialist' from the Constitution's Preamble. The challenge under PIL comes from the fact that Section 29A(5) of the Representation of People Act, 1951 requires that each political party have a memorandum of association. This memorandum must include a specific provision that the 'body shall bear true faith ... to the principles of socialism, secularism and democracy'. Without this, a body cannot be recognised as a political party. Otherwise, the Election Commission can derecognize the party.

The Court's reasoning was that since no political party has objected to it, and that the Election Commission has not yet had an occasion to derecognise a party that refuses to reaffirm its commitment to 'socialism', there really is no cause, other than the academic importance of the question, that merits the hearing of this case.

In 2013, A PIL in the Bombay high court sought an interpretation of the term socialist as used in the preamble to the Constitution of India. The PIL does not challenge the government's policy as being unconstitutional, but wants the HC to put to test the relevance of the term socialist in the Constitution given the various policy decisions of the government that are contrary to it, particularly since the liberalization of economy began in 1991.

The PIL pointed to debates of the Constituent Assembly where Dr B R Ambedkar himself in 1948 said: "What should be the policy of the State, how the Society should be organized in its social and economic side are matters which must be decided by the people themselves according to time and circumstances. It cannot be laid down in the Constitution itself, because that is destroying democracy altogether." But in 1976 by the 42nd amendment the word "socialist" was added making the preamble read "...to constitute Indian into a sovereign socialist secular democratic republic." In simple terms, socialism according to the Constitution, though undefined, means the egalitarian measures related to social and economic justice detailed in the Chapters on FRs and DPSPs.

### **Secularism**

Secularism means separation of religion from politics. Religion is private while politics is public. That is one explanation. Another perspective is that if religion and politics are mixed, it may create social tensions and disturb democracy.

Also, in a multi-religious society like India, democracy necessarily means secularism: pluralism being the essence of democracy , all religions should be given equal right to exist. Secularism means equidistance of the State towards all religions- State should not show discrimination either positive or negative towards any one religion. All individuals have the right to follow religion of their choice while respecting the same right of others.

## **Democracy**

Democracy means rule by people. Effectively, it is the adult population which constitutes the electorate- based on universal adult franchise- that is the foundation for democracy. Periodical elections are held to constitute parliament to govern the country. Democracy is pluralism. Plurality of opinions, parties, ideologies, languages, religions and cultures coexist and flourish without any discrimination. Other important features of democracy are rule of law, independent judiciary, and individual rights and so on.

## **Republic**

Republic is a political order in which the supreme power lies in a body of citizens. Will of people is the basis for governance. Public offices are thrown open to all citizens .It also means a country where the Head of State is elected and is not a hereditary institution like the monarchy in Britain. Republican values, like democratic values are aimed at empowering the citizen.

## **Justice**

Justice is a concept involving the fair and moral treatment of all persons, both in the formulation and enforcement of law. It is often seen as the effort to define and do what is "right." It involves reward for doing right and punishment for deviating from it. Preamble speaks of social, political and economic justice. Social justice means the whole society should progress without some sections falling behind and exploited. It is inclusive growth .Equal treatment for all people independent of gender, caste, religion, language or any form of ethnicity is a part of social justice. Social protection programmes are initiated by the Government and corporate agencies and NGOs to ensure that the weak and impoverished are uplifted and, at any rate, are not allowed to become weaker.

Similarly, economic justice means ensuring that growth benefits all by alleviating poverty and generating jobs. If growth does not positively impact on all, the government takes up distributive justice programmes in to supply essential goods at affordable prices and so on.

Political justice means all citizens are given the right to vote and stand for political office except those who are not adults or below the age prescribed for the office and are not mentally sound or barred for violation of law.

## **Liberty**

Liberty is derived from the Latin word 'liber', which means freedom, from slavery, imprisonment etc. It was one of the goals of the French revolution along with equality and fraternity. It is the essence of democracy. Liberties are always associated with reasonable restrictions. Liberty of thought, belief, faith and expression are essential to the development of the individual and the society.

### **Equality**

Equality of status means equal treatment under law, independent of one's status. For example, caste, gender, property and so on can not be basis for conferment or denial of duties, rights and privileges. Equality of opportunity is a refinement over the basic concept in that it seeks to empower the marginalized sections with additional rights and government policies. The basis of the concept of equality of opportunity is that formal equality does not in reality benefit all equally. The vulnerable sections of society need additional protection and preference in education and employment. For example, affirmative action as contained in Art.15 and Art.16 in favour of the SC/ST and the OBCs.

### **Fraternity**

Fraternity means common brotherhood of all Indians. It asserts that social divisions will be removed and integration achieved as emotional integration is the goal of national integration. One common citizenship the feeling of 'being Indian first' is the nature of fraternity.

### **Importance of Preamble**

The Preamble is a part of the Constitution as ruled by the Supreme Court in the Keshavananda Bharti case,( 1973) but is in itself not enforceable. Its primary utility lies in helping clarify the essential character of the Constitution to judiciary in case of ambiguity in the Constitution. For example, cases are pending in various High Courts and the Supreme Court whether India's accession to the World Trade Organization (WTO) is compatible with the objective of socialism. Judiciary may rule on the question taking assistance from the Preamble in this regard.

According to the Supreme Court, in the Keshavananda Bharati case, Preamble is a part of the basic framework of the Constitution and can not be amended. Amendment, when it means abridgement, is not allowed. That is, Preamble can be enriched but not restricted.

In fact, Government has enormous social, economic and political obligations flowing from the Preamble- building a socialist pattern of society; equality of opportunity (affirmative action); deepening democracy by enlisting active participation of all social groups; ensuring that globalization and liberalization do not erode the sovereignty etc.

# **UNION and its TERRITORY**

Art.1 says that India, that is Bharat, is a Union of States.

There is an opinion that the term 'Union of States' implies that India is a unitary system of government and is federal only in a secondary sense. However, the following explanation dispels such an interpretation.

In the Constituent Assembly, the Drafting Committee decided in favour of describing India as a Union, although its Constitution is federal in structure. Moving the Draft Constitution for the consideration of the Constituent Assembly in 1948, Dr.Ambedkar explained the significance of the use of the expression "Union" instead of the expression "Federation". Three reasons are given

- Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source."
- The expression- India is" a Union of States" was chosen as India was already a Union at the time of the Constituent Assembly debates.
- Further, there is a school of thought that federal constitutions grant the provincial units the right to break away and since India does not give any such rights to the states, it is not warranted to call ourselves federal

India is a Union of 28 States and seven centrally administered Union Territories, including the National Capital Territory of Delhi.

The States and UT's found in the First Schedule of the Constitution are Andhra Pradesh, Arunachal Pradesh, Assam, Bihar, Chhattisgarh, Delhi, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mizoram, Nagaland, Orissa, Punjab, Rajasthan, Sikkim, Tamil Nadu, Tripura, Uttarakhand, Uttar Pradesh and West Bengal. The Union Territories- centrally administered territories, are Andaman and Nicobar Islands, Chandigarh, Delhi, Daman & Diu, Dadra & Nagar Haveli, Lakshadweep and Pondicherry.

There are two expressions used in the context of governance in India-' Union of India' and 'Territory of India' : the former includes States that share federal powers with the Union Government and is a political expression; the latter includes not only States but all other units like UT's and so on and thus is a geographical expression. In other words, territory of India encompasses a larger area than Union of India. That is, Territory of India encompasses the entire territory over which Indian sovereignty is exercised while Union of India covers only the federal system.

\* Government of India can acquire any territory by purchase, treaty, cession, conquest or any other method administer it on the basis of Parliamentary Act.

The States and the territories thereof are specified in the First Schedule. 'The territory of India' comprises of the territories of the States; the Union territories specified in the First Schedule; and such other territories as may be acquired. For example, Sikkim in 1974 and Puducherry (Pondicherry then) in 1950's.

Art.2 says that the Parliament may by law admit into the Union, or establish, new States on such terms and conditions, as it thinks fit.

**Art 3. Formation of new States and alteration of areas, boundaries or names of existing States:-** Parliament may by law:-

- form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;
- increase the area of any State;
- diminish the area of any State;
- alter the boundaries of any State;
- alter the name of any State;

The relevant Bill may be introduced in either House of Parliament only on the recommendation of the President. The Bill should be referred by the President to the Legislature/Legislatures of the State/States for expressing views within such period as may be specified in the reference. Such period may be extended by the President. The opinion of the State Legislature/s is not binding on the President. The Bill needs to be passed by the Parliament by a simple majority.

Art.4 says that laws made under Articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters are not to be deemed to be an amendment of this Constitution for the purposes of Article 368.

There are instances where the State legislatures have passed resolution for creating new states. But Constitutionally, states can not initiate the process of creation of states etc. It has to start from the Union Council of Ministers advising the President to recommend the introduction of the Bill in the Parliament.

Uttar Pradesh assembly in November 2011 passed a motion by voice-vote to divide the state into four smaller parts. The resolution was for dividing UP into — Poorvanchal, Paschim Pradesh, Awadh Pradesh and Bundelkhand. It has only suggestive value but no material significance in Constitutional terms.

### **Is the process of creation and abolition of states unitary?**

A federation is one consisting of 'an indestructible Union of indestructible States' as in the USA. India, though a federation, has Constitutional mandate for the abolition of a state. That is, in India, states are not 'indestructible'. A state can be abolished or merged with another state. Its boundaries, area and name can be changed. The process is initiated by the Union Government and the role of the affected state is only to express its opinion which is not binding on the Union Government. Parliament needs to pass the Bill only by a simple majority. The Council of States (Rajya Sabha) which is the representative of states does not have any special powers in this matter. Thus, the process is unitary. However, there are certain aspects that require consideration

- President is given the power to refer the Bill to the state concerned. The Bill can not be introduced in the Parliament without the Presidential recommendation. It acts as a check to politicise the matter to serve the partisan interests of any political group.
- The need for political reorganisation and integration after Independence even in the face of any provincial resistance was the overriding factor. 600 Princely states that were undemocratic had to be absorbed into India and had to be made parts of different states for democratic and administrative reasons.
- The Constitution was drafted at a time when the country was partitioned and the danger from centrifugal tendencies made the Constituent Assembly members feel the need for a strong centre.

It is true that the provisions in Art. 2 and 3 are unitary in content. But, as shown above, the need to centralize power was strongly felt across the political spectrum.

In recent years, however, there has been an opinion that the Union is strong after 65 years of Independence and states may be given more powers including the power to influence formation of new states.

### **The case of Pondicherry (Puducherry)**

It is a former French colony. A treaty of cession was signed by India and France in 1956. It was ratified by the French parliament in 1962. Till 1962, therefore, it could not be given the status of a Union Territory and was given the status of 'acquired territory'. In 1962 India and France exchanged the instruments of ratification under which France ceded to India full sovereignty over the territories it held. It came to be administered as the Union Territory of Pondicherry from 1963. Parliament in 2006 passed a Bill to rename the Union Territory (UT) of Pondicherry as Puducherry in response to the wishes of the people of the Union Territory expressed through a unanimous resolution by the legislative Assembly in 1980. The Bill amends Part VIII, the First and Fourth Schedules of the Constitution and the Government of Union Territories Act 1963.

Puducherry encompasses four regions - Puducherry, Karaikal (near Nagapattinam in Tamil Nadu), Mahe (near Thalassery, Kerala) and Yanam (near Kakinada, Andhra Pradesh).

### **The case of Sikkim**

Sikkim was originally a protectorate\* of India. Reflecting the wishes of the people of Sikkim , the Constitution (Thirty-fifth amendment) was passed in Parliament in 1974 to up-grade the status of Sikkim from a protectorate to an associate state of the Indian Union.

Sikkim Assembly unanimously adopted a resolution in 1975, abolishing the institution of the Chogyal ( royalty) and declaring Sikkim as a constituent unit of India. The Assembly also resolved to submit its resolution to the people of Sikkim by way of a general referendum. Consequently , Parliament made the Thirty- sixth Constitution Amendment Act in 1975 and Sikkim became the 22<sup>nd</sup> state of the Indian Union.

\*In international law, a protectorate is a political entity that formally agrees by treaty to enter into a relationship with another, stronger state, called the protector, which agrees to protect it (diplomatically or militarily) against third parties, in exchange for which the protectorate usually accepts specified obligations.

### **Union Territories**

The reasons for having UTs differ with the Union Territory in question. General reasons are:Unique history; geographical size/location ; cultural heritage; Inter-State disputes; need for territories administered by the Union Government.

Specific reasons are

- 1 Delhi - capital of India.
- 2 Puducherry - French colonial & cultural heritage - small far-flung areas.
- 3 Daman & Diu - Portuguese colonial & cultural heritage- far from Goa.
- 4 Dadra & Nagar Haveli - Portuguese heritage - far from Goa, Daman & Diu.
- 5 Andaman & Nicobar - group of islands deep into the Bay of Bengal - far from the mainland.
- 6 Lakshwadweep - group of small islands deep into the Arabian Sea - far from mainland.
- 7 Chandigarh - dispute between states of Punjab & Haryana - Punjab Accord - awarded to Punjab - transfer not yet through - continues as UT.

### **Creating New States**

Even before Independence, Government was exploring the appropriate basis for states reorganization. Dhar Commission was set up by the President of the Indian Constituent Assembly in 1948 to consider the question of reorganization of states in India. The Commission favoured reorganization on the basis of administrative efficacy and not language. The Indian National Congress at its Jaipur Session (1948) set up a high level committee called Linguistic Provinces Committee -consisting of Jawaharlal Nehru, Vallabhbhai Patel and Pattabhi Sitaramiah to consider the Dhar Commission's recommendations. In its report (J.V.P. Report) the Committee counseled utmost caution in proceeding with the proposal for the linguistic reorganization of states.

Political movements for the creation of new language-based states emerged after independence. The Telugu-speaking people agitated in Madras State for the formation of separate Andhra. In 1953, the 16 Telugu-speaking districts of Madras State became the new State of Andhra. It comprised Coastal Andhra and Rayalaseema Regions. In 1956 Andhra State was merged with the Telangana region of Hyderabad State to form a united Telugu-speaking state of Andhra Pradesh.

Jawahar Lal Nehru subsequently appointed the States Reorganization Commission (1953) that included Fazl Ali, KM Panikkar and HN Kunzru. In 1955, the States Reorganization Commission submitted its report recommending that many British-imposed administrative boundaries be redrawn to recognize certain regional, cultural, and linguistic configurations. The change was justified on the basis of administrative efficiency - the use of a single language in a given state. Explaining the criterion of language as the basis for constituting a state, it said: Linguistic homogeneity provides the only rational basis for reconstituting the state, for it reflects the social and cultural pattern of living obtaining in well defined regions of the country.

The four criteria laid down by the States Reorganisation Commission (SRC) for accepting the demand by a region for the formation of a State are:

- Creation of new States should strengthen and preserve national unity.
- States are to be formed on the basis of linguistic and cultural unity.
- Financial, administrative and economic viability should govern the formation of new states.
- It should aid the process of implementation of five years plans.

Parliament passed the States Reorganization Act (1956) that was based on the SRC report. This was the beginning of states' reorganization in India on a linguistic basis. It was a major development toward incorporating cultural identities into political and administrative units. The reorganisation of states and federal devolution of resources strengthened cultural diversity. Linguistic reorganization of states was the only viable model as it helped administrative efficiency; greater citizen convenience; effective management of diversities and thus strengthening the federal system of governance. It prevents fissiparous tendencies like separatism and disintegration.

Formation of States in India on the basis of languages in 1956 was because language represented relatively acceptable base in comparison to other contending criteria like geography, ethnicity, ecology, economic development and so on.

#### **States Reorganization Act 1956 and Constitution(Seventh )Amendment Act 1956**

The States Reorganization Act of 1956 was made to implement the recommendations of the SRC for linguistic reorganization of states and to revamp the territorial limits of India's states and territories. The Constitution(Seventh) Amendment Act was made to amend the Indian Constitution to replace the three types of states, known as Parts A, B, and C states, with a single class of states.

In order to understand the significance of the SR Act 1956 and the Constitution (Seventh) Amendment Act 1956, the nature of political and administrative organization under the British needs to be followed. British India had two types of territories

- provinces, governed directly by British officials who were responsible to the Governor-General of India and
- princely states under the control of local hereditary rulers having British government as the sovereign but enjoying autonomy based on a treaty

When India became Independent on August 15, 1947, British government dissolved their treaty relations with the over 600 princely states, who had the option of acceding to either India or Pakistan. Most of the princely states joined India. Hyderabad was incorporated into India after armed intervention.

In the three year period during 1947-1950, the princely states were politically integrated into the Indian Union- either merged with the existing provinces or organised into new provinces.

The Constitution of India , when it came into existence on January 26, 1950 had three classes of states.

- The nine Part A states, which were the former governors' provinces of British India, were ruled by an elected governor and state legislature.
- The eight Part B states were former princely states or groups of princely states, governed by a rajpramukh, who was often a former prince, along with an elected legislature. The rajpramukh was appointed by the President of India.
- The ten Part C states included both the former chief commissioners' provinces and other centrally administered areas except Andaman and Nicobar islands. The chief commissioner was appointed by the President of India.

The States Reorganization Act 1956 brought about linguistic reorganization of the states under which absorbed the former British provinces and princely states on the basis of language. The Seventh Amendment to the Constitution (1956) abolished the difference between Part A and Part B states- both became "states" constituting a single category. Part C states were renamed "union territories." The personal privileges of the princes - the privy purse, the exemption from customs duty etc continued till they were abolished in 1971.

### Criticism of Linguistic Reorganization of States

The linguistic reorganization of the states encouraged various ethnic groups to demand statehood. This was because ethnic identity was provided a territory under the scheme of linguistic reorganization. Such potential has been further sharpened because linguistic reorganization in a vast and diverse country like India cannot satisfy the cultural aspirations of all cultural and ethnic groups. The dissatisfactions of some of the unrecognized minority linguistic groups also continue to simmer. Such problems exist with regard to the Konkan region of Maharashtra/Goa, Nepali-speaking groups of Darjeeling, Sikkim, and Assam, and Maithili and Avadhi language groups in Bihar. There

are several political parties which are ethnicity-based, and they build their strength by exploiting the linguistic identities of their constituencies. Demand for Telangana state shows the linguistic basis for creation of states is at best a partial remedy or no solution at all. Development takes centre stage in the formation of new states after the linguistic reorganisation of states has been completed.

The Sarkaria Commission (1988) hinted at weaknesses of the linguistic reorganization of states in this respect when it said:

Very often, the sub-national sentiment which is initially based on linguistic, religious or ethnic groupings, gains strength with a blend of economic issues, such as those relating to... economic backwardness. One of the most significant developments has been the rise of linguistic chauvinism, rearrangement of the boundaries of the States on linguistic basis... resulting in fissiparous tendencies.

Three new states were created in 2000 not on the basis of language but primarily for economic growth and good governance: Jharkhand, Chhattisgarh and Uttarakhand.

Since the SRC report was acted upon first in 1956, many new States came into existence first in South and West and later in the Northwest and the Northeast. The last phase of the reorganization was in the north and the Central India in 2000. There are demands for new States still like Harita Pradesh (western UP); Bundelkhand(UP);Koshal (western Orissa); Telangana (AP); Kodagu (Karnataka); Vidarbha (Maharashtra); Jatland (Haryana); Ladakh (Jammu and Kashmir); Bodoland (Assam); Gorkhaland (West Bengal); UTs of Pudicheri and Delhi.

Needless to say, the demands could not be met as it would lead to proliferation of states to a point of making federal coordination difficult; they are not economically viable; national unity would be threatened ; small states may be unable to tackle political threats like naxalism; small states are not necessarily better governed as seen in Jharkhand and the north east; political instability due to fractured verdicts with Independents deciding crucial issues of government formation and survival ;administrative problems about creation of institutions like High Court ; Secretariat etc; the costs of setting up a capital etc, to name some general reasons.

#### **Experience of new states created in 2000**

Uttarakhand, a hilly state recorded rapid economic growth and social gains and thus outperformed UP. New tax breaks and a surge in tourism helped.

Chhattisgarh, backward but resource-rich and once a part of Madhya Pradesh, is doing much better economically than before with consistently high growth.

Jharkhand in eastern India has faltered after separating from Bihar. But Bihar itself has thrived, with double-digit economic growth and striking social progress since separation. While the reasons for the impressive gains of two small states and the third parent state are many and leadership, improved administration and the overall positive growth

climate in the country were helpful, the fact also remains that the earlier oversized states did deter uniform and robust growth and social development.

Ramachandra Guha, eminent historian holds that the creation of linguistic states has safeguarded the unity of India. Pakistan was divided, and Sri Lanka subject to a protracted civil war, because Bengali speakers in the one case and Tamil speakers in the other were refused the autonomy and dignity they wanted and deserved. On the other hand, the fact that in India citizens are free to educate and administer themselves in their own language has created a feeling of comfort and security.

He further says: Linguistic states were crucial at one stage of Indian history, but have they now outlived their usefulness? In north Karnataka, in the inland districts of Andhra Pradesh and of Maharashtra, and in the hilly districts of northern Bengal — in all these places there are vigorous movements calling for separation from the parent province. Are these movements legitimate, and will they persist? Or are they spurious and hence to be disregarded?

The answer lies in a case by case study of these movements. There may be a case for 2<sup>nd</sup> SRC to consider the historic experience with states reorganisation; lay down new principles for formation of new states; and recommend solutions for the demands we have witnessed so far.

Ram Guha like many others believes that linguistic states were necessary in the first, early, stages of Indian independence, it may now be time for a further reorganisation of states. The proponents of Telangana, Vidarbha, and Gorkhaland all have a robust case. Their regions are well defined in an ecological and cultural sense, and have historically been neglected by the more powerful or richer parts of the State. Likewise, Uttar Pradesh is far too large to be administered as a single unit. Breaking it up into three or four states would lead to more effective and focused governance. After 65 testing years of independence, there need no longer be any fear about the unity of India. The country is not about to Balkanise(break up). The real problems in India today have to do with the quality of governance. Smaller states may be one way to address this problem. All states and UTs believe that the robust democracy of India and the prospect for prosperity can not be compromised with and this feeling justifies creation of new states where ground realities justify the same.

### **Big States or Small States?**

States reorganization has been taking place since mid-fifties-first in south and later in northwest and northeast and now in the northern, central and eastern India so that big states are made more governable through bifurcation on linguistic, cultural, ecological, economic or any other criterion or a combination of them. The case for small states rests on

- big states needed to be divided for administrative viability
- better system of administration through participative planning

- avoid neglect of certain regions and sections of society
- remove regional economic imbalances etc.

Examples of Haryana, Punjab and Himachal Pradesh are shown as successful small states. Northeast is cited to show that without the reorganization, there would have been greater levels of insurgency. The above analysis shows that the creation of small states in 2000 has produced dividends.

While there is no opposition to carving more states out of the big states like Bihar, MP and UP as social and economic indicators show that for reasons of governability, there should be bifurcation, the costs are cited as the following

- viability problems creating fiscal stress for Centre
- more demands by other regions
- leave the parent state with drastically reduced resources
- federal coordination becomes difficult
- higher rates of taxation on citizens to raise the required resources for the following reason: when a UT becomes a State, it foregoes financial assistance that it enjoys as a UT. It necessitates resort to higher taxation to compensate for the central assistance that is no longer available.

According to some development experts, the need for division of big states is undeniable but the debate regarding the desirability of small states is basically one of how to enable balanced development and facilitate better administration. According to them, the answer lies in Local self government institutions; institutionalization of regional planning through autonomous councils etc; sustaining the existing funding mechanisms through Planning Commission (Gadgil formula for plan assistances) and Finance Commission-mediated transfers on the basis of poverty; special category states etc.

Another policy that the GOI adopted is to give concessional funds to underdeveloped states for growth and political stability so as to prevent demands for smaller states. Special category status for certain states has been given to transfer funds to them for plan projects at concessional terms by the Planning Commission. 90% of the financial transfers for planned projects are grants and the rest is loan which is very different from the terms at which other states receive funds – 70% loan and 30% grants.

Given the sensitivities associated with proliferation of States, the need is to take the following measures for the improvement of governance and welfare.

### **Second SRC**

It is true that the substantial part of political reorganization of states has been completed – initially on the basis of language and later on developmental lines. It is very clear that the linguistic division of states has played a crucial role in holding a diverse country like India together. The task however is not complete: there are many regions demanding separate statehood. It may lead to deepening democracy; reduction of regional imbalances; expeditious development and so on.

In this context a second SRC is being recommended to look back at the reorganization so far; what are the outcomes and experiences; what general and specific principles can be laid down for formation of states; can the states concerned have a greater say as there is a resurgence of regionalism in the country and so on.

Besides, twenty years of economic liberalisation has fundamentally altered the political economy of India. Regional imbalances have grown and have created political tensions. Regionalist sentiment is on the rise and requires solution. Therefore, a Second State Reorganisation Commission is necessary to redraw India's federal map, creating many smaller states keeping in mind economic viability and political stability.

The demand for statehood has the following explanatory factors :

- “Development deficit” due to the uneven development of the country is one reason. Those regions that have not seen fruits of growth want a new state.
- Population explosion- electorate today is about 70 crores which is a five fold increase over the 1950’s figure. It has created pressures that have found expression as demands for special status.
- Cultural identities have become the basis for political agitations for separate statehood which is partly the offshoot of language-based statehood followed since 1950’s.
- Political parties also are instrumental in encouraging such demands for their own ends.

So far, a range of Constitutional and non-Constitutional mechanisms have been put in place to satisfy demands for autonomy and respect for cultural identity . They are

- special category states like the north east, Himachal Pradesh, Uttarakhand etc that receive central plan assistance at liberal terms
- there are autonomous councils as in Ladakh, Darjeeling, Bodo where regions enjoy autonomy in administration
- development boards (Art. 371(2)) for the backward regions of the states of Maharashtra and Gujarat
- Finance Commission recommends more finances in terms of tax share and grants for the underdeveloped states
- 73<sup>rd</sup> and 74<sup>th</sup> Amendment Acts for local self government strive to satisfy local aspirations through decentralized governance
- Inclusions of languages in the 8<sup>th</sup> schedule of the Constitution for the cultural development of the people.
- Sixth Schedule benefits

In spite of the above facilities, there is a feeling that a second SRC be formed to recommend further steps.

### **Vijay Kelkar Committee on Balanced Regional Development**

Maharashtra Government in 2011 setup a Committee to study 'Alternative approaches to balance regional development in Maharashtra State' under leadership of renowned Economist and Ex-Chairman of 13th Finance Commission Dr. Vijay Kelkar. This is the second such committee, after one chaired by Dr. V M Dandekar, which had submitted its report in 1984. The New Committee will recommend measures to achieve a balance growth and improvement in Human Development Index in the State of Maharashtra.

It is expected to submit its report in 2013. It is expected to recommend greater and immediate attention to the problems of Gadchiroli, Chandrapur and other Naxal affected districts as unless attention was paid to the developmental concerns of the region, there could be difficulty in maintaining law and order.

Democratic decentralization of governance may also receive adequate attention as local bodies should get more funds in state budget. State of Kerala reserves 33% of funds for local bodies and may have to be emulated.

Kelkar Committee is expected to look into the potential of development of each region in various social and economic sectors. A mechanism for continued guidance regarding future allocations to be made by the government in various sectors is necessary and also to suggest mid term corrections wherever necessary. The need for a monitoring mechanism of region-wise expenditure has been stressed by many.

### **Nation, State and Nation-State**

While the terms Nation and State are often used interchangeably, there is a difference. A State (note the capital "S") is a self-governing political entity within certain geographical boundaries internationally recognised. A "state" (with a lower-case "s") is usually a division of a federal State (such as the states of India). Nations are culturally homogeneous groups of people, larger than a single tribe or community, which share a common language, institutions, religion, and historical experience. When a nationality has a State of its own, it is called a nation-State. There are some States which have two nations, such as Canada and Belgium. There are nations without States: Kurds and Palestinians are stateless nationalities.

A State is characterized by the following:

- Has territory which has internationally recognized boundaries
- Has people who live there on an ongoing basis.
- Has sovereignty, that is ,no other State should have power over the State's territory, people and resources. There is no authority, in within or outside, that has control over the Government
- Has external recognition by other States.
- Has economic activity and an organized economy; regulates foreign and domestic trade and issues money.
- Has a government which provides public services and police power.

India, like all other countries, is a nation in making.

## Telangana

An early expression of regionalism was the Telangana movement in the state of Andhra Pradesh. The region consists of 10 northwestern districts of Andhra Pradesh including the state capital, Hyderabad with a population of 3.5 crores. The Krishna and Godavari rivers flow through the region from west to east. In 1953, based on the recommendation of the States Reorganisation Commission, Telugu-speaking areas were separated from the former Madras States to form Andhra, India's first state established along linguistic lines. Telangana was merged with Andhra to form the new state of Andhra Pradesh in 1956.

The concerns about Telangana stem essentially from economic under-development. Compared to the coastal region, the contrast is stark. Being backward, people of Telangana had the disadvantage in education and jobs. The Telangana movement grew out of a sense of neglect. The movement demanded redress for economic grievances and recognition of a sense of cultural distinctness. The local disadvantaged people of Telangana are called Mulkis.

The 1956 "gentlemen's agreement" provided reassurances to the Telangana people in education, jobs and ministerial berths. The use of Urdu was to continue in the administration and the judiciary. A Regional Council for Telangana was to be responsible for economic development, and its members were to be elected by the members of the state legislative assembly from the region. The demand for Telangana as a separate state re-emerged in recent.

### Srikrishna Commission

Srikrishna Committee on Telangana or Committee for consultations on the situation in Andhra Pradesh (CCSAP) is a committee headed by former chief justice B. N. Srikrishna to look into the demand for separate statehood for Telangana or keep the State united in the present form, Andhra Pradesh. The committee was constituted by the Government of India in 2010.

The Sri Krishna Committee submitted a comprehensive 461-page report after their detailed across the state which included consultations with various political as well as social groups.

The six options presented in the report were as follows:

1. Maintaining Status Quo - Keeping the Andhra Pradesh State as it is with no change in the Telangana, Seemandhra and coastal regions.
2. Bifurcating the state of Andhra Pradesh into Seemandhra and Telengana regions with both of them developing their own capitals in due course of time. Hyderabad to be converted to a Union Territory - This proposal was similar to the Punjab-Haryana-Chandigarh model.
3. Dividing Andhra Pradesh into two states - One of Rayala-Telengana with Hyderabad as its capital and second one of the Coastal Andhra Pradesh
4. Dividing Andhra Pradesh into Seemandhra and Telengana with enlarged Hyderabad Metropolis as a separate Union Territory that will be linked geographically to district Guntur in coastal Andhra via Nalgonda district in the

southeast and via Mahboobnagar district in the south to Kurnool district in Rayalaseema

5. Bifurcation of the State into Telangana and Seemandhra as per existing boundaries with Hyderabad as the capital of Telangana and Seemandhra to have a new capital. This was the second most preferred option according to the report.
6. Keeping the State united and providing for creation of a statutorily empowered Telangana Regional Council for socio-economic development and political development of Telangana region. This was the most preferred option

The Committee's report suggested options 1 through 4 to be not feasible. The Fifth option is to bifurcate the State into Telangana with Hyderabad as its capital and Seemandhra which is to have a new capital city. The Committee noted that "Separation is recommended only in case it is unavoidable and if this decision can be reached amicably amongst all the three regions." The Sixth and the option that the Committee recommended as the "way forward" is to keep the state united and set up Telangana Regional Council with adequate transfer of funds, functions and functionaries in keeping with the spirit of Gentlemen's Agreement of 1956".

While the creation of the separate state of Telangana is recognised as necessary given the widespread support it receives from within the 13 districts, there is no political consensus. Future status of Hyderabad is also contentious—the options being whether Hyderabad should be the capital of Telangana alone; joint capital; made into a UT with joint capital status atleast with a time frame by when a separate capital is set up and built for rest of Andhra.

Advocates say that Telangana can be set up as it satisfies the core prerequisites: economic viability and it has no border disputes.

Concerns are: left wing extremism; there are 13 autonomous development councils in Jammu and Kashmir, Assam, West Bengal, Meghalaya, Mizoram and Tripura. All of them will immediately ask for statehood; for 2,300 Telugu speaker people lived together ; creation separate state may not solve underdevelopment problems; staying within wider AP will give them access to resources etc.

### **Regionalism**

Regionalism refers to a group of people in a region or a state coming together to demand and agitate for more powers of autonomy or a separate state for any of the following reasons

- Collective feeling of neglect in the context of uneven development
- Economic backwardness
- Their resources are being spent on others
- The state is too large for them to be given adequate attention for development.
- Ethnic identity being asserted

Government reacted to the regionalist demands in the following manner

- Grant of a separate state- Uttarakhand, Chattisgarh and Jharkhand in 2000
- Autonomous council
- Inclusion of the language in the Eighth Schedule as in the case of Bodos
- Special provisions for certain regions in a State which are underdeveloped- Art.371(2) for Gujarat and Maharashtra.
- Constitutional establishment of the local self government institutions( 73rd and 74th Amendment Acts in 1992).

Regionalism as seen in Tamil Nadu, Andhra Pradesh, Assam and elsewhere has the effect of stabilizing the polity with the following contributions

- Ensuring that the regional feeling of neglect does not degenerate into separatism
- Checking the centralization tendency and help the states receive more powers and thus develop 'cooperative federalism'
- Contribute to better management of 'cultural diversities' through devolution of powers
- Greater proximity of the government to the people and thus help evolve participative planning systems.

### Comments

The current demand for the break-up of large states like Andhra Pradesh, Maharashtra and Uttar Pradesh needs to be examined seriously and dispassionately in its historical and contemporary context. After Independence, following Partition, Jawaharlal Nehru felt that the idea of linguistic states needed to be postponed since he feared it would foster local nationalisms, breed parochialism and undermine national unity. So, he argued for large states within a strong political Union and a socialist economy that would enable centralised planning of resources, leading to equitable regional development.

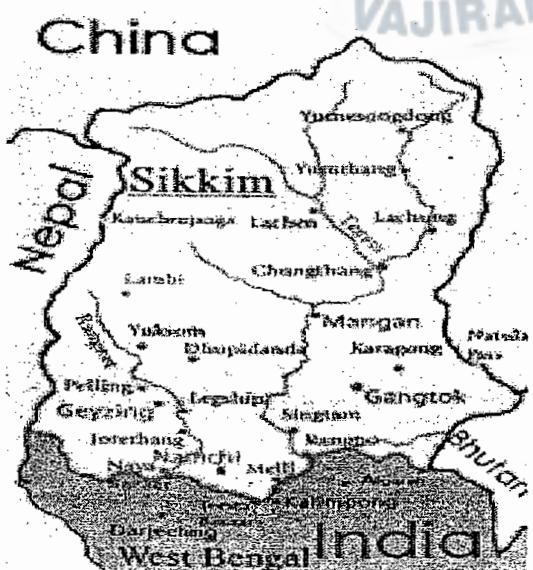
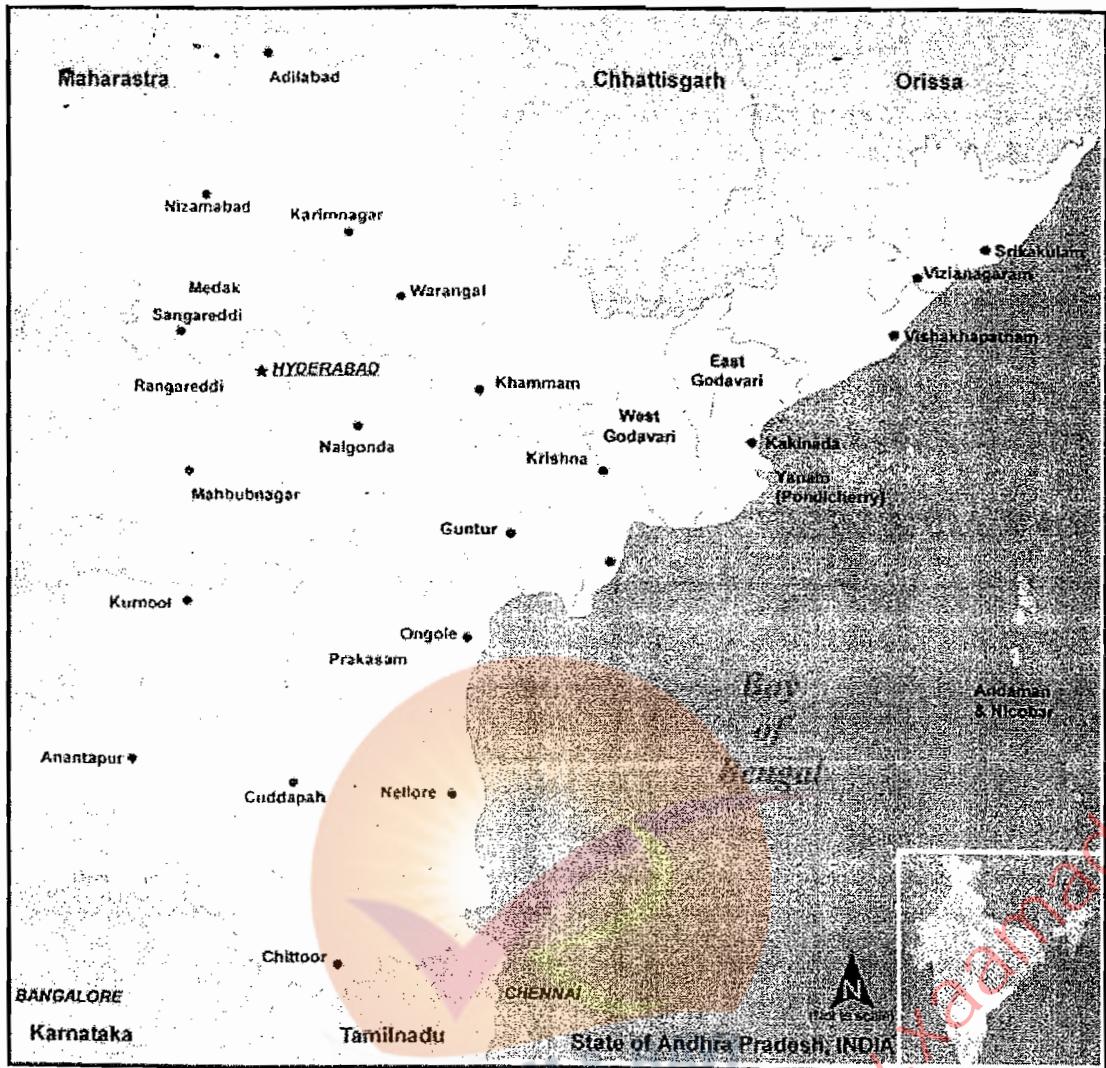
Further, it was thought that the interchange of capital and labour between the richer and poorer sub-regions in large states would create greater equality over time. B R Ambedkar, on the other hand, held that the doctrine of "one language, many states" would enshrine the principles of language and size: there could be four states carved out of Maharashtra, for example, all of which would speak Marathi but be of a viable size.

Today, the situation has undergone a substantial change. There are increasing demands for carving out smaller states out of the large, single-language states created after Independence. In the contemporary post-Congress and post-reform era, states have emerged as important players determining national political patterns. In many states, an upsurge from below has brought the hitherto underprivileged groups to power, creating new political elites. And in the era of coalition governments, regional or state parties have become partners in central governance. The establishment of a market economy, too, has opened the floodgates to private capital that has led to increasing regional inequalities and, thus, contributed to the rising demands for smaller states.

Economic backwardness of sub-regions within large states has also emerged as an important ground on which demands for smaller states are being made. This is evident from the immediate demands for the formation of Vidharbha, Bodoland and Saurashtra, among other states. These developments have been responsible for a shift away from issues of language and culture – which had shaped the earlier process of reorganisation – to those of better governance and greater participation, administrative convenience, economic viability etc.

In this situation, the move towards smaller states appears to be inevitable and would lead to more democratisation. The formation of three new states in 2000 – Jharkhand, Chhattisgarh and Uttarakhand – has provided a fillip to this process. It also points to a new confidence in the political elite in comparison to the early years of Independence. Today, fears of the Centre weakening due to the creation of a large number of small states are unfounded. Many small states were created after 1956 – Punjab, Haryana and some in the north-east – which strengthened rather than weakened the Union. Even as the older federal structure served the polity created at Independence, there is a need to redraw the map of India in keeping with the new social and political order. Reorganisation needs to be seen not as a task undertaken at a single point of time, but as an ongoing process that remains unfinished.

At the same time, the creation of a federation consisting of smaller states is a complex task and requires careful attention. Many critics have correctly argued that the mere creation of smaller states out of the existing bigger ones does not guarantee good governance and faster and inclusive economic development. Considering the plethora of demands being raised, it is time for a second States Reorganisation Commission (SRC) that can redraw India's federal map, creating many smaller states and keeping in mind the twin criteria of economic viability and people's aspirations.



## Kachchatheevu

Kachchatheevu is an uninhabited island belonging to Sri Lanka. This island was given to Sri Lanka by India in 1974. Since then it has been a source of controversy between the two countries. This is because the sea around Kachhativu is rich in prawns, and attracts fishermen from Rameswaram. 1974 agreement expressly protected the "traditional rights" of Indian fishermen to visit Kachhativu and the right of pilgrims to take part in the St. Anthony's festival there. Article 5 of the agreement states: "... Indian fishermen and pilgrims will enjoy access to visit Kachhativu as hitherto, and will not be required by Sri Lanka to obtain travel documents or visas for these purposes." Article 6 says, "The vessels of India and Sri Lanka will enjoy in each other's waters such rights as they have traditionally enjoyed therein"

However, Indian fishermen have been fired at and killed many times by Sri Lankan navy.

A petition was filed in the Supreme Court requesting that the Central government be directed to retake control of Katchatheevel island, which was ceded to Sri Lanka by India through treaties concluded between the two neighbours in 1974 and 1976.

Two issues are involved here: whether an order issued by Supreme Court will be binding on Sri Lanka; status under international law (which governs territorial disputes between states) of any claim that Tamil Nadu may persuade the Centre to make.

The petitioners have argued that ceding of Indian territory requires amendment of the Constitution by Parliament. This is correct as a matter of Indian law. The territory of India is defined in Article 1(2) of the Constitution read with First Schedule to the Constitution. Entry 7 in Schedule-I defines the territorial extent of the State of Tamil Nadu. Thus, alienation of any part of the territory of Tamil Nadu, to be valid in Indian law, requires an amendment of the first Schedule to the Constitution. This position was clarified by the Supreme Court of India in Berubari Union case (1960). A treaty entered into by India ceding Indian territory to a foreign power is without effect in Indian law unless Parliament chooses to give effect to the same through an amendment to the Constitution.

The treaties of 1974 and 1976 establish a boundary line between India and Sri Lanka. Katchatheevel falls on the Sri Lankan side of this line. No legislation or amendment to the Constitution has been passed by Parliament of India to give effect to the treaties. In light of the above position, the treaties, so far as they concern Katchatheevel, are without effect in Indian law if Katchatheevel is included in the territory of India as defined in the First Schedule to the Constitution. Since Katchatheevel is not expressly mentioned in the First Schedule, the Supreme Court will have to enquire, based on the available facts, whether immediately before the commencement of the Constitution, the island was a part of the Province of Madras. For that under Art.143, the President of India may seek the opinion of the apex court.

Even if the court were to find that Katchatheevel forms a part of the territory of Tamil Nadu and that it has been ceded to Sri Lanka illegally, this ruling will have no binding effect on Sri Lanka, which is in control of the island. As a sovereign state, Sri Lanka is immune from the jurisdiction of Indian courts. Hence, the Supreme Court can merely

make a declaration on the historical illegality of the cession. Can the court then direct the Central government to retake possession of the island? While there may not be express constitutional limitations on the power of the court to direct the government to retake Katchatheevu (or any other territory considered in Indian law to be part of India), considering that the Government of India cannot retake territory possessed by another sovereign state without unilateral forceful action, the court is likely to exercise restraint in this regard. Judiciary does not dictate foreign policy.

If the Government of India chooses to entertain Tamil Nadu's demand and raise the issue with Sri Lanka, the question of title to the island will need to be determined under international law between the two States.

As mentioned above, as per the treaties of 1974 and 1976, Katchatheevu would fall within the sovereign territory of Sri Lanka. Both the treaties state that they are subject to ratification. It may be argued that 'ratification' of a treaty ceding territory occurs, as a matter of Indian law, when Parliament amends the Constitution to give effect to the treaty. But the normal process of ratification is done by the Union cabinet. Under Article 27 of the Vienna Convention on the Law of Treaties, 1969, a state may not invoke domestic law to avoid treaty obligations. International Court of Justice holds that non-compliance with a ratification requirement in domestic law does not invalidate a treaty.

Prior to the conclusion of the two treaties, both Sri Lanka and India claimed sovereignty over the island. However, after 1974, India has not asserted its claims while Sri Lanka has continuously maintained control of the island. Such silence of one of the disputing parties in a territorial dispute has been construed as an abandonment of its claim in favour of the other party in several cases.

In sum, regaining control over the Katchatheevu island does not appear to be a realistic possibility both from an Indian law point of view as well as an international law angle. While Tamil Nadu's concerns relating to the alleged harassment of Indian fishermen by the Sri Lankan Navy, which forms the context of the State's renewed claims over Katchatheevu, need to be addressed, more feasible alternative solutions should be explored for the same.

(Substantially borrowed from the Hindu article)

#### **India-Bangladesh LBA:Constitution Amendment(119<sup>th</sup>) Bill 2013**

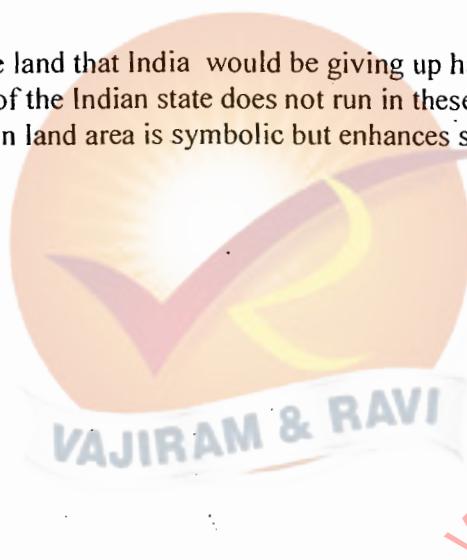
The **Indo-Bangladesh enclaves**, also known as the **chitmohols** are the enclaves along the Bangladesh-India border, in Bangladesh and the Indian state of West Bengal. In September 2011, the Prime Ministers of the two countries (Manmohan Singh of India and Sheikh Hasina of Bangladesh) signed an accord on border demarcation and exchange of adversely held enclaves; however, the Indian parliament has yet to ratify it. Under this intended agreement, the enclave residents could continue to reside at their present location or move to the country of their choice.

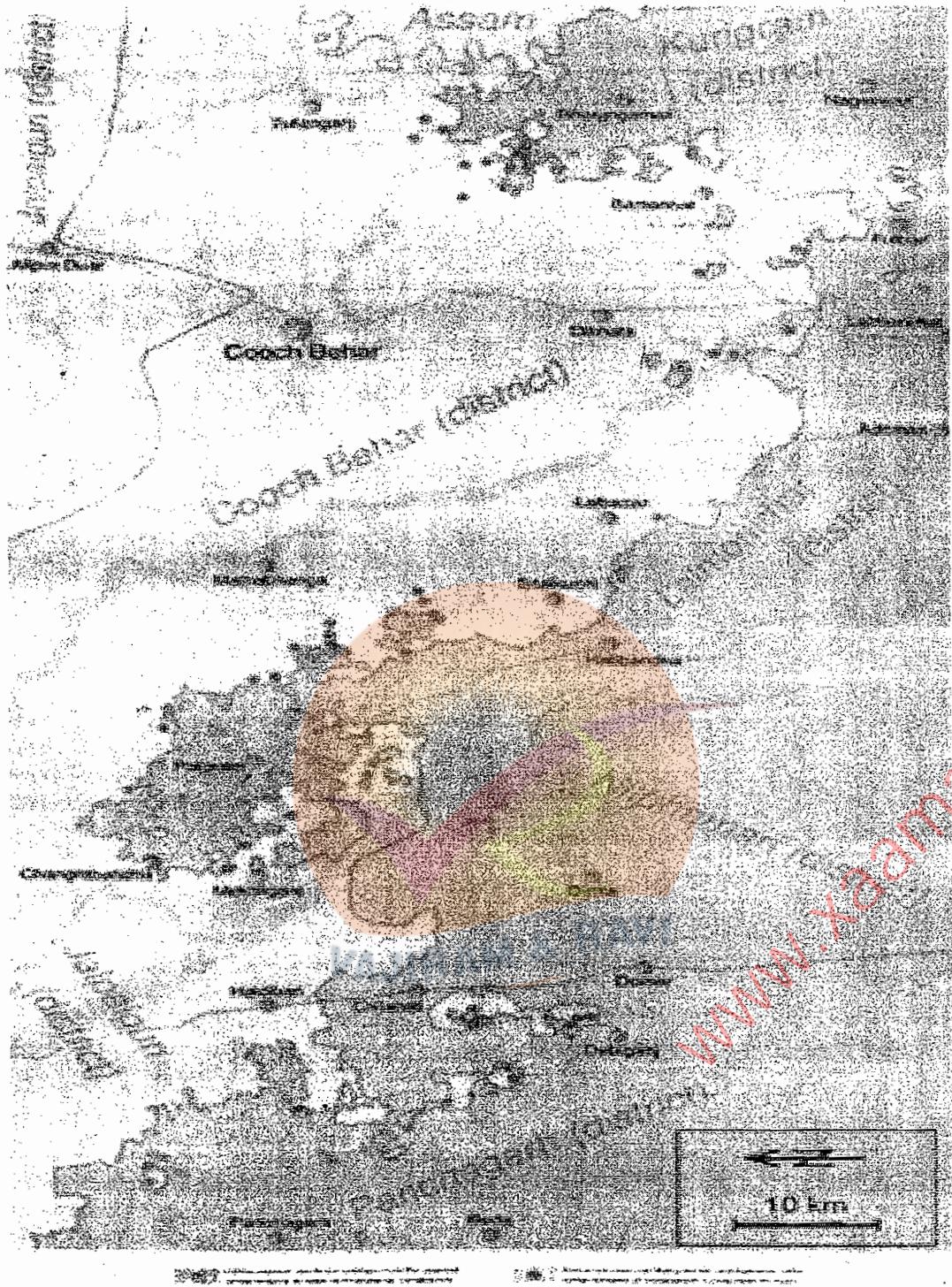
119<sup>th</sup> Amendment Bill to the Constitution relates to amending the Constitution to give effect to the 1974 India-Bangladesh Land Boundary Agreement (LBA); the protocol for

this was agreed during Prime Minister Manmohan Singh's visit to Dhaka in September 2011. If the CAB 119 is passed by the Parliament, would implement the LBA and fully demarcate the 4,100 km India-Bangladesh land border. Operationalising the LBA would also resolve the issue of enclaves and adverse possessions. Currently, India possesses 111 enclaves within Bangladesh, while the latter possesses 51 enclaves within Indian territory. Neither country can exercise jurisdiction over its enclaves due to geographical constraints. This leaves the 51,000 enclave residents virtually stateless. Devoid of any infrastructure – no access to schools or even police stations – in the enclaves, they lead a pitiable existence, running from pillar to post for even the most basic of amenities. This in turn has converted the enclaves into hubs of criminal activities ranging from smuggling to human trafficking. If the LBA comes into effect, it would lead to a exchange of the enclaves, ending the hardships of the enclave dwellers. However, despite the LBA having been ratified in Bangladesh, Indian parliament could not amend the Constitution so far.

Opposition to the deal is based on the fact that since the exchange of enclaves involves India ceding 17,149 acres of its territory to Dhaka in return for 7,110 acres, India would lose a few thousand acres.

However, large part of the land that India would be giving up has been lying fallow for decades. Besides the writ of the Indian state does not run in these landlocked enclaves. Hence, the so called loss in land area is symbolic but enhances security of Indians.





# CITIZENSHIP in INDIA

There are two classes of people in any country- citizens and aliens. Citizens make up the political community of the country and enjoy all rights and entitlements while aliens (owing political allegiance to another country or government) are denied some of them. For example, citizens can vote and contest to hold representative offices like a member of parliament while aliens cannot. Citizens are eligible for all administrative posts while aliens are not. Aliens are of two types: citizens of friendly countries are friendly aliens while those of enemy countries are enemy aliens- the latter being denied some of the rights that the former may enjoy.

Aliens may have come to another country for a variety of reasons: Aliens may find asylum in a country to which they have fled for political reasons. Asylum is the legal protection granted to people in any country who are afraid to return to their home country. Expelling an alien is called deportation. Tourists, students, employees and so on are the other types of aliens.

Domicile means to stay in a country with the intention of making it his or her permanent home. Proof of such an intention is employment or property etc.

Resident is one who resides in the country for certain number of days- 182 days in the previous fiscal year as the Indian law defines.. If not, he or she is considered a non-resident. A non-resident Indian is a citizen of India but has not resided in India for the required number of days. A Person of Indian Origin(PIO) on the other hand is one who acquired citizenship of another country. He is no more a citizen of India unlike an NRI.

The Constitution of India provides for a single citizenship for the entire country. There is no provision for the US model of being a citizen of the country as well as the citizen of the state like Bihar, Karnataka, for example.

Since 2003, a type of dual citizenship is allowed by Indian laws with some restrictions. PIOs can become eligible for certain citizenship rights on par with NRIs in social, economic, commercial areas even though PIOs are not citizens of India any more. Such PIOs who obtain Overseas Citizenship card are entitled to these benefits. It is loosely referred to as dual citizenship. Such dual citizens are called overseas Citizens of India. It is facilitated to satisfy the urge of the diaspora to participate in Indian national affairs more actively.

The provisions relating to citizenship are contained in Articles 5 to 11 in Part II of the Constitution of India.

The Citizenship Act, 1955 deals with matters relating to the acquisition, determination and termination of Indian citizenship. It provides for the acquisition of Indian citizenship by birth, by descent, by registration and by naturalisation. The Citizenship Rules, 1956 prescribe the procedure, forms of applications, fee etc.

## **Modes of acquiring Indian citizenship**

Citizenship of India can be acquired by the following ways

- By Birth
- By descent
- By registration
- By naturalization
- By acquisition of territory

### **By birth**

Those born in India on or after 26<sup>th</sup> January 1950 but before 1<sup>st</sup> July 1987 are citizens of India by birth irrespective of the nationality of their parents. Those born in India on or after 1<sup>st</sup> July 1987, are considered citizens of India only if either of their parents is a citizen of India at the time of their birth. The latter provision is necessary and was inserted in 1980's so that illegal immigrants do not have the benefit.

### **By Descent**

Those born outside India on or after 26<sup>th</sup> January 1950 but before 10<sup>th</sup> December 1992 are eligible for citizenship of India by descent, if their father was a citizen of India at the time of their birth. Those born outside India after 10<sup>th</sup> December 1992, are eligible to be citizens of India if either of their parents is a citizen of India at the time of their birth. The latter provision was inserted into citizenship rules to give men and women equality.

### **By Registration**

Citizenship of India by registration can be acquired by –

- persons of Indian origin(PIO) who are ordinarily resident in India for five years
- persons who are or have been married to a citizen of India and are ordinarily resident in India for five years;
- minor children whose both parents are Indian citizens

### **By Naturalisation**

Citizenship of India by naturalisation can be acquired by a foreigner who is ordinarily resident in India for ten years (continuously for the twelve months preceding the date of application and for nine years in the aggregate in the twelve years preceding the twelve months). The condition can be waived if in the opinion of the Central Government, the applicant is a person who has rendered distinguished services to the cause of science, philosophy, art, literature, world peace or human progress generally.

## **Citizenship by Incorporation of Territory**

If any territory becomes a part of India, its people will be citizens of India.

## **Loss of Citizenship**

It is based on the following grounds

- Voluntary
- Involuntary

### **Voluntary**

#### **Acquisition of citizenship of another country**

Any citizen of India voluntarily acquires the citizenship of another country, he cease to be a citizen of India. If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by Central Government

#### **Involuntary Deprivation**

The Central government under the Indian citizenship Act, 1955 deprives any citizen of Indian Citizenship grounds like the registration or certificate of naturalization was obtained by means of fraud, false representation or concealment of any material fact; or that citizen has shown himself by act or speech to be disloyal towards the Constitution of India; or that citizen has, during the war in which India may be engaged, unlawfully traded or communicated with an enemy assisted any enemy in that war etc.

#### **Determination of citizenship**

If a question arises as to whether, when and how, a citizen of India acquired the Citizenship of another country, it will be determined only by the Central Government.

#### **“Dual Citizenship” Law in India**

In 2004, by an amendment to the Citizenship Act, the facility of Overseas Citizenship of India (OCI) was made available to PIOs in 16 specified countries. Later ,it was extended to PIOs of any country (except Pakistan & Bangladesh) that allows dual citizenship, by Citizenship (Amendment) Act, 2005 .

Persons who have dual nationality as citizens of both India and the foreign country are subject to all Indian laws.

Dual citizens do not have voting rights in India. Neither can they be elected to public office,nor are they eligible for defence jobs.

Following are the benefits to dual citizens in detail

- does not require visa for travel to India.
- no need of going through registration formalities for staying in the country, which a foreigner is required to undergo.

- Is granted parity with non-resident Indians in respect of facilities available to the latter in the economic, financial and educational field
- is allowed to own real estate and purchase property within India with few or no restrictions. There are some restrictions on owning agricultural property
- allowed to live in India indefinitely, unlike the Person of Indian Origin (PIO) card, which permitted a single stay for a period of six months.
- The children of dual citizens can avail of the facilities for obtaining admission to educational institutions, including medical colleges, engineering colleges, IITs, IIMs, etc. under the general category
- can also avail facilities under the various housing schemes of the LIC, state government and other government agencies.

### **Ministry of Overseas Indian Affairs**

The ‘Ministry of Non-Resident Indians’ Affairs’ was created in 2004 and was renamed the ‘Ministry of Overseas Indian Affairs’ (MOIA).

#### **Few important terms**

Person of Indian origin is one who or either of whose parents or grand parents was an Indian but is a foreign citizen now. NRI on the other hand is a citizen of India who is abroad to a point that he/she did not reside in India for the mandatory 182 days in the previous year. PIOs can not vote in Indian elections as they are not citizens. NRIs, however can. (Read ahead)

#### **Emigré**

One who has left a native country, especially for political reasons.

#### **Expatriate( expat)**

One who has left his country voluntarily

#### **Stateless Persons**

A stateless person is one with no citizenship or nationality. It may be because the state that gave their previous nationality has ceased to exist and there is no successor state, or their nationality has been repudiated by their own state, making them effective refugees. For example, the tea plantation workers from Tamil Nadu in central Sri Lanka who were taken there as indentured labour by the British in 19<sup>th</sup> century.

#### **Stateless Tamils in Sri Lanka**

They have no nationality, no right to vote, to work officially, to open a bank account or to obtain state land, no possibility to apply for documents like a passport or birth certificate.

Most of the stateless people in Sri Lanka are descendants of people who had been brought from India by British colonisers between 1820 and 1840 to work on coffee and tea plantations in Sri Lanka. Known as "up-country Tamils" or "hill Tamils", the majority still lives on tea estates in southern and central Sri Lanka. A minority was displaced in the north and east by inter-ethnic fighting in 1983.

Over the years, several Indo-Ceylon agreements have granted some of these people either Indian or Sri Lankan citizenship, the latest being a Sri Lankan Parliamentary Act to grant them citizenship in 2004.

### **Refugee**

Refugee is defined as a person who is outside his/her country and is unable or unwilling to return to that country because of a genuine fear that she/he will be persecuted because of race, religion, nationality, political opinion, or membership in a particular social group. Some refugees leave their country due to civil war- for example, Syrian citizens are going to Jordan and other neighbouring countries to escape the civil war. So did the Tamils from northern and eastern Sri Lanka in the last few decades. They had escaped to India. In 2012, Rohingya muslims of Myanmar are also in news for attempting to flee Myanmar due to negative discrimination and persecution.

Those who seek refugee status in another country are sometimes known as asylum seekers and the practice of accepting such refugees is that of offering political asylum. The most common asylum claims to industrialized countries are based upon political and religious grounds.

### **Green card**

A green card in the USA gives official immigration status (Lawful Permanent Residency)

### **H1b visa**

The H-1B visa program allows American companies and universities to employ foreign scientists, engineers, programmers, and other professionals in the United States for up to 6 years.

### **L1 visa**

There are two kinds of L visas:

- L-1A-for employees in an executive or managerial position, and
- L-1B-for employees in a specialized knowledge capacity

### **Surrogacy and citizenship**

Twins born to German parents through a surrogate Indian mother remained stateless for some time recently in India. Their parents are German nationals, but the woman to whom the babies were born is Indian surrogate mother from Gujarat. The boys were refused German passports because Germany does not recognize surrogacy as a legitimate means of parenthood. Therefore, they could not go to Germany. India was unable to grant citizenship to the twins born through surrogacy. The acquisition of citizenship by birth under the Indian Citizenship Act, 1955 requires either one of the parents of the child to be Indian Citizens at the time of birth of the child. In the case on hand the children did not

have an Indian National parent. The contention of the German couple was that the children born to an Indian surrogate mother using the gamete from an Indian anonymous egg donor should be considered Indians ; and that the surrogate mother was required to be regarded as the legal mother of the children. This contention had got the sympathetic hearing of the High Court of Gujarat, which agreed that the surrogate mother should be regarded as the legal mother of the child. The Gujarat High also directed the Union of India to grant citizenship and passport for the children enabling them to travel abroad. Union of India appealed against the High Court order in the Supreme Court. Germany relented, issuing travel visas, and the family went home.

### Rohingyas

The Arakan State in Myanmar , bordering Bangladesh, is inhabited by two ethnic sister communities, the Rakhine Buddhist and the Rohingya Muslim. The Rakhine Buddhists are the majority group while the Rohingya Muslims are minority group. The Rohingyas numbering approximately 2 million are enduring continued persecution and the ethnic cleansing policy of military regime in Myanmar. Also about 1.5 million Rohingyas have been living in exile in many countries all over the world.

Once the refugees had been repatriated, this law was specifically designed effectively to deny Rohingyas the right to a nationality. The 1982 Citizenship law has had the effect of rendering the vast majority of Rohingyas ineligible to be Myanmar citizens.

Rohingyas are not issued any new national identity cards which are issued to other citizens. There are restriction of movement . Rohingyas in Arakan State must routinely apply for permission to leave their village, even if it is just to go another nearby village. These restrictions prevent people from seeking work in other villages, trading, fishing or even attending a funeral of a relative or visiting a doctor.

## **FUNDAMENTAL RIGHTS**

Some human actions are necessary for individual and social progress. That is, they are right actions. Throughout history, in all societies such 'right actions' are accepted and promoted, initially morally and later legally. Such actions are called rights and are protected by law. For example, freedom of speech and movement (Art.19); freedom to acquire and own property (Art.300A) and so on. In modern times when Constitutional governance is the norm, rights have been central to the relation between citizen and government.

A right is a legal claim that a citizen or any other individual is granted by the Constitution or any statute. For example, right to life. It means the individual's life can not be abridged or abolished by any one except in a manner that is prescribed in law (Art.21). If any one violates the right illegally, the individual can approach the court for justice. The right can be diluted or denied according to a procedure established by law.

Rights are the essence of democracy as they empower the individuals and enable them to develop. Rights not only promote individual development but are generally associated with equality in contemporary times and establish a level playing field among the people-rich and poor; men and women; and various social groups. Thus, they are egalitarian in nature. They limit government control over individuals and are a protection against arbitrary Government actions.

Rights may be associated with obligations, there being very few absolute rights. For example, Right to Education that is made a Fundamental Right by the insertion of Art 21a by the Constitution 86<sup>th</sup> Amendment Act 2002 in India may confer the obligations on some citizens of the country to pay taxes that contribute to the revenues necessary to implement the right. Fundamental Duties that were inserted into the Constitution by the Constitution (42<sup>nd</sup>) Amendment Act 1976 are the obligations that citizens are expected to discharge. Fundamental Duties in Art. 51a require citizens to contribute to national and social development.

### **Various Kinds of Rights**

**Natural Rights:** These are universal rights which are inherent in every individual, being a part of human nature. They are recognised and made enforceable by law. For example, right to life.

**Human Rights:** Human rights are similar to natural rights in the sense that they are universal and are intrinsic to human nature. They are needed for dignified human life and are enjoyed irrespective of social, political and other considerations. They are contained in United Nations Universal Declaration of Human Rights 1948.

**Civil Rights:** These are the rights that citizens of a country enjoy and are conferred by the Constitution or the law of the country. Civil rights may differ from one country to another while human rights are universally accepted by all.

**Statutory/legal rights:** Where a right has the backing of law, it is called a statutory right. It may be a part of the Constitution or not. For example, the limited right to work given in the Mahatma Gandhi National Rural Employment Guarantee Act is a statutory right. Similarly, right to information is a statutory right. The above two rights like many more are not a part of the Constitution like the right to life. But they have to be compatible with the Constitution as otherwise; they will be declared null and void by the higher courts- High Court and Supreme Court.

**Constitutional Rights:** They are rights enshrined in the Constitution. Some enjoy special status as Fundamental Rights and some others do not enjoy such status- for instance, outside part III of the Indian Constitution (other than Fundamental Rights)

**Fundamental Rights:** They are a branch of civil rights and are given highest importance in India as they are defended by the Supreme Court directly. To restrict them, Constitution has to be amended. Some Fundamental Rights are confined to citizens only while others are open to all. For example, Art.15, 16, 19, 29 and 30 in the Chapter on Fundamental Rights in the Indian Constitution (Part III) are available to Indian citizens only. They are essential for human development, democracy and social progress.

### **Fundamental Rights**

Fundamental Rights are important for the individual to live with dignity and the society to evolve on democratic lines. Constituent Assembly of India borrowed the concept of Fundamental Rights from American Constitution where they are found in the Bill of Rights. In fact, Fundamental Rights are considered so sacrosanct that if they are violated, the aggrieved individual can approach the Supreme Court of India directly (Art.32). Supreme Court can issue writs mentioned in Art.32 for the defence of the Fundamental Rights. The individual concerned can approach the High Court as well. For all other rights, the highest court of first instance is the High Court. But not the Supreme Court.

Fundamental rights include individual and group rights. They are common to most liberal democracies: equality before law, freedom of speech and expression, freedom of association and peaceful assembly, freedom to practise religion and the right to constitutional remedies in case of violation of the rights. The Constitutional remedies are the writs(orders) such as habeas corpus. Right to life is an example of individual rights while affirmative action in favour of certain castes, women and minorities is an example of group rights.

