

# THE CONSTITUTIONAL LAW OF INDIA

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By

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TENTH EDITION

Foreword by :

The Hon'ble Mr. Justice H. C. P. TRIPATHI  
*Judge, High Court, Allahabad.*

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## FOREWORD

Liberty, equality and fraternity were the watch-words of the French Revolution. The concept of social justice permeated the Bolshevik upsurge which overwhelmed the old order in Russia. In the Indian Constitution a successful attempt has been made to bring about a synthesis between the concepts of individual freedom and social justice. It is for this reason that the attainment of social, economic and political justice, along with the liberty and equality of its citizens is enshrined in the Preamble as the objectives of the Constitution.

The Constitution of India is an organic document which defines the powers and functions of the various organs of the State and their *inter se* relationship. It is modelled on the pattern of a federal structure with a strong bias in favour of the Centre. It provides for Parliamentary democracy with an Executive responsible to the Legislature. Like American Constitution, it has armed the Judiciary to test the validity of the Parliamentary legislation on the touchstone of the constitutional provisions.

The Constitution guarantees to its citizens certain fundamental rights—right to equality, right to freedom of speech and religion, right to property and to constitutional remedies—rights which are essential for the development of human personality. In this, the Indian Constitution has gone a step forward than the Bill of Rights incorporated in the Constitution of the U. S. A. Constitution is the Supreme Law of the Land, and naturally during the course of the last 22 years a number of commentaries, written by eminent men of law and learning, have come out on the Constitution.

Sri Jai Narain Pandey, the author of this book, is a teacher of law in the University of Allahabad. He has long felt the need of a handy volume giving an integrated picture of the Constitution to the University students. He has made this attempt in that direction.

I have read some portions of this book. I find that Sri Pandey has succeeded in giving a brief but lucid exposition of the main characteristics of the Constitution. He has also noticed the important authoritative pronouncements of the Supreme Court at appropriate places. I hope the book will prove useful not only to the University students but also to those who are in the profession of law.

H. C. P. Tripathi,  
Judge, High Court, Allahabad.

Allahabad :  
9th December, 1969.

## PREFACE TO THE TENTH EDITION

The last edition of the book appeared at a time when the Sixth Lok Sabha was dissolved and mid-term election was ordered by the President. At that time a serious doubt was expressed by constitutional jurists about the outcome of the election results. It was then feared that no party would be able to obtain majority and an era of Coalition Governments was likely to commence, threatening the very fabric of Indian polity. Fortunately, the Indian electorate demonstrated an exceptional sense of political maturity and voted for a strong and stable Government. The Congress Party headed by Srimati Indira Gaodhi, which was completely routed in the 1977 elections, secured a spectacular majority in the Lok Sabha poll and formed the Government at the Centre. This makes it amply clear that the Indian Constitution has successfully withstood the political turmoils faced by the country during the last decade and also that the political institutions established by it are capable enough to delivering goods to the teeming millions of this country provided our political leaders work with honesty and sincerity. Alas ? Honesty is the rarest quality found amongst our political leaders. Why then we blame the Constitution for our own failures ?

Since the publication of the last edition two significant constitutional developments have taken place. *First*, by the Constitutional 45th Amendment Act, 1980, the duration of the reservation of seats in the Lok Sabha and the State Assemblies for Scheduled Castes and Scheduled Tribes has been extended for a further period of ten years making it forty years from the commencement of the Constitution. How long this reservation will continue would depend upon the good sense of our leaders. This change has been incorporated in this edition.

*Secondly*, a judicial pronouncement of great significance has been delivered by the Supreme Court in the case *Minerva Mills v. Union of India*, (unreported). In that case, the Supreme Court, applying the principles laid down in *Kesavananda Bharati's* case, has struck down Art. 31C (which gave primacy to Directive Principles over the Fundamental Rights) and sub-clauses (4) and (5) of Art. 368 (which conferred on Parliament unlimited amending power) on the ground that it destroys and damages the "basic features" of the Constitution. The above mentioned Articles were added to the Constitution by the Constitution (42nd Amendment) Act, 1976 which was enacted during the emergency. The order of the Court makes it clear that the Constitution—not Parliament—is supreme in India. Indeed this is the very spirit of a written Constitution. This decision is to be welcomed by all. It is hoped that the Government will also accept this decision and will not try to undo it by amending the Constitution or by filing a petition to review the *Kesavananda* ruling. This order has been incorporated in this edition.

This edition also incorporates all important judicial pronouncements by the Supreme Court of India reported upto March 1980.

The present edition, it is hoped, will continue to serve its readers like its earlier editions.

J. N. Pandey.

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Allahabad.

5th June, 1980.

## PREFACE TO THE FIRST EDITION

The Fundamental law of the land is its Constitution. Consequently constitutional law is a subject of paramount importance. Eminent and distinguished authors have written authoritative books on this lively subject. The highest Judicial Tribunal of the country has also given from time to time authoritative pronouncements on some of the most intricate and fundamental aspects of the Indian Constitution.

In my opinion, however, the books written on the Indian Constitution being in a commentary style do not adequately fulfil the needs of the students as they fail to give a coherent and integrated picture. As a teacher of the Constitutional law, I have felt the need of a text book succinctly explaining the basic principles of the Indian Constitution. An attempt is, therefore, made in this book to enunciate the underlying concepts of the Indian Constitution and to briefly comment on its basic structure. In dealing with the subject, I have also referred to the relevant provisions of the other Constitutions notably U. S. A., U. K., Australia and Canada wherever necessary.

This book is primarily meant for LL. B. and LL. M. Students of the Indian Universities. It is, however, expected that it will also prove useful to those who are preparing for the various Competitive Examinations. The usefulness of the book is judged by those for whom it is meant. I shall consider my labour to have been amply rewarded if the book could be helpful to the students of law in appreciating the essential characteristics of the Indian Constitution.

I crave the indulgence of the readers of any error or imperfection which might have, despite the best possible endeavours, crept in this work. Any suggestion for improvement of the book shall be gratefully welcomed.

I must express my thanks to my colleague and friend Shri U. P. D. Kesari, who inspired me to write this book and to my friend Shri S. N. Misra, Lecturer, from whom I have received valuable suggestions on numerous occasions. My grateful thanks are also due to my reverend teachers Prof. V. N. Shukla, Dean Faculty of Law, University of Lucknow, and to Prof. S. N. Shukla, Dean Faculty of Law, University of Allahabad, for their kind guidance and blessings.

I must thank my pupil Shri Nisha Kant Pandey, for his assistance in bringing out this book.

I must record my thanks with gratitude, to the Hon'ble Mr. Justice, H.C.P. Tripathi of the Allahabad High Court, who has given me useful advices and pleased to give it grace and honour by his "Foreword".

In the end, I am grateful to the Publishers, the Central Law Agency, who induced me to write the book and the painstaking co-operation and efforts in bringing it out in this excellent form.

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ALLAHABAD.

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## I

# Introduction

The Twenty-Sixth January, 1950, was a red letter day in the long and chequered history of India. For, on that day the present Constitution of India was brought into force which announced to the world the birth of a new Republic.

**What is a Constitution.**—A Constitution means a document having a special legal sanctity which sets out the frame-work and the principal functions of the organs of Government of a State and declares the principles governing the operation of those organs.<sup>1</sup>

**What is Constitutional Law.**—There is no hard and fast definition of Constitutional Law. In the generally accepted use of the term it means the rule which regulate the structure of the principal organs of the Government and their relationship to each other, and determine their principal functions. The rules consist both of legal rules in the strict sense and of usages, commonly called conventions, which without being enacted are accepted as binding by all who are concerned in Government. Many of the rules and practices under which our system of Government is worked are not part of the law in the sense that their violation may lead directly to proceedings in a court of law. Though the constitutional lawyer is concerned primarily with the legal aspects of Government; there is required for a constitutional law some knowledge of the salient features of constitutional history and of the workings of our political institutions.<sup>2</sup>

**Historical Background.**—All Constitutions are the heirs of the past as well as the testators of the future.<sup>3</sup> The very fact that the Constitution of the Indian Republic is the product not of a political revolution but of the research and deliberations of a body of eminent representatives of the people who sought to improve upon the existing systems of administration, makes a retrospect of the constitutional development indispensable for a proper understanding of this Constitution.<sup>4</sup>

No one will deny the truth of the above statement that if any one seeks to study the law, constitutional or other, of a country, a knowledge of the historical process which led to its present form is indispensable for correct insight and understanding of subject. It is, however, not necessary to go to any period beyond what is known as the 'British Period' for the modern political institutions originated and developed in that period only. The political institutions established by the Hindus in the olden days and by the Muslims in the medieval period have become a thing of the past, and they do not survive in any form in the present days. The British period in the history of India began with the incorporation of East India Company in the year 1600 in England. Now, let us study the various phases of the growth of our Constitution from the advent of the English on Indian shore till this day. We can broadly divide the period as follows :

1. 1600—1765
2. 1765—1858

1. Wade and Philips—Constitutional Law, 7th Edition, p. I.

2. Ibid, p. 4.

3. Jennings—Some Characteristics of the Indian Constitution, (1953), p. 56.

4. Basu, D. D.—Introduction to the Constitution of India, Third edition 1964, p. 3

3. 1858—1919
4. 1919—1947
5. 1947—1950.

### I. 1600 TO 1765—THE COMING OF THE BRITISH

**The Coming of British**—The Britishers came to India in 1600 as traders in the form of East Indian Company. Attracted by the stories of the fabulous wealth of India and fortified by the adventurous maritime activity of the Elizabethan era, Englishmen were eager to establish commercial contracts with the East.<sup>1</sup> To facilitate such a venture some of the enterprising merchants of London formed themselves into a company. The company secured for it a Charter from Queen Elizabeth in December, 1600, which settled its constitutions, powers and privileges. The Charter vested the management of the company in the hands of a Governor and 24 members who were authorised to organise and send trading expeditions to the East India. The Charter granted the company a monopoly of trade with the East. It had authority to keep an armed naval force for its security. The Charter was granted in the first instance for 15 years and was terminable on two years' notice. It could be renewed if the interest of the Crown and the people were not prejudicially affected.

Fortified with the Charter the company started establishing its trading centres or factories at several places in India. The first settlement of the company was at Surat (1612) which was established as a result of a Royal 'Firman' from the Emperor Jahangir granting her land and other concessions. This was followed by Musulipattam—Madras (1639) and later at Hariharpur in Mahanadi Delta (1690). Thus in the course of time the factories at Bombay, Madras and Calcutta became the chief settlements or presidencies of the company. The administration of these presidencies was carried on by a President and a Council composed of the servants of the company.

During this period except in case of Bombay which had been ceded with full sovereignty to the British Crown, wherever the English settled they did so with the consent of the Indian rulers. The natural consequence of their position would have been their submission to the law of the place. But anyhow they secured the permission of the local kings to retain their own laws. As Ilbert observes : "In India concessions granted by or wrested from native rulers gradually established the company and the Crown as territorial sovereigns in rivalry with other country powers and finally left the British Crown exercising undivided sovereignty throughout British India, the paramount authority over the subordinate native States."<sup>2</sup>

**Legislative Power.**—The Charter of 1601 granted to the Governor and company the power to make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances for the good governance of the company.

Though limited in scope, but the legislative powers of the company was of great historical importance as it is "the germ out of which the Anglo-Indian Codes were ultimately developed."<sup>1</sup>

By the Charters of 1609 and 1661 similar powers were affirmed. The Charter of 1693 makes no mention of legislative powers.

**The Charter of 1726.**—The Charter of 1726 had a great legislative significance. Hitherto, the legislative power was vested in the Court of Directors in England. They were not conversant with the conditions prevailing in India. It was, therefore, considered desirable to vest law-making power in those who were acquainted with the Indian conditions. Accordingly, the Charter authorised the Governor and Council of the three Presidencies to make, constitute and ordain bye-laws, rules and ordinances for the government of the Company and impose punishments for their contravention. These bye-laws, rules and ordinances and punishments were to be reasonable and not contrary to the laws and statutes of England and they were to be effective unless approved and confirmed in writing by the Company's Court of Directors. The Charter also established the Mayor's Courts at Calcutta, Bombay and Madras and expressly introduced English laws into these Presidencies.

But the Britishers had not become a ruling power in India until the second-half of the 18th century. It was still a trading concern. Thereafter, events of great importance took place in the interior of Bengal. It was a period of gradual disintegration of the Moghul Empire. Its last strong Emperor Aurangzeb was dead. Soon after the death of Aurangzeb the controlling and powerful unifying force that existed in country under the rule of Aurangzeb declined and India became a battleground of rival contesting principalities. The East India Company took full advantage of this chaotic situation and gradually established itself as the unrivalled master of the Indian sub-Continent. The victory of the Company in the battle of Plassey in 1757 against Sirajuddaula, Nawab of Bengal, had laid the foundation of the British Empire in India. In 1765 Shah Alam granted the Diwani, i. e. the responsibility of the collection of revenue to the Company, which automatically involved the administration of civil justice. As Ilbert has said,—“The year 1765 makes a turning point in the Anglo-Indian History and may be treated as commencing the period of territorial sovereignty by the East India Company”. The Company henceforth threw off the mask of traders and appeared in the true garb of rulers.

## 2. 1765 TO 1858—BEGINNING OF THE BRITISH RULE

**Regulating Act of 1773.**—The grant of Diwani made the East India Company real masters of Bengal, Bihar and Orissa. As a result of Diwani the company became responsible for the administration of civil justice and collection of land revenue. But it was very difficult for the company—a trading body—to administer this vast territory. It did not, therefore, take over these functions immediately. The administration of civil justice and collection of revenue was, therefore, left to Indians. The company, however, appointed two English officers to supervise the working of this system. This system proved to be harmful for the country. The Indian officials who were responsible for administration had no effective power to enforce their decisions. On the other hand, the company's servants who were real rulers had no responsibility and they exploited the situation for their selfish ends.

They were directly responsible to the Court of Directors in England. The Governors and Councillors were appointed from among senior servants of the Company. They had manifold business to perform. Under the Governor

1. Ilbert—Government of India, 1915, p. 10.

3. 1858—1919
4. 1919—1947
5. 1947—1950

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**Legislative Power**—The Charter of 1601 granted to the Governor and company the power to make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances for the good governance of the company.

The legislative power of the company was very limited in its scope and character. They were not to be contrary to the laws, statutes or customs of England. The power conferred under the Charter was essentially a power of minor legislation prohibiting any fundamental change in the principles of English law. It was not a power to legislate for some territory because the company was purely a trading concern and not a political sovereign acquiring foreign territory. The legislative power was thus designed to enable the company to regulate its business and to maintain discipline among its servants.

1. Pylee, M. V.—Constitutional History of India, p. 1.

2. Illbert—The Government of India, 2nd Edition, 1907, p. 1.

General. The Councillors were to hold office for 5 years and could not be removed earlier except by the King on the recommendations of the Court or Directors. The Council was to take decision by a majority. The Governor-General had a casting vote in case of a tie in the council. The council was also vested with 'the power of superintendence and control of Governments of Bombay and Madras Presidencies in matters of war and peace except in case of emergency when they could take orders from the Directors in London. The Governor-in-Council of the two presidencies were required to pay due obedience to the orders of the Governor-General-in-Council of Bengal and to transmit to them regularly information regarding all transactions relating to the Government's revenue or interests of the Company. The Governor-General-in-Council of Bengal had power to suspend any offending Governor and his Council.<sup>1</sup> Thus the Governor-General of Bengal and his Council became supreme authority of India.

Thus, the Act of 1773 took the first step in the centralisation of Administrative machinery in India.

(c) Legislative power.—The Act empowered the Governor-General and Council to make rules, ordinances and regulations for the good Government of the Company's settlements at Fort William and factories subordinate thereto. But their legislative power was subject to the following restrictions—(1) they were not to be repugnant to the laws of England; (2) they were to be reasonable; (3) they were not valid until " duly registered and published in the Supreme Court". The legislative power was thus controlled by the Supreme Court. They could be set aside by the King-in-Council on the application of any person or persons in India or in England.

(d) Supreme Court.—The Act also provided for the establishment of a Supreme Court at Calcutta consisting of a Chief Justice and three other judges who were to be a barrister of at least 5 years' standing. They were to be appointed by the Crown and were to hold office during his pleasure. The Court was vested with civil, criminal, admiralty and ecclesiastical jurisdictions. Its jurisdiction extended to all British subjects residing in Bengal and Orissa and to hear all complaints against any of His Majesty's subject for crimes, misdemeanours of oppressions and to suits, actions and complaints against any person employed by or in the service of the Company or of any of His Majesty's subjects. The Governor-General and Councillors and Judges of the Supreme Court were exempt from arrest or imprisonment in any action or suit or proceeding in the court. Appeal from the Supreme Court lay to the King-in-Council in England. The Court was to try cases by jury.

The object of the Act was good but the system that it established was imperfect. It suffered from many defects, i. e. (1) It did not define clearly the relationship of the Governor-General and his Council and the Supreme Court with each other. (2) It did not make clear as to what law the Supreme Court was to administer. (3) It placed the Governor-General at the mercy of his Council.

Act of 1781.—To remove the defects of the Regulating Act of 1773, Parliament passed the Act of Settlement of 1781. The Act of Settlement of 1781 made the following changes in the Regulating Act—(1) It exempted the actions of the public servants of the Company done in official capacity from the jurisdiction of the Supreme Court. (2) It tried to settle the question of jurisdiction of the court over servants of the Company and the native inhabitants. (3) It made it clear as to what law was to be applied by the Supreme Court. (4) The Act recognised and confirmed the appellate jurisdiction of

1. Section 9 of the Act.

and the Council was a body of civil and military servants. These servants were classified into writers, factors—Junior and Senior—and merchants. The salaries of these servants of the Company was ridiculously small. In the circumstances, these low-paid servants of the Company used their official position freely to get rich quickly and extracted presents, bribes and levies from the poor people. As Lecky has said "Never before the natives experienced a tyranny which was at once so skilful, so searching and strong...whole districts which had been populous and flourishing were at last utterly depopulated, and it was noticed that on the appearance of a party of English merchants the villages were at once deserted and the shops shut, and roads thronged with panic-stricken fugitives."

Such was the administration of the Company after the Battle of Plassey. The servants of the Company exploited the Indians, amassed wealth and returned to England. The suffering of the people reached to maximum when there was a great famine in Bengal. The climax was reached when the Company approached the British Government for a huge loan. It was indeed a strange thing that while its servants were getting richer, the Company was heading towards bankruptcy. All those led the British public to suspect that something was palpably wrong with the administration of the Company. The members of the British Parliament attracted the attention of the British Government towards the sorry state of Company's administration. A Secret Committee was appointed by the House of Commons to inquire into the affairs of the Company on 13th April, 1772. The Committee in its reports, exposed several defects deficiencies in the administration of East India Company and suggested that the affairs of the Company must be regulated by Parliament. Consequently, the Parliament passed the Regulating Act of 1773.

The Act of 1773 is of great constitutional importance because it asserted for the first time the right of Parliament to regulate the affairs of the East India Company. This Act is the first Act of British Parliament which established a definite system of Government in India. *It did the following things—*(a) Changed the constitution of the company in England. (b) Reorganised the Government in Calcutta. (c) Brought the Presidencies of Bombay and Madras to some extent, under the control of the Governor-General of Bengal. (d) Established a Supreme Court at Calcutta.

**(a) Home Government.**—Prior to the Regulating Act the affairs of the Company was managed by the Court of Directors containing 24 members elected annually by the Court of Proprietors. A shareholder who held shares worth £500 had right to elect the Directors. The tenure of Directors was only one year. The period of one year was too short to enable a director to acquire a grip over Company's affairs, and they had to please a larg number of proprietors to secure re-election and were thus on the mercy of shareholders. The Regulating Act restricted the voting right to those shareholders who held shares of worth £ 1,000 and increased the term of office of Directors to 4 years, 1/4 of them retiring every year. The Directors were required to submit all correspondence from the Governor-General in India relating to revenue to the Treasury and those relating to the Civil and Military Government to one of the Secretary of State. Thus, the Act strengthened the control of the British Government over the Company.

**(b) Form of Government of India.**—Prior to the passing of the Regulating Act, three Presidencies were separate and independent of one another. They had direct dealings with the Court of Directors in England. The Act of 1773 appointed a Governor-General and four Councillors for the Presidency of Fort William in Bengal and vested in them "the whole civil and military Government" of the Calcutta Presidency. The Act itself named the first Governor-General and his four Councillors. Warren Hastings was to be first Governor-

Commander-in-Chief, four members of the Council, and six legislative members of whom two were English Judges of the Calcutta Supreme Court and the other four were officials, appointed by the local Governments of Madras, Bombay, Bengal and Agra. In this manner the local representation was introduced for the first time in the Indian Legislature. Legislation was for the first time treated as a special function of the Government requiring special machinery and special process.

But no law made by the Council could be promulgated without the assent of the Governor-General who had the power to veto any Bill of the Legislative Council. The Act made a separate Governor-General for Bengal. The directors were deprived of their privileged power of appointment. It was a severe blow to the Court of Directors. According to *Punjab*, it paved the way for the transfer of Indian Territories to the Crown. The Mutiny of 1857 only accelerated this process and brought the career of the East India Company to an end.

### 3. 1858 TO 1919—END OF COMPANY'S RULE

**The Government of India Act, 1858.**—The objective of the Pitts India Act which introduced a Double Government failed. The Board of Control failed to have proper control over Company's affairs. As a result, the Company's Government in India became thoroughly irresponsible. In the words of the Prime Minister, Lord Palmerston, the Double Covenant was inconvenieit, cumbrous and complex. At this stage, when the circumstances were going against the Company, the Mutiny of 1857, the first war of Independence, gave death blow to the company's rule. As a result of all this, the British Parliament passed the Act for the better Government of India, 1858.

The Act of 1858 transferred Government of India from the Company to the British Crown. India was henceforth to be governed by and in the name of her Majesty. The Board of Control and the Courts of Directors were abolished and their powers were transferred to one of Her Majesty's Secretaries of State. The powers of the Crown were to be exercised by the Secretary of State for India assisted by a Council of 15 members. This was known as the 'Council of India'. Eight of its members were to be appointed by the Crown and the remaining seven were to be elected by the Court of Directors. Future vacancies were to be filled up by the Crown.

The Council was an advisory body. The Secretary of State was made the Chairman of the Council. The Secretary of State was required to lay before the Parliament an account of the annual produce of the revenues of India. He was required to submit to Parliament annually a statement of the moral and material progress of India. The Law member and the Advocate-General of the Governor-General-in-Council of India were to be appointed by the King.

The Act of 1858 constituted the Secretary of State in Council as a body corporate, capable of suing and being sued in India and in England.

The transfer of Company's Government to the British Crown was announced by a 'Royal Proclamation' made by the Queen of England. The proclamation has a great constitutional importance. According to Mr. G. N. Singh "the passing of the Government of India Act, 1858, closed one great period of Indian history and ushered in another great era—the direct rule of the Crown".<sup>1</sup>

**Indian Council Act of 1861.**—The Indian Council Act of 1861 was of basic importance. It brought about the beginning of the representative institutions.

1. O. N. Singh.—Landmark in Indian Constitutional and National Development, p. 73.

the Governor-General-in-Council in cases decided by the Mysore Courts. (5) It empowered the Governor-General-in-Council to frame regulations for the Provincial Courts and Councils also.

**Pitts India Act, 1784** — The Act of Settlement of 1781, however, could not cure the defects of the Regulating Act and agitation for an effective control over the company's Indian affairs continued. The matter was raised in the Parliament. Consequently, Parliament appointed two Committees. The Committee recommended for the recall of the Governor-General, Warren Hastings and the Chief Justice Impey. But the Court of Proprietors refused to recall them. This demonstrated the very inadequate degree of Parliamentary control over the Company and its administration. To remedy this situation the Pitts India Act was passed by the Parliament.

The Act distinguished between commercial and political functions of the Company. The Court of Directors were allowed to manage commercial affairs of the Company, but for political affairs a Board of Six Commissioners, known as Board of Control, was appointed to control such affairs. The Commissioners were appointed by the King and were to hold office during his pleasure. The Board empowered to superintend, direct and control all operations of the civil and military Government of the British possessions in the East Indies. But the Court of Directors were still strong; they had retained their vast patronage and had right to appoint and dismiss their servants in India, initiating policies and receiving all information from India. The function of Board of Control was merely to revise and control over the doings of the Directors.

The Charter Act of 1793 renewed the Company's monopoly of trade for a further period of 20 years.

**The Charter Act of 1813** — The Charter was preceded by the most searching investigation by a Committee of the House of Commons into the financial affairs of the Company. Although the Act renewed the Charter for a further period of 20 years, it took away the exclusive right of the Company to trade in India. The Indian trade was thrown open to all British merchants. By the Charter of 1813 the British Crown asserted a greater control over the power of the Councils. Henceforth the regulations made by the three Councils in India were required to be laid before the Parliament. The monopoly of East India Company was taken away and Indian trade was thrown open to all British subjects.

**The Charter Act of 1833.**—The Charter Act of 1833 introduced important changes in the constitution of the legislatures in India. The Governor-General of Bengal was made the Governor-General of India. The Act vested the legislative power solely in the Governor-General-in-Council. The Governor-General-in-Council was empowered to make laws and regulations for all persons, places and things within the territory of the Company. The Council was enlarged for legislative work by the addition of a fourth member—the Law Member—who had no voice in executive matters. But this power was not to extend to the enactment of law with respect to certain specified matters. There was also express saving of the right of Parliament to make laws for India.

The laws made under the previous Acts were called Regulations but the laws made under the Act of 1833 were called Acts of Parliament.

**The Charter Act of 1853.**—This was the last of the Charter Acts enacted between 1793 and 1853. The Charter of 1853 took a decisive step in separating the legislative machinery from the executive. The Act created a separate Legislative Council for India consisting of 12 members. The Council of the Governor-General was enlarged for legislative purposes by the addition of 6 new members. The 12 members were the Governor-General, the

by admitting a considerable proportion of elected members as well as an increase in their powers.

The Viceroy Lord Dufferin felt that the time had come to accept the demands of the Congress for reform seriously. He appointed a Committee and drew up plans for the enlargement of the Council and association of Indians with the work of Government. The report of the Committee was sent to the British Government. On the basis of these principles a Bill was introduced in the Parliament which was passed after two years and became the Indian Councils Act of 1892.

**The Indian Councils Act, 1892**—The Indian Councils Act of 1892 achieved three things : (a) it increased the number of members in the Central and provincial Councils, (b) introduced the elective system partially, (c) enlarged the functions of the Councils.

The Governor-General's Council was to have not less than 10 and not more than 16 members. He was empowered to make regulations for the nomination of additional members. In Bombay and Madras the number was to be not less than 8 and not more than 20. The maximum for Bengal was fixed at 20 and for the North West Provinces and Oudh at 15.

The Councils were to have power of discussing the budget and subject to certain restrictions to ask questions from the Government. But the President of the Council had the power to disallow any question without giving a reason.

It is true that the Act laid down the foundation of the representative Government but it also suffered from many defects. The first defect was that the system of election introduced by it was defective. It did not give the representation to the people in the real sense. Certain classes of people were over-represented while others had no representation at all. In the Bombay Council 6 seats were allotted to the European merchants but the Indian merchants were given none. Secondly, the power of Legislative Councils were very limited. The members had no right to ask questions on budget. Thirdly, the number of non-official members was very small.

Although the Act of 1892 fell far short of the demands made by the Indian National Congress, yet it can be said that it was a great advance upon the existing state of things. It certainly paved the way of future progress by conceding the principles of elections and giving the Legislative Councils some control over the Executive.

**The Morley-Minto Reforms**—The Indian Councils Act of 1909.—The first attempt at introducing a representative and popular element was made by the Morley-Minto Reforms, known by names of the Secretary of State (Lord Morley) and the Viceroy (Lord Minto) which were implemented by the Indian Councils Act, 1909. By this Act the members of the Councils were increased. The size of Central Legislative Council was greatly enlarged by this Act. The number of additional members was raised from 16 to a maximum of 60.

By the Act of 1909 the powers of the Legislative Councils, both Central and Provincial, were enlarged. Now the Councils were empowered to discuss any matter, ask questions and supplementary questions.

The Councils had also the right of discussing and moving a resolution on the financial statement but they were not given the power of voting.

#### 4 1919 To 1947—INTRODUCTION OF SELF-GOVERNMENT

**1. The Montagu-Chelmsford Report**—The Government of India Act, 1919.—The next landmark in the constitutional development of India is the

It provided India with the framework of Government which lasted up to the present time. Under this Act Indians were for the first time associated with the work of legislation.

(i) Legislative power.—The Act enlarged the Council of the Governor-General for the purpose of making laws and regulations by the addition of not less than 6 and not more than 12 'Additional members'; half of these were to be non-official members. The term of the office of these members was of two years.

The Legislative Council was given the power to frame laws and regulations for all persons, Courts of Justice, places and things and public servants, inside and outside the British India. The Act restored Legislative powers to the Presidency Governments of Bombay and Madras. The Provincial Legislative Councils were empowered to make laws for the benefit of the Province. The Governor-General's assent on every Bill passed by the Legislative Council was necessary and only then it could not become an Act. In addition to this, the Governor-General had the power to veto any Bill. He was also empowered to issue ordinances. He had also power to alter the limits of the Provinces, Presidencies and territories. The provincial legislatures were not empowered to make any laws, that might alter the Acts of Central Legislature.

According to G. N. Singh, the Indian Act of 1861 is important in the Constitutional History of India for two chief reasons. Firstly, because it enabled the Governor-General to associate the people of the land with the work of legislation and, secondly, by vesting legislative powers in the Governments of Bombay and Madras and making provision of good government, it laid down the foundation of the policy of legislative Devolutions, which resulted in the grant of almost complete internal autonomy to the Province in 1937.

The Indian Council Act of 1861 suffered from many defects, it gave unlimited power to the Governor-General. The non-official members had no right in the Governor-General's Council. They could not ask questions and discuss the budget. Moreover, the non-official members were used to be native Princes or Zamindars. They were not men of intelligence and had absolutely no interest in the legislation for India.

The political situation in India was very explosive. The period from 1861 to 1892 was the rise of Indian National Movement. The chief factor that gave rise to the movement have been grouped by Mr. G. N. Singh into 6 heads; (1) inspirations of the political ideals of the west; (2) religious revival and faith in the ancient glory of India; (3) economic discontent and disappointment at the non-fulfilment of British promises; (4) the influence of Indian press and the vernacular literature; (5) the development of the means of communications and the holding of Imperial Darbars; and (6) the increase in feeling of racial bitterness due to the arrogant and insolent attitude of the ruling race, the plundering administration of Lord Lytton and the display of violent temper and organised scurrilous propaganda carried on by Europeans and Anglo Indians over the Ilbert Bill.<sup>1</sup>

The Indian National Congress was founded in 1885 and in its first session passed resolution expressing grave dissatisfaction at the existing system of Government and demanded reform and expansion of the Legislative Councils

1. G. N. Singh.—Landmarks in Indian Constitutional and National Development, p. 108.

the power of certifying any Bill or grant refused to be passed or made by the Legislature, in which case it would have the same effect as if it was passed or made by the Legislature. Fourthly, he could make Ordinances, having the force of law for a temporary period, in cases of emergency.

*4. Structure of Government to remain unitary.*—The Central Legislature had power to legislate on any matter. So it was not possible to challenge the validity of the Central laws. In case of controversy it was the Governor-General and not the Courts, who had the authority to decide whether a particular subject was a Central or Provincial subject. Thus, the Government of India remained a unitary and centralized Government with the Governor-General-in-Council as the key-stone of the whole constitutional edifice.

*Shortcomings of the Act of 1919.*—The Reforms of 1919, however, failed to fulfil the aspirations of the people in India, which led to an agitation by the Congress for 'Swaraj' or 'self-Government' to be attained through non-co-operation.

*Non-Fulfilment of the demand for responsible Government.*—Though the Act gave a substantial measure of power to the Provinces, yet the structure of the Central Government remained unitary and centralised with the Governor-General-in-Council as the key-stone of the whole constitutional edifice, and it was through the Governor-General-in-Council that the Secretary of State and ultimately the Parliament discharged their responsibility for the peace, order and good Government of India.<sup>1</sup> It was the Governor-General and not the Courts who had the authority to decide whether a particular subject was Central or Provincial. The Provincial Legislature could not, without the previous sanction of the Governor-General, take up for consideration any Bill relating to a number of subjects.

*The Failure of Dyarchy.*—The greatest difficulty came from the working of the system of Dyarchy in the Provinces. In a large measure the Governor came to dominate the ministerial policy by means of his overriding powers and the control over the official members in the Legislatures. The main defect of the system from the Indian point of view was the control of the purse. Finance, being a reserved subject, was placed in charge of a member of the Executive Council and not in charge of a Minister. Thus it was impossible for a Minister to implement any progressive measure for want of funds.

There were no provisions for collective responsibility of the ministers to the Provincial Legislature. They were appointed individually and acted as advisers to the Governor and differed from the members of the Executive Council only in the fact that they were non-officials.

*Simon Commission.*—The persistent demand for further reforms led the British Government to appoint a Statutory Commission known as Simon Commission. The Government of India Act had provided for the appointment of a Statutory Commission after the expiry of ten years of the passing of the *Act to inquire into and report on the working of the Act in 1927*. The Commission, headed by Sir John Simon, submitted its report in 1930.

The report was considered at a Round Table Conference, consisting of the representatives of the British Government and of British India as well as the Rulers of the States. A white paper was prepared as the result of this Conference embodying the outlines of the reforms. The white paper was submitted to the Select Committee of the Parliament. In accordance with the recommendations of the Select Committee the Government of India Bill was introduced in the Parliament and passed with certain amendments as the Government of India Act, 1935.

I. Report of the Joint Parliamentary Committee, Vol. I, pp. 232-238.

Montagu-Chelmsford Report which led to the enactment of the Government of India Act, 1919.

The Morley-Minto Reforms failed to satisfy the aspirations of the Indians as they did not establish Parliamentary system of Government in the country.

Indian National Congress became very active during the time of the 1st World War and pressed for reforms.

In response to this popular demand the British Government made a declaration on August 20, 1917, that the future policy of His Majesty's Government was that of "increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to progressive realisation of responsible Government in British India as an integral part of the British Empire". No doubt this was the step which paved the path for the Independence of India.

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

1. *The Declaration*.—It promised a responsible Government to the Indians.

2. *Dyarchy in the Provinces*.—The Act introduced a system of Dyarchy in the provinces. Dyarchy has been derived from the Greek word 'di-arche', means double rules. The object of the Dyarchy was to train the natives in the act of self-Government. In matter of legislation subjects were divided into Central and Provincial. Subjects were further divided into two parts 'reserved' and 'transferred'. Jail, Police, Justice, Finance and Irrigation, comparatively more important subjects, were the 'reserved' subjects and they were to be governed by the Governor and his Executive Council without any responsibility to the Legislature, Education, Agriculture, Local Self-Government, etc. subjects of lesser importance were transferred to the Indian Ministers and the Governors. The Governor could override both the Ministers and the Executive Council. The Provincial Legislative Council was empowered to legislate in respect of provincial matters only. But there were many restrictions on their powers of legislation. In several cases the previous sanction of the Governor-General was necessary. He had the power to stop the consideration of a Bill or a part of it. He could secure legislation on reserved subjects notwithstanding that the Council had not consented to it. He had also the power to veto Bills. The proportion of the elected members was increased up to 70% in the Provincial Legislative Councils but the separate electorate for Muslims was continued.

3. *Central Government*.—The principle of responsible Government was not introduced in the Centre. The Central Government remained responsible to the British Parliament through the Secretary of State. The Central Legislature was to have a bicameral legislature. It was now a more representative body. The Council of State (Upper House) was composed of sixty members of whom thirty-four were elected and the Legislative Assembly (Lower House) was composed of 144 members of whom 104 were elected and the rest nominated. Among the nominated members about 26 were officials.

The powers of both the Houses were equal except that the power to veto a Bill was given exclusively to the Lower House. In respect to financial Bills both the Houses had equal powers. Thus the Central Legislature retained the power to legislate for the whole of India, relating to any subject.

The Governor-General had overriding powers in respect of Central Legislature. Firstly, his prior sanction was required to introduce Bills relating to certain matters. Secondly, he had the power to veto or reserve for consideration of the Crown any Bill passed by the Indian Legislature. Thirdly, he had

*4. Federal Legislature.*—The Federal Legislature was to consist of two Houses, the Council of States and the Legislative Assembly. The Legislative Assembly (Lower House) was to consist of 375 members, 250 of British Indian Provinces and 125 representing the Indian States. Its tenure was, unless dissolved earlier, five years.

The Council of States (Upper House) was to consist of 260 members, out of which 156 members were to represent British India, 6 of them representatives to be nominated by the Governor-General and the rest elected directly. One hundred and four members were to be nominated by the Princes of the Indian States.

The powers of the Federal Legislature were extremely limited. They had in general equal powers but demands of supply of votes and financial Bills were to originate in the Lower House. If there was any difference between the two Houses, the Act provided for a joint session of the two Houses for solving the deadlock.

*5. Provincial Government.*—The Provincial Executive was to consist of the Governor and a Council of Ministers to advise him. The Governor was the head of the Executive. Three types of powers were given to the Governor : (a) Discretionary, (b) Powers exercised in his individual judgment ; (c) Powers to be exercised on the advice of the ministers. But in regard to matters involving his special responsibility he had right to override the advice given by the ministers.

*6. Provincial Legislatures.*—After this Act, the Legislatures of Bombay, Bengal, Madras, Bihar, Assam and the United Provinces were made bicameral i. e., two houses and in other five Provinces unicameral. The composition of the Provincial Assembly varied from Province to Province. The voting qualifications for the membership of the Council were not the same in all Provinces. The principle of communal electorate was preserved in the election of the members of the Assembly. The normal duration of the Assembly was of five years.

The Provincial Legislature had power to make laws on the subjects given in the Provincial list. They could also make laws on the subject in the Concurrent List. The power also extended to those residuary subjects which were assigned to it by the Governor-General.

The previous sanction of the Governor and Governor-General for introducing almost all the Bills was obligatory. Financial Bills could only be introduced on the recommendation of the Governor. No Bill passed by the Legislature could become an Act without the assent of the Governor. The Governor had the right to return Bills for reconsideration. The discretionary powers and the responsibilities of the Governor made him to act as a dictator in the Provinces.

*7. Distribution of Legislative power between the Centre and the Provinces.*—The Act made a three-fold division of power between the Centre and the Provinces—Federal List, Provincial List and Concurrent List.

*Federal List.*—The Federal Legislature had exclusive power of legislation over the subjects mentioned in the Union List. The Union List consisted of 59 subjects. These subjects were subjects of national importance and essential and vital for the existence of the Federation. The most important of them were external affairs, currency and coinage, naval, military and air forces, census, etc.

*Provincial List.*—The Provincial Legislature had exclusive jurisdiction to

**The Government of India Act, 1935.**—The Government of India Act, 1935, is regarded as the second milestone on the highway leading to a full responsible Government. It was a lengthy document, detailed and complicated having 321 sections with 10 Schedules. The basic features of the Act were the introduction of partial responsibility at the Centre, Provincial autonomy and an All India Federation.

#### Main Features of the Act :

1. *All India Federation.*—The Act provided for the establishment of an All-India Federation comprising of the British Indian Provinces and such Indian States who would desire to come into the Federation. While under all the previous Government of India Acts, the Government of India was unitary, the Act of 1935 proposed a Federation taking the provinces and the Indian States as one unit. But the accession of the States to the Federation was optional. It could not be established until the States had given their assent to join the Federation. At the time of joining it, each ruler of the State was required to sign an *Instrument of Accession* mentioning therein the extent to which it consented to surrender its authority to the Federal Government. The Rulers of Indian States never gave their consent and thus the Federation envisaged by the Act never came into being.

2. *Dyarchy at the Centre*—The Act of 1935 abolished dyarchy at the Provincial level and introduced it at the Centre. The executive authority of the Centre was vested in the Governor-General. The Federal subjects were divided into two categories—the ‘reserved’ and the ‘transferred’: (a) The administration of ‘reserved subjects’ like defence, external affairs, ecclesiastic affairs and tribal areas, was to be made by the Governor-General in his discretion with the help of Councillors appointed by him who were not responsible to the Legislature. (b) The ‘transferred’ subjects, on the other hand, were to be administered by the Governor-General who was to act on the advice of a Council of ministers who were responsible to the Legislature. But even in regard to this latter sphere, he might act contrary to the advice so given by the ministers, if any of his special responsibilities were involved.

As regards the special responsibilities, he was to act under the control and direction of the Secretary of State for the Crown.

3. *Provincial Autonomy.* The important feature of the new Act was that it marked the beginning of Provincial Autonomy. It was definitely an advance on the Act of 1919. The Act divided Legislative power between the Provincial and Central Legislatures, and within its defined sphere the provinces were no longer delegates of the Central Government but were autonomous units of administration. To this extent the Government of India assumed the role of a Federal Government *vis à vis* the Provincial Governments, though the Indian States did not join to complete scheme of Federation.

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

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

**The Cripps' Mission.**—In the year 1942 the British Government realised that it was difficult to remain indifferent towards the Indian problem any longer. Therefore on March 22, 1942, the British Government sent Sir Stafford Cripps to negotiate with Indian leaders and secure their co-operation in the prosecution of War. Sir Stafford Cripps suggested the following proposals for the settlement of the Indian problem :

(a) Immediately after the end of war steps shall be taken to set up in India an elected body for framing a new Constitution of India.

(b) Provision shall be made, as set out below, for participation of Indian States in the Constitution-making body.

(c) The British Government undertakes to accept and implement the Constitution so framed subject only to : (i) The right of any province of British India, which is not prepared to accept the new Constitution, to retain its present constitutional position, provision being made for its subsequent accession if it so decides. If they so desire, His Majesty's Government will be prepared to agree upon a new Constitution giving them the same full status of the Indian Union ; (ii) The signing of a treaty which shall be negotiated between His Majesty's Government and the Constitution-making body.

(d) The Constitution making body shall be composed of persons elected by Provincial legislatures and nominated by the Indian Princes unless the leaders of Indian origin of the principal communities agreed upon some other form before the end of hostilities.

(e) His Majesty's Government must bear the responsibility for and retain the control and direction of defence of India.

**Comments on the proposal.**—Indians were not satisfied with the above proposals and therefore they rejected it. The Indian leaders found in it the seed of the partition of the country. The main cause for its rejection was inadequacy of the proposals and the insistence of Congress on Cabinet Government.

The Labour Party came into power in England. The Labour Government was more sympathetic towards India and wanted to solve the Indian problem. With this end in view, the Cabinet Mission was sent to India.

**The Cabinet Mission, 1946.**—The Cabinet Mission came to India on 4th March, 1946. It consisted of three British Cabinet Ministers—Lord Pethick Lawrence, Sir Stafford Cripps and Mr. Alexander. The Mission recommended the following proposals :

(1) There should be a Union of India embodying both British India and the States and with the exception of certain reserved subjects. All subjects were to be retained by the States.

(2) The paramountcy of Crown was to lapse.

(3) For the purpose of framing a new Constitution a Constituent Assembly was to be elected.

(4) An interim Government to be set up having the support of major political parties.

The proposals of Cabinet Mission were accepted and in July 1 46, elections to Constituent Assembly took place.

**The Indian Independence Act, 1947.**—The provisions of the Act were as follows :

make laws on subjects mentioned in the State List. It consisted of 54 subjects which were subjects of local importance. The main amongst them were, police, provincial public services, education, etc.

**Concurrent List.**—The Federal and Provincial Legislatures were to have concurrent powers to legislate on subjects mentioned in the Concurrent List. The subjects in the Concurrent List were essentially of a provincial and local nature but required a uniform policy throughout India. It contained 26 subjects. Criminal law, criminal procedure, civil procedure, marriage and divorce, arbitration, etc., were most important subjects amongst them.

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

In case of repugnancy in the concurrent field, a Federal law prevailed over a Provincial law to the extent of the repugnancy. But if the Provincial law received the assent of the Governor-General or of His Majesty, having been reserved for their consideration for this purpose, the Provincial law was to prevail. The allocation of residuary power of legislation in the Act was unique. It was not vested in either of the Legislatures, Central or Provincial. But the Governor-General was empowered to authorise either the Federal or the Provincial Legislature to enact a law with respect to any matter which was not enumerated in any of the three Legislative Lists.

**The Federal Court.**—The Act established a Federal Court. The Federal Court had one Chief Justice and not more than six other Judges. The retiring age of these judges was sixty-five years. The necessary qualifications for the Judges were also given in the Act. These Judges were appointed by the Crown.

**Jurisdiction of Federal Court.**—The Federal Court had three kinds of jurisdiction, i. e., original, appellate and advisory. The Court had exclusive *original jurisdiction* in any dispute between the Federation and its units or the units *inter se*. The *appellate jurisdiction* of the Federal Court extended to appeals from the judgment of any High Court in India to the Federal Court if the High Court certified that the case involved a substantial question of law as to the interpretation of the Government of India Act, 1935 or any order in Council made thereunder.

An appeal could go to the Privy Council from decision of the Federal Court. The Federal Court had also *advisory jurisdiction*. The Governor could refer any question of law to the Court to obtain its opinion whenever he liked to seek its advice.

The Government of India Act, 1935, was greatly criticised by almost all the parties of India. The Act came into force in regard to the Provinces in April, 1937, but the Central Government continued to be governed in accordance with the provisions of the Government of India Act, 1919, with minor amendments. The elections took place and popular ministries came into office in the Provinces but they lasted only for two years.

In 1939 the 2nd World War broke out in Europe. The British Government declared India as a belligerent country at War with Germany. This was done without consulting Indian leaders and the Indian Legislatures. Consequently, the Congress ministries resigned from office on the issue of participation of India in the War.

Ali Khan, Khwaja Nazimuddin, Sir Feroze Khan Noon, Suhrawardy, Sir Zafarullah Khan, Dr. Sachchidananda Sinha.

The first meeting of the Assembly was held on 9th December, 1946. It was held in an atmosphere of uncertainty, because the Muslim League boycotted the Assembly. In spite of this, the Assembly made a substantial progress and adopted an 'Objective Resolution' which later became the Preamble of the Constitution. It appointed various Committees to deal with different aspects of the Constitution. The report of these committees formed the basis on which the first draft of the Constitution was prepared. On August 29, 1947, a Drafting Committee of 7 members was set up under the Chairmanship of Dr. Ambedkar.

The Draft Constitution was published in January, 1948. The people of India were given 8 months to discuss the draft and propose amendments. As many as 7,635 amendments were proposed and 2,473 were actually discussed. The Constituent Assembly held 11 sessions. The Draft Constitution was considered for 114 days. In all, the Constituent Assembly sat for 2 years, 11 months and 18 days.

The new Constitution of India was adopted by the Constituent Assembly on 26th November, 1949 and signed by the President, Dr. Rajendra Prasad. Articles 5, 6, 7, 8, 9, 60, 324, 356, 367, 379, 380, 388, 391, 392 and 393 came into force at once. The remaining provisions of the Constitution came into force on 26th January, 1950, which is the date of the commencement of this Constitution.

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1. The Act provided for the creation of two independent Dominions, India and Pakistan from 15th August, 1947.

2. Each Dominion was to have a Governor-General who was to be appointed by the King.

3. The Constituent Assemblies of both Dominions were empowered to frame laws for their respective territories till the new Constitution came into force.

4. After August 15, 1947 the British Government was not to control the Dominions or the Provinces.

5. For the time being, till the new Constitutions were framed, each of the Dominions and the Provinces were to be governed by the *Government of India Act, 1935*.

6. The post of Secretary of the State for India was to be abolished and it was taken over by Secretary of the Commonwealth of Nations.

7. The Act proclaimed laps of British paramountcy over Indian States.

The Indian Independence Act, 1947, came into force on August 15, 1947, when the British rule in India came to an end.

### 5. 1947 TO 1950 -THE FRAMING OF THE NEW CONSTITUTION

The struggle for independence was thus over by 15th August, 1947. But the attainment of independence was not an end in itself. It was only the beginning of a new struggle, the struggle to live as an independent nation and, at the same time, establish a democracy based on the ideals of justice, liberty, equality and fraternity. The need of a new constitution forming the basic law of the land for the realisation of these ideals was paramount. Therefore, one of the first tasks undertaken by independent India was the framing of a new Constitution.<sup>1</sup>

As provided in the Cabinet Mission Plan the Constituent Assembly came into being in November, 1946. Its members were elected by the Provincial Assembly by indirect election. Out of 296 seats for British India, the Congress captured 111 seats and the Muslim League 73 seats. The rest were not filled up.

It is to be noted that this Constituent Assembly could not be called a sovereign body. It was brought about by the British Government and could be abolished by it. Its authority was limited. It was to work within the framework of the Cabinet Mission Scheme. It could not change the outlines of the Constitution as given in the Cabinet Mission Plan. But on the passing of the Indian Independence Act of 1947, the above-mentioned limitations were removed. According to the terms of the Act of 1947 it became a sovereign body. It was not to work within the framework of the Cabinet Mission Plan. It was free to frame any constitution it pleased.

The important members of the Constituent Assembly were Jawahar Lal Nehru, Rajendra Prasad, Sardar Patel, Maulana Azad, Gopalaswami Ayyangar, Govind Ballabh Pant, Abdul Ghaffar Khan, T. T. Krishnamachari, Alladi Krishnaswami Ayyar, H. N. Kunzru, Sir H. S. Gaur, K. V. Shah, Masani, Acharya Kripalani, Dr. Ambedkar, Dr. Radha Krishnan, Dr. Jayakar, Liaquat

1. Pylee, M. V.—Constitutional History of India, p. 24.

the criterion. Is the federal principle predominant in the constitution? If so, that constitution may be called a "federal constitution". If, on the other hand, there are so many modifications in the application of the federal principle that it ceases to be of any significance, then the constitution cannot be termed as federal. This appears to be the most instructive and responsible way in which to use the term 'federal constitution'. It seems essential to define federal principle rigidly, but to apply the term "federal constitution" more widely.<sup>1</sup> Thus Dr. Wheare accepts that exceptions are permissible provided the federal principle is predominantly retained in the Constitution.

**Essential characteristics of a federal Constitution.**—A federal constitution usually has the following essential characteristics :—

(1) *Distribution of Powers.*—The distribution of powers is an essential feature of federalism. Federalism means the distribution of the powers of the State among a number of co-ordinate bodies each originating in and controlled by the Constitution.<sup>2</sup> The basis of such distribution of powers is that in matters of national importance, in which a uniform policy is desirable in the interest of the units, authority is entrusted to the Union, and matters of local concern remain with the States.

(2) *Supremacy of Constitution.*—A federal State derives its existence from the Constitution. Just as a corporation derives its existence from the grant by which it is created. Hence, every power, executive, legislative or judicial whether it belongs to the nation or to the individual State is subordinate to and controlled by the Constitution.<sup>3</sup> The Constitution in a federal State constitutes the supreme law of the land. Prof. Wheare says "that these two institutions—the supreme constitution and the written constitution are, then, essential institutions to a federal Government. The supreme constitution is essential if Government is to be federal ; the written constitution is essential if federal Government is to work well."<sup>4</sup>

(3) *A Written Constitution.*—A federal constitution must almost necessarily be a written constitution. The foundations of a federal State are complicated contracts. It will be practically impossible to maintain the supremacy of the Constitution, unless the terms of the constitution have been reduced into writing. To base an arrangement of this kind upon understandings or conventions would be certain to generate misunderstandings and disagreements.<sup>5</sup>

(4) *Rigidity.*—A natural corollary of a written constitution is its rigidity. A constitution which is called the supreme law of the land must be rigid also. In a rigid Constitution the procedure of amendment is very complicated and difficult. This does not mean that the constitution should be legally unalterable. It simply means that the power of amending the Constitution should not remain exclusively with either the Central or State Governments. A constitution of a country is considered to be a permanent document. It is called the supreme law of the land. The supremacy of the supreme law of the land can only be maintained if the method of amendment is rigid. At the same time it requires that a change in it should not become impossible.

1. Wheare, K. C.—"Federal Government" 4th Edn. 1963, p. 15.

2. Dicey, A. V.—The Law of the Constitution (10th Edn.), p. 157.

3. Ibid at p. 144.

4. Wheare, K. C.—Federal Government, p. 56.

5. "It can be said that a written constitution is not logically required by the federal principle. The truth seems to be that while it is essential for a federal Government that its constitution is supreme to the extent defined above, it is also essential for a good federal government that the supreme Constitution be written";—Prof. K. C. Wheare—Federal Government, p. 56.

## Nature of the Indian Constitution

Is the Constitution of India Federal?—According to the traditional classification followed by the political scientists, constitutions are either unitary or federal. In a unitary constitution the powers of Government are centralised in one Government, viz. the Central Government. The provinces are subordinate to the Centre. In a federal constitution, on the other hand, there is a division of powers between the Centre and the State Governments and both are independent in their own spheres.

There is, however, a difference of opinion amongst the constitutional jurists about the nature of the Indian Constitution. One view is that it is a quasi-federal constitution and contains more unitary features than federal. The other view is that it is a federal constitution with a novel feature adopting itself to national emergencies.

The view of the framers of the Constitution is that the Indian Constitution is a Federal Constitution. Dr. Ambedkar, the Chairman of the Drafting Committee, has observed thus "I think it is agreed that our Constitution notwithstanding the many provisions which are contained in it whereby the Centre has been given powers to override the Provinces (States) nonetheless, is a *Federal Constitution*".<sup>1</sup> Thus, the framers of the Constitution, unanimously describe the Indian Constitution, as federal.

But some constitutional jurists hesitate to characterize the Indian Constitution as federal. It is, therefore, necessary to ascertain *first* what federal constitution is and what are its essential characteristics, and then to examine whether our Constitution possesses those characteristics.

**Federal Principle**—"By the federal principle", Prof. Wheare observes, "is meant the method of dividing powers, so that the *general* and *regional* Governments are each within a sphere co-ordinate and independent. Both the Federal and the Regional Governments are co-ordinate and independent in their spheres and not subordinate to one another."<sup>2</sup>

The American Constitution is universally regarded as an example of federal constitution. It establishes dual polity or dual form of Government i. e. the Federal and the State Governments. The powers of both the Central and the State Governments are divided and both are independent in their own sphere. *The existence of co-ordinate authorities independent of each other is the gist of the federal principle.*

Prof. Wheare after giving the definition of what the federal principle is, himself starts examining the Constitutions of different countries. He observes : "Are we to confine the forms to cases where the federal principle has been applied completely and without exception ? It would not be sensible to do this. After all, the Constitution of the United States itself, as originally drawn up contained at least one exception to the federal principle in that the Senate was composed of representatives selected by the Legislatures of the State. Thus a part of the general Government of the United States was dependent to some extent upon a part of the regional Government. This exception to the federal principle was maintained in law until 1913. Yet the American Constitution from 1787-1913 was and must be called a "federal constitution" for the federal principle was predominant in it. That is

1. C. A. D., Vol. 4, p. 133. Also see C. A. D., Vol. 5, pp. 33-36.

2. Wheare; *Federal Government*, p. 27. Jennings—*Some Characteristics of the Indian Constitution*, p. 1.

the criterion. Is the federal principle predominant in the constitution? If so, that constitution may be called a "federal constitution". If, on the other hand, there are so many modifications in the application of the federal principle that it ceases to be of any significance, then the constitution cannot be termed as federal. This appears to be the most instructive and responsible way in which to use the term 'federal constitution'. It seems essential to define federal principle rigidly, but to apply the term "federal constitution" more widely.<sup>1</sup> Thus Dr. Wheare accepts that exceptions are permissible provided the federal principle is predominantly retained in the Constitution.