### **Freedom Struggle and Fundamental Rights**

In 1928, a series of All Party conferences were chaired by Motilal Nehru. They drafted a constitutional scheme, called the Nehru Report. This constitution called for a parliamentary democratic system of government and protection of minorities. In 1931, the Indian National Congress, at its Karachi session further committed itself to individual rights and liberties which included social and economic rights in favour of the lower castes and for a living wage for the workers.

- Fundamental Rights were incorporated into the Indian Constitution with the inspiration of the leadership of the freedom struggle and the experience of the world's leading democracies – UK, USA and France that had detailed provisions for the recognition and protection of individual rights in their Constitutions: Bill of Rights of UK, Bill of Rights of USA and Declaration of Rights of Man of France.

Fundamental Rights essentially safeguard individuals from any arbitrary State actions, but some rights are enforceable against private persons as well. For example, abolition of untouchability (Art.17) is a limitation on State action as also on individual actions.

Art. 15, 16, 19,29 and 30 are available to citizens only while others are enjoyable by non-citizens (aliens) as well. The reasons for limiting these rights to citizens only is evident in the content of these rights.

Fundamental Rights, being Constitutional rights, can be amended by the Parliament only- abridge or expand. However, Parliament is not free to abridge the FRs unless it serves public interest. Even then, amendment to the Constitution is the only way to amend the FRs.

The Supreme Court upheld the power of the Parliament to amend the Fundamental Rights from the commencement of the Constitution till the Golak Nath case verdict in 1967. In the Golak Nath case ruling, it held that Parliament could not amend the Fundamental Rights as these rights enjoy a 'transcendental' status under the Indian Constitution. But in the Keshvananda Bharati case (1973) verdict, it permitted limited power to the Parliament to amend the Fundamental Rights.

In the Kesavanda Bharati vs. State of Kerala case, the Supreme Court laid down the concept of "basic features" of the Constitution. The apex court ruled that basic features cannot be amended by the Parliament. What is meant is that the basic features cannot be restricted or violated but there is scope of enrichment and amplification, subject to judicial review. Fundamental Rights are not classified as a basic feature but if they are violated and there is no clear public purpose served by the violation, the violative law can be partially or wholly struck down by the courts.

The "Doctrine of Basic Structure" that was introduced in the Kesavananda Bharati vs State of Kerala (1973) was amplified in various verdicts of the apex court since then.

The sanctity attached to FRs under the Indian Constitution is seen in the fact that apex court can be approached directly; amendment to the FRs is possible only by an Amendment to the Constitution; FRs can be abridged only if public interest is served and the judiciary will determine if public interest is being served or not( Coelho case (I.R. Coelho v. State of Tamil Nadu 2007). State legislatures can not restrict FRs at all.

Under National Emergency (Art. 352,358 and 359) however, Constitution permits suspension of the operation/enforcement of all Fundamental Rights except Art. 20 and 21.

## **Limitation on Fundamental Rights**

Most of the rights are subject to reasonable limitations. Some however are absolute- for example, untouchability is abolished unconditionally. Art.19.2 says that the rights contained in Art.19.1 are conditional and subject to reasonable restrictions. Such reasonable restrictions are spelt out in Art. 19.2 for some freedoms while for others, such limitations are added through either Amendment Acts or Supreme Court verdicts. For example, the doctrine of proportionality demands that restrictions be truly limited and not excessive.

## **Six Classes**

There are six classes of Fundamental Rights in Part III of the Constitution. They are:

- Right to equality (Art.14-18)
- Right to freedom (Art.19-22)
- Right against exploitation (Art.23-24)
- Right to freedom of religion (Art.25-28)
- Cultural and educational rights (Art.29-30)
- Right to constitutional remedies (Art.32)

**Right to Equality:** It is a very important right enshrined in Articles 14, 15, 16, 17 and 18 of the Constitution. It is the principal foundation of all other rights and liberties and guarantees equality before law, social equality and equal access to public areas, equality in matters of public employment, abolition of untouchability and abolition of titles. Thus, the State cannot discriminate against a citizen on the basis of religion, race, caste, sex, or place of birth. Every person shall have equal access to public places. While equality for all is guaranteed, affirmative action in favour of deprived groups is constitutionally allowed- for women, children, scheduled castes/ scheduled tribes, other backward classes( that is, other than the SC/STs). Practice of untouchability has been declared an offence and anyone practicing it is punishable by law. The State cannot confer any titles and citizens of India cannot accept titles from a foreign State, without the permission of the Government of India. The titles of Rai Bahadurs and Khan Bahadurs are also abolished. However, military and academic distinctions can be conferred on the citizens of India. The awards of Bharat Ratna and Padma Bhushan and Vibhushan "cannot be used by the recipient as a title and does not, accordingly, come within the constitutional prohibition". The Supreme Court ( 1995) upheld the validity of such awards.

**Right to Freedom:** It is given in Articles 19, 20, 21 and 22 of the Constitution of India, with the view of guaranteeing individual rights that were considered vital by the framers of the Constitution. The right to freedom encompasses the freedom of speech and expression, freedom to assemble peacefully without arms, freedom to form associations or unions, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of the territory of India and the freedom to practice any profession or to carry on any occupation, trade or business. Restrictions can be imposed on all these rights

in the interest of public order, security of State, decency or morality. The constitution also guarantees the right to life and personal liberty and says that the right can be limited or denied in a way prescribed by the law. Protection with respect to conviction for offences, protection of life and personal liberty and the rights of a person arrested under ordinary circumstances is laid down in the right to life and personal liberty. However, the right to life and personal liberty cannot be suspended under any circumstance even under the National Emergency imposed according to Art.352.

Right to education by the 86<sup>th</sup> Constitutional amendment 2002 has been made one of the Fundamental Rights under the right to life and personal liberty (Art.21a). It is in line with the expanded reading of the right to life that the Supreme Court introduced since late seventies.

**Right against Exploitation:** The right against exploitation, given in Articles 23 and 24, provides for two provisions, namely

- abolition of trafficking in human beings and
- abolition of employment of children below the age of 14 years in hazardous jobs like factories and mines.

Child labour is considered a gross violation of the spirit and provisions of the constitution. Trafficking in humans for the purpose of slave trade or prostitution is also prohibited by law. Compulsory military conscription is however, permitted. In 2013, the concern with 'missing children' has become acute as children are exploited through trafficking.

**Right to Freedom of Religion :** Right to freedom of religion, covered in Articles 25, 26, 27 and 28, provides religious freedom to all people in India. The objective of this right is to sustain the principle of secularism in India. According to the Constitution, all religions are equal before the state and no religion shall be given preference over the other. Citizens are free to preach, practice and propagate any religion of their choice. However, certain practices like wearing and carrying of Kirpans in the profession of the Sikh religion can be restricted in the interest of public order, morality and health. Religious communities can set up charitable institutions of their own, subject to certain restrictions in the interest of public order, morality and health. No person is compelled to pay taxes for the promotion of a religion. A State run institution cannot impart religious instruction.

Secularism in India was further strengthened with the Supreme Court ruling in April 2013 when it said that the Vedanta Group's bauxite mining project in the Niyamgiri Hills of Orissa will have to get clearance from the gram sabha, which will consider the cultural and religious rights of the tribals and forest dwellers living in Rayagada and Kalahandi districts. (Details further ahead)

**Cultural and Educational Rights:** They are given in Articles 29 and 30 of the constitution and are measures to protect the rights of the minorities- linguistic and religious. Any community which has a language and a script of its own has the right to conserve and develop them. No citizen can be discriminated against for admission in State or State aided institutions. All minorities, religious or linguistic, can set up their own educational institutions in order to preserve and develop their own culture. In

granting aid to institutions, the state cannot discriminate against any institution on the basis of the fact that it is administered by a minority institution.

**Right to Constitutional Remedies:** Art.32 confers the right to move the Supreme Court directly in case of any denial of the fundamental rights. For instance, in case of arrest and detention, the person concerned can challenge the same as illegal and courts may either grant him/her bail or may set him free completely if there is no legal basis. The courts can issue various kinds of writs to safeguard FRs: habeas corpus, mandamus, prohibition, quo warranto and certiorari.

### **Explanation of Art.12-35**

Art.12 defines "the State" as including 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. The definition is important when any one approaches courts against the Government as they have to show that the agency being challenged is a part of State. For all practical purposes, government and State are used interchangeably.

Art.13. The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

- 1 There was a controversy about what constitutes 'law'. Supreme Court concluded in various verdicts that "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law. But not an amendment to the Constitution. Law is what the parliament does in its legislative capacity and amendment is what it does in its Constituent power. The latter thus is outside the purview of Art.13 and thus an amendment Act can abridge FRs though within limits as laid down by the apex court.
- 2 In sum, nothing in this article shall apply to any amendment of this Constitution made under Article 368.

### **Doctrine of Eclipse**

The doctrine says that a law that is overridden by a subsequent law does not cease to exist. It only goes into dormancy. Once the overriding law is diluted or deleted, the earlier law may come into operation. For example, a pre-Constitution law goes into eclipse if it conflicts with a provision in the Constitution.. When the Constitution is amended , it allows the pre-Constitution law to re-surface, it comes out of eclipse. Generally, it does not apply to the post-Constitutional laws as they become null and void from inception if they contradict the Constitution.

### **Article 14:- Equality before Law**

The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. Equality before law means that irrespective of any other

criteria, all persons-citizens and others are equal in the eyes of law. The exception in certain matters is the President of India and the Governor of a State.

Equal protection of laws means 'like are treated alike' or 'people in similar circumstances are treated similarly'. For example, persons having the same taxable income have to pay the same amount of tax. Equal protection of laws has been responsible for the affirmative action in USA and India. It allows deprived sections to be treated differently. Thus, SC/STs, women and others were given positive discrimination and thus equality is introduced in government policies causing social progress in the country. Similarly, African Americans in the USA were empowered.

### Rule of Law

Rule of law is a basic feature of all modern Constitutional democracies. An expert on English Constitution , Prof. A.V. Dicey says rule of law has following dimensions.

- Firstly, rule of law means absence of arbitrary power on the part of the Government. There is a written law that lays down rights and responsibilities of citizens and others; it also states clearly the powers, obligations and the limitations of government action.
- Secondly, it means that no one is above the law and every one, whatever be his rank or status, is subject to the ordinary law of the land and the jurisdiction of the courts.
- Thirdly, Constitution is not the source of rights but recognises the pre-existing rights and codifies the same for legal protection. For example, right to life, liberty,property etc.

As nation states emerged and democracy dug deeper, rule of law became the norm. Earlier, rule by individuals and groups according to their own whims and fancies was the order. Arbitrariness defined such rule. Rule of law gradually replaced it and is characterised by the following

- Notion of equality and equal protection of laws, as explained above
- Penal laws can not be made retrospectively
- Separation of powers, since the fusion of powers in one authority leads to dictatorship or absolutism.

Supreme Court of India, relying on Dicey observed: "The rule of law ...means that decisions ... should be predictable and the citizen should know where he is."

Rule of law is the norm in modern times and arbitrary exercise of power by individuals and groups and rule by decree are not accepted.

"Howsoever high you may be, the Law is above you" sums up the essence of rule of law.

## **Doctrine of eclipse**

The Doctrine of Eclipse is based on the principle that a law which violates fundamental rights, is not nullity or void ab initio but becomes, only unenforceable i.e. remains in a limbo. Such laws are not deleted from the statute book. It essentially applies to the pre-Constitution laws as we will see ahead.

Supreme Court formulated the doctrine of eclipse in *Bhikhaji v. State of M.P* 1955. In this case the provisions of C.P. and Berar Motor Vehicles (Amendment) Act 1948 authorized the State Government to take up the entire motor transport business in the Province to the exclusion of motor transport operators. This provision though valid when enacted, became void on the commencement of the Constitution in 1950 as they violated Article 19(1)(g) of the Constitution. However, in 1951 Clause (6) of Article 19 was amended by the Constitution (1st Amendment Act) so as to authorize the Government to monopolise any business. The Supreme Court held that the effect of the amendment was to remove the shadow and to make the impugned Act free from blemish or infirmity. It became enforceable against citizens as well as non-citizens after the constitutional impediment was removed. This law was eclipsed for the time being by the fundamental rights. As soon as the eclipse is removed, the law begins to operate from the date of such removal.

The doctrine generally does not apply to the post-Constitution laws as they are challenged and invalidated immediately if they contradict FRs.

## **Juvenile Justice (Care and Protection of Children) Act, 2000**

The Juvenile Justice (Care and Protection of Children) Act, 2000 which was further amended in 2006 is the primary legal framework for juvenile justice in India. The Act provides for a special approach towards the prevention and treatment of juvenile delinquency and provides a framework for the protection, treatment and rehabilitation of children in the purview of the juvenile justice system. 'Juvenile' or 'Child' means a person who has not completed 18 years of age. Under the law, Juvenile Justice Boards (JJB) are set up for each district or group of districts by state government to deal with matters relating to juveniles in conflict with law. JJB may pass orders to counsel parents / guardian and the child; advise / admonish the child and release; advise the child to participate in group counseling and similar activities; perform community service; order payment of fine, if juvenile is above 14 years of age and earns money; release on probation of good conduct, and place him under care of parent / guardian or other fit person or fit institution; or send to a Special Home. JJB must remove records of conviction after expiry of period of appeal / reasonable period. Orders that the JJB cannot pass include sentencing to death / life imprisonment / committed to jail.

Some rules:

- Juvenile MUST be released on bail irrespective of the offence.
- A juvenile may be released on bail with or without surety
- A juvenile may not be released on bail if release brings him into association with a criminal; exposes him to moral, physical or psychological danger

- A juvenile not released on bail must be kept in the Observation Home/place of safety pending inquiry
- Parents / guardian of juvenile must be informed of the detention of the juvenile as soon as possible.

High Courts have constituted "Juvenile Justice Committees" which are monitoring committees headed by sitting Judges of High Courts. These Committees supervise and monitor implementation of Juvenile Justice Act in their Jurisdiction and have been very effective in improving state of implementation. Juvenile Justice Committee of Delhi High Court is considered a model in this regard.

Criminal Law (Amendment) Act 2013 is an example of special laws for women. Anti-sexual harassment law made in 2013 is a similar example.

#### **Right to education and the special rights of the disadvantaged children**

In March 2013, it was decided that a constitution bench of the Supreme Court ( minimum strength of five judges) will hear the challenge to Article 15(5) of the constitution, which places an obligation on unaided private schools to reserve 25 percent seats for students from socially and economically weaker sections of society. The provision, under the Right to Education Act (RTE), was challenged by managements of private schools in various states. The petition quoted Article 145(3) of the Constitution: "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." Since the challenge involved raises the question as to the validity of Articles 15(5) and 21-A of the Constitution of India, the apex court held that matter needs to be referred to the constitution bench of five Judges."

The apex court Oct 8, 2012, issued notice to the centre on a petition that sought equal status for unaided educational institutions at par with unaided minority institutions in reserving 25 percent seats for socially and economically backward sections. In 2002, in the TMA Pai case, the apex court held that unaided minority educational institutions need not give seats to non-minority students.

The petition contended that Article 15 (5) was ultra vires of the basic structure of the constitution as it discriminates between two similarly placed category of educational institutions on the basis of their minority and non-minority status and thus violates right to equality. In the same verdict the Supreme Court said that such reservation violates Art.19.1g. Article 19(1)(g) in the constitution provides for freedom to practise any profession, occupation, trade or business.

Clause 5 of the Article 15 says " Nothing in this Article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause

(1) of Article 30." It exempts the minority and does not exempt the non-minority educational institutions.

In April , 2012, an apex court upheld the constitutional validity of the Right to Education (RTE) Act that mandates unaided private schools to keep 25 percent seats for students from economically and socially weaker sections of society. The petition seeks to challenge that verdict as a Constitution Bench is required to judge the validity of the 86<sup>th</sup> Amendment Act that gives right to education under Art.21a.

The apex court by majority judgment, upheld the constitutional validity of Section 12(1)(C) of the RTE Act that provides that seat quota.

While upholding the Section 12(1)(C) of the RTE Act, the majority judgment exempted unaided minority educational institutions from such quota but held back same exemption from un-aided non-minority institutions.

However, in a separate judgment Justice K.S. Radhakrishnan held that the mandate under the RTE Act providing for reservation of seats was not constitutionally valid, and thus the unaided schools, whether majority or minority, could not be compelled to earmark 25 percent seats in their institutions.

Art.15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.

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.

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

93<sup>rd</sup> Constitution Amendment Act (2005) inserted a new clause in Art.15. The new Clause-Art.15.5 states more explicitly that the State can make any special provision for SC,ST and SEBCs (Socially and Educationally Backward Classes) in regard to admissions to educational institutions, including private educational institutions, whether aided or unaided by the state. However, minority educational institutions (Article 30) are exempt. It is an enabling Act and requires specific Central and State laws to enforce it. The enabling law was made in 2006- The Central Educational Institutions (Reservation in Admission) Act 2006.Similarly states also have enacted the relevant laws.

## **Art.15 and social progress**

Art.14 establishes equality before law but historical facts of inequality mandate that special treatment for the disadvantaged groups be given. Constitution recognizes that affirmative action is necessary for genuine social development. Therefore, in Art.15, there are provisions in support of marginalized sections of Indian society. One of the main goals of Art.15 is to reform the traditional social order which is beset with discrimination against certain sections.

Preferential treatment in favour of SC/ST and OBCs regarding educational and other facilities is a social reform that is based on Art.15. At the same time, the Supreme Court sought to balance the quota-based preferential action with general social good by limiting the quantitative extent of reservation permissible. For example, 50% is the limit laid down by the court for all reservations combined. Also, in the case of the SEBCs, creamy layer is excluded. Further, the Supreme Court sought updated data about the SEBCs in India to see if the quota set aside is in conformity with that or not.

Regarding women and their social progress on the basis of Art.15, the following needs to be noted:

1. According to Supreme Court, reservation of posts exclusively for women is valid under Art.15 (3) as the Article 15(3) covers every dimension of State action. It needs to be noted that Art.15 does not cover employment for any other social group except women. All others are given preference in jobs under Art.16.
2. Provisions in the criminal law and procedural law in favour of women have been accepted by the courts in view of their social weakness.
3. Reservation for women in local bodies (Panchayat and Nagarapalika bodies) and educational institutions is supported by the Art.15.
4. In Visakha vs State of Rajasthan (1997), Supreme Court suggested measures to eliminate sexual harassment in the work place as it violates Art.14, Art.15 and Art.23.

The Women's Reservation Bill that is being nationally debated since 1996 is also based on the protective provisions of Art.15 (3). Constitution(108) Amendment Bill was passed by the Rajya Sabha in March 2010.

## **Art.16. Equality of opportunity in matters of public employment**

- There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- 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.

- Parliament may legislate that residence is a criterion for employment in certain categories. For example, 'sons of soil policy' whereby people in the vicinity of an area may have the employment reserved for them.
- 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.
- Religious and denominational institutions can reserve the employment in them for those professing the religion. For example, church, mosque etc.

### **Explanation**

Descent and Residence are the two additional criteria found in Art.16 (2) as compared to Art.15 (1).

Descent can be exemplified by the following. In GD Rama Rao Vs State of Andhra Pradesh, the Supreme Court struck down an order of the Government where the Collector was directed to appoint persons from among the last holders of the office as it amounted to discrimination on the basis of descent.

### **Art.16 (3)**

Residence can not be the basis for reservation. However, Art.16 (3) makes exceptions. That is, a State or a UT can reserve certain posts for its own residents. Parliament alone is competent to make such laws for any State or UT. The exception is made for reasons of efficiency as knowledge of local conditions is essential, at times, for discharge of duties well. Jobs so reserved are generally subordinate in nature. It is called 'sons of soil policy'.

Parliament, in 1957 made the Public Employment (Requirement as to Residence) Act for a temporary duration for preferential appointment to the residents of the State for the non-gazetted ranks in the States of Andhra Pradesh, Himachal Pradesh, Tripura and Manipur. The Act expired in 1974.

### **Art.16 and Supreme Court Judgement in Indira Sawhney vs Union of India**

In Indira Sawhney vs Union of India 1992, the Supreme Court upheld the Government policy of providing for reservation for the other backward classes (OBC) in government services. The gist of the verdict is the following:

- It is not necessary that the 'provision' under Art. 16(4) should necessarily be made by the Parliament/ Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the State falling under Art. 12 of the Constitution are themselves competent to make such a provision, if so advised.
- Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social groups for the purposes of Art. 16(4).

- 'Creamy layer' can be, and must be excluded.
- There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories.
- Reservations contemplated in Clause (4) of Art. 16 should not exceed 50%, except in rare circumstances. The rule of 50% should be applied to each year. More than 50% amounts to reverse discrimination.
- Article 16(4) does not permit provision for reservations in the matter of promotion.
- While the rule of reservation cannot be called anti-meritarian, there are certain services and posts to which it may not be advisable to apply the rule of reservation. For example, super speciality institutions; research based institutions etc.
- The reservation of 10% of the posts in favour of economically backward sections among the forward castes is not constitutionally invalid and is accordingly struck down.

#### **Nagraj case and later: Promotion in reservation for SC/ST**

In 2012 April, the ruling of the Supreme Court in the case of U.P. Power Corporation Ltd. vs. Rajesh Kumar & Ors struck down provision of reservation in promotion to SCs and STs in the State of UP.

In 1992 in the case of Indra Sawhney (Mandal verdict), the apex court held reservation in promotion is ultra vires but allowed its continuation for five years from the date of judgment as a special case. The 77th amendment to the Constitution was made in 1995 inserting clause (4A) to Article 16 before expiry of five year which enabled the Government to continue reservation for SCs and STs in promotion.

The 81st amendment was made to the Constitution whereby clause (4B) was incorporated in Article 16 of the Constitution which permits to treat the backlog reserved vacancies as a separate and distinct group, to which the limit of 50% may not apply. This enables the Government to launch Special Recruitment Drives to fill up the backlog vacancies reserved for SCs/STs and OBCs.

The 82nd amendment was made to the Constitution whereby a proviso was incorporated in Article 335 of the Constitution which enabled the State to give relaxations/concessions to the SC and ST candidates in the matter of promotion.

The aforesaid Constitutional amendments were made in order to protect the interests of the backward classes including Scheduled Castes and Scheduled Tribes. The validity of all these four Amendments were challenged before the Supreme Court through various writ petitions clubbed together in M. Nagaraj & others vs. Union of India & others.

Supreme Court in its judgment in 2006 in *Nagaraj* case upheld the validity of all these amendments. However, the Court stipulated that if the State Government wishes to make provision for reservation to SCs and STs in promotion, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335.

### Affirmative Action and Art.15 and Art.16

Affirmative action means policies, programs and procedures that give preference to vulnerable sections of society like minorities and women in employment, educational opportunities and so on. Affirmative action is any action aimed at empowering the weak: scholarships, coaching etc. Reservation on the other hand is based on a statutory requirement for quantitative targets. It is quota based and gives no discretion to the employer. Some use affirmative action to include quota. After all, the aim is the same—empowerment.

The instruments available for affirmative action or reservation are seats in educational institutions; various government jobs; employment opportunities in the corporate sector; bank loans, etc.

Affirmative action (positive discrimination) programmes are specifically written into the Indian Constitution.

- Clauses (3) and (4) of Article 15 permit the making of any kind of special provision for advancing the interest of women and children and the Scheduled Castes and Scheduled Tribes and SEBCs.
- Art.15.5 is inserted by the 93<sup>rd</sup> Amendment Act 2005.
- Clause (4) of Article 16 provides specifically for reservation of appointments or posts under the State in favour of backward classes of citizens.

### State of Madras vs Champakam Dorairajan 1951

In this case, caste-based reservations were overruled as unconstitutional by the Supreme Court on the basis of Art.29 (2). The Madras government order that was ruled ultra vires by the apex court involved fixing the proportion of students from various communities, including the Scheduled Castes, who could be admitted to the State's medical and engineering colleges.

Art.29(2) says that in Government or Government-aided educational institutions, a citizen could not be denied admission on grounds of religion, race, caste or language.

The First Amendment to the Constitution in 1951 was made necessary by the *Champakam* case judgement. Article 15(4) was added to the Constitution by the First Amendment in 1951.

Article 15(4) states: "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."

### **93<sup>rd</sup> Amendment Act 2005**

The Constitution has been amended to include reservation of seats for Scheduled Castes, Scheduled Tribes and SEBCs in educational institutions: government, private aided and unaided educational institutions. Minority educational institutions are not covered by the amendment.

The Supreme Court judgement in Inamdar case (2005) - doing away with reservations for SC/STs in unaided private professional educational institutions was the immediate reason for the 93<sup>rd</sup> Act. The 93<sup>rd</sup> Act has gone well beyond what was required to undo the apex court verdict in Inamdar case. It widened the scope of reservations by extending it to all aided/unaided private educational institutions and not merely professional educational institutions. Minority educational institutions are exempted as mandated by Art.30. Centre and States have to come up with enabling legislations to enforce the Act.

Clause (1) of Article 30 provides the rights to all minorities to establish and administer educational institutions of their choice. It is essential that the rights available to minorities are protected in regard to institutions established and administered by them. Accordingly, institutions declared by the State to be minority institutions under Article 30 are omitted from the operation of the 93<sup>rd</sup> Act. The right of the unaided minority institutions not to be subjected to any regulatory measures, other than those aimed at promoting the educational standards of the institution and the interests of the community concerned, has been judicially upheld in the judgements of the Supreme Court. Further, minorities need to advance educationally for socio-economic progress to take place. National integration also requires that minorities should progress educationally.

However, some concerns were raised during the debate in Parliament on the issue. One set of criticisms relates to abuse of the right by members of religious and linguistic minorities simply for profiteering. The other points out that at least the weaker sections among minorities especially Muslims and Christians of Dalit and OBC origin, should get the benefit of reservation in unaided minority educational institutions.

Article 15 of the Constitution now carries an enlarged mandate for the advancement of socially and educationally backward classes and Scheduled Castes and Scheduled Tribes. The prime purpose of this amendment is to make premier educational institutions accessible to SEBCs.

Notably, Article 15(5) makes it necessary for the State to make any special provision for the advancement of these weaker sections by legislative action and not by any executive order. So far, the government has been implementing the policy of reservation for the weaker sections through executive orders and instructions.

### **Central Educational Institutions (Reservation in Admission) Act, 2006**

It provides for reservation in public, private aided and private unaided educational bodies as well. However, following are the exceptions

- Institutions of Excellence because in these bodies students are not admitted for studies. They are basically the research institutions
- Minority educational institutions as they are Constitutionally given a separate status

## **Supreme Court Verdict 2008**

A five-Judge Constitution Bench headed by Chief Justice K.G. Balakrishnan upheld the law. The Supreme Court wanted the creamy layer to be excluded from the socially and educationally backward classes for reservation. The court directed that every five years, there should be a review of the lists of backward classes.

### **Art.17. Abolition of Untouchability**

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

There are two important legislations related to Article 17:

- The Protection of Civil Rights Act, 1955 (PCRA) and
- The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (PAA).

Initially the Untouchability (Offences) Act, 1955, had been enacted to abolish the practice of untouchability and social disabilities arising out of it against members of the Scheduled Castes. It was amended in 1977 and is now known as the Protection of Civil Rights Act, 1955. Under the revised Act the practice of untouchability was made both cognizable (a police officer can arrest the accused person without magisterial warrant) and non-compoundable and stricter punishment was provided for the offenders. (In certain offences, the parties involved can come to a compromise while the case is under trial in the court. This is 'compoundable', further action in trial is discontinued. More serious offences are called non-compoundable as they can not be withdrawn)

### **Art.18. Abolition of Titles**

No title, not being a military or academic distinction, shall be conferred by the State. No citizen of India shall accept any title from any foreign State. 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. 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.

The British government had created an aristocratic class known as Rai Bahadurs and Khan Bahadurs in India. Constitution abolishes these titles for the reason that they create inequality. However, Military and academic distinctions can be conferred on the citizens of India.

The Supreme Court, in 1995, upheld the validity of awards like Bharat Ratna and Padma awards. The apex court ruled that the awards of Bharat Ratna and Padma Vibhushan could not be used by the recipient as a title and did not, accordingly, come within the Constitutional prohibition.

Art.18 is only a Constitutional enabling provision. Laws have to be made to operationalise the general provisions found in the Article.

## **Art. 19: Right to Freedom**

The right to freedom in Article 19 guarantees the following six freedoms:

- Freedom of speech and expression, which enable a citizen to participate in public activities- freedom of expression includes freedom of press. Reasonable restrictions can be imposed in the interest of public order, security of State, decency, morality etc.
- Freedom to assemble peacefully without arms, on which the state can impose reasonable restrictions in the interest of public order and sovereignty and integrity of India.
- Freedom to form associations or unions on which the state can impose reasonable restrictions on this freedom in the interest of public order, morality and the sovereignty and integrity of India.
- Freedom to move freely throughout the territory of India though reasonable restrictions can be imposed on this right in the interest of the general public, for example, restrictions may be imposed on movement and travelling, so as to control epidemics.
- Freedom to reside and settle in any part of the territory of India which is subject to reasonable restrictions by the State in the interest of the general public or for the protection of the scheduled tribes from exploitation and coercion.
- Freedom to practise any profession or to carry on any occupation, trade or business on which the state may impose reasonable restrictions in the interest of the general public. Thus, there is no right to carry on a business which is dangerous or immoral. Also, professional or technical qualifications may be prescribed for practicing any profession or carrying on any trade.

State can impose reasonable restrictions on the exercise of the above rights on grounds of:

- sovereignty and integrity of India
- security of State
- public order
- friendly relations with foreign States
- decency or morality
- contempt of court
- defamation or
- incitement to an offence.

The courts have the power to review the reasonableness of the restrictions and strike them down if they are not justified.

### **Press Freedom in India**

There is no separate provision guaranteeing the freedom of the press, but the Supreme Court has held that freedom of the press is included in the 'freedom of expression' under Article 19(1) (a) of the Indian Constitution.

Reasonable restrictions as mentioned above apply to freedom of press too.

The printer, publisher or editor of a newspaper who is aggrieved by an infringement of this right by a law or order may apply for relief to the Supreme Court under Art.32 or a High Court under Arts. 32 or 226 of the Constitution.

The National Commission to Review the Working of the Constitution (NCRWC) recommended that freedom of press be explicitly granted and not left to be implied in the freedom of speech.

Freedom of speech guaranteed to citizen is subordinate to the parliamentary privileges (Art.105 and 194) and in case of a clash between the two, the latter prevails.(More ahead)

### 'Reasonable restrictions'

Art.19(2) says that in the interests of public order, security of state, morality etc, reasonable restrictions may be imposed on the six freedoms mentioned in Art.19(I). However, 'reasonableness' should be qualified with the following

- the authority that imposes restrictions is responsible for showing that they are reasonable and
- restrictions, to be reasonable, should satisfy the test of 'proportionality'- that is the restriction should not be excessive.

The Supreme Court has held that a reasonable restriction is one which is not in excess of the requirements of the case. This test involves a drawing of balance between the interest of the citizen and collective demands like national security and public order.

### Rights and restraints

The rights that spring from Article 19(1) are not absolute and unchecked. There cannot be any liberty absolute in nature and uncontrolled in operation so as to confer a right wholly free from any restraint. Had there been no restraint, the rights and freedoms may become synonymous with anarchy and disorder.

State has a duty to protect itself against certain unlawful actions and, therefore, may enact laws which would ensure such protection.

However, the restrictions must be reasonable. The test of reasonableness, wherever prescribed, should be applied on a case by case basis and no abstract standard or general pattern of reasonableness, can be laid down as applicable to all cases.

For determining the reasonableness of a restriction, factors such as the duration and extent of the restrictions, the circumstances under which and the manner in which that imposition has been authorized, the nature of the right infringed, the underlining purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the prevailing conditions at the time enter into the judicial consideration.

## **Freedom of Speech and bandhs and hartals**

Freedom of speech does not include calling for forced bandhs. The Kerala High Court had in 1997 and again delivered judgements curbing the right of trade unions and political parties to call for forced bandh. ( Bandh and Hartal mean essentially the same. Hartal was originally a Gujarati expression meaning the closing down of shops to press a demand) The Supreme Court in 1997 upheld the Kerala High Court's order making bandhs illegal." Bandhs and hartals cost the State and private citizens by way of loss to investments and destruction to property. The Bombay High Court ( 2004) imposed a fine on two political parties for organising a bandh in Mumbai in 2003. The petitioners had claimed damages of Rs 50 crore on the basis of economic loss to the city for one day of stoppage.

The essence of the judicial position is this: people cannot be made to participate in bandhs under duress and that organisers of bandh "trample upon the rights of the citizens protected by the Constitution."

However, right to protest is Constitutional. The Supreme Court (2012) pronounced a landmark judgement on the incident that took place on the midnight of 4-5<sup>th</sup> June, 2011 at Ramlila Maidan, Delhi where Baba Ramdev and his supporters were carrying on a protest against corruption and prevalence of black money in India. They were agitating against the reluctance of the government to take key steps to eliminate the menace of corruption and black money.

The protest was peaceful. The Supreme Court in its judgement has upheld the right to peaceful protest to a Constitutional right. The Court observed – "Freedom of speech, right to assemble and demonstrate by holding dharnas and peaceful agitation are the basic features of a democratic system. The people of a democratic country like ours have a right to raise their voice against the decisions and actions of the Government or even to express their resentment over the actions of the government on any subject of social or national importance. The Government has to respect, and in fact, encourage exercise of such rights. It is the abundant duty of the State to aid the exercise of right to freedom of speech as understood in its comprehensive sense and not to throttle or frustrate exercise of such rights by exercising its executive or legislative powers and passing orders or taking action in that direction in the name of reasonable restrictions".

The right to peacefully protest subject to just restrictions is now an essential part of free speech and the right to assemble. Additionally, it is an affirmative obligation of the State to make that exercise of this right effective.

The judgement , however, imposes an obligation on the protesters to obey every lawful order like Section 144 of CrPC.

## Judicial intervention and Art.19.1a

### -Aarakshan case

Before the release of Aarakshan, which attempts to critically analyse the system of reservation in admissions in the Indian education system, three States, namely, Punjab, Andhra Pradesh and Uttar Pradesh, decided to suspend the screening of the film in their respective States. The Director of the film approached the Supreme Court against this decision of the States. Punjab and Andhra Pradesh withdrew the order of suspension. However, Uttar Pradesh decided to defend its order.

Striking down the decision of the Uttar Pradesh Government, the Supreme Court held that even delicate issues like reservation require public discussion and debate in a vibrant democracy such as ours. Such a discussion on social issues spreads awareness, which is required for the effective working of the democracy.

### Da Vinci Code

Some people had objected to screening of Da Vinci Code, as the movie was considered to hurt the Christian feelings. Allowing the screening of the film, the Madras High Court held that the issue is whether there can be a work of art or literature or a film which propounds such interpretations, and whether the public have the right to decide whether to accept or reject such alternative interpretation. The issue is whether the state is bound to protect the person whose fundamental right is sought to be violated by people who threaten to breach peace.

While the democratic credentials of India are convincing, there are certain worrying signs like the assault on freedom of speech and expression in the case of Salman Rushdie not being allowed to participate in the Jaipur Literary Festival; A.K. Ramanujan's great essay on the Ramayana being banned by the Central University of Delhi and so on.

### Viswaroopam 2013

The recently released Kamal Hassan movie Vishwaroopam portrays Afghan jihadis as offering quranic prayers before waging jihad. Some Muslim groups in Tamil Nadu were offended. The government and the court banned the movie and suggested to Kamal Hassan to negotiate with the protesting Muslim groups to reach a settlement. The reason cited by the State government to stop the screening of the film till the cuts were affected was that law and order could not be maintained due to public protests. However, cinematography is in the Union List(Entry60) and the Censor Board passed and it was open to be challenged. Supreme Court in earlier verdicts said that inability to keep law and order could not be a ground for stopping the screening of the film. Apart from freedom of speech and expression and the right to do business( both being a part of Art.19.1, the other issues involved here are whether any one has a right not to be offended. Federal issues are whether state government can stop screening of a film that has been passed by Censor Board.

Supreme court held that it is the duty of the State government to maintain law and order and ensure the safe screening of a film that has been cleared by the expert body i.e. CBFC. In Prakash Jha's case, the U.P. government had sought to prohibit screening of the film 'Aarakshan' under the U.P. Cinemas (Regulation) Act, 1955, the Supreme Court did not accept it.

### **Section 66A of Information Technology Act**

Section 66A, which was added to the Information Technology Act in 2008 states that any message sent out electronically that is "grossly offensive or has menacing character" with the purpose of "causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages," shall be punishable with a fine and a prison term; which may extend to three years. The section was intended to curb the misuse of communications services such as SMS, MMS and email through the sending of offensive messages or spam.

The Union government defended in the Supreme Court legal validity of Section 66A of Information Technology Act, which was used by Thane police to arrest two girls from Palghar for their comments on Facebook. The SC had asked the Maharashtra government to explain the action taken against erring police officials for the manner in which the 21-year-old girls were detained in the night. It had also sought the Centre's response to Shreya Singhal's PIL challenging the constitutional validity of Section 66A.

The ministry of communication and information and technology in its affidavit said Section 66A did not curb freedom of expression and speech guaranteed under Article 19(1) of the Constitution, as the provision did not provide absolute freedom but imposed certain restrictions. It added that the "content, effect, and the purpose of Section 66A of the IT Act clearly shows that it is regulatory in nature" and was not in breach of Article 14, 19 and 21 of the Constitution. Moreover, the advisory issued by the Centre to states not to effect arrest under Section 66A without prior permission from senior police officers would rule out unnecessary detentions in future.

The Centre provided statistics about internet users in India and the danger of internet misuse. Of the 700 million internet users worldwide, India had 125 million and accounted for 16% of spam mails/messages, which has emerged as an altogether new medium to spread malicious content and information.

"The misuse of information technology, particularly the social media sites, has been witnessed by the country in the recent past when emails were sent, messages posted on social media sites attaching morphed images purported to certain incidents," the ministry said.

"There have been innumerable instances to disturb/outrage the religious/inter-community harmony and faith by uploading, publishing and transmitting highly inflammatory and objectionable information in the forms of texts, tweets, images, audio-videos and links," it said.

"The policies adopted by the internet mega companies located outside India compounded the problem by not offering information pertaining to perpetrators/offenders under certain pretexts which effectively blunts the law enforcement activities. The cyberspace therefore, offers altogether different kind of medium, opportunities as well as a perception of invisibility as compared to physical shape," the Centre said defending the regulatory mechanism under Section 66A.

The apex court had also issued notice to Delhi government , West Bengal government and Puducherry administration taking into account three other incidents of harassment last year -- arrest of Jadavpur University professor Ambikesh Mahapatra, businessman Ravi Srinivasan in Puducherry and Air India employee R Jagannatha Mayank Sharma in Mumbai.

#### Critics' points

Article 19(1)(a) of Indian Constitution guarantees freedom of speech and expression. Threat to public order, defamation, incitement to offence, contravening decency and morality, committing contempt of court, etc, are listed in Article 19(2) as grounds to limit freedom. Curbs on speech cannot go beyond this.

If the police consider a tweet or blog 'grossly offensive' or 'of menacing character', or causing 'inconvenience, annoyance, danger, obstruction or insult', they can prosecute the netizen responsible under Section 66A of the IT Act, which carries a maximum imprisonment of three years. This is certainly a breach of the fundamental right to speech. The grounds provided are not rooted in those listed in Article 19(2) ( see the grounds given above). If an expression is not criminal when it is made in the physical world, it cannot become one in the virtual world of internet. An eminent Constitutional lawyer says: Justice Markandey Katju, Chairman, Press Council, wrote in The Hindu that the Shiv Sena policy of favouring sons of the soil would lead to balkanization of the nation. Police might think this article causes 'annoyance', 'inconvenience', or that it is 'grossly offensive' to the Shiv Sena. Would it be constitutional to prosecute him for these comments as they are also on The Hindu website?

The Indian Penal Code and other provisions of the IT Act, especially after the 2008 amendment, provide enough safeguards against defamation, intentional insult leading to breaking the peace, incitement to commit offence, etc. Political criticism often causes some annoyance to someone. Should they be chargesheeted? The basic idea behind freedom of speech is to allow divergent critical views without looking into whether people are annoyed or inconvenienced.

- Section 66A is harsh as it deprives right to life personal liberty in Art.21.

### Free Speech and hate speech debate

The question of whether freedom of speech is an absolute right has been a subject of recurrent debate in the wake of recent controversies. There were serious debates over the publication of cartoons of the Prophet Muhammad in a Danish newspaper, which prompted comparisons with the landmark controversy over Salman Rushdie's *The Satanic Verses*. There have been protests against artist MF Husain's depiction of Hindu deities in the nude, and the works of a fine art student in Vadodara, whose work was considered by some to be 'derogatory' to certain gods. In 2013, Viswaroopam film by Kamal Hassan had to go for cuts before it could be screened in Tamil Nadu. Salman Rushdie could not take part in the Jaipur Literary Festival in 2012. These cases stirred a wider debate on the limits of freedom of expression in an democratic , pluralist and secular country committed to protecting people's religious sentiments.

There is the related question of incitement and hate speech, triggered by the violence against migrants in Mumbai. The tirade by Raj Thackeray, leader of Maharashtra Navnirman Sena (MNS), against north-Indian migrants in Mumbai resulted in his arrest and a gag order against him. Politicians across the board have demanded a ban on MNS. Further, the Indian Constitution justifies restrictions on freedom of speech in the interest of communal harmony and public order.

The Enlightenment thinker Voltaire is associated with the sentiment that 'I disapprove of what you say, but I will defend to the death your right to say it'. The philosopher JS Mill defended freedom of speech on the basis that it is only by allowing beliefs to be criticised that we can be justified in believing that they are true. Some argue these ideas are still fundamental and that free debate, not restrictions, remains the only way of countering false or offensive views.

However, certain actions are criminalised in order to protect people from physical harm. Extending this argument to speech, it is argued that some types of speech, particularly hate speech, should be banned because they may lead to physical harm ('incitement to violence'), or because the harm these forms of speech cause is just as serious as physical harm. In a culturally diverse society, respect for others' beliefs should take precedence. On the other hand, it is argued that if one accepts some limits to free speech on grounds of offence, it will lead to competing demands by other groups not be offended, leading to an overall loss of freedom. Furthermore, the best way to oppose speech is to use free speech against it.

Advocates of absolute freedom of speech say that in a diverse society, instead of trying to prevent offence, the right to be offensive should be seen as essential to democracy. Diverging values lead to political conflict and the only way to progress is through airing different views. Looked at this way, free speech is the basis for all other political values, as it assumes people are rational and fully capable of assessing different arguments. Those wary of protecting absolute freedom of speech take a very different view. They argue that speech is not only used to make rational arguments, but to foment hatred and stigmatise powerless minorities. Rather than free speech being egalitarian, it is too often used to oppress those 'without a voice'.

One argument against absolute freedom of speech is that speech is never really 'free' but has consequences; like all rights, it comes with responsibilities. Proponents of the above argument point out, for example, that there is no right to shout 'fire!' in a crowded theatre. They claim that

this can be extended to other areas, such as speech that incites others to harm third parties physically, which justifies banning certain inflammatory types of speech.

Rushdie says : There is no right in the world not to be offended. In a free society, an open society, people have strong opinions, and these opinions very often clash. In a democracy, we have to learn to deal with this. And this is true about novels, it's true about cartoons, it's true about all these products.

### **Freedom of speech and Civil Servants**

According to the Supreme Court, restrictions on freedom of speech in Art.19 (1a) can be curtailed for the public servants in the interest of discipline even though such a restriction is not mentioned in Art.19(2). Service rules are essential for discipline within the service- for example, criticism in public of the superiors is not permitted . The objective is not to curb freedom of speech and expression but to ensure that government servants effectively discharge their statutory duties and obligations. Thus, service rules are valid and the restrictions on freedom of speech that they carry are justified. Thus, there is a balance to be established between the organizational functioning and the freedom of speech. Such restrictions, however, do not apply to an elected representative in an organization as he represents people.

The 97th amendment to the Indian constitution makes the right to form cooperative societies a fundamental right under Article 19(1)(c). The article now reads: the right to form “associations or unions or cooperative societies”.

### **Freedom of movement and residence Art.19(1d) and (1e)**

The former deals with the right of the citizens to move freely throughout the country and the latter grants the right to residence. The basis for the grant of the rights is that India is one territory. Both are related and in fact follow from one another. They are not available to the foreigners like other freedoms in Art.19. The restrictions that apply to other rights in Art.19(1) apply to them also. The following are the reasonable restrictions that additionally apply to them

- to maintain public order: if authorities suspect the movement of persons is likely to disturb public order in a region, the right can be denied. However, the restrictions can not be oppressive or excessive.
- for safety reasons, helmets can be prescribed for the two wheeler riders
- extemntion orders against citizen to leave the territory of a state if he is an anti-social element. In June 2011, Baba Ramdev was externed from Delhi as the police feared for law and order. A person can be externed from a state if he is intimidating witnesses in a case
- protection of the interests of Scheduled Tribes.

### **Art.19(1g)**

It gives citizens the right to practise any profession, or to carry on any occupation , trade or business. However, there can be restrictions imposed on following grounds

- qualifications can be prescribed for the same

- State can monopolise business in any sector to the exclusion of any one- partial or complete. It may be a part of the planned economy
- Restrictions on trading in liquor or any intoxicating substances in public interest( prohibition)
- Betting and gambling are not a part of 'trade' and so can be restricted or banned
- For food security, traders can be asked to sell a commodity at a concessional price( levy sugar)
- Restriction on slaughter of animals.

#### **Art. 20. Protection in respect of conviction for offences**

1. No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act ; nor be subjected to a penalty greater than that which might have been given under the law in force at the time of the commission of the offence. If a law is made in violation of the principle mentioned above, it is invalid. Thus, retrospective criminal legislation is illegal.
2. No person shall be prosecuted and punished for the same offence more than once. That is, double jeopardy for the offence committed only once is unconstitutional.
3. No person accused of any offence shall be compelled to be a witness against himself.

#### **Ex post facto Laws (Retrospective laws)**

An ex post facto law (from the Latin for "from something done afterward") or retroactive law is a law that retrospectively changes the legal consequences of acts committed prior to the enactment of the law. In reference to criminal law, it means the following

- criminalize actions that were legal when committed or
- aggravate a crime by bringing it into a more severe category than it was at the time it was committed or
- change or increase the punishment prescribed for a crime or
- alter the rules of evidence in order to make conviction for a crime more likely than it would have been at the time of the action for which a defendant is prosecuted.

An ex post facto law may also decriminalize certain acts or alleviate possible punishments .For example by reducing punishment from rigorous imprisonment to simple imprisonment. If the retroactive law eases the punishment for a crime, it is valid.

In May 2010 the Supreme Court of India in the case "Smt. Selvi vs. State of Karnataka" held narco, polygraph (also called Lie-detector) and brain mapping tests to be unconstitutional as they violate article 20(3) of the Constitution which says that a person can not be compelled to be a witness against himself.

The Kerala High Court in 2011 held that relief under the provisions of the Protection of Women from Domestic Violence Act, 2005 could be sought against domestic violence that took place before the Act came into force. Delhi High Court also ruled the same in 2010:There is no difference between the women who were subjected to domestic violence before 2005 and those who were later, as any differentiation would tantamount to denying the right of equality before

law guaranteed under Article 14 of the Constitution. It further held that legislative intent of helping women who are harassed at the hands of their husbands and their in-laws, should be taken into consideration while interpreting the Act.

Critics however argue against the verdict on two grounds: if the Parliament wanted to make it retrospectively valid, it would have stated it expressly. Further, it is violative of Art.20.

### Vodafone case

Parliament in the budget session amended retrospectively the Income-Tax Act to give clarity to tax law in the country so that it can recover Rs 11,000 crore from Vodafone. Its validity is being debated in the country and abroad.

In the Vodafone case, the SC had declared that the I-T Department doesn't have the jurisdiction to levy tax on the US\$ 11 billion acquisition deal between the UK telecom major and Hutchison Essar in 2007.

Justice JS Verma, former CJI opined : "It is a well-settled SC decision that the legislature has the power to amend laws retrospectively, including tax laws."

Justice K T Thomas, former judge of the SC, clarified that only penal statutes cannot be amended by the legislature retrospectively. Article 20 of the Constitution applies to the criminal/punitive laws. But this is not the case for fiscal statutes, which can be amended in public interest by raising revenue concerns and public interest.

Parliament made many such retrospective fiscal rules and laws to overcome the court verdicts and were upheld by the apex court.

### Art.21. Protection of life and personal liberty

No person shall be deprived of his life or personal liberty except according to procedure established by law. This Article prescribes a negative mandate that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The procedure established by law for deprivation of rights conferred by this Article must be fair, just and reasonable.

#### 86<sup>th</sup> Amendment Act introduced Art.21a introduced right to education which says:

"21A. the State shall provide free and compulsory education to all children of the age of six to fourteen year in such manner as the State may, by law, determine".

However, it is only an enabling law and is to be made operational by the Government with relevant legislation. The Right of Children to Free and Compulsory Education Act or Right to Education Act (RTE), which was passed by the Indian parliament in August 2009, describes the modalities of the provision of free and compulsory education for children between 6 and 14 in India under Article 21A of the Indian Constitution. India became one of 135 countries to

make education a fundamental right of every child when the act came into force on 1 April 2010. Supreme Court upheld the law in 2012.

### **Art.21 saw many developments since the Constitution commenced.**

Supreme Court in the Menaka Gandhi case (1978) applied the American jurisprudence – the principle of due process of law , to the restrictions on Art.21 on the basis of the following arguments

- 1 Art.19 and 21 can not be understood as water tight compartments and the same criteria of reasonableness as in Art.19 must be applied for Art.21 too.
- 2 Merely following the procedure established by law is not enough. The courts have the right to review and question the reasonableness of law itself .
- 3 Restrictions must be reasonable, just and fair and should not be arbitrary.

Thus, Maneka Gandhi case judgement overturned the apex court verdict in the Gopalan case (1950) when the Supreme Court ruled that it was enough if the procedure was followed and that courts could not inquire into the reasonableness of the procedure .In India traditionally, procedure established by law was followed as it prevailed in Britain. But since the apex court judgement in 1978, presently we follow both thus strengthening judicial review.

#### **Due process of law**

Law has to be fair and reasonable. If it is not, it is liable to be struck down, even if the prescribed procedure is followed. This is the essence of the expression 'due process of law' as it obtains in the US. It is discussed in the context of the protection of the right to life, liberty and property. In the USA, the Supreme Court scrutinizes the law as it is made and implemented to ensure that 'due process' is followed. Otherwise, it is nullified.

Due process of law includes such constitutional requirements as adequate notice, assistance of counsel, and the rights to remain silent, to a speedy and public trial, to an impartial jury, and to confront and secure witnesses.

The constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property.

Procedural due process sees if the law is clearly written and whether it grants the

- Right to a fair and public trial
- Right to be present at the trial
- Right to an impartial jury
- Right to self-defense and so on.

Substantive due process can be the basis for pronouncing the law unconstitutional if the law making agency has no power to make the law.

## 'Judiciary deduced rights' or 'inferred rights' or 'derived rights'

In recent years, courts have been expanding the scope of the Right to life and liberty. Art. 21 has been enriched in a number of cases to safeguard the rights of different sections of the society. The Article has been invoked to give right to elementary education, protect the rights of prisoners, the rights of inmates of protective homes, right to legal aid, right to speedy trial, right of release and rehabilitation of bonded labour, right to health, and right to healthy environment.

In Francis Coralie vs. Union Territory of Delhi [(1981)] former Chief Justice of India, P.N. Bhagwati said "...the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter...."

Relying on Francis Coralie, in Bandhua Mukti Morcha vs. Union of India (1984) where the question of bondage and rehabilitation of some labourers was involved, Justice Bhagwati observed:

"It is the fundamental right of everyone in this country... to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Art. 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Art. 39 and Articles 41 and 42 and..... therefore, it must include protection of the health and strength of the workers, men and women and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief."

In 1993, the Supreme Court held in J. P. Unnikrishnan case that Right to Education is a fundamental right as the objectives set forth in the Preamble to the Constitution can be achieved only when education is provided to the citizens of this country; Part III (FRs) and IV (Directive Principles of State Policy) are supportive of each other. Unless the right to education is made a reality, the fundamental rights in Part III will remain beyond the reach of the illiterate majority.

Over the years, SC expanded the scope of Art.21 by including many rights in it like the following:

1. Right to elementary education ( Mohini Jain vs the State of Karnataka case 1992 and the Unnikrishnan case 1993)
2. Right to livelihood ( Pavement dwellers' case 1986)
3. In Olga Tellis (1985) the apex court held that the right to life included the right to livelihood.
4. Right to life with dignity ( Maneka Gandhi case 1978)
5. Bonded labour should not only be identified and released but must be suitably rehabilitated (Neerja Choudary vs The State of MP 1984).
6. Right to water; Right to speedy justice; Right to clean surroundings; Right to travel abroad; Right to privacy; Right to health.
7. In 2009, Justice Katju declared right to water as part of the right to life guaranteed by Article 21 of the Constitution. Justice Katju's observations came in a decision on a petition filed by the state of Orissa, which sought directions to end its dispute with the

Andhra Pradesh Government over the construction of a barrage over the Vamsadhara river.

8. Supreme Court in Ramdev case in 2012, the apex court ruled that right to sleep is a part of the right to life. While ruling that the police action on a sleeping crowd at Baba Ramdev's rally at Ramlila Maidan in mid-2011 amounted to violation of their crucial right, it said "Sleep is essential for a human being to maintain the delicate balance of health necessary for its very existence and survival. Sleep is, therefore, a fundamental and basic requirement without which the existence of life itself would be in peril," terming it as a basic human right.

### **Euthanasia and Aruna Shanbaug case**

In 2011, Supreme Court while responding to the plea to end the life( mercy killing or euthanasia) Aruna who was sexually assaulted and attacked and was driven into a vegetative state , made by activist-journalist Pinki Virani, turned down the mercy killing petition . The court, in its landmark judgement, however allowed passive euthanasia in India.

While rejecting Pinki Virani's plea for Aruna Shanbaug's euthanasia, the court laid out guidelines for passive euthanasia. According to these guidelines, passive euthanasia involves the withdrawing of treatment or food that would allow the patient to live. Active euthanasia means killing by injecting poison.

### **Right to Education**

(Read along with the material given above as a part of Art.15)

Acharya Ramamurti Committee in 1990 recommended that the right to education should be included as a fundamental right in Part III of the Constitution.

In 1992, Supreme Court held in Mohini Jain v State of Karnataka, that the "right to education" is a part of right to life (Art.21) and thus is a Fundamental Right enshrined under Part III of the Constitution"

The Supreme Court judgement in the case of Unnikrishnan, J P v State of Andhra Pradesh further reinforced the same when it affirmed that right to education flows from the right to life guaranteed under Article 21 and draws its support from the Directive Principles of the Constitution, Article 41 and 45. Art.41 provides for right to education. Article 45 of the Constitution originally required state to make provisions within 10 years for free and compulsory education for all children until they complete the age of 14 years. It has been replaced by the 86<sup>th</sup> Amendment Act.

86th Constitutional Amendment Act 2002 brought about the following changes to the Constitution

- Under Article 21-A of the Constitution, every child between the ages of 6–14 has a fundamental right to education, which the State shall provide 'in such manner as the State may, by law, determine'
- Early childhood care and education (for children in the age group of 0–6 years) is provided for as a directive principle of State Policy under Article 45 of the Constitution.

- Article 51(K)- who is a parent or guardian, to provide opportunities for education to his child or, as the case may be, ward-between the age of six and fourteen years

NCRWC recommended that the inferred rights be given explicit status.

The above inferred rights- deriving from the court verdicts are positive rights- the State has an obligation to provide them- water, environment, education, health, work etc. That is very significant. No less significant however are the negative rights- rights that require the State to be inactive- for example, right to freedom of speech and expression. The State should allow these rights to be exercised and not interfere unless required.

### **Right to personal liberty broadly includes**

1. The right to go abroad.
2. The right to privacy.
3. The right against solitary confinement.
4. The right against hand cuffing.
5. The right against delayed execution.
6. The right to shelter
7. The right against custodial death.
8. The right against public hanging.
9. Doctor's assistance

### **Right to privacy**

In India, the Constitution does not expressly recognize the right to privacy. The concept of privacy as a fundamental right first evolved in 1964 in the case of Kharak Singh v State of Uttar Pradesh. The Supreme Court, for the first time, recognized that there is a right of privacy implicit in the Indian Constitution under Article 21. The Court held that the Right to Privacy is an integral part of the Right to Life. In R.Rajagopal v State of TN (1994) the Supreme Court held that the right to privacy is a right to be let alone.

In recent years, partly due to rise of the new social media and for public order and national security reasons as well, right to privacy has come under pressure. The following are some judicial verdicts and government laws followed by certain analytical points.

Another dimension is the conflict between the right to information(RTI) and the right to privacy.

The Indian Telegraph Act is a 125-year-old law, which has stood the scrutiny of time. It allows interception of telecommunications only on the occurrence of any 'public emergency' or in the 'interest of public safety'. Only when either of these two conditions are satisfied, can the competent authority permit the interception of telephonic communications, if it is in the interest of sovereignty and integrity of India, security of the state, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence. If any of these conditions are not satisfied, telephonic interceptions are unconstitutional.

In 1996, in the People's Union of Civil Liberties (PUCL) case, the Supreme Court reaffirmed the above law. The right to privacy, even though not constitutionally provided for, has been now

read as an essential ingredient of personal liberty. Privacy gives one the right to be left alone. Telephonic communications have been elevated to the right of free speech and expression. Interception thus is a violation of Art. 19(1) a though it can be reasonably restricted.

What are the obligations of the state, once it is in possession of the intercepted material? The 1885 Telegraph Act does not deal with this subject at all. Ordinarily, it would stand to reason that the intercepted material can only be used for the purpose for which the interception was ordered. The Supreme Court, in the PUCL judgment, has held that the competent authority, while passing the order permitting the interception, must state thereupon as to how the intercepted material is to be dealt with.

The intercepted materials' disclosures are neither prohibited nor can at present be penalised. It is expected that the same would be available with the relevant departments of the government and a legitimate disclosure of the same could be made either through the RTI Act or through an investigative process if the same are utilised for that purpose. If the material intercepted deals with matters concerning the affairs of the state, unauthorised intervention in the functioning of a government or commission of an offence, it could be handed over to the competent authority dealing with the matter.

However, if the conversations so tapped are private in nature and have no bearing whatsoever on the functioning of the state, it would ordinarily be expected from the competent authority to direct that such conversations or intercepts be maintained in absolute secrecy and its disclosure and use is prohibited.

Here the interplay of public interest, right to privacy and right to information can be seen and it is necessary to balance the three on a case by case basis.

Those who seek to interfere in the matters of the state and influence decisions concerning the state of play in the political arena are hardly expected to contend that a cloak of secrecy be maintained around their roles. They may have a right to privacy in relation to their private lives but not in relation to activities which are wholly political or related to the public affairs of the state.

The above arguments are relevant to the Nira Radia episode where the telephonic conversations were secretly recorded.

#### **Justice A. P. Shah panel on right to privacy**

A Committee headed by J. AP Shah dealing comprehensively with the law of privacy submitted its report recently to the Planning Commission . The object of this report was to provide recommendations on the right to privacy in the context that the information that the government has access to about its citizens has considerably increased with the rise of the digital age.

It has recommended an over-arching law to protect privacy and personal data in the private and public spheres. The report also suggested setting up privacy commissioners, both at the Central and State levels. It has spelt out nine national privacy principles that could be followed while framing the law.

The report comes at a time when there is growing concern over unique identity numbers, DNA profiling, brain-mapping, etc, most of which will be implemented on the ICT platform.

The report has listed certain exceptions in the right to privacy such as national security, public order, disclosure in public interest, prevention, detection, investigation and prosecution of criminal offences and protection of the individual or of the rights of freedom of others.

In certain cases, historical or scientific research and journalistic purposes can also be considered as exceptions, says the report.

Referring to social networking sites and search engines, which have their own privacy code, Justice Shah said these will either have to follow the model provided in the proposed Act or have a self-regulatory mechanism approved by the privacy commissioner.

The report suggests harmonising the proposed privacy Act with the RTI Act. Responding to privacy infringement concerns, as aired by the Prime Minister recently, Justice Shah said RTI was the only law that gave statutory protection to privacy, which could be over-ridden only in certain cases for individuals, not companies.



### **Live in relationship: Art.21**

In an verdict in 2010, the apex court held that live-in-relation is a part of Art.21

The apex court made the observation while reserving its judgement on a special leave petition filed by noted south Indian actress Khusboo seeking to quash 22 criminal cases filed against her after she allegedly endorsed pre-marital sex in interviews to various magazines in 2005. Khusboo had approached the apex court after the Madras High Court in 2008 dismissed her plea for quashing the criminal cases filed against her throughout Tamil Nadu.

### **Article 22:- Protection against arrest and detention in certain cases**

- 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.
- 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 the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
- Nothing in clauses (1) and (2) to any person who is arrested or detained under any law providing for preventive detention.

### **Safeguards against Preventive Detention**

- No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has endorsed that there is, in its opinion, sufficient cause for such detention.
- Communicate to such person the grounds on which the order has been made. Reasons for detention need not be disclosed if the authority considers it to be against the public interest to disclose.
- Give the detainee the earliest opportunity of making a representation against the order.

Parliament may relax the provisions of Art.22 relating to preventive detention. For example, detention for more than 3 months.

The following laws make room for such relaxation: National Security Act, Conservation of Foreign Exchange and Prevention of Smuggling Act (COFEPOSA) and Prevention of Terrorism Act (POTA) have a provision to detain beyond 3 months.

### *Preventive Detention Laws in India*

Since independence, the Government of India passed much legislation for preventive detention and there are about forty such laws presently on the statute book in India.

Entry 9 of List I of the Constitution allows Parliament to enact preventive detention laws in national security. Entry 3 of List III of the Constitution of India allows Parliament and state

legislatures to pass preventive detention laws in times of peace for “the maintenance of public order or maintenance of supply and services essential to the community.”

Preventive Detention Act was passed by Parliament in 1950. After the expiry of this Act in 1969, the Maintenance of Internal Security Act (MISA) was enacted in 1971, followed by Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) in 1974 and the Terrorism and Disruptive Activities (Prevention) Act (TADA) in 1985. Though MISA was repealed and TADA lapsed, COFEPOSA continues to be operative along with other similar laws such as the National Security Act (NSA) 1980 and Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980. Prevention of Terrorism Act (POTA) 2002 was repealed in 2005. Laws with similar provisions are also enacted by the State governments.

### **TADA**

Terrorist And Disruptive Activities (Prevention) Act (TADA) was passed in 1985. It expired in 1995. The constitutional validity of TADA was challenged before the Supreme Court in 1994, but the Supreme Court upheld its validity. TADA provides for the constitution of designated courts for speedy and expeditious trial of offences. However, under TADA, the conviction rate was less than 10% as witnesses were not protected nor was the evidence in the form of intercepted communications accepted as valid. To overcome these limitations, POTA was made in 2002.

### **POTA**

POTA is the Prevention of Terrorism Act, 2002. It was passed by the Parliament in 2002 in a joint sitting of the budget session of the Parliament as Rajya Sabha did not permit it to be introduced. POTA was drafted on lines recommended by the Law Commission and was an improvement over the Terrorist and Disruptive Activities (Prevention) Act (TADA). The safeguards that the Supreme Court prescribed were incorporated to ensure that the potential for abuse is minimised. However, since critics maintained that POTA was draconian and was misapplied and open to abuse, it was repealed in 2005.

### **Right against Exploitation**

Art.23: Prohibition of traffic in human beings and forced labour :-(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. 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.

Begar is described as labour or service which a person is forced to give without receiving any remuneration for it. It is also known as ‘debt bondage’.

Legislations that is made to check human trafficking is the following

- Immoral Traffic Prevention Act (ITPA) 1956
- Bonded Labour System (Abolition) Act 1976 and

- Juvenile Justice (Care and Protection) Act, 2000

### **Missing children**

SC on "Missing children"

The landmark judgment of the Supreme Court of India about the missing children in May 2013 will have far reaching impact on the lives of millions of children. This historic judicial verdict was delivered in response to a petition filed by my Indian organization Bachpan Bachao Andolan (BBA) which is the key partner of Global March Against Child Labor.

The Supreme Court ruled for compulsory registration of all cases by police of missing children with the presumption that they are victims of kidnapping and trafficking; preparation of standard operation procedures in all Indian states to deal with such cases; appointment and training of Special Child Welfare Officers at every police station to deal with cases related to missing children; records related to all missing and traced children to be maintained by Ministry of Home Affairs and Police; and provisions for para-legal workers to be present at every Police station to assist the parents whose child maybe the victim of a crime.

The Honorable Court defined missing children as "a person below eighteen years of age, whose whereabouts are not known to the parents, legal guardians and any other person, who may be legally entrusted with the custody of the child, whatever may be the circumstances/causes of disappearance. The child will be considered missing and in need of care and protection within the meaning of the later part of the Juvenile Act, until located and/or his/her safety/well being is established."

In India one child goes missing every ten minutes as per government records. Complaints for 90,654 missing children were received in 2011 but it was only 15,284 First Information Reports (FIRs) that were eventually registered by the police to investigate various crimes these children were victims of. Unfortunately, the graph of missing children continues to rise. Most are untraced due to their poverty. The metros continue to report the largest number of missing children. Trafficking is a profitable business, with traffickers targeting low-income families. Kailash Satyarthi of the NGO Bachpan Bacchao Andolan points out: "The maximum number of children being trafficked today belong to dalit, tribal and poor Muslim families that do not have the economic strength to put pressure on the police or political leaders." Forty per cent of the children said they had been trafficked when they were less than 10 years old. A deep net of organized crime is behind the missing Indian children , according to the Central Bureau of Investigation.

**Art.24. Prohibition of employment of children in factories, etc.: No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.**

Child Labour (Prohibition and Regulation) Act, 1986 is the legislation to check child labour.

On the recommendation of the Technical Advisory Committee on Child Labour headed by the Director General, Indian Council of Medical Research, the Government ordered ban on

employment of children as domestic help or servants at the roadside kiosks in 2006. The ban was imposed by the Labour Ministry under the Child Labour (Prohibition and Regulation) Act, 1986.