**Essential characteristics of a federal Constitution.**—A federal constitution usually has the following essential characteristics :—

(1) *Distribution of Powers.*—The distribution of powers is an essential feature of federalism. Federalism means the distribution of the powers of the State among a number of co-ordinate bodies each originating in and controlled by the Constitution.<sup>2</sup> The basis of such distribution of powers is that in matters of national importance, in which a uniform policy is desirable in the interest of the units, authority is entrusted to the Union, and matters of local concern remain with the States.

(2) *Supremacy of Constitution.*—A federal State derives its existence from the Constitution. Just as a corporation derives its existence from the grant by which it is created. Hence, every power, executive, legislative or judicial whether it belongs to the nation or to the individual State is subordinate to and controlled by the Constitution.<sup>3</sup> The Constitution in a federal State constitutes the supreme law of the land. Prof. Wheare says "that these two institutions—the supreme constitution and the written constitution are, then, essential institutions to a federal Government. The supreme constitution is essential if Government is to be federal ; the written constitution is essential if federal Government is to work well."<sup>4</sup>

(3) *A Written Constitution.*—A federal constitution must almost necessarily be a written constitution. The foundations of a federal State are complicated contracts. It will be practically impossible to maintain the supremacy of the Constitution, unless the terms of the constitution have been reduced into writing. To base an arrangement of this kind upon understandings or conventions would be certain to generate misunderstandings and disagreements.<sup>5</sup>

(4) *Rigidity.*—A natural corollary of a written constitution is its rigidity. A constitution which is called the supreme law of the land must be rigid also. In a rigid Constitution the procedure of amendment is very complicated and difficult. This does not mean that the constitution should be legally unalterable. It simply means that the power of amending the Constitution should not remain exclusively with either the Central or State Governments. A constitution of a country is considered to be a permanent document. It is called the supreme law of the land. The supremacy of the supreme law of the land can only be maintained if the method of amendment is rigid. At the same time it requires that a change in it should not become impossible.

1. Wheare, K. C.—"Federal Government" 4th Edn. 1963. p. 15.

2. Dicey, A. V.—The Law of the Constitution (10th Edn.), p. 157.

3. Ibid at p. 144.

4. Wheare, K. C.—Federal Government, p. 56.

5. "It can be said that a written constitution is not logically required by the federal principle. The truth seems to be that while it is essential for a federal Government that its constitution is supreme to the extent defined above, it is also essential for a good federal government that the supreme Constitution be written"—Prof. K. C. Wheare—Federal Government, p. 56.

(5) *Authority of Courts*.—In a federal State the legal supremacy of the Constitution is essential for the existence of the federal system. The very nature of a federal State involves a division of powers between the Central and State Governments under the framework of the Constitution. It is, therefore, essential to maintain this division of powers between the two levels of Governments. This must be done by some independent and impartial authority above and beyond the ordinary bodies whether federal or State legislatures existing under the constitution. The judiciary has, in a federal polity, the final power to interpret the constitution and guard the entrenched provisions of the Constitution.

The Indian Constitution possesses all the essential characteristics of a federal constitution mentioned above. The constitution establishes a dual polity, a system of double Government with the Central Government at one level and the State Government at the other. There is a division of powers between the Central and the State Governments. Each level of Government is supreme in its own sphere. The Constitution of India is written and is supreme. The provisions of the Constitution which are concerned with federal principles cannot be changed without the consent of the majority of States. The Constitution establishes a Supreme Court to decide disputes between the Union and the States, or the States *inter se* and interpret finally the provisions of the Constitution.

But, as said earlier, some scholars hesitate to characterise the Indian Constitution as truly federal because according to them in certain circumstances the Constitution empowers the Centre to interfere in the State matters and thus places the States in a subordinate position which is against the federal principle.<sup>1</sup> They, therefore use such expressions for it as 'quasi-federal', 'unitary with federal features' or 'federal with unitary features'. In the opinion of Prof. Wheare :

'The Constitution establishes a system of Government which is almost quasi-federal.....a unitary State with subsidiary federal features rather words than a federal State with subsidiary unitary features.'<sup>2</sup>

Jennings has characterised it as 'a federation with a strong centralising tendency'.<sup>3</sup>

Let us now examine what are those provisions of the constitution which are produced in support of the above argument and how they modify the strict application of the federal principle. In the following matters, it is pointed out, that the Indian Constitution contains the modifications of the federal principle :

(1) *Appointment of Governors*.—The Governors of the States are appointed by the President (Arts. 155 and 156) and are answerable to him. This is, however, not a matter of much significance for the Governor is only the constitutional head of the State who shall normally act on the advice of his Ministers. There are provisions in the Constitution which require in certain matters Central assent to laws passed by State Legislatures to make them valid. [Power of the President to veto the State laws reserved for his consideration—Arts. 286 (3), 288 (2) & 31 (3)]. But whatever be the letter of the Constitution, in practice there are not many examples where the President has vetoed the State Legislature. The only example has been the *Kerala Education Bill*.

1. In *State of W. B. v. Union of India*, A. I. R. 1963 S. C. 1241. The Supreme Court has held by majority that it is not truly federal. However, Subba Rao, J., in his dissent treats it basically federal.
2. Wheare, K. C.—India's New Constitution Analysed, 1950 A. L. J. 22.
3. Jennings, Some Characteristics of the Indian Constitution, p. I.

cation Bill.<sup>1</sup> But here also the Centre obtained the advisory opinion of the Supreme Court before sending it back to the State Legislature for suitable amendments in the light of the Court's opinion.

(2) *Parliament's power to legislate in the national interest.*—Under Art. 249, Parliament is empowered to make laws with respect to every matter enumerated in the State List if it is in the national interest. But there cannot be any objection to this provision :

Firstly, no one will deny that if a subject in the State List assumes national character, the Parliament should make a law on it. In normal course this cannot be done unless the Constitution is amended. But in this provision we have devised an expedient way by which without formally amending the Constitution we can achieve the desired effect, namely, the acquisition by the Centre of the power to administer and legislate upon a subject which has assumed national importance.

Secondly, it should also be noted that this power is given to Parliament by the Council of States by passing a resolution supported by 2/3rd majority of the members present. Thus in effect by this device the Constitution is amended by the agreement of majority of the States. We, therefore fail to understand how Art. 294 places the States in subordinate position.

(3) *Parliament's powers to form new States and alteration of boundaries of existing States.*—The Parliament of India may form new States ; it may increase or diminish the area of any State and it may alter the boundaries or name of any State (Art. 3). The very existence of the States depends upon the sweet-will of the Union Government. The power conferred on Parliament to make territorial adjustment is better explained on the historical basis. The Government of India, for the first time, established federal polity in India. It deliberately created the constituent units of the federation although they had no organic roots in the past. The framers of the Constitution were well aware of the peculiar conditions under which and the reasons for which the States were formed and their boundaries were defined and so they deliberately accepted the provisions in Art. 3 with a view to meeting the possibility of the re-distribution of the State territory after the integration of Indian States. It may, therefore, be assumed that the provisions in Art. 3 takes into account the fact that the Constitution contemplated re-adjustment of the territories of constituent State and there was no guarantee about their territorial integrity.

(4) *Emergency provisions.*—The Constitution envisages three types of emergency : emergency caused by war or *armed rebellion*<sup>2</sup> (Art. 352) ; by failure of constitutional machinery (Art. 356) ; and financial emergency (Art. 360). When the proclamation of emergency is made under Article 352, the normal distribution of powers between the Centre and States undergoes a vital change. Parliament is empowered to make laws with respect to any matter enumerated in the State list. The Centre is empowered to give directions to any State as to the manner in which the State's executive power is to be exercised. Further, the President may by order direct that all or any of the provisions of Articles 268 to 279 relating to distribution of revenue between the Center and the State shall take effect with such exceptions or modifications, as he thinks fit. Under Art. 356, if the President is satisfied that the Government of a State cannot be carried on in accordance with the provisions of the Constitution he can dismiss the State ministry and dissolve the Legislature and assume all the functions of

1. *In re Kerala Education Bill*, A. I. R. 1958 S. C. 956.

2. Inserted by the 44th Amendment Act, 1978.

the State. Thus the normal distribution of powers between the Centre and the States, which is the basic element of a federal constitution, is completely suspended. It is alleged that these provisions enable the Union Parliament to convert the Union into a unitary State which thus vitally changes the federal character of the Indian Constitution.

Do these provisions modify the federal character of the Indian Constitution? "The correct view", observes Dr. V. N. Shukla, "is that the emergency provision which come into operation only on the happening of the specific contingencies, do not modify or destroy the federal system. It is rather a merit of the Constitution that it visualises the contingencies when the strict application of the federal principle might destroy the basic assumptions on which our Constitution is built. The Constitution by adopting itself to a changed circumstance strengthens the Government in its endeavour to overcome the crisis. In an emergency the behaviour of each federal Constitution is very much different from that in peace time. Though the Constitution of the U. S. A., Australia and Canada do not expressly provide for enlargement of federal powers during the periods of emergency, but during the two World Wars, the defence power of the Federal Government was given so extended an interpretation by the courts that these countries behaved more like unitary than federal State. For the above reasons we maintain that the Indian Constitution is federal in nature. Prof. Wheare has coined a phrase 'quasi-federation' as applicable to India but constitution has nowhere defined what a 'quasi-federation' is. It is not necessary to use such a vague term 'quasi-federal' to characterise it. The term 'quasi-federal' is extremely vague as it does not denote how powerful the Centre is, how much deviation there is from the pure federal model" or what kind of special position a particular quasi-federation occupies between a unitary State and a federation proper. The fundamental principle of federation is that the powers are distributed between the Centre and the States and that is done by the Constitution. That is what the Constitution does. The States do not depend upon the Centre, for in normal times the Centre can not intrude. It may be that the centre has been assigned a larger role than the States, but that by itself does not detract from the federal nature of the Constitution for it is not the essence of federation to say that only so much, and no more, power is to be given to the Centre.<sup>1</sup>

*Prof. Wheare* appears to feel that American Constitution is truly of federal type. He says 'among example of federal constitutions there may be mentioned those of the United States, Switzerland and Australia'.

It may, however, be clearly understood that the nature of federalism is more of historical growth based on a nation's necessity. To accept the same pattern of federalism in all countries, is well nigh impossible. With all respects to Prof. Wheare, we may tell him that federalism varies in form from place to place, and from time to time depending on so many factors—historical, geographical, economical and political<sup>2</sup>. So what is good for America is not necessarily good for India. The people of a country can take in only the required dosages, otherwise they may stunt or destroy their growth. Federalism is not like the set pattern of coats to wear. It is a cloak of varying organised patterns befitting each wearer and helping him to the next and superior stages of federalism. India's federalism is unique and good for itself. America's federalism is not so perfect as it is stated to be. It has got its

1. M. P. Jain—Indian Constitutional Law, Third Ed., (1978), p. 347 at p. 357.  
 2. C. F. Strong—Modern Political Constitutions (1973), p. 87.

own drawbacks. Indian Constitution is sufficiently federal. It is no less federal basically than American federalism which on paper is of a higher degree but in actual practice the leaning is towards centralisation of national interest. The term 'quasi' is a misnomer. *India is federal and America is more federal* in the outline of the Constitution. In practice there is not much difference between the two.<sup>1</sup>

It may be that we deviated in respect of certain matters from the strict federalism as operating in the U. S. A. or Switzerland, but the reasons are obvious. The Indian Constitution defined the Indian federal structure not with an eye on theoretical or *a priori*, but on practical considerations under the impact of world war, international crisis, scientific and technological progress and development of the philosophy of a social welfare state, the whole concept of federalism had been undergoing a change for sometime throughout the world. There are centralising tendencies in evidence in every federation and whether it is in U. S. A. or in Australia, strong and powerful National Governments emerged through time. The framers of the Indian Constitution took note of these tendencies and kept in view the practical needs of the country designed on federal structure not on the footing that it should conform to some theoretical, definite or standard pattern, but on the basis that it should be able to subserve the need of the country. The Indian Constitution, therefore, constitutes a new bold experiment in the area of federalism.

**Conclusion.**—In short, it may be said, that the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a union of composite state of a novel type. It enshrines the principle that in spite of federalism, the national interest ought to be paramount. Thus, the Indian Constitution is mainly federal with unique safeguards for enforcing national unity and growth.<sup>2</sup>

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1. V. G. Ramchandran—1958 (S. C. J.), p. 97.

2. Jennings—*Some Characteristics of Indian Constitution*, p. 55.

noted that India's membership of the Commonwealth of Nations does not in any way restrict her sovereignty. India's membership of the Commonwealth is a self-imposed limitation. According to Mr. Ramaswamy "it is a courtesy arrangement devoid of any constitutional significance". Explaining the true position of India in the Commonwealth on 10th May, 1949, the then Prime Minister, Jawahar Lal Nehru said "we took a pledge long ago to achieve Purna Swaraj. We have achieved it. Does a nation loose its independence by an alliance with another country? Alliance normally means mutual commitments. The free associations of Sovereign Commonwealth Nations does not involve such commitments. It is well known that it is open to any member nation to go out of the Commonwealth if it chooses . . . . It must be remembered that the Commonwealth is not a super-State in any sense of the term. We have agreed to consider the king as symbolic head of this free association. But the king has no functions attached to that in the Commonwealth. So far the Constitution of India is concerned, the king has no place and we shall owe no allegiance to him."

The term Socialist has been inserted in the Preamble by the Constitution 42 Amendment Act, 1976. The concept of socialism is 'however' implicit in the Constitution. The Amendment merely spells out clearly this concept in the Preamble. The preamble declares India's resolve to secure to all its citizens 'economic justice'. The framers, however, did not provide for any fixed brand of economic justice. It can be established by various ways. The framers have therefore left enough room for people of different ways of thinking, to achieve the ideal of economic justice in their own way by persuading the electorate that it is best way of achieving economic justice. Dr. Ambedkar said, "while we have established political democracy it is also the desire that we should lay down as our ideal economic democracy.... The question is, have we got any fixed idea as to how we should bring about economic democracy? There are various ways in which people believe that economic democracy can be brought about; there are those who believe in individualism as the best form of economic democracy; there are those who believe in having a socialistic state as the best form of economic democracy; there are those who believe in the communistic idea as the most perfect form of economic democracy. Now, having to the fact that there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used, in the directive principles, which is not fixed or rigid. We have left enough room for people of different ways of thinking, with regard to the reacting of the idea of economic democracy, to strike in their own way, to persuade the electorates that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act."<sup>1</sup>

The 42nd Amendment now makes it clear that the nation has chosen the path of 'democratic socialism' to achieve the aforesaid economic democracy. The word 'socialism' has been used in both democratic as well as the constitutions of the Communistic countries. It has no definite meaning. In general, however, it means a State where the means of production, if not wholly, then at least partially, owned and controlled or regulated by the State. India has however chosen its own brand of socialism, e. g. mixed-economy.

The term 'Secularism' makes it clear that India has no religion of its own as recognised religion of State. It treats all religions equally. In a

1. Article 13.

Cons. 4

## Salient features of the Indian Constitution

1. The lengthiest Constitution in the world.—The Indian Constitution is the lengthiest and the most detailed of all the written Constitutions of the world. It originally consisted of 395 Articles divided into 22 Parts and 9 Schedules. After the 44th Amendment Act, 1978, the Constitution now consists of 407 articles divided into 24 Parts and 9 Schedules. This extraordinary bulk of the Constitution is due to several reasons :—

(1) The framers of the Indian Constitution had gained experience from the working of all the known Constitutions of the world. They were aware of the difficulties faced in the working of these Constitutions. This was the reason that they sought to incorporate good provisions of those Constitutions in order to avoid defects and loopholes that might come in future in the light of those Constitutions. Thus, while they framed the Chapter on the Fundamental Rights on the model of the American Constitution, and adopted the parliamentary system of Government from the United Kingdom, they took the idea of the Directive Principles of State's policy from the Constitution of Ireland, and added elaborate provisions relating to Emergency in the light of the Constitution of the German Reich and the Government of India Act, 1935.

(2) The Indian Constitution lays down the structure not only of the Central Government but also of the States. The American Constitution leaves the State to draw up their own Constitutions.

(3) The vastness of the country and peculiar problems relating to the language, Scheduled Castes and Scheduled Tribes to be solved have also contributed towards the bulk of the Constitution.

(4) The Constitution contains a long list of Fundamental Rights and also a number of Directive Principles, which confer no justiciable rights upon the individual. Though these rights by their very nature could not be made legally enforceable yet the makers sought to incorporate them in the Constitution which would serve as the moral restraint upon future governments to implement the ideals cherished by the framers to be achieved by a welfare state as envisaged in the Constitution. It was also felt that the smooth working of an infant democracy might be jeopardised unless the Constitution mentioned in detail things which were left in other Constitutions to ordinary legislation. This explains why we have in our Constitution detailed provisions about the organisation of the judiciary, the services, the Public Service Commissions, Elections and many transitory provisions and the like.<sup>1</sup>

**Establishment of a Sovereign, Socialist, Secular,<sup>2</sup> Democratic Republic.**—The Preamble of the Constitution declares India to be a Sovereign, Socialist, Secular, Democratic Republic. The word Sovereign emphasises that India is no more dependent upon any outside authority. Its membership of the Commonwealth of Nations and that of the United Nations Organisation do not restrict her sovereignty. Critics say that India's membership of the Commonwealth of Nations is not compatible with her sovereign status. But it is to be

1. Constitution Assembly Debates, Vol. XI, pp. 839-840.  
2. Added by the 42nd Amendment Act, 1976.

(b) that matters which should have been left to ordinary legislation having been incorporated into the Constitution and no change in these matters is possible without undergoing the process of amendment.

**5. Fundamental Rights.**—The incorporation of a formal declaration of Fundamental Rights in Part III of the Constitution is deemed to be a distinguishing feature of a democratic State. These rights are prohibitions against the State. The State cannot make a law which takes away or abridges any of the rights of the citizens guaranteed in Part III of the Constitution. If it passes such a law it may be declared unconstitutional by the courts. But mere declaration of certain fundamental rights will be of no use if there is no machinery for their enforcement. Our Constitution has, therefore, conferred on the Supreme Court the power to grant most effective remedies in the nature of writs of *Habeas Corpus*, *Mandamus*, Prohibition, *Quo Warranto* and *Certiorari*, whenever such rights are violated.

It must, however, be clearly understood that fundamental rights are not absolute rights. They are subject to certain restrictions. Thus our Constitution tries to strike a balance between the individual liberty and the social interest. The idea of incorporating a Bill of Rights has been taken from the Constitution of the United States. But the guarantee of individual rights in our Constitution has been very carefully balanced with the need for security of the State itself.<sup>1</sup>

*The 42nd Amendment Act, 1976*, makes it clear that the social interest is supreme. It gives precedence to the directives over the fundamental rights.

**6. Directive Principles of State Policy.**—The Directive Principles of State Policy contained in Part IV of the Constitution set out the aims and objectives to be taken up by the States in the governance of the country. Unlike the Fundamental Rights, these rights are not justiciable. If the State is unable to implement any provisions of Part IV, no action can be brought against the State in a law court. For this want of enforceability there has been much criticism. But the criticism is not justified. Though by their very nature they are not justiciable in the court of law, the State authorities have to answer for them to the electorate at the time of election. The idea of a welfare State envisaged in our Constitution can only be achieved if the States endeavour to implement them with a high sense of moral duty.

*The Constitution 25th Amendment, 1971* and the *42nd Amendment, 1976* have enhanced the importance of the directive principles *vis-a-vis* fundamental rights. They have given precedence to the directive principles over the fundamental rights. In case of conflict between the directives and fundamental rights, the courts shall now be under a duty, notwithstanding its enforceability, to give effect to the former.

**7. A Federation with strong centralising tendency.**—The most remarkable feature of the Indian Constitution is that being a federal Constitution it acquires a unitary character during the time of emergency. During the proclamation of emergency the normal distribution of powers between the Centre and the States undergoes a vital change. The Union Parliament is empowered to legislate on any subjects mentioned in the State List. The Central Government is empowered to give directions to States as to the manner in which it should exercise its executive powers. The financial arrangements between the Centre and State can also be altered by the Union Government. Thus during the proclamation of emergency all powers are centralised in the

1. Constituent Assembly Debate, Vol. VI, pp. 594-95.

Secular State the State regulates the relation between man and man. It is not concerned with the relation of man with God.

The term 'democratic' indicates that the Constitution has established a form of Government which gets its authority from the will of the people. The rulers are elected by the people and are responsible to them. Justice, Liberty, Equality and Fraternity which are the essential characteristics of a democracy are declared in the Preamble of the Constitution as the very objectives of the Constitution.

The term 'Republic' signifies that there shall be an elected head of the State who will be the chief executive head. The President of India, unlike the British King, is not a hereditary monarch but an elected person chosen for a limited period. It is an essential ingredient of a Republic.

**2. Sovereignty resides in the people.**—The Preamble of the Constitution declares that the Constitution of India is adopted and enacted by the people of India and they are the ultimate master of the Republic. Thus the real power is in hands of the people of India, both in the Union and in the States.

**3. Parliamentary form of Government.**—The Constitution of India establishes a parliamentary form of Government both at the Centre and the States. In this respect the makers of the Constitution have followed the British model *in toto*. The reason for this is that we were accustomed to this type of Government. The essence of the Parliamentary form of Government is its responsibility to the Legislature. The President is the constitutional head of the State. The real executive power is vested in the Council of Ministers whose head is the Prime Minister. The Council of Ministers is collectively responsible to the Lower House, e. g. Lok Sabha. The members of the Lower House are elected directly by the people on the basis of adult franchise normally for five years. The position is the same in the States. This Government is, therefore, called a responsible Government. On the other hand, the American Constitution establishes a Presidential type of Government based on the principle of separation of powers. The President is the real executive; elected directly by the people for 4 years. All executive powers are vested in him. He is not responsible to the Lower House, e. g. the Congress. The members of his Cabinet are not members of the Legislature. They are appointed by the President and therefore responsible to him.

**4. Unique blend of rigidity and flexibility.**—It has been the nature of the amending process itself in federations which had led political scientists to classify federal constitution as rigid.<sup>1</sup> A rigid constitution is one which requires a special method of amendment of any of its provisions while in a flexible constitution any of its provisions can be amended by ordinary legislative process. A written constitution is generally said to be rigid. The Indian Constitution, though written, is sufficiently flexible. It is only a few provisions of the Constitution that require the consent of half of the State legislatures. The rest of the provisions can be amended by a special majority of the Parliament. The fact that the Indian Constitution has been amended 45 times during the 30 years of its working disapproves the view taken by Sir Ivor Jennings who had characterized our Constitution as rigid for the following reasons :—

(a) that the process of amendment was complicated and difficult;

1. Wheare, K. C.—Federal Government, p. 209.

(b) that matters which should have been left to ordinary legislation having been incorporated into the Constitution and no change in these matters is possible without undergoing the process of amendment.

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1. Constituent Assembly Debate, Vol. VI, pp. 594-95.

Union Government and Constitution acquires a unitary character. This does not happen only during the emergency. Even in times of peace our Constitution functions as unitary.

This combination of federal and unitary system is a unique feature of the Indian Constitution. It is not only in times of war but also in times of peace that our Constitution functions as unitary. This feature of the Constitution can be better understood in the historical background upon which the federalism has been introduced in India and also in the light of the experience in other federal countries.

**8. Adult Suffrage**—The old system of communal electorates has been abolished and the unilateral adult suffrage system has been adopted. Under the Indian Constitution every man, woman above 21 years of age has been given the right to elect representatives for the legislature. The adoption of the universal Adult Suffrage (Art. 326) without any qualification either of sex, property, taxation, or the like is a 'bold experiment' in India, having regard to the vast extent of the country and its population, with an overwhelming illiteracy. This suffrage is wider than all the democratic countries which have given right of vote to their people. In spite of many difficulties, this bold experiment has been crowned with success. This is evident with the increased number of voters on the electoral rolls in the general elections.

**9. An Independent Judiciary**.—Mere enumeration of a number of fundamental rights in a Constitution without any provision for their proper safeguards will not serve any useful purpose. Indeed, the very existence of a right depends upon the remedy for its enforcement. Unless there is remedy there is no right, goes a famous maxim. For this purpose, an independent and impartial judiciary, with a power of judicial review has been established under the Constitution of India. It is the custodian of the rights of citizens. Besides, in a federal Constitution it plays another significant role of determining the limits of power of the Centre and States.

**10. A Secular State**.—A Secular State has no religion of its own as recognised religion of State. It treats all religions equally. The Preamble declares the resolve of the people of India to secure to all its citizens "liberty of ..... belief, faith and worship." Articles 25 to 28 of the Constitution give concrete shape to this concept of secularism. It guarantees to every person the freedom of conscience and the right to profess, practise and propagate religion. In a secular State the State only regulates the relationship between man and man. It is not concerned with the relation of man with God. One may worship God according to the dictates of his own conscience.

It is to be however noted that the freedom of religion is not an absolute freedom, but subject to the regulatory power of the State. In the name of religion nothing can be done which is against public order, morality and health of the public. Secularism is also subject to 'democratic socialism'. Religious freedom cannot therefore be used to practise economic exploitation. The right to acquire, own and administer property by religious institutions is subject to the regulatory power of the State.

**11. Fundamental Duties**.—The Constitution (42 Amendment) Act, 1976, has introduced a code of ten "Fundamental Duties" for citizens. The fundamental duties are intended to serve as a constant reminder to every citizen what the Constitution specifically conferred on them certain fundamental rights, it also requires citizens to observe certain basic norms of democratic conduct, and democratic behaviour.

## 4

## The Preamble of the Constitution

The Preamble to an Act sets out the main objectives which the legislation is intended to achieve.<sup>1</sup> It is a sort of introduction to the statute and is many a times very helpful to understand the policy and legislative intent. It expresses "what we had thought or dreamt for so long."<sup>2</sup> The Constitution makers gave to the Preamble 'the pride of place'. It embodies in a solemn form all the ideals and aspirations for which the country had struggled during the British regime.<sup>3</sup> In *re Berubari case*,<sup>4</sup> the Supreme Court has said, the Preamble to the Constitution is a key to open the mind of the makers, and shows the general purpose for which they made the several provisions in the Constitution. In a 'nutshell' the Preamble contains "the ideals and aspirations of the people of India."

The Preamble of the Indian Constitution says :

"We, the People of India, having solemnly resolved to constitute India into a "Sovereign [Socialist Secular]<sup>5</sup> Democratic Republic and to secure to all 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 dignity of the individual and the unity [and integrity]<sup>6</sup> of the nation ;

In our Constituent Assembly this Twenty-sixth day of Nov., 1949 do Hereby Adopt, Enact and Give to ourselves this Constitution."

Preamble how far useful in interpreting the Constitution.—The Preamble is the key to open the mind of the makers. But it does not mean that the preamble is to override the express provisions of the Act. In *Berubari's case* the Supreme Court had held that the Preamble is not a part of the Constitution and therefore it has never been regarded as the source of any substantive powers. Such powers are expressly granted in the body of the Constitution..... What is true about the powers is equally true about the prohibitions. It has limited application and can be resorted to where there is any ambiguity in the statute. If the term used in the Constitution are ambiguous or capable of two meanings' in interpreting them some assistance may be taken from the objectives enshrined in the Constitution and the construction which fits the preamble may be preferred.

1. Subba Rao, C. J. in *L. C. Golak Nath v. State of Punjab*, A. I. R. 1967 S. C. 1643.
2. Sir Alladi Krishnaswami : Constituent Assembly Debates, Vol. 10, p. 417.
3. Shelat and Grover, JJ., in *Kesavanand Bharti's case*, A. I. R. 1973 S. C. 1461.
4. A. I. R. 1960 S. C. 845.
5. Inserted by the 42nd Amendment, 1976.

But in *Kesavananda Bharti's case*<sup>1</sup> the Supreme Court has rejected the above view and held that the preamble is the part of the Constitution. Though in an ordinary statute not much importance is attached to the preamble all importance has to be attached to the preamble in interpreting the Constitution.<sup>2</sup> *Sikri, C. J.* has further observed "no authority has been referred before us to establish the propositions that what is true about the powers is equally true about the prohibitions and limitations. Even from the Preamble limitations have been derived in some cases.... It seems to me that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble."<sup>3</sup>

The purpose it serves.—The Preamble serves the following purposes :

- (a) It indicates the source from which the Constitution comes, viz. the people of India.
- (b) It contains the enacting clause which brings into force of the Constitution.

(c) It declares the great rights and freedoms which the people of India intended to secure to all citizens and the basic type of Government and polity which was to be established as it has been explained in the preceding Chapter.<sup>4</sup>

It is ordained by the people of India through their representatives assembled in a sovereign Constituent Assembly. The preamble declares in unambiguous terms that it is the people of India who have adopted, enacted and given to themselves this Constitution. *It declares, therefore, that the source of authority under the Constitution is the people of India and there is no subordination to any external authority.*

The Preamble of the Constitution declares India to be a 'Sovereign Socialist, Secular,<sup>5</sup> Democratic Republic.' 'Sovereign power' is that which is absolute and uncontrolled. In the words of Cooley, "A State is sovereign where there resides within itself a supreme and absolute power acknowledging no superior." The word 'sovereign' emphasizes that India is no more dependent upon any outside authority. However, India is still a member of the Commonwealth of Nations. But as it has been explained in the preceding Chapter, her membership of the Commonwealth of Nations is not inconsistent with her independent sovereign status.

In a democratic State, It may have an elected or a hereditary head.—It is 'republic' because the head of the State is not a hereditary monarch. In a 'republic' the political sovereignty vests in the people and the head of the State is only a person elected by the people for a fixed term. In our Constitution there is a President who is the head of the Executive and who is elected, as opposed to hereditary monarch, and holds office for a fixed term of five years. The term 'democratic' indicates that the Constitution has established a form of Government which gets its authority from the will of the people. The rulers are elected by the people and are responsible to them. The democratic set up can

1. AIR 1973 SC 1461.

2. Sir Alladi Krishnaswami : Constituent Assembly Debates, Vol. 10, 417.

3. Supra Note 1.

4. *Kesavanand Bharti v. State of Kerala*, A. I. R. 1973 S. C. 1461.

5. Inserted by the Constitution (42nd Amendment) Act, 1976.

be of two types : (i) Direct, (ii) indirect. In a direct democracy the legal and political sovereignty vests in the people, as is the case in Switzerland. In the indirect system of Democracy, it is the representatives of the people who exercise the power of legal as well as political sovereignty. The electorate choose their representatives who carry on the Government. It is for this reason that this type of democracy is called *representative democracy*.

In the Indian Constitution we have adopted indirect or representative system of democracy. All the adults above the age of 21 years have a right to vote.

The term 'democracy' in its broadest sense embraces, in addition to political democracy, also social and economic democracy. The term 'democratic' is used in this very sense in the Preamble.

**Objectives enshrined in the Preamble.**—The following are the objectives which the Preamble secures to every citizen :

**Justice.**—Social, economic and political.

**Liberty.**—Of thought, expression, faith and worship :

**Equality.**—Of status and opportunity,  
and to promote among them all.

**Fraternity.**—Assuring the dignity of the individual and the [unity and integrity] of the Nation.

Democracy would indeed be hollow if it fails to generate this spirit of brotherhood among all sections of the people—"a feeling that they are all children of the same soil, the same motherland. It becomes all the more essential in a country like India composed of many races, religions, languages and of culture."<sup>2</sup> Article I of the Declaration of Human Rights adopted by the U. N. O. embodies this noble and human principle that "all the human beings are born free and in equal dignity and rights, they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." It is this concept of brotherhood of man which is contained in the Preamble of the Constitution and is given practical shape by abolishing title (Art. 18) and untouchability (Art. 17) and many other social evils which swayed the social arena of Indian society.<sup>3</sup> Liberty, Equality and Fraternity which the Constitution seeks to secure for the people of India is to serve the primary objective of ensuring social, economic and political justice. Justice is the harmonious blending of selfish nature of man and the good of the society. The attainment of the collective good as distinguished from individual good is the main aim of rendering justice. Combining the ideals of political, social, economic democracy with that of equality and fraternity, the Preamble, Gandhiji described as "The India of My Dreams", namely—"an India, in which the poorest shall feel that it is their country in whose making they have an effective voice ; an India in which all communities shall live in perfect harmony."<sup>4</sup>

**Can Preamble be amended under Article 368.**—This question was raised for the first time before the Supreme Court in the historic case of *Kesavananda v. State of Kerala*.<sup>5</sup> On behalf of the Union and the States it was argued that by

1. Inserted by the Constitution (42nd Amendment) Act, 1976.

2. Basu—Introduction to the Constitution of India, 3rd Ed., 1954, p. 23.

3. Buckingham & Carnatic Co. Ltd. v. Venkatach, A. I. R. 1964 S. C. 1272.

4. M. K. Gandhi—India of My Dreams, pp. 9-10

5. A. I. R. 1973 S. C. 1461.

virtue of the amending power in Article 368 even the Preamble can be varied, altered or repealed. It was said that the Preamble is a part of the Constitution and therefore it can be amended like any other provisions of the Constitution. The petitioners, on the other hand, contended that the amending power in Article 368 is limited. Preamble creates an implied limitation on the power of amendment. The Preamble contains the basic elements or the fundamental features of our Constitution. Amending power cannot be used so as to destroy or damage these basic features mentioned in the Preamble. It was urged that the preamble cannot be amended as preamble is not a part of the Constitution.

The majority held that the Preamble is a part of the Constitution. The Court said that the earlier view as expressed in the *Re Berubari* case that preamble is not part of the statute is not correct. This view is in accord with modern authorities who consider the Preamble a part of the statute.<sup>1</sup>

On the question whether the preamble can be amended, six judges (*Ray, Palekar, Mathew, Beg, Divedi, Chandrachud, JJ.*), held that it can be amended. *Shelat, Grover, Reddy, JJ.*, expressly held that the preamble cannot be amended. Three Judges, the Chief Justice *Sikri, Hegde and Mukherjee, JJ.*, did not express any clear opinion on the point. The Chief Justice, however, said that since Parliament had not chosen to amend the preamble it is not necessary to express any opinion on this point. However, all the three judges held that the basic element or fundamental features of the Constitution mentioned in the preamble of the Constitution cannot be destroyed or damaged under the amending power. The Chief Justice said that the preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble. *Khanna, J.*, held "as preamble is a part of the Constitution its provisions other than those relating to basic structure or framework are as much subject to the mandatory powers contained in Article 368 as other parts of the Constitution."

The majority thus favoured the view that the preamble cannot be amended or at least that part of it which relates to the basic structure or framework cannot be destroyed or damaged. In this respect it would be pertinent to refer the observations made by *Shelat and Grover, JJ.* They said. "The stand taken by the respondents that even the preamble can be amended under Article 3.8 is an extraordinary one. It may be true about ordinary statutes but it cannot be the subject in the light of the historical background, the objectives resolution which formed the basis of the preamble and the fundamental position which the preamble occupies in our Constitution. It constitutes a landmark in India's history and sets out as a matter of historical fact what the people of India resolved to do for moulding their destiny."

The edifice of our Constitution is based upon the basic elements mentioned in the preamble. If any of these elements are removed the structure will not survive and it will not be the same Constitution or it cannot maintain its identity. The preamble declares that the people of India resolved to constitute their country into a Sovereign Democratic Republic. No one can suggest that these words and expressions are ambiguous in any manner. An amending power be interpreted so as to confer power on the Parliament to take away any of these fundamental and basic characteristic of our policy? Can it be said or even suggested that the amending body can make institution

1. *Craies on Statute Law*, 6th Ed., p. 200; see also H. M. Srivastava's *Constitutional Law of India*, 1967 Ed., p. 75.

created by our Constitution undemocratic as opposed to democratic; or abolish the office of the President and instead have some other head of the State who would not fit into the conception of a Republic? The width of amending power claimed on behalf of the respondents has such a large dimension that even the above part of the preamble can be wiped out from which it would follow that India can cease to be a sovereign Democratic Republic.

It is submitted that the view that the basic elements in the Preamble cannot be destroyed or damaged under amending power is correct. The amending power cannot change the Constitution in such a way that it ceases to be a 'sovereign democratic Republic.' It can only be done by wrecking the Constitution.

**42nd Amendment, 1976 and the Preamble.**—This Amendment has inserted three new words in' the Preamble, i. e. Secularism, Socialism and Integrity. These concepts are implicit in the Constitution. The Amendment merely spells out clearly these concepts in the Preamble.

'Socialism' is implicit in the preamble and the directive principle of the Constitution. The term "economic justice" in the Preamble denotes nothing but India's resolve to bring socio-economic revolution. 'The Directive Principles' particularly Art. 39 of the Constitution, are Charters of social and economic liberties of the people.

The word 'socialism' has, however, no definite meaning. It has been invariably used in both the types of Constitutions—democratic and communistic. Generally, the term implies a system of government in which the means of production is wholly or partially controlled by the State.

India's socialism is, however, a democratic socialism and not a 'communistic socialism'. For this purpose, the Preamble has combined both the words Socialism and Democracy in the Preamble.

This combination of the words, socialism and the democracy have been criticised by many writers. It has been said that democracy and socialism cannot co-exist. This criticism is, however, not justified in view of the gradual change of thinking in the modern socialists. Their thinking is in line with the idea of a welfare state which would prevent only the excess of exploitation and free competition without destroying individual initiative and without detriment to the political freedoms. It is, thus, marriage of democracy and socialism which has been embedded in the Indian Constitution.\*

The word "integrity" is intended to put an end to separatist tendencies and make people feel that every part of India is their home. This concept is implicit in the nature of the Federation envisaged by the Indian Constitution. The framers have used the word "India shall be a Union of States" in Art. 1 of the Constitution with a view to make it clear that the States have no right to secede from the federation. In addition to this, Art. 19 empowers the State to impose reasonable restrictions on the freedom of speech and expression of citizens in the interests of integrity and sovereignty of India. This freedom cannot be allowed to endanger the integrity or sovereignty of India or to allow citizens to preach secession of any part of India from the Union. In view of these provisions in the Constitution, it is difficult to understand why this new word has been included in the Constitution. The Preamble is

I. Deshpande, V. S. : Rights and Duties under the Indian Constitution, (15) JLLI 1973, p. 94. Also see Excel Wear v. Union of India, AIR 1979 SC 25—Effect of the word 'Socialism' has been considered by the Court.

not the source of power and cannot control the written words of the Constitution.

'Secularism' means a State which does not recognise any religion as a State's religion. It treats all religions equally. The Preamble declares the resolve of the people of India to secure to all its citizens "liberty of.....belief, faith and worship". Further, Articles 25 to 28 of the Constitution guarantee to every person the freedom of conscience and the right to profess, practise and propagate religion. In the recent case of *St. Xavier's College v. State of Gujarat*,<sup>1</sup> the Supreme Court has observed, "although the words 'secular State' are not expressly mentioned in the Constitution but there can be no doubt that our Constitution-makers wanted to establish such a State" and accordingly, Articles 23 to 28 have been included in the Constitution.

The 42nd Amendment removes the doubt about the amendability of the Preamble as expressed in the decision of the Supreme Court in the case of *Keshavanand Bharti v. State of Kerala*. In that case, the Court had held that the part which related to the basic features in the preamble cannot be amended. This amendment makes it clear that the preamble is the part of the Constitution and therefore like other provisions of the Constitution, subject to the amending power of the Parliament.

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1. AIR 1974 SC 1389.

## 5

## The Union and its Territory (Arts. 1-4)

**Union of States.**—Article 1 of the Constitution declares that the sovereign democratic Republic of India "shall be the Union of States". The choice for a federation with a strong centre was made both for political and administrative reasons although the move to describe the Constitution as federal failed. The Constituent Assembly accepted the view of the Drafting Committee that describing the Union as Federation was not necessary.<sup>1</sup> While submitting the Draft Constitution Dr. Ambedkar, the Chairman of the Drafting Committee stated that "although its constitution may be federal in structure", the Committee had used the term "Union" because of certain advantages.<sup>2</sup> These advantages, as explained in the Constituent Assembly, indicate two things (a) that the Union of India is not result of an agreement among the units like the American Federation, consequently (b) the States have no right to secede from the federation. Dr. Ambedkar explained the purpose of the word 'Union' thus : ". . . . though India was to be a federation, the Federation was not the result of an agreement by the States to join in a Federation and that the Federation not being the result of an agreement, no State has the right to secede from it. The federation is a Union because it is indestructible. Though the country and the people can be divided into different States for convenience of administration, the country is an integral whole, its people, a single people living under single imperium derived from a single source. The Americans had to wage a civil war to establish that the States have no right to cession and that better Federation was indestructible. The Drafting Committee thought that it was better to make it clear at the outset, rather than to leave it to speculation."<sup>3</sup>

The name of the Union is India or Bharat. The members of the Union at present are the States specified in the First Schedule.

**Territory of India.**—The territory of India falls under three categories :

- (1) State territories ;
- (2) Union territories ; and
- (3) Territories which may be acquired by Government of India.

Before the Constitution (Seventh Amendment)<sup>4</sup> Act, 1956, the Union consisted of States which were classified into four main categories—Parts A, B, C and D of the First Schedule. Thus at the time of the commencement of the Constitution, the Union of India consisted of 10 Part A States, 8 Part B States, 9 Part C States and 1 Part D State.

The Constitution (7th Amendment) Act, 1956, abolished the three categories and placed all the States of the Union on the same footing as a result of re-organization made by the State Re-organization Act, 1956. It has reduced these categories into two only. The territory of India at present consists of the following :

1. See the Drafting Committee's footnote on p. 2 of the Draft to the following effect : "The Drafting Committee considers that following the language of the British North American Act, 1867, it would not be inappropriate to describe India a Union although its Constitution may be federal in structure, C.A.D., VII, pp. 6, 3 et seq., 400.
2. Draft Constitution, 21-2-1948, p. 4.
3. Constituent Assembly Debates, Vol. 7, p. 43.
4. Amendment in Art. 1 of the Constitution.

## UNION

States 1	Union Territories 2	Other Territories as may be acquired 3
1. Andhra Pradesh	1. Delhi	
2. Assam	2. The Andaman and Nicobar Islands	
3. Bihar	3. Lakshadweep <sup>10</sup>	
4. Gujarat	4. Dadra and Nagar Haveli <sup>4</sup>	
5. Kerala	5. Pondicherry <sup>5</sup>	
6. Madhya Pradesh	6. Goa, Daman and Diu <sup>6</sup>	
7. Tamil Nadu (Madras)	7. Chandigarh	
8. Maharashtra <sup>1</sup>	8. Mizoram <sup>7</sup>	
9. Karnataka <sup>8</sup>	9. Arunachal Pradesh <sup>7</sup>	
10. Orissa		
11. Punjab		
12. Rajasthan		
13. Uttar Pradesh		
14. West Bengal		
15. Jammu & Kashmir		
16. Nagaland <sup>2</sup>		
17. Haryana <sup>9</sup>		
18. Himachal Pradesh		
19. Manipur <sup>7</sup>		
20. Tripura <sup>7</sup>		
21. Meghalaya <sup>7</sup>		
22. Sikkim <sup>6</sup>		

The Union territories mentioned above are centrally administered areas, to be governed by the President acting through an Administrator appointed by him unless Parliament provides otherwise. The President may appoint the Governor of a State as the administrator of an adjoining Union territory. In

1. Subs. for Bombay by the Bombay Re-organization Act, 1960.
2. Inserted by the State of Nagaland Act, 1962.
3. Inserted by the Punjab Reorganization Act, 1966.
4. Inserted by the Constitution (Tenth Amendment) Act, 1961.
5. Inserted by the Constitution (Twelfth Amendment) Act, 1962.
6. Inserted by the Constitution (Fourteenth Amendment) Act, 1963.
7. Inserted by Act 31 of 1971. See also the Constitution (27th Amendment) Act, 1971.
8. Added by the Constitution (36th Amendment) Act, 1974.
9. Subs. vide G. S. R. 471 (E), dated 8-10-1973 (w. e. f. 1-11-1973).
10. The Laccadive, Minicoy and Amindivi Islands (Alteration of Names) Act No. 34 of 1973 (w. e. f. 1-11-1973).

that capacity a Governor shall exercise his functions independently of the Council of Ministers [Art. 239 (1)].

Any territory which may at any time be acquired by India will be included in the definition of Union territories. The power to acquire new territories is an attribute of sovereignty. For this, no parliamentary legislation is required. The usual modes of acquisition of territory by a State are cession, occupation, subjugation, acquisition, prescription, accretion and conquest. Thus, foreign territories acquired by India may be admitted into the Union as a new State under Art. 2 or may be merged into an existing State under Art. (3) (a) or 3 (b).

**Admission or establishment of New States.**—Article 2 provides that Parliament may admit into the Union or establish new States on such terms and conditions as it thinks fit. Article 2 thus gives Parliament two powers, firstly, to admit into the Union new States, and secondly, the power to establish new States. The first refers to the admission of States which are duly formed and established and are already in existence. The second refers to the admission and formation of a State which was not in existence before. It is to be noted that Article 2 deals with admission or establishment of new States into the Union of India which may be formed of the territories not included in the existing States.

It is worth noticing that the admission or establishment of a new State will be '*on such terms and conditions as Parliament may think fit.*' Here again our Constitution differs from the American and Australian Constitutions which accept the theory of equality of States. Each State in America sends equal number of representatives in the Senate. The principle of equality applies even to the new States admitted by the Congress in the Union.<sup>1</sup> Also, no re-adjustment of the boundaries of the States of the Union can be done without the consent of the Legislatures of the States concerned as well as of the Congress.<sup>2</sup>

It has already been pointed out that the American federation is the result of an agreement between various constituent independent States. It is therefore obvious that the agreement cannot be altered without the consent of Legislatures of those States. But the Indian federation is not the result of any agreement between independent States. None of the constituent units of Indian Union were sovereign and independent in the sense the American colonies were before they federated. There is no provision in the Indian Constitution which gives a right to a new State, after its admission into the Union of India to claim complete equality or status with a State existing at the commencement of the Constitution or formed thereafter under Article 3 of the Constitution. In India, Article 2 gives complete discretion to Parliament to admit or establish new States on such terms and conditions as "it thinks fit".

After a new State is admitted or the boundaries of the existing States are altered, the Parliament can by law make all consequential changes in the Constitution by simple majority and any Act of the Parliament for the aforesaid purpose will not be deemed to be an amendment of the Constitution.<sup>3</sup>

**Formation of new States and alteration of boundaries, etc. of existing States.**—Under Art. 3, a new State may be formed or established in the following ways :—

1. Art. IV, Section 3 (1) of the U. S. Constitution.
2. Art. IV, Section 3 (2) of the U. S. Constitution.
3. Art. 4 of the Constitution.

- (1) by separation of territory from any State ; or
- (2) by uniting two or more States ; or
- (3) by uniting parts of States ; or
- (4) by uniting any territory to a part of any State.

Parliament under this Article can also increase or decrease the area of any State or alter the boundaries or change the name of any State. Article 3 deals thus with the formation of a new State out of the territories of the existing States. The power to form new States under Art. 3 (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory. The word 'State' in Art. 3, Cls. (a) to (e) includes a 'Union territory' also.

The Indian Constitution empowers the Parliament to alter the territory or integrity of its units, i. e. States, without their consent or concurrence. It can form new States, and can alter the area, boundaries or names of the existing States by a law passed by a simple majority. The conditions laid down for making of such a law are—*First*, no Bill for the formation of new States or the alteration of the boundaries or the names of the existing States shall be introduced in either House of the Parliament except on the recommendation of the President. *Secondly*, if the Bill affects the area, boundaries or names of the States, the President is required to refer the Bill to the Legislature of the State, so affected for expressing its views within the period specified by the President.

The President may extend the period so specified. If the State Legislature to which the Bill has been referred, does not express its views within the period so specified or extended, the Bill may be introduced in the Parliament even though the views of the State have not been obtained by the President. If the State Legislature expresses its views within the time so specified or extended, the Parliament is not bound to accept or act upon the views of the State Legislature.<sup>1</sup> Further, it is not necessary to make fresh reference to State Legislature every time an amendment to the Bill is proposed and accepted.<sup>2</sup>

Thus, it is clear that the very existence of a State depends upon the sweetwill of the Central Government. The reason why such a power has been conferred on the Union has already been explained in the preceding Chapter.

These Articles<sup>3</sup> thus demonstrate the flexibility of the Indian Constitution. By a simple majority and by ordinary legislative process Parliament may form a new State or alter the boundaries, etc. of existing States and thereby change the political map of India.

**Cession of Indian territory to foreign country.**—Under Article 3 (c) Parliament may by law increase or diminish the area of any State. The diminution of the area of any State may occur where a part of the State is taken out and added to another State. Parliament has even power to cut away the entire area of a State to form a new State or to increase the area of any State. Does the power of Parliament to diminish the area of any State include also the power to cede Indian territory to a foreign State?

The question came up for consideration before the Supreme Court of India in reference made by the President of India under Article 143.<sup>4</sup> The facts of the case are as follows :

1. Babulal v. State of Bombay, AIR 1960 SC 51.
2. In re Berubari Union, AIR 1960 SC 858 at p 860.
3. Articles 2, 3 and 4 of the Constitution
4. Reference by the President of India under Article 143, AIR 1960 SC 845.

The Indo-Pakistan Agreement entered into in 1958 for resolving certain border disputes, provided *inter alia* (i) for the transfer of one-half of the area of Berubari Union by India to Pakistan and (ii) for the exchange of old Cooch-Bihar enclaves. Berubari Union comprised an area of 9 square miles in the State of West Bengal with a population of About 12,000. When the Central Government sought to implement the agreement, a powerful political agitation was started against the proposed transfer of territory to Pakistan, the President referred the matter to the Supreme Court for its Advisory opinion under Article 143. The questions referred to were : (i) Is any legislative action necessary for the implementation of the agreement relating to Berubari Union, and (ii) if so, is a law of Parliament under Article 3 sufficient or is an amendment of the Constitution in accordance with Article 368 necessary or both.

On behalf of the Union Government, it was contended that the agreement did nothing more than to ascertain the true boundary of India and, therefore, its implementation did not involve handing over any Indian territory but only territory which did belong to Pakistan and this could be done in the exercise of the executive power of the Union.

The Supreme Court rejected this contention and held that transfer agreement involves cession of territory included in the Schedule and it was outside the scope of Parliamentary legislation. The power of Parliament under Art. 3 to 'diminish the area of any State does not cover ceding of Indian territory to a foreign State'. Accordingly, the Court held that the Parliament has no power under Art. 3 (c) to make a law to implement the Berubari agreement, an agreement entered into with the Government of a foreign State ceding Indian territory to a foreign State. The said agreement can only be implemented by an amendment of the Constitution in accordance with Art. 368. The territory ceded may be a part of the State or Union territory.<sup>1</sup> Construing the scheme of Arts. 2 and 3 the Court held that Art. 3 deals with internal readjustment *inter se* of the territories of the constituent States of India. The area diminished under Art. 3 (c) continues to be part of the territory of India. Art. 3 (c) does not, therefore, provide for cession of national territory to a foreign State. Hence, an agreement involving a transfer of territory to a foreign State cannot be implemented simply by passing a law under Art. 3. *For this an amendment of the Constitution is necessary.*

This does not, however, mean that there is no power to acquire or cede territory. The power to acquire and cede territory is an attribute of sovereignty and India being a sovereign State it has power to acquire and cede territory both under International Law and according to the Preamble.

Pursuant to the Court's opinion, the Constitution (Ninth Amendment) Act, 1960, was passed to give effect to the transfer of certain territory to Pakistan under an agreement entered into between the Government of India and Pakistan.

But an agreement to refer a boundary dispute does not require for its implementation any Parliamentary legislation. In *Maganbhai v. Union of India*,<sup>2</sup> dispute regarding the adjustment of a boundary line in Rann of Kutch between India and Pakistan, was referred to a Tribunal. The Government wanted to implement the award without any Parliamentary legislation. It was held that an agreement to refer the dispute to a Tribunal did not amount cession of territory to a foreign country and hence an amendment of the Constitution was not necessary for its implementation. It could be implemented by Government of India under its executive power.

1. *Ram Kishore v. Union of India*, AIR 1966 SC 644.

2. AIR 1969 SC 733.

## Citizenship (Arts. 5-11)

**Meaning of Citizenship.**—The population of a State is divided into two classes—citizens and aliens. A citizen of a State is a person who enjoys full civil and political rights. Citizens are different from aliens who do not enjoy all the above-mentioned rights. Citizenship carries with it certain advantages conferred by the Constitution. Aliens do not enjoy these advantages. The following fundamental rights are available only to citizens :

(1) The right not to be discriminated against any citizen on grounds of religion, race, caste, sex or place of birth (Art. 15).

(2) The right to equality of opportunity in the matter of public employment (Art. 16).

(3) The right to seven freedoms enumerated in Art. 19, i. e., freedom of speech and expression ; assembly ; association ; movement ; residence ; profession.

(4) Cultural and educational rights conferred by Arts. 29 and 30.

(5) Then, there are certain offices under the Constitution which can be occupied by citizens only, e. g. offices of the President [Art. 58 (1) (a)] ; Vice-President [Art. 66 (3) (a)] ; Judges of the Supreme Court [Art. 124 (3)] or of a High Court [Art. 217 (2)] ; Attorney-General [Art. 76 (1)] ; Governor of a State (Art. 157) ; Advocate-General of a State (Art. 165).

(6) The right to vote for election to the House of the People and the Legislative Assemblies of State. Only a citizen of India can become member of the Union and the State Legislatures.

**Constitutional Provisions.**—The Constitution does not lay down a permanent or comprehensive provision relating to citizenship in India. Part II of the Constitution simply describes classes of persons who would be deemed to be the citizens of India at the commencement of the Constitution, that is, 26th January, 1950, and leaves the entire law of the citizenship to be regulated by law made by Parliament. Article 11 expressly confers power on Parliament to make laws to provide for such matters. In exercise of its power the Parliament has enacted the Indian Citizenship Act, 1955. This Act provides for the acquisition and termination of citizenship subsequent to the commencement of the Constitution.

**Citizenship at the commencement of the Constitution, i. e. January 26, 1950.**—The following persons, under Arts. 5 to 8 of the Constitution of India, became citizens of India at the commencement of the Constitution :

1. Citizenship by domicile (Art. 5).
2. Citizenship of emigrants from Pakistan (Art. 6).
3. Citizenship of migrants to Pakistan (Art. 7).
4. Citizenship of Indians abroad (Art. 8).

**1. Citizenship by domicile (Art. 5).**—Article 5 deals with this matter. A person is entitled to citizenship by domicile if he fulfils two conditions laid down by Art. 5. First, he must, at the commencement of the Constitution, have his domicile in the territory of India. Secondly, such person must fulfil any one of the three conditions laid down in the Article, namely, (1) he was born in India, (2) either of his parents was born in India, (3) he must have

been ordinarily resident in the territory of India for not less than five years immediately before the commencement of the Constitution.