### Right to Freedom of Religion

Art.25. Subject to public order, morality and health, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

Government can make laws for regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; 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.

(The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. Hindus include persons professing the Sikh, Jaina or Buddhist religion).

In the Jagadiswaranand vs the Police Commissioner 1984 case, the Supreme Court held that the Anand Margi practice of dancing with skulls is not essential to their religion and could be reasonably restricted. Cow slaughter similarly is not considered inherent to Islam on Bakrid day. Thus, State can regulate what constitutes the essential religious practice and what does not and outlaw the latter if it is not social.

### Limitations on religious freedom

The limitations on Art.25 are of three types

- public order, morality and health
- other provisions of part III of the constitution
- matters related with social reforms

'Public order' is the same as public peace, safety and tranquility. The other limitation is 'morality'. Health considerations can be explained thus: Haryana legislature disqualified persons having more than two children from holding panchayat posts. It was challenged in the High Court on grounds that it was against personal laws of Muslims. High Court upheld the law on grounds of

- health for women and
- social reform.

The High Court thus ruled(1998) that the provision in question does not interfere with the right to profess, practise or propagate the religion of one's choice.

Temples may be thrown open to all Hindus which was not the case earlier as some sections were not allowed. It is a measure of social reform.

A person can exercise his religious freedoms while respecting the FRs of others. For example, right to propagate does not include the right to convert others as it means the violation of their right to religious freedom.

The state is empowered to regulate secular activities associated with religious practices with the object to bringing about social reform: activities of an economic, commercial or political character.

Art.25 was further strengthened by the apex court in its April 2013 landmark ruling that directed the gram sabhas to use their powers and take a decision on whether the Vedanta group's \$1.7 billion bauxite mining project in Odisha's Niyamgiri Hills can go forward or not. Gram Sabha was given the power to balance the religious rights of Kondhs against the need for growth and development.

"We are, therefore, of the view that the question whether STs [Scheduled Tribes] and other TFDs [traditional forest dwellers], like Dongria Kondh, Kutia Kandha and others, have got any religious rights i.e. rights of worship over the Niyamgiri hills, known as Nimagiri, near Hundaljali, which is the hill top known as Niyam-Raja, have to be considered by the Gram Sabha," said a three-member Bench in its order.

#### **Art.26. Freedom to manage religious affairs**

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

- a) to establish and maintain institutions for religious and charitable purposes;
- b) to manage its own affairs in matters of religion;
- c) to own and acquire movable and immovable property; and
- d) to administer such property in accordance with law.

Article 27: No person shall be compelled to pay any taxes for the promotion or maintenance of any particular religion.

The Supreme Court (2011) upheld the constitutional validity of central assistance to subsidize air fare for Haj pilgrims. A bench said the amount given as subsidy for Haj was too meagre and could not be termed as a diversion of a major chunk of taxes to violate Article 27 of the Constitution.

Petitioner Prafull Goradia had complained that though he was a Hindu, he had to pay direct or indirect taxes, part of which were utilized by the government to subsidize Haj. Dismissing the petition, the bench said: In our opinion, if only a small part of any tax collected is utilized for providing some conveniences or facilities or concessions to any religious denomination, that would not be violative of Article 27 of the Constitution. It would be violated if a substantial part of the tax collected in India were to be utilized for promotion or maintenance of any particular religion. Nor is the amount spent, collected specifically for Haj subsidy.

The Bench pointed out that the State governments incurred some expenditure for the Kumbh Mela and the Centre, for facilitating Indian citizens to go on pilgrimage to Mansarovar, etc. Similarly some State governments provided facilities to Hindus and Sikhs to visit temples and gurdwaras in Pakistan. "These are very small expenditures in proportion to the entire tax collected. Thus there is no discrimination.

It must be clarified that the order of the apex court in 2012 upheld the Haj subsidy once again as Constitutional but suggested that it be phased out in 10 days as it is wasteful and the same amount be spent in educational needs of Muslims.

#### **Article 28:**

- 1) No religion instruction shall be provided in any educational institution wholly maintained out of State funds.
- 2) Nothing in clause (1) shall apply to an 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 unless such person or, if such person is a minor, his guardian has given his consent thereto.

#### **Cultural and Educational Rights**

##### **Article 29: Protection of interests of minorities**

- (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 30: Right of minorities to establish and administer educational institutions.-**

- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
  - I(A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority the State shall ensure that the amount fixed will be on market lines.
  - (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.

#### **Linguistic Minorities**

Broadly, a linguistic minority is one that speaks a language other than the language spoken by the majority in the State. Partly, linguistic minorities emerged after the states were reorganised on linguistic basis in 1956. For the protection of the linguistic minorities, the following directives are provided.

Every State and other local authority within a State is directed 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 is authorised to issue such directions to any State as he may consider necessary for the securing of such facilities. (Art 350a)

A Special Officer for linguistic minorities is appointed by the President to investigate all matters relating to the safeguards provided by the Constitution for linguistic minorities and to report to the President upon those matters. It shall be the duty of the President to cause all such reports to

be laid before each House of Parliament and also to be sent to the Government of the State concerned. (Art 350B).

Constitution of India provides safeguards to the linguistic minorities under Article 345 and 347:

- Article 345 : ...the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State.
- Article 347:"On a demand being made in that behalf the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purposes as he may specify."

The figures for persons speaking a language subsidiary to their mother tongue are given below: Hindi (5.10%), Oriya (5.75%), Malayalam (7.11%), Gujarati (7.31%), Tamil (8.11%), Bengali (8.65%), Assamese (8.96%), Marathi (10.47%), Kashmiri (10.69%), Telugu (14.03%), Punjabi (14.16%), Kannada (14.43%), Urdu (22.09%).

#### Art.29 and 30: Analysis

Article 29(1) guarantees to any section of the citizens residing in any part of India having a distinct language, script or culture of its own, the right to conserve the same, i.e., language, script or culture. A minority community can preserve its language, script or culture by and through educational institutions. Right to establish and maintain educational institutions of their choice is necessary to preserve their distinctive language, script or culture. In order to preserve and promote their language etc, education is important and so Art.29 (2) supports the above. However, since the expression 'any section of citizens' is used in the Article, it applies to majority as well.

Article 29(2) says that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on ground only of religion, race, caste, language or any of them.

Article 30(1) says that all minorities ,whether based on religion or language, have the right to establish and administer educational institutions of their choice. This right is further strengthened by Article 30(2) which prohibits the State from discriminating against any educational institutions in granting aid , on the ground that it is under the management of a minority whether based on religion or language.

Article 29(1) is a general protection given to sections of citizens to conserve their language, script or culture. Article 30 is a special right to minorities based on religion or language to establish and administer educational institutions of their choice. While Article 29(1) confers right on any section of the citizens which will include the majority section, Article 30(1) confers the right only on minorities based on religion or language. While Article 29(1) is concerned with the right to conserve language, script or culture, Article 30(1) deals with the right of minorities to establish

and administer educational institutions of their choice. While Article 29(l) does not deal with education as such, Article 30(l) deals only with the establishment and administration of educational institutions.

### **Important Judgements**

#### **St. Stephen's College vs University of Delhi**

In St. Stephen's College vs University of Delhi (1992), the Supreme Court ruled that minority institution should make available at least 50% of annual admission for other communities. The admission of other communities should be done purely on the basis of merit.

#### **T.M.A. Pai Foundation and Others vs State of Karnataka and Others case 2002**

Following are the essential features of the landmark judgement

- All citizens have right to establish and administer educational institutions
- The right to administer MEI(Minority Educational Institutions) is not absolute .
- State can apply regulations to unaided MEIs also to achieve educational excellence
- Aided MEIs should admit certain percentage of non-minority students
- Percentage of non-minority students to be admitted to an aided MEI to be decided by the State or University
- Fees to be charged by unaided MEI cannot be regulated but no institution can charge capitation fee

The essence of the judgement is the following

- Right to establish an educational institution is available to both minority and majority
- concept of minority is with reference to the State as States have been linguistically reorganized since Independence
- aided and unaided MEI need to be differentiated
- excellence demands that there should be reasonable regulation by the Government even of the unaided MEIs.

#### **Islamic Academy of Education Vs State of Karnataka case 2003**

Supreme Court's five-member Constitution Bench (2003)clarified on the TMA Pai case verdict. Essentially, the ruling says that: Article 30 confers on linguistic and religious minorities the right to establish educational institutions but Government could exercise control and regulation on them for good standards.

The issue acquires importance in the context of the fact that Constitution does not define the words "majority" and "minority" - a lacuna that has induced many Hindu sects, like the Arya Samajists and the Ramkrishnaites to claim minority status. It may be noted that Hindus (82% of the Indian population) are a minority in five States, (Jammu & Kashmir, Punjab, Nagaland, Mizoram, and Meghalaya).

### **Conversions**

India is a secular country with Art. 25-28 containing the essence of secularism and Preamble to the Constitution proclaiming the same categorically. The people of the country are given the freedom of conscience and the right to freely profess, practise and propagate religion subject to the public order, morality, health and so on (Art. 25.1).

There has been a debate about whether Art. 25(1) can be understood as granting to the people the right to convert another person to one's own religion. But the Constitution bench of the SC, in Rev. Stainislau vs State of MP case 1977 ruled that Art. 25(1) does not give the right to convert but only the right to spread the tenets of one's own religion. The substance of the judgement is

- Art. 25.1 gives the freedom of conscience to all religions and not to one particular region.
- Right to convert another person is a violation of his own freedom of conscience.
- What is freedom for one is freedom for the other in equal measure.
- State can intervene in the defence of the public order etc., even if conversions are construed as legal.
- If the conversions are permitted they will be indulged in by every religion and the result is bound to be chaos and destabilization.

The SC delivered the verdict about the legislation made in MP and Orissa to outlaw conversions based on force, fraud and allurement thus exploiting the vulnerability in the social situation. Thus, only voluntary conversions are valid in India.

Some states in India have passed anti-conversion laws.

#### Art.31

Art.31 was originally the right to property but was repealed in 1978 by the 44<sup>th</sup> Amendment Act and made into an ordinary right- Art.300A.

Article 31A: If Parliament makes law for implementing agrarian reforms, it can not be struck down by the courts on grounds that it is inconsistent with any of the rights conferred by Article 14 or Article 19.

Article 31B: Validation of certain Acts and Regulations: None of the Acts and Regulations specified in the Ninth Schedule shall be deemed to be void on the ground that such Act, Regulation or provision is inconsistent Art.14 or Art.19.

Article 31C: Saving of laws giving effect to certain directive principles.

The 25<sup>th</sup> Amendment Act inserted Article 31 ( c) which immunises legislation undertaken to protect two Directive Principles in Article 38(b) and (c) from challenge in a court of law for any infringement of the rights guaranteed under Articles 14, 19 and 31.

The scope was further extended to immunise all DPSPs against the three Fundamental Rights by the 42<sup>nd</sup> Amendment Act 1976.

The Supreme Court upheld the immunity but struck down the other part of Art.31( c) which is the following: 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.

The expanded scope of Art.31( c ) under the 42<sup>nd</sup> Amendment Act was struck down by the apex court in the Minerva Mills case 1978 for denial of judicial review.

The 25<sup>th</sup> Amendment Act also said that in case of acquisition of property for public purpose, an 'amount' can be paid and market rate compensation need not be paid. Supreme Court upheld the same but ruled that the 'amount' can not be 'illusory'

### **Right to Property: Legislative and Judicial history**

Originally the Constitution contained the following:

Art. 19(l) (f) All citizens shall have the right to acquire, hold and dispose of property....,

Art 19(5) nothing in the above clauses shall prevent the state from making any laws in the interests of the general public

Art 31 Right to property: The right to property came under pressure from Parliamentary laws from amendments to Art.31 by way of addition of Arts.31 a, b and c.

Art.31A and 31B as were inserted by the very first Constitution Amendment Act 1951 were a limitation on the right to property. Art.31C that was introduced by the twenty fifth Constitution Amendment Act 1971 was another limitation. They were aimed at implementing DPSPs. Finally, 44th Amendment Act 1978 deleted Art 31 as the right to property . It now appears as Art.300A. The difference being that it is only a Constitutional right and not a fundamental right any longer.

The objective of initially limiting and later removing the right to property as a Fundamental Right is to implement socialistic policies to benefit the havenots.

### **Ninth Schedule**

The Ninth Schedule was created by a Constitution Amendment in 1951 by former Prime Minister Jawaharlal Nehru to implement land reforms. The basic purpose of the schedule was to abolish zamindari system. Over the years, government included several laws under it, for example the 69 per cent reservation law of Tamil Nadu.

The Ninth Schedule was included in the Indian Constitution by the Constitution (First Amendment) Act, 1951, as provided by Article 31 B. Items placed in it are given judicial immunity and can not be questioned in a court of law for contradicting Art.14 and Art.19. Thus, judicial review is excluded.

An act is included in the Ninth Schedule by exercising the constituent power of the Parliament i.e. by a process of constitutional amendment. Today the schedule consists of about 284 Acts. Most of them are related to land ceiling and are passed by the State Legislatures. They are placed in the Ninth schedule by the Parliament by an amendment Act. The Ninth Schedule was conceived as a novel and innovative way of ensuring that parliamentary legislation of a progressive kind is not caught in litigation and delay.

However, it is seen that laws which are not in any manner connected with land reforms or agrarian reforms have been included in the Ninth Schedule in order to avoid judicial scrutiny of their constitutionality on the ground of violation of Fundamental Rights. For example.

- The Industries (Development and Regulation) Act, 1951
- The Monopolies and Restrictive Trade Practices Act, 1969 and
- The Foreign Exchange Regulation Act, 1973.

**This is contrary to the purpose and object of article 31B.**

In 1994, the TN Backward Classes, Scheduled Castes, Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993, was included in the Ninth Schedule of the Constitution through the 76th Constitution Amendment. The TN Act enjoys constitutional protection from challenge in court.

From the 1970's onwards, the courts realized the scope for misuse of Ninth Schedule. The Waman Rao case verdict of the apex court (1981) stated that any amendments or additions to the Schedule after the Keshavananda Bharti case verdict 1973 would have to be examined with respect to their compatibility with the basic structure of the Constitution.

#### **Questions raised by the frequent recourse to the Ninth Schedule**

- it is to escape judicial review
- Judicial review is a basic feature of the Constitution and it can not be abridged. To insert in the Ninth Schedule an Act which is nullified by the apex court is to destroy the basic structure of the Constitution.
- it is arguable if policies other than agrarian reforms can be placed in the Ninth Schedule- for example, inclusion of the Tamil Nadu reservation law giving reservation up to 69% against the Supreme Court verdict of limiting it to 50%.
- its impact on separation of powers and checks and balances if judicial review is denied.
- Ninth Schedule is redundant as the purpose of Art.31B is met.

An important aspect of the controversy around the Ninth Schedule pertains to the relationship between Parliament and the Judiciary- conflict between the representative legislature that needs to respond to the needs of the people and the judicial insistence on basic structure of the Constitution being maintained.

### **Supreme Court Judgement(2007) on Ninth Schedule**

The Supreme Court , in the I.R.Coelho judgment in 2007 ruled that laws placed under Ninth Schedule after April 24, 1973( the date of Keshavananda Bharati case verdict when the concept of 'basic features' was introduced by the apex court) shall be open to challenge in court for violation of the basic structure. Also, 9<sup>th</sup> Schedule items can be challenged for violating fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution. Articles 14, 19 and 21 of the Constitution constitute the 'golden triangle' and can be diluted only if sufficient public interest is served.

The question in Coelho case essentially related to the competence of Parliament to put any law under the Ninth Schedule and, thus, beyond judicial scrutiny.

"A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court," the bench held.

The ruling thus tests an item in the Ninth Schedule on two grounds

- basic structure doctrine
- sanctity of fundamental rights

A three-judge bench was set up to look into every law placed in the Schedule since April 1993 and satisfy itself that its place is justified.

### **Wrts**

#### **Introduction**

Under the Indian legal system, jurisdiction to issue 'prerogative writs' is given to the Supreme Court, and to the High Courts. Parts of the law relating to writs are set forth in the Constitution of India. The Supreme Court, the highest in the country, may issue writs under Article 32 of the Constitution for enforcement of Fundamental Rights and under Articles 139 (if the Parliament permits) for enforcement of rights other than Fundamental Rights, while High Courts, the superior courts of the States, may issue writs under Articles 226. The Constitution broadly provides for five kinds of "prerogative" writs: habeas corpus, certiorari, mandamus, quo warranto and prohibition.

1. The writ of habeas corpus is issued to a detaining authority, ordering the detainer to produce the detained person in the issuing court, along with the cause of his or her detention. If the detention is found to be illegal, the court issues an order to set the person free.
2. The writ of mandamus is issued to a subordinate court, an officer of government, or a corporation or other institution commanding the performance of certain acts or duties.
3. The writ of prohibition is issued by a higher court to a lower court prohibiting it from taking up a case because it falls outside the jurisdiction of the lower court. Thus, the higher court transfers the case to itself or any other court of competence.

4. The writ of certiorari is issued to a lower court directing that the record of a case be sent up for review, together with all supporting files, evidence and documents, because the lower court does not have jurisdiction or for similar reason. If any interim order is given, it is quashed.
5. The writ of quo warranto is issued against a person who claims or usurps a public office. Through this writ the court inquires 'by what authority' the person supports his or her claim.

All the above 5 writs are called **prerogative writs** (a writ is an official order) as they were originally available only to the Crown under English law. The term may be considered antiquated

#### Right to Constitutional Remedies

Article 32: Remedies for enforcement of rights conferred by this Part.

(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

- 1 Habeas Corpus
- 2 Mandamus
- 3 Prohibition
- 4 Certiorari
- 5 Quo Warranto

The above writs are issued for the enforcement of any of FRs by the SC

**Habeas Corpus:** The writ of Habeas Corpus is a remedy available to a person who is confined without legal justification. The words habeas corpus literally means "to have the body". The court issues the writ which has to be obeyed by the detaining authority by producing the person before the court. A Habeas Corpus is a legal writ that protects an individual against arbitrary imprisonment by requiring that any person arrested be brought before a court for formal charge. If the charge is considered valid, the person must submit to trial; if not, the person is left free. When the law is suspended, for example, when national emergency is proclaimed, then individuals can be imprisoned indefinitely and without charge.

Under Articles 32 and 226, any person can move for this writ to the Supreme Court and High Court respectively. The applicant may be the prisoner or any person acting on his behalf to safeguard his liberty. An appeal to the Supreme Court may lie against an order granting or rejecting the application. Disobeying this writ is met with by punishment for contempt of court under the Contempt of Courts Act.

The difference between bail and the writ of Habeas is that the former wants a release from jail conditionally even as the case is proceeding, the latter challenges the very detention as illegal. Parole on the other hand is conditional release from jail of a person who has been

convicted and imprisoned . Parole is granted because of "good" behavior or jail over-crowding and that the prisoner does not pose a threat to society being released from Prison before sentence has been completed... If he/she violates conditions of Parole... he/she will be returned to Prison and complete entire sentence and may be even extra time for violation(s). For parole, no money/fees need be paid. For bail it has to be.

**Mandamus:** The word mandamus literally means "we command". The writ of mandamus is a command issued to direct public or semi-public authority commanding him to discharge a specific public duty. This writ is used when the inferior public or semi public office has refused to discharge its official duty. Mandamus commands activity. The writ is used for securing judicial enforcement of public duties. It is not issued if the authority has discretion. That is, the official duty must be a statutory requirement. The Constitution, through Articles 226 and 32, enables mandamus to be issued by the High Court and the Supreme Court, respectively. It is issued to government, subordinate court, corporation etc commanding them to act or refrain from acting.

Mandamus has less scope compared to habeas corpus- while habeas corpus can be issued to a private person, mandamus can be issued only to the public or semi-public body.

Mandamus does not lie against the President or the Governor of a State for the exercise of their duties and power (Article 361) as they work on the advice of the Council of Ministers. It does not lie also against a private individual or body except where the State is in collaboration with such private party. It is a discretionary remedy and the High Court may refuse if alternative remedy exists except in case of infringement of fundamental rights.

The duty sought to be enforced must have two qualities:

- It must be a public duty
- It must not be discretionary duty

**Continuing Mandamus** is a writ of Mandamus issued by the higher judicial bodies- HCs and SC in India- in general public interest asking the officer or the authority to perform its task expeditiously and independently for preventing miscarriage of justice. The concept of Continuing Mandamus has been discussed and dealt with in the respective cases of 1997 *Vineet Narain v. Union of India* and 1984 *Bandhua Mukti Morcha v. Union of India & Ors.*

Supreme Court of India has, in an act of remarkable judicial activism, created the concept of "continuing mandamus" on policing and investigative authorities in order to ensure that criminal investigation, particularly in high-profile cases, is done without political executive using the agencies for its self interest. To further this free and fair investigation, the Supreme Court monitors investigations performed by agencies like the Central Bureau of Investigation. In 2010 in *Centre for Public Interest Litigation and Ors. v. Union of India and Ors.*, the Supreme Court issued a continuing mandamus on the investigation by the CBI and the Enforcement Directorate into the 2G spectrum scam.

Another instance is the **2006 Delhi sealing drive**, a campaign by the Municipal Corporation of Delhi (MCD) to close (and thus "seal" the locks of) a number of illegal commercial establishments in Delhi which are running in residential areas without authorization. The ran until early 2007. It was done under the writ of continuing mandamus by Supreme court.

"Continuing mandamus" allows the court to issue interim orders from time to time.

Late Justice(Retd) JS Verma says the following about the difference between the continuing mandamus in the Jain hawala case and the Black money case where the SC has set up an SIT (special investigation team) headed by retired Supreme Court judge: in Jain hawala case, court directed the CBI to keep the court apprised of the investigation but the court didn't participate in the investigation. It only monitored the case when a PIL was filed that the CBI was not investigating the case properly. Court was not one of the investigators. SIT in black money case with a SIT headed by a retired judge raises uncomfortable questions. The presence of a judge in the investigation might make the accused think the case is already weighed against him. Court should only monitor the investigations. Not take over the investigations.

The criticism of continuing mandamus is that it confuses the chain of command as the executive is made to be accountable to both the judiciary and the legislature; it violates the principle of separation of powers; courts without competence for execution and investigation take up the work and so on. However, it is resorted to very rarely.

**Prohibition:** A writ of prohibition is issued to an inferior court or semi-judicial body (tribunal), preventing the latter from exercising jurisdiction which does not belong to it. When a semi-judicial body acts without or in excess of jurisdiction, or in violation of rules or law, a writ of prohibition can be issued. It is generally issued before the trial of the case. While mandamus commands activity, prohibition commands inactivity, it is available only against judicial or quasi-judicial authorities and is not available against a public officer who is not vested with judicial functions.

**Certiorari:** In Latin, it means 'to be informed of' or "to be ascertained". It refers to the order a court issues to a lower court or semi-judicial body to transfer the case to another court or semi-judicial body. The reason is that the original body does not have the jurisdiction or there are irregularities involved. The higher court can quash a portion or total of the proceedings that have already taken place. Certiorari is issued after the proceedings have commenced.

Essentially, it is a writ issued by a superior court and is directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case.

It is a writ with the same scope as prohibition. It is issued after proceedings begin so as to quash the proceedings and transfer the case to a competent court. If the judgement has already been given, certiorari writ is issued to quash it.

The following are the circumstances under which prohibition and certiorari are issued:

- When the judicial body does not have jurisdiction
- Exercises excessive jurisdiction

- Natural justice is violated
- Acts on the basis of a law that is itself struck down

**Quo Warranto:** It means 'by what authority?' The writ of quo warranto enables enquiry into the legality of the claim which a person asserts, to a public office and to oust him from such position if he is holding it illegally and without valid credentials. The holder of the office has to show to the court under what authority he holds the office. It is issued when

- the office is of public and of a substantive nature
- created by statute or by the Constitution itself, and
- the respondent has asserted his claim to the office.

It can be issued even though he/she has not assumed the charge of the office. The fundamental basis of the proceeding of quo warranto is that the public has an interest to see that a lawful claimant occupies a public office. It is not available against a ministerial office.

Supreme Court set aside J. Thomas' appointment as Central Vigilance Commissioner (CVC) in 2010 on a petition in a PIL case in 2010 with the writ of quo warranto and certain other conditions.

**Article 33:** Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,-

- (a) Members of the Armed Forces; or
- (b) Members of the Forces charged with maintenance of public order; etc
- (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or
- (d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them

**Article 34:** Restriction on rights conferred by this Part while martial law is in force in any area

**Article 35:** Legislation to give effect to the provisions of this Part.

Welfare provisions of Part III of the Constitution are included in Art.15, Art.16, Art.17, Art.23, Art.24, and Art.30.

### Fundamental Rights and National Emergency

Under the Indian Constitution, national emergency can be imposed by the President when the national security is threatened( Art.352). Such proclamation impacts on the FRs in the following way

**Art.358**

Art.358 comes into effect immediately after the proclamation of National Emergency. Article 19 is suspended when a Proclamation of Emergency is made on grounds of war or external aggression. That is, if the proclamation is on grounds of armed rebellion, Art.19 can not be suspended under Art.358.

### **Art. 359**

Art.359 suspends the enforcement of the rights conferred by Part III during emergencies. It suspends the right to move any court for the enforcement of such of the Part III rights (except articles 20 and 21) as may be mentioned in the President's 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.

**Such order should be laid before each House of Parliament.**

It must be clearly seen that Art.359 suspends the enforcement and not the right itself.

Constitution was amended by Constitution (Forty-Fourth) Amendment Act 1978 and it was provided by article 359-1A that articles 20 and 21 cannot be suspended when a proclamation of emergency is in operation.

### **NCRWC and Fundamental Rights**

The National Commission to Review the Working of the Constitution (NCRWC) that was set up in 2000 by the Union Government, submitted its report of recommendations in 2002 and sought to strengthen the Fundamental Rights in the following ways

- freedom of speech and expression( Article 19 ) should be amplified to explicitly provide for freedom of the press and other media
- Art.19 should be expanded to incorporate right to information
- right to privacy
- right to compensation if a person is illegally deprived of his right to life or liberty
- right to leave and return to India
- right not be preventively detained, under any circumstances, for more than six months
- no suspension of fundamental rights to freedom of religion or right to move the Supreme Court (habeas corpus) under Emergency ( Article 352).
- Article 300-A of the Constitution be amended to ensure that "no deprivation or acquisition of agricultural, forest etc land belonging to or customarily used by the Scheduled Castes and the Scheduled Tribes shall take place except by authority of law which provides for suitable rehabilitation scheme before taking possession of such land."

### **Important Constitution amendments to FRs**

Changes in Fundamental Rights, Directive Principles and Fundamental Duties require a Constitutional amendment which has to be passed by a special majority of both houses of the Parliament.

- Art.15 and 16 were amended for empowerment of the SC, ST and OBC communities-, the 1<sup>st</sup> and 93rd Amendment Act.
- The right to property was originally included as a fundamental right. However, the 44th Amendment passed in 1978, revised the status of property rights by removing it from Part III
- Article 31-C, inserted into the Directive Principles of State Policy by the 25th Amendment Act of 1971 seeks to upgrade the DPSPs with reference to Arts.14 and 19.
- The right to education at elementary level has been made one of the Fundamental Rights under right to life and personal liberty by the 86th constitutional amendment of 2002.

#### Fundamental Rights: A retrospective

FRs have seen a mixed record. On the one hand, they are expanded by way of

- Art. 15 being strengthened
- Art.16 being extended to OBCs
- Art.21 leading to a large group of rights under the right to life
- Due process of law being adopted in the Menaka Gandhi case in 1978 to strengthen judicial protection of rights
- Minority protection in the educational sphere being given additional attention by the amendment of Art.30.

On the other, they have been diluted in the following way

- Protection from Art.13 was removed by the 24<sup>th</sup> Amendment Act
- Pressure from the DPSPs
- Removal of right to property from Part III

#### Rights, Duties and DPSPs

Parts III, IV and IVA of the Constitution of India are closely connected and are in fact interdependent.

With the development of law in recent years, certain matters covered under Part IV relating to Directive Principles have been elevated to the status of fundamental rights, for instance, the right to education. Though this right formed a part of the Directive Principles of State Policy initially, compulsory and primary education has been treated as a part of Article 21 of the Constitution of India by the courts, which consequently led to the enactment of the Right of Children to Free and Compulsory Education Act, 2010.

Article 51A deals with the fundamental duties of the citizens. It postulates that it shall be the duty of every citizen of India to abide by the Constitution, to promote harmony and the spirit of common brotherhood, to safeguard public property and to abjure violence.

A common thread runs through Parts III, IV and IVA of the Constitution of India. One Part enumerates the fundamental rights, the second declares the fundamental principles of governance and the third lays down the fundamental duties of the citizens.

It is difficult to imagine the existence of a right not coupled with a duty. The duty may be a direct or indirect consequence of a fair assertion of the right. Part III of the Constitution of India although confers rights, still duties and restrictions are inherent thereunder. The intimate bonds the complementary relation will be further explored ahead.

#### **FRs for prisoners**

It must be stated that any one imprisoned – undertrial or convict- can enjoy those FRs which can be enjoyed , physical confinement notwithstanding. For example, freedom of speech is enjoyable while freedom of movement is physically not possible.



# **DIRECTIVE PRINCIPLES OF STATE POLICY**

Fundamental Rights (Part III of the Indian Constitution) that were discussed in the earlier chapter are the bedrock of political democracy. They ensure, with the help of individual rights, that democracy prevails and the roots of democracy run deep. They are essential for individual development - essential for an individual to attain full physical, intellectual, moral and spiritual development.

Political democracy , however, remains fragile unless the socio-economic foundations are strengthened with policies that aim to establish a welfare state. Welfare State is a government that takes primary responsibility for the welfare of the people ,particularly those who are weak and vulnerable. It is a state that aims to minimize disparities and ensure equitable development . Individual rights can be effectively enjoyed and become meaningful only when social security and economic well being are ensured. DPSPs aim at creating a new socio-economic order to provide a firm foundation to political democracy in India

Directive Principles of State Policy are contained in Part IV of the Indian Constitution in Art.36-51. These are instructions/directions given to all present and future governments in India-federal and state governments to make policies and legislation incorporating these principles. DPSPs, thus guide public policy.

## **Influences**

The concept of Directive Principles as incorporated in the Constitution of India, is influenced by various factors. Firstly, DPSPs as an idea was borrowed from the constitution of Ireland. Secondly, Government of India Act, 1935 contained a set of such "Instruments of Instructions" . Thirdly, the leadership of the freedom struggle representing liberal democratic ideas of the west chose to include them in the Indian Constitution as moral guidelines for the public policy of the welfare state. That is, DPSPs were intended to help the Government play a positive role in rebuilding India as a model democracy with socialist content. Fourthly, the contemporary socialist ideas had impacted the framers of the constitution. For example, the DPSPs related to worker welfare, elimination of inequality etc. Fifthly, the Constituent Assembly was influenced by the ideas of Mahatma Gandhi like Panchayatraj, promotion of village industries etc.

It is necessary to note that in Part III of the Indian Constitution- Fundamental Rights -some important economic and social rights were not originally included , such as : right to work, right to education, social security etc . These rights found place in the Directive Principles. However, as Indian democracy strengthened and economy grew, the State found the need and resources to shift some of these DPSPs into the Chapter on FRs. For example, the right to education is today an FR. Right to work since 2005 has been a limited legal right-limited to the rural adults and also limited because it is available for only 100 days in a year(MGNREGA).

Constitution of India declares that DPSPs are "fundamental in the governance of the country"( Art.37). Both the Legislature and the Executive should apply DPSPs while making and implementing policies in social and economic spheres.

## **Classification of Directive Principles**

DPSPs are very comprehensive in their scope to include almost all aspects of socio-economic change. They guide State activity in political, economic, social, environmental, educational, cultural and international areas. The DPSPs can be broadly classified into the following categories

- Socialistic
- Gandhian
- Social
- International
- Others

### **DPSPs and Socialism**

Socialism is a worldview in which the Government makes policies that aim to minimize inequalities. Government does so by public ownership of means of production. The aim is to prevent concentration of wealth in a few hands. It grants right to work to the people and actively intervenes in the socio-economic affairs in favour of poor and vulnerable like elderly and women. Since the 11<sup>th</sup> Five Year Plan(2007-12), the goal of inclusive growth is being actively followed by the government to achieve socialist society. In the 12<sup>th</sup> plan(2012-17), the aim is to make planning “more inclusive”.

Socialist policies are necessary in an underdeveloped country like India with large section of the population being poor.

DPSPs that are socialistically oriented are

- Art.38
- Art.39
- Art.41
- Art.42
- Art.43
- Art.45
- Art.46
- Art.47

The above DPSPs direct the State to make policies for distribution of wealth; legislate on right to work and education; living wage which is equal for equal work; care of the weaker sections. The state is mandated to legislate for securing right to work, right to education and right to public assistance in case of unemployment, old age, sickness and disablement.

### **Gandhian Principles**

The philosophy of Mahatma Gandhi centres around empowerment of people through decentralization of political power to villages and economic power to the village industries. It is embodied in the traditional Indian institutions of participatory governance called Panchayatraj and Nagarapalika bodies. The economic democracy that Gandhian ideals speak of is based on

cottage and villages industries as they are labour-intensive; help in dispersal of power geographically and also in terms of economic benefits; and prevent concentration of wealth. Further, Gandhiji advocated banning of cow slaughter and banning consumption of intoxicating substances. The above elements of Gandhian ideology are found in the DPSPs in the following Articles of the Constitution

- Art.40( Panchayatraj)
- Art.43( Village and cottage industries)
- Art.47( prohibition)
- Art.48( banning of cow slaughter)

### **DPSPs and Social Integration**

DPSPs encompass a wide range of State activity. They impose social obligations on federal and the State Governments which are to be enacted into law.

Gender disparities; caste exploitation; inter-religious divergences on vital areas of social life like marriage and succession; backwardness of certain social sections like the Dalits are some of the social areas in need of change. While Fundamental Rights address some of the above problems on a justiciable basis( Art.15, Art.16 and Art.17), DPSPs contain instructions to the Government to eradicate these social imbalances with public policy-

- Protection and development of children( Art.39 and 45)
- Right to education(Art.41)
- Art.42( maternity relief)
- Art.44 ( uniform civil code)
- Early childhood care and education(ECCE)(Art.45)
- Art.46( welfare of weaker sections)
- Art.47( improvement of health standards)

### **International Relations**

Indian foreign policy, since Independence, has stood for peace in the world and multilateralism. Our initiation of the non-alignment as the bedrock of foreign policy to defuse global tensions and build a independent and stable base for national development is a classical example. Our support for decolonization, opposition to apartheid and advocacy of democratization of United Nations and universal and non-discriminatory disarmament are consistent with Art.51 which says the following

The state shall:

- Promote international peace and security
- Aim at the settlement of international disputes by arbitration.
- Also aim at maintaining just and honourable relations with other countries.

Thus, seeking international peace and cooperation is a Constitutional directive.

## **Others**

There are other Directive Principles which deal with important areas of governance like separating the judicial powers from executive so that there is no arbitrary administration and civil liberties are safe( Art.50). Also, preservation of cultural and historical sites (Art.49 ) Workers' participation in management ( Art.43A) and environmental directives ( Art.48A ) are other examples.

## **Characteristics of DPSPs**

- Amplification of Preamble
- Socio-economic justice
- Guidelines for public policy
- Non-justiciable

## **DPSPs elaborate on Preambulary values**

Socialist democracy is enshrined in the Preamble to the Indian Constitution. In fact, the word 'socialist' was incorporated into the Preamble by the 42<sup>nd</sup> Amendment Act 1976. Socialism is elaborated in Art.38 and 39. Democracy is given full meaning by the 73<sup>rd</sup> and 74<sup>th</sup> Amendment Acts in 1992 with Panchayat and Nagarapalika bodies being given Constitutional status and enforceability. Secularism is found in Art.44 where the goal of uniform of civil code is mentioned. Social justice is also substantially contained in the Part IV as seen above.

Preamble commits the government to equality- social, political and economic. It is given substance by Art.38 and Art.39 where redistribution of material resources for the entire community is promised.

## **DPSPs and economic justice**

The Constituent Assembly chose welfare state over the minimalist state. Minimalist state discharges law and order responsibilities internally and keeps security from external threats. Government , under minimalist or laissez faire state, does not take up socio-economic interventions.

DPSPs guide public policy to distributive justice where resources of the country are to be meant for the welfare of all. DPSPs differ from FRs in the sense that the former have economic content - prevent concentration of economic resources( Arts.38 and 39); promise right to work( Art.41); social security for the vulnerable sections like sick and old-aged( Art.41); just and humane conditions of work( Art.42); labour-intensive growth process( Art.43) and so on. FRs deliver on political democracy, largely.DPSPs are not justiciable. DPSPs are positive- require Government to act. DPSPs guide governance(Art.37)

## **DPSPs are non-justiciable**

The Sapru Committee appointed by an "All Parties Conference" in 1944 submitted its report in 1945. Constituent Assembly drew from its recommendations in formulating the Fundamental Rights and other rights in the Indian Constitution.

Sapru Committee suggested two categories of individual rights- justiciable and non-justiciable. The former are found as FRs and other rights in the Indian Constitution .The latter are

mentioned in Part IV of the Constitution as DPSPs which are largely in the nature of 'instruments of instruction' to the Government for making appropriate policies of socio-economic change.

Art.37 says that DPSPs are non-justiciable but are fundamental to the governance of the country. They are moral guidelines to the government to make positive socio economic policies for inclusive growth. DPSPs are not mere pious declarations. It was the intention of the framers of the Constitution that DPSPs should guide the State for socio-economic and political reconstruction of the country. Same is stated in Art.37.

The reason for making the DPSPs non justiciable are the following

- Economic resources may not permit. For example, right to work
- Social and political development may not be adequate. For example, uniform civil code
- They are moral in nature and can not be legally imposed: banning cow slaughter and prohibition
- Administrative and economic constraints . For example, free and compulsory education for children in 10 years after the commencement of the Constitution(Art.45)

### **Guidelines to public policy**

Public policy is essentially the policy of the Government. Public policy is made by the Executive conventionally, at times with a legislative Act made by the Parliament.Certain important government policies have been enacted by parliamentary laws: education, labour, environment etc. Judiciary also contributes to it- education, food etc. But largely, it is the privilege of the Executive. DPSPs deal with the public policy that aims at socio-economic change which in a developing country like India is largely aimed at removing the hardships of the weak. It also has environmental dimension.

Judiciary considers DPSPs as an important moral input in government policy. In fact, the Supreme Court, starting from Keshavananda Bharati case verdict in 1973 ruled that DPSPs can be a source of reasonable limitation on Fundamental Rights in pursuit of public interest.The same was reinforced in the IR Coelho verdict(2007) dealing with the Ninth Schedule.

DPSPs influence a wide gamut of government policies- economic policies like agrarian reform; banking and taxation policy; employment generation; political decentralization; closing gender disparities; factory legislation; unifying personal laws; pre-school child care; environmental stability; prohibition; and divesting the executive of its judicial responsibilities and powers.

### **DPSPs in detail**

Art. 36. "the State" has the same meaning as in Part III(Fundamental Rights)

Art.37. DPSPs are not enforceable by any court( in case of non-implementation, courts can not be moved), but the principles therein laid down are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

### **Art.37**

DPSPs are fundamental to governance(Art.37) means that the government needs to keep in consideration these ideals while making laws. Similarly, the courts also give importance to DPSPs while adjudicating on laws. A law may be struck down if it goes against DPSPs.

The Government has an obligation to implement these principles. The language used is indicative of the obligation of the State to implement DPSPs.

### **Art.38. State to secure a social order for the promotion of welfare of the people**

- The State shall secure a social order in which justice, social, economic and political, shall inform all the institutions of national life.
- The State shall, minimize the inequalities not only among individuals but also amongst groups of people

**Art.39. Certain principles of policy to be followed by the State:-** The State shall, in particular, direct its policy towards securing

- the right to an adequate means to livelihood;
- that the ownership and control of the material resources of the community are so equitably distributed that
- concentration of wealth is prevented
- that there is equal pay for equal work for both men and women;
- children are not forced by economic necessity to enter avocations unsuited to their age or strength;
- that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that children are protected against exploitation .

**Art.39 A. Equal justice and free legal aid.-** The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Legal Aid implies giving free legal service to the poor and needy who cannot afford the services of a lawyer for the conduct of a case or a legal proceeding in any court, tribunal or before an authority.Unless legal aid is given to needy, due process of law may have been compromised-Afzal Guru who was hanged In February 2013 claimed that at the trial court stage , he did not have legal assistance and so the case turned against him and led to his death sentence.

Legal aid is provided in Article 39A and thus is a constitutional obligation of the state and right of the citizens.Justice Krishna Iyer regards it as a catalyst that enables equality of opportunity. Art.14 and Art.21 and Art.22 implicitly contain it, the latter confirmed in various apex court verdicts.

Article 39 A of Indian constitution says that:-“It is the duty of the State to see that the legal system promotes justice on the basis of equal opportunity for all its citizens. It must therefore arrange to provide free legal aid to those who cannot access justice due to economic and other disabilities.”

### **Legal Services Authorities Act, 1987 and the basis for providing Legal Aid**

Section 12 of the Legal Services Authorities Act, 1987 prescribes the criteria for giving legal services to the eligible persons. Section 12 of the Act reads as under:-

Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is-

- a member of a Scheduled Caste or Scheduled Tribe;
- a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;
- a woman or a child;
- a mentally ill or otherwise disabled person;
- a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
- an industrial workman; or
- in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956); or in a juvenile home within the meaning of clause
- of section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987);
- in receipt of annual income less than a prescribed amount.

National Legal services authority is the apex body constituted to lay down policies and principles for making legal services available under the provisions of this act to frame most effective and economical schemes for legal services. It also disburses funds and grants to state legal services Authorities and NGO's for implementing free legal Aid schemes and programmes.

In every state, State legal authority is constituted to give effect to the policies and directions of the central Authority (NALSA) and to give legal services to the people and conduct Lok Adalats in the state. State Legal services Authority is headed by the chief Justice of that High court. A serving or the retired judge of the high court is nominated as its executive chairman.

District legal services authority is constituted in every district to implement legal aid programmes and schemes. The district judge of that particular district is its ex-officio chairman.

Taluk legal services committees are constituted for each of the Taluk or Mandal or for groups of Taluk or mandals to coordinate the activities of legal services in the Taluk and to organize Lok Adalats. Every taluk legal services committee is headed by a civil judge operating within the jurisdiction of the committee who is its ex-officio chairman.

Right to get legal aid starts from the time the accused is arrested. If the person is not aware of this right then it is the duty of the Magistrate to inform the person about this. It is the duty of the police to inform the nearest 'legal aid' committee also about the arrest of an accused seeking legal aid for the first time and this goes on whenever the person is brought in for questioning.

#### When can the free legal aid be denied?

- Contempt of court
- Lying under oath
- Proceedings related to elections
- Cases where the fine imposed is not more than Rs. 50.
- Economic offences and offences against social laws
- Defamation
- Proceedings related to elections

#### Art.39.d

Article 39(d) of the Indian Constitution states that *the state shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women*. Supreme Court ruled in "Grih Kalyan Kendra Workers" Union vs Union Of India And Others (1991) that "Equal pay for equal work is not expressly declared by the Constitution as a Fundamental Right but in view of the Directive Principles of State Policy as contained in Art. 39(d) of the Constitution "equal pay for equal work" has assumed the status of the Fundamental Right in service jurisprudence having regard to the constitutional mandate of equality in Articles 14 of the Constitution". The Court further observed: "Directive Principles as even pointed out in some of the Judgments of this Court, have to be read into the Fundamental Rights as a matter of interpretation".

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

Art 41. Right to work, to education and to public assistance in certain cases.- 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.

#### Right to work

In a country with high level of unemployment, there is a need for right to work as a measure of social justice. Art.41 commits the Government to it. However, Art.41 says that right to work can be given within the limits of economic capacity and development. In other words, if the government has resources and the development paradigm permits the same, the right can be given. It will help create assets; remove poverty; lead to better use of human resources; and social indicators will improve.

The MNREGS since 2006( Parliamentary Act was made in 2005 and it became operational in 2006) which is operating in the entire country since 2008 partially fulfills Art.41.

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

**Art 43.** Living wage, etc., for workers.- 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.

Living wage means the wage necessary for a person to achieve certain specific standard of living. It is different from minimum wage which is set by law and may not meet the requirements of a living wage.

**Art 43.A** Participation of workers in management of industries.- The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.

97th amendment to the Indian constitution inserts a new directive principle into Part IV of the constitution, Article 43B, which reads: "The State shall endeavour to promote voluntary formation, autonomous functioning, democratic control and professional management of cooperative societies". The amendment came into force in January , 2012. Gujarat High Court however struck down portions of the Amendment Act as it encroached into state subject.

**Art 44.** Uniform civil code for the citizens.- The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

### **Uniform Civil Code**

#### **Personal laws**

Personal laws relate to marriage, divorce, maintenance, succession, and adoption; they also have tax and other implications. A secular and democratic society requires common law that fosters national and social integration. Art.44 directs that "the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

#### **Rationale for the UCC**

The reasons given for endeavouring for the UCC are the following

- Separate personal laws can be the basis for sub-national identities
- Intra and inter religious differences in inheritance, marriage etc are against social harmony
- As there is a common criminal law, there should be common civil code as well
- UCC makes sure that women who are given a subordinate status under all religions , attain equality. Thus, legal gender empowerment also requires UCC.

At the same time, Constitution does recognize the fact that UCC can only be introduced on voluntary demand but not imposed, in the long term social and national interest. If it is imposed,

it can divide the society and communalise it. It is felt that with social and political development, UCC could be gradually implemented as different religions will volunteer to adopt it. Otherwise, it may be seen as an imposition and rejected. That is the reason for its incorporation as a DPSP which is non-binding but fundamental to governance of the country.

Even though personal laws are not codified in India, there have been many attempts at reforming these laws. For example, Special Marriage Act, 1954- under which men and women have same rights as it is religion-neutral. Two, progressive verdicts of the courts also made personal laws more gender sensitive.

### **Personal Laws and the status of women**

The Hindu Succession Act makes provision for a Hindu Undivided Family to ensure that property remains with the male line of descent. A son gets a share equal to that of his father; a daughter gets only a share in her father's share. She cannot reside in the family home unless she is single or divorced, and cannot claim her share of property as long as the men of the family continue to live in it. A woman's right to agricultural property is also similarly restricted to "prevent fragmentation of landholdings." The law is changed as detailed ahead.

Some Muslim personal laws have been codified in the Shariat Act 1937, the Dissolution of Muslim Marriages Act, 1939 and the Muslim Women (Protection of rights on Divorce) Act, 1986. Under the Muslim Personal Laws, women's right to property is limited to half of what their brothers get. The 1937 Act categorically denies women any right to agricultural land. Polygamy among Muslims remains an issue. Muslim personal law makes man the sole guardian of a child.

Personal laws applicable to Christians were the earliest to be codified. The Indian Divorce Act was amended to give women and men equality in seeking divorce. However, the Roman Catholic Church does not accept divorce under the Indian Divorce Act.

Thus, the personal laws of different religions in India do injustice to women and need changes. It is one of the reasons for adopting UCC.

### **Hindu Succession Act : 2005 Amendments**

The Hindu Succession Act 1956 governs the succession to the property of a deceased Hindu. The Hindu Succession Act is applicable to any person who is a Hindu. It includes Buddhists, Jains and Sikhs within its ambit.

There are mainly two schools of Hindu Law namely the Mitakshara and the Dayabhaga. The Mitakshara school is prevalent in many parts of India, while Dayabhaga school prevails in West Bengal and some of its surrounding areas. Property of a Hindu can be broadly divided into two categories - joint property and separate or self-acquired property. Joint property (coparcenary property) comprises of ancestral property essentially.

According to the Mitakshara law, only the son, grandson and great grandson constituted a class of coparceners. Coparcenary is a body of persons within a joint Hindu family consisting of father, son, grandson and so on. Coparcener's wives or widows and unmarried daughters have no significant rights. Females cannot inherit ancestral or joint property as males can. It is only

when a coparcener dies, a female can get her share in her capacity as an heir to his estate. The amendment to Hindu Succession Act in 2005 removes this discrimination.

Under the amended law, the daughter is given a share in the ancestral property. If a person can be the member of the coparcenary the next stage is that he or she can become the Karta of the family.

A Karta is the head of the family and hence now it would be possible for daughters to occupy this role. Currently only male members can occupy this specific position.

This change can be quite significant in terms of social equations. However all this relates to only coparcenary property. In case of other property there is no restriction on the ability of anyone to will away the self acquired property in any manner that they desire.

### **UCC and Supreme Court**

Article 44 of the constitution states that *the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India*. In the case of *Shah Bano Begum v. Mohd. Akeel Khan* 1985 a Muslim woman sought maintenance from her husband after their divorce. Being a Muslim, husband had paid her maintenance for the period as required by the personal Muslim Law, but it was held by the Supreme Court that Shah Bano would be entitled to get maintenance under section 125 of CrPC. This decision resented and protested against by several Muslims priests claiming that this decision would harm their personal law and social order. Parliament responded by passing *the Muslim Women's (Protection of Rights in Divorce) Act in 1986*, a law that essentially provided for maintenance for Muslim women outside the criminal code, thus ensuring that Muslim women were not protected under the constitutional right to equality, and that they could not have the benefit of Section 125 of the Criminal Code.

The second instance in which the Supreme Court again directed the government of Article 44 was in the case of *Sarla Mudgal v. Union of India* (1995). In this case, the question was whether a Hindu husband, married under the Hindu law, can become a Muslim so that he could marry again. The Court said no to such conversion.

The Supreme Court again reminded the government of its Constitutional obligations to enact a UCC in 2003 when a Christian priest moved the Court challenging the Constitutional validity of Section 118 of the Indian Succession Act. His contention was that Section 118 of the said Act was discriminatory against the Christians as it imposed unreasonable restrictions on their right to donate property for religious or charitable purpose by will. The apex court struck down the Section declaring it to be unconstitutional.

**Art 45. Provision for free and compulsory education for children.-** The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years. The above contents are replaced by the 86th Amendment Act 2002 by the following: The State shall endeavour to provide early childhood care and education(ECCE) for all children until they complete the age of six years.

Art 46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. State shall protect them from social injustice and all forms of exploitation.

Art 47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health, 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.

Art 48. Organisation of agriculture and animal husbandry.- 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.

Art 48A Protection and improvement of environment and safeguarding of forests and wild life.- The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

Art 49. Protection of monuments and places and objects of national importance.- It shall be the obligation of the State to protect every monument or place or object of artistic or historic interests, 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.

Art 50. Separation of judiciary from executive- The State shall take steps to separate the judiciary from the executive in the public services of the State.

### **Separation of judiciary from executive**

The need for the separation are

- It is necessary for independence of judiciary
- It helps in specialization
- Such separation helps in better governance as there will be more checks and balances based on the doctrine of separation of powers
- Rule of law also demands that the separation take place as otherwise the judiciary may not be impartial
- Civil rights are better protected

According to the Law Commission (14<sup>th</sup> Report, 1958), "... separation means officers will devote their time entirely to judicial duties and this fact leads to efficiency in the administration of justice."

The essential feature of the scheme for the separation since Independence was the transfer of purely judicial functions like trial of criminal cases from the collector and subordinate magistrates to a new set of judicial officers who were no longer to be under the control of the collector. Previously, under the CrPC and other relevant codes , the functions of a magistrate fell into three classes

- “police” functions, e.g. the handling of unlawful assemblies
- administrative functions, e.g. issuance of licenses for firearms and similar functions; and
- judicial functions, e.g. the trial of criminal cases.

When separation was effected, the judicial functions were transferred to courts. Thus, executive magistrates and judicial magistrates were separated. The former were given functions like sanction of prosecution etc while judicial functions were with the latter.

**Art 51. Promotion of international peace and security.-** 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 encourage settlement of international disputes by arbitration.

### **Implementation of DPSPs**

Since the commencement of the Constitution, there has been substantial legislation to implement the DPSPs. As detailed below:

First amendment Act is for implementing land reforms. It was followed by the 4<sup>th</sup>, 17<sup>th</sup>, 25<sup>th</sup>, 42<sup>nd</sup>, and 44<sup>th</sup> Amendment Acts.

The 73<sup>rd</sup> Constitution Amendment Act (1992) is in pursuit of the implementing the Art. 40.

In 2005, NREGA was made and is operating in the entire country since 2008. It gives shape to Art.41, right to work.

Ajeevika( National Rural Livelihoods Mission) also finds its base in Art.41.

86<sup>th</sup> Amendment Act 2002 makes provisions for early childhood care and education (Art.45)

The food security Bill being considered is to give effect to Art.47.

**NRIIM and NUIIM are based on Art.47.**

There has been much welfare legislation to make the conditions of the work humane for the workers. Factory laws, Industrial Disputes Act 1947 are some examples.

Promotion of the cottage industries has been one of the main aspects of the economic policy of the government and there is in existence the Khadi and the Village Industries Commission for the purpose. 97<sup>th</sup> Amendment Act 2012 promotes cooperatives which is a Gandhian dream.

The government position as regards the uniform civil code is that the matter being sensitive in the country with its social backwardness , unless the religious groups concerned come forward and voluntarily seek the enforcement of the UCC, it is not desirable to implement the article. Women are brought on par with men in Hindu Succession Act that was amended in 2005. Special Marriage Act 1954 is made to give everyone the option of marrying outside their personal laws.

The policy of preferential treatment in education, administration and economy for weaker sections including women, SCs, STs and the OBC has been a consistent plank of the government welfare policy, the most recent being the implementation of the Mandal

Commission in pursuit of Art. 46. The 93rd Amendment Act 2006 is a step in the direction of pursuit of Art.46.

Regarding Art. 48, the green revolution and the research in biotechnology are aimed at modernizing agriculture and animal husbandry, among other things. India is permitting genetically modified (GM) organisms and crops like Bt cotton in India for boosting productivity, among other things.

The Biological Diversity Act 2002 is a law meant to achieve three main objectives

- the conservation of biodiversity;
- the sustainable use of biological resources;
- equity in sharing benefits from such use of resources.

The Environment Protection Act. 1986; the Wild Life Act; The National Forest Policy 1988 are some examples for implementation of Art. 48A. Government is taking many steps for countering climate change centrally sponsored programme for climate resilient agriculture(2011). National green tribunal was set up in 2010.

The Archaeological Survey of India , Ministry of Culture , is responsible for archaeological studies and the preservation of archaeological heritage of the country in accordance with the various acts of the Indian Parliament

Separation of judiciary from executive is being done by amending the CrPC. Appointment of judges of High Courts and Supreme Court is being done on the recommendation by a collegiums of judges of the higher judiciary since 1993 , based on Art.50.

The efforts of India to secure international peace are many like participation in the peacemaking operations of the UN is a prime examples of contribution to international peace and security. India has been the largest troop contributor to UN missions since inception. So far (2012) India has taken part in 43 Peacekeeping missions with a total contribution exceeding 1,60,000 troops India pioneered Non Aligned Movement to defuse cold war after the second world war.

### **Relation between FRs and DPSPs**

The FRs and the DPSPs constitute the conscience of the Constitution. The purpose of the FRs is to confer on individuals the rights necessary for their development free from coercion. DPSPs are essential for the welfare society. According to forme CJI, Justice.Chandrachud, the Constitution aims to bring about a synthesis between the two and together they constitute, not individually, the conscience of the Constitution. The two are complementary and not mutually exclusive.

Since commencement of the Constitution in 1950, the inevitable tension between the FRs and the DPSPs surfaced. DPSPs could not be implemented without the FRs being restricted. For example, land redistribution in an unequal society demanded that land be taken from those having in excess and given to those in need of it.But , the affected parties went to court on the ground that their right to property- an FR at that time, was violated.

Parliament has the obligation to promote justice by implementing Art.39. When they conflicted with the FRs- Art.14 and 19, the laws were challenged and the Supreme Court most of the time upheld the parliamentary laws.

Supreme Court in the Shankari Prasad case, 1951 and Sajjan Singh case in 1965 said that Art.13 did not come in the way of parliament's power to limit the FRs. In the Golaknath case 1967, however the earlier position was reversed and in the Keshavananda Bharati case , the constituent power of the Parliament was partly restored . In the 42<sup>nd</sup> amendment Act in 1976, DPSPs were given precedence over the FRs and the same was struck down in the Minerva Mills case verdict (1980) for the following two reasons

- 1 it removes judicial review which is a basic feature of the Constitution
- 2 FRs and DPSPs have a complementary relation which can not be upset.

The relation between the two Parts is complementary and this relation is a basic feature and can not be disturbed either way. That is the legal position since then. It is to be noted that FRs could be diluted by the DPSPs only if public interest is served(Coelho verdict 2007)

#### Relevant Judgements and CAAs

- Shankari Prasad case 1951
- Sajjan Singh case 1965
- Golaknath Vs the State of Punjab( 1967) relates to the power of the Parliament to amend the Constitution to a point of abridging FRs. Specifically, the validity of 1<sup>st</sup>, 4<sup>th</sup> and 17<sup>th</sup> Amendments regarding restrictions on the right to property was questioned and the SC Judgement says
  - FRs are given a transcendental position in the Constitution and are not amenable to Parliamentary restriction as stated in Art. 13.
  - A place of permanence is given to FRs in the Constitution.
  - In order to amend Fundamental Rights , a new Constituent Assembly is necessary.
  - Art. 368 provides the procedure to amend the Constitution but does not confer power on Parliament to amend the Constitution.

Doctrine of prospective overruling was applied in the case of the Golaknath verdict and it said that the actions already taken do not become void but the judgement applies to future actions of the State.

#### 24<sup>th</sup> Amendment Act

The Constitution 24<sup>th</sup> Amendment 1971 was made to overcome the SC judgement in the Golak Nath case. Its contents are

- Nothing in Art.13 bars Parliament from amending the Constitution under Art. 368.
- Art. 368 contains the procedure as well as empowers the Parliament to amend any part of the Constitution.
- President shall assent to a Constitution Amendment Bill duly passed by the Parliament.

24<sup>th</sup> Amendment Act, along with the 25<sup>th</sup> and 29<sup>th</sup> judgements was questioned in the apex court and the majority judgement of the 13 judge Constitution Bench in the Kesavanand Bharati Vs the State of Kerala case is as follows

- 24<sup>th</sup> Amendment Act is valid.
- Parliament can amend any part of the Constitution except 'basic features'
- The word 'law' in Art. 13 does not include a Constitution Amendment Act and includes only ordinary legislation as stated in the Shankari Prasad and Sajjan Singh verdicts

The main question addressed in the verdict was whether the Parliament had the power to amend the Constitution without limits or not and the way to interpret Art. 13 and Art. 368.

#### 25<sup>th</sup> CAA

It gave parliament power to amend any part of the Constitution.

#### Keshavananda Bharati verdict

It struck down the unlimited power parliament claimed under the 25<sup>th</sup> CAA and introduced the doctrine of basic features.

#### Minerva Mills case

In the Minerva Mills Ltd. Vs Union of India case 1980, the SC was responding to issues related, among others, to the 42<sup>nd</sup> Amendment Act 1976 where it gave Parliament unlimited constituent powers, making implementation of some DPSPs unquestionable in the courts of law for violating Art. 14, 19 and 21.

The SC by a majority of four to one ruled that

- Powers of Parliament to amend the constitution are limited by the basic framework as introduced by the SC in the Kesavananda Bharati case
- Fine balance between the FRs and DPSPs as found in the Constitution can not be tilted in favour of either.

The relation between the FRs and DPSPs presently is based on the Minerva Mills verdict of the Supreme Court.

#### DPSPs outside Part IV

In addition to the Directives that are found in Part Four of the Indian constitution, there are certain other directives in other Directives in other Parts of the Constitution addressed to the state and non-justiciable like the rest. They are the following

- Art.335 says that in reserving jobs for the Scheduled Caste and Tribes in Government, due attention should be paid to efficiency in administration.
- Art 351 enjoins the state to promote the use of Hindi so that it may be developed as a medium of communication.
- Art.350A enjoins the state and the local authorities to impart primary education to the linguistic minorities in their mother tongue.

## **Directive Principles and Fundamental Rights: The differences**

Both FRs and DPSPs are essential for a welfare state- democratic socialism. Both aim at building human capital.

- FRs are essentially individual rights . Directive Principles are in the nature of instruments of instructions to the Government of the day to undertake collective positive actions.
- The fundamental rights are enforceable in the courts, hence are justiciable. But the Directive Principles are not enforceable in the courts, thus they are non – justiciable. Justiciable means that if Fundamental Rights are violated, the aggrieved individual can move the courts for the protection of their Fundamental Rights. Non-justiciable means that citizens can not go to court to secure implementation of the Directive Principles. DPSPs are made non-justiciable as their implementation requires resources; society may not be ready for their implementation- UCC; they need time for introduction- local self government institutions etc.
- Fundamental Rights aim at establishing political democracy in India while Directive Principles attempts to provide socio-economic foundations to Indian democracy.

Fundamental Rights and Directive Principles are not opposed but are complementary to each other. Both ultimately aim at the welfare and the well-being of the people. While Directive Principles are non-justiciable, it does not imply that they need not be implemented. They are fundamental to the governance of the country. FRs have legal sanction while DPSPs enjoy moral and political sanction. The real strength of Directive Principles is derived from a vigilant public opinion.

In a nutshell, the differences between FRs and DPSPs are

- FRs are rights while DPSPs are directions to the Government
- FRs are enforceable( justiciable) while DPSPs are not
- FRs are essentially individual –centered while DPSPs are group-centered
- FRs are aimed at creating political democracy while DPSPs aim for an inclusive society that is environment-friendly.

### **DPSPs and the nature of State obligations**

The words as against each obligation, such as “strive to promote” (Art. 38) “direct its policy towards securing” (Art. 39) .... “endeavour to secure.....” (Art. 43).... “take steps .....” (Art. 43A) “..... promote the educational and economic interests ..... (Art. 46)” “..... endeavour to raise the level of nutrition..... (Art. 47), all indicate a continuous process of “progressive” implementation of these principles. Therefore, the State cannot adopt any “regressive” measure which will hinder the objective of full realization of these rights.

### **Supreme Court and the DPSPs**

Initially, the apex court allowed the parliament to amend the Constitution in favour of DPSPs, Art.13 notwithstanding. It permitted the FRs to be restricted to some extent in the process. Later, Supreme Court became activist and gave expanded meaning to Art.21 by reading DPSPs into it.

Since life is not merely “animal existence, it has to be rendered meaningful and imparted a sense of dignity for which DPSPs contribute significantly.

In the case of bonded labourers – Bandhua Mukti Morcha Case ( 1984 ), the Court said: “It is the fundamental right of every one in this country..... to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Art. 21, derives its life-breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Art. 39 and Arts. 41 and 42,43A, 48A and at least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity.....” In Mohini Jain’s Case (1992), right to education was declared an FR. It was till then a DPSP.

### **Note on laissez faire, welfare and socialist state**

Welfare state is one where the responsibility of social welfare rests with the State. It seeks to provide employment to the jobless, remove poverty, provide for social security, take care of women and other marginalized sections like SC/STs in India, deepen democracy and institutionalize genuine democracy from the grass roots level, ensure distributional justice and so on.

Laissez faire is a French term meaning "let do, let go, let pass.". It is a form of economic organization where the markets operate with minimal government control.

By contrast with the welfare state, the minimalist state is the ideal of those commentators who criticize social legislation (labour law and social security law) as a source of rigidity which damages competitiveness in economy. The term "nightwatchman state" is also used to describe a minimalist state as it exists in a laissez faire economy. Socialist state is one that owns the means of production and does not permit private property in a significant way.

# Fundamental Duties

While rights are important, they need to be balanced with duties. Unless duties are performed, rights become vacuous. Right to free speech and expression can be meaningful only when the duty to protect public property is followed. One's right to life is complete only when one is educated and helps his/her children go to school. Right to do business needs to be harmonised with the right to respect environment. The duty to build a modern and egalitarian nation coexists with the democratic rights.

Duties are generally associated with the socialist countries. Part IV A of the Constitution relating to Fundamental Duties was inserted in the Constitution by the Constitution (Forty-second Amendment) Act, 1976 in accordance with the recommendations of the Swaran Singh Committee appointed to review the Constitution. This Part contains only one article, namely, article 51A containing 11 Fundamental Duties. Originally it had only 10 duties but the 86<sup>th</sup> Amendment Act- Right to education- included the 11<sup>th</sup> one. The following are the FDs:

"51A. Fundamental Duties – It shall be the duty of every citizen of India –

- (a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- (b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
- (c) to uphold and protect the sovereignty, unity and integrity of India;
- (d) to defend the country and render national service when called upon to do so;
- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- (f) to value and preserve the rich heritage of our composite culture;
- (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
- (h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
- (i) to safeguard public property and to abjure violence;
- (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.”.

(k) who is a parent or guardian to provide opportunities for education to his child or as the case may be, ward between the age of six and fourteen years".(added by the 86th Amendment Act)

The duties reflect Indian tradition and values and in India environment is traditionally revered. Respect for women pervades our culture. Education is necessary for science and technology which is the forte of ancient India. Our commitment to multicultural society is one of the sources of our soft power.

#### **Justice Verma Committee Report on Teaching Fundamental Duties to Citizens**

Justice Verma Committee Report on Teaching Fundamental Duties to Citizens was est up in 1998 and the report was presented in 2000. It recommended re-orienting approaches to school curriculum and teachers' education programmes and incorporating fundamental duties in higher and professional education,

#### **Supreme Court on citizens' duties**

In 2003, Supreme Court has directed the Centre to enact a law for the enforcement of fundamental duties by citizens as suggested by the Justice Verma Committee(2000).

The former Chief Justice of India, Ranganath Mishra, in a letter to the Chief Justice of India, requested the apex court to issue necessary directions to the State to educate its citizens in the matter of fundamental duties so that a right balance emerged between rights and duties. This letter was treated as a writ petition. The apex court appointed senior advocate K. Parasaran, as amicus curiae to assist the court.

National Commission to Review the Working of the Constitution(NCRWC) report in 2002 recommended the implementation of the report of Justice Verma Committee

The Commission recommended that the first and foremost step required to be taken by the Union and the State Governments was to sensitise the people and create a general awareness of the provisions of fundamental duties amongst the citizens, on the lines recommended by the Justice Verma Committee.