Domicile in India is considered an essential requirement for acquiring the status of Indian citizenship. But the term 'domicile' is not defined in the Constitution. Ordinarily, it means permanent home, or place where a person resides with the intention of remaining there for an indefinite period.<sup>1</sup> The simplest definition of domicile has been given by Chitty, J.<sup>2</sup> He said, "That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom."<sup>3</sup>

Two elements are necessary for the existence of domicile—

- (i) a residence of a particular kind, and
- (ii) an intention of a particular kind.

The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside forever in the country where the residence has been taken up. Domicile is not the same thing as residence. Mere residence in a place is not sufficient to constitute domicile. It must be accompanied by the intention to make it his permanent home. Thus, there must be both the *factum* and *animus* to constitute the existence of domicile for neither domicile nor mere residence is sufficient to make him an Indian citizen. Domicile accompanied with five years' residence are necessary to make a person a citizen. Thus a person born in Goa of Goan parents came to Bombay in his boyhood, was educated there, had resided there since then and did his father's business there. He was held to be an Indian citizen by domicile.<sup>4</sup>

Domicile is of two kinds : domicile of origin and domicile of choice. Every person is born with a domicile of origin. It is domicile received by him at his birth. The domicile of origin of every person is the country in which at the time of his birth his father was domiciled.

Thus the domicile of origin is a concept of law. It clings to a man till he abandons it and acquires a new domicile. Every independent person can acquire a domicile of choice by a combination of (a) actual residence in a particular place, and (b) intention to remain there permanently or for an indefinite period.

In *Mohammad Reza v. State of Bombay*,<sup>5</sup> the appellant came to India in 1938. He went on pilgrimage to Iraq in 1945. On return, he was registered as a foreigner and several times his stay in India was extended. In 1957 his request to extend the stay period was refused. He contended that he must be regarded as a citizen of India under Article 5, but his appeal was dismissed. The Court held that though he was originally resident ; he did not acquire Indian citizenship because he did not have a domicile in India. When the appellant returned from Iraq, he took over the job of a cashier in a hotel. That by itself was held insufficient to establish that there was a change in his mind of the kind necessary to acquire a new domicile. His application for

extending his stay in India made from time to time fortified this conclusion. The domicile of choice continues until the former domicile has been resumed or another has been acquired.

A minor or a married woman is not independent person. Neither of these classes has the legal capacity to make a change of domicile. Therefore, *the domicile of an infant generally follows the domicile of his father*,<sup>1</sup> while a married woman takes the domicile of her husband.<sup>2</sup> A widow retains the domicile of her husband until changed by her own act.<sup>3</sup>

Intention is an important element in determining the domicile of a person. It can be inferred from the conduct of persons. Thus a person in Government service, who was given the choice for opting for India or Pakistan, who opted for Pakistan, actually went to Pakistan, served there under the Government of Pakistan, but who subsequently resigned his job there and came to India cannot claim the benefit of Art. 5 for he never became the citizen of India.<sup>4</sup>

**2. Citizenship of persons who migrated to India from Pakistan before the commencement of the Constitution.**—Persons who have migrated from Pakistan have been classified into two categories for the purposes of citizenship, i. e. (i) those who came to India before July 19, 1948, and (ii) those who came on or after July 19, 1948.

Article 6 provides that a person who has migrated to India from Pakistan shall be deemed to be a citizen of India at the commencement of the Constitution, i. e. on 26th January, 1950, if he or either of his parents or any of his grandparents were born in India as defined in the Government of India Act, 1935, and in addition to above condition which applies in both cases fulfils one of the following two conditions :—

- (i) in case he migrated to India before July 19, 1948 (the date on which the permit system for such migration was introduced) he has been ordinarily residing in India since the date of his migration ; or
- (ii) in case he migrated on or after July 19, 1948, he has been registered as citizen of India by an officer appointed by the Government of India for the purpose :

Provided that no person shall be so registered unless he has been residing in India for at least six months immediately before the date of his application for registration. If the above conditions are satisfied, a person shall be deemed to be a citizen of India.

**3. Citizenship of Migrants of Pakistan.**—Under Article 7 a citizen by domicile (Art. 5) or by migration (Art. 6) ceases to be a citizen if he has migrated to Pakistan after March 1, 1947. An exception is, however, made in favour of a person who has returned to India on the basis of a permit for resettlement in India. Such a person is entitled to become a citizen of India if he fulfils other conditions necessary for immigrants from Pakistan after July 19, 1948, under Art. 6. He can register himself as a citizen of India in the same manner as a person migrating from Pakistan after July 19, 1948.

Article 7 thus overrides Arts. 5 and 6.<sup>5</sup> Both Art. 6 and Art. 7 use the term 'migrated'. The meaning of the term 'migrated' came for consideration before

1. Naziranbai v. State of M. B., A. I. R. 1957 M. B. 1; Sharafat v. State of U. P., A. I. R. 1960 All 637.
2. Katiunissa v. State of M. P., A. I. R. 1955 Nag. 6.
3. Prakash v. Shahni, A. I. R. 1965 J. & K. 83.
4. Aslam Khan v. Fazal Haque Khan, A. I. R. 1959 All. 79.
5. State of Bihar v. Kumar Amar Singh, A. I. R. 1955 S. C. 282.

the Supreme Court in a recent case of *Kulathil v. State of Kerala*.<sup>1</sup> According to the Court the term 'migrated' used in Arts. 6 and 7 has to be construed with reference to the context, purpose and the prevailing political condition at the time the Constitution was being enacted. So interpreted, the word 'migrated' could mean nothing except voluntarily going from India to Pakistan permanently or temporarily. The majority held that the word 'migrate' was used in a wider sense of moving from one country to another with the qualification that such movement was not for a short visit or for a special purpose.

Thus it is a question of fact whether a person has migrated to or has gone to Pakistan on a temporary visit only. It is a question to be decided on the facts and circumstances of each case.<sup>2</sup> Citizenship comes to an end only when there is a migration and not where there was only a temporary visit. But in the context of the Constitution, it has the notion of transference of allegiance from India to Pakistan. A temporary visit on business or otherwise cannot amount to migration.<sup>3</sup>

In *State of Bihar v. Kumar Amar Singh*,<sup>4</sup> one Kumar Rani who was admittedly born in the territory of India, and claimed to be the lawfully wedded wife of an Indian citizen whose domicile was Indian at all material times, left India for Pakistan in July, 1948, for returning to India in December, 1948 on a temporary permit and went back to Pakistan in April, 1949. On May 14, 1953, she came back to India under a permanent permit obtained from the High Commissioner for India in Pakistan, which was cancelled on July 12, 1950, because it was wrongly issued without the concurrence of the Government as required by the rules made under the Influx of Pakistan (Control) Act, 1949. She contended first that she had never ceased to be a citizen of India because she was born in India and her domicile was the domicile of her husband who was an Indian and consequently she was a citizen of India. She contended, alternatively that the proviso to Art. 7 applied to her since she had returned to India on a permanent permit and the subsequent cancellation of the permit was illegal and irrelevant. It was held that 'there could be no doubt that the lady must be held to have migrated from the territory of India after 1-3-1948, although her husband stayed in India'. She could not prove that she went to Pakistan for a temporary purpose. The Supreme Court observed : "Article 7 clearly overrides Art. 5. It is peremptory in its scope and makes no exception for such a case, i. e. of the wife migrating to Pakistan leaving her husband in India."

4. **Citizenship of persons of Indian origin residing outside India.**—Article 8 provides that any person or either of whose parents or any of whose grandparents was born in India as defined in the Government of India Act, 1935, and who is ordinarily residing in any country outside India, shall be deemed to be a citizen of India if he has been registered as a citizen of India by the Diplomatic or Consular representatives of India in the country where he is for the time being residing—on an application made by him to such diplomatic or consular representative, whether before or after 26th January, 1950, in the

1. AIR 1966 SC 1614, followed in *Mashkurul Hasan v. Union of India*, AIR 1967 SC 563. It should be noted that the Supreme Court has in this case overruled its earlier decision in *Smt. Shanno Devi v. Mangat Singh*, AIR 1961 SC 58, which has held that the word 'migrated' means going from one place to another with the intention of permanently residing in the latter place.
2. *Nisar v. Union of India*, AIR 1958 Raj 63; see also *State of Bihar v. Kumar Amar Singh*, AIR 1953 SC 232.
3. *Ataur Rahman v. State of M. P.*, AIR 1951 Nag. 44.
4. AIR 1955 SC 282.

form and manner prescribed by the Government of the Dominion of India or the Government of India. This Article confers citizenship on Indian nationals residing abroad on their complying with its provisions.

Article 9 provides that if a person voluntarily acquires the citizenship of any foreign State he shall not be able to claim to be a citizen of India under Articles 5, 6 and 8. It deals only with voluntary acquisition of citizenship of a foreign State before the Constitution came into force. Case of voluntary acquisition of a foreign citizenship before the commencement of the Constitution will have to be dealt with by the Government of India under the Citizenship Act of 1955.

Article 10 provides that every person who is or is deemed to be a citizen of India under any of the foregoing provisions shall continue to be a citizen of India subject, however, to the provisions of any law that may be made by Parliament. Thus in exercise of this power Parliament may take away the right of citizenship of any person. But the right to citizenship given under the foregoing provisions can only be taken away by an express law made by Parliament. It cannot be taken away indirectly.<sup>1</sup> In *Ebrahim Wazir v. State of Bombay*,<sup>2</sup> the constitutional validity of the Influx from Pakistan (Control) Act, 1949, was involved. This Act provides that no person domiciled in India or Pakistan shall enter India from Pakistan without a permit. If a person enters India without a permit he commits an offence punishable under the Act. Section 7 of the Act authorises the Central Government to direct the removal from India of any person who has committed, or against whom a reasonable suspicion exists that he has committed an offence under the Act. The Supreme Court held that section 7 is *ultra vires* of Parliament because to allow the forcible removal of an Indian citizen from India would be tantamount to destroying the right of citizenship conferred by Part 2 of the Constitution. The right of citizenship, the Court said, could only be taken away by recourse to Art. 11 of the Constitution. Thus in absence of any law expressly made under Art. 11, the right of citizenship cannot be destroyed by an Act made for a different purpose.

**Citizenship under the Citizenship Act, 1955.**—Parliament, in exercise of the power given to it under Art. 11 of the Constitution, has passed the Citizenship Act, 1955, making provisions for acquisition and termination of citizenship after the commencement of the Constitution. The Act provides for the acquisition of Indian citizenship after the commencement of the Constitution in five ways, *i. e.*, birth, descent, registration, naturalization and incorporation of territory :

(1) *Citizenship by birth.*—Every person born in India on or after January, 1950 shall be a citizen of India by birth. However, such a person shall not be a citizen of India, if, at the time of his birth (a) his father possesses such immunity from suits and legal process as is accorded to any envoy of a foreign sovereign power, or (b) his father is an enemy alien.

(2) *Citizenship by descent.*—Broadly speaking, a person outside India on or after 26th January, 1950, shall be a citizen of India by descent, if his father was a citizen of India at the time of that person's birth.

(3) *Citizenship by registration.*—The prescribed authority may on application register as a citizen of India, any person who is not a citizen by virtue of

1. *Ebrahim Wazir v. State of Bombay*, AIR 1952 SC 229.

2. *Ibid.*

the Constitution or the provisions of the Citizenship Act and belongs to any of the following categories :—

- (a) persons of Indian origin who are ordinarily resident in India for six months immediately before making an application for registration ;
- (b) persons of Indian origin who are ordinarily resident in any country or place outside India ;
- (c) women who are, or have been, married to citizen of India ;
- (d) minor children of persons who are citizens of India ;
- (e) persons of full age and capacity who are citizens of a country mentioned in the First Schedule.

(4) *Citizenship by naturalisation.*—Where an application in the prescribed manner is made by any person of full age and capacity, who is not a citizen of countries specified in the First Schedule the Central Government may, if satisfied that the applicant is qualified for naturalization, grant him a certificate of naturalization. The qualifications for naturalization are the following :—

- (a) he must not be a citizen of a country where Indian citizens are prevented from becoming citizen by naturalization,
- (b) he has renounced the citizenship of the other country,
- (c) he has either resided in India or has been in Government service for 12 months before the date of making the application for naturalization, or during 7 years prior to these 12 months, he has resided or has been in the Government service for not less than four years,
- (d) he must take an oath of allegiance,
- (e) he is of a good character,
- (f) he has an adequate knowledge of a language recognised by the Constitution.
- (g) that after naturalization being granted to him, he intends to reside in India or to serve under the Government of India. However, if in the opinion of the Central Government the applicant has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress, it may waive all or any of the above conditions for naturalization in his case (Proviso to section 6).

(5) *Citizenship by incorporation of territory.*—If any new territory becomes a part of India, the Government of India shall specify the persons of the territory to be citizens of India.

*Termination of citizenship.*—The Citizenship Act, 1955, also lays down how the citizenship of India may be lost whether it was acquired under the Citizenship Act, 1955, or prior to it, or under the provisions of the Constitution. It may happen in any of the three ways (a) renunciation, or (b) termination, and (c) deprivation.

(a) *Renunciation of citizenship.*—An Indian citizen of full age and capacity, who is also a citizen or national of another country, can renounce his Indian citizenship by making a declaration to that effect and having it registered. But if such a declaration is made during any war in which India is engaged, the registration shall be withheld until the Central Government otherwise directs. When a male person renounces his citizenship, every minor child of his ceases to be an Indian citizen. Such a child may, however, resume Indian citizenship, if he makes a declaration to that effect within a year of his attaining full age that is, 18 years.

(b) *Termination of citizenship (Section 8).*—If a citizen of India voluntarily acquires the citizenship of another country he shall cease to be a citizen of India. This provision, however, does not apply to a citizen who during a war in which India may be engaged voluntarily acquires the citizenship of another country. If any question arises as to whether, when or how any person has acquired the citizenship of another country, it is to be determined by such authority and in such manner as may be prescribed by the rules (section 9).

(c) *Deprivation of citizenship.*—Deprivation is a compulsory termination of the citizenship of India. A citizen of India by naturalization, registration, domicile and residence, may be deprived of his citizenship by an order of the Central Government if it satisfied that—

(a) registration or naturalization was obtained by means of fraud, false representation or concealment of any material fact ; or

(b) he has shown himself by act of speech to be disloyal or disaffected towards the Indian Constitution ; or

(c) during a war in which India may be engaged he has unlawfully traded or communicated with the enemy ; or

(d) within five years of his registration or naturalization he has been sentenced to imprisonment for not less than two years ; or

(e) he has been ordinarily resident out of India for seven years continuously.<sup>1</sup>

Before making an order depriving citizenship, the Central Government is to give to the person concerned a written notice containing the ground on which the order is proposed to be made and in certain cases, he might have his case referred to a Committee of Inquiry. The Central Government is then bound to refer the case to a Committee consisting of a Chairman and two other members. The Committee of Inquiry shall hold the inquiry and the Central Government is to be ordinarily guided by its report in making the order.<sup>2</sup>

*Commonwealth Citizenship.*—Section 11 of the Citizenship Act provides for Commonwealth citizenship. Every person who is a citizen of a Commonwealth country, shall by virtue of that citizenship have the status of Commonwealth citizenship in India.

Section 12 empowers the Central Government to make provisions on the basis of reciprocity for the conferment of all or any of the rights of a citizen of India on the citizens of the U. K., Australia, Canada, Ceylon, New Zealand, Pakistan, Federation of South Rhodesia and Nyasaland.

Section 18 of the Act vests in the Central Government an authority to make rules under the Act. This section of the Indian Citizenship Act, 1955, makes it clear that it is very comprehensive legislation, covering up all possible details regarding citizenship.

*One citizenship in India.*—It should be noted that our Constitution, though federal, recognises one citizenship only, that is, the citizenship of India. There is not separate State citizenship. Every citizen has the same

1. This will not apply if he is a student abroad, or is in service of a Government in India or an International Organization of which India is a member or has registered annually at an Indian Consulate his intention to retain his Indian citizenship.
2. Section 10, Indian Citizenship Act

rights, privileges and immunities of citizenship, no matter in what State he resides. In Federal States like the U. S. A. and Switzerland, there is a dual citizenship, namely, the citizenship of U. S. A. and the citizenship of the State where a person is born and permanently resides, and there are distinct rights and obligations flowing from the two kinds of citizenship. In India, a person born or resident in any State can acquire only one citizenship, that is, the citizenship of India.

A Company or Corporation is not a citizen of India under Art. 19.— Citizenship as defined in Part II includes only natural person and not juristic persons like corporations.<sup>1</sup> In *Kumar and Bros. v. Iron and Steel Controller*,<sup>2</sup> the Calcutta High Court interpreted the term 'person' in Art. 5 of the Constitution to include both 'natural' and 'artificial' person. Hence a company could become a citizen. But in *State Trading Corporation of India v. Commercial Tax Officer*,<sup>3</sup> the Supreme Court held that company or corporation is not a citizen of India and cannot, therefore, claim such of the fundamental rights as have been conferred upon citizens. The citizenship conferred on a citizen by Part II of the Constitution, the Court said, is concerned only with natural persons and not juristic persons. In this case the State Trading Corporation was sought to be taxed in respect of sales effected by them in the course of their business operation. The corporation contended that its transaction related to inter-State sales and is therefore, exempted from taxation under Art. 286 (1). The impugned tax was, therefore, an infringement of its fundamental right under Art. 19 (1)(g). The Supreme Court, however, held that the State Trade Corporation is not a citizen and therefore cannot claim the right under Art. 19 (1)(g).

In *Tata Engineering & Locomotive Co. v. State of Bihar*,<sup>4</sup> in a petition by the company some shareholders also joined. They argued that though the company was not a citizen but its shareholders are citizens and if it is shown that all its shareholders are citizens the veil of corporate personality may be lifted to protect their fundamental rights. The court rejected this argument and held that "if this plea is upheld, it would really mean that what the corporations or companies cannot achieve directly, can be achieved by them indirectly by relying upon the doctrine of lifting the corporate veil."

But in the *Bank Nationalisation Case*,<sup>5</sup> the Court held that "A measure" executive or legislative may impair the right of the company alone, and not of its shareholders ; it may impair the rights of the shareholder and not of the company, it may impair the right of the shareholders as well as of the company. Jurisdiction of court to grant relief cannot be denied when by State action the rights, of the individual shareholder are impaired, if that action impairs the rights of the company as well. The test in determining whether the shareholder's right is impaired is not formal ; it is essentially qualitative. If the State action impairs the right of the shareholders as well as of the company the Court will not, only upon technical ground, deny itself jurisdiction to grant relief. A shareholder is entitled to protection of Art. 19 of the Constitution. The Fundamental rights of the shareholders as citizens are not lost when they associate to form a company. When their fundamental

1. S. T. Corporation of India v. Commercial Tax Officer, AIR 1963 SC 184.

2. AIR 1961 Cal 258.

3. AIR 1963 SC 1811.

4. AIR 1965 SC 40. See also Barium Chemicals Ltd. v. Company Law Board, AIR 1957 SC 295.

5. AIR 1970 SC 565.

rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholder's rights are equally and necessarily affected if the rights of the company are affected.

The result of the *Bank Nationalisation's case*, is that if the action of the State impairs the right of the company thereby affecting the rights of an individual shareholder the protection of Article 19 will be available to him. This ruling of the Supreme Court has thus neutralised much of the adverse effect of the *State Trading Corporation Case*.<sup>1</sup>

The *Bank Nationalisation case* was followed by the Supreme Court in the *Bennett Coleman & Co. v. Union of India*.<sup>2</sup> In that case the question was whether the shareholder, the editor, the printer have right to freedom under Article 19 of the Constitution. Relying on the *Bank Nationalisation Case* the Court held that the protection of Article is available to a shareholder, editor, printer and publisher of a newspaper. The Court said, the right of share-holders with regard to Art. 19 (1) (a) are protected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. The individual rights of speech and expressions of editors, directors and shareholders are all exercised through their newspapers through which they speak. The press reached the public through the newspapers. The shareholders speak through their editors. The *locus standi* of the shareholders is beyond challenge after the ruling of this Court in the *Bank Nationalisation Case*.

In *Godhra Electric Co. Ltd v. State of Gujarat*,<sup>3</sup> the Court held that though a company is not a citizen under Art. 19 but a shareholder, a managing director of a company has right to carry on business through agency of company and if that right is taken away or abridged he is not disabled from challenging the validity of the provisions of any Act, which affects his right.

1. AIR 1963 SC 1811. Also see Jain, M. P.: Comments on the *Bennet Coleman Case* (15) JILI 1973, p. 154.

2. AIR 1973 SC 106.

3. AIR 1973 SC 32.

## Fundamental Rights (Arts. 12-13)

**Origin and development of Fundamental Rights.**—Part III of the Constitution contains a long list of Fundamental rights. This Chapter of the Constitution of India has very well been described as the Magna Carta of India.<sup>1</sup> As early as 1214 the English people exacted an assurance from King John for respect of the then ancient liberties. The Magna Carta is the evidence of their success which is a written document. This is the first written document relating to the fundamental rights of citizens. Thereafter from time to time the King had to accede to many rights to his subjects. In 1689 the *Bill of Rights* was written consolidating all important rights and liberties of the English people. In France *Declaration of the Rights of Man and the Citizen* (1789) declared the natural, inalienable and sacred rights of Man. Following the spirit of the Magna Carta of the British and the Declaration of the Rights of Man and the citizen of France, the Americans incorporated the Bill of Rights in their Constitution. The Americans were first to give Bill of Rights a constitutional status. Thus, when the Constitution of India was being framed the background for the incorporation of Bill of Rights was already present. The framers took inspiration from this and incorporated a full Chapter in the Constitution dealing with fundamental rights. But the declaration of fundamental rights in the Indian Constitution is the most elaborate and comprehensive yet framed by any State.

The inclusion of a Chapter on Fundamental Rights in the Constitution of India in an accordance with the trend of modern democratic thought, the idea being to preserve that which is an indispensable condition of a free society. The aim of having a declaration of fundamental rights is that certain elementary rights, such as, right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majority in Legislatures of the country should not have a free hand in interfering with these fundamental rights.<sup>2</sup> In *West Virginia State Board of Education v. Barnett*,<sup>3</sup> Jackson, J., dealing with the nature and the purpose of the Bill of Rights observed : "The very purpose of Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections."

**Need for Fundamental Rights.**—Fundamental Rights were deemed essential to protect the rights and liberties of the people against the encroachment of

1. V. G. Ram Chandran, *Fundamental Rights and Constitutional Remedies*, Vol. I, 1964, p. 1.

2. A. K. Gopalan's case, AIR 1950 SC 27.

3. 319 U. S. 624 : 87 L ed 1628.

the power delegated by them to their Government. They are limitations upon all the powers of the Government, legislative as well as executive and they are essential to the preservation of public and private rights, notwithstanding the representative character of political instruments.<sup>3</sup>

Speaking about the importance of fundamental rights in the recent case of *Maneka Gandhi v. Union of India*,<sup>2</sup> Bhagwati, J., observed, "These fundamental rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a 'pattern of guarantee on the basic structure of human rights' and impose negative obligations on the State not to encroach on individual liberty in its various dimensions."

These rights are regarded as fundamental because they are most essential for the attainment by the individual of his full intellectual, moral and spiritual stature. The negation of these rights will keep the moral and spiritual life stunted and his potentialities undeveloped. The declaration of fundamental rights in the Constitution serve as reminder to the Government in power that certain liberties, assured to the people by the Constitution are to be respected. "The statement of Fundamental Rights thus limits the range of State activity in appropriate direction in the interest of the liberty of the citizens."<sup>3</sup>

The 'danger of encroachment on citizen's liberties' is particularly great in parliamentary system in which those who form the Government are leaders of the majority party in the Legislature and can get laws made according to their wishes. The advocates of inclusion of these rights in the Indian Constitution emphasise that their incorporation in the Constitution vests them with a sanctity which the legislators dare not to violate so easily.

The object behind the inclusion of the Chapter of Fundamental Rights in Indian Constitution is to establish 'a Government of Law and not of man' a governmental system where the tyranny of majority does not oppress the minority. In short, the object is to establish Rule of Law and it would not be wrong to say that the Indian Constitution in this respect goes much ahead than any other Constitutions of the world. The object is not merely to provide security to and equality of citizenship of the people living in this land and thereby helping the process of nation building, but also and not less important to provide certain standards of conduct, citizenship, justice and fairplay. They were intended to make all citizens and persons appreciate that the paramount law of the land has swept away privileges and has laid down that there is to be perfect equality between one section of the community and another in the matter of all those rights which are essential for the material and more perfection of man."<sup>4</sup>

**Striking a balance between individual liberty and social needs.**—Absolute and unrestricted, individual rights do not, and cannot exist in any modern State. Liberty, however, becomes a licence and jeopardises the liberty of others. "Civil liberties as guaranteed by the Constitution, imply the existence of an organised society maintaining public order without which liberty

1. *Hartado v. People of California*, 28 L ed. 232, per Mathews, J.

2. AIR 1978 SC 597 at p. 619.

3. Dr. M. P. Sharma : *The Republic of India*, p. 41.

4. *Moti Lal v. State of Uttar Pradesh*, AIR 1951 All. 257.

itself would be lost in the excess of unrestrained abuses."<sup>1</sup> "If people were given complete and absolute liberty without any social control the result would be ruin.....Law is a scheme of social control, so that when we are concerned with, we are concerned only with the question of how much personal liberty is best and how much social control is best...."<sup>2</sup>

It is obvious that, if individuals are allowed to have absolute freedom of speech and action, the result would be chaos, ruin and an anarchy. On the other hand, if the State has absolute power to determine the extent of personal liberty the result would be tyranny. Hence, the question arises how to make a balance between the conflicting interests of individuals and of the society and particularly in a welfare State like ours.

The Indian Constitution attempts to do it by enumerating what are fundamental rights and by setting limits within which they can be curtailed. The Constitution permits "reasonable" restrictions to be imposed on individual's liberties in the interest of society. In this connection following observation of Mukerjee, J., in *A. K. Gopalan v. State of Madras*,<sup>3</sup> may be quoted :

"There cannot be any such thing as absolute and uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community. In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard the interest of society, on the other hand, social control which exists for public good has got to be restrained, lest it should be misused to the detriment of individual rights and liberties. Ordinarily, every man has the liberty to render his life as he pleases, to say what he will, to go where he will, to follow any trade and occupation or calling at his pleasure and to do any other thing which he can lawfully do without any hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution therefore attempts to do by declaring the rights of the people is to strike a balance between individual liberty and social control."

Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality.

American Constitution.—The Constitution of America embodies the Bill of Rights in the first ten amendments to the Constitution. These rights are declared in absolute terms. The Constitution contained no limitation on these rights. But it was soon realised that for the maintenance of public order, to prevent corruption of the public morals, incitement to crime and the like, some limitations must of necessity be imposed upon the liberty of the individual. The Supreme Court in interpreting the Constitution, had therefore to invent the doctrine of 'police power' of the State, under which the States have the inherent power to impose such restrictions upon the fundamental rights as are necessary to protect the common good, e. g., public health, safety and morals.<sup>4</sup> The liberty of an individual must yield to the common

1. *Cox v. New Hampshire*, (1941) 312 U. S. 569 at p. 574.

2. Willis—Constitutional Law and the United States, pp. 477-82.

3. AIR 1950 SC 27.

4. *Gillow v. New York*, (1925) 233 U. S. 652 : 69 L. ed. 1133 (1925). See also Cooley Constitutional Law, p. 239.

good. What is police power is again a question to be decided by the Court. The Supreme Court of America has given a very wide meaning to the term 'police power' so as to include everything that tends to promote the public welfare, e.g., increase the industries of the State, develop its resources and add to its wealth and prosperity.<sup>1</sup>

The Indian Constitution does not leave the question of limitation to be decided by the Judiciary. Limitations are prescribed by the Constitution itself. In addition to this, the Supreme Court has itself held that the provisions of our Constitution should be interpreted by the plain words used in the Constitution and not with reference to the connotation to police powers in American Constitutional law.<sup>2</sup> Our Constitution does not recognise this doctrine of police power. The object of specifying the restrictions in clauses (2) to (6) of Art. 19 was to define with certainty the limitations that might be imposed upon the freedoms instead of leaving that to the disposal of the judges.<sup>3</sup>

But what constitutes "reasonable restriction" is again a matter to be decided by the courts in each case which comes before it. By the reason of the word 'reasonable', the Indian Constitution has partially imported the American doctrine.<sup>4</sup> The only difference is that while in U. S. A. the Supreme Court had to assume the power of reviewing legislative acts under the cover of interpreting the "due process" clause, the Indian Constitution specifically confers this power upon the courts by the use of the word 'reasonable' in clauses (2) to (6) of Article 19.