#### **Relationship between the Fundamental Rights, Directive Principles and Fundamental Duties**

The Fundamental Rights, Directive Principles of State Policy and Fundamental Duties are parts of the Constitution of India that lay out what the Government owes to the citizens and vice versa. While FRs are democratic in nature, they lead to citizen contribution to democracy and secularism. It is complemented by the State working for the DPSPs that render the society even more democratic( Panchayats) and egalitarian(Art.38 and 39). The secular provisions of FRs and DPSPs are also complimentary- Art.25-28 and Art.44 can be read together as mutually rendering each other meaningful. FDs, on their part contribute to a

stronger , socially diversified and democratic nation. DPSPs prescribe the fundamental obligations of the State to its citizens and FDs prescribe duties of the citizens to the State.

The Fundamental Rights are basic rights of all citizens in Part III of the Constitution; apply irrespective of race, place of birth, religion, caste, creed or gender. They are enforceable by the courts, subject to specific restrictions.

The Directive Principles of State Policy are guidelines for the framing of laws by the government. These provisions, set out in Part IV of the Constitution, are not enforceable by the courts( not justiciable), but the principles on which they are based are fundamental guidelines for governance that the State is expected to apply in framing and passing laws.

The Fundamental Duties are defined as the moral obligations of all citizens to help promote a spirit of patriotism and to uphold the unity of India. These duties, set out in Part IV-A of the Constitution, concern individuals and the nation. Like the Directive Principles, they are not legally enforceable. However, like the DPSPs these are made enforceable through various laws, though in themselves non-justiciable. For example, the FD that citizens should not destroy public property finds enforcement through various legislative statutes. Similarly, the DPSP of maternity relief has been enacted into various enforceable laws. These are only two examples from the many that are available.

The Supreme Court, after the judgment in the Kesavananda Bharati case, has adopted the view of the Fundamental Rights and Directive Principles being complementary to each other, each supplementing the other's role in aiming at the same goal of establishing a social democracy and welfare state by means of social revolution. The same was stressed in the Minerva Mills case and the IR Coelho verdict(2007) Similarly, the Supreme Court has used the Fundamental Duties to uphold the Constitutional validity of statutes which seeks to promote the nationalist objects. These Duties have also been held to be obligatory for all citizens, subject to the State enforcing the same by means of a valid law. The Supreme Court has also issued directions to the State in this regard, with a view towards making the provisions effective and enabling a citizens to properly perform their duties.

## Some excerpts from NCRWC report

Fundamental Duty enshrined in clause (c) of article 51A is essentially addressed to those citizens who belong to the defence forces or responsible for the maintenance of law and order.

Practically, the whole of Chapter VI of the Indian Penal Code (IPC) relating to offences against the State is relevant for protecting the sovereignty and integrity of India. If liberty resides in the minds of men and women, the same is true of unity. Any conduct which seeks to destroy or damage unity is punishable under Section 153-A of the IPC; Imputations and assertions prejudicial to national integration are punishable under Section 153-B of the IPC. Statements or reports containing alarming news which tend to promote enmity etc. are punishable under Section 505 (2) of the IPC.

The Fundamental Duty enshrined in clause (d) of article 51A is contingent on the citizens being called upon to defend the country and render national service. It is addressed to all citizens other than those who belong to the army, the navy and the air force. It is a Fundamental Duty entrusted to the common man as indicated by the expression "when called upon to do so". Those citizens who belong to any of the three defence forces are entrusted constantly with this Fundamental Duty. This Fundamental Duty has not so far been tested as there has been no occasion when the common man was called upon to render national military service and to defend the country from any external aggression. The defence of the country may be needed against external aggression and war mongering armed rebellion within the country. It connects with FR in Art.23.2

### 51A.e

The duty to promote harmony and the spirit of common brotherhood amongst all the people of India essentially flows from the basic value of fraternity enshrined in the Preamble to the Constitution. India is a country of different castes, languages, religions and many cultural streams but we are one people with one Constitution, one flag and one citizenship. Spirit of brotherhood should come very normally among the citizens of a country like India where the norm has been to consider the entire world as one family. The Constitution also casts upon us the Fundamental Duty of ensuring that all practices derogatory to the dignity of women are renounced. This again should come normally to a country where it is an aphorism that Gods reside where women are worshipped. (*yatra naryastu pujyante ramante tatra devata*). It is for us to rise above the later day degenerations and aberrations which tarnished the image of our society.

The first part of the clause (e) deals with the duty of citizens to promote harmony and spirit of common brotherhood among all the people of India.

The second part of the clause gives a mandate to remove prejudices and prejudicial or harmful concepts and conduct based on gender. The central core of the concept is indignity to women. The passing of the Commission of Sati (Prevention) Act, 1987 emphasizes the importance of the duty. Many laws have been passed by the Union Government and the State Governments which punish practices derogatory to the dignity of women. The significance of clause (e) lies in its call to every citizen to renounce such practices. This clause easily lends itself to its effectuation in a

concrete case because of its comparatively precise dimension.” (Vishaka vs State of Rajasthan 1997 )

### Enforceability

It is true that there is no legal sanction provided for violation or non-performance of Fundamental Duties.

Out of the eleven clauses in article 51A, six are positive duties and the other five are negative duties. Clauses (b), (d), (f), (h) , (j) and (k) require the citizens to perform these Fundamental Duties actively.

It is no longer correct to say that Fundamental Duties enshrined in article 51A are not enforceable to ensure their implementation and are a mere reminder. Fundamental Duties have the element of compulsion regarding compliance. What is needed is to enact suitable legislation wherever necessary to require obedience of the duties by the citizens, with legal sanctions. There is need for comprehensive legislation in this area to ensure a faithful and effective implementation of the Fundamental Duties.(Read above in the relevant excerpt )

A number of judicial decisions are available towards the enforcement of certain clauses under Article 51A.



# CONSTITUTION AMENDMENT PROCESS

Constitution reflects the aspirations and needs of the people of the country. It has to be a dynamic document giving shape to the popular aspirations as they evolve from time to time. It has to facilitate socio-economic change and national security. Law can not lag behind the fast moving society and its needs. Therefore, all constitutions provide for built-in procedures for amendment. Such procedures can be rigid or flexible. Rigid procedure is elaborate, difficult and special. It is a characteristic of federal Constitutions where the Constitution involves distribution of powers to the two levels of government and so can be amended only when both the tiers of government accept the same. Rigidity, thus, usually involves ratification by state legislatures. However, only federal provisions are covered by the rigid procedure and not the non-federal parts of the Constitution.

Flexibility means passing an amendment Bill in the same manner as an ordinary Bill. Indian Constitution has a combination of both.

Constitutions undergo amendments informally(imperceptibly) and formally(perceptably). In the former method, there are two ways

- Judicial pronouncements
- Conventions

Imperceptible methods

Judicial rulings and Constitutional amendments

In India, the Supreme court contributed to evolution of the Constitution in a significant way by its verdicts. Some important rulings are

- Introduction of the doctrine of Basic features of the Constitution and the ruling that they can not be amended by the Parliament(Keshavananda Bharati case verdict of the Supreme Court 1973)
- FRs and DPSPs are complementary and such balance between the two Parts of the Constitution can not be disturbed( Minerva Mills case verdict 1980 )
- Territory can not be ceded except by an amendment Act( berubari case 1960)
- Even though Art.361 gives Governor of a state immunity from judicial review, judiciary has the right to invalidate any wrong and malafide actions that a Governor may take( Bihar assembly dissolution case 2006)

Conventions and Constitutional change

Conventions are a set of unwritten rules that have come to be accepted as having the force of law. Some conventions in India in the field of Constitution and governance are

- Prime Minister hails from the Lok Sabha
- President dissolves the Lok Sabha on the advice of the Union Council of Ministers
- Government accepting the recommendations of the Finance Commission

British Constitutional expert Dicey is of the opinion that conventions can not be enforced by courts as they are unwritten. But there is also an opinion that they are enforceable and that there is no distinction between Constitutional law and an established Constitutional convention and the latter is enforceable if it is long established(Justice Kuldip Singh, former judge of Supreme Court of India ). The former view is correct in some cases like the prime Minister belonging to the Lok Sabha. It is certainly not enforceable Dr. Manmohan Singh's a member of Rajya Sabha. Similarly , the recommendations of the Finance Commission have been conventionally accepted. But that can not be enforced as some recommendations may not be acceptable. For example, the 10<sup>th</sup> FC(1995-2000) recommended that its recommendations be in force for 15 years which was clearly out-of- mandate.

### **Formal and Perceptible method**

It refers to an amendment according to the procedure laid down in the Constitution.

### **Bills seeking to amend the Constitution are of three types:**

1. Bills that are passed by Parliament by simple majority;
2. Bills that have to be passed by Parliament by the special majority prescribed in article 368(2) of the Constitution; and
3. Bills that have to be passed by Parliament by the special majority as aforesaid and also to be ratified by not less than one-half of the State Legislatures.

The first category in the above list is not 'deemed ' to be amendment. The latter 2 types are. (Read ahead)

### **Art.368**

The Constitution amendment process is given in Art.368 in which two methods of amendment are mentioned .

One category of amendments are those which can be made by Parliament by the prescribed 'special majority'. The second category of amendments require ratification by at least one half of the State Legislatures after being passed by a special majority by each House of the Parliament.

## Amendment by special majority

A Bill seeking to amend any other provision of the Constitution has to be passed in each House of Parliament by a special majority which means

- a majority of not less than two-thirds of the members of that House present and voting'
- and
- a majority of the 'total membership of that House. The expression "present and voting", means members who vote for "ayes" or for "noes". Members who are present in the House and vote "abstention" either through the electronic vote recorder or on a voting slip or in any other manner, are not treated as "present and voting." Total membership means total number of members comprising the House irrespective of any vacancies or absenteess on any account.

Taking a strict interpretation of the Constitutional provision, the special majority prescribed may be required only for voting at the third reading stage, but by way of caution, the requirement of special majority has been provided for in the Rules of Procedure and Conduct of Business in Lok Sabha in respect of all the effective stages of the Bill i.e. motion that the Bill be taken into consideration, motion that the Bill, as reported by the Select or Joint Committee, be taken into consideration, motion that the Bill, as passed by Rajya Sabha/LS , be taken into consideration, motion for adoption of clauses and schedules to the Bill and finally for the adoption of the motion that the Bill be passed. Motions that the Bill be circulated for eliciting opinion thereon or that the Bill be referred to a Select or Joint Committee are passed by simple majority.

All provisions of the Constitution can be amended by a special majority in the parliament except the 'federal provisions' as mentioned in the Art.368. They require amendment by special majority and ratification by at least half State Legislatures. The following features fall in that category:

- Manner of election of the President
- extent of the executive power of the Union and the States
- Supreme Court and the High Courts; High Courts in UTs
- distribution of legislative powers between the Union and States(Seventh Schedule)
- or the representation of States in Parliament
- very procedure for amendment as specified in the Constitution (Art.368)

In the above cases, the amendment, after it is passed by the special majority has also to be ratified by Legislatures of not less than one-half of the States by resolutions by a simple majority before the Bill is presented to the President for assent. The Constitution does not contemplate any time-limit within which the State Legislatures should ratify the amendments referred to them.

Constitution (Fifty-second Amendment) Act, 1985, popularly known as the Anti-Defection Law, was not ratified by the State Legislatures. But it seeks to keep out the courts and bar judicial review. In the Kihoto Hollohan case, the Supreme Court upheld the validity of the Tenth

Schedule but declared its paragraph 7 invalid for want of ratification by State Legislatures as it excludes judicial review and dilutes powers of higher judiciary. While doing the apex court treated paragraph 7 as severable part from the rest of the Schedule. ( Doctrine of Severability)

### **Deadlocked Bills**

The following are the instances when Constitution Amendment Bills passed by one House could not secure the requisite majority in the other House

- Constitution (Twenty-fourth Amendment) Bill, 1970, regarding abolition of privileges and purses of erstwhile rulers, was passed by the Lok Sabha but Rajya Sabha rejected it ,
- Constitution (Sixty-fourth and Sixty-fifth Amendment) Bills,1989, regarding Panchayats and Municipalities, as passed by the Lok Sabha were rejected by Rajya Sabha.

Both the above Bills were rejected by the Rajya Sabha and so did not bring down the governments that introduced the Bills.

### **Private Member and Constitution Amendment Bills**

Constitution Amendment Bills can be introduced in either House of Parliament. If sponsored by a Private Member, the Bill has to be examined in the first instance and recommended for introduction by the Committee on Private Members' Bills and Resolutions before it is included for introduction in the List of Business.

### **Parliament's power to amend the Constitution**

Article 368 of the Constitution confers power on Parliament to amend the Constitution and prescribes procedure for the same .In the Shankari Prasad Singh( 1951) and Sajjan Singh( 1965) cases- to review the legality of 1<sup>st</sup> and 17<sup>th</sup> amendment Acts –Parliament ruled that the word 'law' in Art.13 excludes Constitution amendment and so Art.13 does not apply to Art.368.However, in the verdict in the Golak Nath case(1967), the Supreme Court had held that

- a. Art.368 contains only the procedure of amendment but does not confer power on the Parliament to amend any part of the Constitution
- b. Art.13 applies to Art.368 and restricts Parliamentary power
- c. Fundamental rights are immutable
- d. If parliament wants to amend the FRs, it should convene a Constituent Assembly
- e. Amendment refers to minor changes and not to substantive changes

The ruling led Parliament to enact the Constitution (Twenty-fourth Amendment)Act in 1971 , which declared expressly that

- there would be no limitation on the constituent power of Parliament to amend the provisions of the Constitution
- Article 13 which was a bar against abridging or taking away any of the fundamental rights did not apply to a Constitution Amendment under article 368 and
- President has no choice but to assent to the CAB

When the 24<sup>th</sup> Amendment Act along with other Amendment Acts – 25<sup>th</sup> and 29<sup>th</sup> Acts- was challenged in the Supreme Court, Supreme Court delivered the Kesavananda Bharati case verdict in 1973. In the Kesavananda Bharati case(24/4/1973) the Supreme Court reversed the decision given in the Golak Nath case and held that Parliament could amend any part of the Constitution but not the 'basic features'- a concept that it introduced in the judgement. Also, Art.13 does not apply to Art.368. The apex court had the sole authority to declare any feature of the Constitution as basic and could do so from time to time.

The 42<sup>nd</sup> Amendment Act(1976) gave Parliament full power to amend the Constitution . It was challenged and the Supreme Court delivered the Minerva Mills case verdict (1980) to reiterate the pre-42<sup>nd</sup> Amendment Act position.

The theory of basic structure of the Constitution was reaffirmed and applied by the Supreme Court in the Minerva Mills case (1980) when the Supreme Court held that the Constitution had conferred a limited amending power on the Parliament and this limited amending power was one of the basic features of the Constitution. Parliament, therefore, could not , under Article 368 expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution and its basic and essential features. The Court developed the concept of basic structure in subsequent cases also like the Bommai case in 1994 when secularism was pronounced a basic feature.

#### Salient features of amendment process in India

- Constitution is both flexible and rigid- rigid essentially for the federal features.
- When Parliament amends the Constitution, it does so in exercise of its constituent power as distinguished from its ordinary legislative power.
- An amendment Bill can be introduced by a private member( member of Parliament who is not a minister) or a Minister
- An amendment Bill can be initiated only by the Union Government and can be introduced only in the Parliament- either House. States do not have the power to initiate an amendment Bill.
- The Bill so initiated must be 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.
- There is no provision for a joint sitting in case of disagreement between the two Houses as it will override the interests of the States because Rajya Sabha is numerically inferior to Lok Sabha.
- An amendment Bill after being passed duly and sent to the President shall be assented to by the President(24<sup>th</sup> Amendment Act).
- An ordinance can not amend the Constitution
- Basic features can not be amended

Constitution of India can be amended with the following limitations

- basic features can not be amended

- In the verdict on Ninth Schedule in 2007 - I.R. Coelho judgment-, the Supreme Court ruled that FRs- the 'golden triangle' of Art.14,19 and 21- could be amended but only if substantive public interest is served by such restriction which is open to judicial review.

### 'Amendments' not 'deemed' to be so

There are some provisions in the Indian Constitution that may be amended by the parliament but such 'amendments' are not considered- 'deemed' – Constitution amendments . The reason is that the procedure for such changes is not found in Art.368; the process requires only a simple majority in the Parliament; some of them are of consequential nature(Art.4 and 169, for example). The following are such provisions in the Constitution :

- admission or establishment of new States or formation of new States and alteration of areas, boundaries or names of existing States; changes in First and Fourth Schedules as a result(Art.4)
- Art.11 empowers Parliament to make laws related to certain aspects of citizenship
- Parliament can amend Second Schedule to revise the salaries of certain Constitutional dignitaries
- creation or abolition of Legislative Councils in States(Art.169)
- Fifth and Sixth Schedules- administration and control of Scheduled Areas and Scheduled tribes; administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram respectively ; amendment of Scheduled Castes and Scheduled Tribes Orders
- Art.239A relating to creating an Assembly or Council of Ministers in a UT.
- Art.105(3) contains parliamentary privileges until Parliament defines them

### Legislative Councils and Amendment Act

Article 168 of the Constitution contains provision for constitution of two Houses of the Legislatures in the States mentioned therein i.e., Legislative Council and the Legislative Assembly. Art.169 talks of abolition and creation of legislative council. Legislative Council Act to be passed by the Parliament after the Resolution is passed by the State Assembly confers power upon the President for issuing an order to include the name of the State in clause (1) of article 168 of the Constitution. In the case of abolition of the Council, the name is to be deleted identically. Since the amendment thus brought about in the Constitution is by a process outside Art.368 and is consequential in nature, it is not deemed to be an amendment. In Tamil Nadu, an Act was made in 2010 to create a Council and a similar Bill was introduced in Lok Sabha in 2012 for repealing the earlier Act, on the basis of a TN Assembly resolution passed in 2011.

Normal legislative procedure applies to this category of amendments. However, the Constitution lays down certain conditions before Parliament legislates in respect of some of such amendments. For instance, no Bill for the formation of a new State, etc. can be introduced in either House of Parliament except on the recommendation of the President and unless such Bill is referred by the President to the Legislature of the State concerned for expressing its views thereon within the specified period. Further, Parliament's power to make law for the abolition or creation of a Legislative Council in the States is exercisable only if the Legislative Assembly of the concerned State passes a resolution to that effect by a majority of total membership of the

House and a majority of not less than two-thirds of the members of the Assembly present and voting( special majority).

## Basic Structure

Constitution gives Parliament power to amend the Constitution(Art.368). This power is not absolute in nature. It is limited by the Constitution. For example, Art.13 denies State (effectively parliament) the power to abridge Fundamental Rights. Parliament's constituent power is also subject to judicial review.

In the Shankari Prasad(1952) and Sajjan Singh (1965) cases, the Supreme Court ruled that Parliament could abridge FRs without any limitation from Art.13 by amending the Constitution and not by ordinary legislation. Golaknath case judgement overturned it in 1967. 24th Amendment Act was made by parliament in 1971 to overcome the Golaknath ruling. In the Keshavananda Bharati case verdict; apex court gave parliament power to amend the Constitution but limited it with the introduction of " basic structure" concept.

Thirteen judges of the Supreme Court, including then Chief Justice Sikri, heard arguments in Kesavananda Bharati v. The State of Kerala and thus considered the validity of the 24th, 25th and 29th amendments, and more basically the correctness of the decision in the Golak Nath case. This time, the court held, by 7-6, that although no part of the constitution, including fundamental rights, was beyond the amending power of Parliament (thus overruling Golaknath ruling ), the "basic structure of the Constitution could not be abrogated even by a constitutional amendment".It said that basic features are 'embedded' in the Constitution and could not be diluted.

In Kesavananda there was little consensus among the majority for what the "basic structure" of the constitution comprised. Chief Justice Sikri, writing for the majority, indicated that the basic structure consists of the following:

- The supremacy of the constitution.
- A republican and democratic form of government.
- The secular character of the Constitution.
- separation of powers.
- The federal character of the Constitution.

Justices Shelat and Grover added three features to the Chief Justice's list:

- The mandate to build a welfare state contained in the Directive Principles of State Policy.
- Maintenance of the unity and integrity of India.
- The sovereignty of the country.

Justices Hegde and Mukherjea instead provided, in their opinion, a separate and shorter list:

- The sovereignty of India.
- The democratic character of the polity.
- The unity of the country.

- Essential features of individual freedoms.
- The mandate to build a welfare state.

Justice Jaganmohan Reddy preferred to look at the Preamble, stating that the basic features of the constitution were laid out by that part of the document, and thus could be represented by:

- A sovereign democratic republic.
- The provision of social, economic and political justice.
- Liberty of thought, expression, belief, faith and worship.
- Equality of status and opportunity.

Since then, the basic features have been growing in number as the apex court added to them through various judgements. For example. Judicial review in Chandra Kumar case(1997).In the Minerva Mills case( 1980), the following basic features are added

- limited power of the Parliament to amend the Constitution
- balance between the FRs and the DPSPs

In Bommai case verdict (1994), secularism was added to the list of basic features with the further ruling that a State Government that violates it is liable to be dismissed and President's rule imposed. This is a new dimension to the concept of basic features and has not been seen till then and since then.

The effect of the doctrine of basic features is the following

- essential features are preserved
- parliament's dynamic responsibilities are recognised but its constituent power is restricted
- judicial review is retained to protect the original aims of the Constitution
- judicial review and parliamentary powers and obligations are balanced for the sake of good governance and individual liberties.

Basic features are an evolving and dynamic concept that enable the judiciary to retain the essence of the Constitution.

The basic structure doctrine applies only to the constitutionality of amendments and not to ordinary Acts of Parliament, which must conform to the entirety of the Constitution and not just to its basic structure.

**Is the amendment process so simple as to make the Constitution a 'toy' in the hands of the Parliament?**

There have been 97 amendments to the Indian Constitution till 2012 necessitated by the objective of welfare State( land reforms etc); social justice( 1<sup>st</sup> and 93<sup>rd</sup> Acts);cleanse the political process of defections( 52nd and 91<sup>st</sup> Amendment Act); fiscal reforms( 88<sup>th</sup> Amendment Act to streamline service tax) etc. While the number of amendments , on the face of it does

suggest that Constitution has been too flexible ; it is not entirely because of the flexibility of the Constitution. It was the response of the Parliament and states to the need to shape India democratically and socialistically. Management of diversities, implementation of policies for a socialist pattern of society, making the political process stable and clean etc are the compulsions that rendered the amendments necessary. It must not be forgotten, that the more voluminous the Constitution, the greater the number of amendments.

The Constitutional safeguards that make it very difficult to pass amendments are the following

- majority required is special majority and in some cases ratification by at least half the State Legislatures
- both the Houses , sitting independently , should pass the Bill. That is, there is no joint session in case of a deadlock between the two Houses and the Bill needs to be reintroduced
- only Union Government can initiate the amendment Bill. It can be introduced only in the Parliament
- an Ordinance promulgated by the President can not amend the Constitution.

#### Important Amendments to the Constitution

1. The Constitution (First Amendment) Act, 1950—The amendment inserted two new Articles, 31A and 31B and the Ninth Schedule to give protection from challenge to land reform laws.

7. The Constitution (Seventh Amendment) Act, 1956—This amendment Act purported to give effect to the recommendations of the State Reorganisation Commission .

9. The Constitution (Ninth Amendment) Act, 1960—The purpose of this amendment is to give effect to the transfer of certain territories to Pakistan in pursuance of the agreement entered into between Governments of India and Pakistan. This amendment was necessitated in view of the Judgement of Supreme Court in "In the Berubari Union" case by which it was held that any agreement to cede a territory to another country could not be implemented by a law made under Article 3 but would only be implemented by an amendment of the Constitution.

24. Twenty-Fourth Amendment 1971- The amendment was made necessary by the Supreme Court judgement in the Golaknath case in 1967 when the apex court ruled that Art.13 is a limitation on Parliamentary power to amend the Constitution. Art.368 gave only the procedure and not the power of amendment to the Parliament.

1 Nothing in Art.13 shall apply to any amendment of this Constitution made under article 368".

2 Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power to amend any provision of this Constitution in accordance with the procedure laid down in Art.368.

3 When the duly passed Constitution Amendment Bill is presented to the President for his assent , President shall give his assent.

25. Twenty-Fifth Amendment 1971 - In the Bank Nationalisation Case [1970], the Supreme court had held that the Constitution guaranteed right to compensation, that is, the equivalent in money of the property compulsorily acquired. Thus, the adequacy of compensation has become justiciable inasmuch as the Court could go into the question whether the amount paid to the owner of the property was reasonable. The Act amends the Constitution to surmount the difficulties placed in the way of giving effect to the Directive Principles of State Policy by the aforesaid interpretation.

- 1 Amendment of article 31 so that the word 'compensation' is replaced by the word 'amount'.
- 2 31C. 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(socialist legislation as a part of Directive Principles of State Policy) shall be deemed to be void on the ground that it is inconsistent with any of the rights conferred by Article 14 and Article 19 ; 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:
29. The Constitution (Twenty-ninth Amendment) Act, 1972—The Ninth Schedule to the Constitution was amended to include therein two Kerala Acts on land reforms.

#### 42. Forty-second Amendment 1976

It is called a 'mini-Constitution and has been affected on the recommendations of the Swaran Singh Committee in 1976.

Amendment of the Preamble: the words 'SOCIALIST, SECULAR and integrity' are inserted.

- 1 All DPSPs are given precedence over all FRs
  - 2 Amendment of article 39 to include that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."
  - 3 Insertion of new article 39A:Equal justice and free legal aid.-The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.".
  - 4 Insertion of new Part IVA:FUNDAMENTAL DUTIES(Art.51A)
  - 5 use 1971 census figures for election till 2000 AD and freeze the LS and Assembly strength till 2001 census as otherwise the states with more population will gain and those limiting population will lose
  - 6 TRIBUNALS:323A and 323B.Administrative tribunals and other tribunals are to be introduced to decongest the courts and speed of disposal of cases.
  - 7 There shall be no limitation on the constituent power of Parliament to amend Constitution
  - 8 Amendment of the Seventh Schedule.Forests, education etc should be shifted from State List to Concurrent List
44. The Constitution (Forty-fourth Amendment) Act, 1978—The right to property which had been the occasion for more than one amendment of Constitution was omitted as a Fundamental

Right and it was made into an ordinary legal right- Art.300A. Article 352 of the Constitution was amended to provide "armed rebellion" as one of the circumstances for declaration of emergency replacing

'internal disturbance'. Internal disturbance not amounting to armed rebellion would not be a ground for the issuance of a Proclamation. Emergency and President's rule provisions were strengthened. President is empowered to return the advice given by the Union Council of Ministers once for reconsideration- Art.74 being amended for this.

52. The Constitution (Fifty-second Amendment) Act, 1985—Anti-defection law and the Tenth Schedule.

61. The Constitution (Sixty-first Amendment) Act, 1989—The Act provides for reducing voting age from 21 to 18 years by amending Article 326 of the Constitution.

73. The Constitution (Seventy-third Amendment) Act, 1993—Article 40 of the Constitution which enshrines one of the Directive Principles of State Policy lays down that the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. In the light of the above, a new Part IX relating to the Panchayats has been inserted in the Constitution to provide for among other things, Gram Sabha in a village or group of villages; constitution of Panchayats at village and other level or levels; direct elections to all seats in Panchayats at the village and intermediate level, if any and to the offices of Chairpersons of Panchayats at such levels; reservation of seats for the Scheduled Castes and Scheduled Tribes in proportion to their population for membership of Panchayats and office of Chairpersons in Panchayats at each level; reservation of not less than one-third of the seats for women; fixing tenure of five years for Panchayats and holding elections within a period of six months in the event of supersession of any Panchayat.

74. The Constitution (Seventy-fourth Amendment) Act, 1993—In many states local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersession and inadequate devolutions of powers and functions. As a result, Urban Local Bodies are not able to perform effectively as vibrant democratic units of self-government.

Having regard to these inadequacies a new part IX-A relating to the Municipalities has been incorporated in the Constitution to provide for among other things, constitution of three types Municipalities, i.e., Nagar Panchayats for areas in transition from a rural area to urban area, Municipal Councils for smaller urban areas and Municipal Corporations for larger urban areas.

#### **Recent Amendment Acts upto 2013**

- 87<sup>th</sup> Amendment Act, 2003 - delimitation of constituencies for LS and LA elections on the basis of 2001 census
- 88<sup>th</sup> Amendment Act, 2003- Service tax amendment
- 89<sup>th</sup> Amendment Act, 2003- for SCs and STs, separate Commissions were set up while earlier they were combined into a single one.
- 91<sup>st</sup> Amendment Act relates to strengthening the anti defection law and limiting the size

- of the ministries
- 92<sup>nd</sup> amendment Act relates to inclusion of four languages in the Eighth Schedule- Bodo, Dogri, Maithili and Santhali.
- 93rd amendment Act 2006 to provide reservations in educational institutions for SC, ST and SEBCs- other than minority educational institutions
- 94<sup>th</sup> Amendment Act amends Art.164 to stipulate that there shall be a minister in the council of Ministers of the states of Jharkhand and Chattisgarh while excluding Bihar as it has no significant tribal population. The other two states that must have a tribal affairs minister are Orissa and Madhya Pradesh.
- 95th Amendment amended Article 334 in 2010 to extend the reservation of seats for SCs and STs in the Lok Sabha and states assemblies from Sixty years to Seventy years
- 96<sup>th</sup> Amendment amended Eighth Schedule 2011 . It substituted "Odia" for "Oriya"
- 97<sup>th</sup> Amendment amended Art 19(1)(c) and added Part IXB and Art.43B, January 2012.(See the Chapters on FRs and DPSPs). It was however rejected by the Gujarat High Court in 2013.

Important Constitution Amendment Bills at various stages of passage are

1. 108 CAB related to women's reservation in state and parliament legislatures
2. 110 CAB 50% women's reservation in PRIs
3. 112 CAB 50% women's reservation in Nagarapalikas
4. 114 CAB bring the *retirement age of High Court Judges* at par with that of the Supreme Court Judges
5. 115 CAB for GST
6. 117 CAB for promotion in reservation for SC/STs
7. 119 CAB to ratify the LBA with Bangladesh signed in 2011

#### Golaknath case

The family of Henry and William Golak Nath held over 500 acres of farmland in Jalandhar,Punjab. In the face of the 1953 Punjab Security and Land Tenures Act, the state government held that the brothers could keep only thirty acres each, a few acres would go to tenants and the rest was declared 'surplus'. This was challenged by the Golak Nath family in the courts and the case was referred to the Supreme Court in 1965. The family filed a petition under Article 32 challenging the 1953 Punjab Act on the ground that it denied them their constitutional rights to acquire and hold property and practice any profession (Articles 19(f) and (g)) and to equality before and equal protection of the law (Article 14). They also sought to have the Seventeenth Amendment - which had placed the Punjab Act in the Ninth Schedule - declared ultra vires.The issues that were to be determined by the apex court were:

- Whether Amendment is a "law" under the meaning of Article 13(2)?
- Whether Fundamental Rights can be amended or not?

Court reversed the earlier verdicts and ruled in favour of FRs( given ahead). Doctrine of prospective overruling was applied to the effect that in future, the verdict will be respected and the government actions already taken would not be retrospectively undone.

### Kesavananda Bharati v. State of Kerala

The case originated in 1970 when Swami HH Kesavananda Bharati Sripu, head of "Edneer Mutt" - a Hindu Matha situated in Edneer, a village in Kasaragod District of Kerala, challenged the Kerala government's attempts, under two state land reform acts, to impose restrictions on the management of its property. It was challenged under Article 26 , concerning the right to manage property acquired for managing religion without government interference. The majority judgement - by seven judges of the thirteen-judge bench - overturned the I.C. Golak Nath and Ors. vs. State of Punjab .

It is a landmark decision of the Supreme Court of India that introduced the Basic Structure doctrine of the Constitution. The Basic Structure doctrine forms the basis of a power of the Indian judiciary to review, and strike down, amendments to the Constitution of India enacted by the Indian parliament which conflict with or seek to alter this basic structure of the Constitution.

The 13-judge Constitutional bench of the Supreme Court deliberated on the limitations, if any, of the powers of the elected representatives of the people and the nature of fundamental rights of an individual. In a sharply divided verdict, by a margin of 7-6, the court held that the while the Parliament has "wide" powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution.

S M Sikri, Chief Justice held that fundamental rights conferred by Part III of the Constitution of India cannot be abrogated, though a reasonable abridgement of those rights could be effected in public interest. According to the learned Chief Justice, the expression "amendment of this Constitution", in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the preamble, made in order to carry out the basic objectives of the Constitution. Accordingly, every provision of the Constitution was open to amendment provided the basic foundation or structure of the Constitution was not damaged or destroyed.

Shelat and Grover, JJ held that, Parts III and IV of the Constitution which respectively embody the fundamental rights and the directive principles have to be balanced and harmonised. This balance and harmony between two integral parts of the Constitution forms a basic element of the Constitution which cannot be altered. The word 'amendment' occurring in Article 368 must therefore be construed in such a manner as to preserve the power of the Parliament to amend the Constitution, but not so as to result in damaging or destroying the structure and identity of the Constitution. There was thus an implied limitation on the amending power which prevented the

Parliament from abolishing or changing the identity of the Constitution which rests on its Basic Structure.

Justice Hegde and Justice Mukherjea held that in the Constitution of India, the basic constituent remained constant and the circumstantial was subject to change. According to the learned Judges, the broad contours of the basic elements and the fundamental features of the Constitution are delineated in the preamble and the Parliament has no power to abolish or emasculate those basic elements of fundamental features. The building of a welfare State is the ultimate goal of every Government but that does not mean that in order to build a welfare State, human freedoms have to suffer a total destruction.

Justice Jaganmohan Reddy held that the word 'amendment' was used in the sense of permitting a change, in contradistinction to destruction. Therefore, the width of the power of amendment could not be enlarged by amending the amending power itself. The learned Judge held that the essential elements of the basic structure of the Constitution are reflected in its preamble and that some of the important features of the Constitution are justice, freedom of expression and equality of status and opportunity. The word 'amendment' could not possibly embrace the right to abrogate the pivotal features and the fundamental freedoms and therefore, that part of the basic structure could not be damaged or destroyed. The learned Judge held that though the power of amendment was wide, it did not cover the power to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements of the basic structure of the Constitution or to destroy the identity of the Constitution. Subject to these limitations, Parliament had the right to amend any and every provision of the Constitution.

Justice H R Khanna broadly agreed with the aforesaid views of the six learned Judges and held that the word 'amendment' postulated that the Constitution must survive without loss of its identity, which meant that the basic structure or framework of the Constitution must survive any amendment of the Constitution. According to the learned Judge, although it was permissible to the Parliament, in exercise of its amending power, to effect changes so as to meet the requirements of changing conditions, it was not permissible to touch the foundation or to alter the basic institutional pattern.

The 42nd amendment was made in 1976 to cancel the impact of the verdict and Parliament assumed complete power to amend any part of the Constitution and DPSPs were given unconditional precedence over FRs. It was however partly repealed by the apex court in the Minerva Mills case and partly dropped by the 43<sup>rd</sup> amendment act under the Janata regime. In 1977.

More on Basic structure:

### Doctrine of Basic Structure : Background, content and impact

The basic structure doctrine as introduced in the Keshavananda Bharati case verdict in 1973 (see above) is an Indian judicial doctrine that the Constitution of India has certain basic features that cannot be altered or destroyed through amendments by the parliament.

The "basic features" principle was first expounded by Justice J.R. Mudholkar in his dissenting note in the case of Sajjan Singh v. State of Rajasthan ( 1965 ):"It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Art. 368 ?"

Although Kesavananda was decided by a narrow margin of 7-6, the basic structure doctrine has since gained widespread acceptance and legitimacy due to subsequent cases and judgments. The basic structure doctrine applies only to constitutional amendments. It does not apply to ordinary acts of parliament, which must conform to the entirety of the constitution; not just to its "basic structure".

In 1967, in Golak Nath vs. The State of Punjab, a bench of eleven judges (such a large bench constituted for the first time) of the Supreme Court deliberated as to whether any part of the Fundamental Rights provisions of the constitution could be revoked or limited by amendment of the constitution. This question had previously been considered in Shankari Prasad v. Union of India and Sajjan Singh v. State of Rajasthan. In both cases, the power to amend the rights had been upheld on the basis of Article 368. Chief Justice Subba Rao writing for the majority (six judges in special bench of eleven, overruled the previous decisions) held that:

- In Article 13 , the word law includes Constitution Amendment Act
- Article 368 does not contain a power to amend the constitution but only a procedure.
- FRs hold a transcendental status and are thus outside the reach of Parliament's power to amend

Parliament responded by making the 24<sup>th</sup> CAA in which Art.13 and 368 were amended to make the CAA outside the scope of Art.13 and Art.368 was amended to give Parliament all the power to amend the Constitution. 25<sup>th</sup> Amendment was made restricting FRs legitimate while implementing DPSPs(Art.39 b and c). 29<sup>th</sup> CAA was made to insert the land reform laws of Kerala in the Ninth Schedule.

The above CAAs were challenged in Supreme Court resulting in the Keshavananda Bharati case verdict in 1973.

Thirteen judges of the Supreme Court, including then Chief Justice Sikri, heard arguments in Kesavananda Bharati v. The State of Kerala and thus considered the validity of the 24th, 25th and 29th amendments and also the correctness of the decision in the Golak Nath case. This

time, the court held, by a thin margin of 7-6, that although no part of the constitution, including fundamental rights, was beyond the amending power of Parliament (thus overruling the 1967 case), the "basic structure" of the Constitution could not be abrogated even by a constitutional amendment".

The interpretation of the basic structure has since evolved in numerous other court rulings since the Kesavananda judgment. In the Minerva Mills case (1980), the fine balance between the FRS and DPSPs was added. In the Bommai case (1994), secularism was added. In the Chandra Kumar case in 1997, judicial review was added.

In 1976, The Constitution (Forty-Second Amendment) Act had been enacted in response to the Kesavananda judgment in an effort to reduce the power of the judicial review of constitutional amendments by the Supreme Court. (Read above). 43<sup>rd</sup> CAA nullified most of the provisions brought in by the 42<sup>nd</sup> CAA. Minerva Mills case verdict too contributed.

The impact of the basic structure doctrine is that the immutable part of the Constitution is protected; parliamentary power to amend is balanced with the judicial power to protect the permanent part of the Constitution; judiciary asserted its role as the guardian of the Constitution.



# EMERGENCY PROVISIONS

A country faces threats to its security both from outside and inside. Union Government requires additional powers to deal with such emergencies. In a federal government, the need for such emergency provisions is even greater as federal government, by virtue of sharing powers with the provincial (state) governments, enjoys relatively limited powers. Part XVIII of the Constitution (Articles 352 – 360) deal with emergency.

Members of the Constituent Assembly believed that "the danger of a grave emergency arising in this country is not merely theoretical; it is very real". In the words of Alladi Krishnaswami Ayyar, "we are in grave and difficult times". They were convinced of the need for a strong Centre which could effectively deal with emergent situations.

Indian Constitution recognizes three types of emergency

- 1 National emergency(Art.352)
- 2 Financial Emergency( Art.360)
- 3 State Emergency or President's rule or Central Rule(Art.356)

## National Emergency

Following are the features of the national emergency

- It can be imposed under Art.352
- 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
- three grounds are given based on which emergency can be imposed: war or external aggression or armed rebellion
- President may declare national emergency in respect of the whole of India or part of the territory
- Proclamation may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger..
- Union Cabinet consisting of the Prime Minister and other Ministers of Cabinet rank should communicate the same in writing to the President. This provision ensures that Prime Minister, without the approval of the Union Cabinet can not recommend. When the advice is given in writing, it is also open to judicial review. When the highest ranking class of Union Ministers recommend, it carries greater credibility.
- Parliament should ratify the proclamation by special majority, within a month. Special majority is two thirds of the members present and voting and a majority of the total membership of the House ("total membership" means the total number of members comprising the House irrespective of whether there are vacancies or absentees on any account).

If the Lok Sabha can not ratify it within 30 days for any reason, the proclamation must be passed by Rajya Sabha in 30 days and by Lok Sabha within 30 days after its first meeting.

( 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 one month 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.)

- After being ratified by both the Houses, emergency will last for 6 months from the date of ratification by the latter of the two houses.
- It can be extended at a time for six months and as many times as necessary.
- Lok Sabha has the power to initiate proceedings for the discontinuation of the emergency. Lok Sabha can issue a notice in writing signed by not less than one-tenth of the total members with the intention to move a resolution for disapproving the continuance in force of emergency. It should be addressed
  - to the Speaker, if the House is in session; or
  - to the President, if the House is not in session.

A special sitting of the House shall be held within fourteen days from the date on which such notice is received for the purpose of considering such resolution. If the resolution is passed by a simple majority, emergency stands discontinued.

### **Effect of Proclamation of Emergency**

Rendering the Union Government more powers to deal with a threat to national security involves the following

- 1 On the executive front, the country becomes a unitary system. The executive power of the Union shall extend to giving of directions to any State as to the manner in which the executive power thereof is to be exercised. In normal times, such directions are to be confined to certain matters only like maintenance of railways, promotion of Hindi etc.
- 2 On the Legislative front, life of Lok Sabha/Assembly can be extended by a period of one year at a time. New Lok Sabha has to be constituted within 6 months after the emergency ceases, if the normal life of Lok Sabha has expired. Distribution of Union-state legislative powers can be suspended in favour of the Parliament. That is, Parliament gets concurrent power to legislate on any item in the State List. If there is any repugnancy, doctrine of federal supremacy ensures that federal laws will prevail. State assembly however, continues to exist.
- 3 As far as the federal fiscal framework is concerned, according to Art.354, the President may direct that all or any of the provisions of Articles 268 to 279 (division of revenues etc) be modified. Such orders should be tabled in the Parliament. However, no such order can last beyond the financial year in which emergency ends.
- 4 On Fundamental Rights, the impact is given below.

## **Fundamental Rights and national emergency**

Art.358 and 359 are relevant. Art. 358 says that suspension of provisions of Article 19 automatically takes place during emergency if the proclamation is on grounds of war or external aggression and not armed rebellion. Art.358 comes automatically into effect with the proclamation. Such suspension may be made for any part of India that is not under Emergency when any other part is under emergency.

Art. 359 needs to be separately invoked with Presidential order. It says that enforcement of any Fundamental Right can be suspended except Arts.20 and 21. President should specify that the suspension is in connection with the emergency. Every such order must ,as soon as it is made, be laid before each House of Parliament. It lasts for such period as the president may specify during the period of emergency- that is, it need not last for the full period of emergency unlike Art.358. It may apply to the whole or a part of the country- that part where the emergency is in force.

### **Comment**

The Supreme Court in 2012 observed that it had permitted violation of the fundamental rights of citizens during the 1975 Emergency. It took the view that the majority decision of a five-member Constitution bench upholding the suspension of fundamental rights during Emergency in the ADM Jabalpur V Shivakant Shukla case (1976) was erroneous.

The majority opinion was that in view of the Presidential order under Article 359(1) of the Constitution, no person has the locus standi to move for any writ petition under Article 226 before a high court for Habeas Corpus or any other writ to enforce any right to personal liberty of a person detained under the then law of preventive detention (MISA) on the ground that the order is illegal or malafide or not in compliance with the Act.

The Bench pointed out that in the 4:1 ruling that it was Justice Khanna who gave a dissenting judgement by holding that "under Article 226 under which the high courts can issue writs of Habeas Corpus is an integral part of the Constitution. No power has been conferred upon any authority in the Constitution for suspending the power of the high court to issue writs in the nature of habeas corpus during the period of Emergency."

However, Art.359 reads as follows: "Suspension of the enforcement of the rights conferred by Part III during Emergencies... 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 (except articles 20 and 21)] as may be mentioned in the order ...shall remain suspended."

### **Revocation of Emergency**

Emergency may end when the President revokes it with a proclamation on the advice of the Union cabinet. As mentioned above, since the 44<sup>th</sup> Amendment Act 1978, the Lok Sabha initiative is also provided.

#### **44<sup>th</sup> Amendment and Emergency**

The 44<sup>th</sup> Constitution made the following amendments in the national emergency law in order to minimize its scope for abuse

1. replacement of internal disturbance with armed rebellion
2. Union Cabinet should recommend to the President( Cabinet is the highest class of ministers among the Union Council of Ministers. The word Cabinet is found in no other Article of the Constitution.)
3. In writing
4. Ratification should be in 1 month and not two months as earlier and
5. by special majority
6. Lok Sabha is given special power to discontinue emergency and
7. Art.20 and 21 can never be suspended in their enforcement

The above changes were made by the Janata Government in 1978 as the experience of national emergency imposed in 1975 was resented and it was thought that the terms of national emergency should be made more stringent and less open to abuse.

Emergency was imposed in the country when China attacked India (external aggression) in 1962(by S.Radhakrishnan) and was lifted in 1968. It was again imposed when Pakistan launched war on India in 1971( by President VV Giri). In 1975, on grounds of internal disturbance, emergency was imposed : President Fakhruddin Ali Ahmed declared a State of Emergency upon the advice of the Prime Minister, Mrs.Gandhi on 26 June 1975.The two impositions were revoked in 1977. The need for the 1975 imposition was felt as the Government perceived internal threat to national security. While the effect of the two emergencies- 1971 and 1975 was the same, the political message was different. The 1975 emergency gave the government legitimacy to suspend rights.

VAJIRAM & RAVI

## Financial Emergency

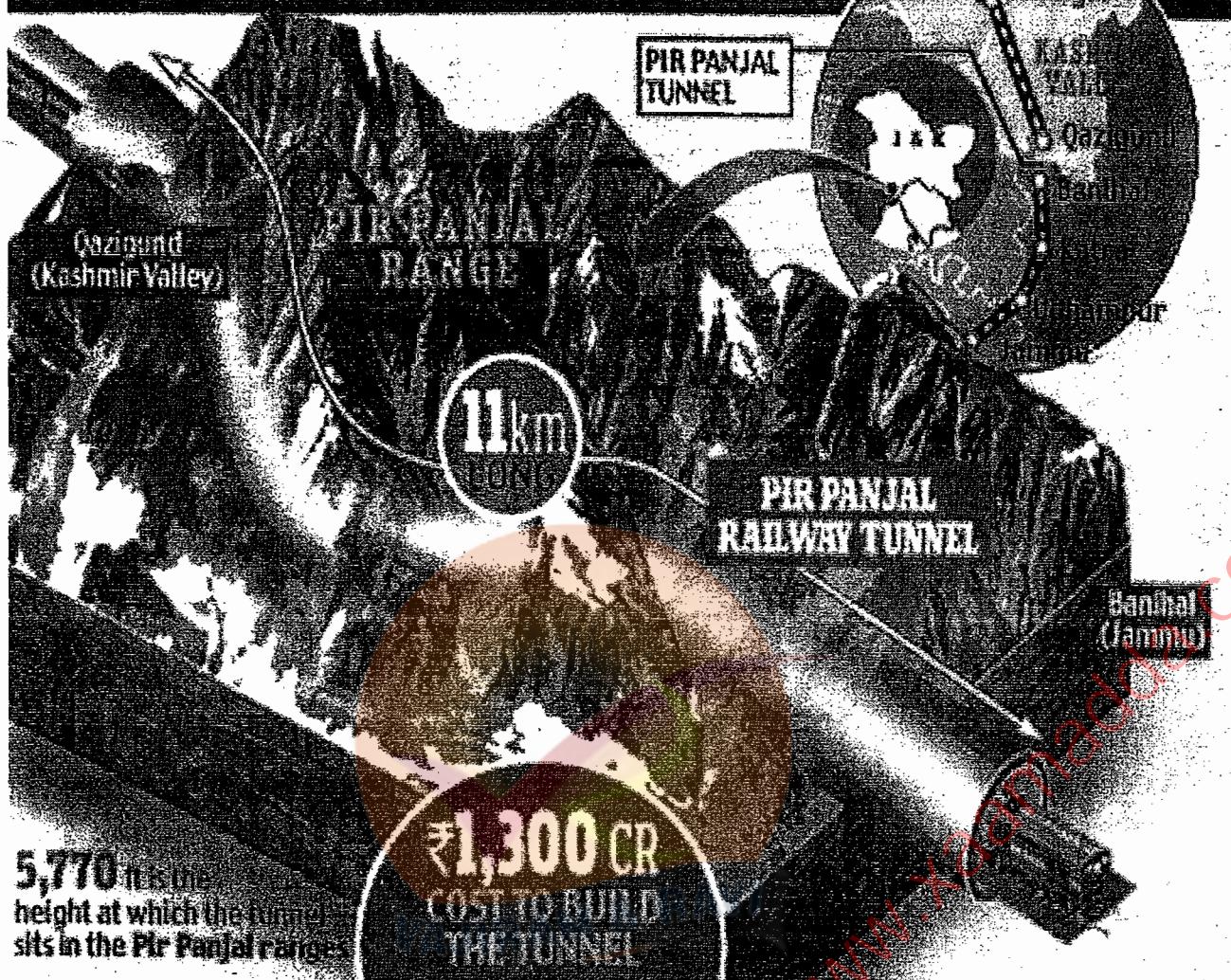
Provisions regarding financial emergency are contained in Art.360 to deal with crises that destabilise the economic condition of the country either from internal sources or because of external shocks. If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory is threatened, he may proclaim financial emergency. The proclamation needs to be approved by resolutions of both Houses of parliament within 2 months. Majority required is simple.

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 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. Financial emergency , once imposed can last till it is revoked.

During the emergency, the executive authority of the Union shall extend to giving of directions to any State to observe such canons of financial propriety as may be specified in the directions. Any such direction may include a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State; a provision requiring all Money Bills or related Bills be reserved for the consideration of the President after they are passed by the Legislature of the State; issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

The country so far did not have financial emergency though conditions of severe economic crisis did prevail in the year 1990-91.The economic situation of the country in 2013 has also deteriorated on internal and external fronts and there are suggestions in some quarters that Art.360 be invoked.

# A RIDE LIKE NO OTHER



5,770 feet  
height at which the tunnel  
sits in the Pir Panjal range

# President's Rule

Proclamation of President's rule in a state may become necessary if the state can not be governed in accordance with the Constitutional provisions. Such imposition is the logical outcome of the duty conferred on the Union Government under Art.355.

## Art 355

It is the duty of the Union to protect States against external aggression and internal disturbance: It shall be the duty of the Union 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 the Constitution.

Under Art.355, the following steps are generally taken

- 1.sending fact finding teams to the States in question
- 2.despatching Central forces
- 3.deployment armed forces

It is to be mentioned that invocation of Article 355 is not necessarily the first step towards dismissal of a government under Art.356. It, in fact can be a warning to the erring State and be preventive in nature.

## President's Rule: Art.356

If the President, on receipt of report from the Governor of the 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 the Constitution, the President may

- 1 assume to himself all or any of the functions of the Government of the State other than the Legislature of the State;
- 2 declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament.

Powers vested in the High Court are unchanged.

The state legislative assembly may be suspended or dissolved, depending upon the circumstances. If the President believes that the Assembly can be revived and there will be a political coalition that can form a government, suspension is the course of action. Or, it may be dissolved.

The proclamation is to be ratified by the parliament within 2 months.

The Proclamation ceases to operate on the expiration of a period of six months from the date of issue of the Proclamation: Extension by a period of six months at a time is possible but President's rule cannot last for more than 3 years.

If the President's rule has to be extended by more than one year, two conditions must be met:

- a Proclamation of Emergency is in operation, in the whole of India or, as the case may be, in the whole or any part of the State, at the time of the passing of such resolution, and

- the Election Commission certifies that the central rule should continue due to the difficulties in holding elections.

Once these two conditions are met, it can be extended six months at a time till a limit of 2 years. Already, it lasted for 1 year. That is, the total period for which it can last through extensions is 3 years, though conditionally. The idea is that an internal problem related to one state should be amenable to a solution within 3 years.

### **Effects of President's rule**

1. President assumes the executive powers of the State government
2. Confers on the Parliament the powers of the state legislature
3. Parliament can authorize the President or his nominee to legislate for the state when it is not in session
4. 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.

### **Jharkhand 2013**

Jharkhand was put under President's rule in January 2013 and the assembly placed under suspended animation after the Chief Minister Arjun Munda of the BJP resigned as his ministry was reduced to a minority after JMM withdrew support. The promulgation was approved by both Houses of Parliament in the Budget session. Assembly was not yet dissolved by June 2013. By July 18, the first six month period ends. Either it has to be extended by another six months or elections are to be held by dissolving the assembly.

### **When President's rule imposed or what is constitutes 'failure of the Constitutional machinery'?**

"Failure of the Constitutional machinery" is not found in the Constitution as a term. However, if the state cannot be governed in accordance with the Constitution, President's rule may be recommended by the Governor. Practically, it may involve the following situations

- After elections, a hung assembly results and no clear winner emerges and there is no possibility of a coalition government
- The leader of a party with relative majority refuses to form Government- the party has the largest number of seats but not enough
- Party in power loses majority and there is no alternative( as in the Jharkhand case given above)
- The party in power loses majority and refuses to step down
- Armed rebellion in the state
- State government does not comply with the directions of the Centre( Art.365)

**Sarkaria Commission on Union-States Relations recommended in 1987 that:**

1. President's rule should be the last resort
2. Governor's report should be a speaking document
3. dissolution of the assembly should not be done till the proclamation is ratified
4. In order to make judicial review more concrete, a constitutional amendment should be made to provide that the material facts and grounds on which Article the promulgation is made should be made an integral part of the Proclamation issued under that Article. This would also make the control of Parliament over the exercise of this power by the Union Executive more effective.
5. majority of the political party should be tested on the floor of the assembly.

### **S.R. Bommai Vs. Union of India case judgement**

S.R. Bommai Vs. Union of India case judgement (1994) of the apex court is a land mark judgement in relation to Art.356 as it aims to minimise the partisan application of the provisions. The judgement was delivered partly as a response to the challenge to the imposition of President's rule in four states- UP, HP, MP and Rajasthan after the Babri mosque destruction in December 1992.Important points of the judgement

- Art.356 is within the scope of judicial review
- secularism is a basic feature of the Constitution and its violation by a State government makes it liable to be dismissed under Art.356.
- Governor's report or any other authentic report should be the basis for the proclamation
- Art.74.2 says that Union Cabinet can withhold its recommendations to President from courts under the provision of confidentiality. But when President's rule is recommended and imposed, the recommendation needs to be produced in the apex court, if the Court so directs, so that the court can establish mala fides, if any
- dissolution of the Assembly should not be resorted to until the proclamation is ratified by the Parliament
- if mala fides are proved, dissolution of the assembly may be reversed and the dismissed government can be reinstated

### **Significance of the Bommai judgement**

The background of the verdict was that the Article was used indiscriminately. Art.356 was used more than 100 cases and in many cases, it appeared to be of doubtful constitutional validity and was largely politically motivated. That power was exercised to dismiss the State Governments controlled by a political party opposed to the ruling party at the Centre. The Supreme Court laid down standards according to which the centre's power under Art.356 is to be exercised. In short, Bommai judgement made Art.356 liable to judicial review; Union Cabinet accountable and made exercise of powers under Art.356 more responsible.

**Inter-State Council (Art.263)** also made some recommendations in this regard

1. erring state should first be warned
2. Governor's report should be a speaking document
3. instead of two months, proclamation needs to be ratified only within a month
4. special majority should be necessary for ratification.

In 1998, President of India returned for reconsideration the recommendation of the Council of Ministers to impose President rule in Bihar. The points raised by the President are noteworthy

- The charge that the Constitutional Governance of the State failed is not established beyond doubt
- Warnings, directives and eliciting seeking from the State should have preceded the option of President's rule being recommended.
- The Rabri Devi ministry enjoyed majority in the Assembly and could not be ignored.
- Parliament should discuss the matter.
- Other States with worse conditions were spared the same recommendation.
- The President further mentioned that the parliamentary passage of the proclamation was in doubt as the ruling coalition had differences within and it did not have majority in RS.

**NCRWC (national Commission to Review the Working of the Constitution) recommendations**

- Article 356 should not be deleted but it must be used sparingly and only as a remedy of the last resort.
- The Governor's report should be a "speaking document", containing a precise and clear statement of all material facts and grounds, on the basis of which the President may take the decision
- amend Article 356 - in line with the Supreme Court's judgment in S.R. Bommai vs Union of India (1994) - to ensure that the State Legislative Assembly is not dissolved before the proclamation is approved by the Parliament

#### **Bihar assembly dissolution case 2006**

The Bihar assembly was dissolved in May 2005 after the declaration of President's rule in March 2005 when the elections in February 2005 did not throw up a clear winner – hung assembly. The decision was challenged in the Supreme Court which delivered the verdict in 2006 with an indictment of the Governor for not discharging Constitutional duties with a sense of objectivity and impartiality. The apex court saw political motives in the actions of the Governor – to prevent the formation of government by one political party. It further observed that the Union Cabinet should have verified the authenticity of the report of the Governor. When the Governor asserted correctness of his actions on the basis of the need to curb defections, the apex court ruled that it was not the duty of the Governor to prevent defections. Speaker of the Assembly is Constitutionally vested with such duties. Governor 's duty was to swear in the party with majority .

### **Art.356 in recent times**

In recent years, the checks on the Art. 356 have emerged from

- Coalition Partners not being in agreement about the desirability or political correctness of dismissing state governments without reason
- Sensitization of the Government due to the regional parties' ascendancy.
- Supreme Court bringing Art.356 under judicial review in Bommai verdict
- Presidential objections to partisan application of Art.356 as was seen in 1998 when KR Narayanan made counter points
- Inter State Council norms and so on.

Punchhi Commission recommends that there should be provision in the Constitution for localized emergency- under Arts.352 and 356 – wherein a part of the State can come under emergency/President's rule. 2. The commission has proposed “localising emergency provisions” under Articles 355 and 356, contending that localised areas — either a district or parts of a district — be brought under Governor's rule instead of the whole state. Such an emergency provision should however not be of duration of more than three months.



# PRESIDENT of INDIA

India adopted the Westminster model of democracy where the Parliament is supreme and the political executive composed of the Union Council of Ministers headed by the Prime Minister, is the head of the Government- de facto head. President is the Head of State and is the nominal head- counterpart of the British monarch- de jure head.

In some democratic systems, the head of the State is also the head of the government and, therefore, he is also the head of the political executive. The US Presidency represents this form. In Britain, the monarch is the symbolic head, representing the British nation. The powers of the Government are vested in the Cabinet headed by the Prime Minister. India follows the same model with President as the counter part of the British Crown- though the former is elected and can be removed.

The President of India is the first citizen and represents the entire Indian nation and is not, therefore, partisan. He/she is largely ceremonial in his status.

## President and the Constitution

The entire Union of India- President, Parliament and Judiciary along with the CAG are contained in PART V of the Constitution( Art. 52-151).

Article 52 states that there shall be a President of India.

According to Art.53, the executive powers of the Union shall be vested in the President.

## Preference for indirect election

Constituent Assembly debated whether the President should be directly or indirectly elected. Some preferred direct election of the President . The suggestion was rejected on the following grounds

- if President of India is elected directly by people, it will be a partisan process- the President will represent a particular political party which denies the office universal character. He may not work impartially
- Secondly, a directly elected Chief Executive will insist on enjoying real powers and not satisfied with a ceremonial role and thus clash with the council of ministers, particularly if the Presidency and the Council of Ministers come from different parties.

A middle course was chosen by the framers of the Indian Constitution by having an electoral college with elected representatives from parliament and the state assemblies.

## Election of the President

Article 54 of the constitution says:-

"The President shall be elected by the members of an electoral college consisting of -

- The elected members of both Houses of Parliament and

- The elected members of the Legislative Assemblies of the States (including National Capital Territory of Delhi and the Union Territory of Puducherry after the Constitution 70th amendment Act, 1992)."

In India, no special electoral college is elected, as in the case of America( in the USA, members of electoral college are elected by the people and the body ceases to exist once the election is over.) In India the electoral college is made up of the elected MPs and elected MLAs of all states and the two UTs of NCT of Delhi and Puduchery . The members act in their non-legislative and elective capacity while electing the President.Election of the President of India is by the system of proportional representation by means of single transferable vote as provided by Article 55(3) of the Constitution. This system is chosen for the following reason:In this system, there is a quota as we will see ahead. Any candidate to be elected will have to obtain the quota. In the case of the president , the quota works out to 50% plus 1 of the valid votes cast- that is simple majority. It is necessary for the president to get more than 50% of valid votes as he/she represents the nation and can not be elected by a plurality ( largest number of votes though not majority) of votes as in the Lok Sabha elections. If none of the contestants gets majority/quota- election will be complete only when there is a round off election with the top two candidates going into the next and final round-as in the case of the French Presidential elections in May 2012 when Francois Hollande and Nicolas Sarkozy did. The process is tedious and not warranted for a ceremonial head. Therefore, the proportional system is chosen. Under this, there is no second round of voting but only counting of second preference of votes as we will see ahead.

The nominated members of Parliament and legislative assemblies have no right to vote in the election. Similarly, the members of the Legislative Councils of the State Legislatures have also been excluded from the electoral college.

### **Procedure for the Election of the President**

The Constitution provides for the election of the President by the system of proportional representation by means of the single transferable vote. Two fundamental principles are laid down in Art.55

- to secure as far as possible, uniformity in the scale of representation of different States of the Union
- to secure parity between the States as a whole and the Union in order to do justice to federal idea.

For the purpose of securing such uniformity and parity the following method is laid down:

Each member of the electoral college who is an elected member of a State Legislative Assembly will have a number of votes calculated as follows:

Total Population of the State ( by 1971 census) is divided by total number of elected MLAs. The resultant number is further divided by 1000. Fractions exceeding one half being counted as one:

$$\frac{\text{Total population of the state}}{\text{Total number of elected member} \times 1000}$$

The value of the vote of an elected member of the assembly of each State is found out. The number of elected MLAs is known. Total number of votes assigned to the elected members of all the State /UT assemblies is calculated. It is divided by total number of elected members of both Houses of the Parliament to arrive at the value of the vote of an elected MP. Thus, centre-state parity is respected(Art.55)

Uniformity in the scale of representation of states is arrived at by following the same principle for fixing the value of the vote of an elected MLA for all states.

### Proportional Representation

Article 55(3) of Indian Constitution requires that the President should be elected in accordance with the system of proportional representation by means of the single transferable vote.

In the ordinary mode of election known as "straight voting system", or 'first past the post system' or 'winner takes all system', a candidate getting plurality of votes- relative majority( more than the nearest rival) is elected- even if , in percentage terms, it means only a plurality of the electorate. It means he has more votes than any of his rivals. Very often such candidates secure far less than simple majority of votes polled.

The 'first past the post' principle can not be applied for Presidential election for the reason that the President should have a majority of the votes cast as he represents the nation. Therefore, proportional representation is prescribed where the President is bound to secure a majority of votes.

Proportional Representation as adopted in the Presidential elections is called the "Single Transferable Vote", which means that each elector has only one vote but it is transferable. He expresses his preferences in the single vote that he casts- first preference, second preference etc. A candidate, to be elected, requires to obtain a quota. If no candidate gets quota on the basis of first preference votes, the candidate who gets the least number of votes is eliminated. Those who voted for him as first preference will have their second preferences counted and they are distributed among those in the fray. The process continues till such time that a candidate is finally elected. Thus, votes are 'transferable'.

### Quota of Votes

Under the Proportional Representation system, a quota is fixed for being elected. Any member who secures the necessary quota of votes is declared elected. Quota is arrived at by dividing the total number of valid votes cast by the members of the electoral college divided by the total numbers of candidates to be elected plus one and one is added to the quotient. The formula may be represented as follows:-

$$\text{Quota} = \frac{\text{Total number of valid votes cast}}{\text{Total number of seats to be filled}} + 1$$

Supposing there are 100 valid voting papers and four seats are to be filled up. According to the above formula, quota is 21. After the quota is fixed, any candidate whose total number of first preference votes is equal to or exceeds the quota is declared elected.

### **Elimination of the Bottom Candidate**

If a candidate is elected in first count, the election is completed. But if no candidate gets quota in the first count, the process of selection continues by eliminating the candidate who has the least number of first preferences. His second preference votes are transferred to those in the fray. The process continues till the candidate is elected.

(For the Rajya Sabha elections, there is a small but significant change in the system: In case of adequate number not getting the quota, surplus votes, if any, from the elected members are transferred to those in the contest.)

### **VV Giri**

VV Giri was elected in 1969. He was independent candidate sponsored by Mrs.Gandhi who fell out with the old guard in the Congress party. Sanjeev Redy was the choice of the old guard. In the 1969 election , no candidate was declared elected after the counting of first preference votes. In that year, the candidates were V.V.Giri, N.S. Reddy, C.D. Desmukh and others. V.V.Giri got 4,01,515 first preference votes. Reddy and Desmukh got 3,13,548 and 12,799 first preference votes respectively. Giri was short of 16,654 votes to get absolute majority. After the counting of second preference votes; Giri got 4,20,077 votes which was more than absolute majority. Giri was declared elected as the President of India.

The following facts make the presidency a federal institution:

- Electoral college has Legislative Assemblies of States
- There is parity between centre and the States

The election to the offices of the President and the Vice- President are regulated by the Presidential and Vice-Presidential Elections Act, 1952. For the purposes of these elections, it has been the established practice that the Secretary-General of the Lok Sabha or the Rajya Sabha is appointed by the Election Commission as returning officer along with one or more assistant returning officers.

The nomination for a presidential candidate has to be proposed and seconded by 50 electors each. The security deposit is Rs 15,000 which is forfeited if the candidate does not get at least  $1/6^{\text{th}}$  of the total valid vote.

An election petition calling in question an election to the office of the President may be presented – within 30 days from the date of publication of the result of election- to the Supreme Court by any candidate at such election or any twenty or more electors joined together as petitioners.

#### **14<sup>th</sup> Presidential election**

The 14th indirect presidential election, in order to elect the 13th president, was held in India on 19 July 2012. The two leading candidates for the office of the presidency are former Finance Minister Pranab Mukherjee from West Bengal and former Speaker of the Lok Sabha, P. A. Sangma from Meghalaya. Returning Officer was Rajya Sabha Secretary-General, Vivek Agnihotri.

On 22 July, Mukherjee was declared the winner. Mukherjee gained 373,116 MP votes and 340,647 MLA votes for a total of 713,763 votes to win the election. He defeated Sangma, who got 145,848 MP votes and 170,139 MLA votes for a total of 315,987 votes.

Pranab Mukherjee was the 13<sup>th</sup> President and the election was the 14<sup>th</sup> one as Babu Rajendra Prasad held the position for two terms- 1952-62.

#### **Apex Court verdict December 2012**

Sangma has challenged Mukherjee's election on grounds that Mukherjee was holding offices of profit as chairman Indian Statistical Institute , Kolkata and as also the leader of the Congress Party in Lok Sabha when he had filed his nomination and entered the Presidential race.

The Supreme Court dismissed Purno Sangma's petition.A five-judge bench of the apex court which is mandatorily set up to hear such pleas decided by 3:2 majority that the petition did not deserve to be entertained for detail trial, which if ordered would have entailed possible cross examination of Pranab Mukherjee.

Chief Justice Altamas Kabir, who led the 3 to 2 majority ruling, held that Sangma's petition is not maintainable for regular hearing.

Earlier, the Attorney General had opposed the plea of Sangma on the issue of office of profit."An office of profit is an office which must be under the Government, which enjoys the power to appoint and remove and some salary or emoluments must be attached to the post," Vahanvati said, adding that this was not the case with the post of Chairperson of Indian Statistical Institute (ISI)."No pecuniary benefits was attached to the post of Chairman of ISI" the law officer, who is assisting the court, said.

#### **Conscience vote**

Elected MPs and MLAs are free to abstain from voting in the Presidential election. They can vote the way they choose. There can not be a whip issued by the party . Such a whip amounts to influencing the voter and is illegal. Thus, there is conscience vote in the Presidential elections.

Members of the electoral college- elected MPs and MLAs do not act in their legislative capacity and therefore are not subject to anti-defection law in the Tenth Schedule to the Constitution of India . Electors are at liberty to vote or not to vote at the Presidential election as per their own free will and choice. Thus, there is conscience vote.

Election of the President can be held even if some seats in the Electoral College are vacant. Such election cannot be called in question on the ground of any vacancy existing for any reason. The phrase, "the elected members of Legislative Assemblies of States" means only

those who are actually in office at the time of Presidential Election. The elected members of a suspended Assembly (Article 356) are entitled to take part in the Presidential election.

Election of the President by a lame-duck Electoral College- where the Lok Sabha members are not present as the LS is dissolved at the time of Presidential election, is an open question and there is no Constitutional or statutory law in this regard. However, it is inconceivable.

### **Qualifications(Art.58)**

A person eligible for election as President should be

- a citizen of India
- not less than thirty-five years in age
- should be qualified to be a member of the Lok Sabha and
- should not hold an office of profit under the Government. The offices of the President, Vice-President, Governor of a State or the Minister for the Union or a State, are not offices of profit for this purpose. Certain offices of profit under the Government have also been declared as not to disqualify the holders thereof for being chosen as President. A Member of Parliament or of a State Legislature including the respective Presiding Officers can seek election to the office of the President but if any one of them is elected President, he is deemed to have vacated his seat in Parliament or the State Legislature as the case may be, on the date on which he enters upon his office as President.

### **Term of office (Art.56)**

The President holds office for a term of five years from the date on which he enters upon his office. Even after the term expires, he continues to hold his office until his successor enters upon the office.

The Presidential election must be held before the expiration of his term of office. The Election Commission shall issue the notification on or as soon as conveniently may be, after, the sixtieth day before the expiration of the term of office of the out-going President.

**According to Art.57, he is eligible for re-election.**

The President may resign before the expiration of his term of office by writing under his hand addressed to the Vice-President. The resignation is forthwith required to be communicated to the Speaker of the Lok Sabha.

President gets emoluments of Rs. 1,50,000 per month .

### **Impeachment(Art.61)**

The President may be removed from office before the expiration of his term by impeachment for violation of the Constitution. The process is as follows:

The charge may be preferred( initiated) by either House of Parliament. Conditions are the following:

- atleast fourteen days' notice in writing
- should be signed by not less than one-fourth of the total number of members of the House and
- such resolution should be passed by a majority of not less than two-thirds of the total membership of the House in which the resolution originates.

When a charge has been so preferred by either House of Parliament, the other House will investigate the charge or cause the charge to be investigated. The President has the right to appear and to be represented at such investigation.

If the investigation upholds the charges of violation of Constitution against the President and a resolution is passed by a majority of not less than two-thirds of the total membership of the other House , President stands removed.

#### **Oath of office**

Before the President enters upon his office, an oath of office is administered to him by the Chief Justice of India or in his absence, by the senior-most Judge of the Supreme Court available, in the form set out in Art. 60 of the Constitution. The President takes oath/affirmation to protect, preserve and defend the Constitution.

#### **Succession to Presidency(Art.62)**

The Constitution provides that where a vacancy in the office of the President occurs by reason of his death, resignation or removal or otherwise, the Vice-President acts as the President until the new President enters upon his office and the election is required to be held within six months from the date of occurrence of the vacancy. The Constitution also provides that 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 .

However, the Constitution does not provide for cases where a vacancy occurs in the offices both of the President and the Vice-President simultaneously, or where the Vice-President while acting as, or discharging the functions of, the President is unable to do so. The Constitution has, therefore, empowered Parliament to make such provisions as it thinks fit for the discharge of the functions of the President in any contingency not provided for in the Constitution . Parliament has accordingly, enacted the President (Discharge of Functions) Act, 1969, whereunder in such cases, the Chief Justice of India or, in his absence, the senior-most Judge of the Supreme Court discharges the functions of the President.

When the Vice-President, Shri V.V. Giri, who was acting as the President in the vacancy caused by the death of the President, Dr. Zakir Husain, resigned from the office of the Vice-President in 1969, the Chief Justice of India, Shri M. Hidayatullah, discharged the functions of the President .

#### **President's privileges**

The privileges of the President are the following

- he enjoys immunity for the official acts ( Art.361)
- no criminal proceedings can be instituted against him for his official and personal acts while he is in office
- civil proceedings cannot be instituted for his official acts but in his personal actions, they can be instituted only after a two months notice.

## **Independence of the office of the President**

The independence is maintained by the following Constitutional provisions

- fixity of tenure- 5 years term
- impeachment process being a difficult one
- Art.361 and judicial immunity
- Immunity against criminal and civil proceedings
- Emoluments etc are fixed by the Parliament and cannot be reduced while he is in service.



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## **Powers of The President**

President is the Head of the executive of the country. The entire administration of the country is run in his name.

### **Executive or Administrative Powers**

While there is no definition of executive powers in the Constitution, they basically refer to policy making; policy execution; appointment and removal of high Constitutional dignitaries for the purpose and related matters.

Art.53 says that all executive powers of the Union are vested in the President. The President can exercise them on his own or by his subordinates. The President appoints the prime Minister and on his advice other ministers in the Council.

President can seek information from the Prime Ministers and also enforce collective responsibility of the Council of Ministers which is the centre piece of policy making in the parliamentary system of democracy(Art.78)

President has significant powers with regard to the Fifth and Sixth Schedule provisions in relation to tribals. He can declare that an area in a state is a scheduled area.

### **President directly administers the UTs.**

However, the powers of the President, like in other fields, are subject to the advice of the Council of Ministers headed by the Prime Minister(Art.74)

### **Appointments made by the President**

President appoints the following:-

- Prime Minister and his advice rest of the Union Council of Ministers
- Governors of States
- Judges of the Supreme Court and High Courts
- Chief Election Commissioners and the two other Election Commissioners and Regional Election Commissioners, if any
- CAG
- UPSC Chairman and members
- Chairmen and members of the statutory commissions like NHRC, Minorities Commission etc
- Chairman and members of the Finance Commission every five years
- Special Officer for Linguistic Minorities.
- Attorney General

The power of removal in some cases rests with the President. For example, the Governor of the state, Attorney General etc hold office during the time they enjoy the pleasure of the President. Others can be removed by elaborate procedures- SC and HC judges can be removed by a parliamentary vote by a special majority for 'proved misbehaviour and incapacity' and on that basis the President removes them. Similar is the case with CAG and Chief Election Commissioner. Election Commissioners are however removed by the

President on the advice of the Chief Election Commissioner. UPSC members, under certain circumstances are removed by him.

### Diplomatic Powers

The diplomatic powers of the President include the following

- All treaties and agreements are signed by India in the name of the President
- He appoints High Commissioners of India( ambassadors to Commonwealth countries are called High Commissioners) and ambassadors; and receives the credentials of the ambassadors and High Commissioners of other countries.

### Military Powers

They are the following

- 1 He is the Supreme Commander of Defence Forces and
- 2 War and peace are declared in his name

### Judicial powers

The President

- appoints the Chief Justice and other judges of the of the Supreme Court and High Courts
- removes the judges mentioned above if the two Houses of the Parliament pass resolutions to that effect by special majority for 'proved misbehaviour and incapacity'(Art.124)
- may seek the advisory opinion of the Supreme Court(Art.143)

### Mercy powers

The President can issue the following orders of mercy to the convicted citizens of India(Art.72)

- Pardon means absolving the convict of all guilt and punishment
- Commutation is reduction of punishment from death sentence to life imprisonment
- Remission is quantitative reduction of punishment without affecting the nature of punishment, for example, 2 years of rigorous punishment becomes 1 year of rigorous punishment
- Respite means reduction of punishment in view of a special fact, for example, pregnancy or old age
- Reprieve is stay of death sentence or life imprisonment pending an appeal for pardon or commutation.

### President's clemency powers: Critical appraisal

The need for the mercy powers of the President is the following

- The importance of Art.21 which guarantees right to life
- Fallibility of the judgement of the apex court
- The judicial verdict may be too harsh and deserves relief
- Based on the same evidence and on some other factors like remorse, record of behaviour and so on, the President can either give relief partly or wholly
- The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State.

Thus, the President acts in a wholly different plane from that of the Court. It is a Constitutional responsibility and is meant for the benefit of the convict as well as the people at large whose faith in the criminal justice system needs to be sustained.

The Presidential power of mercy is not considered a judicial power as the President does not 'hear' any arguments; also, the power is exercised on the advice of the Union Cabinet.

The personality of the President and his/her value system is also a factor in the exercise of mercy powers. For example, former President KR Narayanan(1997-2002) is known as a 'no hanging President'.

Every civilised country in its Constitution or in its laws provides for a power to grant pardon or remission of sentence. Articles 72 and 161 of our Constitution confer this power on the President and the Governor, respectively. It is settled law that this power is to be exercised in accordance with ministerial advice and not by exercise of the President's or the Governor's individual discretion. The rationale of the pardon power is public faith in the humaneness of law- the President being the symbol of people in a republican country like ours.

The following are the legitimate and relevant considerations for exercise of the pardon power

- seriousness of the offence
- there is a shade of doubt about the convict's guilt
- the health of the prisoner, especially any serious illness from which he may be suffering
- post-conviction conduct, character and reputation
- remorse and atonement
- the effect on the family members of the victim
- the period of imprisonment undergone and the remaining period
- interest of society and the convict

Supreme Court has categorically ruled that the power of pardon cannot be exercised for political considerations. It has further held that considerations of religion, caste, colour or political loyalty can not come into the field.

Exercise of power of pardon is not immune from judicial scrutiny. Courts in exercise of judicial review have interfered with orders of pardon or remission when it is established that the order was *mala fide* or is arbitrary.

Delay is a sad fact in deciding on these cases for clemency. Delay of 12 years occurred in considering the mercy pleas of the three death-convicts in the Rajiv Gandhi assassination case with their pleas being ultimately rejected in August , 2011 by the President of India. Afzal Guru was sentenced to death by the Supreme Court in 2005 and the government hanged him in 2013..In 1983, the Supreme Court of India observed that a self-imposed rule should be followed by the executive authorities that every such petition should be disposed of within a period of three months from the date it is received.

There is no mercy plea pending with the President by 2013 April.

## **President, Supreme Court and mercy matters : Bachhan Singh, Macchi Singh, Kehar Singh and Bhullar**

The Supreme Court's five-judge Constitution Bench judgment in Bachan Singh v State of Punjab (1980) is basic to the discourse on death penalty and mercy in India. It introduced the doctrine of rarest of rare crimes. It said that judges must consider the aggravating features of the crime, as well as the mitigating factors of the criminal.

In the Machhi Singh v. State of Punjab, delivered by a three-Judge Bench in 1983, apex court sought to standardize crimes into five absolute categories, in order to identify the rarest of rare crime deserving death sentence. These five categories are manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and personality of victim of murder.

In *Kehar Singh v Union of India (AIR 1989 SC 653)*, the Supreme Court asserted that "the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review." Judicial review is part of the basic structure of the Constitution which even Parliament cannot interfere with.

Kehar Singh was convicted for murder and conspiracy for the assassination of Indira Gandhi, the then Prime Minister of India, and was sentenced to death. After his appeal to the Supreme Court was dismissed, his son presented a petition before the President of India for grant of pardon to his father under Article 72 which deals with the President's power to grant pardon, suspension, remittance and commuting of sentences in certain cases. The President rejected the petition. After the rejection of the mercy petition, Kehar Singh's son approached the Supreme Court. A Bench of five judges considered the question whether the President can scrutinise evidence while exercising pardoning power. The apex court took a liberal view and held that the President, in the exercise of the pardon power vested in him under Article 72, could "scrutinize the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to guilt of and sentence imposed on the accused." However, as explained by the apex court, the President had no power to amend or modify or supersede the judicial record. The nature of the constitutional power exercised by the President in this regard is totally different from the judicial power. Without altering the judgment, the President could remove the stigma of guilt or remit the sentence imposed on him. Thus, the President can go into the merits, examine the record of evidence and determine whether a petitioner deserves mercy or not.

The apex court allowed Kehar Singh to appeal to the President once again for mercy. Kehar Singh's appeal however was turned down by President Venkataramanan.

R.S. Pathak, then the Chief Justice of India, explained in the Kehar Singh case that "[p]ardonning power of President is [a]constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by context." The CJ further explained the reason: "to any civilized society, there can be no attributes more important than life and personal liberty of its members ... recourse is provided to the judicial organ for its protection ... There is always a possibility of the fallibility of human judgment." The Constitution has provided checks and balances for almost every conceivable situation. If the judiciary is fallible,

the President has a chance of making a correction under Article 72. And if the President's exercise of his power was questionable, the higher judiciary may ask him to reconsider.

It paved the way for the three convicts sentenced to death in the Rajiv Gandhi assassination case, Santhan, Murugan, Perarivalan to secure a reprieve from the Madras High Court after the President dismissed their clemency petition in 2011 (though the jurisdiction of the High Court is questionable). Similarly, in the same year, the Supreme Court admitted a plea by Devinder Pal Singh Bhullar's wife. He had been sentenced to death for a 1993 terror attack in Delhi, and his petition for pardon had been rejected.

### **Bhullar case 2013**

The apex court verdict delivered in April 2013 says that long delay by the President or the Governor in disposing of mercy petitions of persons convicted under anti-terror laws or similar statutes cannot be a ground for commutation of the death sentence. A two-judge bench gave this ruling while rejecting the plea of Khalistani terrorist and death-row convict Devinderpal Singh Bhullar.

The Bench of Justices G. S. Singhvi and S. J. Mukhopadhyaya said the Supreme Court's earlier judgements holding that long delay might be one of the grounds for commutation of the death sentence could not be invoked in cases where a person was convicted for offences under the TADA or similar statutes. "Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes," the Bench said. Giving examples, the court said if murder was committed in an extremely brutal or dastardly manner, giving rise to intense and extreme indignation in the community, the court might be fully justified in awarding the death penalty. Bride-burning for the sake of money or greed was another example. In Bhullar's case, the Bench agreed that there was considerable delay in disposal of his mercy plea. Much of the delay could be attributed to the "unending spate of petitions" filed on behalf of the prisoner.

### **President and Governor on mercy (In the classroom).**

#### **Legislative Powers of President**

According to Art. 79, Parliament consists of the President and the two Houses of Parliament - the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). Thus the President is the Head of executive as well as a constituent part of Parliament. President is made a component part of the Parliament as every Bill passed by the Houses of Parliament has to be reserved for the assent of the President under article 111.

#### **Summon, Prorogue and Dissolve**

President summons from time to time each House of Parliament, may from time to time prorogue the Houses or either House and dissolve the Lok Sabha (Art. 85). Summon means to call the House into session. Prorogue means to terminate a session. Dissolve means to end the life of Lok Sabha and pave way for elections to constitute a new Lok Sabha which is mandatory every five years except during national emergency.

### **Address the Parliament and send messages**

At the commencement of the first session after each general election to the Lok Sabha and at the commencement of the first session of each year (calendar year), the President addresses both Houses of Parliament assembled together and informs Parliament of the causes of its summons (Art.87). He has also the right to address either House of Parliament or both Houses assembled together and send messages to either House, whether with respect to a Bill then pending in Parliament or otherwise (Art.86). President has a message twice under this provision since the commencement of the Constitution

- Return for re-passage Post Office Bill by President R. Venkataraman in 1990
- Return for repassage the Office of Profit Bill by President Abdul Kalam in 2006

### **Art.87**

Articles 86 and 87 of the Constitution deal with the Address by the President. Article 86 confers a right on the President to address either House of Parliament or both Houses assembled together, and for that purpose require the attendance of members. However, since the commencement of the Constitution, the President has not so far addressed a House or Houses together under this provision.

Article 87 deals with a Special Address by the President and provides that the President shall address both Houses of Parliament assembled together at the commencement of the first session after each general election to the Lok Sabha and at the commencement of the first session of each year and inform Parliament of the causes of its summons.

As article 87 makes it clear, the Address is to be to both Houses of Parliament assembled together. In other words, it means that if at the time of commencement of the first session of the year, the Lok Sabha has been dissolved and the Rajya Sabha has to meet, then the Rajya Sabha can have its session without the President's Address. During the dissolution of the Lok Sabha in 1977 and 1991, the Rajya Sabha had its sessions in February 1977 and June 1991, respectively without the President's Address.

The President's Address to both Houses of Parliament assembled together is a constitutional obligation for the President. It is a statement of the government policy of which, as the constitutional Head, he is the symbol. The President represents not only the executive authority but is a symbol of the Constitution.

The discussion on the Address is initiated by a Motion of Thanks moved by a member and seconded by another member and is put to vote. It is adopted with or without amendments.

### **Appointment of Pro tem Speaker and Pro tem Chairman**

The President appoints a pro tem Chairman of the Rajya Sabha (Art.91.1) and pro tem Speaker of the Lok Sabha (Art.95.1) in certain circumstances. Pro tem Chairman of Rajya Sabha is appointed when the offices of the Chairman and the Deputy Chairman are vacant. Pro tem Speaker is appointed in the new Lok Sabha to swear in the newly elected members.

## **Administer oath**

Every Member of Parliament, before taking his seat in the House, is required to make and subscribe the oath or affirmation before the President or before the person appointed by him in that behalf. (Art.99)

### **Nomination**

The President nominates to the Rajya Sabha twelve persons having special knowledge and practical experience in respect of such matters as literature, science, art and social service. (Art.80) The President also nominates to the Lok Sabha not more than two members to represent the Anglo-Indian community, if he is of the opinion that the community is not adequately represented in the Lok Sabha.( Art.331)

### **Disqualification of members of Parliament**

Grounds of disqualification of a Member of Parliament are given in Article 102. President is the authority to disqualify a member of parliament . Art.103 says that the President decides on disqualification in consultation with the Election Commission. Such disqualification, according to Art.102, can arise from the following

- if a member holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;
- if he is of unsound mind and stands so declared by a competent court;
- if he is an undischarged insolvent;
- if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
- if he is so disqualified by or under any law made by Parliament.

Broadly speaking, except for cases of defection and expulsion, President is the authority to disqualify a member of Parliament in consultation with the Election Commission(Art.103)

### **Prior recommendation of the President for some Bills**

The President's prior recommendation for introduction of a Bill is required for the following

- introduction of a Bill relating to formation of new States or alteration of areas, boundaries or names of existing States(Art.3)
- Money Bill (Art.110)
- Financial Bill(A) (Art.117.1)
- Financial Bill B after it is introduced but before it is taken up for consideration( 2<sup>nd</sup> Reading)(Art. 117.3)
- introduction of a Bill or moving of an amendment affecting taxation in which States are interested or changing the definition of 'agricultural income'
- State Bills restricting freedom of trade(Art.304)

It is clear that the above provisions centre around either of the two features as given below

- Federalism and the rights of the states
- Money matters.

The role given to the President is to preserve the federal character and ensure that fiscal system and responsibility is protected.

### **Joint session of Parliament**

In the case of disagreement between the two Houses on a Bill (other than a Money Bill and Constitution Amendment Bill), the President summons a joint sitting of both Houses. (Art.108.3) The President has, after consultation with the Chairman of the Rajya Sabha and the Speaker of the Lok Sabha made rules for the procedure with respect to joint sittings of the two Houses( Art.118.3)

### **Rules**

The President has, after consultation with the Chairman of the Rajya Sabha and the Speaker of the Lok Sabha made rules regulating the recruitment and the conditions of service of persons appointed to the secretarial staff of the respective Houses. The later rules are, however, subject to any law made by Parliament.( Art.98)

### **Laying of statements,reports etc**

The President causes to be laid before both Houses of Parliament in respect of every financial year.

- statement of the estimated receipts and expenditure of the Government of India (i.e., Budget) for that year, (Art.112)
- statements showing supplementary or additional grants (and before the Lok Sabha, excess grants), ( Art.115)

Reports of constitutional functionaries or bodies such as

- Comptroller and Auditor-General of India, (Art.151)
- Finance Commission, ( Art.281)
- Union Public Service Commission, (Art.323)
- Commissions for the Scheduled Castes and Scheduled Tribes,( Art.338)
- Backward Classes Commission,(Art.340)
- Commissioner for Linguistic Minorities,( Art.350B)

### **Promulgation of Ordinances(Art.123)**

Ordinance is an executive law.

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 Ordinances as the circumstances require. Like most actions, it is also exercised on the advice of the Union Council of Ministers. An Ordinance so promulgated by the President has the same force and effect as an Act of Parliament. Every Ordinance has to be laid before both Houses of Parliament and it ceases to operate at the expiration of six weeks from the reassembly of Parliament. It may be disapproved before the expiration of that period if both Houses pass a resolutions to that effect.

The President may issue an Ordinance to

- enforce the provisions of a Bill introduced in, and pending before a House or a Committee or
- to enforce the provisions of a Bill already passed by one House but not yet passed by

- the other House or
- on an entirely new matter or
- for a temporary purpose.

Ordinance can not be promulgated to amend the Constitution.

Parliament in session can be adjourned sine die and prorogued if there is any urgent need to promulgate an ordinance. An ordinance can be promulgated containing the provisions of a Bill pending in the Parliament, when Parliament is not in session if the government feels urgent implementation is necessary. For example, there is a discussion (June 12, 2013) about the need to promulgate Food Security Ordinance even as the Bill for the same is awaiting passage in Parliament, having been introduced in 2011 December. (as mentioned above).

The Criminal Law (Amendment) Bill, 2013 was passed by the Parliament before its 1 month long recess began on March 22. It replaced the *Criminal Law (Amendment)* Ordinance promulgated on February 3<sup>rd</sup>. If the Bill was not passed by March 22<sup>nd</sup>, it would have lapsed. Given the urgency, it could not be referred to the Standing Committee of Parliament.

As stated above, unless the Criminal Law (Amendment) Bill, 2013 was passed within six weeks of the first sitting of Parliament (February 21), the ordinance would lapse. Given that the budget session broke for a month, starting March 22 for the recess, it gave the government only four and not six weeks to pass the Bill. If the ordinance lapsed, it could be re-promulgated, but only after the budget session ended in May and await the monsoon session of Parliament for its passage.

Ordinances promulgated by the Governor of a State under the President's Rule are also laid on the Table in the Parliament in the same manner as Ordinances promulgated by the President.

Rule by the ordinance is against the spirit of the parliamentary democracy. Therefore, there are safeguards built into the Constitution like

- promulgation is permitted only when either House is not in session
- it can not amend the Constitution
- Parliament needs to be explained the reasons for the Ordinance
- It can not last for more than 6 weeks after parliament reconvenes
- Parliament – both the houses independently of each other- can pass resolution seeking its discontinuation before the period of 6 weeks expires after the reassembly of the Parliament
- Whenever a Bill seeking to replace an Ordinance with or without modification is introduced in the House, a statement explaining the circumstances which had necessitated legislation by Ordinance, is required to be placed before the House along with the Bill
- Judicial review is also a limitation on recourse to ordinance (Cooper's case verdict 1970).

Constitutional experts and others have objected to the frequent resort to the power to issue an Ordinance by the Government, particularly on dates too close to a session of Parliament.

Ordinance raj refers to the practice of a government to avoid making legislation and instead rely on ordinances as legislative debate and vote may unsettle the party in power. Supreme Court objected to such re-promulgation of ordinances without any genuine compulsions.

Of late, ordinances have become necessary for one additional reason: coalition government, lacking in majority in the Rajya Sabha is not in a position to have the Parliament pass the Bill. But international treaties may require that the Parliament enact legislation. In such circumstances, Government promulgates and re-promulgates the ordinances to make the necessary law. It should not be considered misuse of the powers.

In the Cooper's case (1970) and AK Roy case (1982), the Supreme Court upheld the power of courts to review the justification for the ordinance.

### Veto powers

'Veto' (Latin for "I forbid") means that a party has the right to stop unilaterally a certain piece of legislation. President of India has veto powers with regard to a Bill passed by the Parliament. After a Bill has been passed by the two Houses of Parliament, it is presented to the President who has the option of assenting to it or exercising any of the following types of veto

- withhold the assent, that is, reject the Bill in which case that is the end of the Bill. He may do so in case of Private member's Bill or a State Bill. A state Bill may be reserved for Presidential assent by the Governor of the State(Art.200) and the President may return it for repassage by the state legislature any number of times(Art.201). The State legislature has no way of prevailing. It is called the absolute veto.
- He may return the Bill, if it is not a Money Bill to the Parliament with a message for reconsideration of the Bill or any specific provision thereof. When a Bill so returned is passed by both the Houses again, by a simple majority, with or without amendment, the President cannot withhold assent. It is called suspensive veto
- President also has a pocket veto, that is, since the law does not prescribe any time limit for the President to decide on a Bill, he may not commit himself either way for any reason. Generally, pocket veto is used to buy time in circumstances of political fluidity-for example, the party that may succeed may not accept the Bill.

A Constitution amendment Bill shall be assented to by the President( 24th amendment Act 1971). The Money Bill can not be returned to the Parliament but assent can be withheld.

In 1986, the President of India, Gyani Zail Singh exercised pocket veto with regard to Indian Post Office(Amendment) Bill as in his opinion it was violative of Fundamental Rights in Art.19 as the Bill authorized for intercepting the mail. President R. Venkataraman in 1991 returned it to Rajya Sabha. In other words, the former was a pocket veto and the latter was a suspensive veto. The Bill survived the dissolutions of the Lok Sabha and was withdrawn about a decade later.

**President Kalam in 2006 returned the Parliament (Prevention of Disqualification) Amendment Bill, 2006- popularly known as Office of Profit Bill to emphasise that the Bill needed improvement. It is also a suspensive veto.**

President Venkataraman withheld assent from the MPs (Salary, Allowances and Pensions) Bill 1991 as it was not introduced with his prior recommendation.

Thus, the Presidential veto of the above three kinds can be exercised in the following circumstances

- If the legislative competence is breached
- If the Bill is ill conceived
- If the Bill is hastily passed
- If he has suggestions about how to improve the Bill
- If Fundamental Rights and other Preambular values are violated
- If procedure is not followed

In sum, there are substantive and procedural grounds for the President to exercise his veto. Generally veto powers are exercised on the advice of the Union Council of Ministers.

#### **Emergency powers**

If the President is satisfied that a grave emergency exists whereby the security of India or any part of its territory is threatened, whether by war or external aggression or armed rebellion, ( Art.352) or there is a failure of constitutional machinery in a State ( Art.356) or a situation has arisen whereby the financial stability or credit of India or of any part of its territory is threatened, ( Art.360) he issues a Proclamation for the purpose. These Proclamations need parliamentary approval.

#### **President and Caretaker Government**

A Government that continues to be in office even after the dissolution of Lok Sabha, pending general elections, is a caretaker government. The situation may arise for the following reasons

- resignation on its own or
- resignation on losing majority or
- term is over

It is requested to continue to be in power by the President till the new ministry is sworn in. For example, after the Government of Sri Atal Bihari Vajpayee lost majority in the LS in April 1999, it had to resign and was asked to continue as 'care taker government' by the President till such time that the elections to the 13<sup>th</sup> LS were held and a new government was formed.

Caretaker government is not a Constitutional concept but a political compulsion as there can not be a Constitutional vacuum because there is no provision for President's rule at the centre. The options for the President are the following

- Let the incumbent government exit. But it will create a constitutional vacuum and so is not a valid choice.
- Asking the ministry to continue even after its majority in the LS is lost which violates Art.75.3 that says that the ministry lasts till it enjoys the confidence of LS.
- The President to take over the responsibility of administration for which there is no Constitutional sanction as Art. 74.1 clearly spells out that the President can act only on the advice of the Council of Ministers.

The most appropriate option is to ask the incumbent ministry to continue to take care of the Government till elections produce a successor.

Caretaker governments like the Charan Singh Ministry in 1979 lasted 5 months; the Gujral ministry lasted 4 months in 1997-98 and the Vajpayee ministry lasted longer in 1999. An important question is whether crucial decisions regarding national security; foreign policy ; international treaty obligations like patent laws; economic policy like FDI, support prices for farmers; transfers of senior officials etc could be taken by the caretaker government. In fact, the Kargil tragedy exposed the nation to international hostility when the caretaker government was in power. There is, thus, the need to lay down norms governing the caretaker government. The President must evolve conventions in such political circumstances for governance of the country.

Recurrence of the minority governments; their inherent instability; and the relatively long periods for which caretaker governments are in power forces the 'ceremonial Presidency' to become a 'working Presidency'. The conventions for the relationship between the President and the Council also have to be redefined in such a context.

#### **President and Union Council of Ministers**

India is a parliamentary form of democracy modeled after the British system where the Council of Ministers is the effective Head of the Government and the President (the British counterpart being the Monarch) is only the ceremonial Head of State without any real powers.

Art. 74 clearly states that the President of India shall follow the advice given by the Council of Ministers headed by the Prime Minister though he does have the power to return the advice for reconsideration once at the end of which it is mandatory for him to accept it.

There are however circumstances when the President need not go by the advice of the Council of Ministers like

- when it advises that the Lok Sabha be dissolved merely because it has lost its majority
- exercise of veto powers- return of a Bill for repassage (suspensive veto)

## **Questions about the nature of Indian Presidency**

Questions were raised as to the true nature of the Presidency immediately after the Constitution came into force. Babu Rajendra Prasad, the first President of India expressed his opinion that he would act independently of the Council of Ministers in two matters

- Giving assent to the Bills passed by the Parliament
- Sending messages to the Parliament.

Babu Rajendra Prasad raised the issue again while laying the foundation stone for Indian Law Institute building in 1960 when he said that it was necessary to look into the Constitution to see which provisions required the President to act independently of the Council of Ministers.

In 1967, the issue came up on the eve of Presidential elections when regional parties came to power in many states. Opposition parties asserted that the President of India had independent powers and was not a titular head.

The same controversy was raised by

- President Zail Singh exercised pocket veto on Post Office Bill in 1986
- President KR Narayanan did not accept the advice of the Cabinet to impose President's rule in Bihar in 1998
- President APJ Kalam returned the Office of Profit Bill to the Parliament for repassage in 2006(suspensive veto)

## **Apex court verdicts**

In the U.N.R.Rao case (1972) Supreme Court concluded that, even after the dissolution of the Lok Sabha, the care-taker Council of Ministers' advice is binding on the President. It is in line with the apex court judgement in 1974 in the Shamsher Singh case that the President of India should act on the advice of the Council and Presidency is a ceremonial institution.

## **44<sup>th</sup> Constitution Amendment Act 1978**

The Constitution (44<sup>th</sup> Amendment) Act 1978 made the following changes in the powers of the President so as to invest the institution with greater strength.

- Art. 74 has been amended to make it possible for the President to return the advice of the Council of Ministers once for reconsideration.
- Art.352 is amended to the effect that the written advice of the Union Cabinet (the word Cabinet is found only in Art.352 of the Constitution) is necessary for the President to proclaim the national Emergency. It is meant to ensure that the Prime Minister without the approval of the Cabinet does not recommend. Also, the written advice renders it open to judicial review.

Both the amendments strengthen the President of India and make governance more accountable.

## **Constitutional role of the President**

President of India, the Head of the State, is a formal position. Real power rests with the Prime Minister heading the Council of Ministers – called Head of the Government. Article 74 of the

Indian Constitution says that the President shall act on the aid and advice of the Council of Ministers .The role of the Head of State is to 'reign and not rule'- similar to the British Crown.

British Constitutional expert Walter Bagehot said that a "constitutional monarch" has the right to be consulted, to encourage, and to warn".It applies to the President of India as well since the roles are almost identical.

The powers of the President are interpreted in different ways by different scholars- some say that he has only a ceremonial role while few others say that his role is substantive. However, the consensus opinion is that the President of India almost always acts on the aid and advice of the Council of Ministers except under the following circumstances.

- In selecting the Prime Minister from among the contenders when general elections result in a hung parliament.
- In the dissolution of the Lok Sabha when the Council of Ministers is voted out or resigns and advises the President to dissolve the Lok Sabha but significant portion of life of Lok Sabha still remains.. The President is expected to exercise his discretion in such circumstances to explore the possibility of forming an alternative.
- Asking the Council of Ministers to re-consider the advice(Art.74.1)
- While exercising veto power , generally suspensive or pocket but rarely absolute veto also
- Direct the Council of Ministers to prove its majority if there is any indication that they may have lost it. It is particularly true in the coalition era.
- Disqualifying members of the Parliament in consultation with the EC(Art.103)

In the first five cases mentioned above, it is a case of the president exercising powers in his 'discretion'. The last case leaves him with no discretion as the advice rendered by the EC is final and binding.

It may be said that the President of India is a ceremonial institution but assumes certain real powers under circumstances as mentioned above- hung parliament, dissolution of the Lok Sabha and veto powers. In the era of coalition Governments, the President becomes a 'working President' as it throws up situations without a precedent and the President needs to set standards

# Vice-President of India

The Vice-President of India is the second highest constitutional office in the country. He serves for a five-year term, but can continue to be in office, irrespective of the expiry of the term, until the successor assumes office.

Art. 63 declares: "There shall be a Vice-President of India." That is, the office can not remain vacant.

## Election :Qualifications

A person cannot be elected as Vice-President unless he

- is a citizen of India
- has completed the age of 35 years, and
- is qualified for election as a member of the Council of States (Rajya Sabha).

Under Art.102, a person cannot become a Member of Lok Sabha or Rajya Sabha if he is of unsound mind and a competent court has declared so, an undischarged insolvent, has voluntarily acquired the citizenship of a foreign state or if he has been disqualified under any parliamentary law.

A person is not eligible if he holds any office of profit under the Government of India or a State Government or any subordinate local authority( Art.66.4).

The Vice-President is not a member of either House of Parliament or of a House of a Legislature of any state. If a member of either House of Parliament or of a House of a Legislature of any state is elected as Vice-President, he is deemed to have vacated his seat in that House on the date he/she enters his office as Vice-President (Art.66.2).

## Manner of election

The Vice-President is elected by an electoral college consisting of members of both Houses of Parliament, in accordance with the system of proportional representation by means of the single transferable vote and the voting in such election is by secret ballot. The Electoral College to elect a person to the office of the Vice-President consists of all members of both Houses of Parliament unlike that of the President of India where nominated members of the Parliament have no role.

## Superintendence of the Election of the Vice-President

The Election Commission of India conducts the election to the office of the Vice-President.

Important Provisions relating to the Election of the Vice-President are:

The election of the next Vice-President is to be held within 60 days of the expiry of the term of office of the outgoing Vice-President. The Returning Officer appointed to conduct the Vice-Presidential elections is the Secretary-General of either House of the Parliament, by rotation. Any person qualified to be elected and intending to stand for election as Vice-President is required to be nominated by at least 20 MPs as proposers and at least 20 MPs as seconders. A candidate seeking election as Vice-President is required to make a security deposit of Rs.15,000/- . He loses the security deposit if he does not secure 1/6<sup>th</sup> of the valid votes.TK Viswanathan , Lok Sabha Secretary General was the Returning Officer for Vice Presidential poll in 2013.

### **Proportional system**

In the election an elector has as many preferences as there are candidates. In casting his vote, an elector is required to record on his ballot paper the figure 1 at the space opposite the name of the candidate whom he chooses as his first preference and may, in addition, record as many subsequent preferences as he/she wishes by recording on his ballot paper the figures 2,3,4, and so on, in the space opposite the names of other candidates. Each elector shall have as many preferences as there are candidates but no ballot paper shall be considered invalid solely on the ground that all such preferences are not marked. The procedure for counting votes consists of the following steps:

- The number of first preference votes secured by each candidate is ascertained.
- The numbers so ascertained are added up - the total is divided by two( number of candidates to be elected and add the number to one) and one is added to the quotient . The resulting number is the quota sufficient for a candidate to secure his return at the election. For example, assuming the total of valid votes polled by all candidates is 789, the quota required for getting elected is:

$$\frac{789}{2} + 1 = 394.5 + 1 \text{ (Ignore 0.5)}$$
$$\text{Quota} = 394 + 1 = 395$$

After ascertaining the quota, the Returning Officer has to see whether any candidate secured the quota for being declared as elected on the basis of the total of first preference votes polled by him/her.

If at the end of any count, no candidate can be declared elected, then, second preference votes of the candidate with the least number of first preference of votes , are transferred to the candidates left in the fight. The process continues till a candidate attains the quota.

After the election has been held and the votes have been counted, the Returning Officer declares the result of the election. Thereafter, he reports the result to the Central Government (Ministry of Law & Justice) and the Election Commission of India and the Central Government publishes the name of the person elected as Vice-President, in the Official Gazette.

### **Disputes regarding Election of the Vice-President**

An election petition calling in question an election to the office of Vice-President may be presented by any candidate at such election or by any ten or more electors joined together as petitioners.

According to Article 71 of the Constitution, all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court. Further, according to Presidential and Vice-Presidential Elections Act, 1952, an election petition can be filed only before the Supreme Court.

A petition challenging the election of the Vice-President is heard by a five-judge bench of the Supreme Court of India. The petition has necessarily to be accompanied by a security deposit of Rs. 20,000/-.

An election petition may be presented within 30 days from the date of publication of the declaration containing the name of the returned candidate.

Shri Hamid Ansari secured his re-election as vice-president to become the second person after S Radhakrishnan to become reelected to the post. Ansari defeated the NDA nominee Jaswant Singh by 252 votes in the electoral college of 787 Rajya Sabha and Lok Sabha MPs. Of the 736 votes polled, Ansari secured 490 against Singh's 238. Fifty one MPs did not cast their votes, while eight votes were declared invalid. The abstentions largely belonged to BJD, TDP and RSP that had decided to stay away from the election.

### **Oath of the Vice President**

Text of Oath of Affirmation by the Vice-President:

"I, \_\_\_\_\_ do swear in the name of God that I will bear true faith and allegiance to solemnly affirm the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter."

### **Term of office**

It is five years from the date of assumption of office. Even after the expiration of the term, the vice-President shall continue in office until his successor assumes office. Art 67(c). The Vice-President may resign his office by writing to the President. The resignation becomes effective from the day it is accepted.

### **Removal**

The Vice-President can be removed from office by a resolution of the Council of States (Rajya Sabha); passed by a majority of its members at that time and agreed to by the House of the People (Lok Sabha). A resolution for this purpose may be moved only after a notice of at least a minimum of 14 days has been given of such an intention.

It may be noted that for Impeachment of the President, the cause or reason is "violation of the Constitution". But for the removal of Vice-President, no cause or reason has been mentioned in the Constitution.

### **Vacancy**

An election to fill a vacancy caused by the expiry of the term of office of Vice-President is completed before the expiry of the term. In case a vacancy arises by reasons of death, resignation or removal or otherwise, the election to fill that vacancy is held as soon as possible after the occurrence. In contrast, the Constitution provides an outer limit of six months (Article 62) for election to the office of the President of India under these circumstances. The person so elected is entitled to hold office for a full term of 5 years from the date he enters office.

The Constitution says that when the Vice President's office is vacant, his functions as the Chairperson of the Council of States (Rajya Sabha) are performed, during the period of such vacancy, by the Deputy Chairperson of the Rajya Sabha, or any Vice Chairman of Rajya Sabha or other member of the Rajya Sabha authorised by the President of India (Protem Chairman), depending upon the circumstances.

### **Emoluments**

There is no specific provision of salary/pension for the Vice President, per se. He/she receives the salary of the Chairman of the Rajya Sabha, which is currently Rs. 1,25,000 per month. The constitution provides that when the Vice President acts as the President or discharges the duties of the President, he/she is entitled to the salary and privileges of the President of India. He draws his salary for the duties he discharges as the ex-officio Rajya Sabha Chairman. The pension is 50% of the salary.

### **The Vice-President as Chairperson (ex-officio) of the Rajya Sabha( Art.64)**

The Vice-President is the ex-officio Chairperson of the Council of States (Rajya Sabha ) and does not hold any other office of profit. During any period when the Vice-President acts as, or discharges the functions of the President, he does not perform the duties of the office of the Chairperson of the Council of States (Rajya Sabha) and, is not entitled to any salary or allowances payable to the Chairperson, Rajya Sabha.

### **The Vice-President as Acting President (Art.65.1)**

The Vice-President acts as President during casual vacancy in the office of the President by reason of death, resignation or removal or otherwise, until a new President is elected as soon as practicable and, in no case, later than six months from the date of occurrence of the vacancy. When the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President discharges the Presidential functions till the President resumes office(Art.65.2).During this period, the Vice-President has all the powers, immunities and privileges of the President and receives emoluments and allowances payable to the President.

# Attorney-General of India

The Attorney General for India is the chief legal advisor of Indian government and its primary lawyer in the Supreme Court of India. He is appointed by the President of India under Article 76(1) of the Constitution and holds office during the pleasure of the President. He must be a person qualified to be appointed as a Judge of the Supreme Court.

The Attorney General is responsible for giving advice to the Government of India in legal matters referred to him. He also performs other legal duties assigned to him by the President.

The Attorney General is to be consulted only after the Ministry of Law has been consulted. All references to the Attorney General are made by the Law Ministry.

The Attorney General has the right of audience in all Courts in India as well as the right to participate in the proceedings of the Parliament, though not to vote. The Attorney General appears on behalf of Government of India in all cases in the Supreme Court in which Government of India is concerned. He also represents the Government of India in any reference made by the President to the Supreme Court under Article 143 of the Constitution. For example, the Presidential reference regarding the 2G case verdict of the Supreme court that was given in 2012.

The Attorney General can accept briefs but cannot appear against the Government. He cannot defend an accused in the criminal proceedings and accept the directorship of a company without the permission of the Government.

The Attorney General is assisted by a Solicitor General and many Additional Solicitors General. By June 2013, there are 18 additional Solicitor Generals.

The current Attorney General is Goolam Essaji Vahanvati.

The Attorney General is the highest law officer in the country.

Functions of AG can be broadly classified under the following heads

- Legal advice: The Attorney General is the Government's chief legal adviser.
- Litigation: The Attorney General is the government's primary lawyer in the Supreme Court and High Courts.
- Parliament: The Attorney General has the right to participate in the proceedings of the Parliament and its committees but has no right to vote. He may be invited by the parliament to clarify on any legal matter.

Advocate General of a State government is the counterpart of Attorney General for India.

## **Solicitor General of India**

The Solicitor General for India is subordinate to the Attorney General of India. The Solicitor General for India is the second law officer of the country, assists the Attorney General, and is himself assisted by many Additional Solicitors General for India. It is not a Constitutional post unlike the A-G. Like the Attorney General for India, the Solicitor General and the Additional Solicitors General advise the Government and appear on behalf of the Union of India in terms of the Law Officers (Terms and Conditions) Rules, 1972. Union Law Ministry appoints the solicitor and additional solicitor general.

"Law Officer" means and includes the Attorney-General for India, the Solicitor-General for India, Additional Solicitor-General for India.

# **THE JUDICIARY**

## **Supreme Court**

The Supreme Court of India was constituted under Article 124 of the Constitution. It commenced its sittings on January 28, 1950.

The original Constitution of 1950 provided for a Supreme Court with a Chief Justice and 7 puisne Judges -( "puisne judge " is a judge of the Supreme Court other than the Chief Justice). Parliament is given the power to increase this number. There was progressive increase in the total strength of the apex court to 26 in 1986. Supreme Court (Number of Judges) Amendment Act, 2008 increased the number of judges to 31 including the Chief Justice of India. They are appointed by the President of India. The proceedings of the Supreme Court are mainly in English and the procedure is regulated by the Supreme Court Rules, 1966.

### **Qualifications**

In order to be appointed as a Judge of the Supreme Court, a person must be a citizen of India and must have been:

- For at least five years, a Judge of a High Court or of two or more such Courts in succession, or
- An advocate of a High Court or of two or more such Courts in succession for at least 10 years, or
- in the opinion of the President, a distinguished jurist.

### **Appointment of Judges to the Supreme Court: Details**

Art. 124 of the Constitution of India deals with the appointment of Supreme Court Judges.

Art 124(2) says that every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary. In the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. However, the actual process of appointment has gone through changes due to apex court verdicts.

### **Collegium of Judges**

In the SP Gupta case ( 1982) a seven-judge Constitution Bench held that the President is the final authority to appoint judges. He need not follow the advice of the judges whom he consults. In other words, 'consultation' is not 'concurrence'.

### **It is known as the First Judges case.**

In 1993, a nine-Judge Constitution Bench of the Supreme Court in the Advocates-on-Record Association case over-ruled the decision given in S.P.Gupta. The Supreme Court observed that when the President consulted the judges of the Supreme Court and the High Courts, the advice received by him is binding on him- 'consultation' is concurrence'. It held that the recommendation for appointment should be made by the Chief Justice of India in consultation

with his two senior-most colleagues and that such recommendation should be followed by the President. In case of any divergence between the judicial advice and the Presidential opinion, the former will prevail. Art 50 is quoted to give substance to the verdict- divesting the executive of its judicial powers.

#### **It is known as the Second Judges Case.**

The 1993 decision was reaffirmed with minor modifications in 1998 , on a reference made by the President under Article 143 of the Constitution. It was held that the recommendation for appointment etc should be made by the Chief Justice of India and his four senior-most colleagues (instead of the Chief Justice of India and his two senior-most colleagues in the earlier verdict in 1993)- referred to as the 'Collegium' for the purpose of appointment of Judges to the Supreme Court.

#### **It is known as the Third Judges Case.**

So far as the appointment of the Chief Justice of the Supreme Court of India is concerned, both the 1993 decision and the 1998 opinion lay down that the senior-most judge should always be appointed as the Chief Justice of India. The Constitution also provides for the appointment of a Judge of a High Court as an ad-hoc Judge of the Supreme Court and for retired Judges of the Supreme Court or High Courts to sit and act as Judges of that Court.

#### **Retirement, resignation and removal**

Supreme Court judge retires when he attains the age of 65 years. He may resign addressing the letter to the President of India. He may be removed by an order of the President based on parliamentary vote.

#### **Removal of Supreme Court Judge**

Supreme Court Judge may be removed from his office 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 on the ground of proved misbehaviour or incapacity. Article 124(5) specifically lays down that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity. In pursuance of Article 124 (5), Parliament passed the Judges (Inquiry) Act, 1968. The Judges (Inquiry) Rules, 1969 lay down the details of procedure for investigation and inquiry into the allegations against a judge.

Judges (Inquiry) Act, 1968 regulates the procedure for the inquiry into an allegation of misbehaviour or incapacity of a Judge of the Supreme Court or High Court and for the presentation of an address by Parliament to the President for removing him from office , if charges have been proved.

The Act authorizes the constitution of a three-member committee once a motion for presenting an address to the President seeking the removal of a Judge is admitted in Parliament. The motion can be admitted only if 100 Lok Sabha or 50 Rajya Sabha members propose it to their respective

Houses. The committee includes the Chief Justice or one of the Judges of the Supreme Court, Chief Justice of one of the High Courts, and one distinguished jurist.

The committee, after giving reasonable opportunity to the Judge concerned to defend himself/herself, has to submit its report to the Parliament. If the committee finds the Judge guilty- fully or partly, then its report, along with the motion, has to be considered by Parliament. The motion should be adopted by each House of Parliament by a majority of that House and by a majority of not less than two-thirds of the members of that House present and voting. The address shall be presented to the President during the same session of Parliament for the removal of the judge. The guilty Judge is removed from office by Presidential Order.

Justice Soumitra Sen of the Calcutta High Court tendered his resignation letter to the President to avoid being the first judge to be impeached by the Parliament. Justice Sen was due to face the impeachment proceedings in Lok Sabha in September 2011 after the Rajya Sabha passed the impeachment motion earlier successfully.

### **Adhoc and Acting Judges**

Art.127 says that if there is no quorum of the Supreme Court judges to hold or continue any session of the Court , the CJI , with the previous consent of the President and in consultation with the Chief Justice of the High Court concerned can request in writing a judge of the high Court who is qualified to be a judge of the Supreme Court, to function as ad hoc judge of the Supreme Court. While so attending as the judge of the Supreme Court he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a Judge of the Supreme Court.

Art.128 says that retired High Court and Supreme Court judges may be requested by the CJI, with prior consent of the President to sit and function as the judge of the Supreme Court. Every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court. His consent is necessary for attendance as the acting judge.

### **Seat of Supreme Court**

Art.130 says that the Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.

### **Chief Justice of India**

The **Chief Justice of India** is the highest-ranking judge in the Supreme Court of India, and thus holds the highest judicial position in India. As well as presiding in the Supreme Court, the Chief Justice also head its administrative functions.

The current Chief Justice is S. H. Kapadia, who has held the office since May 2010.

According to Art.124, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted

As the chief judge, the Chief Justice is responsible for the allocation of cases and appointment of constitutional benches which deal with important matters of Constitutional law and Presidential references under Art.143. In accordance with Article 145 of the Constitution of India and the Supreme Court Rules of Procedure of 1966, the Chief Justice allocates work to the other judges, who are bound to refer the matter back to him or her in case they require the matter to be looked into by a bench of higher strength.

On the administrative side, the Chief Justice carries out the following functions:

- appointment of court officials;
- matters relating to the supervision and functioning of the Supreme Court.

Article 124 of the Constitution of India provides for the manner of appointing judges to the Supreme Court. However, no specific provision is made as to the appointment of the Chief Justice; as a result, the latter is appointed in the same manner as for the other judges to the Supreme Court.

the Supreme Court declared (in the constitutional bench S.P. Gupta case) that the Government of India would be bound to nominate only the most senior judge of the Supreme Court for the position of Chief Justice, thereby removing a potential source for Government influence over the judiciary. In the appointment of the Chief Justice of the Supreme Court of India, both the 1993 decision and the 1998 opinion lay down that the senior-most judge should always be appointed.

In the 2<sup>nd</sup> Judges case 1993, it was said that the collegium headed by the CJI would recommend the names of judges for appointment to HCs and SC and also transfer and appointment of HC judges.

Once appointed, the Chief Justice remains in office until his or her retirement or death, unless removed by impeachment.

CJI is administered oath by the President while the CJI administers oath to all other judges of the apex court.

### **Acting CJI**

Art.126 says that when the office of the Chief Justice of India is vacant or when he is not in a position to perform his duties, they are performed by such other judge of the Supreme Court that the President may appoint.

### **Benches of Supreme Court**

To dispose of the cases before Supreme Court the matters are placed before various Benches of Supreme Court.

The Bail applications in appeals are heard by single-Judge (also known as Chamber Judge)

Most of the matters are decided by Division Benches of the Supreme Court- two judges. If the two judges disagree- which is rare- the view of the senior judge prevails.Or a third judge may be appointed by the CJI for the case.

Three-Judge Bench - Matters placed before three-Judge Bench are considered priority matters.CVC case( 2011) and Vodafone case(2012).

All cases involving Constitutional Interpretation and Presidential references are placed before a five-Judge Bench, popularly known as a Constitution Bench.

The largest Bench so far was the 13-judge bench that delivered the Kesavananda Bharati case verdict in 1973. There has not been a 13 judge bench since then or till then.

Another landmark verdict – Golaknath case( 1967) was determined by eleven-Judge Bench .

## Jurisdiction

The Supreme Court has original, appellate and advisory jurisdiction.

### Original jurisdiction

Original jurisdiction means that a case originates in the court. It may be exclusive or otherwise.

Under Art.131, exclusive original jurisdiction of the Supreme Court is one where no other court in the country enjoys the same power. It extends to all federal disputes- any dispute between the Government of India and one or more States or between the Government of India and any State or States on one side and one or more States on the other or between two or more States.

It also involves clarification as to whether a certain item is in the 'residuary' category or not. To explain, the Constitution distributes legislative powers to the Union parliament and State Legislature in the VII Schedule. Any item that comes up subsequently and is not covered by the three Lists- Union, State and Concurrent is in the 'residuary' category and belongs to the Union Parliament.

The writ jurisdiction of the Supreme Court is original but not exclusive as the power is also available to the High Courts(Art.226). Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them.

### Appellate Jurisdiction

The appellate jurisdiction of the Supreme Court is given in Art. 132, 133 and 134 for Constitutional, civil and criminal cases respectively. While Constitutional cases involve deviation from the Constitution, civil and criminal cases are different in the following ways: Civil cases are generally brought by private individuals or corporations seeking to collect money owed or monetary damages. A criminal case is brought by the local, state or federal government in response to a suspected violation of law and seeks a fine or a jail sentence or both. Criminal cases are generally initiated by the Government as crimes are a threat to the whole society and not only to a particular individual.

### Constitutional cases

Art.132 of the Constitution provides for an appeal to the Supreme Court from any judgment of a High Court , whether in civil, criminal or other proceedings, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the constitution.A substantial question of law means a question on which two or more High Courts have differed.

For example, the Domestic Violence Act 2006 has been interpreted to have retrospective value for the aggrieved women some HCs and some others differed. Since retrospective laws of a criminal nature are not allowed under Art.20, it becomes a Constitutional case of substantial importance.

### Civil cases

Appeals lie to the Supreme Court in civil matters (Art.133) if the High Court concerned 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.

The term 'general importance' means that the case holds interest for a wider section of the society other than the litigants.

### Criminal cases

According to Art.134 and Criminal Procedure Code provisions, an appeal lies to the Supreme Court if the High Court

- a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, 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 and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or
- c) certifies that the case is a fit one for appeal to the Supreme Court.

Earlier, life imprisonment meant an imprisonment of 14 to 20 years, but of late, the courts are interpreting it as 'imprisonment until the end of the natural life of the convict', unless remitted.

Parliament is authorised to confer on the Supreme Court any further powers in criminal jurisdiction, under Art.134.

### Difference between criminal and civil cases

In a criminal case, prosecution is by the State of a person or organization, for committing a public wrong considered an offense against the State. Standard of proof for crimes is higher than for civil wrongs (torts) and, for major crimes such as a murder, guilt must be established beyond a reasonable doubt (see proof beyond a reasonable doubt). Civil cases on the other hand involve disputes between individuals or corporations and are settled by monetary payments and damages. Civil case is a lawsuit brought to redress a private wrong such as breach of contract, encroachment, or negligence; or to enforce civil remedies such as compensation, damages etc.

Civil cases are generally brought by private individuals or corporations seeking to collect money owed or monetary damages. A criminal case is brought by the government in response to a suspected violation of law and seeks a fine, a jail sentence or both.

## **SLP**

The Supreme Court has a very wide appellate jurisdiction over all Courts and Tribunals in India as it may, in its discretion, grant special leave to appeal under Art. 136 of the Constitution from any judgment or order – interim or final-in any matter from any Court or Tribunal in the territory of India. However, SLP is not available against orders of military courts constituted under any law relating the Armed Forces.

Certain facets of SLP need to be noted: it is available against both interim and final orders; it is not a right of the aggrieved party; it is a discretionary power vested with the Supreme Court and needs to be used in cases where natural justice or others forms of justice are violated or substantive question of law is involved.

## **Art.138**

Art.138 says that the powers of the Supreme Court can be enlarged by the Parliament.

Art.139: 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.

### **Power to transfer a case**

Article 139A(1) of the Constitution provides that where cases involving the same or substantially the same question of law are pending before the Supreme Court and one or more High Courts or before two or more High Courts and Supreme Court is satisfied, on its own motion, or on an application made by the Attorney General of India or by a party to any such case, that such questions are substantial questions of general importance, the Supreme Court may withdraw the case or cases and dispose of all cases itself.

Article 139A(2) of the Constitution provides that the Supreme Court may, in pursuit of justice, transfer any case, appeal or other proceedings pending before any High Court to any other High Court

Code of Civil Procedure and Code of Criminal Procedure provide that Supreme Court may transfer any case from a High Court or other subordinate Court in one State to a High Court or other subordinate Court in any other State.

## **Art.140**

It enables Parliament to confer ancillary powers on Supreme Court consistent with Constitution to make the Court more effectively discharge its Constitutional duties.

## **Art.141**

It says that the law declared by Supreme Court is binding on all courts within the territory of India.

## **Art.142**

It says that 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 pending before it, and it shall be enforceable throughout the territory of India

## **Advisory jurisdiction: Art.143**

The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under Article 143 of the Constitution.

According to Art.143, if it appears to the President that

- a question of law or fact has arisen, or is likely to arise
- which is of public importance and that
- it is necessary to take the opinion and advice of the Supreme Court on it

the President of India may seek the advice of the Supreme Court on such a matter. The Supreme Court may render its advice or it may decline to do so. But in one case such advice is to be mandatorily given: pre-Independence agreements and accords that India entered into.

If the apex court accepts the reference, it sets up a Constitution bench and hears the arguments where the Government's case is argued by the AG.

The Article is titled : Power of President to consult Supreme Court.

Under the Art.143, what the President seeks and what the court gives is opinion and therefore, it is not binding. But it has the value of a judgement for all courts and other bodies.

The power to reject a reference by the apex court is given as all references may not be amenable to judicial clarification- a reference made whether there was a temple in the place where the mosque was built five centuries back(1993).

But if the SC answers the questions raised in a presidential reference, would its advice be binding? The question came up in the Cauvery Waters inter-state river water dispute of 1991- a 5 judge bench held that 'the advisory opinion is entitled to due weight and respect and normally, it will be followed.'

The question that was raised in the 2G reference was whether it was correct to take the route of Art.143 while the route of appeal to a larger bench was open. The answer however is that the verdict raises certain fundamental questions that go beyond the verdict itself and so reference route is appropriate.

The advisory powers of the Supreme Court have been of enormous value so far in clarifying on various matters Constitutional and legal matters as can be seen from the list of references given below. There have been 14 references to the Supreme court so far including the 2G reference in 2012.

#### **Presidential references in the last two decades**

- 2012 2G verdict of the Supreme Court
- 2004 SYL canal and unilateral termination of all agreements by Punjab
- 2002 Gujarat Assembly and Art.174
- 1998 Judges appointment
- 1993 Rama Janma Bhoomi( declined)
- 1991 Interim Order of Cauvery Water Disputes Tribunal

#### **2G Reference 2012**

The government in April 2012 moved the Supreme Court with a Presidential Reference for its opinion on issues arising out of its 2G spectrum judgment delivered earlier in 2012 , including whether auctioning of natural resources across all sectors is mandatory and the verdict be given retrospective effect for licenses granted since 1994.

Eight questions have been raised, including whether there could be judicial interference in policy matters, whether the court holds that within the permissible scope of judicial review that the policy is flawed, is the court not obliged to take into account investment made under the said policy including the investment made by foreign investors under the multi and bilateral agreements.

The apex court had observed that auction was best suited route for allocating natural resources like telecom spectrum because the policy of first-come-first-serve was flawed.

#### **Art.144**

Art.144 says that it is the duty of every person and authority in the country to act in aid of and render necessary assistance for the enforcement of the orders of the Supreme Court.

## **Miscellaneous powers: Election disputes**

Article 71 of the Constitution, provides that all doubts and disputes relating to election of a President or Vice-president are required to be enquired into and decided by the Supreme Court.

## **Public service commission member's removal**

Article 317 of the Constitution, provides that the Chairman or any other member of a Public Service Commission can be removed from his office by order of the President, on the ground of misbehavior, after the Supreme Court on reference being made by the President, has on enquiry reported that he ought, on such ground, to be removed from his office.

## **Contempt powers**

Contempt of Court Acts which wilfully seek to disrupt the normal judicial process constitute contempt of court. In India, Supreme Court and High Courts are given the power to punish contempt of court as shown below:

Article 129 : "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."

Article 215: Every High 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.

### **Need for contempt of court powers**

Effective discharge of Constitutional and other legal duties demands that the majesty of law and the dignity and authority of the courts should be respected and protected. It in turn helps uphold the rule of law and Constitutional governance. Contempt powers are necessary for the higher courts to enforce rule of law and judicial orders, prevent corruption, insubordination and defiance. Contempt powers are a balance between the right of an individual to criticize the judiciary and the need of the judiciary to enforce respect for the law.

### **Civil and criminal contempt**

Contempt of court may be civil contempt or criminal contempt

"Civil contempt" means willful disobedience to any judgement, direction, order, writ etc of a court or willful breach of an undertaking given to a court. Civil Contempt normally attracts a fine and not imprisonment unless there are special circumstances.

"Criminal contempt" means saying or doing anything that

- scandalizes or lowers the authority of court, or
- interferes with the due course of any judicial proceeding , or
- obstructs the administration of justice in any other manner.

Willfulness is necessary to constitute contempt. Mere disobedience without a willful element is not sufficient to constitute contempt. Partial non-compliance of a court order also amounts to contempt. Supreme Court has inherent power under Article-129 of the constitution to take suo motu action to proceed against contempt

- Of itself
- Of High Court and
- of a subordinate court.

High Court being a court of record has inherent power in respect of contempt

- of itself as well as
- of subordinate courts.

High Courts have power to punish for contempt of subordinate courts under Article-215 but that does not affect or abridge the inherent power of Supreme Court under Article-129. The Supreme Court and High Court both exercise concurrent jurisdiction under the constitutional scheme of punishing for contempt of any subordinate court and contempt of High Court. Generally, cases relating to contempt of subordinate courts are matters for High Courts. However, under rare circumstances affecting the entire judiciary, Supreme Court may directly take cognizance of contempt of subordinate courts.

Defence: Contemnor may defend himself on the basis of truth and public interest.

Under the contempt law, to protect principles of natural justice, it is necessary that the

- procedure is fair
- that the contemnor( one who commits contempt of court) is made aware of the charge against him and is
- given a fair and reasonable opportunity to defend himself.

When a person defies the orders of a High Court in a place that is outside the Court's normal jurisdiction, the High Court's powers extend beyond the normal territorial limits to punish for contempt.

### Court of record

Under Art. 129 of the Constitution the Supreme Court is a court of record. It means it has the following attributes

- its proceedings are recorded and can be quoted as evidence in any court in the country
- it can punish for contempt of court including contempt of itself.

### Curative petition

The concept of Curative petition was evolved by the Hon'ble Supreme court in the matter of Rupa Ashok Hurra vs.Ashok Hurra(2002) where the question was whether an aggrieved person is entitled to any relief against the final judgement/order of the Supreme Court,after dismissal of a review petition. The Supreme Court in the said case held that in order to prevent abuse of its process and to cure gross miscarriage of justice,it may reconsider its judgements in exercise of its inherent powers. For this purpose the Court has devised what has been termed as a "curative" petition. Curative petition has to be certified by a senior advocate. The Curative petition is then circulated to the three senior most judges and the judges who delivered the impugned judgement,if available.No time limit is given for filing Curative petition. The court could impose "exemplary costs" to the petitioner if his plea lacks merit.

### Critical analysis of collegium model

Appointment of judges is a vital function in a democracy based on the rule of law and whose Constitution guarantee fundamental rights. Constitution originally provided for Presidential appointments based on consultation with the higher judiciary(High courts and the Supreme Court). In 1993, the system changed. Collegium model was instituted. In other words, collegium of the Chief Justice and four senior-most judges of the Supreme Court appointing

supreme court judges has not been provided by the Constitution. Supreme court created the model on the basis of the word ‘consultation’ which is meant to be “concurrence” in the interpretation in the 1993 verdict, as you have studied earlier in the notes. The need for the collegiums model is felt to be the following

- a. Independence of the judiciary
- b. Art.50 wants the ‘judicial powers’ of the Executive divested and given to the judiciary itself for the independence of the judiciary
- c. Coalition governments may be under pressure to dilute principles of integrity a competence in appointments
- d. Mrs.Gandhi in the 1970’s advocated a committed judiciary that supported the government programmes and policies which the judiciary found to be unconstitutional

However, the collegian model worked for 20 years by 2013 and its working has been found to be deficient on the following grounds

- a. it is not provided in the Constitution
- b. it is not transparent
- c. many vacancies are not filled.

At any given time there are two to three vacancies in the Supreme Court, and 200 in the 24 High Courts ( new ones to have come up in 2013 being in Tripura, Meghalaya and Manipur). If we add the issue of transfer of High Court judges, an administrative task of high magnitude results to cope with which the apex court has necessarily to be detracted from their principal judicial work of hearing and deciding cases. The collegium neither has a secretariat to shoulder this burden nor an intelligence bureau to make appropriate inquiries of the competence, character and integrity of a proposed appointee. Lacking this infrastructural backup is a major problem with the collegiums.

### **Remedy**

It is necessary that the appointment etc process has to be broad based. The power of the executive can not be restored as it stood pre-1993. T.R. Andhyarujina, Constitution expert says: In several countries of the Commonwealth, National Judicial Appointment Commissions have been established to select judges. Such judicial commissions have worked with success in the U.K., South Africa and Canada. The advantage of judicial commissions are that they are independent, broad based and they represent not only the views of the judiciary but also of the executive and other sections of society. They are transparent in their working even to the extent that applications are invited by public advertisement. In India proposals for the establishment of a National Commission for Judicial Appointments have been made at various times. The Law Commission in 1987 recommended a broad based body of judges and other person to make recommendations for the appointments of judges. A Constitutional Amendment Bill was tabled in Parliament for the establishment of such a Commissions in 1990 but it lapsed. The National Commission to Review the Constitution 2002 set up by the Government of India favoured a National Judicial Commission with a predominance of judicial members as an alternative to the collegium system. With the size of the Indian superior judiciary, it may be necessary to have two judicial commissions in India, one for the Supreme Court and another for the High Courts.

Before his recent demise, Justice J S Verma, the author of the Second Judges' case which evolved the collegium system, had expressed his disappointment with its working. There is also a demand that the reasons for appointment of a particular judge and rejection of other judges should be briefly disclosed as that would impart transparency to the process.

The Constitution may have to be amended to set up the NJC.