**Suspension of Fundamental Rights.**—As said earlier, the fundamental rights are not absolute rights. The Constitution, therefore, provides for the curtailment or the suspension of the fundamental rights in the following circumstances :

Article 358 provides that when the proclamation of emergency is made by the President under Art. 352 the seven freedoms guaranteed by Art. 19 are automatically suspended and would continue to be so for the period of emergency. The suspension of rights guaranteed by Art. 19 thus removes the restrictions on the legislative and the executive powers of the State imposed by the Constitution. Any law, executive order made by the State during this period cannot be challenged on the ground that they are inconsistent with the rights guaranteed by Article 19. Such laws shall, however, cease to have effect as soon as the proclamation ceases and then Art. 19 is automatically revived and begins to operate. Article 358, however, makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over.

Article 359 further empowers the President to suspend the right to move any Court for the enforcement of rights conferred by Part III of the Constitution during the continuance of emergency. The suspension of the right to move the courts for the enforcement of the fundamental rights can be done by an order of the President. He may mention in his order the rights whose enforcement is to be suspended. The order of the President may extend to the whole or any part of the territory of India.

It is to be noted that while under Article 358 the rights conferred by Art.

1. *Day Brite Lighting v. Missouri*, (1952) 342 U. S. 421.

2. *Chiranji Lal v. Union of India*, AIR 1951 SC 41, per Mukherjee, J. at p. 56.

3. C. A. D., Vol. VII, p. 41.

4. D. D. Basu—*Commentary on the Constitution of India*, 3rd Ed. (1965), p. 155.

19 are automatically suspended, under Article 359 the suspension can only be brought about by an order of the President.

In *Habeas Corpus Case*<sup>1</sup> the Supreme Court held that in view of the Presidential order under Article 359 suspending the right to move any Court for the enforcement of the fundamental rights no person has any *locus standi* to file any petition under Art. 226 before a High Court or Supreme Court under Art. 32 for a writ of *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or vitiated by *mala fide* or is based on extraneous considerations.

The (44th Amendment) Act, 1978 has now introduced a number of safeguards against the abuse of the emergency powers. It provides that now under Art. 358, Art. 19 will be suspended only when a proclamation of emergency is declared on the ground of war or external aggression and not on the ground of 'armed rebellion' as has been provided by the (42nd Amendment Act, 1976). Secondly, it provides that Art. 358 will not apply to any law which is not related to emergency... The Amendment Act has amended Art. 359 which provides that the Presidential order suspending the right to move the Court for the enforcement of a fundamental right cannot be exercised in respect to the right to life and personal liberty. This means that in future it will not be possible to suspend the right to life and personal liberty guaranteed by Art. 21. This is intended to prevent the recurrence of the happenings during 1975 emergency.

**Classification of Fundamental Rights.**—The fundamental rights as incorporated in the Indian Constitution can be classified under the following six groups :

- (a) Right to equality (Arts. 14-18).
- (b) Right to freedom (Arts. 19-22).
- (c) Right against exploitation (Arts. 23-24).
- (d) Right to freedom of religion (Arts. 25-28).
- (e) Cultural and educational rights (Arts. 29-30).
- (f) Right to constitutional remedies (Arts. 32-35).

The 44th Amendment Act, 1978 has abolished the right to property as a fundamental right guaranteed by Art. 19 (1) (f) and Art. 31 of the Constitution, and hence Art. 19 (1) (f) and Art. 31 have been omitted.

Fundamental rights afford protection against State action and not against action of private individual.—Individual needs constitutional protection against the State. The rights which are given to the citizens by way of fundamental rights as included in Part III of the Constitution are a guarantee against State action as distinguished from violation of such rights from private parties. Private action is sufficiently protected by the ordinary law of the land. In *P. D. Shamdasani v. Central Bank of India*,<sup>2</sup> the petitioner, in an application

1. A. D. M., Jabalpur v. S. Shukla, AIR 1976 SC 1207.

2. AIR 1952 SC 59. See also *Vidya Verma v. Shivnarayan*, AIR 1956 SC 108. In this case writ of *Habeas Corpus* was refused against a private person : *K. K. Kochunni v. State of Madras*, AIR 1959 SC 725 Civil Rights' Cases, (1883) 109 U. S. 3 Ex parte Virginia, (1880) 100 U. S. 339 : 25 L. ed. 676. The American Supreme Court held that the 14th Amendment affords protection from State action.

under Art. 32 of the Constitution, sought the protection of the Court on the ground that his property right under Articles 19(1)(f) and 31 were infringed by the action of another private person—the Central Bank of India. The Supreme Court dismissed the petition and held :

"Neither Art. 19(1) nor Art. 31(1) was intended to prevent wrongful individual acts or to provide protection against merely private conduct..... The language and structure of Art. 19 and its setting in Part III of the Constitution clearly show that the Article was intended to protect those freedoms against the State action other than in the legitimate exercise of its power to regulate private rights of property by individuals is not within the purview of the Articles."

#### 'The State' (Art. 12) :

(a) Definition.—Article 12 defines the term 'State' as used in different Articles of Part III of the Constitution. It says that unless the context otherwise requires the term 'State' includes the following :—

1. the Government and Parliament of India, i.e., Executive and Legislature of the Union,
2. the Government and the Legislature of each State, i.e., Executive and Legislature of States,
3. all local or other authorities within the territory of India,
4. all local and other authorities under the control of the Government of India.

The term 'State' thus includes executive as well as the legislative organs of the Union and States. It is, therefore, the actions of these bodies that can be challenged before the courts as violating fundamental rights.

(a) Authorities.—According to Webster's Dictionary 'Authority' means a person or body exercising power or command.<sup>1</sup> In the context of Article 12, the word 'authority' means the power to make laws, orders, regulations, bye-laws, notifications, etc., which have the force of law and also power to enforce these laws. Thus in *Kesava v. State of Mysore*,<sup>2</sup> it was held that the Public Service Commission under the Constitution did not possess even the power to implement its own decisions without referring to the State Government and therefore not included in the definition of "State" under Article 12.

(b) Local Authorities within the territory of India.—Local 'authorities' as defined in section 3(31) of the General Clauses Act refers to authorities like Municipalities, District Boards, Panchayats, Improvement Trust and Mining Settlement Boards. In *Mohammed Yasin v. Town Area Committee*,<sup>3</sup> the Supreme Court held that the bye-laws of a Municipal Committee charging a prescribed fee on the wholesale dealer was an order by a State authority contravening Art. 19(1)(g). The bye-laws in effect and in substance have brought about a total stoppage of the wholesale dealer's business in the commercial sense. In *Sri Ram v. The Notified Area Committee*,<sup>4</sup> a fee levied under section 294 of the U. P. Municipalities Act, 1919, was held to be invalid.

1. See also *Kesava v. State of Mysore*, AIR 1956 Mys. 20.

2. *Ibid.*

3. AIR 1952 SC 115. See also *Rashid Ahmed v. Municipal Board, Kairana*, AIR 1950 SC 163.

4. AIR 1952 SC 118.

(c) Other authorities within the territory of India.—In Article 12 the words 'other authorities' is used after mentioning a few of them, such as the Government, Parliament of India, the Government and Legislature of each of the States and all local authorities. In *University of Madras v. Santa Bal*,<sup>1</sup> the Madras High Court held that 'other authorities' can only indicate authorities of a like nature : i. e., *ejusdem generis*. So construed, it could only mean authorities exercising governmental or sovereign functions. It cannot include persons natural or juristic, such as, a University unless it is 'maintained by the State'.

But in *Ujjambi v. State of U. P.*,<sup>2</sup> the Supreme Court rejected this restrictive interpretation of the expression 'other authorities' given by the Madras High Court. It held that the *ejusdem generis* could not be resorted to in interpreting this expression. In Art. 12 the bodies specifically named are the Government of the Union and the States, the Legislature of the Union and the States and local authorities. There is no common genus running through these named bodies nor can these bodies be placed in one single category on any rational basis.

In *Electricity Board, Rajasthan v. Mohan Lal*,<sup>3</sup> the Supreme Court has held that 'other authorities' will include all authorities created by the Constitution or statute and on whom powers are conferred by law. It is not necessary that the statutory authority should be engaged in performing governmental or sovereign functions. On this interpretation the expression 'other authorities', will include *Rajasthan Electricity Board*,<sup>4</sup> *Cochin Devasom Board*,<sup>5</sup> *Co-operative Society*,<sup>6</sup> which has power to make bye-laws under Co-operative Societies Act, 1911. The Chief Justice of a High Court is also included in the expression 'other authorities' as he has power to appoint officials of the Court.<sup>7</sup> The President,<sup>8</sup> when making order under Art. 359 of the Constitution comes within the ambit of the expression 'other authorities'.

In effect, the *Rajasthan Electricity Board's decision*<sup>9</sup> has overruled the decision of the Madras High Court in *Santa Bal's case*, holding a University not to be "the State". And finally the Patna High Court, following the decision of the Supreme Court, has held that the Patna University is "the State".<sup>10</sup>

In *Sukhdev Singh v. Bhagatram*,<sup>11</sup> the Supreme Court reviewed its earlier decisions on the meaning of the word "authorities" in Art. 12. The majority by 4—1 decision [*Alagiriswamy, J. dissenting*] held that *Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation* are 'authorities' within the meaning of Art. 12 of the Constitution and therefore they

1. AIR 1954 Mad 67. See also *Devdas v. Karnatak Engineering College*, AIR 1964 Mys. 6; *Krishna Gopal v. Punjab University*, AIR 1966 Punj. 34.

2. AIR 1962 SC 1621.

3. AIR 1967 SC 1857, followed in *Umesh v. V. N. Singh*, AIR 1968 Pat. 3.

4. *Electricity Board, Rajasthan v. Mohan Lal*, AIR 1967 SC 1857.

5. *P. B. M. Namboodripad v. Cochin Devasom Board*, AIR 1956 TC 19.

6. *Dukheram v. Co-operative Agricultural Association*, AIR 1961 MP 289.

7. *Parmatrao Satar v. Chief Justice*, AIR 1964 Raj. 13.

8. *Haroothai v. State*, AIR 1967 Guj. 229.

9. AIR 1967 SC 1857.

10. *Umesh v. V. N. Singh*, AIR 1968 Pat. 3.

11. AIR 1973 SC 1321.

are 'State'. The rules and Regulations framed by the above bodies have the force of law. The employees of these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. The employees are entitled to claim protection of Arts. 14 and 16 against the Corporation.

It means that the 'authorities' not created by the Constitution or by a Statute can not be a State within the meaning of Art. 12 of the Constitution.

Thus, a society registered under the Societies Registration Act (e. g., the Council of Scientific and the Industrial Research) is not an authority within the meaning of Article 12. The society does not have a statutory character like the Oil and Natural Gas Commission or the Life Insurance Corporation or Industrial Finance Corporation.<sup>1</sup> A company registered under Indian Companies Act is not a State within the meaning of Art. 12 of the Constitution.

(d) Authorities under the control of the Government of India.—By words 'authorities under control of the Government of India', it is meant to bring into the definition of State all areas outside Indian territory but which are under or may come under the control of the Government of India, such as, mandatory or trustee territories. Such a territory may come under India's control by International agreement. Thus even such areas will be the subject to Part III and the inhabitants of such areas may also claim the benefit of Fundamental Rights guaranteed in Part III.<sup>2</sup>

Is Judiciary included in the word "State"?—In the United States it is well settled that the judiciary is within the prohibition of the 14th Amendment.<sup>3</sup> The judiciary, though not expressly mentioned in Art. 12 should be held to be included within the expression 'other authorities' since courts are set up by statute and exercise power conferred by law.<sup>4</sup> It is suggested that discrimination may be brought about...even (by) judiciary and the inhibition of Art. 14 extends to all actions of the State denying equal protection of the laws whether it be the action of any one of the three limbs of the State.... What may superficially appear to be an unequal application of the law may not necessarily amount to denial of equal protection of law unless there is shown to be present in it an element of International and purposeful discrimination.

The question whether the judiciary was included within the definition of 'the State' in Art. 12 arose for consideration of the Supreme Court in *Naresh v. State of Maharashtra*.<sup>5</sup> It was held that even if a court is the State a writ under Art. 32 cannot be issued to a High Court of competent jurisdiction against its judicial orders, because such orders cannot be said to violate the fundamental rights. The Court did not express any categorical opinion on the question. Mr. H. M. Seervai is of opinion that the judiciary is included in the definition of 'the State' and a judge acting as a judge is subject to the writ jurisdiction of the Supreme Court.<sup>6</sup> The courts, like any other organ of the

1. *Sabharji Tewari v. Union of India*, AIR 1975 SC 1329.

2. C. A. D., Vol. VII, p. 607. See also *Mastan Saheb v. Chief Commissioner*, AIR 1963 SC 531.

3. *Virginia v. Rives*, (1880) 100 US 313, 318 : 25 L. Ed. 667.

4. Dr. V. N. Shukla—Constitution of India, 5th Ed., p. 20.

5. AIR 1967 SC 1.

6. H. M. Seervai—Constitutional Law of India, 1st Ed., p. 155.

State, are limited by the mandatory provisions of the Constitution and they can hardly be allowed to override the fundamental rights under the shield that they have within their jurisdiction, the right to make an erroneous decision.<sup>1</sup>

**Laws inconsistent with Fundamental Rights (Art. 13).**—Article 13 (1) declares that all laws in force in the territory of India immediately before the commencement of this Constitution shall be void to the extent to which they are inconsistent with the provisions of Part III of the Constitution. Clause (2) of this Article provides that the State shall not make any law which takes away or abridges the fundamental rights conferred by Part III of the Constitution; and any law made in contravention of fundamental rights shall to the extent of contravention, void. Clause (3) of this Article gives the term 'law' a very broad connotation which includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law. Thus not only the Legislative enactments, but anything mentioned here can be challenged as infringing a fundamental right.

**Power of Judicial Review.**—Article 13 in fact provides for the 'judicial review' of all legislations in India, past as well as future. This power has been conferred on the High Courts and the Supreme Court of India which can declare a law unconstitutional if it is inconsistent with any of the provisions of Part III of the Constitution.

**Meaning and basis of Judicial Review.**—'Judicial Review' is the power of courts to pronounce upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void.<sup>2</sup>

"Judicial Review" said Khanna, J., in the *Fundamental Rights Case*,<sup>3</sup> "has thus become an integral part of our Constitutional System and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of the provisions of statutes. If the provisions of the statutes are found to be violative of any Article of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and the High Courts are empowered to strike down the said provisions."

That power corrupts a man and absolute power corrupts absolutely which ultimately leads to tyranny, anarchy and, chaos has been sufficiently established in course of evolution of human history, and all round attempts have been made to erect institutional limitations on its exercise. When Montesque gave his doctrine of separation of powers, he was obviously moved by his desire to put a curb on absolute and uncontrollable power in any one organ of the Government. A legislature, an executive and a judicial power comprehend the whole of what is meant and understood by Government. It is by balancing each of these two powers against the other two that the efforts in human nature towards tyranny can alone be checked and restrained and any freedom preserved in the Constitution.<sup>4</sup>

Judicial review is thus the interposition of judicial restraint on the legislative as well as the executive organs of the Government. The concept has the

1. Basu—Commentary on the Constitution of India, 5th Ed., p. 145.
2. Crown, E. S. : Essay on the Judicial Review in Encyclopaedia of Social Sciences, Vol. VIII, p. 457.
3. Keshavanand v. State of Kerala, AIR 1973 SC 1461.
4. Letters by James Adams to Richard Henry.

origin in the theory of limited Government and in the theory of two laws—an ordinary and supreme (that is the Constitution). From the very assumption that there is a supreme law which constitutes the foundation and source of other legislative authorities in the body politics, it proceeds that any act of the ordinary law-making bodies which contravenes the provisions of the supreme law, must be void and there must be some organ which is to possess the power or authority to pronounce such legislative acts void.<sup>1</sup>

The doctrine of judicial review was for the first time propounded by the Supreme Court of America. Originally, the United States Constitution did not contain an express provision for judicial review. The power of judicial review was, however, assumed by the Supreme Court of America in the historic case of *Marbury v. Madison*.<sup>2</sup> The facts of the case were as follows : The Federalists had lost the election of 1800, but before leaving the office they had succeeded in creating several new judicial posts. Among these were 42 justices of peace, to which the retiring Federalists President, John Adams appointed forty-two Federalists. The appointment of commissions were confirmed by the Senate and they were signed and sealed, but Adam's Secretary of State, John Marshall, failed to deliver certain of them. When the new President, Thomas Jefferson, assumed office, he instructed his Secretary of State, James Madison, not to deliver seventeen of these commissions including one for William Marbury. Marbury filed a petition in the Supreme Court for the issue of a writ of *mandamus* to Secretary Madison ordering him to deliver the commissions. He relied on section 31 of the Judiciary Act of 1789 which provided "The Supreme Court...shall have the power to issue...writs of *mandamus*, in cases warranted by the principles and usages of law, to...persons holding office, under the authority of the United States." The Court, speaking through Marshall, who had now become Chief Justice, held that section 13 of the Judiciary Act was repugnant to Art. III, Section 2 of the Constitution inasmuch as the Constitution itself limited the Supreme Court's original jurisdiction to cases "affecting ambassadors, other public ministers and consuls, and those to which a State is party"—Since Marbury fell in none of these categories the court had no jurisdiction in his case. The observations of Marshall, C. J., in that case are pertinent to note :

"The Constitution is either superior paramount law unchangeable by ordinary means or it is on a level with ordinary legislative Acts, and like other Acts, is alterable when the legislature shall please to alter it...Certainly all those who framed written constitutions contemplate them as forming the fundamental and paramount law of the nation and, consequently the theory of every such Government must be that an Act of the legislature repugnant to the Constitution is void. And further, 'It is emphatically the province and duty of the Judicial department to say what the law is....'"

In the Indian Constitution there is express provision for judicial review, and in this sense it is on a more solid footing than it is in America. In the *State of Madras v. V. G. Row*,<sup>3</sup> Patanjali Sastri, C. J., observed :

"Our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the Fifth and

1. Basu's Commentaries on Constitution of India, Vol. I.

2 L. ed. 60.

AIR 1957 Crim. 102

'Fourteenth Amendments. If then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of duty plainly laid upon them by the Constitution. This is specially true as regards the fundamental rights as to which this Court has been assigned the role of sentinel on the *qui vive*.'

But even in the absence of the provisions of judicial review, the courts would have been able to invalidate a law which contravened any constitutional provisions, for, such power of judicial review follows from the very nature of constitutional law. In *A. K. Gopalan v. State of Madras*,<sup>1</sup> Kania, C. J. pointed out that it was only by way of abundant caution that the framers of our Constitution inserted the specific provisions in Art. 13. He observed :

"In India it is the Constitution that is supreme and that a statute law to be valid, must be in all conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not."

But while the basis of judicial review of legislative acts is far more secure under our Constitution than in the United States, its potentialities are much more limited. This is due to the detailed provisions of the Indian Constitution and the easy method of its amendments in contradistinction to the American Constitution's vague and general phraseology and the rigid method of its amendments.

Thus under this power of judicial review the highest Court of the Nation can test all pre-Constitution and post-Constitution or future laws, and declare them unconstitutional in case they contravene any of the provisions of Part III of the Constitution.

In *Keshavananda Bharti's case*<sup>2</sup> it has been held, that Judicial Review is one of the 'basic features' of the Indian Constitution and therefore cannot be taken away by amending the Constitution under Article 368 of the Constitution.

However, the recent constitutional developments would have far-reaching consequences on the scope of the power of judicial review exercised by our High Courts and the Supreme Court.

In *Smt. Indira Nehru Gandhi v. Raj Narain*,<sup>3</sup> the validity of Art. 329-A (4) and (5) which was added by the Constitution (39th Amendment) Act, 1975, was challenged on the ground '*inter alia*' that it takes away the power of judicial review which is one of the 'basic features' of our Constitution. By this amendment the election dispute of the appellant pending in the High Court of Allahabad was declared valid. The High Court had declared the election of the appellant to the Lok Sabha invalid on the ground of corrupt practice at election. Though the clause has been struck down by the Court, but some of the judges have made startling observations. Ray, C. J., said "when the constituent body exercises powers, the constituent power comprehends legislative, executive and judicial powers. All powers flow from the constituent power.... The constituent power is independent of the doctrine of separation of powers. The constituent power is sovereign. It is the power which creates

1. AIR 1950 SC 27.

2. AIR 1973 SC 1461.

3. AIR 1975 SC 2299. Also see *The Habeas Corpus case*, AIR 1976 SC 1207 and the Constitution (42nd Amendment) Act, 1976.

origin in the theory of limited Government and in the theory of two laws—an ordinary and supreme (that is the Constitution). From the very assumption that there is a supreme law which constitutes the foundation and source of other legislative authorities in the body politics, it proceeds that any act of the ordinary law-making bodies which contravenes the provisions of the supreme law, must be void and there must be some organ which is to possess the power or authority to pronounce such legislative acts void.<sup>1</sup>

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1. Basu's Commentaries on Constitution of India, Vol. I.
2. 2 L. ed. 60.
3. AIR 1952 SC 196.

declared unconstitutional then a question arises whether the whole of the statute is to be declared void or only that part which is unconstitutional should be declared as such. To resolve this problem the Supreme Court has devised the doctrine of severability or separability. This doctrine means that if an offending provision can be separated from that which is constitutional then only that part which is offending is to be declared as void and not the entire statute. Article 13 of the Constitution uses the words "to the extent of such inconsistency be void" which means that when some provision of the law is held to be unconstitutional then only the repugnant provisions of the law in question shall be treated by courts as void and not the whole statute.<sup>1</sup>

In *A. K. Gopalan v. State of Madras*,<sup>2</sup> the Supreme Court while declaring section 14 of the Preventive Detention Act, 1950, as *ultra vires*, observed :

"The impugned Act minus this section can remain unaffected. The omission of the section will not change the nature or the structure of the subject of the legislation. Therefore, the decision that section 14 is *ultra vires*, does not affect the validity of the rest of the Act. Similarly, in *State of Bombay v. Balsara*, a case under Bombay Prohibition Act, 1949, it was observed that the provisions which have been declared as void do not affect the entire statute, therefore, there is no necessity for declaring the entire statute as invalid."

This is, however, subject to one exception. If the valid portion is so closely mixed up with invalid portion that it cannot be separated without leaving an incomplete or more or less mingled remainder, that the courts will hold the entire Act void. The primary test is whether what remains is so inextricably mixed with the part declared invalid, that what remains cannot survive independently.<sup>3</sup> The Supreme Court observed in *Ramesh Thappar v. State of Madras*,<sup>4</sup> that:

"Where a law purports to authorise the imposition of restrictions on a Fundamental Right in language wide enough to cover restrictions, both within and without the limits provided by the Constitution and where it is possible to separate the two, the whole law is to be struck down. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void."

The doctrine of severability was elaborately considered in *R. M. D. C. v. Union of India*.<sup>5</sup> Where Sec. 2 (d) of the Prize Competitions Act, which was broad enough to include competitions of a gambling nature as well as competitions involving skill, was involved. The Supreme Court held that the provisions of the Act were severable and struck down only those provisions which related to competition involving skill. The Court thus in effect modified its observation made in *Ramesh Thappar's case*,<sup>6</sup> where it was said that when an offending provision is couched in a language wide enough to cover restrictions both within and without the constitutionally permissible limits, it cannot be separated if there is possibility of its being applied for purposes not sanctioned by the Constitution. The Court in *R. M. D. C. case*<sup>7</sup> held that where after

1. *Qasim Rizvi v. State of Hyderabad*, 1953 SCR 589.

2. AIR 1950 SC 27 : 1950 SCJ 174.

3. *State of Bihar v. Kamleshwar Singh*, AIR 1952 SC 252.

4. AIR 1950 SC 124. See also *Chintaman Rao v. State of M. P.*, AIR 1951 SC 118.

5. AIR 1957 SC 628.

6. AIR 1950 SC 124.

7. AIR 1957 SC 618.

the organs and dis- his submission is that  
Parliament can exercise judicial function even without amending the Constitu-  
tion. It is submitted that this submission is not correct.<sup>1</sup>

**Pre-Constitution Laws.**—According to clause (1) of Article 13 all pre-  
Constitution or existing laws, i. e., laws which were in force immediately before  
the commencement of the Constitution shall be void to the extent to which  
they are inconsistent with Fundamental Rights from the date of the commence-  
ment of the Constitution.

**Article 13 not retrospective in effect.**—Article 13 (1) is prospective in  
nature. All pre-Constitution laws inconsistent with a Fundamental Right will  
become void only after the commencement of the Constitution. They are not  
void *ab initio*. Such inconsistent law is not wiped out so far as the past Acts  
are concerned. A declaration of invalidity by the Courts will, however, be  
necessary to make the laws invalid. The Supreme Court in *Keshava Madava  
Menon v. State of Bombay*,<sup>2</sup> observed :

"There is no Fundamental Right that a person shall not be prosecuted  
and punished for an offence committed before the Constitution came into  
force. So far as the past Acts are concerned the law exists notwithstanding  
that it does not exist with respect to the future exercise of the Fundamental  
Right."

In that case, a prosecution proceeding was started against the petitioner  
under the Press (Emergency Powers) Act, 1931 in respect of a pamphlet pub-  
lished in 1949. The present Constitution came into force during the pendency  
of the proceeding in the court. The appellant contended that the Act was  
inconsistent with the Fundamental Right conferred by Art. 19 (1) (a) of the  
Constitution hence void, and the proceeding against him could not be con-  
tinued. The Supreme Court held that Art. 13 (1) could not apply to his case  
as the offence was committed before the present Constitution came into force  
and therefore the proceedings started against him in 1949 was not affected.  
The Supreme Court held that :

"As the Fundamental Rights become operative only on and from the  
date of the Constitution, the question of the inconsistency of the existing laws  
with those rights must arise from the date those rights came into being.....  
The voidness of the existing law is limited to the future exercise of Fundamental  
Rights. Article 13 (1) cannot be read as obliterating the entire operation  
of the inconsistent laws, or to wipe them out altogether from the Statute Book,  
for to do so will be to give them retrospective effect which, we have said, they  
do not possess."