### **Green benches**

India is facing a growing backlog of environmental cases with rapid industrialization leading to disputes with traditional stakeholders. Land acquisition has become a huge problem with industries and mining interests facing increasing protests from farmers and fishermen. One may not be able to balance different interests. Recognizing this fact India's Chief Justice has decided to restructure the "Green Bench" to expedite the cases before it. There will be 2 benches which will deal with environmental matters, one bench will deal with norms while the other will focus on their implementation. Adjournments are not allowed. The Bench would hear only one case at a time.

### **All Women Judges Bench in the Apex Court**

For the first time in the history of the Supreme Court, an all women bench heard cases in the top court in April 2013. Justice Gyan Sudha Misra headed the women bench with her colleague Justice Ranjana Prakash Desai. However, such a bench has not been institutionalized.

### **Independence of the Judiciary**

An independent judiciary is essential for the strength of a federal democracy like ours. Our Constitution establishes it on the basis of the following

- Appointment of judges of Supreme Court is kept above politics as the President appoints Supreme Court and High Court judges in consultation with the CJI and such other judges of the SC and HCs as he deems necessary
- Removal is possible on grounds of proved misbehaviour or incapacity and the parliament should vote with special majority followed by Presidential Order of removal
- Salaries etc are charged on the Consolidated Fund of India and are non-votable
- Administrative expenses of the Supreme Court are charged on the Consolidated Fund of India
- Conditions of service can not be varied to the disadvantage of judges after their appointment
- After retirement, Supreme Court judge can not practise in any court in the country and a High Court judge can not practise in the High Court where he retires
- Parliament can only enhance the powers of the Supreme Court and can not reduce the same
- Art.141 says that the SC judgements are binding on all courts in the country

## All – India Judicial Service

The subordinate courts/subordinate judiciary is a State subject( an item in State List ( List II). The appointment of the members of the subordinate judiciary is made by the Governor. Such appointment is to be made in the case of district judge, in consultation with the High Court and in the case of other posts, in consultation with the Public Service Commission and the High Court. There has been a suggestion for many decades that an AIJS should be constituted to attract the best young talent that can improve the efficiency of the subordinate judiciary. Law Commission recommended that AIJS should be constituted, essentially for manning the higher services in the subordinate judiciary. The Supreme Court endorsed the recommendation .

Article 312 deals with the All-India Services. Constitution (Forty-second Amendment) Act, 1976 inserted All-India Judicial Service into the Article. The Amendment Act says that the All-India Judicial Service shall not include any post inferior to that of a district judge as defined in article 236.

The process of creation of an All India Service needs to be noted. If the Council of States (Rajya Sabha) declares by resolution supported by not less than two-third of members present and voting that it is necessary or expedient in the national interest to do so, Parliament may by law provide for creation of an All-India Judicial Service (AIJS) common to the Union and the States and also to regulate the recruitment and conditions of service of persons appointed to such All-India service( Art.312). Law of the Parliament to create AIJS is not to be deemed to be an amendment of the Constitution within the meaning of Article 368.

The advantages with AIJS are that the best talent at a young age can be tapped. It helps to fill the strength in High Courts after the AIJS recruits become eligible and thus vacancies may not plague the higher judiciary. Near uniform standards prevail in the country in judicial matters. Finally, national integration is another benefit.

Three main objections are raised in this matter

- inadequate knowledge of regional language would dampen judicial efficiency
- promotional opportunities of the members of the State judiciary would be severely hurt
- erosion of control of the High Court over subordinate judiciary would impair independence of the judiciary.

The objections have been answered effectively by, among others, the Law Commission. Learning the regional language has never been a problem as seen in our experience with the IAS and IPS. It also furthers cultural integration.

With respect to the second objection, only a portion of the total vacancies are to be filled through the All India competitive examination while the remaining are open to be filled by promotion from the lower cadres.

Control of the High Court will remain as , on allotment to a State, the allottees (members of AIJS) would become members of the State Judicial Service for all practical purposes.

At present, almost all states have a system of selecting members of the subordinate judiciary. But, there is no all India judicial service.

### National Judicial Commission

The process of appointment to the higher judiciary and transfer of High Court judges has been a point of national discussion in the last many years, particularly since the Second Judges case in 1993 when the primacy was given to the Collegium of judges in this matter. Power of the President was reduced to formalizing the recommendations of the collegiums. There is a large section of opinion that there should be NJC with members of the executive judiciary and distinguished jurists involved in the process for the process to be transparent and broad-based. Another issue related to higher judiciary is to ensure its accountability in matters of conduct. To address the twin issues, National Judicial Commission has been under consideration. Two attempts at passing a Bill were made- 1990 and 2003. Both failed. National Commission to Review the Working of the Constitution (NCRWC) (2002) recommended it.

### Pendency and Judicial Reforms

Supreme Court ruled that speedy trial is a part of right to life(Art.21). Judicial delays and huge backlog have the effect of emboldening anti-social elements; common man loses faith in the judicial system; loss of important evidence is possible because of fading of memory or death of witnesses.

By 2012, over 25 million cases were pending in trial courts, while the number of cases pending in 21 High Courts stood at 3.7 million. Backlog is increasing for many reasons like

- Increasing number of laws and increasing levels of literacy lead to mounting litigation
- judicial impact assessment(JIA) is inadequate. That is, it is not estimated for every Bill passed as to the impact on caseload, judges/staff, infrastructure and financial needs.
- Judge –population ratio is low at 11 judges per 1 million. Law Commission recommended to raise it 5-fold Approved strength of High Courts is 906(2013) but there are 276 vacancies( 2013). Similarly, against a sanctioned strength of 18,100 trial court judges, there are only 14,300 judges available (2013)
- Judicial infrastructure is inadequate- both in terms of courts or adoption of new technology(IT etc)
- Procedures permit unwarranted adjournments (postponements)

Chief Justice K G Balakrishnan suggested higher budgetary allocation to set up new courts like evening courts and special magistrate courts to combat pendency of cases. 59 lakh petty cases are pending and they can be disposed off in a short time if special magistrates could be appointed. In Andhra Pradesh, morning courts are functioning before the normal office hours. In Gujarat, 'evening courts' are functioning. They have disposed off lakhs of cases.

Gram Nyayalayas Act is one solution. Pendency can also be reduced through alternative settlement of disputes- mediation and conciliation. Lok Adalats have proved to be useful in mass disposal of cases and quickly.

State governments should set up more family courts – one family court should be set up in every district as it means adoption of a conciliatory approach in such cases, giving preference to mutual settlement over adjudication by court. The country now has only 190 family courts.

The judiciary has recently adopted some measures, including increase of the working hours of High Court judges.

Government allocated an amount of Rs. 1,470 crore for the Eleventh Five Year Plan period for development and modernisation of judicial infrastructure and improving access to justice. The amount will be used for setting up of Gram Nyayalayas, computerisation of District and Subordinate Courts in the country and for upgradation of ICT infrastructure of the Supreme Court and the High Courts.

Government accepted the recommendations of the Thirteenth Finance Commission( 2010-2015) to provide a grant of Rs. 5,000 crore to the States for improving the justice delivery system in the country- to organise more Lok Adalats and strengthen mediation with a view to reduce court pendencies.

Video-conferencing should be allowed in the judicial process. It is common for the criminal cases getting adjourned on account of inability of the police or jail authorities to produce the accused in court. Sometimes the witnesses are residing at far off places or even abroad. It is not convenient for them to attend the court. Video conferencing is a convenient, secure and less expensive option and can speed up the trial, among other advantages.

National Judicial Infrastructure Plan prepared by the National Judicial Academy, Bhopal for upgrading judicial infrastructure to enable access to justice for common man is under consideration. The plan proposes new initiatives such as fast track courts, second shift in existing courts, etc for speedy disposal of cases

#### **Moily Commission**

Second Administrative Reforms Commission (ARC) headed by Veerappa Moily made the following recommendations

- fixing a time limit for various stages of trial by suitable amendments to the Criminal Procedure Code
- cases under the Prevention of Corruption Act are held on a day-to-day basis for quick disposal
- guidelines to avoid unwarranted adjournments
- endorsement of Malimath Committee proposal for increasing the working days of High Courts.

#### **Judicial reforms**

- pendency must be drastically pruned
- Computerization of the courts
- fill up vacancies in High Courts and subordinate courts..
- competent and able members of bar are to be ‘attracted’ to the judicial posts
- the high level of court fees prescribed by many state governments must be reduced as it adds to the cost of justice
- judicial accountability needs to be strengthened
- witness protection
- Laws need to be modernized as some of them are more than 100 years old
- Judicial impact assessment( read ahead)

Many reforms have already been initiated and are in progress. Some have already taken effect as shown below:

- Fast track courts in 2001 as well as 2013, the latter being for women related cases
- Criminal law amendment act 2013- gender sensitivity
- Lok Adalats
- Gram Nyayalayas Act 2008
- E-judiciary
- It is suggested that the jury system like in the US should be adopted where the common public can be asked to work as jurors (judges) and decide cases on the basis of facts. It will reduce pressure on courts.

### CPC Amendments 2002

In a move to speed up justice delivery, the Centre amended the Civil Procedure Code which provide for time-bound disposal of civil cases. The following amendments make for speedier disposal of cases

- Only three adjournments are permitted.
- The court is also empowered to fix a time limit for oral arguments and to avoid delay, it may ask the parties to file written submissions.
- a judgment is to be pronounced within 60 days from the date on which the hearing concludes
- ADR- conciliation and arbitration- should be encouraged
- The 2013 Criminal Law Amendment Act

### Plea Bargain

It was introduced in India by amendment of the Code of Criminal Procedure. Under plea bargain, criminal defendant and prosecutor reach an agreement subject to court approval. The accused admits guilt without a trial, and in return is given a lighter punishment.

This is allowed for cases in which the maximum punishment is imprisonment for seven years. However, offences in socio-economic area like sati are not covered and offences committed against a woman or a child below the age of fourteen are also excluded.

The rules say the court would examine the accused in-camera to determine if he has willingly opted for plea bargaining

Critics of the system point out that it puts strong pressure on defendants to plead guilty to crimes that they know that they did not commit. Furthermore, the system encourages lawyers to overcharge.

### Gram Nyayalayas Act 2008

Gram Nyayalaya Act 2008 aims at providing inexpensive justice to people in rural areas on their doorstep. It provides for first class judicial magistrates dispensing justice-Nyaya Adhikaris are appointed by the states in consultation with the high courts. Gram Nyayalayas try criminal cases, civil suits, claims or disputes concerning all the offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Theft, receiving or retaining stolen property, assisting in the concealment or disposal of stolen property —where the value of property does not exceed Rs 20,000 —, dispute relating to purchase of property, cultivation of land, right to draw water from a tubewell or well are some of the offences which could be tried in the Nyayalayas. An appeal from the judgment of the Gram Nyaylaya lies with

the sessions court which will be heard and disposed of within six months from the date of filing of the appeal.

For the Gram Nyayalayas, the Centre bears the full cost on capital account. These courts sit at the district headquarters and in taluks. They go in a bus or jeep to the village, work there and dispose of the cases- thus they are mobile courts. The cost of litigation would be borne by the state and not by the litigant.

Tribal areas are not covered .

Gram Nyayalayas Act, 2008 had come into force from 2.10.2009.Six State Governments have notified 159 Gram Nyayalayas. Out of these, 151 are operational.

### **Fast Track Courts**

Fast track courts were set up , on the recommendation of the 11<sup>th</sup> Finance Commission to deal with criminal cases involving undertrials – those in jail facing trial for the alleged offences and have spent long periods , sometimes well ahead of the punishment that the alleged crime may get; and other cases pending for more than two years. The aim is to set up five fast track courts in each district. FTCs across the country disposed of lakhs of cases so far. They were ended in 2011. Though the central government stopped giving financial assistance to the states for establishing FTCs, the state governments could establish FTCs from their own funds. The decision of the central government not to finance the FTCs beyond 2011 was challenged in the Supreme Court. In 2012, the Court upheld the decision of the central government. Y 2013, some states such as Arunachal Pradesh, Assam, Maharashtra, Tamil Nadu and Kerala decided to continue with the FTC scheme. However, some states such as Haryana and Chhattisgarh decided to discontinue it. Other states such as Delhi and Karnataka have decided to continue the FTC scheme only till 2013. FTCs gave a boost to faster disposal of cases. 39 lakh cases transferred to these courts, verdict was given to 32 lakh cases.

After the recent gang-rape of a 23 year old girl, the Delhi High Court directed the state government to establish five Fast Track Courts (FTCs) for the expeditious adjudication of cases relating to sexual assault. Other states such as Maharashtra and Tamil Nadu have also begun the process of establishing FTCs for rape cases. The reason for the fast track courts to produce decisions quickly is that they hold proceedings continuously.

73 such courts are set up since Janunary 2013 to try cases of sexual harassment and other heinous crimes. As part of its comprehensive agenda for legal and judicial reforms, the government and the top judiciary have resolved to set up at least 1,800 fast-track courts and run it for three years with majority central funding. These fast-track courts will be established both for trial of heinous crimes as well as for offences against elderly, women and children.

### **Alternative Dispute Resolution**

Alternative dispute resolution encompasses a range of means to resolve conflicts short of formal litigation. The modern ADR movement seeks to reduce cost and delay and avoid adversarial nature of litigation. The interest in ADR essnentially centres around Lok Adalats.

ADR today falls into two broad categories

- court-driven options and
- community-based dispute resolution mechanisms(Lok Adalats)

Court-driven ADR includes mediation/conciliation—the classic method where a neutral third party assists disputants in reaching a mutually acceptable solution. Supporters argue that such methods decrease the cost and time of litigation, improving access to justice and reducing pressure on courts, while at the same time preserving important social relationships for disputants. Community-based ADR is often designed to be independent of a formal court system that may be expensive and inaccessible. India set up lok adalats in the 1980s.

### **Arbitration, conciliation and negotiation:**

#### **Conciliation**

Conciliation is an informal process designed to create an environment where negotiations can take place. If the parties fail to reach an agreement, the case is referred to mediation.

#### **Mediation**

Mediation is a voluntary and confidential process where a neutral third party assists negotiation. The parties are responsible for reaching an agreement and the mediator cannot impose a settlement. The mediator's role is to facilitate communication, promote understanding, and use problems solving techniques with the goal of assisting the parties to reach their own agreement. If the mediation fails to reach agreement, the case is referred to arbitration.

#### **Arbitration**

Arbitration is a form of private adjudication where a mutually acceptable third party hears arguments from either side in a dispute, and renders a judgment. The judgment, known as an award, is confidential and binding.

#### **Lok Adalat**

Lok Adalat literally means "peoples" court". It is an alternative dispute settlement mechanism which settles disputes through conciliation and mediation. It helps in quick disposal of cases and the process is simple and carries no fees. Lok Adalats are statutory forums since the enactment of Legal Services Authorities Act, 1987. (Connect with the Chapter on DPSPs) All legal disputes pending in civil, criminal, revenue courts or a tribunal can be taken to Lok Adalat for amicable settlement except criminal cases which are non-compoundable (that is, serious offences where charges cannot be dropped without the consent of the judge). Legal disputes can be taken up and settled by Lok adalats at pre-litigative stage also i.e. before the parties have entered into litigation by filling a case in a regular court.

Lok Adalats, generally, consist of a judicial member, a legal practitioner and a social worker (generally, a woman). They follow their own procedure. They have the power of a Civil Court, in respect of summoning of evidence and, examination of witnesses, requisitioning of public records, etc. However, they are not 'courts' (read ahead). No lawyers are involved in the process. The procedure, followed in the Lok Adalats for the settlement of cases, is simple, informal and flexible.

Supreme Court ruled that the Lok Adalats set up under the Legal Services Authority Act have no adjudicatory or judicial functions since they do not 'hear' arguments. They suggest a solution

subject to the litigants accepting the same. If it is accepted, it is binding. If it is not accepted and one/both the parties reject it, the recourse is to the courts. Thus, Lok Adalats are not courts, in this sense. They are conciliatory bodies, suggesting remedies.

If the case is settled in the Lok Adalat, that is, if the litigants agree to a settlement in the Lok

Adalat, it will have to be complied with. It is enforceable like the decrees of a civil court once the compromise is accepted.

Lok Adalats are monitored by the State Legal Aid and Advisory Boards.

Parliament in 2002 made the Legal Services Authorities (Amendment) Act 2002, which provides for the constitution of permanent Lok Adalats with maximum monetary jurisdiction of Rs. 10 lakhs for conciliation and settlement of cases relating to public utility services like electricity boards, transport corporations etc.

In their conciliatory role, the Lok Adalats are guided by the principles of justice, equity and fair play. The Lok Adalats have delivered inexpensive and expeditious justice and need to be extended further.

### **Parivarik Mahila Lok Adalat**

The concept of Parivarik Mahila Lok Adalat (PMLA) has been evolved by the National Commission for Women (NCW) to supplement the efforts of the District Legal Service Authority for redressal and speedy disposal of matters pending in various courts related to marriage and family affairs. Other advantages of the PMLA are that it is cheaper, it helps encourage the public to settle their disputes outside the formal set-up, it empowers the public (especially women) to participate in the justice delivery mechanism, and ideally, cases are amicably settled by the parties in a harmonious atmosphere.

### **Judicial Impact Assessment**

JIS means assessing the extra load that the passing of a Bill or making of a certain rule based on an Act will create for the courts.

The Task Force constituted by Government to study the feasibility of Judicial Impact Assessment in India under chairmanship of Shri Justice M. Jagannadha Rao submitted its report in 2008. Mandatory judicial impact assessment of every bill will have a fair estimate of extra caseload, judges/staff, infrastructure and financial needs a new law is likely to generate.

The committee recommended that Judicial Impact Assessments must be made on a scientific basis for the purpose of estimating the extra case-load which any new Bill or Legislation may add to the burden of the Courts and the expenditure required for adjudication of such cases must be estimated by the Government and adequate budgetary provision must be made therefore.

Such impact assessments must be made in respect of Bills that are introduced in Parliament as well as Bills introduced in the State legislatures. If implemented, it will be for the first time that India follows a system that is in vogue in the USA.

The expenditure on fresh cases likely to be added to the Supreme Court and high courts by new laws must be reflected in the Financial Memoranda attached to the Central/ State Bills. The panel proposed setting up of a judicial impact office in Delhi and similar offices in states to carry out the assessment by involving social scientists, legal experts and NGOs. Indian courts are disposing of 1.5 crore cases annually and there were 2.5 crore cases still pending in lower courts. ,

Protection of Children from Sexual Offences Act, 2012, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Ac 2013 and Criminal Law (Amendment) Act, 2013 were passed recently and they are likely to impose huge burden on the courts unless proactively judiciary is strengthened.

### **Malimath Committee and Criminal Justice System**

Criminal justice system involves the police, prosecution, judiciary and the jails along with the witnesses. If it functions well- efficiently, crime rate will decline and conviction rate increases. Otherwise, the country faces the risk of erosion of people's faith with the increase in the crime rate. The Malimath Committee, constituted in 2000 to recommend revamping of the criminal justice system in the country gave its report in 2003. The two volume report makes 158 recommendations with regard to the police, prosecution, the judiciary and criminal jurisprudence. It has, to a large extent, incorporated the recommendations made by in various reports of the Law Commission and the National Police Commission.

It recommended the following:

Empower the court to summon and examine as witness any person it considers appropriate. The right of the accused to silence (the right not to be compelled to be a witness against oneself) must also be amended with the court given the right to draw adverse inferences if he refuses to answer the questions put to him by the court.

The committee also concluded that the current standard of proof — "beyond reasonable doubt" — put a "very unreasonable burden" on the prosecution. It has suggested that the standard of proof be set midway between the current standard in India and the much lower standard current in continental Europe, namely "preponderance of probabilities", at "clear and convincing" proof. It recommended amendments to Section 125 of the Criminal Procedure Code (CrPC) so that "a woman living with a man like his wife for a reasonably long period is also entitled to the benefit of maintenance".

It further suggested life sentence for the rapist and it should not be commuted; lenient law for women and child convicts.

### **Special Courts**

Special courts may be set up under various acts to expedite justice like Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989; Immoral Traffic Prevention Act 1956 provides for special courts. The National Investigation Agency set up in 2008 after the Bombay terror attacks in November 2008 allows special courts to be set up and function continuously. Evening courts in Gujarat and Fast Track courts are also special courts. In Bihar *Special Courts Act, 2009* against corruption by public servants. Special courts essentially speed up justice.

### **Advocates on Record**

- Only these Advocates are entitled to file any matter or document before the Supreme Court. They can also file an appearance or act for a party in the Supreme Court.

### **Governance in Judiciary**

#### **E-judiciary**

The e-Judiciary initiative is taken up- computerization and connectivity- to help in meeting the needs of the citizens in a transparent manner and enable quicker disposal of cases.

The Supreme Court took up the “e-courts” project under the National e-Governance Plan (NeGEP) for linking courts in the country. From the time the case is filed till it is disposed of with judgment, the entire processing must take place electronically. This will enable easy search, retrieval, grouping, information processing, judicial record processing and disposal of the cases. COURTIS project undertaken by NIC has streamlined registries at various courts. With the implementation of the system the number of pending cases in the Supreme Court has come down. COURTNIC is an information system designed to provide the information on the status of cases in the Apex Court to a wide variety of users, from anywhere in the country.

Computerisation of all 24 High Courts on the lines of Apex Court’s Computerisation has been done. All High Courts’ Cause List are also available on Internet. NIC took up the computerisation of all 430 District Courts in the country on the lines of High Courts Computerisation Project. NIC brought out Judgement Information System (JUDIS) on CD-Rom consisting of complete text of all reported judgement of Supreme Court of India from 1950. The Judgements of 2001 onwards are available on Internet. Causelists contain information on the scheduling of cases to be heard by the courts on the following day. The daily orders of Supreme Court, Delhi High Court are available on the web, immediately after they are signed by the Judges.

### **National Mission for Justice Delivery and Legal Reforms 2011**

The Union Government in 2011 approved an ambitious programme that would usher in radical legal reforms aimed at, among other goals, disposal of pending cases in three years, from the current average of 15 years, and establishment of an All India Judicial Service.

Known as the “National Mission for Justice Delivery and Legal Reforms,” it seeks to operationalise a number of plans to ensure expeditious and quality justice. The Centre is committed to spending Rs. 5,510 crore in the next five years for the Mission.

The broad areas under it are: policy and legislative changes, re-engineering of procedures, human resource development, leveraging information technology and improvement of physical infrastructure of subordinate courts.

The Mission would comprise an Advisory Council, a Governing Council, a National Mission Leader and a Mission Directorate. The Advisory Council will advise on the goals, objectives and strategies and an action plan. The Governing Council will facilitate implementation, give policy directions and oversee the work of the Mission. The Mission Directorate will monitor the Mission's various initiatives.

Action plan worked out by the Ministry of Law and Justice focuses on initiatives such as an All India Judicial Service, a Litigation Policy, Judicial Impact Assessment, reforms in Arbitration & Conciliation Act and Legal Education Reforms. It seeks re-engineering of the procedures and alternative methods of dispute resolution such as identification of bottlenecks, procedural changes in court processes, statutory changes to reduce and disincentivise delays, fast tracking of procedures, appointment of court managers and Alternative Dispute Resolution.

## Judicial Accountability

In a Constitutional democracy, every institution is subject to accountability, including the judiciary. There are three dimensions to judiciary and its accountability- judicial, administrative and ethical standards.

Accountability of the judiciary in respect of its judicial functions and orders is provided for by an appeal and review of orders up the judicial hierarchy from subordinate courts upwards.

The mechanism for accountability for serious judicial misconduct , for disciplining errant judges is removal, in the Indian Constitution (Art.124). It is so difficult that it is not practical and so does not function as a deterrent. Therefore, Judicial Standards and Accountability Bill 2010 that is being considered by Parliament(2013) provides for remedies for minor cases of misdemeanor as well. -

The National Commission to Review the Working of the Constitution (NCRWC) made similar recommendations in the matter in its report in 2002. -

Administrative accountability is via the RTI.

The judicial accountability question has the following dimensions:Judicial accountability under which the lower court verdicts are open to challenge and nullification by the higher court. Within the High Court and Supreme Court, there is an appeal to a larger bench. After review petition has been disposed off, if there is any natural justice issue involved, there is curative petition.Finally, in matters of mercy, the President and Governor are the arbiters( Art.72 and 161 respectively), after which there is judicial review once again.

Thus, there is a multilayered judicial accountability in the country.

Where the judicial members suffer from misbehavior or incapacity, Art.124 prescribes removal by Parliamentary address and Presidential order.

## The Judicial Standards and Accountability Bill, 2010

The Judicial Standards and Accountability Bill lays down enforceable standards of conduct for judges. It also requires judges to declare details of their and their family members' assets and liabilities. Importantly, it creates mechanisms to allow any person to complain against judges on grounds of misbehaviour or incapacity.

The Judicial Standards and Accountability Bill, 2010 requires judges to declare their assets, lays down judicial standards, and establishes processes for removal of judges of the Supreme Court and High Courts. Judges will be required to declare their assets and liabilities, and also that of their spouse and children.The Bill establishes the National Judicial Oversight Committee, the Complaints Scrutiny Panel and an investigation committee. Any person can make a complaint against a judge to the Oversight Committee on grounds of 'misbehaviour'.A motion for removal of a judge on grounds of misbehaviour can also be moved in Parliament. Such a motion will be referred for further inquiry to the Oversight Committee.Complaints and inquiries against judges will be confidential and frivolous complaints will be penalised.The Oversight Committee may issue advisories or warnings to judges, and also recommend their removal to the President.

## Judicial review, activism and overreach

Judicial review is the power of the judiciary to review the laws made and executed by the legislature and executive respectively, to make sure that they are in line with the Constitution and statute. If they are not, judiciary strikes them down partly or wholly. The power of judicial review is given to the judiciary by various provisions of the Constitution and law. For example, Art.13 says that no law is valid if violates Fundamental Rights. Art.131 says that if there is a

federal dispute between states and centre or between states, Supreme Court has exclusive power to settle it. Art.32 and 226 give power to the Supreme Court and High Courts , respectively , to restore Fundamental Rights(Supreme Court) and all rights(High Courts) in case they are violated. Art.142 etc.

Thus, the review jurisdiction comes from FRs and federalism. In the sphere of administrative actions, ordering it to act or not to act is within the power. Invalidations of illegal acts is also a part of it.

While above said review power is the conventional form, in the last more than 30 years, in India, there is a trend of judiciary enabling the masses to access the courts by unconventional means. It is often referred to as judicial activism.

Public interest litigation(PIL) was innovated by the apex court in late seventies to enable any one -- those unrelated to the case- to challenge government action or inaction in the higher judiciary .

The key to the historic game changing innovation was to not to insist on locus standi in matters of public interest- social justice issues like child labour, pollution etc. Unlike in private litigation, the person moving the petition need not be related to the case. It can be a member of civil society- an NGO, media, individual with social conscience etc. Thus, the courts had come to the rescue of the illiterate and the resourceless by rendering the rules flexible. It finds its support in Art.21 and Art39.

Judicial activism is understood as the judicial stance which activates the public and the government in support of the common man and good governance. It is the outcome of the PIL movement.

The PIL movement is a case of the judiciary being actively interested in taking justice to the door step of the marginalized.

The Supreme Court since late seventies has been expanding the scope of FRs – particularly Art.21(right to life and personal liberty).

Judicial overreach , on the other hand, is a case of judiciary encroaching into the territory of the other two organs- legislature and executive. Judicial collegiums appointing judges since 1993 is said to be an example of overreach. Continuing mandamus under which the apex court keeps the executive constantly accountable is another example.

Another case cited in the overreach debate is the following: The Supreme Court directed the permanent Speaker of the Jharkhand Legislative Assembly to conduct a composite floor test in the Assembly in 2005 to ascertain who enjoyed the majority — the Chief Minister, Shibu Soren, appointed by the Governor or the former Chief Minister, Arjun Munda.

It was seen as an interference in the legislative domain.

One more case relates to the Supreme Court admitting the petition challenging the expulsion of MPs from LS in the cash for query scam in 2005 and sending to the Speaker summons which was vigorously opposed by Somnath Chatterjee, Fali Nariman and other legal luminaries.

Two recent cases represent encroachment in the domain of the Executive- CVC case and the black money case.

In the CVC case(2011), the appointment of the CVC by the collegium headed by the PM was set aside in a PIL by a three judge bench headed by the CJI as it did not comply with the due process.

In the black money order given in 2011, the two judge bench set up a two retired judge Special Investigation Team to oversee the investigation into black money- which was criticized as the function of the Executive.

While activism is welcome as it helps the weak, keeps the Executive on its toes and makes it efficient and, by and large, sustains the faith of the people in the government, it is criticized for the following reasons

- Judiciary has no resources to monitor the tasks it assigns to the executive
- It upsets the delicate balance among the three organs of the government
- It disturbs the normal chain of command
- Judiciary making the law, implementing it and adjudicating it means concentration of power which is inimical to democratic rights
- Judiciary must turn its attention to solving its own problems like arrears.

Overreach is justified as a response to the underreach of the other two organs where it exists- as in black money case.



## **Public Interest Litigation**

Justice Krishna Iyer, in Mumbai Kamgar Sabha v Abdulbhai Faizullahbhai ( 1976) used the expression PIL for the first time. Justice Bhagavathi added momentum to PIL in the late seventies.

PIL must be differentiated from private litigation. In private litigation, courts are approached for the redressal of wrong or injustice of a private person ( or a company which is a legal person). He has to show that he has locus standi- that he is connected to the case and has the right to act or be heard. No one can approach the court without locus standi.

But in PIL, the victims of violation of constitution and law may be weak, vulnerable and illiterate. There are many cases where public interest is violated- for example, child labour, bonded labour; criminals in election process; environmental damage, pollution, children not being able to go to school, people in high places being corrupt and so on. In such a case involving public interest, Supreme Court since late 1970s, allowed the principle of locus standi to be set aside. Any socially spirited individual is allowed to bring it to the notice of the court. Procedural rigidities have not been insisted on. The reason is that the victims are weak and illiterate and cannot approach the courts themselves. The aim is to bring justice to the doorstep of the weak. It is called public interest litigation or social interest litigation.

PIL means a legal action initiated in a court of law for the enforcement of public interest in which the public as against private individuals have interest in the form of protection/restoration of their rights.

It is meant to catalyse progressive socio-economic change; make administration responsive; lead to better environmental practices ; make civil society active; and so on.

In the famous Asiad Labour case 1982, the apex court accepted a letter written by an NGO as writ petition and ruled in favor of workers. Newspaper reports can also be the basis for initiation of action. Affidavits have not been asked for.

There are many cases in which the SC and the HCs ruled for popular welfare tightening norms for the blood banks ; coming to the rescue of the under-trials who were imprisoned without trial for unduly long periods, setting guidelines for introduction of CNG based buses etc in Delhi; cleaning Yamuna etc; directing Delhi industrial units to take care of the child labourers; release of bonded labourers; CVC case and black money case along with the Salwa judum case where the under paid, under trained and under equipped Special Police Officers were declared unconstitutional by the apex court (2011)

Public Interest Litigation is the power given to the public by courts through judicial activism. It is a case of judicial activism as the judiciary activates the public to approach the courts in social interest.

PIL can be moved against the government for its inaction or wrong action or any company for flouting norms like environmental rules etc.

While the PIL instrument has great potential to help the ordinary people, there is concern about misuse of PIL

- it is being used for publicity; private interest is being projected as public interest
- individuals and organizations are trivializing and politicizing the PIL by questioning various government decisions without justification
- has led to loss of precious court time
- It has become a tool for obstruction, delay and sometimes, harassment.

CJI Kapadia in 2010 observed: "PIL petitioners have been moving the courts straightaway without even bringing the problem to the notice of the authorities. And the courts have been entertaining these PILs, virtually taking over the function of the authorities. We will not allow such bypassing of the authorities to take place any more."

The Supreme Court ruled that PIL was not a fundamental right implying that the courts had the right to reject appeals on the basis of public interest.

A two judge Bench of the apex court(2008) observed that frivolous PIL cases should be imposed a penalty of Rs.1 lakh. There is a wing in the apex court that screens out frivolous PILs. Some frivolous PILs are: India should be renamed Hindustan; the Arabian Sea should be called Sindhu Sagar; the national anthem Jana Gana Mana should be replaced by the one offered by the petitioner (and partly sung before the Chief Justice); scrap the Indo-US nuclear deal etc.

In April 2013, the High Court of Jharkhand at Ranchi ordered the State Respondents to submit a report and account for the high number of maternal deaths in the Public Interest Litigation (PIL). Jharkhand reports a state-wide maternal mortality rate (MMR) of 278 maternal deaths per 100,000 live births, while Godda District has a MMR of 823.5.

A plea has been filed in the Supreme Court seeking cancellation of generic drugmaker Ranbaxy's manufacturing licence on the grounds that it manipulated data and sold adulterated products in the US. On spot-fixing in IPL, PIL was filed in Supreme Court in June 2013.

Supreme Court in the PILs on FDI in MBR and nuclear power plant in Koodankulam in TN gave verdicts earlier in 2013.

#### **Judicial legislation and Policy making**

Judiciary: judicial legislation "...there is no liberty, if the judicial power be not separated from the legislative and executive."(Montesquieu in his book- Spirit of Laws)

According to French political philosopher Montesquieu , to safeguard democracy it is necessary that there is a separation of power between the three different organs of the State. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the pre-existing law .

Under the Indian Constitution , as in the case of all parliamentary democracies unlike the Presidential systems, the doctrine of separation of powers has not been rigidly stated as in the

constitution of the United States or Australia .

India has followed a liberal approach, resorting to the doctrine of checks and balances.

According to the Supreme Court in *Asif Hameed v. State of Jammu & Kashmir* :

"Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein."

The doctrine came under pressure in recent years when the apex court is said to have encroached into the domain of the legislature. Supreme Court in the case of *Vishakha v. State of Rajasthan* ruled that in the absence of legislative and executive action, the judiciary may step in to fill the gap. The court gave certain directives in the said case for guarding women employees in all organizations against sexual harassment.. It was clarified that the Court was acting under Article 32 of the Constitution and the directions "would be treated as the law declared by the Court under Article 141 of the Constitution."

Supreme Court gave the ADR case verdict in continuation of the same basis: since there is legislative vacuum, the apex court ordered the contestants in the MLA and NP elections to furnish details about their education,assets and liabilities and criminal antecedents, if any ( 2003).

Article 142 confers the court with the power to do complete justice and under this power, the court makes law.

Recently in 2009 a division bench of the Supreme Court in *University of Kerala v. Council, Principals', Colleges, Kerala and Ors* referred the following questions regarding judicial legislation to a constitution bench:

- Whether under our Constitution the judiciary can legislate, and if so, what is the permissible limit of judicial legislation.
- Will judicial legislation not violate the principle of separation of powers broadly envisaged by our Constitution;
- Whether the judiciary can legislate when in its opinion there is a pressing social problem of public interest or it can only make a recommendation to the legislature or concerned authority in this connection;

While Justice Katju voices his reservations against judicial legislation Justice Ganguly voices his praise for judicial intervention. But both the judges agree that confusion exists and there is a need to resolve it.

In 2009, the two-member bench of Justices Markandey Katju and Asok Kumar Ganguly raised a basic Constitutional issue of the judiciary's competence to make executive orders or frame laws while hearing a petition of some Jawaharlal Nehru University students. The petitioners

questioned a September 2006 apex court order for implementation of the J M Lyngdoh Committee recommendations on reforming students' union polls in colleges and universities. Honourable judges observed: "Today there are high prices and large-scale unemployment. These are pressing social needs. But can we pass orders on these to the government because we do not have the expertise though we are also affected by the price rise."

Earlier in 2012, Supreme Court directed the Centre to constitute a 'special committee' for inter-linking of rivers. A Bench headed by Chief Justice S.J. Kapadia directed the committee to take firm steps and fix a definite time frame for laying down the guidelines for completion of feasibility or other reports and to ensure completion of projects, so that the benefits could be obtained in a reasonable time and cost. The court directed the Central and State governments to participate in the programme and render all financial, administrative and executive help for completing these projects effectively.

It is a fact that the intervention of the judiciary in policy making has evoked mixed response. Its role in food policy, education policy, land acquisition policy and various aspects of environmental regulation has been praised. In electoral reforms, too (ADR case)

2003). Its empowerment of the civil society (PIL) is a paradigm shifting instance of enabling a dynamic policy milieu. At the same time, its order in the inter linking of rivers etc have been criticized.

Judiciary is very much conscious of its duty under the Constitution to enable good governance and establishment of welfare society (DPSPs).

#### **Judiciary and the Executive**

The conflict arises on the basis of

- a. Appointment- Art.124, CVC etc
- b. Policy- FDI-MBR
- c. Implementation of laws- in the normal sphere of judicial review

#### **Parliament and the Judiciary**

Indian Constitution provides for a parliamentary democracy and the essential features of federalism. Separation of powers among the three organs of the government is a basic feature. There is a clear and delicate balance of power between the three organs. In their respective jurisdiction, the three organs are independent and the Constitution bars any interference.

Articles 121 and 211 bar the legislature from discussing the conduct of any judge in discharge of his duties except when impeachment proceedings are being taken up, Articles 122 and 212 on the other hand preclude the courts from interfering in the internal proceedings of the legislature. Article 105 (2) and 194 (2) privileges protect the legislators from interference of the Courts with regards to freedom of speech and freedom to vote.

However, in recent years, the phenomenon of 'judicial encroachment' was seen to disturb the delicate balance and the judiciary was seen to have overstepped into the domain of the legislature.

For example, in 1998, when there was contention for the Chief Ministership of Uttar Pradesh - Jagadambika Pal and Kalyan Singh - , the apex court directed the Speaker to conduct the Composite Floor Test in the State Assembly. A similar situation in 2005 in the case of the Jharkhand Assembly, the apex court directed the Protem Speaker to conduct a Composite Floor Test to ascertain the majority in the House. The 2005 case of expulsion of MPs from Parliament is another such instance

#### Comments on judicial over-reach :

- In the Conference of Presiding Officers of Legislative Bodies convened by the Speaker of the Lok Sabha, Somnath Chatterjee in 2005, the Presiding Officers expressed concern over court orders that disturbed "the delicate balance of power" between the legislature and the judiciary. They drew attention to the gradual ascendancy of the judiciary at the expense the other two other branches.
- Former Attorney General of India Soli Sorabjee said "judges must not instill in themselves that the judiciary can solve all problems".
- In the conference of Chief Ministers and Chief Justices held in New Delhi recently the Prime Minister cautioned the Courts not to cross their limits.



# **Union-State Relations and Federal System**

On the basis of distribution of power between centre and states, Governments can be classified into three types

- Unitary
- Federation and
- Confederation

## **Unitary system**

In a unitary government, the central government possesses preponderant authority and decision-making power. Provincial governments are the administrative arms of the central government. They do not have any constitutionally conferred powers. The powers enjoyed by them are 'devolved' to them by the unitary government at its will and these powers are subject to withdrawal- partly or wholly. In fact, the provinces can be abolished altogether. Examples, Britain, France and China.

## **Federations**

Federation is a system of constitutional governance brought about by the voluntary agreement among states that join together into a new federal union in which power is divided between the Union Government at the centre(federal government) and states(provinces) . A written Constitution divides powers. Constitution is rigid and can be amended only when the centre and states accept the amendment. Thus, there is a dual government with their respective jurisdictions . In case of a conflict, there is an independent judiciary to resolve the differences. Examples, India, USA, Canada, Australia, Belgium and Switzerland. Each level of government has its own resources as conferred by the Constitution.

Federal system is adopted so that states and their diversity can flourish with autonomy and their security is assured by the central government.

## **Confederations**

They are nations where the provinces have maximum autonomy so much so that they can become members of international organizations, have flag and may even secede. For instance, the former USSR and Yugoslavia that broke up in the 1990's.

### **'Coming together' and 'Holding together' Federations**

When independent states 'come together' voluntarily to form a larger nation where they retain their cultural identity and Constitutional powers of legislation and administration while having their security ensured by a central government, it is called 'coming together' type of federation. For example, the USA. In this case, constituent units tend to enjoy more powers than the federal government.

When a large country decides to establish provincial governments with which it is willing to share Constitutional powers in a written manner so that the country can 'hold together', it is called 'holding together' federation. For example, India. In this case, states are not given co-equal powers on par with the federal government.

### **Motives of federating units**

There is a range of expectations on the part of the federating units to come together.

The political motives are

- security from external and internal threats
- additional central assistance when required
- political stability while keeping a separate cultural and ethnic identity.

In the economic sphere, the federating state can expect

- access to a larger national market
- financial assistance from federal government
- transfer of resources from other states in case of underdeveloped states etc

### **The case of India**

In India, 'holding together' federation formed differently from the American experience of coming together. 'Holding together' federations as in India is a framework that is adopted for the sake of unity of the country and national integration. It is a response to a specific historic situation: Constituent Assembly prescribed federalist model so that the country can be 'held together' in the face of the challenges in the form of centrifugal forces; rapid and balanced development; reorganization of states etc. Therefore, compared to 'coming together' federation like the USA, Indian federation does not confer high level autonomy on the states.

States did not bargain and create a federation as in the USA. There were only three states at the time of Independence and the others were created according to the Constitutional provisions.

### **Federal System in India**

India is essentially a federation though in our case the provinces did not join together voluntarily. Federalism is a prescription for our multi-diverse country to pursue pluralist polity.

While the core of federalism is seen in the Indian polity, there are some features that are unfederal, which are seen to be necessary for national security, integration and development, particularly in the light of the experience of partition. They are

- States can be created and abolished without their consent. States are not indestructible

- Residuary powers are with the Union parliament
- There is no dual citizenship of province(state) and the country unlike in the USA
- There is a unified system of audit which is under Union control
- Unified and hierarchical judiciary
- Elections are held for assemblies under the authority of the Election Commission that is appointed by the Union government
- The role of Governor is pro-Centre
- President's rule is a threat to the existence of democratically elected state governments.

However, all the basic features of federalism are found in the Indian Constitution. Since there are strong unitary features as well, it is called quasi-federation. It must be clarified that the fact that in Art. I of the Constitution India is described as a 'Union of States' only stresses the unity among the provinces and not have any unitary implications for our polity. Dr. Ambedkar explained that the expression "India is a union of states" in Art. I is chosen to mean that we are a union at the time of Independence and that it is not a result of the voluntary coming together of the provinces.

No particular significance need be attached to the word 'Union', since it is used in the Preamble to the Constitution of the United States of America, which is a federation. During the Constituent Assembly discussions, B.R. Ambedkar mentioned the above examples and stated that 'the description of India as a Union of States, though its Constitution is federal, does no violence to usage'.

There is no model federal State. One can only determine whether a constitution is basically federal or unitary. The Indian Constitution is basically federal, but with strong unitary features. Therefore it is described as 'quasi-federal' - 'unitary with subsidiary federal features', 'a federation with a strong centralizing tendency', etc.

The Constitution framers opted for a mix of strong Central control with adequate provincial autonomy. In their concern for the unity and integrity of the country in the face of partition of the country, a strong centre was preferred. Strong centre is found to be necessary to coordinate policy and action among the federal units. At the same time, there is enough scope for autonomy of States in the Indian Constitution

### **Union-State relations in India: Constitutional Framework .**

#### **Legislative Sphere**

The framework for division of legislative powers in the Indian Constitution is contained in Chapter I in Part XI. It comprises 11 articles- 245 to 255. It should be read with Seventh Schedule. Three fold distribution of the subjects of legislative power is adopted- Union List(List I); State List(List II); and Concurrent List(List III).

#### **Union list**

Union list consists of 99 items on which the parliament has exclusive power to legislate with including: defence, armed forces, arms and ammunition, atomic energy, foreign affairs, war and peace, citizenship, extradition, railways, shipping and navigation, airways, posts and telegraphs,

telephones, wireless and broadcasting, currency, foreign trade, inter-state trade and commerce, banking, insurance, control of industries, regulation and development of mines, mineral and oil resources, elections, audit of Government accounts, constitution and organisation of the Supreme Court, High Courts and union public service commission, income tax, custom duties and export duties, duties of excise, corporation tax, taxes on capital value of assets, estate duty, terminal taxes.

### **State list**

The state list consists of 61 items and individual states have exclusive authority to legislate on items included in this list: Public order, police, administration of justice, prisons, local government, public health and sanitation, agriculture, animal husbandry, water supplies and irrigation, land rights, forests, fisheries, money lending, state public services and state Public Service Commission, land revenue, taxes on agricultural income, taxes on lands on buildings, estate duty, taxes on electricity, taxes on vehicles, taxes on luxuries.

### **Concurrent list**

Concurrent list consists of 52 items. Uniformity is desirable but not essential on items in this list: Marriage and divorce, transfer of property other than agricultural land, education, contracts, bankruptcy and insolvency, trustees and trusts, civil procedure, contempt of court, adulteration of foodstuffs, drugs and poisons, economic and social planning, trade unions, labour welfare, electricity, newspapers, books and printing press, stamp duties.

Subjects of common importance are in the Concurrent List, matters that can be legislated upon by both the union and state legislatures - socio economic planning, education, forests, protection of wild animals and birds; ports other than major ports; marriage and divorce; adoption; price control; criminal law; preventive detention; labour etc.

Matters that do not figure in any of the three Lists are the residuary items and are given to the Union Parliament. Which item is residuary is determined by the Supreme Court. (Art.248, entry 97 in the Union List), including items related to residuary matters in taxation. For example, service tax was in the residuary category till the 88th amendment act made it explicit.

Parliament has the exclusive jurisdiction over List I items. State legislatures have exclusive jurisdiction over List II items except under five circumstances when the Union parliament is empowered to legislate on them. Regarding the Concurrent List, the following are the relevant facts

- Union and State legislatures can legislate on these items.
- Rule of federal supremacy operates in this List- if there is a clash between the Union and State laws, the Union law prevails. However, in the following case, the State law is valid even if there is a clash: if the State law is reserved for the assent of the President by the Governor and such assent is already received. But at the same time, the Parliament can

legislate to overrule the State law subsequently. Thus, the Union power is seen in case of conflict or inconsistency when the rule of repugnancy, as contained in article 254, comes into play.

Art.245 says that parliament can legislate for the whole nation while the State Legislatures can legislate for the whole or part of the State.

### Rationale for the Concurrent List

Concurrent List items fall in the common territory. Both Centre and states have a common interest in them. On these items , depending on the circumstances, Centre or the States or both can make the relevant law. Uniformity of law throughout the country is necessary in national interest and so the Parliament legislates. Being restricted to its own territory, State Legislature can not assure such uniformity. On the other hand, problems vary from state to state and may require diverse remedies suited to the peculiarities of the state. For example, education. In such situations , State laws are more relevant though the centre can give the broad policy framework. Therefore, there is a need for the Concurrent List to enable the best policy response under all circumstances.

There are three reasons for the Concurrent List

- \* To secure uniformity in the main principles of law
- \* To guide and encourage local efforts
- \* For flexibility in public policy

It can be explained with the help of education as a subject of legislation.

Education, which was originally distributed in its various aspects into all the three Lists, was subsequently transferred to the Concurrent List by means of 42<sup>nd</sup> Constitution amendment in 1976. It enables the Union Government to accept a larger responsibility to reinforce the national and integrative character of education, to maintain quality and standards (including those of the teaching profession at all levels) etc.

NCRWC report(2002) expresses the need and significance of the Concurrent List in the following words: "The framers of the Constitution recognised that there was a category of subjects of common interest which could not be allocated exclusively either to the States or the Union. Nonetheless, a broad uniformity of approach in legislative policy was essential to combine specific requirements of different States with the articulation of a common national policy objective. Conceived thus, harmonious operation of the Concurrent List could well be considered to be creative federalism at its best."

Government accepted Sarkaria Commission's recommendation that laws in respect of subjects in the Concurrent List should be made, as a matter of convention, only after active consultation with the State governments except in cases of extreme urgency. This is because laws enacted by the Union, particularly those relating to matters in the Concurrent List, are enforced through the machinery of the States and consultation is essential to secure uniformity.

### **Recent developments 2013**

Right to Free and Compulsory Education Act was passed by Parliament in 2009. The implementation of this Act would require large capital as well as revenue outlays. The Act has a provision for sharing of costs between the centre and the states.

There is another challenge. Land Acquisition and Rehabilitation and Resettlement Bill has been introduced in Parliament. Land is a State List item while land acquisition is a concurrent list subject. States may also make laws on this topic as long as those laws do not contradict the central enactment. This leaves open the question of the level of detail to be included in the central law. A higher degree of detail ensures uniformity across the country and provides the same level of protection and rights to land owners and displaced persons. However, it reduces the flexibility for states to tailor the law for their local (and possibly very different) conditions. For example, the Bill lists 25 facilities that need to be provided in any area being developed for rehabilitation and resettlement. If people in some states prefer a higher level of an item being guaranteed and are willing to take a lower level of another item in return, such a compromise would not be possible under the current Bill. Such a state Bill, however, can be reserved for the President by the Governor under Art.200 and the President may assent to it.

Food is in the Concurrent List. The National Food Security Bill also raises these two issues. It requires states to implement a number of initiatives, and to provide for the funds for the purpose. It also prescribes a uniform system for implementation across states.

### **Singur 2013**

Within a month of Ms. Banerjee's government coming to power, the Singur Land Rehabilitation and Development Act, 2011 was passed to enable the return of a portion of the land acquired for the setting up of the Tata Motors small car factory to "unwilling farmers." A week later, Tata Motors moved the Calcutta High Court against the Act challenging its constitutional validity. In 2012, a Division Bench held the Act to be "unconstitutional and void." The reasons are the following:

- a. Land acquisition being in the concurrent list, the state law has to be in line with the central law. In the central law- Land Acquisition Act, 1894- there is no provision for return of the land.
- b. In such a case of friction with central law, the Governor should have reserved the state law for the Presidential assent and if the assent is given, it would be valid, repugnance notwithstanding.
- c. The state government did not do it and so the Act is invalid.

The State government then went to the apex court where the case is pending.

Parliament can make laws on State List items under certain special circumstances:

### **Exceptions**

Though states have exclusive powers to legislate with regards to items on the states list, articles 249, 250, 252, and 253 state situations in which the federal government can legislate on these

items.Under the following five circumstances, Parliament can legislate on an item in the State List

- when national emergency is in force. The law made by the Parliament during emergency can last a maximum of 6 months after the emergency has been ended. It needs to be emphasized that when there is national emergency(Art.352), State Legislative Assembly continues to exist but the Constitution gives power to parliament as well to legislate on an item in the State List unlike when the President's rule is proclaimed when the State Legislative Assembly is either suspended(suspended animation) or dissolved and the Parliament can make laws for the State concerned
- President's rule when the Assembly does not operate as mentioned above and so the Parliament makes laws for the state. Such laws may be repealed, retained or amended by the Assembly after a new democratic government resumes in the state.
- Art.249 says that Rajya Sabha can empower the Parliament to legislate on an item in the State List in national interest by passing the relevant resolution by two thirds majority of the members present and voting. In other words, Rajya Sabha authorizes Parliament to legislate on a subject in the State List. The resolution has a life of one year but can be extended by year at a time. The law made by the parliament can be in force for a maximum of 6 months after the resolution has expired.Such a law can be made for the whole or part of the country. The need for empowering the Parliament in such a manner as shown above is because routing it through the Rajya Sabha makes it federal
- When two or more States request the parliament to do so by passing a resolution to that effect. For example, Wild Life (Protection) Act 1972; Water (Prevention and Control of Pollution) Act; Urban Land (Ceiling and Regulation) Act; Transplantation of Human Organs Act 1994 and its amendment in 2011; Clinical Establishments (Registration and Regulation) Act, 2010.Other states may later resolve to come under such a law. (Art.252)
- In the implementation of international treaties and agreements, Parliament can legislate on a State List item. For example, WTO. There is no Constitutional validity to the States challenging the Central policies made under WTO agreements.(Art.253). Lokpal and Lokayuktas Bill 2011 has provisions relating to state government officials. Two justifications were made for the inclusion of these provisions: first that the law was on criminal justice which is a concurrent list item, and second that India's obligations under the UN Convention Against Corruption meant that Parliament had jurisdiction to enact such a law. The latter falls under Art.253.

### **Residuary Power and Taxation**

All residuary powers are with the Union Parliament. Service taxes are still imposed and collected by the Union government by virtue of this power even though the 88<sup>th</sup> Amendment Act was passed in 2002 because it has not been notified. States demand that the power be

transferred to the Concurrent List. However, Sarkaria Commission on Centre-State relations, which submitted its report in 1987, wanted the residuary powers in taxation to be retained with the centre and not transferred to the States, even though it endorsed the Supreme Court's interpretation that these powers cannot be so expansively interpreted as to dilute the power of the State legislatures.

The Sarkaria Commission reasoned that the Constitution-makers did not include any entry relating to taxation in the Concurrent List so as to avoid Union-State frictions, double taxation and frustrating litigation. The Commission said that the power to tax might be used not only to raise resources but also to regulate economic activity and giving the power to states may prejudice national interest. As mentioned above, states demand that the residuary powers, including those of taxation, be vested in the States. The States argue that they need taxation powers in order to mobilise resources to meet their developmental needs.

### **Centre's control over state laws**

Centre's control over State legislation is covered by the following

- Governor can reserve a Bill for President's consent over which the President has absolute veto (Art 200 and 201)
- President's prior permission is required for the introduction of state Bill restricting freedom of trade and commerce
- During financial emergency( Art.360), President may direct the State government to send for his consideration Money Bills and related Bills
- During Emergency (Art.352), Parliament can legislate on any State subject
- During National Emergency, the union state financial relations as they are contained in Art.268-279 can be suspended in favour of the Centre.
- The Concurrent List items are subject to the doctrine of federal supremacy. That is, in case of repugnancy between the central and state laws, federal law prevails.

### **Sports, betting and Centre's residuary powers**

The IPL spot fixing scam also brought to light the question of regulating sports and dishonest practices in sports. One view is that there can be no national legislation on this because sports under entry 33 of list two is a state subject. Betting and gambling under entry 35 of list two is also a state subject. But if the IPL scam is neither betting nor gambling and is an unfair practice that changes the outcome of the game, centre can legislate in its residuary capacity.

The AG is of the opinion match-fixing, spot-fixing do not come within the purview of the term betting and gambling as defined in the state list.

## Fiscal Federal Relations

Art.268 to 293 in Part XII deal with the financial relations. The Constitution contains fixed as well as dynamic parts for ensuring adequate finances to the States and the Union. The static part relates to some sources of finance being entirely given to the states- taxes and duties specified as such in the Constitution like sales tax.

The dynamic portion consists of making revenues from central taxes and duties divisible between centre and the states- respective shares of the divisible pool being determined every five years by a Finance Commission(Art.282)

All the taxes and duties can be grouped under the following broad categories:

- Taxes and duties imposed, collected and enjoyed by the states. For example, sales tax
- Duties levied by the Union but collected and appropriated by the States(Art.268) Stamp duties on bills of exchange, cheques, promissory notes etc
- Taxes levied and collected by the Union but assigned to the States(Art.269)- central sales tax on goods produced in one state where they are bought so as to sell them in another state. The latter state gains in the form of sales tax while the former (producing state) gets the CST. However, CST is being phased out as it has to be made a part of the GST, which is due.
- Taxes levied and collected by the Union but shared with the states on the recommendations of the Finance Commission(Art.270)- all central taxes and duties except cess and surcharges(Art.271)

Following are the important Articles in the fiscal federal relations:

268. Taxes and duties levied by the Union but collected and appropriated by the States.  
Ex: medicinal preparation with alcohol in them
269. Taxes levied and collected by the Union but assigned to the States- CST as mentioned above
270. Taxes levied and collected by the Union and distributed between the Union and the States.  
Income tax, corporation tax etc ( see ahead)
271. Surcharge on certain duties and taxes for purposes of the Union. Surcharges are not shareable

Art.274: Prior permission of President for the introduction of certain Bills. Art.274  
No Bill or amendment which imposes or varies any tax or duty in which States are interested, or

varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian income-tax, or affects the principles on which moneys are or may be distributable to States, shall be introduced or moved in either House of Parliament except on the recommendation of the President. This is to protect the interests of the States.

275. Grants from the Union to certain States. Parliament may provide grants-in-aid of the revenues of some States if they are in need of assistance, and different sums may be fixed for different States. Such sums are charged on the CFI.

276. Taxes on professions, trades, callings and employments. It is a tax that the States impose, collect and appropriate but the annual limit is set by the Parliament. Presently the limit is Rs.2,500 per annum. There is no **profession tax in Union Territories**. The power of the Legislature of a State to make laws with respect to taxes on professions, trades, callings and employments shall not be seen as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

279. Calculation of "net proceeds", etc. (from the gross collections of taxes, when the amount spent on collection is deducted, net amount is arrived at: gross minus collection expenditure= net).

280. Finance Commission.

#### **Finance Commission: Constitutional provisions**

##### **Article 280**

The President sets up every five years, or at such earlier time as the President considers necessary, a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President. Duties of the FC involve making recommendations to the President as to

- the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them and the allocation between the States of the respective shares of such proceeds
- the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India;
- the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Panchayats in the State on the basis of the recommendations made by the Finance Commission of the State
- the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State on the basis of the recommendations made by the Finance Commission of the State

- any other matter referred to the Commission by the President in the interests of sound finance.

The recommendations are presented to the President in the FC report and the President causes the same to be tabled in the Parliament. They are not binding but are conventionally accepted by the Government. They fall into three categories

- Implemented by an Order of the President- relating to Art.270( income tax etc that is divisible) and Art.275( grants in aid)
- Those to be implemented by executive orders(relief grants etc)
- Those to be examined further.

Art.280 says that the Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected. Parliament made the Finance Commission (Miscellaneous Provisions) Act, 1951 in pursuit of Art.280. The Finance Commission is headed by one who has wide experience in public affairs. There are four other members including a High Court judge- one who is qualified to be a judge or who is or retired as a judge. Other three are distinguished with special knowledge in economics and two members with experience and special knowledge in government finances and accounts respectively.

#### **Art. 270**

Taxes levied and collected by the Union and distributed between the Union and the States.

There are many taxes and duties that are levied and collected by the Union and are shared with the states. In fact, there are no taxes and duties that go only to the centre except the cesses and surcharge on taxes. Surcharges are temporary and additional taxes on taxes. The difference between cess and surcharge is that the purpose for the levy of the former is made explicit while the latter is general purpose additional levy. Surcharges and cesses are not shareable as they are temporary( Art.271). Originally, income tax other than agricultural income tax and Union Excise duties were in the divisible pool . But since the Tenth Finance Commission recommendations ( 80th Constitution Amendment Act 2000) came into force , all taxes and duties that were exclusive to the Union Government are also made divisible . For example, customs duties, corporate tax , service tax etc. Only surcharges go to the Union exclusively.

#### **Tenth Finance Commission(TFC) and Alternative Scheme of Devolution(ASD)**

The Constitution (Eightieth Amendment) Act, 2000, which seeks to provide an alternative scheme for sharing taxes between the Union and the States, is based on the recommendations of the Tenth Finance Commission.

Constitution was amended to give it legal effect. Under the provisions of the Act, amendments have been made in Article. 270 .ASD essentially means making all Union taxes and duties shareable with States unlike earlier when the Union had some taxes and duties exclusively to it.

The advantages of the system are

- States will be able to share the buoyancy of Central taxes
- The Central Government can pursue tax reforms and expect states to cooperate
- Economic reforms in general will have wider consensus
- Creates conditions for Cooperative federalism in other spheres

### **Background to ASD**

The Constitution of India specified the taxes whose revenues were to be shared between the Union and the state governments, but did not mention the formula for such division, leaving it to the Finance Commission. Over the years, it was observed that the Union government concentrated in improving the elasticity of non-shareable taxes such as corporate income tax and Union Customs duty, and similar effort was not visible in shareable taxes like personal income tax and Union excise duty. Regional parties became a force to reckon with since 1967 and particularly since the eighties. They demanded that more fiscal resources be made available to them . With Coalition government becoming the norm and the regional parties being influential players, center yielded.

Need for rapid tax reforms to make the country a common market and bring in foreign investment is another reason. Economic reforms and political developments thus made it necessary to move towards ASD.

### **Short Notes on Art.275:Grants from the Union to certain States.**

After the devolution of the taxes and duties from the divisible pool , if some States still face revenue deficits, the Finance Commission recommends 'gap-filling grants' to such states. They are meant to even out the 'horizontal imbalances' among the states to an extent. They are the grants in aid of the revenues of the States. Not all states get them . Nor is the amount same to all states.Generally, gap-filling grants are interpreted to mean only revenue grants and not for plan purposes.

Dr.Kelkar says: Art. 275 which enjoins the Commission to give State specific grants to ameliorate particular problems faced by individual States. It is through these grants that the Finance Commission meets the requirements of what we call 'special category' States, which are essentially micro States which have geographically difficult terrain such as mountainous regions and which are relatively more sparsely populated. The share of these Art 275 grants in the total Finance Commission's transfers has been between 15-18 per cent.

## **Central fiscal transfers to the states**

They are of the following types:

- The Central tax devolution through the FC which constitutes about one-third of the total tax revenues of the states.
- A second channel of resource flow from the Centre to the states is central assistance for state plans. State plans are financed partially by states' own resources and the balance by central plan assistance. Plan assistance is by way of grants and loans. In the case of fiscally weak states (called Special Category States) the grant component is 90 percent and loan is 10%. These states are the hill, border and weak-infrastructure states and can not repay the loan. For other states, it is 70% loan and 30% grant. The distribution of Plan assistance to the states is governed by the "Gadgil formula", so called after the Deputy Chairman of the Planning Commission which prepared the Fourth Five Year Plan (1969-74). National development council (NDC) approved the formula in 1991 and it is called the Gadgil-Mukherjee formula since then as Shri.Pranab Mukherjee was the Deputy Chairman of the PC then.  
1. Eleven Special Category states - Arunachal Pradesh, Assam, Himachal Pradesh, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Uttarakhand are given preference. Their needs should first be met out of the total pool of Central assistance.  
2. The remaining balance of the Central assistance should be distributed among the remaining States on the basis of the following criteria: (i) 60 per cent on the basis of population; (ii) 25% on per capita income (iii) 7.5% for performance in Tax Effort, Fiscal Management and Progress in respect of National objectives and (iv) 7.5% on the basis of special problems like: all of them have the common characteristics of hilly and difficult terrain and very low level of infrastructural development. Most of them have significant tribal population. Almost all of them are border States with considerable international borders.
- Central ministries provide finances for some central schemes in the areas of irrigation, power, health etc
- Miscellaneous transfers like the transfers from the National Investment Fund(NIF)

## **Finance Commission and Fiscal federalism**

FC has a crucial role in the following areas

- Cooperative financial relations between centre and states
- Level the inequality among the states- bridge horizontal imbalances by giving more to the backward states( read ahead) as a part of the mandate to create equity

- Bridge the vertical imbalances between the centre and the states by recommending adequate devolution to the states
- Promote state fiscal autonomy and efficiency
- Various reforms, on being referred by the President of India, for infrastructure and good governance.

The above role can be comprehended by looking into the recommendations of the 13<sup>th</sup> FC(2010-15) and the basis of the recommendations.

### **Federalism and Fiscal and Economic Imbalances**

Vertical and horizontal imbalances are common features of most federations and India is no exception to this. The Constitution assigned taxes with a nation-wide base to the Union to make the country one common economic space unhindered by internal barriers to the extent possible. States being closer to people and more sensitive to the local needs, have been assigned functional responsibilities involving expenditure disproportionate to their assigned sources of revenue resulting in vertical imbalances. Horizontal imbalances across States are on account of factors, which include historical backgrounds, differential endowment of resources, and capacity to raise resources. Unlike in most other federations, differences in the developmental levels in Indian States are very sharp. In an explicit recognition of vertical and horizontal imbalances, the Indian Constitution embodies the following enabling and mandatory provisions to address them through the transfer of resources from the Centre to the States.

1. Levy of duties by the Centre but collected and retained by the States (Article 268)
2. Taxes and duties levied and collected by the Centre but assigned in whole to the States (Article 269).
3. Sharing of the proceeds of all Union taxes between the Centre and the States under Article

270. (Effective from April 1, 1996, following the eightieth amendment to the Constitution replacing the earlier provisions relating to mandatory sharing of income tax under Article 270 and permissive sharing of

Union excise duties under Article 272).

4. Statutory grants-in-aid of the revenues of States (Article 275)
5. Grants for any public purpose (Article 282).
6. Loans for any public purpose (Article 293).

Vertical imbalances are taken care of by the FC with tax devolution. It was further consolidated with the ASD since 2000 when all central taxes and duties became shareable.

Horizontal imbalances are rectified by tax devolution and the criteria adopted for the distribution among the states and UTs( each UT counts for a State for the FC and each UT gets its own funds); and the grants under Art.275.

In addition to provisions enabling transfer of resources from the Centre to the States, a distinguishing feature of the Indian Constitution is that it provides for an institutional mechanism to facilitate such transfers. The institution assigned with such a task under Article 280 of the Constitution is the Finance Commission. There is Planning Commission working on the guidelines of the NDC. Inter State Council under Art.263 can advise on such matters.

#### TFC

The five member team, headed by economist Dr. Vijay L Kelkar submitted report of the Thirteenth Finance Commission to the Government and was tabled in the Parliament during the Budget session 2010. It focused on three key objectives of inclusive and 'green' growth, macro economic stability and fiscal consolidation for both the Centre and the States particularly in view of the global recession since 2009 when the economy had to undertake fiscal expansion in response to domestic economic slowdown.

On sharing of Union taxes, the Commission recommended the share of States in the net proceeds of Union Taxes be fixed at 32 per cent, against the 12th FC prescribed transfer of 30.5 per cent, an increase of 1.5 per cent. It has also said that the total transfers to the States, inclusive of grants, be subjected to an indicative ceiling of 39.5 per cent of the gross tax revenues of the Centre.

The Commission has recommended a grant of Rs 51,800 crore for eight States that have a revenue deficit chronically(Art.275).

With elementary education at State level remaining a problem area, the Commission has accorded a grant, based on the Sarva Shiksha Abhiyan norms, of Rs 24,068 crore.

In a bid to de-carbonize development in line with growing interests in promoting green growth, the Commission favoured a grant of Rs 15,000 crore, each Rs 5000 crore for forest grant, promotion of renewable energy and for water sector. As there remains a gap between outlay and outcome due to deficiency in delivery mechanism or designing of proper schemes to help the needy, the Commission recommended six grants for improving outcomes, amounting to Rs 14,446 crore over the award period. An incentive grant for reduction in infant mortality of Rs 5000 crore is to be released to States starting 2012-13 depending on the reduction in infant mortality rate (IMR) achieved by the States with reference to the baseline level of 2009-10 figures. Grant of Rs 5000 crore for improved delivery of justice has been proposed for Lok Adalats and Legal Aid, Alternate Dispute Resolution Centre, Heritage Court Buildings, State Judicial Academy and training of judicial officers and public prosecutors. With legal cost becoming dearer and lakhs of poor people denied access to justice, this move would help address the aberrations and anomalies in the system. Other components under this include, Rs 2989.10 crore for the Unique Identification (UID) programme based on the number of people covered under the UID database, two grants of Rs 616 crore each for District Innovation Funds and improving statistical systems at district and State levels and a grant of Rs 225 crore for setting up database of employees and pensioners. There are also grants for the requirement of roads in a State amounting to Rs 19930 crore for four years of the award period beginning 2011-12. Finally, under grants, the Commission has provided Rs 27,945 crore for various State-specific needs of the States.

The above grants were recommended by the 13<sup>th</sup> FC as their terms of reference include the need to improve the quality of public expenditure to obtain better outputs and outcomes and the need to manage ecology, environment and climate change consistent with sustainable development. They are connected to fiscal management as they have growth implications and thus fiscal consequences.

On the Goods and Services Tax (GST), the Commission has put in place a model GST structure that includes features such as single rate of 12 per cent of goods and service tax, zero rating of exports, inclusion of various indirect taxes at the Central and State level in GST ambit, major rationalization of the exemption structure. It has recommended a grant of Rs 50,000 crore for implementation as per the recommended model.

On fiscal consolidation, the Commission has drawn a roadmap for fiscal deficit reduction and spelt out a combined debt target of 68 per cent of GDP, against 75 per cent in 2009-10. It has stressed the need for achieving and maintaining revenue account in balance and containing the fiscal deficit to 3 per cent of Gross State Domestic Product (GSDP) for the respective States by 2014-15.

An important recommendation that might satisfy the interests of States relates to its proposal allocating revenues arising from the 'fiscal commons' such as 'profit petroleum, profit gas and revenue shares from spectrum'. Since these are national resources and must therefore be the collective disposal of the Central and all States, there is a case to view such non-tax revenues that were predominantly in the domain of the Centre "as being sharable between the Centre and the States collectively". In order to execute this proposal it needs to be included as a part of the divisible pool which entails Constitutional amendment.

At a time when coalition governance has become a rule rather than an exception in national politics, the whole recommendations of the 13th Finance Commission, most of which have been accepted by the Government, would go a long way in reducing the federal trust deficit and bring about good governance and national welfare.

Any FC adopts certain criteria with respective weights for giving to the states and the UTs their individual share from the total quantum that they are accorded from the net proceeds. For example, the TFC under Vijay Kelkar recommended for the states and UTs 32% of the total. The issue is which state gets how much. That is decided by the criteria and weights. Fiscal capacity distance is the criterion that replaces the earlier criterion of per capita income- the state that has the least per capita income is given the maximum share. Therefore, it is called the 'inverse of per capita' - the lower the per capita the more the share. Fiscal discipline measures the improvement in the financial performance of each State during a certain period over a selected base year in terms of the ratio of its own revenue receipts to total revenue expenditure- essentially how effective is its tax effort; how much is its borrowing and how wasteful or otherwise its expenditures.

### Criteria and Weights adopted by the TFC

- Population in 1971- 25.0%
- Area -10.0%
- Fiscal Capacity Distance -47.5%
- Fiscal Discipline- 17.5%

### FC and Performing states

FC has so far taken into consideration regional equality and the need to bridge it , as one of the objectives of the recommendations. The criteria of per capita income and Grants in aid(Art.275) are used to assist the economically backward states. Developed states have made the following three arguments against it

- It punishes performance and laggards are helped at their expense
- The moral hazard is that it incentivizes backwardness
- Such FC recommendations have not helped and inequalities and imbalances persist and have become worse.

The answer of the FC is: Indian federation can be stable and be sustained only if all regions and states enjoy an element of regional balance for which FC has an obligation. Secondly, if regional imbalances persist, it is because of other structural factors like not attracting investment etc. It must also be recognized that the leading states develop when the savings of the laggards are used for the trade and industrial development of the leaders. Also, cheap labour from all over the country fuels development of the so called performing states.

Finally, the criterion of fiscal discipline encourages better performance and has no bias.

### FC and Planning Commission

#### Green Federalism

The Constitution of India has generally remained silent on the environmental issues in Indian federal system. In the original Seventh Schedule of the Constitution, all the natural resources - land, water, forests and minerals - were assigned to the States, while the central government was given the responsibilities to regulate the development of mines and mineral resources.

Constitution made separate arrangements for resolving inter-State disputes on sharing of river water among the States. The 42nd Constitution (Amendment) Act 1976 amended the Seventh Schedule to include 'Forests' and 'protection of wild animals and birds' in the Concurrent List, thereby enabling a formal role of the central government on the subject.

The Ministry of Environment and Forests came into existence in 1980 and starting with the Forest Conservation Act, 1980, several measures have since been initiated by the Government to protect and manage the environment. These include the Environmental (Protection) Act, 1986; Air (Prevention and Control of Pollution) Act, 1981; Water (Prevention and Control) Act, 1974; as well as certain rules viz. Hazardous Wastes (Management and Handling) Amendment Rules, 2003 and Ozone Depleting Substances (Regulation and Control) Rules, 2000. These powers were exercised by the Parliament under Art.253.

It is felt that the Central government should have more definite and coordinating role on environmental issues. The Commission on Centre-State Relations headed by Punchi has recommended that the Constitution needs to be amended again to provide a specific Entry in List I - Union List of the Seventh Schedule empowering the Union on matters concerning 'Environment, Ecology and Climate Change'.

Apart from the jurisdictional issues there are larger issues of governance, research, resources and capacity building to deal with the complex issues of environment management, which cannot be handled by just one layer of government, but requires sustained efforts of all the three layers of governance - national, state and local - and involvement of all relevant stakeholders in the process. 'Green Federalism' refers to the holistic management of all these issues of environmental matters. Federal countries around the world are facing new challenges and opportunities to deal with the issues of environment and therefore sharing of knowledge and experiences among the federal countries shall be mutually useful and beneficial.

#### 14<sup>th</sup> FC

Union Government in January 2013 constituted the 14th Finance Commission under former Reserve Bank of India (RBI) governor Yaga Venugopal Reddy. The commission under YV Reddy is going to primarily review finances of the governments keeping in mind the fiscal consolidation road map that was laid out by his predecessor Vijay Kelkar, the head of 13th finance Commission. The Commission would have three full-time members-

- Sushma Nath
- M. Govind Rao
- Sudipto Mundle

It has Prof. Abhijit Sen, the Member of Planning Commission as its part-time member. Also, Ajay Narayan Jha had been appointed Secretary to the Commission. The commission has to give its report by October 2014 and the recommendations will come into effect from April, 2015 for a five-year period.

Terms of reference of the 14th Finance Commission-The FFC is asked to suggest changes to the Fiscal Responsibility and Budget Management (FRBM) Act, assess the impact of the proposed goods and services tax (GST) on government finances and also the mechanism to compensate states for revenue losses, if any. The FFC has also been asked to look at the need to insulate the pricing of public utility services - drinking water, irrigation, power and public transport from policy fluctuations through statutory provisions. FFC has also been asked to look at the level of subsidies needed for inclusive growth, and equitable sharing of subsidies between the Centre and the states.

## Fiscal Federalism

The fiscal relations between the Centre and the States have been defined under the Constitutional provisions of distribution of revenues between the Union and the States.

Under the scheme of distribution of taxing powers, the major sources of revenue assigned to the Union are: taxes on income other than agricultural income; customs duties including export duties; excise duties on goods manufactured in India except alcohol and liquors for human consumption; taxes on capital value of the assets, exclusive of agriculture land, of individuals and companies; taxes on the capital of companies; estate duty and succession duty in respect of property other than agricultural land; etc.

The major sources of revenue allocated to the States, on the other hand, are: land revenue; taxes on agricultural income; succession duty in respect of agricultural land; estate duty in respect of agriculture land; taxes on land and buildings; taxes on mineral rights; excise duties on alcoholic liquors for human consumption; sales tax; professional taxes; taxes on the consumption of electricity; taxes on advertisements; etc.

While the resources of the States are limited, they have larger responsibilities for social, educational and economic development of the people. Further there are wide differences in the level of development of the States. In order to address the issues of this vertical and horizontal imbalance in the Centre-State and inter-State relations, the Constitution of India has provided for inter-governmental transfers through the mechanism of Finance Commission which is constituted once in five years to recommend transfers of central revenue to the States for a five yearly fiscal cycle. Thirteen such Finance Commissions have been set up so far.

Further such transfers also take place through the Planning Commission. There are three main channels of Central transfers to States; the finance commission transfers, plan transfers and assistance for central sector and centrally sponsored schemes. Today such transfers constitute about 44 per cent of state's total revenues, 42 per cent of the state's current expenditure; and almost 36 per cent of the revenues collected by the central government.

The figures show that the transfers have grown at a faster rate than the revenues collected by both the centre and the States. Still the resources available to the States have not been found adequate for discharging the responsibilities of the State governments.

Centre and states are having friction in the financial relations based on the following issues:

- a. Gst
- b. FDI- MBR
- c. Royalties for minerals
- d. Centrally sponsored schemes

## **Cooperative Federalism**

Although the Constitution of India has nowhere used the term 'federal', it has provided for a structure of governance which is essentially federal in nature. First of all, Constitution has provided separate governments at the Union and the States with separate legislative, executive and judicial wings of governance. Secondly, Constitution has clearly demarcated the jurisdictions, powers and functions of the Union and the State Governments. Third, Constitution has spelt out in detail the legislative, administrative and financial relations between the Union and the States.

Within this basic framework of federalism, the Constitution has given overriding powers to the Central government. States must exercise their executive power in compliance with the laws made by the Central government and must not impede on the executive power of the Union within the States. Governors are appointed by the Central government to oversee the States. The Centre can even take over the executive of the States on the issues of national security or breakdown of constitutional machinery of the State.

Considering the overriding powers given to the Central government, Indian federation has often been described as 'quasi-federation', 'semi-federation', 'pragmatic federation' or a 'federation with strong unitary features'.

Indian federation should be seen in the context of its democratic system of governance at the national, state and local levels and the pluralities of its culture in terms of ethnic, linguistic, religious and other diversities which cut through the States. India is the largest democratic country as also the largest federal and the largest pluralist country of the world. While democracy provides freedom to everybody, federation ensures that governance is distributed spatially and a strong central government enables that the 'unity amidst diversity' is maintained and the country mobilizes all its resources to maintain its harmony and integrity and marches ahead to progress.

A strong Centre in India is therefore necessary for strong States and vice versa. Since the seventies when different political parties are in power in the centre and the states and more recently when national parties were eroded and coalition governments became the norm in the Centre, there are signs of stresses and tensions in intergovernmental relations between the Centre and the States.

The federal challenges in the country today requiring cooperation include national security (NCTC etc), food security, inflation management, education, land acquisition and so on.

Article 263 of the Constitution has provided for the setting up of an Inter-State Council for investigation, discussion and recommendation for better coordination of relation between the Centre and the States. The Zonal Councils set up under the State Reorganization Act 1956 provide another institutional mechanism for centre-state and inter-state cooperation to resolve the differences and strengthen the framework of cooperation. The National Development Council and the National Integration Council are the two other important forums that provide opportunities for discussion to resolve differences of opinion. Central councils have been set up by various ministries to strengthen cooperation. Besides Chief Ministers, Finance and other

Ministers have their annual conferences in addition to the regular meetings and discussions of the officials of the Centre and the States to share mutual concerns on various issues.

One of the challenges of Indian federation would be how best these mechanisms of cooperative federalism can be strengthened further to promote better coordination and cooperation between the Centre and the States.

### Federal Flashpoints

#### NCTC

National Counter Terrorism Center(NCTC) India is federal anti-terror organisation which gained urgency after the 26/11 attacks as it was strongly felt that India lacked a federal agency with real time intelligence inputs of actionable value specifically with respect to terrorism. Much blame had been put on the states which failed to act on intelligence inputs provided prior to the Mumbai attacks.

The NCTC's function will include drawing up of plans and coordinating all actions and integrating all intelligence pertaining to counter-terrorism. It will coordinate with relevant investigation and intelligence agencies to make sure that the perpetrators of terror are brought to justice, besides maintaining a comprehensive database of terrorists, their associates and supporters.

The agency derives its powers from the Unlawful Activities Prevention Act, 1967. It includes among other things, the power to carry out searches and issue arrest warrants throughout India in the interest of preventing terror attacks.

The UAPA Act was amended in December 2008, and the Lok Sabha added Section 43 (a) to 43 (f). Section 43 (a) refers to designated agency, saying "designated agency may, under certain circumstances, counter terrorism, arrest and seize articles."

The "moment arrest is made, the accused must be handed over to the nearest police station. This is a law made by Parliament and thus any criticism that it is unfederal is answered.

States say that it is antagonistic toward the federal structure of India and encroach into state list - police and law and order.

Union Home Ministry has assured the States that "in normal course, arrest/search/seizure shall be carried out by the ATS or police units of the State concerned."

Experts stress on the shared responsibility of the Centre and the States in dealing with crucial issues of internal security and terrorism.

Dwelling upon the Constitutional provisions, experts point out that in List II, law and order is the responsibility of the State governments. In Article 355, it is the responsibility of the Central Government to protect every State against external aggression and internal threat.

Another objection of the Chief Ministers pertains to the proposed NCTC being part of the Intelligence Bureau (IB), which is controlled by the Home Ministry. Some of the Chief Ministers have suggested giving an independent status to it. Some suggested that it be accountable directly to the Parliament if such a procedure is feasible. Chief Ministers' Conference on internal security held in June 2013 remedied it and said that the NCTC will directly report to the Home Minister.

There were other changes also proposed in the new draft the CMs conference was shown in 2013 June: keeping the NCTC out of the purview of the Intelligence Bureau, and taking States into confidence before carrying out any operation in their territories.

Some CMs say NCTC shouldn't be given wide powers to search, seize and arrest anyone from the States as such powers are not given to IB anywhere in the world.

### RPF Act Amendments

The proposed amendment in 2012 is meant to make the Railway Protection Force (RPF) more effective, since the central force deployed on moving trains and railways premises has to take up cases in various states. The RPF has to take the help of local police in each state when offences take place. To ensure that the force is more effective, the railway ministry had proposed that it be given powers to register cases against offenders and move against them. But this proposal ran into trouble with some states.

However, it has become a bone of contention in the Indian federal system. Some CMs have criticized it as RPF is unwarranted, violation of the constitutional spirit and blow to federal structure of India. It also usurps power of the state legislature.

"Public order" and "police" are state subjects and proposing an amendment on these subjects under entry 22, 30 and 93 of Union List with entry 2 of the concurrent list in schedule VII of the Constitution of India is, not only a step to infringe upon powers of the state but also a serious blow to the federal structure of the Country- some critics hold.

### BSF Act Amendments

BSF (Amendment) Bill 2012 wants the BSF that is deployed in the hinterland like Jharkhand and Chattisgarh to have some powers additionally. As per the present legal position, BSF can be deployed only along or adjoining the borders of India. However in recent times, BSF has been deployed in the hinterland, especially in Chhattisgarh and Odisha. The said deployments have been questioned. Government has proposed to amend the relevant provisions of the Act to permit deployment of this force in other parts of the territory (hinterland) as well. The major objections raised by the CMs are related to conferring of powers of arrest, search and seizure to BSF, when deployed in hinterland as states believe that such powers may be in conflict with functions of the local police. The states have also argued that such powers given to the BSF would weaken the federal structure as it would violate the 'rights' of states.

Chidambaram had explained that such powers are already available in Section 139 of the BSF Act, 1968, when deployed in the local limits of such area adjoining the border.

### Minerals

In the federal structure of India, the State Governments are the owners of minerals located within their respective boundaries. The Central Government is the owner of the minerals underlying the ocean within the territorial waters or the Exclusive Economic Zone of India.

In this context, the entry 23 of List II (State, list) to the Constitution of India states, '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.'

The entry at serial No. 54 of List I (Central list) to the Constitution of India states, '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.'

### Communalism and federalism: Punchi Commission

Maintenance of communal harmony in the country is one of the key responsibilities of both the Union and the State Governments. It is the duty of the States under the Constitution, to maintain public order (List II, entry 1, Schedule 7) and thus prevent communalism. However, if such violence gets prolonged, and threatens to cause internal disturbances in a large area of the State, or which has potential for escalation in other parts of the country, then it becomes the duty of the Union under Article 355 to protect all its citizens and the property and bring the situation back to normal as quickly as possible. As in the case of communal incidents, violence is also quite common in caste, sectarian, ethnic or other social conflicts. Such incidents have the potential of assuming evil proportions. As such, the Government has the responsibility to nip in the bud the problems threatening communal, caste, sectarian, ethnic and social harmony.

The Centre's role should generally include issue of timely advisories and intelligence inputs, monitoring of the situation and for providing para-military forces support at the specific request of the States for enabling the State Governments to bring the situation under control at the earliest. Centre's support to the State Governments would be of paramount importance in the relief and rehabilitation efforts.

Centre's responsibility to act under Article 355 was well recognized. Enlarging the provisions of Article 256 so that the Union Government may give appropriate and time-bound direction to the States. Thus, while maintenance of Law and Order is in the domain of States, maintenance of communal harmony is a joint responsibility of the Centre and States.

Punchi Commission suggests that National Integration Council (NIC) could be utilized as a forum for preparing a comprehensive strategy involving all political parties for fighting

communal conflicts in the society. The Liberhan Commission recommended that NIC be conferred with statutory powers in this regard for it to play proactive and effective role.

### **Naxalism and centre state relations**

The most important Internal Security problem which needs extensive Centre- State co-operation and coordination to ensure effective handling is Naxal issue. The process of effective implementation of land reforms and extending Panchayati Raj to the Scheduled Areas (PESA) has already been initiated by State Governments. Similarly, under the Forest Rights Act, 2006, the vesting of forest rights of the scheduled tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded a framework has been provided for recording the forest rights so vested. Special schemes for development of states and districts affected by left wing extremism are also in place. A positive aspect is that most of these schemes are being implemented at the Panchayat level.

Since the Naxal problem has spread over a large geographical area in the country, covering several States, a collective approach and coordinated action will be a pre-requisite as response mechanism. In respect of improving the Centre-State and InterState coordination in containing Naxal violence, as such, several measures have been adopted by the Centre in co-operation with the affected States. Inter-State coordination is being ensured through joint action by neighbouring States. The initiatives include regular security reviews, more frequent and intensified joint anti-Naxal operations, intelligence sharing on Naxal activities and activities of other criminals, hot pursuit of extremists even across the border of the State, general information sharing, police modernization and fortification of Police Stations etc. The deployment of Central Para Military Forces has also been increased substantially in the affected areas. Creation of joint local resistance groups against Naxalite movement with adequate security cover.

### **Centre pays salaries of the SPOs.**

Unmanned aerial vehicles(UAVs) are being used.

Unified commands for streamlining anti-Naxal operations in four Maoist-affected states of the country are in place. The commands, based in capitals of the four states of Chhattisgarh, Jharkhand, Orissa and West Bengal, are headed by their respective chief secretaries. The other members are state DGP, CRPF, Intelligence Bureau (IB) along with a retired major general rank officer of the Army.

Naxal issues are being discussed in the Zonal Council meetings.

National Investigating Agency (NIA) may also probe naxal acts of violence, if necessary.

Under the Constitutional scheme, 'National Security' is not a subject specifically listed in any of the three Lists i.e the Union, the State or the Concurrent List. The subject of Security under the Article 352 and under the Emergency Provisions in Part XVIII of the Constitution has been assigned to the Union Government. However, 'Security' is a subject in which the States and the Union have a common interest and are expected to act in a co-ordinated manner.

Under the co-operative relationship, the duties and obligations of the Union and the States are covered primarily in Article 256 (Union Government's directions to the states), 355, 356 and 365 and also under relevant provisions. Entries pertaining to Defence of India and control and deployment of the armed forces of the Union are covered in List-I of the Seventh Schedule.

Public order and Police feature as Entries 1 and 2 in the List II.

Criminal law, Criminal procedure and Administration of Justice are covered in List III as Entries 1, 2 and 11A.

Problems of internal security have conspicuous external dimensions. Several States affected by internal disturbances are at the nation's frontiers, and external support and sanctuaries in neighbouring countries have exacerbated the internal challenge. Also, increasingly, there is a pernicious nexus between domestic miscreants and international criminal networks.

National security has internal security as a dimension. Therefore, the close co-operation between the Centre and the States has been provided under the Constitution as it is a vital subject with multiple challenges.

### Executive/Administrative relations

Articles 256 - 263 on Administrative Relations Articles 256 - 261 - General 256. The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

The costs incurred for the above functions will be borne by the GOI.

Article 258(1). Notwithstanding anything in this constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

Article 262 - on Disputes relating to waters(given ahead)

Article 263 - on Co-ordination between States- Inter State Council

In a federal system , executive powers of the respective governments and their distribution and implementation is complex and requires elaborate detail

The provisions mentioned above are meant to prevent conflicts – largely taken from Government of India Act of 1935.

According to Article 256, the executive power of every State is to be exercised in such a way as to ensure compliance with the laws made by Parliament. Further, the Union Executive is empowered to give such directions to a State as may appear to the Government of India be necessary for the purpose. The idea of the Union giving directions to the States is foreign to most federations. It is looked upon with suspicion and distrust in the United States. In Australia too, the position is more or less the same.

Explaining the object of Article 256, Ambedkar said that it envisaged two propositions:

"The first proposition is that generally the authority to execute laws which related to what is called the Concurrent field, whether the law is passed by the Central Legislature or is passed by the State Legislature shall ordinarily apply to the State."

The second proposition it lays down is that if in any particular case Parliament thinks that in passing a law which relates to the Concurrent field, the execution ought to be retained by the Central Government, Parliament shall have the power to do so."

Ambedkar also said that if the Centre did not have such power, it would become impossible to secure the proper execution of the laws which Parliament was obliged to enact. For example: laws such as the untouchability abolition law, factory legislation, and child marriage abolition law.

In addition to the general power of the Union to give directions to the States, the Constitution wants every State (under Article 257) not to impede or prejudice the executive power of the Union in the State.

If any Union agency finds it difficult to function within a State, the Union Executive is empowered to issue appropriate directions to the State Government to remove all obstacles. The Union's power of giving directions in this regard includes certain specific matters such as:

(1) The construction and maintenance of means of communication which are of national or military importance; and

(2) The protection of railways within the States.

The Constitution also empowers the Union Executive, with the consent of the Government of a State, to entrust to that Government or its officers functions which fall within the scope of the Union's executive functions. The Union Government will pay to the State the cost involved in the discharge of functions by the States or its officers.

To facilitate the smooth working of the administrative machinery of the country as a whole as well as to ensure the better co-ordination of policy and action between the Union and the States or between the States themselves, the Constitution empowers the President to appoint an Inter-State Council whenever the necessity is felt. The Council is charged with the following three specific duties:

(1) To enquire into and advise upon disputes which may have arisen between States;

(2) To investigate and discuss subjects in which the States and the Union have a common interest,

(3) To make recommendations upon these subjects and, in particular, recommendations for the better co-ordination of policy and action with respect to these subjects.

The President is empowered not only to establish such a Council but also to determine its organisation and procedure and to define the nature of its duties. In accordance with this provision an Inter-State Council was established by Parliament in 1990. (Read ahead)

Apart from the above, Centre can give directions to states on the following matters too:

- Union can direct the State Governments to ensure execution of schemes essential for the welfare of the Scheduled Tribes in the States
- Union can direct the State Governments to secure the provision of adequate facilities for

instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups

- Union can direct the State Governments to ensure the development of the Hindi language.

If the directions of the centre are not followed by a state, Art.365 allows the central government to invoke Art.356 and take over the state administration under the President of India.

### Treaty Making

Entering into treaties and agreements with foreign powers is one of the attributes of State sovereignty. No State can insulate itself from the rest of the world whether it be in the matter of foreign relations, trade, commerce, economy, communications, environment or ecology. The advent of globalization and the enormous advances made in communication and information technology have rendered independent States more inter-dependent. Article 246 (1) read with Entry 14 of List I- Union List of the Seventh Schedule empowers Parliament to make laws with respect to "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries". As per the provisions contained in article 253, 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. This article (article 253), therefore, overrides the distribution of legislative powers provided for by article 246 read with Lists in the Seventh Schedule to the Constitution.

The ratification of treaty is done by the Union Cabinet. Parliament has the power to discuss and has no say in the approval.

NCRWC recommends that for harmonious federalism and for expeditious decision-making on important issues involving States, prior consultation by the Union Government with the inter-State Council may be considered before signing any treaty vitally affecting the interests of the States regarding matters in the State List. For example, LBA and Teesta river water sharing with Bangladesh.

### River Water Disputes India

The Seventh Schedule to the Constitution contains the legislative powers of federal and state governments. Water is a state subject and is included as entry 17 in list 2 (i.e., subject matters for state legislation). This entry reads: "Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56

of List I". The role of federal government is stipulated in entry 56 of List I: ""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".

When a "Water dispute" arises between two or more state governments , the following is the procedure to resolve the same:

Article 262 of the constitution empowers the Parliament to make laws for the adjudication of inter-state water disputes. That article also permits the Parliament to exclude such disputes from being referred to the Supreme Court.

The Inter States Water Disputes (ISWD) Act, 1956, was enacted by the Parliament to deal with inter-state water disputes. Government of India can set up a tribunal to settle such a dispute when one or more riparian states of an inter-state is/are of the opinion that their interests are (or are likely to be) affected by actions or plans of other states, they can request the government of India to constitute a tribunal under the Act. Within one year of receiving such a request and when convinced that such dispute cannot be resolved through negotiations, the government of India shall constitute a tribunal to hear the disputes concerning claims of water sharing and adjudicate an award. Such a tribunal should have three members who should be judges of the supreme court or the high court and are appointed in consultation with the Chief Justice of India; the government of India can appoint up to two assessors to assist the tribunal; after considering all the aspects as may be necessary, the tribunal gives its report to the government of India; if the riparian states or the government of India need any clarification, they can apply seeking such clarification from the tribunal within 90 days; the tribunal may give further clarifications. Then the report, called award, is published by the government of India in the official gazette. Once it is published, the award is binding on all the parties and it is deemed equivalent to an order or decree of the Supreme Court. The act also empowers the central government to make schemes and constitute an authority to implement the tribunal's award.

So far, five Inter-state water disputes tribunals have been constituted

- Krishna Water Disputes Tribunal (1969- 1976)
- Narmada Water Disputes Tribunal (1969- 1979)
- Godavari Water Disputes Tribunal (1969- 1980)
- Ravi and Beas Waters Tribunal (1986 and report is still to be submitted).
- Cauvery Water Disputes Tribunal (1990-2007).

## **Changes in the 1956 Act made in 2002 by Parliament**

The following provisions were introduced through an amendment to the 1956 Act in 2002

- the limit of one year from the date of receipt of a request by government of India to constitution of a tribunal
- the requirement for the tribunal to give its award within three years (with a proviso that government of India can extend this by another two years)
- the provision for central government to appoint two assessors to assist the tribunal

### **River Boards Act, 1956.**

In order to promote integrated and optimum development of waters of inter-state rivers and river valleys, under Entry 56 of List-I of the Constitution (Union List), Parliament enacted the River Boards Act, 1956. The Act contemplated the appointment of river boards by the central government in consultation with the state governments. These boards are expected to promote development of irrigation, drainage, water supply, flood control and hydro-electric power.

### **Babhli barrage**

The Babhli barrage, built over River Godavari, stands in Maharashtra's Nanded district. And it has become the flashpoint of the water wars between Maharashtra and Andhra Pradesh.

The Babhli dam will help irrigate 8000 hectares in Nanded, and provide drinking water to nearly 60 villages and towns. Maharashtra's gain will come at a cost, argues the Andhra Pradesh government. It says six districts will turn into a desert. The Godavari flows from Nanded into the Sriramsagar project in Nizamabad district of Andhra Pradesh. The distance between Babhli and Sriramsagar is just 10 km and because of the proximity, unless Babhli releases water, Sriramsagar, which is the lifeline of north Telangana, will dry up.

### **Babhli Dam: A history of controversy**

- The Babhli Project was cleared in 1995, but the construction only began in 2004.
- In 2005, Andhra Pradesh complained to the Centre that Babhli would deny the state its due share of water. The Centre appointed a technical committee to investigate.
- In 2006, Andhra went to the Supreme Court to stop Maharashtra from constructing the barrage.
- The next year, the court said Maharashtra could continue with the construction but, not install the 13 gates, which are the most crucial part of the dam as their height determines how much water can be stored.

## **Mahadayi Water Disputes Tribunal**

Mahadayi (Mandovi) river originates in Karnataka state, flows 29 km through the State and passes through Maharashtra and Goa where its length is 52 km, before reaching the Arabian Sea. Karnataka had planned to utilise 7.6 tmc feet of water from Kalasa and Banduri tributaries of Mahadayi to meet drinking water scarcity in around 100 areas of northern Karnataka, including Hubli and Dharwad. Objection from Goa is the basis of the controversy. Goa had opposed the project claiming that Mahadayi was a deficit basin and water diversion would impact on the environment in the basin.

Article 262 and Inter-State Water Disputes Act (ISWDA), 1956 provide a legal and constitutional mechanism for adjudication of water disputes between the states in India.

The Government of Goa requested for setting up of an Inter-State Water Disputes Tribunal under the Inter-State Water Disputes Act, 1956 for resolution of the dispute.

The Union Government in 2009 approved the proposal for constitution of Mahadayi Water Disputes Tribunal consisting of a Chairman and two Members nominated in this behalf by the Chief Justice of India from among the persons who at the time of such nomination are Judges of the Supreme Court or High Court.

The Mahadayi Water Disputes Tribunal would adjudicate the water dispute between the State of Goa and Karnataka.

### **Cauvery and related issues to be discussed in the class**

#### **Inter State Council**

The Inter-State Council was set up under Article 263 of the Constitution of India vide Presidential Order dated the May 28, 1990.

Prime Minister is the head of the ISC and the composition includes the Chief Ministers of all States, Chief Ministers of Union territories having Legislative Assemblies and Administrators of Union territories not having Legislative Assemblies, Governors of States under President's Rule, six Ministers of Cabinet rank in the Union Council of Ministers to be nominated by the Prime Minister and two Ministers of Cabinet rank in the Union Council of Ministers to be nominated by the Prime Minister as permanent invitees.

#### **Art.263 reads as follows:**

If at any time it appears to the President that the public interests would be served by the establishment of a Council 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,

it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

The Council in its first meeting in 1990 had considered the recommendations made by the Sarkaria Commission on Centre-State Relations. Keeping in view the complexities of the issues involved and their wider implications, it was decided by the Council that the recommendations would be first examined by a Sub-committee of the Council and thereafter considered by the Council. In its second meeting, the Council broadly endorsed the recommendations of the Sarkaria Commission as finalised by the Sub-committee. In the same meeting, the Inter-State Council decided to set up a Standing Committee for having continuous consultation and processing of all matters for consideration of the Inter-State Council. Accordingly the Standing Committee was set up in 1996.

The Inter-State Council has held ten meetings so far and has taken important decisions on 171 of the 247 recommendations of the Sarkaria Commission. Some of the major decisions of the Council are as follows

- a) The Council approved the Alternative Scheme of Devolution of Share in Central Taxes to States as recommended by the Standing Committee.
- b) Articles 355 and 356 of the Constitution of India was another matter.
- c) The Council decided that on the subject of delay in State Bills referred for President's consideration, there should be time-bound clearance of Bills referred. The Bills should not be reserved for President's consideration in a routine manner.
- d) The Council decided that the issue regarding the use of articles 256, 257 and 365 of the Constitution should be remitted to the Sub-Committee deliberating on the issues of article 356.

The Ninth ISC meet was held in mid-2005 with the theme of good governance and last meeting was in 2006.

ISC is the only Constitutional body to deal with federal issues and disputes, apart from the Supreme Court and the river water dispute panels set up under Art.262.

### Zonal Councils

The idea of creation of Zonal Councils was mooted by the first Prime Minister of India, Pandit Jawahar Lal Nehru in 1956 when during the course of debate on the report of the States Re-organisation Commission, he suggested that the States proposed to be reorganised may be grouped into four or five zones having an Advisory Council "to develop cooperative working" among these States. This suggestion was made by Pandit Nehru at a time when linguistic reorganization led to bitterness and hostilities. As a remedy to this situation, it was suggested that a high level advisory forum should be set up to minimise the impact of these hostilities and to create healthy inter-State and Centre-State environment with a view to solving inter-State problems and fostering balanced socio economic development of the respective zones. There are five zonal councils

- i. The Northern Zonal Council, comprising the States of Haryana, Himachal Pradesh, Jammu & Kashmir, Punjab, Rajasthan, NCT of Delhi and U.T. of Chandigarh;
- ii. The Central Zonal Council, comprising the States of Chhattisgarh, Uttarakhand, Uttar Pradesh and Madhya Pradesh;

- iii. The Eastern Zonal Council, comprising the States of Bihar, Jharkhand, Orissa, Sikkim and West Bengal;
- iv. The Western Zonal Council, comprising the States of Goa, Gujarat, Maharashtra and the Union Territories of Daman & Diu and Dadra & Nagar Haveli; and
- v. The Southern Zonal Council, comprising the States of Andhra Pradesh, Karnataka, Kerala, Tamil Nadu and the Union Territory of Pondicherry.

The seven North Eastern States i.e. (i) Assam (ii) Arunachal Pradesh (iii) Manipur (iv) Tripura (v) Mizoram (vi) Meghalaya and (vii) Nagaland are not included in the Zonal Councils and their special problems are looked after by the North Eastern Council, set up under the North Eastern Council Act, 1972. Sikkim was added to the NEC recently.

The Zonal Council for each zone consists of the following members :

- (a) the Chief Minister of each of the States included in the zone and two other Ministers of each such State nominated by the Governor;
- (b) where any Union Territory is included in the zone, two members from each such territory nominated by the President;

Further the Zonal Council for each zone has the following persons as Advisers to assist the Council in the performance of its duties :

- (a) one person nominated by the Planning Commission;
- (b) Chief Secretaries of the States included in the Zone;
- (c) Development Commissioners of States included in the zone.

Union Ministers are also invited to participate in the meetings of the Zonal Councils depending upon necessity. The union home minister is the chairman of each of these councils. The Chief Ministers of the States included in each zone act as Vice Chairman of the Zonal Council for that zone by rotation, each holding office for a period of one year at a time.

Each Zonal Council has set up a Standing Committee consisting of Chief Secretaries of the member States of their respective Zonal Councils. These Standing Committees meet from time to time to resolve the issues or to do necessary ground work for further meetings of the Zonal Councils. Senior Officers of the Planning Commission and other Central Ministries are also associated with the meetings depending upon necessity. The Secretariat explores centre-State, inter-State and zonal issues which are to be deliberated by the Councils or the Standing Committees.

The Zonal Councils provide an excellent forum where irritants between Centre and States and amongst States can be resolved through discussions and consultations. Being advisory bodies, there is full scope for free exchange of views in their meetings. Though there are a large number of other fora like the National Development Council, Inter-State Council, Governor's/Chief Minister's Conference and other periodical high level conferences held under the auspices of the Union Government, the Zonal Councils are different, both in content and character. They are regional fora of cooperative endeavour for States linked with each other economically, politically and culturally. Being small and high level bodies, specially meant for looking after the interests of respective zones, they are capable of focussing attention on specific issues taking into account regional factors while keeping the national perspective in view.

The main objectives of setting up of Zonal Councils are as under :

- national integration;
- balancing regionalism with federalism
- Enabling the Centre and the States to co-operate and exchange ideas and experiences; and
- Establishing a climate of co-operation amongst the States for successful and speedy execution of development projects..

Broadly these Councils are expected to :

- Promote a cooperative approach to facilitate economic and social planning and the execution of development schemes particularly inter-State projects;
- (ii) Deal with matters arising out of the re-organisation of States such as border problems, integration of services, linguistic minorities, inter-State transport, roads, etc.;
- (iii) Initiate measures of common interest in the field of social and economic planning, and exchange of information, statistics and experience available with each State to the best common advantage;
- (iv) Tackle common law and order problems and devise uniform policies regarding administration of civil and criminal law; and
- (v) Deal with common problems like floods, drought, scarcity, local cess, etc.

The scope of functions of these Zonal Councils is very wide, as they can discuss any matter in which some or all of the States represented in that Council, or the Union and one or more of the States represented in that Council, have a common interest. These Councils have been set up with the objective to provide a common meeting ground in each zone for ensuring resolution of Inter-State problems, fostering balanced regional development and building harmonious Centre-State Relations.

The issues that were discussed in the meetings of the Zonal Councils included internal security, police modernization, communal harmony and disaster management, coastal security, narcotics control, naxalism, river water sharing, woman and child trafficking and farmers' suicides. The criticism is that the Zonal Councils do not meet as frequently as it may be required.

#### **Eastern Zonal Council meeting 2013**

The 20th meeting of Eastern Zonal Council, comprising of the States of West Bengal, Odisha, Bihar and Jharkhand, was held at Kolkata in April. Shri Sushilkumar Shinde, Union Home Minister chaired the meeting which was hosted by the Chief Minister of West Bengal. Governor of Jharkhand attended the meeting.

Ms. Mamata Banerjee, Chief Minister highlighted the strategic location of the States of the Eastern region and emphasised the need for enhanced cooperation and coordination among the member States on various issues of common importance. The Union Home Minister explained

- the recent initiatives taken for strengthening the mechanism for Centre-State and Inter State cooperation. He emphasised the need for more frequent meetings of the Council to resolve various issues among the States of the region.

The Governor of Jharkhand and Ministers from the States of Odisha and Bihar raised various issues, such as, sharing of information and intelligence, use of national resources like, water, minerals etc, common border check posts, and suggested various mechanisms for strengthening cooperation among the States of the region.

The meeting discussed various important issues, such as, internal security, problems of naxalism, communal harmony, safety on the national highways, use and distribution of coal and other natural resources, allotment of land for CRPF to establish battalion camping sites, matters related to police administration, border area development programme, strengthening of vigilance establishment in the states to deal with corruption, issues relating to scheduled castes and scheduled tribes, etc.

Next meeting of the Council is to be held later this year in Odisha.

### **Northern Zonal Council**

Northern Zonal Council meeting was held in 2012 July. Mr. P. Chidambaram, Union Home Minister, Mr Shivraj Patil, Administrator, UT Chandigarh and Mrs Sheila Dikshit, Delhi Chief Minister, Mr Prem Kumar Dhumal, Himachal Pradesh Chief Minister and Mr Ashok Gehlot, Rajasthan Chief Minister were also present.

Various inter-state issues including those related to co-ordination and co-operation for better working, trafficking of women and children; liquor smuggling, exchange of information on crime and criminals to curb crime, sharing of water and power, apart from several socio-economic issues were on the agenda.

### **NEC**

The North Eastern Council (NEC) came into being by an Act of Parliament, the North Eastern Council Act, 1971 to act as advisory body in respect of socio-economic development and balanced development of the North Eastern Areas consisting of the present States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. The NEC started functioning in the year 1972. In 2003 Sikkim became the 8<sup>th</sup> member of the Council. The members of the NEC consist of the Governors and the Chief Ministers of the eight Member States.

### **Functions**

The North Eastern Council was constituted for performing the following functions

- To discuss any matter in which some or all of the States represented in the Council have common interest and advise the Central Government and the Governments of the States concerned as to the action to be taken on any such matter, particularly with regard to

any matter of common interest in the field of economic and social planning; inter-State Transport and Communications; Power or Flood-control projects of common interest.

- To formulate and forward proposals for securing the balanced development of the North Eastern Areas
- To review, from time to time, the implementation of the projects and schemes included in the Regional Plan
- To review progress of expenditure and recommend to the Central Government the quantum of financial assistance to be given to the States entrusted with implementation of any project included in the Regional Plan.
- To review, from time to time, the measures taken by the States represented in the Council for the maintenance of security and public order and recommend to the concerned State Governments further measures necessary in this regard

The Council acts as a funding agency as well as a planning agency.

### **National Integration Council**

The government reconstituted the National Integration Council (NIC).

The 147-member NIC, headed by the prime minister, has union ministers, chief ministers of states and union territories, heads of political parties, eminent media persons, public figures, representatives of business and women's representatives as members.

The NIC was set up in 1961 by the then prime minister Jawaharlal Nehru following a National Integration Conference to find ways and means to combat the evils of communalism, casteism, regionalism linguism and to formulate definite conclusions in order to give a lead to the country.

The NIC held its first meeting in 1962. The council has held 15 meetings so far, with the last meeting in 2011 focused on communal harmony.

In 2010 the government established a standing committee of the National Integration Council. Home Minister P. Chidambaram was appointed chairman and four Union Ministers and nine Chief Ministers were appointed members. The committee would decide on agenda items for future council meetings.

The NIC meetings discuss various issues relating to national integration and communal harmony in the context of the various disputes, regionalism, communalism, role of educational institutions and responsibility of the mass media, among others.

### **Interstate trade and commerce**

The free flow of trade, without geographical barriers, is a sine qua non for economic prosperity. Our federal constitution guarantees it. We have an arrangement that aims to harmonize and facilitate inter-State trade and commerce without hindrances. Hence, inter-State trade and commerce and some elements of intra-State trade and commerce are a Central responsibility. For example, Part XIII (Articles 301 through 307) is devoted exclusively to trade

and commerce. Several other matters, incidental or necessary to trade and commerce, are also a Central responsibility, through exclusive or concurrent jurisdiction. Article 19 guarantees to every citizen the right to carry on any trade, business or profession, subject to reasonable restrictions, which may be imposed in the interest of the general public. While there is a general declaration in the Indian Constitution that trade and commerce should be free, the Centre and the States (especially the former) have the power to regulate.

Articles 301 to 307 deal with interstate trade and commerce which is a core feature of a federation like ours.

The objective behind the principle of freedom of inter-State commerce is that within the country trade and commerce should develop to the largest possible extent and it should not be hindered by artificial barriers and restrictions imposed by the various States of the federation.

Accordingly, the Constitution has taken national interest as a whole as well as the interests of particular States and the wide geography of this country in which the interests of one region differ from those of another.

The freedom of trade and commerce is subject to certain limitations which may be imposed by Parliament or by the Legislatures of the various States, subject to the fact that the limitations contained in the power of Parliament is confined to cases arising from scarcity of goods in one part of the territory of India, and in the case of the States it must be justified on the ground of public interest."

Article 301 is general in scope and enacts that "subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free". After having stated the general nature of the freedom of trade and commerce, the Constitution details the limitations to this freedom. There are five such limitations:

(1) Parliament may impose restrictions in any part of the territory of India in the public interest (Art. 302). The purpose of this provision is to allow the Government of India to restrict the movement of goods so as to safeguard a well-balanced economy and the proper organisation and ordering of supplies of goods and services.

Famine may be raging in one part of the country while there is plenty in another part, as has been the experience of the country in regard to food during the last several decades.

If Parliament has no effective powers to check such abnormal situations, freedom of trade and commerce, instead of a blessing, will become a menace to the freedom of life itself.

(2) Although Parliament is empowered to restrict the free movement of articles of trade and commerce, normally the laws passed by Parliament in this context ought to be non-discriminatory in character. In other words, it should not prefer one State to another. But when any part of the country is suffering from scarcity of goods, Parliament may, meet such a situation; pass even a discriminatory law (Art. 303).

(3) A State Legislature may impose on goods imported from other States any tax if similar goods produced in that State also are taxed in a like manner. A State Legislature is also authorised to impose reasonable restrictions on the freedom of trade and commerce with or within that State as may be required in the public interest (Art. 304).

But this is subject to Central control. According to this, any Bill who seeks to introduce such restrictions can be introduced in the State Legislative only with the previous sanction of the President.

The President will have the opportunity to see that the legislation is in the public interest and the restriction imposed is reasonable.

The fact that every restriction should be reasonable in relation to its objective leaves the Supreme Court with adequate power to examine and adjudicate upon the reasonableness of such restrictions and declare those that are unreasonable in its view invalid.

(5) Finally, under Article 307, Parliament is empowered to appoint such authority as it considers appropriate for carrying out the purposes of Articles 301 to 304 and to confer on that authority such powers and duties as it thinks necessary.

Speaking on this provision, Ambedkar said, "(It) is merely an article which would enable Parliament to establish an authority such as the Inter-State Commission as it exists in the U.S.A.

### The federal debate 2013

There are 2 ways in which the present federal system is looked at for future course.

- Largely status quo- retaining the present federal structure with some amendments to the Constitution to make it more relevant to present day requirements because the nation building process is not yet complete and serious challenges continue to confront the nation. The country and society are one and not as an aggregate of regional identities.
- principle of federalism needs to be redefined. States need to be empowered more in the backdrop of the changing nature of polity, economy and society. The Centre's role as defined in the Constitution needs to be curtailed and restricted. This was highlighted in the debate in the two houses of Parliament on the Lokpal and Lokayukta Bill(Art.252 vs Art.253); NCTC; GST etc

The holders of this view argued that making Lokayuktas mandatory for states violated the Constitution's federal structure and that it impinged on the autonomy of states. Similarly, even though foreign policy is the prerogative of the Central government and the Constitution does not allow the states to take initiatives in these matters, the West Bengal government challenged the Central foreign policy on sharing the waters of river Teesta by stalling the bilateral treaty with Bangladesh. Some states have been arguing in favour of the role of states in foreign policy, particularly, states with an international border are vocal on issues which directly or indirectly

impact them. Similarly, when the issue of border trade with China came up for discussion, Sikkim's views were sought. In the ongoing negotiations in the WTO on agriculture related issues, the views of states have been incorporated in India's stand. Tamil Nadu has on a number of occasions demanded the Centre's intervention in Sri Lanka.

It is important that these demands should be seen in a larger perspective. In the light of this second discourse, is it indicative that the time has come to review the constitutional

arrangement with the objective of creating enough room for economic development of states without compromising the overall national interest? The North Eastern states of the country have borders with various countries like Myanmar, Bangladesh, China, Bhutan and Nepal and their proximity to countries east of India demands that their economies should benefit more from Look east policy. North east state leaders have been suggesting that New Delhi should take them on board while conducting economic diplomacy, particularly with the neighbouring countries.

Federalism is also seen in the context of decentralisation of powers. Economic liberalisation after 1991, undoubtedly, put India on a fast-track growth trajectory; however, inequity and regional imbalance also increased. The states, therefore, started demanding more flexibility in their policies and growth strategies.

The GST negotiations and the demand that centrally sponsored schemes be transferred to the states are prime examples.

The deepening of democracy and assumption of power by different regional parties in various states has generated an intense debate on giving States more fiscal and other powers.

In the present context, some questions arise: whether the principle of federalism in India is being used as a mere ruse to oppose the Centre because of political compulsions or is there more substance in the argument for a review of the federal structure? Has the time come to have a fresh look at the entire issue of States versus Centre? Are these demands being raised because of fracturing and fragmentation of polity or because of growing political ambitions of some regional leaders who are using the principle of federalism to assert themselves with the desire to project their leadership?

Governments and Panchayats.

# **Comptroller and Auditor General of India**

Public audit is a vital instrument of ensuring supremacy of Parliament over executive and enforcing public accountability. Public audit institutions developed over time to help legislatures to implement the power of the purse. This power had two essential elements: the granting of the moneys and supervision of the expenditure. Public audit is necessary to ensure that money of the people is raised well and spent for the purpose for which the parliament authorised it.

State audit in its present form was introduced first time in Great Britain by a Parliamentary Act as an integral part of parliamentary control over national finance in 1866. The Act required all departments for the first time, to produce annual accounts known as appropriation accounts. (appropriation is legally authorized money being drawn and spent for a specific purpose) The Act also established the position of Comptroller and Auditor General (C&AG) The results of C&AG's investigations were considered by a dedicated parliamentary committee called the Committee on Public Accounts thus establishing a system of parliamentary financial control.

The system of Government accounting and auditing and the organisational structure of the Indian Audit and Accounts department (IAAD) as it exists today in our country is patterned similarly and is, thus, the legacy of British rule.

## **Constitutional and Statutory Position of CAG**

We have to go back to 15th century to find the origin of the word "comptroller," which means "financial officer."

The Constitution gives special status to Comptroller & Auditor General (C&AG) as laid down in Articles 148 to 151. The Act gives authority to C&AG to audit all expenditure from and receipts into the Consolidated fund of India and the States. It also authorises C&AG to audit the receipts and expenditure of bodies or authorities substantially financed by loans or grants from government. Article 151 of the Constitution prescribes that Audit Reports on the accounts of Union and the States be submitted to President and the Governor of the State respectively who shall cause them to be laid in the Parliament and respective State Legislatures.

The organisations subject to the audit of the Comptroller and Auditor General of India are:

- All the Union and State Government departments and offices including the Indian Railways and Posts and Telecommunications.
- About 1200 public commercial enterprises owned by the Union and State governments, i.e. government companies and corporations.
- Around 400 non-commercial autonomous bodies and authorities owned or controlled by the Union or the States.
- Over 4400 authorities and bodies substantially financed from Union or State revenues

Although India has a federal setup, the Constitution provides for a unitary audit by the Comptroller & Auditor General, who conducts audit of the accounts of both the Union and State Governments.

### **Importance of CAG**

CAG helps the parliament/state legislatures hold their respective governments accountable. The CAG is the institution through which the *accountability* of the government and other public authorities — all those who spend public funds — to Parliament and State Legislatures and through them to the people is ensured. Accountability is not the same thing as accounting, though the latter may be a part of the former; the word 'accountability' means answerability. We are of course talking about *financial* answerability. The Executive is answerable to Parliament and to the people for all its decisions, but that answerability is enforced through the CAG where it involves finance and accounts.

Parliament votes funds to the Executive and those funds have to be accounted for. Financial accountability is important. However, answerability is more than that: it also means exercising prudence, avoiding waste, not incurring unnecessary expenditure, showing results for moneys spent, and achieving those results at least cost. If the CAG is our prime accountability-ensuring institution, that institution must go into all these matters.

That is the reason why CAG, according to Dr. B.R. Ambedkar, during the debates in the Constituent Assembly, was described as the most important functionary in the Constitution. Also, the oath administered to CAG according to the Constitution, is identical with that prescribed for the Chief Justice and Judges of the Supreme Court, including the words "I will uphold the Constitution and the laws" while a Minister of the Union swears or solemnly affirms only that he will act "in accordance with the Constitution".

### **Independence**

The importance of the Institution of CAG is such that it needs to be ensured independence for effective functioning. There are several provisions enshrined in the Constitution to safeguard his independence

- He is appointed by the President of India by warrant under his hand and seal and his oath of office requires him to uphold the Constitution of India and the laws made there under
- He can be removed from office only on grounds of proven misbehavior or incapacity after an address by both Houses of Parliament supported by a two-thirds majority
- His salary and conditions of service cannot be varied to his disadvantage after appointment.
- He shall not be eligible for further office under the Government of India or of any State after retirement
- His administrative powers and the conditions of service of persons serving in the Indian Audit and Accounts Department shall be prescribed by rules made by the President only after consulting him.
- The administrative expenses of his office are charged upon the Consolidated Fund of India and are not subject to being voted by Parliament.

### **Audit Duties**

The duties, powers and conditions of service of the Comptroller and Auditor General are laid down in the CAG's (Duties, Powers and Conditions of Service) Act, 1971.

**The statutory duties of the CAG include audit of**

- Receipts and expenditure of the Union and the State Governments accounted for in the respective Consolidated Funds.
- Transactions relating to the Contingency Fund and the Public Accounts.
- Trading, manufacturing, profit and loss accounts and balance sheets and other subsidiary accounts kept in any Government Department.
- Accounts of stores and stock kept in Government organisations, Government companies and Government corporations whose statutes provide for audit by the CAG
- Authorities and bodies “substantially financed” from the Consolidated Funds of the Union and the States(Where the grant or loan is not less than rupees twenty-five lakhs and the amount of such grant or loan is not less than seventy-five percent of the total expenditure of that body or authority, such body or authority is considered to be “substantially financed”)
- Any body or authority even though not substantially financed from the Consolidated Fund, at the request of the President or the Governor.
- Accounts of bodies and authorities receiving loans and grants from the Government for specific purposes.

There is special arrangement for the audit of Government companies i.e. where equity participation is 51 per cent or more. The primary auditors of these companies are Chartered Accountants, appointed by the Union Government on the advice of the CAG. The CAG gives directions to the Chartered Accountants on the manner in which the audit should be conducted. He is also empowered to comment on or supplement the reports of the primary auditors. In addition, he has the right to conduct audit of accounts of such companies and report the results of audit to Parliament and State Legislatures.

A special feature of the audit of such Government companies and Public Sector Undertakings is the periodic comprehensive appraisal of their working by the Audit Boards constituted by the CAG. Experts in disciplines relevant to the operations of a PSU are appointed as members of these Audit Boards. The Audit Boards undertake comprehensive appraisals in the form of Audit Reviews of a few selected undertakings each year which are incorporated in the CAG's Commercial Audit Reports. Similar Audit Boards have also been set up in a few States for audit of PSUs of the State Governments.

Audit Reports on Public Sector Undertakings and Autonomous Bodies are sent to the concerned Ministries or Departments for being laid before the Parliament or the State Legislatures.

As laid down in the Constitution of India, the Audit Reports, after approval of the Comptroller and Auditor General of India, are presented to the President of India or Governors of the States for laying before the Parliament or the State Legislatures as the case may be.

CAG audits both the appropriation and financial accounts prepared by the Controller General of Accounts .

The annual accounts of the Government, comprising the Union Government Finance Accounts and the Appropriation Accounts, are prepared by the Controller General of Accounts. These

documents are presented before the Parliament after their statutory audit by the Comptroller and Auditor General of India.

Appropriation Accounts show the expenditure incurred against the expenditure authorized by the parliament in the previous financial year. All the expenditures are duly audited and excesses or savings in the expenditure are explained.

The Finance Accounts show the details of receipts and expenditure for all the three funds.

Audit covers both the voted and charged expenditures.

After the Appropriation Accounts and the Finance Accounts and the Audit Reports thereon are presented in the Parliament, they shall stand referred to the Committee on Public Accounts for examination and report.

Public Accounts Committee (PAC) takes up the Audit Report for examination. The CAG acts as the "friend, philosopher and guide" for the PAC. Based on the Audit Report, the PAC frames its recommendations which are placed before both the Houses of Parliament/Legislatures. The Government sends Action Taken Notes(ATNs) on the recommendations of PAC. PAC prepares the final report taking into account the ATNs.

In India the institution of CAG only audits the accounts after the expenditure is committed. It does not have control over the withdrawal of moneys as in Britain where the name Comptroller is justified.

### CAG and Policy

Should the CAG question policy decisions? The answer is based on the following

- the financial implications of a policy were not gone into at all before the decision was made
- the assessment of financial implications was quite clearly wrong
- the numbers were correct but the reasoning behind the decision was questionable

In such cases, it is within the CAG's mandate, as the instrument of accountability, to comment on such a policy. Be it underselling government shares in PSEs or not adopting auction process of selling natural resources or adopting tax amnesty schemes with a moral hazard- CAG's audit on these matters contributes to public policy.

Further, CAG is bound by his (or her) oath of office to uphold the Constitution. He has to comment on policy matters that *prima facie* seems unconstitutional. If the government were to formulate a scheme or policy that selectively confers benefits from public funds on an individual or group to the exclusion of others on no stated grounds, or on grounds which seem questionable, it is CAG's duty to point this out.

CAG has been undertaking many types of audit such as propriety audit, performance evaluations, and so on, and they are all well within his ambit, as different modalities of ensuring accountability. Moreover, there are two other grounds for this understanding: century-old traditions, and international consensus.

Even during British rule there was an Auditor General, and traditions of the independence and objectivity of that office were fairly strong. Propriety audit was in vogue then.

Internationally, there are Auditors General, Comptrollers General, Audit Commissions, and other forms of what are known as Supreme Audit Institutions (SAIs) not only in democratic countries, but even in authoritarian systems. In India, the CAG is the SAI. There are professional organisations such as the International Association of Supreme Audit Institutions (INTOSAI) and the Asian counterpart (ASOSAI) in which the Indian SAI plays an important part. CAG performs the audit function like the other SAIs.

### **Nature of Audit**

While fulfilling his Constitutional obligations, the Comptroller & Auditor General examines various aspects of Government expenditure. The audit done by C&A G is broadly classified into the following types:

#### **Regularity Audit (Compliance or Financial )**

It is an audit to ascertain whether the moneys spent were authorised for the purpose for which they were spent. Also, it is an audit to see that the expenditure incurred was in conformity with the laws, rules and regulations

#### **Supplementary audit**

The Comptroller and Auditor General of India (CAG) takes up supplementary audits in PSUs even after the commercial audits are done by the auditors appointed by the CAG as it generates much revenue for the Government through detection of leakages etc.

#### **Propriety audit**

The term 'propriety' means the rightness and moral quality of a course of action

Propriety audit thus focuses on whether the expenditure made is in public interest

Propriety audit focuses on aspects like whether public money is misused for the benefit of a particular person or section of community.

It extends beyond scrutinising the mere formality of expenditure to its wisdom and economy and to bring to light cases of improper expenditure or waste of public money. It is conducted to report whether all the expenditure sanctioned and incurred are need-based and all the revenues due to Government have been realized in time and credited to the government account. It is "Value for Money audit".

CAG's report in 2012 regarding land allotment in Andhra Pradesh brought out the fact that in a large number of cases of land allotment, the State Government ignored the prescribed procedures and disregarded "canons of financial propriety" leading to loss of precious money that would otherwise have gone into government coffers.

#### **Efficiency Audit**

Efficiency audit is the audit, which ensures that money invested yields optimum results. The main purpose of efficiency audit is to ensure that

- that investment is properly prioritized and channeled into most profitable lines
- there is most profitable utilization of investment

### **Performance Audit**

Performance audit is to see that Government programmes have achieved the desired objectives at lowest cost and given the intended benefits. The Comptroller and Auditor General is asked to carry out performance audit of implementation and expenditure incurred in schemes under the NREGA in 11 states. The 11 states that would be covered under special performance audit include Uttar Pradesh, Bihar, Assam, Rajasthan, Andhra Pradesh and Orissa. Ministry of Rural Development, GOI asked CAG to take up an audit of the Indira Awas Yojna.

The ministry issued orders to make it compulsory for all gram panchayat accounts related the rural employment guarantee programme to be certified by chartered accountants. To this end, CAG will create a panel of chartered accountants for each district. There will also be a random check of the gram panchayat accounts by CAG.

The Comptroller and Auditor General of India (CAG) took up auditing bank accounts relating to the Rs71,000-crore farm debt waiver scheme announced by the UPA government. CAG examined how effectively that scheme was implemented. The report did not look into the merits or demerits of the debt-waiver scheme but the implementation of the scheme by public sector banks. CAG does not audit RBI and banks- the latter being audited by the RBI.

### **Environmental audit**

In recent years, environmental audit is gaining momentum. Over the last decade, the office of the CAG of India has increased its focus on audit of Audit of environmental issues, keeping in mind the challenges facing India today with respect to management and conservation of the environment. More than 100 audits on diverse environmental issues like biodiversity, pollution of rivers, waste management etc., have been conducted by the CAG. In 2010, CAG of India undertook an environmental audit on water pollution in India wherein issues, causes and mitigation methods relating to rivers, lakes and groundwater in India were addressed. The aim of this audit was to identify critical issues and suggest solutions which would help the government to conserve and protect this scarce resource more effectively. CAG has done EA for Mumbai Port Trust, Tiger Parks etc.

### **CAG and Internal Audit**

Internal auditing is an independent, objective evaluation of a body designed to add value and improve an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve an organization's effectiveness and efficiency. Many organization engage internal auditors.

In recent years, there has been a debate that the CAG should go in for the internal audit in a rigorous way as it employs many thousands of people and has huge budget annually. The importance of its work also means that it be effective and efficient.

The government wants the audit CAG's expenditure. Currently, there is no independent audit."

CAG needs to be audited, but that doesn't mean loss of independence of the institution is lost. Supreme Court and Parliament are audited by the finance ministry, but they are independent institutions.

Recently, former comptroller and auditor general V.K. Shunlu, who headed the committee that investigated alleged irregularities in the 2010 New Delhi Commonwealth Games, raised the issue of auditing CAG. Shunlu had recommended an external audit of the auditor under the supervision of Parliament's public accounts committee.

CAG currently does not have a dedicated internal wing to audit its functioning. However, it conducts an annual audit by a senior officer and is currently undergoing an external audit by the Australian National Audit Office. CAG had undergone a similar exercise in 2003, which was conducted by the UK's National Audit Office. The findings of these reports are not available in the public domain.

There is a need for a performance audit of CAG, in terms of the internal guidelines, audit mechanism, etc., according to experts.

There are following limitations on the powers of CAG

- its report is post-facto- that is, after the expenditure is incurred and has only prospective value in improving systems and procedures
- secret service expenditure is outside its audit purview(which is incurred in cultivating informers and on collecting data on intelligence, etc. on duty evasion, anti social activities, smuggling activities, etc) and comes within administrative audit. Some departments like police, customs etc have some money authorized for secret service.
- CAG conducts audit as per the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971. At the time of this legislation, concepts like public private partnership (PPP) were non-existent. Rules have not undergone significant change and CAG does not have the power to audit public-private-partnership (PPP) investments
- The Act governing the CAG does not provide for auditing funds that are given to an NGO or elected local bodies. CAG can seek the direction and permission of the Governor of a state to audit the local bodies and panchayatiraj institutions. Thus, CAG does not have full authority to audit them.

Articles 243J and 243Z of the Constitution state that the State Legislature "may, by law, make provisions with respect to the maintenance of accounts by the Panchayats/Municipalities, and the auditing of such accounts." However, states have not responded well to this statutory provision. In most of the States, the Examiners (Local Funds Accounts), functioning under the Finance Department, audit the accounts.

The Comptroller and Auditor General of India (CAG) has been empowered to evaluate all non-government organisations (NGOs) and other agencies involved in the government's social sector schemes. In 2013, The Planning Commission decided that approvals for all social sector projects

undertaken by various NGOs, normally outside the purview of CAG, will come with the rider that they will be subject to audit, if required.

The inclusion of this clause had become necessary as inspection of the account books of private entities that spent government money was not part of CAG's mandate. The current law empowers it to audit only traditional government departments and public sector companies.

### Cag and Mnrega audit 2013

The CAG carried out sample checks in over 3,800 gram panchayats in 182 districts of 28 states for the flagship rural job guarantee scheme MGNREGA . It pointed out many irregularities like rural household employment declined from 54 days in 2009-10 to 43 days in 2011-12 even as the scheme aims to enhance livelihood security by providing at least 100 days of guaranteed wage employment in a year. UP, Bihar and Maharashtra, which are home to nearly 50% of the country's below poverty line (BPL) population, accounted for only 20% of total expenditure under the scheme. The performance in 2012-13 is believed to be even worse.

The CAG report revealed several irregularities in implementation of the scheme like multiple job cards in the name of one person, jobs cards not issued in thousands of cases, diversion of funds etc. The audit also found that plans of social audits were more on paper. The CAG also carried out interviews of 38,000 beneficiaries and more than 75% of them reported that social audit was never conducted in their village.

There were many positives pointed out. One is that the Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS) resulted in empowerment of women and fostering social equity in the State. The potential benefit of convergence of the MGNREGS with other rural development schemes had not been tapped for creation of sustainable outcomes.

Cag audited the NRHM accounts in UP on the request of the UP government in 2011 and came out with the report in 2012.

### Need for more powers to CAG and the Reasons

Since the 1971 Act was passed, many changes have taken place. 73rd and 74th amendments to the Constitution have been adopted, adding a layer of decentralised governance — and hence expenditure management — to the institutions of the state. Liberalisation of Indian economy is another development and has meant public money is increasingly utilised in joint ventures and public-private partnerships. Because of lack of mandate, the CAG feels unable adequately to audit this vast area of public economic activity. Civil society is gaining space and the role of NGOs is increasing.

Comptroller and Auditor General of India (CAG) has written to the Centre seeking to bring non-governmental organisations (NGOs), public-private partnership (PPP) projects and the District Rural Development Agency (DRDA) under its purview.

Some NGOs get funding from the Government and therefore, they should be open to audit by the CAG. The Government knows nothing about their fund utilisation yet they continue to get money from the government. Plus they get-money from foreign sources, whose identity is unclear. The stalling of Koodanmulam nuclear power plant in Tamil Nadu recently by NGOs brought the question to the fore once again.

The CAG also wants to audit of projects which are being built on the PPP model . In these projects, the Government's equity is less than 49 per cent. But if the value of land provided by the Government for the project is added, then it can shoot up to as high as 80 per cent in some projects. Governments have little insight into the financial details of these projects, as they are implemented by private companies.In many infrastructure projects, private companies increase user charges, but the logic behind the increase is never shared with the Government. The new powers will help in unravelling the reasons behind the hike.

Another significant step is the CAG's move to audit the District Rural Development Agency (DRDA), a State government body present in all districts.

The financial dealings of the DRDA have always been outside the purview of CAG audit, as DRDA is registered as a society under the Indian Societies Registration Act of 1860. Now, the CAG is keen on auditing the books of DRDAs as very large sums of money for rural development are sent to them.

#### **Separation of accounts from audit**

Compiling accounts and auditing the same are related but usually the two functions are combined under a single department primarily due to reasons like the two functions are related and also to save money.

From time to time, however, attempts have been made to separate accounting from auditing as in the case of railways, defence etc. In 1971, the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act was passed, which visualised the need for separating accounts from audit. It empowered the President, after consultation with the CAG to divest the Comptroller and Auditor General of the responsibility of compiling the accounts of any department of the Union Government. A scheme for the separation of accounts from audit was approved by the Government of India in 1975. Parliament amended the Comptroller and Auditor General's (DPC) Act 1971 to relieve the CAG of the responsibility of compiling accounts of Ministries Departments of Government of India. He, however, still performs the accounts and audit functions in each state.

The justification to combine the two functions of audit and accounts is two fold-accounting and audit functions are interrelated and the economy that it results in. The need to separate the two is to ensure greater efficiency and specialization.