This does not mean that a discriminatory procedure laid down by a  
pre-Constitution Act is to be followed in respect of pending proceedings or in  
respect of new proceedings started in respect of pre-Constitution rights or liabili-  
ties. Though the substantive rights and liabilities acquired or accrued before  
the date of the Constitution remain enforceable, nobody can claim his rights  
and liabilities to be enforced under a particular procedure which becomes  
inconsistent with Fundamental Rights.<sup>3</sup>

**Doctrine of Severability or Separability.**—When a part of the statute is

1. Ibid See Beg. J's observations.

2. AIR 1951 SC 128. See also *Rabindra Nath v. Union of India*, AIR 1970 SC 470.

3. *Lachmandas v. State of Bombay*, AIR 1952 SC 235.

stitution. If State makes such a law then it will be *ultra vires* and void to the extent of the contravention. It is a still born law and cannot be revived by removal of the constitutional prohibition by subsequent amendment of the Constitution. Though post-Constitution laws inconsistent with fundamental rights are void from their very inception, yet a declaration by the Court of their invalidity will be necessary.<sup>1</sup> And again the court does not grant a declaration in respect of invalidity of law, except at the instance of a person who is possessed of a fundamental right and whose right has been infringed,<sup>2</sup> but not at the instance of mere volunteers.<sup>3</sup>

As distinguished from clause (1), clause (2) makes the inconsistent laws void *ab initio* and even convictions made under such unconstitutional laws shall have to be set aside. "Anything done under such a law, whether closed, completed or inchoate will be wholly illegal and any person adversely affected by it will be entitled to relief."<sup>4</sup>

#### Does the doctrine of eclipse apply to a post-Constitution law?

In *Deep Chand v. State of U. P.*,<sup>5</sup> the matter was fully considered by the Supreme Court. According to the majority view under Art. 13 (2) no law can be made in the post-Constitution period so as to contravene the fundamental right and such a law if made, is nullity from its inception, and is a still born law. It is void *ab initio*. The doctrine of eclipse does not apply to post-constitutional laws and therefore a subsequent constitutional amendment cannot revive it. The minority however, expressed the view that the doctrine of eclipse is applicable even to a post-Constitution law.

In *Mahendra Lal Jain v. State of U. P.*,<sup>6</sup> the Supreme Court approved the majority view expressed in *Deep Chand's case*. It was held that the doctrine of eclipse applies only to pre-Constitution law under Art. 13 (1) and not to post-Constitution laws under Art. 13 (2). There is a clear distinction between pre-Constitution and post-Constitution laws. The voidness of the pre-Constitution laws is not from its inception but only from the date of the commencement of the Constitution. On the other hand, the voidness of a post-Constitutional Law is from its very inception and such a law cannot therefore exist for any purpose. In that case, the U. P. Land Tenures (Regulation of Transfers) Act, 1952, was declared unconstitutional as it contravened Art. 13 (2) of the Constitution and could not therefore be revived by the operation of doctrine of Eclipse by a subsequent enactment of Constitution (Fourth Amendment) Act. It could only be re-enacted.

But, in *State of Gujarat v. Sri Ambica Mills*,<sup>7</sup> the Supreme Court has modified its view as expressed in *Deep Chand's case* and *Mahendra Lal Jain's case* and held that a post-Constitution law which is inconsistent with fundamental rights is not nullity or non-existent in all cases and for all purposes. The doctrine of absolute nullity is not a universal rule and there are many exceptions to it. A post-Constitution law which takes away or abridges the right

1. Md. Ishaq v. State, AIR 1961 All. 522.
2. Chiranji Lal v. Union of India, AIR 1951 SC 41 : 1950 SCR 869.
3. Paschim Beng. Malbali Cycle Mazdoor Union v. Commissioner of Police, Calcutta, AIR 1961 Cal. 125.
4. Deep Chand v. State of U. P., AIR 1959 SC 643.
5. AIR 1969 SC 643.
6. AIR 1963 SC 1019.
7. AIR 1974 SC 1300.

removing the invalid provision what remains constitutes a complete Code there is no necessity to declare the whole Act *ultra vires*. In such cases the determining factor is the intention of the Legislature. But if what remains on the statute book cannot be enforced without making alteration the whole Act should be declared as void. Severability is the question of substance and not of form, and in determining the intention of the Legislature it is legitimate to take into account the history of the legislation and the object as well as the title and Preamble. In taxation laws where taxes are imposed, on subjects which are divisible in nature and some of the subjects are exempt from taxation the taxation statute will not be wholly void. It can be declared void only with regard to those subjects to which a constitutional exemption is attracted.<sup>1</sup>

**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 moribund condition. "It is over-shadowed by the fundamental rights and remains dormant, but it is not dead".<sup>2</sup> Such laws are not wiped out entirely from the statute book. They exist for all past transactions, and for the enforcement of rights acquired and liabilities incurred before the present Constitution came into force and for determination of right of persons who have not been given fundamental rights by the Constitution, e. g. non-citizens.<sup>3</sup> It is only as against the citizens that they remained in a dormant or moribund condition but they remain in operation as against non-citizens who are not entitled to fundamental rights.<sup>4</sup>

Can such a law, which becomes unenforceable after the Constitution came into force, be again revived and be made effective by an amendment in the Constitution?

It was to solve this problem that the Supreme Court formulated the doctrine of eclipse in *Bhikaji v. State of M. P.*<sup>5</sup> In that case a provision of C. P. and Berar Motor Vehicle (Amendment) Act, 1947, authorised the State Government to take up the entire motor transport business in the Province to the exclusion of motor transport operations. This provision, though valid when enacted, became void on the coming into force of the Constitution in 1950, as they violated Art. 19(1)(g)<sup>6</sup> of the Constitution. However, in 1951, Clause (6) of Art. 19 was amended by the Constitution (First Amendment) Act, so as to authorise 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 all blemish or infirmity'. It becomes enforceable against citizens as well as non-citizens after the constitutional impediment is removed. This law was merely 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.

**Post-Constitution Law.**—Clause (2) of Art. 13 prohibits State to make any law which takes away or abridges rights conferred by Part III of the Con-

1. *State of Bombay v. United Motors*, (1954) 4 SCR 1069.

2. *Bhikaji Narayan v. M. P.*, AIR 1955 SC 781.

3. *Keshav Madhava Menon v. State of Bombay*, AIR 1951 SC 128 at p. 599-600.

4. *State of Gujarat v. Sri Ambica Mills*, AIR 1974 SC 1300.

5. AIR 1955 SC 781.

6. Right to practise any profession, or to carry on any occupation, trade or business,

**'Law' and Law in force'.**—For the purposes of Art. 13 "Law" is defined as including any Ordinance, Order, bye-law, regulation, notification, custom or usage having the force of law. The definition of 'law' in this Article is wider than the ordinary connotation of law which refers to enacted law or legislation. It includes even the administrative order issued by an executive officer,<sup>1</sup> but does not include administrative directions or instructions issued by the Government for the guidance of its officers.<sup>2</sup> It does not include departmental instructions. Departmental instructions are neither "law" within the meaning of Article 13 (3) (9) nor are they "procedure established by law" without the meaning of Article 21. Though the term "law" includes all 'laws in force', i.e., custom,<sup>3</sup> usage, etc. having the force of law, personal laws of Hindus, Muslims and Christians are excluded from the definition of "law" for the purpose of this Article.<sup>4</sup>

'Law in force' denote all prior and existing laws passed by the Legislature or other competent authority which have not been repealed notwithstanding the fact that they are not in operation wholly or in part throughout India or part thereof. The term 'existing law' includes a wider range, such as, ordinance, orders, bye-laws, rules or regulations by Legislature or other authorised body or person. Thus an Ordinance issued by the President,<sup>5</sup> or the Governors,<sup>6</sup> a Government notification,<sup>7</sup> a bye-law of a municipal body are all laws in force.<sup>8</sup>

The term 'having the force of law' means rule of conduct enforceable in a court of law. In order that a particular rule of conduct should be called a law it must be established that it has a force of law.

Is constitutional amendment a 'law' under Article 13 (2)?—The question whether the word 'law' in clause (2) of Art. 13 includes a 'constitutional amendment was for the first time considered by the Supreme Court in *Shankari Prasad v. The Union of India*.<sup>9</sup> In that case the validity of the Constitution (First Amendment) Act, 1951, which introduced the new Arts. 31-A and 31-B was involved. The Court held that the word 'law' in clause (2) does not include law made by Parliament under Art. 368. The word 'law' in Art. 13 must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constitutional power and therefore, Art. 13 (2) does not affect amendments made under Art. 368. This interpretation of the *Shankari Prasad's* case was followed by the majority (Hidayatullah and Mudholkar, JJ., dissenting) in the case of *Sajjan Singh v. State of Rajasthan*.<sup>10</sup>

But in *Golak Nath v. State of Punjab*,<sup>11</sup> the Supreme Court overruled

1. *Jeshingbhai v. Emperor*, AIR 1950 Bom. 363; *D. Elayunni v. State*, AIR 1961 Ker 52; *Dwarka Nath v. State of Bihar*, AIR 1959 SC 249; *Vasudeo v. State of Mysore*, AIR 1966 Mys. 92.
2. *State of West Bengal v. Anwar Ali*, AIR 1952 SC 75.
3. *D. B. M. Patnaik v. State of A. P.*, AIR 1974 S. C. 2092.
4. *Bhan Rum v. Baijnath*, AIR 1962 S. C. 1476.
5. Article 123.
6. Article 213.
7. *Ramkishan Dalmia v. Justice Tendolkar*, AIR 1958 SC 338.
8. *Vastu v. Town Area Committee*, AIR 1952 SC 115.
9. AIR 1951 SC 458.
10. AIR 1965 SC 845.
11. AIR 1967 SC 1643.

conferred by Art. 19 will be operative as regards to non-citizens because fundamental rights are not available to non-citizens. Such a law will become void or non-existent only against citizens because fundamental rights are conferred on them. The 'voidness' in Art. 13 (2) can only mean 'void as against persons whose fundamental rights are taken away or abridged by law'. Non-citizens cannot take advantage of the voidness of the law. The reasons why a post-Constitution law remains operative as against non-citizens is that it is void only to the extent of its inconsistency with rights conferred on citizens, namely, rights under Art. 19.

Accordingly, the Court held that the Bombay Labour Welfare Fund Act, 1953 was valid as respect to non-citizens. The respondent, a company, had challenged the validity of the Act on the ground that its provisions violated the fundamental right of citizen employers and employees, and therefore they were void under Art. 13 (2) of the Constitution. It was held that even assuming that under Art. 226 a company which was not a citizen was entitled to move the High Court and seek a remedy for infringement of its ordinary right to property, the provisions of the Bombay Labour Welfare Fund Act, 1953 were not *non est* but were valid laws enacted by a competent legislature as respects non-citizens and the company could not take the plea that its right to property were being taken or abridged without the authority of laws.

**Doctrine of Waiver.**—Can a citizen waive his fundamental right? The doctrine of waiver can have no application to the provisions of law enshrined in Part III of the Constitution. It is not open to an accused person to waive or give up his constitutional rights and get convicted.<sup>1</sup>

The question of waiver directly arose in *Basheshwar Nath v. Income Tax Commissioner*.<sup>2</sup> The petitioner whose case was referred to the Income-tax Investigation Commission under section 5 (1) of the Act was found to have concealed a large amount of income. He, thereupon, agreed as a settlement in 1954 to pay Rs. 3 lakhs in monthly instalments by way of arrears of tax and penalty. In 1955 the Supreme Court in *Muthiah v. I. T. Commissioner, A. I. R. 1956 S. C. 269* held that section 5 (1) of the Taxation of Income (Investigation Commission) Act was *ultra vires* of Art. 14. The petitioner then challenged the settlement between him and the Income Tax Investigation Commission. The respondent contended that even if section 5 (1) was invalid, the petitioner by entering into an agreement to pay the tax had waived his fundamental right guaranteed under Art. 14.

The majority expressed the view that the doctrine of waiver as formulated by some American Judges in interpreting the American Constitution cannot be applied in interpreting the Indian Constitution. The Court held that it is not open to a citizen to waive any of the fundamental rights conferred by Part III of the Constitution. These rights have been put in the Constitution not merely for the benefit of the individual but as a matter of public policy for the benefit of the general public. It is an obligation imposed upon the State by the Constitution. No person can relieve the State of this obligation, because a large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. In such circumstances, it is the duty of this Court to protect their rights against themselves.<sup>3</sup>

1. *Behram v. State of Bombay*, AIR 1955 SC 146.

2. AIR 1959 SC 140.

3. *Basheshwar Nath v. Income-tax Commissioner*, AIR 1959 SC 149, per Subba Rao, J.

## Right to Equality (Arts. 14 to 18)

**Introduction**—Articles 14 to 18 of the Constitution guarantee the right to equality to every citizen of India. Article 14 embodies the general principles of equality before law and prohibits any discrimination on grounds of religion, race, caste, sex or place of birth between citizens. Article 14 embodies the idea of equality expressed in the Preamble. The succeeding Articles 15, 16, 17 and 18 lay down specific application of the general rules laid down in Art. 14. Article 15 relates to prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Article 16 guarantees equality of opportunity in matters of public employment. Article 17 abolishes 'Untouchability'. Article 18 abolishes titles.

### Equality before the Law and Equal Protection of Laws (Art. 14)

Article 14 declares that 'the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'. Thus Art. 14 uses two expressions "equality before the law" and "equal protection of the laws". The phrase "equality before the law" finds a place in almost all written Constitutions that guarantee fundamental rights.<sup>1</sup> Both these expressions have, however, been used in the Universal Declaration of Human Rights.<sup>2</sup>

The first expression 'equality before law', is of English origin and the second expression has been taken from the American Constitution. Both these expressions aim at establishing what is called 'equality of status' in the Preamble of the Constitution. While both the expressions may seem to be identical, they do not convey the same meaning. While 'equality before the law' is a somewhat negative concept implying the absence of any special privilege in favour of individuals and the equal subjection of all classes to the ordinary law. "Equal protection of the law" is a more positive concept implying equality of treatment in equal circumstances.<sup>3</sup> However, one dominant idea common to both the expressions is that of equal justice.<sup>4</sup> In *State of West Bengal v. Anwar Ali Sarkar*,<sup>5</sup> Patanjali Sastri, C. J., has rightly observed that the second expression is a corollary of the first and it is difficult to imagine a situation in which the violation of the equal protection of laws will not be the violation of the equality before law. Thus, in substance the two expressions mean one and the same thing.

1. USA—Section 1 of 14th Amendment says "No State shall... deny to any person within its jurisdiction the equal protection of the laws."

Burma—Section 13 "All citizens irrespective of birth, religion, sex or race are equal before law, that is to say, there shall not be any arbitrary discrimination between one citizen or class of citizens and another."

Iire—Section 40 (1) "All citizens shall, as human persons be held equal before law."

Chile—Art. 10 "All inhabitants of the Republic are assured equality before the law."

2. Art. 7 of the Human Declaration of Human Rights says : "All are equal before the law and are entitled without any discrimination to equal protection of the law."

3. Dickey—Law of the Constitution, 10th Ed., p. 49.

4. Sheoshankar v. M. P. State, AIR 1951 Nagpur 58 (F. B.). See also Dickey, 1939 Edn., p. 47.

5. AIR 1952 SC 75.

the decisions given in the aforesaid cases. Delivering the majority judgment, Subbarao, C. J., held that : "The word 'law' in Art. 13 (2) includes every branch of law, statutory, constitutional, etc., and hence, if amendment to the Constitution takes away or abridges fundamental right, the amendment would be void."

**The Constitution (24th Amendment) Act, 1971.**—In order to remove the difficulty created by the Supreme Court's decision in *Golak Nath's* case the Constitution (24th Amendment) Act, 1971 was enacted. By this amendment a new clause (clause 4) was added to Art. 13 of the Constitution which provides that "Nothing in this Article shall apply to any amendment of this Constitution made under Art. 368." In other words, constitutional amendments passed under Art. 368 shall not be considered as 'law' within the meaning of Art. 13 and therefore, cannot be challenged as infringing provisions of Part III of the Constitution.

The validity of the Constitution (24th Amendment) Act, 1971, has been upheld by the Supreme Court in the *Fundamental Right's* case.<sup>1</sup>

This question has finally been put at rest by the *Constitution (42nd Amendment) Act, 1976* by inserting Cl. (4) in Art. 368 which provides that, "no amendment of this Constitution shall be called in question in any court except upon the ground that it has not been made in accordance with the procedure laid down by this Article."

1. *Kesavanand v. State of Kerala*, AIR 1973 SC 1461.

are immune from the jurisdiction of courts. Article 361 of the Indian Constitution affords an immunity to the President of India and the State Governors. Art. 361 provides that the President or the Governor of a State shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.

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

No process for the arrest or imprisonment of the President or the Governor of a State shall be issued from any Court during his term of office.

Article 14 permits classification but prohibits class legislation.—The equal protection of laws guaranteed by Art. 14 does not mean that all laws must be general in character. It does not mean that the same laws should apply to all persons. It does not mean that every law must have universal application for, all persons are not, by nature, attainment or circumstances in the same position. The varying needs of different classes of persons often require separate treatment.<sup>1</sup> From the very nature of society there should be different laws in different places and the Legislature controls the policy and enacts laws in the best interest of the safety and security of the State. In fact, identical treatment in unequal circumstances would amount to inequality.<sup>2</sup> So a reasonable classification is not only permitted but is necessary if society is to progress.<sup>3</sup>

The varying needs of different classes or sections of people require differential and separate treatment. A Legislature which has to deal with diverse problems arising out of an indefinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects, and for that purpose it must have large powers of election or classification of persons and things upon which such laws are to operate.<sup>4</sup> Thus what Art. 14 forbids is class legislation but it does not forbid reasonable classification,<sup>5</sup> for legislative purposes. The classification, however, must not be arbitrary, it must rest upon reasonable grounds of discrimination.<sup>6</sup>

Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privilege granted and between whom and the persons not so favoured no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the one from such privilege.<sup>7</sup>

**Test of Reasonable Classification.**—While Art. 14 forbids class legislation,

1. *Chiranjit Lal v. Union of India*, AIR 1951 SC 41, per Das, J.; *State of Bombay v. P. N. Balsara*, AIR 1951 SC 318, per Fazal Ali, J.; *Kedar Nath v. State of West Bengal*, AIR 1953 SC 404.
2. *Abdul Rahman v. Pinto*, AIR 1951 Hyd. II.
3. *Jagjit Singh v. State*, AIR 1954 Hyd. 28.
4. *Ameeroolha v. Mabhoob*, AIR 1953 SC 91; 1953 SCR 404. It is said that the entire problem under the equal protection clause is one of classification or of drawing lines. See also *Anwar Ali's case*, AIR 1952 SC 75.
5. *Lachman Das v. State of Bombay*, AIR 1952 SC 235; *Kameshwar Singh v. State*, AIR 1951 Pat. 91; *Loknath Misra v. State*, AIR 1952 Orissa 42.
6. *R. C. Cooper v. Union of India*, AIR 1970 SC 564.
7. *Monoponier Co. v. City of Los Angeles*, 33 Cal. App. 675.

**Equality before Law.**—The concept of equality does not mean absolute equality among human beings which is physically not possible to achieve. It is a concept implying absence of any special privilege by reason of birth, creed or the like in favour of any individual, and also the equal subjection of all individuals and classes to the ordinary law of the land. As Dr. Jennings puts it :

"Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be same for all citizens of full age and understanding without distinctions, of race, religion, wealth, social status, or political influence."<sup>1</sup>

The guarantee of equality before the law is an aspect of what Dicey calls the Rule of Law in England.<sup>2</sup> It means that no man is above the law and that every person, whatever be his rank or conditions, is subject to the jurisdiction of ordinary courts. "With us", Dicey wrote "every official from the Prime Minister down to a constable or a Collector of taxes is under the same responsibility for every act done without legal justification as any other citizen."<sup>3</sup>

The rule of law embodied in Art. 14 is the "basic feature" of the Indian Constitution and hence it can not be destroyed even by an amendment of the Constitution under Art. 368 of the Constitution.

**Equal protection of the Laws.**—The guarantee of equal protection of laws is similar to one embodied in the 14th Amendment to the American Constitution.<sup>4</sup> This has been interpreted to mean subjection to equal law, applying to all in the same circumstances.<sup>5</sup> It only means that all persons have right to equal treatment in similar circumstances, both in the privileges conferred and in liabilities imposed by the laws. Equal laws should be applied to all in the same situation, and there should be no discrimination between one person and another. As regards the subject-matter of the legislation their position is the same.<sup>6</sup> Thus, the rule is that the like should be treated alike and not that unlike should be treated alike.<sup>7</sup>

The word "any person" in Art. 14 of the Constitution denotes that the guarantee of the equal protection of laws is available to any person which includes any company or association or body of individuals. A person may be a citizen or an alien. The equality before the law is guaranteed to all without regard to race, colour or nationality. Corporations being juristic persons are also entitled to the benefit of Article 14.<sup>7</sup>

**Exceptions.**—The above rule of equality is, however, not an absolute rule and there are a number of exceptions to it. For instance, foreign Diplomats

1. Jennings : *Law of the Constitution*, 3rd Ed., p. 49. See also *Ram Prasad v. State of Punjab*, AIR 1953 SC 215 ; *Lachman Das v. State of Bombay*, AIR 1952 SC 235.
2. Dicey : *Law of Constitution*, 10th Ed., pp. 202-3.
3. The 14th Amendment says, "Nor shall any State—deny to any person equal protection of laws."
4. *Lindsley v. Natural Carbonic Gas Co.*, (1910) 220 US 61.
5. *State of West Bengal v. Anwar Ali Sarker*, AIR 1952 SC 75. See also *Chiranjit Lal's case*, AIR 1951 SC 41 : 1950 SCR 869 (911) and *Wills Constitutional Law*, p. 579.
6. Dr. V. N. Shukla : *Constitution of India*, 5th Edn., p. 27.
7. *Chiranjit Lal v. Union of India*, AIR 1951 SC 41,

(1) A law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by itself.

(2) The presumption is always in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles.

(3) The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.

(4) It must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

(5) In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation.

(6) The Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

(7) While good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

(8) The classification may be made on different basis, e. g., geographical or according to objects or occupations or the like.

(9) The classification made by the Legislature need not be scientifically perfect or logically complete.<sup>1</sup> Mathematical nicety and perfect equality are not required.<sup>2</sup> Equality before the law does not require mathematical equality of all persons in all circumstances. Equal treatment does not mean identical treatment. Similarity, not identity of treatment is enough.<sup>3</sup>

(10) There can be discrimination both in the substantive as well as the procedural law. Article 14 applies to both.<sup>4</sup>

*If the classification satisfies the test laid down in the above propositions, the law will be declared constitutional. The question whether a classification is reasonable, and proper or not, must, however, be judged more on common sense than on legal subtleties.<sup>5</sup>*

1. *Kedar Nath v. State of West Bengal*, AIR 1953 SC 404 : 1954 SCR 30

2. *Kameshwari Singh v. State of Bihar*, AIR 1951 Pat 91.

3. *Per Fazal Ali, J., in Balsara's case*, AIR 1951 SC 318 : (1951) SCR 682 (709, 710) and *Chandra Shekbar Aiyar, J. in Anwar Ali Sarkar's case*, (1952) SCR 284 (349-50).

4. *State of West Bengal v. Anwar Ali*, AIR 1952 SC 75.

5. *Saghir Ahmad v. State*, AIR 1954 AH 257.

it does not forbid reasonable classification for the purpose of legislation. The classification, however, should not be arbitrary. It must always rest upon some real and substantial distinction bearing reasonable and just relation to the things in respect to which the classification is made. Thus the only limitation on the power of the State is that the classification should not be unreasonable and arbitrary. Classification to be reasonable must fulfil the following two conditions—

(1) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group ; and

(2) the differentia must have a rational relation to the object sought to be achieved by the Act.<sup>1</sup>

The differentia which is the basis of the classification and the object of the Act are two distinct things. What is necessary is that there must be a nexus between the basis of classification and the object of the Act which makes the classification.<sup>2</sup>

In *Chiranjit Lal v. Union of India*,<sup>3</sup> Mukherjea, J., observed that 'Legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of equal protection, but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made ; and classification made without any substantial basis should be regarded as invalid.'

It is only when there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory. Thus, the Legislature may fix the age at which persons shall be deemed competent to contract between themselves but no one will claim that competency to contract can be made to depend upon the stature or colour of the hair. Such a classification will be arbitrary.<sup>4</sup>

The true meaning and scope of Art. 14 have been explained in a number of cases<sup>5</sup> by the Supreme Court. In the leading case of *Ramkrishna Dalmia v. Justice Tendolkar*,<sup>6</sup> Das, C. J., reviewed the whole case-law and summarised the important principles established in those cases for permissible classification. The learned Chief Justice has laid down the following propositions in *Dalmia's* case :

1. *Kathi Ranning v. State of Saurashtra*, AIR 1952 SC 123. See also *Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538 ; *The Bank Nationalisation case*, AIR 1970 SC 564.
2. *Ibid* p. 564. Also see *State of West Bengal v. Anwar Ali*, AIR 1952 SC 75, per Das, J.
3. AIR 1951 SC 41; 1950 SCR 869 ; *Southern Railway Co. v. Greene*, 216 US 400.
4. *Anwar Ali's case*, AIR 1952 SC 75.
5. *Chiranjit Lal v. Union of India*, AIR 1951 SC 41 ; *State of Bombay v. F. N. Balsara*, AIR 1951 SC 318 ; *Anwar Ali Sarkar's case*, AIR 1952 SC 75 ; *Kathi Ranning v. State of Saurashtra*, AIR 1952 SC 123 ; *Lachmandas v. State of Bombay*, AIR 1952 SC 235 ; *Qasim Rizvi's case*, AIR 1953 SC 156 ; *Habeeb Mohammad v. State of Hyderabad*, AIR 1953 SC 287 ; *Budhan Chowdhury v. State of Bihar*, AIR 1955 SC 191.
6. AIR 1958 SC 538.

v. *State of Uttar Pradesh*,<sup>1</sup> a monopoly created by the State in its favour was held not to violate Art. 14. In *Baburao v. Bombay Housing Board*,<sup>2</sup> a law which exempted the factories run by the Government from operation but to applied other factories or local authority, was held not to be discriminatory. Thus the Government as a banker can be given special facilities for realisation of its dues which may not be available to other bankers.<sup>3</sup> And again, a longer period of limitation may be allowed to Government for enforcing its claims as compared to private persons in respect of similar claims.<sup>4</sup>

(c) Article 14 and Taxation Laws.—The State has wide power in selecting persons or objects it will tax and a statute is not open to attack on the ground that it taxes some persons and objects and not others. But it does not mean that a Taxation law can claim immunity from the equality clause in Article 14 of the Constitution. It has to pass like any other law the equality test laid down in Art. 14. But it must be remembered that the State has in view of the intrinsic complexity of fiscal adjustments of diverse elements, a considerable wide discretion in the matter of classification for taxing purposes. The legislature has ample freedom to select and classify persons, districts, goods, properties, income and objects which it would tax, and which it would not tax. So long as the classification made within this wide and flexible range by a taxing statute does not transgress the fundamental principles underlying the doctrine of equality, it is not objectionable on the ground of discrimination merely because it taxes or exempts from tax some incomes or objects and not others. Nor the mere fact that a tax falls more heavily on some in the same category, is by itself a ground to render the law invalid. It is only when within the range of its selection the law operates unequally and cannot be justified on the basis of a valid classification that there would be violation of Art. 14.<sup>5</sup> Where tax is imposed only on the sale of hides and skins it cannot be challenged on the ground that the purchaser of other commodities were not taxed.<sup>6</sup>

There is a wide range of selection and freedom in appraisal not only in the objects of taxation and the manner of taxation but also in the determination of the rate or rates applicable.

In *E. I. Tobacco Co. v. State of A. P.*,<sup>7</sup> a sales tax on virginia tobacco but not on country tobacco has been held to be valid. In *Western India Theatre v. Cantonment Board*,<sup>8</sup> a higher tax on cinema-houses containing large seating accommodation and situated in fashionable or busy localities where the number of visitors is more numerous, than the tax imposed on smaller cinema-houses containing less accommodation and situated in a locality where visitors are poor and less numerous, was held not to violate the equal protection clause of Art. 14.

In *Twyford Tea Co. v. Kerala State*,<sup>9</sup> under the Kerala Plantation (Addi-

1. AIR 1955 SC 728.
2. AIR 1954 SC 153.
3. *Lachman Das v. State of Punjab*, AIR 1963 SC 222; *Manna Lal v. Collector of Jhalawar*, AIR 1961 SC 828.
4. *Nav Ratan Lal v. State of Rajasthan*, AIR 1961 SC 1704.
5. *I. T. Officer, Shillong v. N. T. R. Rymbai*, AIR 1976 SC 670; *Jaipur Hosiery Mills v. State of Rajasthan*, AIR 1971 SC 1330.
6. *V. M. Syed v. State of Andhra*, AIR 1954 SC 314.
7. AIR 1962 SC 1733.
8. AIR 1959 SC 542.
9. AIR 1970 SC 1133.