#### **Cag audit and Social audit**

Over the last four decades, CAG has been conducting performance audits of socio-economic developmental programmes of the Central and State Governments. This has gained renewed emphasis over the last decade (2013), with the introduction of new performance audit guidelines in line with international best practices. The new performance audit methodology envisages more structured planning to identify governance-centric issues, closer interaction with the Executive at all stages of the audit process (during audit planning, execution and reporting), and use of new methods for gathering audit evidence such as beneficiary/stakeholder surveys, physical inspection, audio visual recordings,statistical sampling etc.

During the last ten years, CAG has conducted performance audits of most of the key socio-economic programmes of the Government of India e.g. National Rural Employment Guarantee Scheme (NREGS), National Rural Health Mission (NRHM), Sarva Shiksha Abhiyan (SSA), Mid-day Meals Scheme, Accelerated Rural Water Supply Programme (ARWSP), and Pradhan Mantri Gram Sadak Yojana (PMGSY). CAG's audits have also covered several niche areas of public interest like Waste Management, Police Modernization Scheme etc. CAG's audit of Government departments, offices, and agencies in the States, dealing with implementation of Government schemes, also touches upon the performance of schemes or their components at various levels of the audit process.

CAG's audit is an external audit on behalf of the tax payers. The Union and State Legislatures, through their respective legislative committees on public accounts and public undertakings, discuss the matters brought out in CAG's audit reports and make recommendations to the executive for appropriate management action. In a broad theoretical sense, therefore, CAG's audit itself is a social audit. Yet, in its commonly perceived sense, CAG audit remains a Government process largely confined to Government officials and Government auditors. Social audit, on the other hand, in its current connotation, seeks to make the audit process more transparent and seeks to take audit findings to a wider public domain of stakeholders, i.e. users of the Government schemes, services and utilities.

The demand for social audit has grown in recent years due to the steady shift in devolution of Central funds and functions relating to socio-economic schemes to the local tiers of Government - Panchayati Raj Institutions (PRIs), Urban Local Bodies (ULBs) and other special purpose agencies set up by the Government for implementation of specific schemes.

#### New Accountability Concerns

The shift in devolution of funds and functions towards PRIs and ULBs has been the result of the 73rd and the 74th Amendments to the Constitution and the recommendations of the XI Finance Commission. Further, Central Government has been entrusting the implementation of various socio-economic developmental schemes to autonomous agencies/societies. More often than not, Central Government schemes have also envisaged direct transfer of funds to PRIs, ULBs and such agencies/societies with only facilitatory involvement of the concerned State Governments. Such fiscal allocations have effectively remained out of the State legislative and administrative accountability loop, as these agencies/societies are outside the traditional State Government administrative structure. In these cases, as indeed at PRI and ULB levels also, local accountability structures are either non-existent or are very fragile. From the audit point of view, the shift in Government expenditure to PRIs, ULBs and other agencies/societies has given rise to a new situation. The CAG's audit jurisdiction over such entities is nebulous, compared to his jurisdiction over traditional Government Departments.

Statutorily, audit of local self government institutions is a States subject and the primary (external) audit of PRIs and ULBs is with the State Local Funds Audit Department (LFAD), or with the designated auditors as specified in the State laws, with the exception of few states.

Also, the scheme guidelines of some of the flagship socio-economic programmes of the Government do not provide adequate clarity with regard to audit of the programmes by the CAG.

Further, despite the joint physical verifications with Departmental authorities, and beneficiary surveys, the primary focus of the CAG's performance audits remains, in most cases, processes within Governmental agencies, with the actual verification of outputs and outcomes being only of secondary focus. The prime reason for this is audit methodology and evidence requirements (necessary in order to ensure the rigour and credibility of our audit findings) as well as manpower constraints. In other words, CAG cannot accept unauthenticated oral evidence except as supplemental to core audit evidence.

Social audit concepts are becoming increasingly popular and relevant. The vital role of social audit for ensuring the local stakeholder's role in grass root level implementation of the public sector programmes, verification of deliverables and ensuring accountability of the implementing agencies, besides a safeguard against corruption and frauds has been recognised. It was also felt that with the ever increasing outlays on the social sector programmes and the decentralised implementation, particularly by the rural and urban local self-government institutions, the participation of local stakeholders and civil society in monitoring the implementation of the programmes cannot be ignored.

Social audit initiatives fall into two categories – social audits carried out by Gram Sabhas/Panchayats or local level Vigilance and Monitoring Committees as stipulated by the Government in the guidelines of various social sector programmes, and those carried out by Civil society groups. In both these types, the social auditors are in a position to obtain direct feedback from beneficiaries on a large scale through Gram Sabha meetings, Jan Sunwais, Sammelans and other oral evidence gathering methods to ascertain the outputs of social sector programmes and pinpoint grassroot level failures.

Considering the significant contribution by various social audit groups in ensuring accountability of the programme managers and implementing agencies, the Government of India has embedded social audit in one form or the other (like village level monitoring committees/vigilance committees) in almost all the flagship social sector programmes like NREGS, ARWSP, NRHM, MDM etc.

CAG studied the social audit practices of Gram Sabhas and civil society organisations and explored the modalities of assimilating social audit concepts and techniques into the audit of CAG of India within the framework of the existing mandate.

CAG is considering the issue of positioning of social audit within the three basic categorisations of audit viz. financial, compliance and performance audits. The objectives of social audit revolve around empowerment of the beneficiaries and directly affected stakeholders of the public sector programmes in matters of planning, implementation, delivery of services, appraisal, corruption and frauds, impact, etc. The social audit procedures provide a voice to the people to participate and be heard. Above all, social audit provides close to complete transparency to the entire gamut of programme management and renders the impact sustainable. It enables the

people to view the decision making process and criteria adopted for various elements of the programme.

While social audit has a crucial role in implementation of social sector programmes, its objectives cannot stand alone mode, sustain the complete audit objective of any of the three basic types of auditing. All the objectives and processes adopted for social audit will fit into the audit objectives of one or more of the three fundamental types of audits. Therefore, social audit cannot be a substitute for the public audit by but can be subsumed within one or more of them to enhance the quality of the audits by CAG of India. Thus, social audit ought to be viewed as a technique or procedure to broaden the depth or spread of audit by CAG rather than a distinct form of audit. Use of social audit techniques or the social audit findings should be viewed as a means to strengthen CAG audit rather than a substitute for CAG's audits.

### **Strengths of Social Audit**

Focus on outputs in social audit process, the directness of its inquisitions and the instantaneous interface and interlocution it provides among the beneficiaries and stakeholders of social sector programmes, has its unique strengths. Social audit provides an opportunity to plug a long felt gap in the audit process and techniques used by our Department. It provides the strongest and irrefutable direct evidence for inputs, processes, financial and physical reporting, compliance, physical verification, assurance against misuse, fraud and misappropriation, and utilisation of resources and assets. In addition, social audits also provide a forum for strengthening the democratic process in governance and grievance redressal. Social audit provides the most important link between oral and documentary evidence and offers a means of securing accountability of the managers of public sector programmes and renders the monitoring and appraisal mechanism.

### **Limitations of Social Audit**

While social audits lend a powerful tool for programme audit and monitoring by the beneficiaries and direct stakeholders, its limitations should be recognised in determining its positioning in the public sector audit framework. The scope of social audits is intensive but highly localised and covers only certain selected aspects out of a wide range of audit concerns in the financial, compliance and performance audits. These are also sporadic and ad hoc, except where broad-based monitoring by Gram Sabha has been embedded in the social sector programmes. Even in these cases, the monitoring is informal and unprocessed. Moreover, the documentation of social audits is not in a form as to provide consistent evidence. The findings of social audit, unless carried out on a representative basis, cannot be either generalised or estimations over the entire population be made.

### **Partnership between Social Audit and CAG's Audit**

Social audits afford an opportunity to strengthen the micro level scrutiny of the programme planning, implementation and monitoring and should be brought into the mainstream of auditing by the Indian Audit and Accounts Department as an essential process and tool in all the performance audits of social sector programmes. It can also be placed in the mainstream of compliance audits of the social sector programmes to assist verification of compliance to the rules and assurance against frauds, corruption and misappropriation. Further, it can facilitate

association of CAG's auditors with local fund auditors and Gram Sabhas in certification of accounts of local governments.

Procedures should be established to necessarily build social audits into the scope of audit by way of utilisation of voluntary or commissioned social audits. A protocol may be established for sustainable ongoing partnership with the major social audit organisations within the country and their findings used in developing the findings and conclusions as a standard procedure in all audits of the social sector programmes. In turn, Cag can provide for assistance in capacity building of the social audit groups and encourage social audits in the States where it has not taken off in a significant manner.

World over, there is a growing perception that it is important to partner with civil society to ensure the latter's participation in policy development, service delivery and public accountability. Auditing for Social Change requires participation of the civil societies in public accountability in partnership with SAIs like Cag , whether in a formal or in an informal process, as it has the real potential to enhance accountability and align public services to citizens' needs in important areas like achievement of Development Goals. Policy makers recognized the wide spectrum of collaboration between civil society groups and audit institutions – from direct participation in audits to focus on demanding follow-up action on audit findings and putting pressure for implementation of audit recommendations , identification of entities that should be the subject of audits and independent audits.

It is said that Cag should take the social audit and social auditors on board for serving the cause of public good. Social auditors are likely to benefit by way of finding a place for their work in a wider and formal/legal forum of the CAGofIndia, ultimately adding value to their work. On the professional development level, they would also be benefited through their exposure to the techniques and objectives of the audits by the CAG of India. Cag can benefit as of its biggest limitations of not being able to reach the beneficiaries for their perception and verification of delivery of the programmes, including the existence of the community assets and their actual utilisation can be overcome in an effective manner.

Space for social audit has been created both by the Constitutional Amendments which ordained that accounts of a Gram Panchayat be placed before a Gram Sabha, and by the RTI Act 2005. State Governments of Rajasthan and Andhra Pradesh have taken the initiative to incorporate social audit as part of their monitoring systems through Gram Sabhas and in partnership with a consortium of NGOs. Given these highly acclaimed initiatives, it is possible for CAG auditors to associate themselves with various activities in the social audit process in these States. The experience in Rajasthan has shown that we can gain immensely from the oral evidence tendered at the public hearings which are part of the social audit process. Participation sensitizes the people and helps them realize that accountability is not just a part but the prime driving force of good governance.

# **Electoral System in India**

India is the most populous democracy in the world with about 75 cores of voters. Being a three-tiered democracy- central, state and local layers of governance-, the depth of democracy is great. India is a great example of representative democracy where periodical elections that are free and fair in which people vote without any coercion or fear, is the norm. All social groups are free to participate in elections without any discrimination.

Apart from a robust constitutional and legislative framework, universal adult franchise, competitive political party system, statutory right to vote, an informed electorate and a vigilant media and civil society o constitute key elements of a sound and democratic electoral system, and are important prerequisites for a credible electoral democracy. It goes without saying that a neutral and efficient election management with transparent systems and procedures in place is the most critical of all.

Constitutional provisions, supplemented by laws made by Parliament and the Rules made by the Election Commission are the basis for the conduct of elections.

Part XV of the Constitution (Art.324-329 ) contains provisions related to elections. There are two RPAs:

- Representation of the People Act, 1950, which mainly deals with the preparation and revision of electoral rolls and
- Representation of the People Act, 1951 which deals, in detail, with all aspects of conduct of elections and post election disputes.

Other laws that confer powers on the EC are Presidential and Vice-Presidential Elections Acts, 1952, Government of Union Territories Act, 1963, Government of the National Capital Territory of Delhi Act, 1991 and the Rules and Orders under them.

Further, the Supreme Court of India held that where the enacted laws are silent or inadequate, the Election Commission has the residuary powers under the Constitution to act in an appropriate manner.

## **Constitutional provisions**

Art. 324 broadly speaks of the functions of the Election Commission and its composition. It confers the power of superintendence, direction and control of elections in the Election Commission. It includes the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and State Legislature; and elections to the offices of President and Vice-President of India.

The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix. President appoints the Chief Election Commissioner and other Election Commissioners subject to any law made by Parliament.

- When any Election Commissioner is appointed, the Chief Election Commissioner shall act as the Chairman of the Election Commission.

Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint, after consultation with the Election Commission, such Regional Commissioners as he may consider necessary to assist the Election Commission.

President determines the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners, subject to the provisions of any law made by Parliament.

The manner of removal of the CEC and the ground for removal are the same as the Supreme Court judge-parliamentary vote followed by the Presidential decision. The conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment.

Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff that is necessary for the conduct of the elections

Art. 325 says that there shall be one general electoral roll for every territorial constituency for election to either House of Parliament and State Legislature. It establishes equality among citizens for being enrolled as voters by affirming that no person shall be ineligible for inclusion in the electoral roll on grounds of religion, race, caste or sex.

326 lays down adult suffrage as the basis for elections to the House of the People and to the Legislative Assemblies of States. The following are the qualifications to vote

- Should be a citizen of India
- Should be not less than eighteen years of age.
- is not disqualified under this Constitution or any law made by the appropriate Legislature on the grounds of
  1. non-residence
  2. unsoundness of mind
  3. crime or
  4. corrupt or illegal practice.

However, right to vote is not implied in Art.326. It is a statutory right under the RPA 1950.

Art. 327 confers on Parliament the power to make provision with respect to elections to federal and state Legislatures, subject to the provisions of the

Constitution, on all matters relating to elections to Parliament or Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies etc.

Art. 328 confers on the State Legislature power to make laws with respect to elections to such Legislature, subject to the provisions of the Constitution and any law made in that respect by Parliament. Such powers include the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses.

Art.329 bars interference by courts in electoral matters.—Notwithstanding anything in the 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.

Any elector or candidate can file an election petition on grounds of malpractice during the election. An election petition can only be filed before the High Court, in respect of elections to the Parliament and State Legislatures. In respect of elections for the offices of the President and Vice President, such petitions can only be filed before the Supreme Court.

#### Election Commission

Since 1993, the Election Commission of India is a three-member body, with one Chief Election Commissioner and two Election Commissioners. It was not a multi member body from the beginning. It was a single - member body when it was first set up in 1950 till 1993 except for a brief period between 1989 October and 1990 January. In 1993 it became a three-member Commission and has remained so since then. Article 324(2) empowers the President of India to fix from time to time the number of Election Commissioners other than the Chief Election Commissioner.

The Chief Election Commissioner and the two Election Commissioners draw salaries and allowances at par with those of the Judges of the Supreme Court of India .

The Chief Election Commissioner or an Election Commissioner holds office for a term of six years from the date on which he assumes his office or till he attains the age of 65 years, whichever is earlier.

The Chief Election Commissioner and Other Election Commissioners (Conditions of Service) Act, 1991, as amended, provides that if the CEC and his colleagues differ in opinion on any matter, such matter shall be decided by the opinion of the majority. CEC has no special role in decision making.

### **Are the commissioners and the CEC equal?**

Former CEC, N. Gopalswami's suo motu recommendation to the President to remove Mr Navin Chawla from the post of Election Commissioner in 2009 raised legal questions as to whether he is Constitutionally competent to do so.

In S.S. Dhanoa vs Union of India (1991), the Supreme Court held: "The Chief Election Commissioner does not... appear to be primus inter pares, i.e. first among the equals, but is intended to be placed in a distinctly higher position."

The position of the apex court evolved in the case of T.N. Seshan vs Union of India(1995). It held that the CEC and the ECs are equal. CEC is given the power of recommending the removal of ECs and it is intended to shield them and not use it against them. He can not use it suo moto as he is an equal of them.

While functioning as the CEC, he acts as the Chairman which means he presides over the meetings, conduct the business of the day, ensure that precise decisions are taken and correctly recorded and do all that is necessary for smooth transaction of business.

### **Functions of Election Commission**

It has administrative, advisory and quasi-judicial functions.

#### **Administrative functions**

Under Article 324(1) of the Constitution of India, the Election Commission of India, interalia, is vested with the power of superintendence, direction and control of conducting the elections to the offices of the President and Vice-President of India. Detailed provisions are made under the Presidential and Vice Presidential Elections Act, 1952 and the rules made thereunder.

The same Article 324 also vests in the Commission the powers of superintendence, direction and control of the elections to both Houses of Parliament. Detailed provisions are made under the Representation of the People Act, 1951 and the rules made thereunder.

Article 324 (1) also vests in the Commission the powers of superintendence, direction and control of the elections to both Houses of the State Legislature. Detailed provisions are made under the Representation of the People Act, 1951 and the rules made thereunder.

#### **EC appoints the following :**

The Election Commission of India nominates or designates an Officer of the Government of the State/Union Territory as the Chief Electoral Officer in consultation with that State Government/Union Territory Administration. the Chief Electoral Officer of a State/ Union Territory is authorised to supervise the election work in the State/Union Territory subject to the overall superintendence, direction and control of the Election Commission.

The Election Commission of India designates an Officer of the State Government as the District Election Officer in consultation with the State Government. The District Election Officer supervises the election work of a district.

The Election Commission of India nominates or designates an officer of the Government or a local authority as the Returning Officer for each of the assembly and parliamentary constituencies in consultation with the State Government/Union Territory Administration. In addition, the Election Commission of India also appoints one or more Assistant Returning

Officers for each of the assembly and parliamentary constituencies to assist the Returning Officer in the performance of his functions in connection with the conduct of elections. The Returning Officer of a parliamentary or assembly constituency is responsible for the conduct of elections in the parliamentary or assembly constituency concerned. EC appoints the officer of State or local government as Electoral Registration Officer (ERO). The Electoral Registration officer is responsible for the preparation of electoral rolls for a parliamentary / assembly constituency.

Under the Representation of the People Act 1951, the Election Commission of India nominates officers of Government as Observers (General Observers and Election Expenditure Observers) for parliamentary and assembly constituencies. They perform such functions as are entrusted to them by the Commission. The amendments made to the Representation of the People Act, 1951 in 1996 make the observers statutory appointments. They report directly to the Commission.

EC's other administrative functions are

- Under Art.324, EC is made responsible for the free and fair elections in the country for elections to Parliament, State Legislature, President and Vice President of India
- Under Art.324, EC has the duty to prepare and revise the electoral rolls
- Political parties have to be registered with the Election Commission.
- Election Commission decides the election schedules for the conduct of elections, general elections or bye-elections; location of polling stations, assignment of voters to the polling stations, location of counting centres, arrangements to be made in and around polling stations and counting centres and all allied matters.
- EC enforces the Model Code of Electoral Conduct that is mutually agreed upon by the political parties
- Defines the national political party and State political party and accords recognition .EC declares other parties as registered-unrecognised parties.
- in case of a dispute as to which party is to be given a particular symbol, it is the Election Commission that decides
- it enforces limits on expenditure on elections
- it postpones( for any reason like floods, cyclone etc) or orders repoll or countmands elections
- if President's rule is to be extended beyond one year, EC should certify that elections can not be held in the State( 44<sup>th</sup> Amendment Act)
- During the elections, vast powers are assigned to the election commission enabling it to work as a civil court. According to Art.329b, courts do not intervene in election matters after the electoral process has begun
- either the CEC or an EC nominated by the CEC is an ex officio member of the Delimitation Commission

#### BLO

Enrolling of all eligible voters and removing the names of the dead and shifted voters from electoral rolls are two important tasks in the updating of the electoral rolls.. As we do not have compulsory voting in our country, the enrolment of eligible voters did not always receive the attention it deserves. Besides, there was no focused attention paid to the process of removal of the names of bogus, dead and shifted voters from electoral rolls. As the result, the inaccuracy of rolls used to be as high as 10 per cent in some cases. The presence of names of non-existent voters in the rolls therefore offered scope for poll-day malpractices such as impersonation and

bogus-voting. Often, names were repeated. With up-to-date software, EC is able to easily eliminate such duplication all over the country. The ECI deliberated and introduced a new system called the booth level officer (BLO) system to deal with these problems. It created a clear line of accountability for preparation of an error-free electoral roll, making the BLO its custodian at the polling booth level. So he or she became accountable for the 1,000 to 1,500 eligible voters in his or her area. During 2009 and the subsequent elections to State Assemblies, the BLOs also ensured door-to-door distribution of voter-identification slips to voters. The preparation of accurate electoral rolls and direct distribution of voter identification slips by the BLOs also boosted voter confidence in the credibility of the election process. BLO system led to increase in voter turnout.

Within a few of years of the introduction of the BLO system in 2007 it has now become an integral part of election management. In subsequent elections in Gujarat and in other States, the BLOs now began to also collect photos for photo electoral rolls. Finally, we adopted the concept of the BLO system as a national exercise in the 2009 election, with very beneficial results.

### **Advisory Jurisdiction**

Under the Constitution, the Commission also has advisory jurisdiction in the matter of

- post election disqualification of sitting members of Parliament and State Legislatures. For example, for holding office of profit.
- cases of persons found guilty of corrupt practices at elections which are dealt with by Supreme Court and High Courts are also referred to the Commission for its opinion on the question as to whether such person shall be disqualified and, if so, for what period.

The opinion of the Commission is given to the President or the Governor as the case may be and is binding.

### **Quasi-Judicial jurisdiction**

The Commission has the power to disqualify a candidate who has not lodged an account of his election expenses within the time and in the manner prescribed by law. The Commission has also the power for removing or reducing the period of such disqualification as also other disqualification under the law.

### **Political Parties & the Election Commission**

The Election Commission of India is the authority to register political parties under Sec.29A of the Registration of People Act. All political parties are registered with the Election Commission under the law. Some parties are merely registered and some are recognized as national and state parties if they comply with the criteria that the EC lays down. The EC may enforce inner party democracy in their functioning by making it compulsory to hold organizational elections at stated intervals.

It has quasi-judicial jurisdiction :settlement of disputes between the splinter groups of a recognised party based on which symbol may be attached or frozen.

The Model Code of Conduct is voluntarily agreed to by the parties who have given power to the EC to enforce the same so that there is level playing field among them- among the big and small parties and also the ruling and opposition parties. EC's power to enforce the MCC is recognized by the courts and also acquires force by precedent.

## **Election Machinery**

The Commission has a separate Secretariat at New Delhi. Two Deputy Election Commissioners who are the senior most officers in the Secretariat assist the Commission. They are generally appointed from the national civil service of the country and are selected and appointed by the Commission with tenure.

At the state level, the election work is supervised, subject to overall superintendence, direction and control of the Commission, by the Chief Electoral Officer of the State, who is appointed by the Commission from amongst senior civil servants proposed by the concerned state government. He is, in most of the States, a full time officer and has a team of supporting staff.

At the district and constituency levels, the District Election Officers, Electoral Registration Officers and Returning Officers perform election work. They all perform their functions relating to elections in addition to their other responsibilities.

The workforce for conducting a countrywide general election to Lok Sabha consists of nearly five million polling personnel and civil police forces so that about 70 crore electorate can vote in about 8 lakh polling booths. This huge election machinery is deemed to be on deputation to the Election Commission and is subject to its control, superintendence and discipline during the election period, extending over a period of one and half to two months. The Secretariat of the Commission has an independent budget, which is finalised directly in consultation between the Commission and the Finance Ministry of the Union Government.

For parliament elections, Central Government bears the expenditure. State Government pays for the elections to State Legislature. In case of simultaneous elections to the Parliament and State Legislature, the expenditure is shared equally between the Union and the State Governments. For Capital Equipment, expenditure related to preparation for electoral rolls and for Electors' Identity Cards too, the expenditure is shared equally.

## **Election Process**

The Commission announces the schedule of elections before the formal process begins. With the announcement of schedule, the Model Code of Conduct for guidance of candidates and Political Parties comes into effect. The formal process for the elections starts with the notification calling upon the electorate to elect Members of a House. As soon as notification is issued, candidates can start filing their nominations in the constituencies from where they decide to contest. These are scrutinised by the Returning Officer of the constituency concerned after the last date for nomination is over. The validly nominated candidates can withdraw from the contest within two days from the date of scrutiny.

At least two weeks are given for political campaign before the actual date of poll. A separate date for counting is fixed and the results are declared for each constituency by the Returning Officer. The Commission announces list of Members elected and issues Notification for the due Constitution of the House. With such notification, the process of elections is complete and the President, in case of the Lok Sabha, and the Governors of the concerned States, in case of Vidhan Sabhas, can then convene the respective Houses to hold their sessions. The process takes 5-to 8 weeks for the national elections, 4 - 5 weeks for separate elections only for Legislative Assemblies.

## **Independence of the EC**

Independence of Election Commission and its insulation from executive interference is guaranteed by the following provisions

- The term of office of the Chief Election Commissioner and other Election Commissioners is six years from the date he assumes office or till the day he attains the age of 65 years, whichever is earlier.
- Art. 324(5) says that Chief Election Commissioner shall not be removed from his office except in like manner and on like grounds as a judge of the Supreme Court and conditions of his service shall not be varied to his disadvantage after his appointment. The other Election Commissioners cannot be removed from office except on recommendation by the Chief Election Commissioner.
- The Chief Election Commissioner and Election Commissioners are entitled to the same salary and other facilities, like rent free accommodation, as are provided to a judge of the Supreme Court
- Conditions of service of the CEC and ECs can not be altered to their disadvantage after their appointment.

It must be stated that unlike the judges of SC and HCs; CAG and the members of the UPSC, the administrative expenditure of the EC or the salaries, allowances and pensions of the CEC and ECs are not charged on the Consolidated Fund of India.

### **Recommendations to make the EC more independent and effective**

- Moily Commission (SAR)( 2007) recommends that there should be a collegium for appointment of Chief Election Commissioner and other Commissioners. It should be headed by Prime Minister consisting of Lok Sabha Speaker, Leader of Opposition in Lok Sabha, Law Minister and Rajya Sabha Deputy Chairperson. Same was earlier recommended by the NCRWC
- The same constitutional protection to all Election Commissioners as is available to the Chief Election Commissioner
- all such functions concerning the Secretariat of the Election Commission, consisting of officers and staff at various levels, such as their appointments, promotions, etc., be exclusively vested in the Election Commission on the lines of the Secretariats of the Lok Sabha, and Rajya Sabha, Registries of the Supreme Court and High Courts etc., and
- EC budget be Charged on the Consolidated Fund of India.

## **Recognition and Reservation of Symbols**

### **The Election Symbols (Reservation and Allotment) Order 1968**

EC is responsible for allotment of symbols to the political parties based on whether a political party is recognized -as national or state party – or unrecognized and is merely a registered party. EC lays down the definition of national and state party.

Following is the definition of a national political party

- it secures at least six percent(6%) of the valid votes polled in any four or more states, at a general election to the House of the People or, to the State Legislative Assembly; and
- in addition, it wins at least four seats in the House of the People from any State or States.

OR

- it wins at least two percent (2%) seats in the House of the People (i.e., 11 seats in the existing House having 543 members), and these members are elected from at least three different States.

OR

- A party recognised as a State party in a minimum of four States (added in 2005)

**State party is one that**

- secures at least six percent (6%) of the valid votes polled in the State in a general election to the Legislative Assembly of the State concerned;
- in addition, it wins at least two seats in the Legislative Assembly of the State concerned.

OR

- it wins at least three percent (3%) of the total number of seats in the Legislative Assembly of the State, or at least three seats in the Assembly, whichever is more.

OR

- In a general election to the LS in the State, it should win at least one seat for every 25 Lok Sabha seats, or any fraction thereof, allotted to that State

OR

- In a Lok Sabha general election from the State concerned, the candidates set up by the party should secure at least 6 per cent of the total valid votes polled in the State, and in addition, the party should win at least one seat in the Lok Sabha from that State in the said general election. (added in 2005).

OR

At the last general election to the House of the People or the Legislative Assembly of the State, the candidates set up by the Party have secured not less than eight percent of the total valid votes polled in the State( In 2011, the last one was a new definition added for the State Party as some parties complained that even after winning 8% or more of vote, they are still denied the status of State party.This is the only definition where votes matter irrespective of seats).

National political parties are six: INC, BJP, Nationalist Congress Party, BSP, CPI and CPI(M). There are about 50 state parties. RJD lost its status recently.A party, that loses its recognition, shall not lose its symbol immediately, but shall be given the facility to use that symbol for some time to try and retrieve its status. However, the grant of such facility to the party to use its symbol will not mean the extension of other facilities to it, as are available to recognised parties, like, free time on Doordarshan/AIR, free supply of copies of electoral rolls, etc.

### **Elephant symbol :**

**AGP, BSP, PMK and SSP to share 'elephant' as election symbol**

The Asom Gana Parishad, Bahujan Samaj Party, Pattali Makkal Katchi and Sikkim Sangram Parishad have elephant as their symbol. BSP is a national party while others are state parties. Inevitably, it led to disputes. They resolved the dispute over the use of the elephant as their election symbol as follows:

The elephant will serve as the BSP's symbol in all states and Union territories except Assam, Puducherry and Sikkim -- while the AGP, PMK and SSP will have its use in their respective states. If BSP contests in these states, it will have the elephant symbol.

### **YSR Congress and Fan symbol**

The party chose ceiling fan symbol. It contested bypolls in 18 assembly constituencies and 1 Lok Sabha constituency in June 2012- they fell vacant as the MLAs from these constituencies revolted against their parties and were either disqualified under anti-defection law or resigned. However, YSRC was not a state party according to the definition of EC and so there was an apprehension that all candidates of the party would not get the same symbol. But all YSR Congress contestants could get the same symbol as EC made the rule that sitting members could choose the symbol of their choice.

### **Common symbol**

National parties and state parties could have the symbol of their choice in all the constituencies where they are contesting. However, the registered but unrecognised parties can not have such a common symbol till 2011 when the EC changed the rule

Hitherto those parties were given symbols by draw of lots in individual constituencies if more than one candidate asked for a particular symbol. Consequently, these parties were unable to get uniform symbols in all the constituencies they contested.

To avail themselves of the concession, under the revised provisions of the Election Symbols (Reservation and Allotment) Order, 1968, such parties will have to contest the general elections from at least 10 per cent of the constituencies in a State, subject to a minimum of 5 Assembly constituencies in a State having less than 50 Assembly Constituencies, and two Parliamentary Constituencies in a State having less than 20 Parliamentary constituencies.

They should intimate the choice of 10 symbols from the list of free symbols.

This concession will be only a one-time facility for the Lok Sabha or the Assembly elections.

### **Models of Representation System**

#### **FPTP system**

FPTP system is one where there are single member territorial constituencies contested usually by two or more candidates.. The winner is one who gets the largest number of votes- more votes than the nearest rival- called plurality of votes . It is in contrast to the term 'majority ' of votes which is one vote more than 50% of the total valid votes polled.

The plurality voting system which is in vogue in India, UK, Canada and the USA, is also called winner-takes-all system . An extended type of the FPTP is one prevailing in France where there are two rounds. The second round of elections is held when the first round does not produce a winner who collects simple majority of votes polled- 50% plus . In the next round, the two highest vote getting contestants fight for 50% plus vote. Whoever polls the majority is declared the winner. It is also called the "two-ballot" or "runoff election" system-the second

round being called the run off round. Francois Hollande won such run off in 2012 to become the President of France. In the run off election, evils like caste based and religion based voting can not succeed. However, minorities have less chance of getting 50% plus 1 of the vote.

FPTP system is adopted for the following reasons:

- simple to administer
- country being huge and the electorate being largely not very literate, it is the most convenient and suitable system
- relatively inexpensive

However, the 'first-past-the-post' system prevailing in our country is found to be distorted for the following reasons

- There are certain States in India where there are three or four recognized political parties, more or less evenly balanced. In such a situation, the winning candidate in many constituencies secures no more than 30% or less of the valid votes polled. Those who cast the remaining 70% of the vote are unrepresented. 145 MPs were elected to the 15<sup>th</sup> LS in 2009 with less than 20% votes
- The first-past-the-post (FPP) system creates a distortion between the votes polled by a party and the seats it secures in the legislature. The votes polled by the ruling party may be marginally more than the nearest rival but the seats secured by the ruling party may be substantially more.
- another situation is also evidenced where a political party polling a substantial portion of votes in a general election is not able to get a single seat in the Parliament/state legislature in the State .

The remedies are the form of PR and semi PR systems

#### Proportional system of representation

Proportional system of representation has been discussed in the chapters on RS and President and VP elections: a quota is set for a candidate to win the election. Quota depends on the number of candidates to be elected- the more the number the less the quota. It means that

- in a single member constituency, quota is 50% plus one which is fair as the candidate with majority of votes is elected.
- in a constituency with more than one candidate to be elected, quota is proportionally less. Thus, it facilitates the election of those candidates who may never be able to obtain a majority of votes as they are in a minority . But they are in sufficiently adequate numbers to have their candidates elected as the quota is far less than 50% of the vote polled.

In the PR system, as indicated above, there are advantages like minorities, women, regional and caste groups can have their representatives which can be progressive and at the same time be divisive also. The disadvantages can be that there will be greater social divisions and polarization. Criminalization of politics can become worse as the threshold is lower and can be achieved with money and muscle power.

A variant of PR system is list proportional representation system. Every party puts up a list and contests elections. It is allotted seats according to the votes it polls. If it gets 25% of votes, it is allotted 25% of seats. Thus, an important lacuna of the FPTP is filled- the vote-seat mismatch.

Voters may vote directly for the party, as in Israel, or they may vote for candidates and that vote will add up to the party, as in Turkey and Finland.

### List system is of two types

- closed list where the list is decided by party leadership. It may encourage sycophancy and representative-voter link may suffer.
- open list order of candidates in the list is determined by the voters at large PR system may be based on single transferable vote (STV) as seen in the Presidential elections in India which is designed to minimize wastage of votes and provide results without further rounds of elections.

### Semi proportional system

There may be a semi-proportional system as recommended by the Law Commission in the 170<sup>th</sup> report in 1999. It may also be called the AMS. The Additional Member System (AMS) is a branch of voting systems in which some representatives are elected from territorial constituencies and others are elected under list system. Voters have two votes, one for the party and the second for the candidate in a constituency. The constituency representatives are elected under the first-past-the-post voting system. The party representatives are elected by a party vote. As explained above, where the party gets 20% of the vote, it gets 20% of the seats from the seats specially meant to be filled under the list system in addition to the normal seats filled by the FPTP. For example, in the case of India, LS has a total membership of elected members at 543. In addition, 250 members may be filled by the List system.

Law Commission recommended that 25% of the number of members in Lok Sabha or Legislative Assemblies of the States should be filled on the basis of list system. Accordingly, in the Lok Sabha as well as in the State Legislative Assemblies, the present strength should be increased by 25% of the existing strength. The increased strength should be filled on the basis of list system. The list system should be confined only to recognised political parties (RPP).

### In support of semi-proportional system in India

Not a single party, since the first general elections in 1952, formed government by commanding over 50 per cent of the polled votes. All the governments at the Centre had more people voting against them than supporting them. The closest to reach the majority mark was the Rajiv Gandhi government in 1984 that polled 48.1 per cent with 415 seats. The lowest was the 1998, the NDA government whose alliance polled 36.2 per cent. In 2004, both the Congress and the BJP together polled only 40 per cent. If democracy is the rule of the majority, then that has not yet been established.

This merits a serious consideration of the proportional representation system where people vote for parties, which, in turn, send to Parliament the number of MPs on the basis of the vote they get- 10% vote means 10% of the total membership in terms of seats.

When a party or alliance rules on the basis of majority vote and not just seat, its moral authority is more. This issue was debated in the Constituent Assembly, but in its wisdom, it adopted the British 'first past the post' system. The 1928 Motilal Nehru Committee report had recommended the system of proportional representation as the best answer to reflect India's diversity. On the debit side, however, critics show the example of Italy's governmental instability, as a result of proportional representation. But it can be amended to suit India conditions and render stability.

In the Indian context, therefore, a combination of proportional representation with the present form may be ideal as recommended by the Law Commission in 1999.

### **Electoral/political reforms for Stable Government**

- Bonus seats as in the case of Greece where the largest single party gets 50 bonus seats .For example, the New Democracy Party that was marginally ahead of the Syriza party got 50 more seats as bonus and was able to form the government with other parties like Pasok in the 300 member Greek Parliament. Otherwise, there would be another round of election
- Constructive vote of no confidence in the LS where the ruling party loses only if there is an alternative. Otherwise, it continues even after losing the vote. However, even as it guarantees stability, it is against Art.75.3. It can create strange and quarrelling coalitions without any policy convergences.
- Presidential system with a security of tenure is a systemic change that may not be warranted because parliamentary system has been functioning well.

### **Electoral reforms**

The success of Indian democracy has been globally applauded but loopholes, in the foundation-the electoral system , remain. Since good governance begins with elections in a parliamentary democracy like ours, the need for a completely free and fair election process needs emphasis. The need for electoral reforms arises from the following reasons

- Make all constituencies have more or less the same number of electorate for representative justice
- Help electorate vote fearlessly
- De-criminalise the polity
- Use new technologies like ICE for more genuine participation by voters
- Establish level playing field among political parties

The Government reformed the electoral system in many ways in the last few decades as given below

- Lowering the voting age to 18 years by amending Art.326
- Introduction of voter identity cards
- Introduction of electronic voting machines
- Making the EC a multi member body as provided by Art.324
- Limited introduction of state finding of elections by making suitable laws like the Election and Other Related Laws (Amendment) Act 2003
- No candidate can contest to Lok Sabha from more than two constituencies
- Delimitation of constituencies for Lok Sabha and Assemblies on the basis of 2001 census
- Section 8 of the RPA 1951 has been interpreted by the EC in such a way as to debar a convicted person from contesting even while an appeal is pending in the apex court

Many committees have studied and reported on electoral reforms with important recommendations. The Joint Parliamentary Committee on Amendments to Election Law headed by Shri Jagannath Rao (1971), the Tarkunde committee set up by Lok Nayak Jai Prakash Narayan(1974), Dinesh Goswami committee (1990), V R Krishna Iyer committee (1994); Indrajit Gupta committee (1998) are some such committees. The 15th Law Commission recommended amendments to Constitution and the Representation of People Act, 1951 in its 170th report ( 1999).

Some more electoral reforms that are recommended and are under consideration are

- None of the above option
- Recall
- Inner party democracy
- Paid news
- Strengthening the EC
- Non-serious candidates to be discouraged.
- Forfeiture of security deposit for failure to secure less than 1/4<sup>th</sup> of the votes polled.
- Statutory backing for important provisions of model code of conduct.The recommendation is not acted upon as statutory backing will open it for judicial review which is time consuming and so is not advisable during elections
- Bye-elections should be held within a period of six months of the occurrence of the vacancy.
- Lowering the age of candidates contesting elections to the Legislative Assembly and Lok Sabha from 25 years to 21 years and in case of elections to the Legislative Councils and Councils of States from 30 years to 25 years.
- Change of present electoral system to Mixed system( semi-proportional system like the additional member constituencies) Making voting compulsory.
- Amendment of Anti-Defection Law to make the President and the Governor in consultation with the EC the authority to disqualify for defection.
- proliferation of parties needs to be stopped with the EC given the power to deregister a party which it does not have now. For example, a communal party . Although canvassing of votes in the name of religion had been barred, political parties, including the recognised ones, continue to play the communal card.
- If a person contests election from two constituencies and wins from both. In such a situation he vacates the seat in one of the two constituencies. The consequence is that a bye-election would be required from one constituency involving avoidable labour and expenditure on the conduct of that bye-election. Law should be amended to provide that a person cannot contest from more than one constituency at a time or he should bear the expenditure of the bye election.
- restrictions on exit polls and opinion polls
- prohibition of surrogate advertisements in print media. Many bodies emerge before elections and give huge advertisements in newspapers with false identities to influence electoral behaviour in the name of secularism, socialism and so on, They are not genuine bodies and it constitutes surrogate advertisement.
- negative / neutral voting in the form of a provision enabling a voter to reject all the candidates in the constituency if he does not find them suitable.

- government sponsored advertisements should be outlawed
- composition of election commission and constitutional protection of all members of the commission. Same protection should be given to the ECs as the CEC.
- expenses of election commission to be treated as charged on Consolidated Fund o India

### **CIC order on political parties:critical analysis**

In June 2013, Central Information Commission (CIC) held that the parties are public authorities and answerable to citizens under RTI Act. The CIC, a quasi-judicial body, has said that six national parties INC, BJP, NCP, CPI-M, CPI and BSP have been substantially funded indirectly by the Central government and they have the character of public authority under the RTI Act as they perform public functions. After the order of the full bench of CIC, the parties will be answerable to the citizens regarding their source of funding, how they spend money and choice of candidates for elections, among other issues.

### **Section 2(h) of the RTI Act defines 'public authority' as follows:-**

"Public authority" means any authority or body or institution of self-Government established or constituted,

- (a) by or under the Constitution;
- (b) by any other law made by Parliament;
- (c) by any other law made by State Legislature;
- (d) by notification issued or made by the appropriate Government, and includes any-
  - body owned, controlled or substantially financed
  - non-Government Organisation substantially financed, directly or indirectly, by funds provided by the appropriate Government

The CIC admits that neither (a), (b), (c) and (d) applies to political parties. 'They have not been established or constituted by and under the Constitution; nor by any other law made by Parliament or the State Legislature; nor are these bodies owned or controlled by any appropriate government.'

But on grounds of sub-clauses (i) and (ii), which pertain to substantial funding- tax-free money raising; land fr party office; AIR/DD time etc.

Dr. Abhishek Singhvi says that the substantial funding subsections (i) and (ii) should apply only if the body satisfies the stipulation of first being established by the government, and which the CIC has itself said is not the case.

Thus, there is a raging debate about whether they can be classified as public authorities under RTI Act 2005.

However, there are advantages to the electoral democracy and the values of transparency and good governance if political parties come under the RTI like financial transparency; why they are not giving tickets to women can be asked; their opaqueness about their internal workings gets corrected -for instance on inner party elections or selection of candidates.

### **Moily Commission on electoral reforms**

The six-member-Commission headed by the former Chief Minister of Karnataka, Veerappa Moily made the following suggestions in its report titled " Ethics in Governance' ( 2007)

- partial state funding of elections should be available
- tightening of anti-defection law. Power of disqualification of MPs and MLAs on grounds of defection should be taken away from the Presiding Officers and be vested with President and Governors on the advice of the Election Commission. Such an amendment to the law is said to be necessary in the light of the long delays seen in some recent cases
- a collegium should be given the power of appointment of Chief Election Commissioner and other Commissioners. Collegium should be headed by Prime Minister and should consist of Lok Sabha Speaker, Leader of Opposition in Lok Sabha, Law Minister and Rajya Sabha Deputy Chairperson
- Special Election Tribunals should be constituted at the regional level to ensure speedy disposal of election petitions and disputes within a stipulated period of six months. Each Tribunal should comprise a High Court judge and a senior civil servant with at least five years of experience in the conduct of elections. Its mandate should be to ensure that all election petitions are decided within a period of six months as provided by the law. The Tribunals should normally be set up for a term of one year only, extendable for a period of six months in exceptional circumstances
- Section 8 of the Representation of the People Act, 1951 needs to be amended to disqualify all persons facing charges related to grave and heinous offences and corruption, with the modification suggested by the EC.

### **Some electoral reforms conducted in the last decade**

The introduction of electoral Identity Cards and preparation of photo voter rolls, stricter enforcement of the Model Code of Conduct, large-scale deployment of central paramilitary forces, the appointment of general and expenditure observers, clear and strict directions of the Election Commission regarding the conduct of party meetings, gradual introduction of Electronic Voting Machines and use of technology in various administrative matters such as videography of elections and secret cameras in sensitive polling stations are some of the salient features introduced by the Election Commission since the '90s. Enhancing voter awareness by declaring January 25, the day the EC came into force in 1950, as the voter awareness day.

These reforms have paid off as can be seen from the high voter turnout in the 2011 and 2012 assembly elections- 75-80%. The reasons for the same are- increasing awareness; fearless voters due to better security that the EC ensured by videography etc; simple voting through EVMs; gravity of issues like corruption; good performance like in Kerala by Achutanandan govt; dynasty issues as in Tamil Nadu with DMK party.

- BLO
- Vulnerability mapping

### **Model Code of Conduct**

The model code of conduct was brought into force in 1967 after the political parties, in discussion with the EC, unanimously agreed to the contents. For example: ministers should not sanction from the discretionary fund once elections are announced. EC can take action against a party that violates the model code after the party is given reasonable time to defend itself. The Code was issued by the EC in 1991 and has since been amended many times.

The objective of the code is to ensure that political parties do not misuse official resources when they are in power. The code seeks to establish a level playing field among the parties. The code comes into effect immediately after the announcement of the elections by the EC and will cease with the declaration of the result.

EC is given the power to conduct free and fair elections under Art. 324 and thus has the implied authority to enforce the Code.

The code prescribes broad guidelines about the conduct of the parties, particularly for the ruling parties at the Centre and the States. Some points of the Code are:

- No party or candidate shall cause tension between different castes and communities, religious or linguistic
- criticism of other political parties, when made, shall be confined to their policies and programme, past record and work.
- Parties and Candidates shall refrain from criticism of all aspects of private life, not connected with the public activities of the leaders or workers of other parties
- the party in power whether at the Centre or in the State shall not use its official position for the purposes of its election campaign
- issue of advertisement at the cost of public exchequer shall be scrupulously avoided
- Ministers and other authorities shall not sanction grants/payments out of discretionary funds

If a recognized political party violates the model code, EC has the power to suspend or withdraw recognition of the party

The Code is not given a statutory status as there is a voluntary desire on the part of the parties to obey the same.

Model Code of Conduct comes into force on the date of announcement of election schedule by the Election Commission.

Critics believe the code obstructs government initiatives for too long a period.

### **Elections and money power**

Contesting elections requires enormous financial resources. Political communication and mobilization in a vast and populous country like ours is very expensive. National political parties contest upto 543 seats to the Lok Sabha. On average, a person contesting for the seat of a member of parliament spends five rupees on a voter and the average MP constituency has 15 lakh voters in it, bringing the total minimum necessary funds to Rs. 75 lakh. Such huge money

cannot be raised from public at large and so the party depends on other sources like corporate funding which can be inimical to democracy and the integrity of the candidate.

Since smaller parties find it difficult to contest if the role of money in elections is excessive, there needs to be regulation of money power.

Following steps have been taken

- fixing the expenditure limits
- making bribery a corrupt practice for the giver and taker
- making donations transparent
- 5% of the profits of the companies( other than government companies) are permitted for the donation to parties.

Steps that are suggested are .

- Holding of simultaneous elections for LS and Legislative Assemblies, logistics permitting.
- Reduction of campaign period
- State funding of elections

A candidate is not free to spend as much as he likes on his election. The law prescribes that the total election expenditure shall not exceed the maximum limit prescribed under Conduct of Election Rules, 1961. Limit are set by the Union Government. EC is only an advisory body. If limits are exceeded, it would also amount to a corrupt practice under R. P. Act, 1951.

The limit for expenditure is fixed by the Government and is revised from time to time. At present the limit of expenditure for a parliamentary constituency in bigger states like U. P, Bihar, Andhra Pradesh, Madhya Pradesh is Rs. 40 lakhs.

The limit of election expenditure for an assembly constituency in the above bigger states is Rs. 16 lakhs.

The maximum limits of election expenditure vary from State to State. The lowest limit at present for a parliamentary constituency is Rs. 10 lakhs for the constituency of Dadra and Nagar Haveli, Daman and Diu and Lakshadweep.

Under section 77 of the R.P.Act, 1951, every candidate at an election to the House of the People or State Legislative Assembly is required to keep, either by himself or by his election agent, a separate and correct account of all expenditure in connection with the selection incurred or authorised by him or his election agent between the date on which he has been nominated and the date of declaration of result, both dates inclusive. Every contesting candidate has to lodge a true copy of the said account within 30 days of result of the election.

In every state the account of election expenses shall be lodged by a contesting candidate with the District Election Officer of the district in which the constituency from which he contested lies. In the case of Union Territories, such accounts are to be lodged with the Returning Officer Concerned.

If a candidate is contesting from more than one constituency, he has to lodge a separate return of election expenses for every election which he has contested. The election for each constituency is a separate election.

Under section 10A of the RP Act, 1951, if the Election Commission is satisfied that a person has failed to lodge an account of election expenses with the time and in the manner required by or under that Act and he has no good reason or justification for the failure, it has the power to disqualify him for a period of 3 years for being chosen as, and for being, a member of either House of Parliament or the Legislative Assembly or Legislative Council of a State.

Acceptance of money to vote for a candidate is a corrupt practice of bribery under Section 123 (1) of R. P. Act, 1951. It is also an offence under section 171-B of Indian Penal Code and is punishable with imprisonment of either description for a term which may extend to one year or with fine or both.

### Media and elections

The relationship between the media and elections is controversial. The media always claim they merely "inform the public", while critics claim they actually shape public opinion, thereby "controlling" democracy. EC tries to control such influence of the media. For example, The Election Commission of India had on April 11, 2013 notified that conducting any exit poll and publishing or publicising by means of print or electronic media or disseminating in any other manner whatsoever the result of any exit poll in connection with the current general elections to Legislative Assembly of Karnataka between 7am and 5.30pm on May 5 would be prohibited. Further, the EC stated that under Section 126 (1)(b) of the Representation of People Act, 1951, displaying any election matter including results of any opinion poll or any other poll survey, in any electronic media would be prohibited during the period of 48 hours ending with the time fixed for conclusion of poll in connection with the elections in Karnataka.

### Paid news

Candidates contesting an election have limits of permissible election expenditure within which publicity is difficult to pay for. Therefore, they resort to bribing the newspapers and other electronic media to print about them. These stories are paid for though it costs far less than an advertisement and carry more value. However, it is a violation of journalistic and representative ethics. It misleads the readers too and viewers too. But it is not an offence under RPA 1951. Therefore, the EC recommendation is made to classify it as a crime.

### Umlesh Yadav

The Election Commission of India's disqualification of Umlesh Yadav, sitting MLA from Bisauli in Uttar Pradesh, is a landmark order. Ms Yadav was disqualified under Section 10-A of the Representation of the People Act 1951 for a period of three years for failing to provide a "true and correct account" of her election expenses. She had failed to include in her official poll accounts the amount she spent on advertisements, shown as news, in two Hindi dailies, Dainik Jagran and Amar Ujala, during her 2007 election campaign. She should have shown it in her election expenditure under Section 78 of the Representation of the People Act. EC therefore disqualified her after auditing her election expenses statements.

It must be clarified that she did not lose her seat and face disqualification for paid news. It was a case of improper accounts.

### **Political parties and their finances**

Political parties have a responsibility to maintain proper accounts of their income and expenditure and get them audited annually. 2<sup>nd</sup> ARC advocated that this needs to be acted upon early. The audited accounts should be available for information of the public domain. Although in an amendment made -the Election and Other Related Laws (Amendment) Act, 2003, a provision has been made regarding preparation of a report of contributions received by political parties in excess of Rs.20,000/- and making it public as it should be received only by cheque, this is not sufficient for ensuring transparency and accountability in the financial management of political parties.

Election Commission has recently got the Institute of Chartered Accountants of India (ICAI) to draw up guidelines concerning the formats, frequency, scrutiny, etc. of the accounts to be maintained by political parties.

The Law Commission recommended the insertion of a new section 78A for maintenance, audit and publication of accounts by political parties in the Representation of the People Act, 1951.

Political parties do not pay income tax as they are not commercial entities and are 'public authorities' as declared by the EC in 2008. CIC also designated them as public authorities in 2013. Being public authorities, they submitted detailed balance sheets indicating the availability of funds, income and expenditure incurred by them.

### **Simultaneous Polls for State Assemblies and Parliament**

#### **None of the Above Option**

(Discussed in the Class)

### **Election and Other Related Laws (Amendment) Act 2003**

The Election and Other Related Laws (Amendment) Act 2003 was made to reform the law related poll funding and party finances.

It provides a strong incentive for open contributions to political parties. In the absence of tax incentives, most companies preferred to fund parties clandestinely for a variety of reasons — on account of the ubiquitous black economy, for fear of retribution from rival parties etc. For the first time, the law now provides for full tax exemption to individuals and corporates for all contributions to recognised political parties. All contributions of Rs 20,000 and above must be disclosed by the party to the Election Commission, and such information will be in the public domain.

State funding is now available to registered parties in the form of allocation of time on the electronic media.

### **State Funding of elections**

State funding of elections has been under consideration in India for more than three decades. It is advocated on the following grounds

- Money is required for the political parties to communicate to the people and educate them and mobilize them on various public issues
- If state funding is absent, corruption can creep into the political system and the integrity of the candidates may be seriously compromised even before he is elected

- the amount of money needed to run a successful election campaign is substantial and prevents smaller parties from exerting their small proportion of influence on the outcome. Smaller parties are a vital part of a democracy, as they ensure that a complete spectrum of opinions is represented. Thus, state funding is required to establish level playing field among the parties
- it prevents the influence of foreign money from influencing the parties

It is, however, opposed on the ground that public money need not be used to fund political parties when there are urgent challenges like public health, education etc.

The following committees recommended state funding of elections

- Joint Parliamentary Committee (1971-1972)
- Tarakunde committee set up by Jaiprakash Narayan (1974)
- Dinesh Goswami committee (1990).
- multi-party parliamentary committee under the chairmanship of Indrajit Gupta( 1998) was set up to look into the question of state funding of elections.

### **Indrajit Gupta Committee on State Funding of elections**

The committee said that state funding of elections would bring in an element of equality to electoral contests, particularly because it would help remove the disadvantage faced by parties which represent the socially and economically weaker sections and which often have limited access to big donors.

### **Indrajit Gupta Committee Recommendations**

- State funding should be confined to recognized national and state parties.
- State should meet some essential expenses of political parties during election campaigns and provide them administrative support during the period between elections
- It should be in kind and take the following form of materials and other facilities for fighting elections like: a specified quantity of petrol or diesel to run vehicles during an election campaign; a specified quantity of paper to prepare election literature and voter identity slips; postal stamps for a specified sum of money; copies of the electoral roll in a constituency; electronic media time; rent-free accommodation for party headquarters in New Delhi and every recognised State party may be provided the same facility in the respective state capitals; one rent-free telephone with subscriber trunk dialling facility etc.
- A separate Election Fund should be created with an annual contribution at the rate of Rs.10 a voter, for the total electorate of about 60 crores, since grew to 75 crores by 2013) by the Centre and a matching amount contributed by all State governments together.
- in order to be eligible for state funding, political parties and their candidates should have submitted their income tax returns up
- political parties should accept all donations above Rs.10,000 in the form of cheques or drafts and disclose the names of the donors.

### **How to reduce election expenditure**

- the State and Parliamentary level elections should be held at the same time
- the campaign period should be reduced considerably

- candidates should not be allowed to contest election simultaneously for the same office from more than one constituency

### **Inner party democracy**

Political parties in India are influenced by dynastic politics. No regular periodical elections are held to elect the organizational office bearers. Polls are postponed. Information regarding crucial party stand is not disseminated among cadres. Decisions are taken by a handful of top leaders. This does not augur well for democracy. Therefore, there needs to be amendments to RPA 1951 for regular elections.

### **Criminalization of Politics**

Criminalization of politics refers to persons with criminal record entering legislature at national, state and local levels through the electoral process by money and muscle power. When law breakers become law makers the adverse consequences are in the form of corruption; demoralization of bureaucracy; loss of faith in the democratic system by the common man; weakening of rule of law and so on..

The reasons for increasing criminalization of politics is the poverty and illiteracy of people; pressure on courts and the consequent delay in settlement of disputes; political parties prefer winnability to ethics and so criminals are given tickets as they can mobilize money and muscle power to intimidate the voters for votes.

Politicisation of crime is related to it. It means justification of crime for political reasons. It has many shades. Crime justified for communal reasons- if it is used against rival group. Similarly, for ethnic reasons, crime is justified. For example, many caste groups set up militias. Political parties safeguard their criminals and pressurize and oppose those of the opponents. State machinery is used to protect some criminals and foist cases against others depending upon their loyalties.

### **Section 8 of RP Act**

The section relates to disqualification of candidates from contesting in an election to Parliament or State Legislature for specified offences.

- 1 Section 8 (1) relates to various offences like under the Prevention of Insults to National Honour Act. 1971 and if a person is convicted under these laws, six years of disqualification from contesting from date of conviction will be in force. It is not considered as to what is the quantum of punishment.
- 2 Section 8(2) deals with some economic crimes and also dowry and sati for which the same punishment as above is given if the person is sentenced for not less than six months.
- 3 Section 8(3) covers all other offences ( for example, offences under Prevention of Corruption Act) and says that if a sentence is for a period of atleast 2 years , the convicted person is disqualified to contest for a period of six years from the date of release
- 4 Section 8(4) applies to sitting legislators. A sitting legislator who is convicted is not barred from contesting for a period of three months from the date of conviction during which time he can appeal; or if an appeal is made in three months, till such time that the appeal is disposed off.

The EC interpreted the Section stringently in 1997. The effect is: earlier during the pendency of appeal, the nomination of the convicted person was accepted while it is not so since 1997. After the High Court convicted and sentenced a person for at least 2 years, the person in question is disqualified from contesting even while an appeal is pending in the Supreme Court. He can only contest if the Supreme Court finds him innocent. The interpretation is found to be necessary to minimize criminals in the political system.

Section 8 of the RP Act quoted above discriminates between a sitting legislator and others in the sense that the former, even if convicted can contest while the appeal is pending, and others can not. According to the EC and other experts, the discrepancy needs to be removed.

#### **ADR case**

Reports of the Law Commission( 1999) and Vohra Committee( 1995) recommended that citizens should have information related to their representatives which is best made available while the candidate files his nomination papers in a election to Lok Sabha or Legislative Assembly..

A Public Interest Litigation (PIL) was filed by ADR( Association for Democratic Rights) in 1999 in the apex court for implementation of the said reports and for a direction to the Election Commission to make mandatory for every candidate to provide information regarding

- criminal antecedents, if any
- educational qualifications
- asset-liability details of himself and his family.

It led to a landmark Supreme Court Judgement in 2002 endorsing the prayer of the ADR. Parliament made an Act in this regard in 2002 but diluted the verdict of the Supreme Court- requiring disclosure of criminal background, but not of financial and educational background. The Act was challenged .

The Supreme Court in a second landmark Judgement in 2003 declared the Act unconstitutional and restored its earlier order. Subsequently, the Election Commission issued orders implementing the judgement

#### **Adjudication of Election Disputes**

Section 80 and 80-A of the Representation of Peoples Act, 1951, provide that election petitions be filed only in the respective High Courts. Sections 86(6) and 86(7) of the Representation of the People Act, 1951, provide that the High Court shall make an endeavour to dispose of an election petition within six months from its presentation and also as far as practicably possible conduct proceedings of an election petition on a day to day basis.

The concern is that the High Courts, given their backlog of cases, take too long to deal with election petitions, final disposition often not happening till after the term of the elected representative is over. This phenomenon is so rampant that the Second Administrative Reforms Commission, in its report —Ethics in Governance|| (2007) observed, —such petitions remain pending for years and in the meanwhile, even the full term of the house expires thus rendering

the election petitions infructuous. The NCRWC, the Election Commission, and the Second Administrative Reforms Commission, all have recommended setting up of Special Election Benches for fast disposal of election related cases.

### **Proxy Voting**

The word proxy means "to act on behalf of another. It is allowed in India for defence personnel since 2003. The need for proxy voting arises from the fact that the campaigning period is reduced to 14 days. Ballot papers can be printed only after withdrawal of the nominations before being dispatched to the far off locations. For example, a soldier from Kerala posted to Tripura has to be sent the ballot postally and must mail it to the returning officer in Kerala within less than a fortnight which very often is found impossible.

Representation of the People Act 1951, says that the voting shall be secret ballot but section 60 of RPA permits special provisions for certain classes of people. Thus, on the strength of Section 60, proxy voting is permitted. Proxy voting is when a soldier in the Indian armed forces authorizes another person to vote on his behalf. He can nominate any eligible voter from his constituency. A soldier's proxy nomination is done only once in his service period. However, if he is unhappy with the proxy, or the proxy dies, the nomination can be revoked. One person can be the proxy for two soldiers. If a soldier does not want to nominate someone as his proxy, he can opt for postal ballot. There are 2.5 m defence personnel who benefit from proxy voting. IFS officers do not have this facility. They vote by postal ballot if they are posted abroad.

### **Exit polls banned**

The Election Commission (EC) banned dissemination of results of opinion polls during 48 hours before the poll and put a blanket ban on exit polls till the last phase is over in the event of multi-phase elections.

The EC's move comes against the backdrop of the Supreme Court leaving it to the discretion of the EC to decide on laying down guidelines on opinion and exit polls till the government frames regulation on the issue. The government had in 2008 amended the Representation of the People Act (RPA), 1951 to curb publication of exit polls during elections till the conclusion of the final phase of voting so that it does not "influence" the voters. Government's move to amend the RPA is seen as an effort to ensure that polls, which are generally spread over several phases, are free and fair.

### **Shorter election process**

There is still a case for a shorter election process. While the counting process is now quickened with the introduction of Electronic Voting Machines, the multi-phase polling process virtually brings the government to a standstill for close to three months. The election itself is held within the space of a month, but from the time the election is announced, which is when the Model Code of Conduct comes into effect, to the time the new Lok Sabha is constituted, it is about three months. No major policy decision can be taken, and welfare schemes and development works are suspended till after the new government takes office. The shorter the period of a lame-duck government, the better it is for governance. True, security considerations, geographical conditions and manpower requirements necessitate the staggering of the election. But the Election Commission in recent years has been quick to make good use of technology and devise

## Right to vote

Part XV of Indian Constitution which deals with elections ; Representation of People Acts 1950 and 1951 and various other provisions of the constitution stipulate the Qualifications and conditions and to vote in India. Constitution of India says that no one shall be ineligible for inclusion in the electoral roll on grounds of religion, race, caste or sex. Every citizen who is not less than eighteen years of age shall be entitled to be registered as a voter unless disqualified under the Constitution or any law made by the appropriate legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice.

Art. 326. 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 eighteen years of age ( reduced from 21 years by the Sixty-first Constitution Amendment Act, 1988 ) 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.

Right to vote, however is not a Constitutional right nor a Fundamental Right. It is a statutory right. Read ahead.

The right to vote is given by Sections 16 & 19 of 1950 RP Act & Ss. 11A & 62 of the 1951 RP Act. Section 16 disqualifies a person from registration in an electoral roll who is not a citizen of India or is of unsound mind or is disqualified for election offences/corrupt practices. Also, after registration if any person becomes disqualified his/her name shall be struck off from the rolls. Section 19 lays down minimum 18 years of age & ordinary residence in the constituency as conditions for registration.

Section 62, 1951 Act deals with right to vote. Every person who is entered in the roll of a constituency is entitled to vote in that constituency. A person suffering from disqualification cannot vote. Every person entitled to vote, can vote only in one constituency and only once at one election. Section 62 (5) disallows a person to vote at an election if he/she is confined in a prison; the confinement may be under a sentence or in the lawful custody of the police. Undertrials have no right to vote. This disentitlement will not apply to those confined under any preventive detention law. A person under trial but who is on bail can vote.

The Constitution identifies disqualification only on grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice.

### Communication for election tracking(COMET)

An efficient election management is about managing information and ensuring mid-course interventions and corrections. Today India has one of the fastest growing mobile network markets. The mobile reach has improved tremendously in recent years. It is estimated that over

60% of the country is covered by mobile connectivity. The Election Commission as a constantly innovating institution took the initiative to try to reach out to every polling station in the country, using one or other multimode communication tool. A systematic mapping of communication assets and resources was done with reference to every polling station. Mobile connectivity, landline phones, high frequency (HF) and very high frequency (VHF) communication equipment, and satellite phones were used in the process. Where none of these worked (as in high mountain areas or deep forests), dedicated "runners" were identified to track remote polling stations. Through this system almost all polling stations could be contacted by supervising officials, and different layers of tracking hierarchy were predetermined for each location. To drive home the seriousness to be attached to this initiative, the Commission ordered the conduct of two "dry runs" to validate the numbers, connectivity and efficacy. COMET created a huge psychological presence of the Commission and ensured an extended vigil even in the remotest of locations.



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efficient ways of human resources management. Even under the existing constraints, a shorter election process will be within the realms of possibility and in the interest of all. Campaign period can be cut short.

#### **None of the above**

The option of not voting for any candidate is available even if the electronic voting machines (EVMs) do not have a button with the 'none of the above' option. A proposal made by the Commission for making provisions in the law for 'none of the above' button in the EVM is pending with the government. This issue is also pending before the Hon'ble Supreme Court." However, if a voter, after going through the formalities of identification, application of indelible ink on the finger etc, decides not to vote for any candidate, he or she will have to inform the polling officer about the decision, and the latter will then make entries in the "register of electors" to the effect that the particular voter has decided not to vote for any candidate. The polling officer will then put his/her signature under such entries. This provision is under rule 49-O of the Conduct of Election Rules 1961. However, it does not go to determine the results. Rest is discussed in the class.

#### **Online voting**

In 2011, The Gujarat State Election Commission implemented e-Voting for Municipal Corporation elections. Many voters registered for e-Voting, and some opted for voting from their homes or office computers, while some went to e-Booths set up by the commission, to cast their votes online.

e-Voting helps citizens who have access to the internet, cast their votes online, without standing in long queues; which are a deterrent. The online voting system is being run by Tata Consultancy Services.

The questions marks are about secrecy of voting; reliability of the e-systems; voter may be under the influence of others etc.

#### **2009 Elections: Snapshot**

714 million people -- more than twice the population of the United States -- are eligible to vote in the world's biggest democratic exercise. 420 millions voted -- about 60% of turnout.

More than 800,000 polling stations are set up for a five-phased vote over several weeks, watched over by 2.1 million security personnel.

Around 1.1 million electronic voting machines were used across the nation. These were first introduced for a general election in 2004, when millions of illiterate voters pressed a button next to a symbol of the party of their choice.

Ballot boxes were also used -- some were transported by elephants and camels to remote voters. In 1996, before the introduction of electronic voting machines, 8,000 metric tonnes of paper were used to print ballots.

A quarter of the 543 lower house elected MPs have criminal cases pending against them. More than half the cases are for serious offences including murder, rape and corruption.

## SYMBOLS

Symbols range from an elephant, a hand, or a hammer, sickle, bicycle, a bow-and-arrow, a pair of spectacles or a telephone.

Free symbols made available by Election Commission to independents and unrecognized parties included bangles, a cricketer, a coat hanger and a ceiling fan.

Polling station No. 29 (Dharampur) in the remote Arunachal Pradesh state that borders China had just one voter in 2004.

Four thousand six hundred and seventeen candidates from over 300 political parties and Independents competed for 543 parliamentary seats.

Voter turnout was a little less than 60% in 2009.

Assembly elections in 2012 also saw huge turnout and it held the lesson that regionalist parties are on the rise. Same is the message with the AP by polls in 2012 June.



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