**Basis of Classification.**—The constitutionality of every statute depends on whether there is a basis for the classification made in the statute. The basis of classification may be different ; e. g. geographical, vocational, difference in time, difference in nature of persons, trade and callings or occupation, etc. It is proposed to refer to certain broad classifications here :

(a) **Geographical basis.**—The words "within the territory of India" used in Art. 14 do not mean that there must be a uniform law throughout the country. A law may be applicable to one State and not to another. A State may be divided into several geographical regions and a law may be applicable to one and not to others depending on particular circumstances. Thus in *Krishna Singh v. State of Rajasthan*,<sup>1</sup> the validity of Marwar Land Revenue Act, 1949, was challenged on the ground that it applied only to Marwar portion of the State of Rajasthan and not to the whole of the State. The Supreme Court held the law not to be violative of Art. 14. It said that the particular conditions of Marwar portion of the State required a special law to be applied there. Similarly, fixation of different dates for holding elections in different constituencies according to the various exigencies prevailing in the locality in which the constituency was situated was held not to violate Article 14.

In *Ram Chandra v. State of Orissa*<sup>2</sup> two Acts were passed to nationalize road transport. One Act applied to one part of the State and the other to the other part of the State because the conditions differed materially in the two parts. The Acts were upheld by the Supreme Court.

Where classification of territory was made into dangerously disturbed areas under the East Punjab Public Safety Act of 1949 and providing for a simpler, shorter and speedier trial of offences committed in disturbed areas, it was held valid as the basis of classification was rational and based on intelligible differentia.<sup>3</sup>

In *State of Kerala v. T. P. Roshana*,<sup>4</sup> the Supreme Court has held that the linkage or distribution of seats on the basis of University-wise student strength for admission of students to medical colleges is violative of Art. 14 of the Constitution. There are two Universities in the State of Kerala—the Kerala and the Calicut Universities—to which the four medical colleges are affiliated, there under the jurisdiction of Kerala University and one to the Calicut University. Calicut University cater to the academic requirement of the Malabar area which is regarded as notoriously backward from the point of view of college education. The number of colleges which provide pre-degree courses necessary by way of qualification for entrance into medical colleges in Malabar area are relatively fewer than in the remaining part of the State where there are numerous colleges and pre-degree students. Following the *Chanchalas case* Krishna Iyer, J. held that the scheme violated Art. 14 because there was no nexus between the registered student strength and the seats to be allotted. The fewer the colleges the fewer the pre-degree and degree students. And so, the linkage of the division of seats with the registered student strength would make an irrational inroad into the University-wise allocation. Such a formula would be punishment for backwardness, not a promotion of their advancement.

(b) **Discrimination by the State in its own favour.**—The State as a person constitutes a different class as compared with private citizens. In *Saghir Ahmad*

1. AIR 1955 SC 795. See also *D. P. Joshi v. State of M. B.*, AIR 1955 SC 334.
2. AIR 1956 SC 298.
3. *Gopichand v. Delhi Administration*, AIR 1959 SC 609.
4. AIR 1979 SC 765.

tional Tax) Act, 1960, as amended by Kerala Plantation (Additional Tax) Act, 1967, the Kerala Government imposed a uniform tax on all the plantations at the rate of Rs. 50 per hectare. 'Plantations' means land used for growing seven kinds of crops—(1) Cocoanut, (2) Arecanut, (3) Rubber, (4) Coffee, (5) Tea, (6) Cardamom and (7) Pepper. The petitioners challenged the validity of the Act on the ground that it makes unreasonable classification (of plantation) : that unequals have been treated as equals and that a flat rate tax imposed on all plantations irrespective of their yield is arbitrary. The Supreme Court held that the Act does not contravene Art. 14. The Act, no doubt, deals with seven different kinds of plantations and imposes a uniform rate of Rs. 50 per hectare but it lays down principle on which equal treatment is ensured. In the case of cocoanut, arecanut, rubber, coffee and pepper plantations, plants capable of yielding produce are to be counted and then the hectares are determined by dividing the total number of plants by a certain figure. This is intended to equalise different plantations for purpose of taxability. In the remaining two cases the extent of land yielding the crops is itself taken as the measure for the tax because it is considered fair and just to treat one actual hectare of crop yielding plantation as equal to other areas converted into hectares on the basis of the number of plants or trees. Differences in yield between one plantation and another having the same crop, no doubt, arise from situation, altitude and rainfall but they are not the only factors. The law does not single out any particular plantation for hostile or unequal treatment. There is no discrimination, notwithstanding the uniform rate for each plantation based on the actual crop-yielding area and the Act therefore is valid.

In *Jaipur Hosiery Mills v. State of Rajasthan*,<sup>1</sup> a Notification was issued by the State Government under the Rajasthan Sales Tax Act exempting from sales tax any garment whether prepared within or imported from outside Rajasthan, the value of which did not exceed Rs. 4 in single piece but this exemption was not given to "hosiery" products. The appellant challenged the validity of the Act on the ground that there was no basis of classification between garments as such and knitted garments. The Supreme Court, held that the classification between garments in general the value of which does not exceed Rs. 4 in a single piece and 'hosiery products' including hosiery garments is valid. Hosiery products are generally knitted articles and are thus different from woven articles. It is not for the court to decide whether the hosiery articles should have been given the exemption in the same way as other garments.

In *V. J. Ferreira v. Bombay Municipality*,<sup>2</sup> the validity of section 27 of the Bombay Building Repairs and Reconstruction Board Act, under which a tax was imposed on residential buildings, though they were in sound and good condition and would not require structural repairs, was challenged as violative of Article 14 of the Constitution. The Act has classified the buildings into three categories : (1) residential tenanted buildings, from the rest, (2), existing buildings, i. e., those built after the date on which the Act was brought into force, and (3) by dividing those which are liable to tax into three categories according to the three periods in which they were constructed.

The Court held that the classification of residential buildings from the rest and those existing at the time when the Act was brought into force from

1. AIR 197

2. AIR 197

the new ones which might be built thereafter can be regarded as based on intelligible differentia and related to the objective which the legislature had sought to achieve. The primary object of the Act is not to repair all buildings subject to tax but to prevent the annually recurrent mischief of house collapse and the human tragedy and deprivations they cause. Thus the tax is being levied to prevent such disasters. There is no question of unequal treatment between one class of owners and another. The classification of buildings into three categories is based on their age and construction current during the periods of their erection. It is, therefore, based on intelligible differentia and closely related to the objects of the legislature.

In *G. K. Krishnan v. State of Tamil Nadu*,<sup>1</sup> the Government by a Notification, under the Madras Motor Vehicles Taxation Act, 1931, enhanced the tax on omnibuses from Rs. 30 per seat per quarter to Rs. 100 per seat per quarter. The petitioner, who was the owner of an omnibus, challenged the validity of this Notification on the ground that the distinction between contract carriages and stage carriages in the matter of levy of vehicle tax is discriminatory and therefore hits Article 14 of the Constitution. It was contended that there was no reason for imposing vehicle tax at a higher rate on contract carriages than on stage carriages because both are similarly situated with respect to the purpose of vehicle taxation, namely, the use of the road and, therefore, a higher vehicle tax on contract carriages is manifestly discriminatory. In short, the argument was that the classifications of the vehicles as stage carriages and contract carriages for the purpose of a higher levy of vehicle tax on contract carriages has no reasonable relation to the purpose of the Act.

The Court, however, held that the levy of enhanced tax on contract carriages was valid and does not offend Article 14. In the absence of any material placed before the Court, the classification between stage carriages and contract carriages for the purpose of imposing higher tax on the latter is presumed to be reasonable. The classification was based on '*local conditions*' of which the Government was fully cognizant. The classification is made on the basis of the capacity of the contract carriages which are running more miles and therefore using the road more than the stage carriages which have got a time schedule, specified routes and minimum and maximum number of trips. The differentiation thus made had a reasonable relation to the object of the Act which was to avoid unhealthy competition between omnibuses and regular stage carriage buses and to put down the misuse of omnibuses.

In *Income Tax Officer, Shillong v. N. T. R. Rymbal*,<sup>2</sup> the respondent challenged the constitutional validity of section 10 of the Income-tax Act, 1961, on the ground that it is violative of Art. 14 of the Constitution and invalid. The respondent belongs to Jaintia Scheduled Tribe and is a permanent resident of United Khasi-Jaintia Hills Autonomous district under the Sixth Schedule of the Constitution (one of the tribal areas) within the State of Meghalaya. He joined service under the Government of Assam in 1941. In the assessment year 1970-71 he was posted at Shillong as Secretary to the Government of Assam. The Assam Secretariat building which was the place of his work, was in that part of the town which is not included in Shillong Municipality and therefore is not a part of the tribal area as described in part 20 of the Sixth

1. AIR 1975 SC 583. See also *State of Karnataka v. D. Sharma*, AIR 1975 SC 594.

2. AIR 1976 SC 670.

tional Tax) Act, 1960, as amended by Kerala Plantation (Additional Tax) Act, 1967, the Kerala Government imposed a uniform tax on all the plantations at the rate of Rs. 50 per hectare. 'Plantations' means land used for growing seven kinds of crops—(1) Coconut, (2) Areca-nut, (3) Rubber, (4) Coffee, (5) Tea, (6) Cardamom and (7) Pepper. The petitioners challenged the validity of the Act on the ground that it makes unreasonable classification (of plantation) : that unequals have been treated as equals and that a flat rate tax imposed on all plantations irrespective of their yield is arbitrary. The Supreme Court held that the Act does not contravene Art. 14. The Act, no doubt, deals with seven different kinds of plantations and imposes a uniform rate of Rs. 50 per hectare but it lays down principle on which equal treatment is ensured. In the case of coconut, areca-nut, rubber, coffee and pepper plantations, plants capable of yielding produce are to be counted and then the hectares are determined by dividing the total number of plants by a certain figure. This is intended to equalise different plantations for purpose of taxability. In the remaining two cases the extent of land yielding the crops is itself taken as the measure for the tax because it is considered fair and just to treat one actual hectare of crop yielding plantation as equal to other areas converted into hectares on the basis of the number of plants or trees. Differences in yield between one plantation and another having the same crop, no doubt, arise from situation, altitude and rainfall but they are not the only factors. The law does not single out any particular plantation for hostile or unequal treatment. There is no discrimination, notwithstanding the uniform rate for each plantation based on the actual crop-yielding area and the Act therefore is valid.

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The Court held that the classification of residential buildings from the rest and those existing at the time when the Act was brought into force from

1. AIR 1971 SC 1330.  
2. AIR 1972 SC 845.

be taken under section 33 (6). The reason is that tax evasion by the unregistered dealer is more difficult to detect than tax evasion by a registered dealer. In case of a registered dealer the Sales Tax Authorities have basic information in pursuance of which they can exercise due vigilance, check and detect any tax evasion by him within a reasonable time fixed in section 35.

(d) Special Courts and Special Procedure.—Under Art. 246 (2) Parliament, by law, is empowered to set up Special Courts and to provide special procedure for the trial of certain 'offences' or 'classes of offences'. Such a law will not be violative of Art. 14 if it lays down proper guidelines for classifying 'offences', 'classes of offences' or 'classes' of cases to be tried by Special Courts.<sup>1</sup> Likewise, the special procedure prescribed by such a law should also not be substantially different from the ordinary procedure prescribed by ordinary Law. The first leading case on this topic is *State of West Bengal v. Anwar Ali*.<sup>2</sup> In this case the validity of the trial of the respondent, Anwar Ali and 49 others, by the Special Courts established under section 5 (1) of the West Bengal Special Courts Act, 1950, was at issue. The Act was passed "to provide for the speedier trial of certain offences" as stated in the Preamble. Sections 6 to 15 prescribed the special procedure which courts had to follow in the trial of the cases referred to. The Supreme Court held that section 5 (1) of the Act contravened Art. 14 and was void since it conferred arbitrary powers on the Government to classify offences or cases at its pleasure and the Act did not lay down any policy or guidelines for the exercise of discretion to classify cases or offences. The majority held that the procedure laid down by the Act for the trial by the Special Courts varied substantially from the procedure laid down for the trial of offences generally by the Criminal Procedure Code. The Court said that the Act did not classify or lay down any basis for classification nor did it mention clearly what kinds of cases were to be directed for trial by the Special Courts. It thus left it to the uncontrolled discretion of the State Government to direct any type of cases which it liked to be tried by the Special Court. The object as stated in the Preamble of the Act "speedier trial of certain offences" was a very vague and uncertain principle to constitute a reasonable basis for rational classification. Further, the Court held that a rule of procedure laid down by law comes as much within the purview of Art. 14 as any rule of substantive law, and it is necessary that all litigants who are similarly situated are entitled to the same procedural rights with like protection without discrimination.

In *Kathi Ranning v. State of Saurashtra*,<sup>3</sup> the validity of Section 11 of the Saurashtra State Public Safety (Third Amendment) Ordinance, 1949, which provided for establishment of Special Courts of criminal jurisdiction for certain special areas to try certain 'classes of offences' in accordance with a simplified and shortened procedure was involved. The object as mentioned in the Ordinance was to provide for "public safety, public order and preservation of peace and tranquillity" in the State of Saurashtra. It thus referred to four distinct categories of 'offences' or 'cases' which could be directed by the Government to be tried by the Special Court established under the Ordinance.

1. *In re-Special Courts Bill 1978*, AIR 1979 SC 478; *Magan Lal Chhagan Lal (P) Ltd. v. Municipal Corporation of Greater Bombay*, AIR 1974 S. C. 2009.
2. AIR 1952 S. C. 75.
3. AIR 1952 S.C. 123. See also *K. Haldar v. State of West Bengal*, AIR 1960 S.C. 457.

Schedule. The Income-tax Authorities sought to tax respondent's income from salary derived from the non-scheduled area. They contended that such income is not covered by the exemption provided under section 10 (26) (a) of the Income-tax Act, 1961. According to section 10 (26) (a) of the Act, a person is entitled to the exemption only if three conditions are fulfilled :—(1) He should be a member of Scheduled Tribe. (2) He should be residing in the tribal areas. (3) The income in respect of which the exemption is claimed, must be an income which accrues or arises to him from any source in that area.

The assessee filed a petition under Article 226 challenging the assessment order and demand for the tax on the ground that it is violative of Art. 14 of the Constitution. The High Court struck down sub-clause (9) of the Act and held that this exemption has been enacted for the benefit of the Scheduled Tribes residing in specified areas. The object of the exemption clause will be frustrated and made nugatory if the income of a member of the Scheduled Tribe is made subject to tax merely because the source of such an income is outside that area. In the opinion of the High Court the classification between members of the Scheduled Tribes whose income accrues or arises from any source from tribal areas and members of the Scheduled Tribe whose income accrues or arises from any source outside the tribal area was not based on any intelligible differentia and therefore unconstitutional.

On appeal, the Supreme Court reversed the judgment of the High Court and held that the classification made under the aforesaid sub-Clause (a) is based on intelligible differentia and is constitutionally valid. The court rejected the argument of the respondent that making of the exemptions conditional upon the classifications provided by in sub-clause (a) of the Act would deter the members of Scheduled Tribes from joining the main stream of national life, or would be inconsistent with the directive principles embodied in Article 46. This Article contains the directive principles for the promotion of educational and economic interest of the weaker sections of the people particularly the Scheduled Castes and Scheduled Tribes. Its primary objective is to provide protection to the weaker sections of society. Members of the Scheduled Tribes who are enterprising and resourceful enough to move out of the seclusion of the tribal areas and successfully compete with their Indian brethren outside those areas and rise to remunerative positions in service or business, cease to be "weaker section".

*State of Gujarat v. Ramjibhai*<sup>1</sup> (1979) the appellant, who were unregistered dealer, challenged the validity of Sec. 336 of the Bombay Sales Tax Act, 1959 (corresponding to Sec. 14 (6) of the 1953 Act) on the ground that it makes unreasonable classification between registered dealers and unregistered dealers and therefore violates Art. 14 of the Constitution. Under section 33 (6) no limitation is prescribed for taking action while section 35 prescribes a limitation within which action can be taken by Sales Tax Authorities, against dealers who evade tax. The Court held the classification valid because putting the unregistered dealer who fails to get himself registered and does not pay any tax is a separate class under section 33 (6) differently from the dealers falling under section 35 rests on intelligible differentia having a rational nexus with the object of preventing tax-evasion. Section. 33 (6) is confined to a particular class of tax evaders, namely unregistered dealers, while section 35 is general provision dealing with escaped assessment. There is rational basis for not putting any restriction as to the length of time within which action can

1. AIR 1979 S. C. 1099,

tution and organisation, that is to say, the creation and setting up of Special Courts. Clause (2) of the Bill is therefore within the competence of the Parliament. The Court rejected the argument regarding the exhaustiveness of the provisions of Chapter IV of Part V and held that the Parliament is competent to pass laws in respect of matters enumerated in Lists I and III notwithstanding the fact that by such laws, the jurisdiction of the Supreme Court is enlarged in a manner not contemplated by or beyond what is contemplated by various Articles in Chapter IV of Part V. The Constitution does not provide that notwithstanding anything contained in Art. 246 (1) and (2) the Parliament shall have no power or competence to enlarge the jurisdiction of the Supreme Court, quantitatively or qualitatively, except in accordance with and to the extent to which it is permissible to it to do so under any of the provisions of Chapter IV, Part V. The provisions of Chapter IV, Part V must therefore be read in harmony and conjunction with the other provisions of the Constitution and not in derogation thereof. Parliament is competent to provide by Cl. 10 (1) of the Bill that an appeal shall lie as of right from any judgment or order of a Special Court to the Supreme Court both on fact and on law. A law which confers additional powers on the Supreme Court by enlarging its jurisdiction is evidently a law with respect to the jurisdiction and powers of that Court within the meaning of Entry 77 of List I. The language of Entry 77 of List I is very wide and unqualified. It is not circumscribed by the qualification, with respect to any of the matters in this List, that is, List I. Thus power of Parliament to legislate with respect to a matter contained in Entry 77, which is 'jurisdiction and powers of the Supreme Court' can be exercised without reference to any of the matters contained in List I or in any other List. There can be no justification for curtailing the amplitude of the Parliament's power in relation to the subject-matter of Entry 77 by reason of anything contained in Chapter IV, Part V. Parliament also possesses the legislative competence to provide by Clause 6 of the Bill for the transfer of pending appeals and revisions in the courts to the Supreme Court. Clause 6 falls squarely within the field of legislation contained in Entry 77 of List I. If there is power in the Parliament to establish a new court, it would certainly have power to provide for an appeal to the Supreme Court from the decision of that Court.

The Court upheld the classification made by Sec. 4 (1) of the Bill as it classifies both 'offences' and a class of offenders, the former in relation to the period in the Preamble, that is to say, from Feb. 27, 1975 to June 25, 1975 during emergency and in relation to the objective mentioned in the Preamble that it is imperative for the functioning of Parliamentary democracy and the institutions created by or under the Constitution of India that the commission of such offences should be decided speedily; and the latter in relation to their status, that is to say, in relation to the high public or political office held by them in India. It is only if both these conditions exist the prosecution can be instituted in the Special Courts. Offences alleged to have been committed during the period of emergency constitute a class by themselves and so do the persons who are alleged to have utilised the high public or political office held by them as a cover or opportunity for the purpose of committing those offences. The cover of emergency provided a unique opportunity to the holders of such offices to subvert the rule of law and perpetrate political crimes on the society. Thus the persons who are singled out by the Bill for trial before special court possess common characteristics and those who fall outside that group do not possess them since they lacked the authority which comes from official position. The object of the Bill is to ensure a speedy trial of the offences and offenders who constitute a single

The Supreme Court held that the Act was not violative of Art. 14 of the Constitution. The Court said the main distinction between the West Bengal case and the present Ordinance was that while in former there was no principle to be found to control the application of discriminatory provisions or to correlate these provisions to some reasonable, tangible and rational objective ; the latter clearly laid down the guiding principle, that is, to provide for public safety, maintenance of public order and preservation of peace and tranquillity in the State. The mere mention of the speedier trial as the object in the West Bengal Act did not cure the defect, because the expression afforded no help in determining what cases required speedier trial. Thus the main object to the West Bengal Act was that it permitted discrimination without reason or without any rational basis.

*In re Special Courts Bill, 1978*<sup>1</sup> the question referred to the Supreme Court for its advisory opinion was whether the Special Courts Bill, 1978 or any of its provisions, if enacted, would be constitutional. The object of the Bill as stated in the preamble was to empower the Government to set up Special Courts for the trial of emergency offences committed by persons who have held high public or political offices in the country. It was stated therein that it was imperative for the functioning of parliamentary democracy and the institution created by or under the Constitution of India that the commission of offences referred to above should be judicially determined with the utmost despatch. Clause (2) of the Bill empowered the Central Government to create adequate number of courts to be called Special Courts. Clause 10 (1) of the Bill provided that notwithstanding anything contained in the Code of Criminal Procedure, 1973 an appeal shall lie as a matter of right from any judgment or order of the Special Court to the Supreme Court both on fact and on law. Clause 6 provided that if at the date of declaration in respect of any offences an appeal or revision was pending in any court of appeal or revision, the same shall stand transferred for disposal to the Supreme Court.

At the hearing stage of the Presidential reference in the Supreme Court a number of objections were raised against the provisions of the Bill. It was contended, that Parliament has no legislative competence to set up Special Courts in view of the provisions in Chapter IV, Part V of the Constitution called 'the Union Judiciary' which are very exhaustive and therefore no more or no greater jurisdiction can be conferred on the Supreme Court than the provisions of that Chapter authorise or warrant. Secondly, the provisions of the Bill are violative of Art. 14, and Art. 21 of the Constitution. It was contended that the Bill makes unreasonable classifications and there is no relationship between the basis of the classification and the object of the Bill : The Bill furnishes no guidance for making the declaration under Section 4 (1) for deciding who and for what reasons should be sent up for trial to the Special Courts and the guidelines prescribed by it are vague and indefinite. It was urged that the procedure prescribed by the Bill for trial before the Special Courts is violative of Art. 21 because it is unfair and unjust and hence unconstitutional.

The seven-Member Bench of the Supreme Court unanimously held that Parliament has legislative competence to enact the Bill. Entry 11-A of the Concurrent list relates to Administration of Justice, constitution and organisation of all courts, except the Supreme Court and the High Court. By virtue of Art. 246 (2) Parliament has the power to make laws with respect to the Constit-

1. AIR 1979 S. C. 478.

tution and organisation, that is to say, the creation and setting up of Special Courts. Clause (2) of the Bill is therefore within the competence of the Parliament. The Court rejected the argument regarding the exhaustiveness of the provisions of Chapter IV of Part V and held that the Parliament is competent to pass laws in respect of matters enumerated in Lists I and III notwithstanding the fact that by such laws, the jurisdiction of the Supreme Court is enlarged in a manner not contemplated by or beyond what is contemplated by various Articles in Chapter IV of Part V. The Constitution does not provide that notwithstanding anything contained in Art. 246 (1) and (2) the Parliament shall have no power or competence to enlarge the jurisdiction of the Supreme Court, quantitatively or qualitatively, except in accordance with and to the extent to which it is permissible to it to do so under any of the provisions of Chapter IV, Part V. The provisions of Chapter IV, Part V must therefore be read in harmony and conjunction with the other provisions of the Constitution and not in derogation thereof. Parliament is competent to provide by Cl. 10 (1) of the Bill that an appeal shall lie as of right from any judgment or order of a Special Court to the Supreme Court both on fact and on law. A law which confers additional powers on the Supreme Court by enlarging its jurisdiction is evidently a law with respect to the jurisdiction and powers of that Court within the meaning of Entry 77 of List I. The language of Entry 77 of List I is very wide and unqualified. It is not circumscribed by the qualification, with respect to any of the matters in this List, that is, List I. Thus power of Parliament to legislate with respect to a matter contained in Entry 77, which is 'jurisdiction and powers of the Supreme Court' can be exercised without reference to any of the matters contained in List I or in any other List. There can be no justification for curtailing the amplitude of the Parliament's power in relation to the subject-matter of Entry 77 by reason of anything contained in Chapter IV, Part V. Parliament also possesses the legislative competence to provide by Clause 6 of the Bill for the transfer of pending appeals and revisions in the courts to the Supreme Court. Clause 6 falls squarely within the field of legislation contained in Entry 77 of List I. If there is power in the Parliament to establish a new court, it would certainly have power to provide for an appeal to the Supreme Court from the decision of that Court.

The Court upheld the classification made by Sec. 4 (1) of the Bill as it classifies both 'offences' and a class of offenders, the former in relation to the period in the Preamble, that is to say, from Feb. 27, 1975 to June 25, 1975 during emergency and in relation to the objective mentioned in the Preamble that it is imperative for the functioning of Parliamentary democracy and the institutions created by or under the Constitution of India that the commission of such offences should be decided speedily; and the latter in relation to their status, that is to say, in relation to the high public or political office held by them in India. It is only if both these conditions exist the prosecution can be instituted in the Special Courts. Offences alleged to have been committed during the period of emergency constitute a class by themselves and so do the persons who are alleged to have utilised the high public or political office held by them as a cover or opportunity for the purpose of committing those offences. The cover of emergency provided a unique opportunity to the holders of such offices to subvert the rule of law and perpetrate political crimes on the society. Thus the persons who are singled out by the Bill for trial before special court possess common characteristics and those who fall outside that group do not possess them since they lacked the authority which comes from official position. The object of the Bill is to ensure a speedy trial of the offences and offenders who constitute a single

and special class. Thus there is a close relationship between the basis of classification under Cl. (4) (1) and the object of (speedier trial) of the Bill as stated in the 6th paragraph of the Preamble of the Bill. The Act lays down proper guidelines for the exercise of the discretion by the Executive. By clause 5, only those offences can be tried by the Special Court in respect of which the Central Government has made a declaration under Cl. (4) (1) of the Bill that declaration can be made by the Central Government only if it is of the opinion that there is a *prima facie* evidence of the commission of an offence during the period mentioned in the preamble by a person who held a high public or political office in India.

The Court held that the classification made by Cl. 4 (1) of the Bill is valid to the limited extent to which the Central Government is empowered to make the declaration in respect of offences alleged to have been committed during the period of emergency by persons holding high public or political offices. The classification is invalid in so far it covers offences committed by such persons between Feb. 27 and June 25, 1975. Thus, the Court unanimously rejected the provisions of the Bill "to ante-date the emergency" from June to Feb., 1975. The Bill sought to regard the "preparations" for emergency as starting from Feb. 1975, instead of from June 5, 1975 the date of the proclamation of the emergency. By "artificially" seeking to extend the category of emergency offences to include acts prior to the declaration of the emergency, the Court held, the Bill destroyed the basis of a rational classification of emergency offences and hence, violative of right to equality under Art. 14.

Once the classification is upheld the court held no grievance can be entertained under Art. 14 that the procedure prescribed by the Bill for the trial of offences is harsher or more disadvantageous as compared with the procedure for ordinary trials.

However, the Bill has got to meet the challenge of other provisions of the Constitution also. The theory that articles conferring fundamental rights are mutually exclusive and that any particular article in Part III constitutes a self-contained code having been discarded, it becomes necessary to examine whether the procedure prescribed by the Bill is violative of any other provision of the Constitution. Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. In *Maneka Gandhi's case* (A.I.R. 1978 S.C. 597) it had been held by the majority that the procedure contemplated by Art. 21 must be right and just and fair and not arbitrary, fanciful or oppressive, otherwise, it would be no procedure at all. It is therefore imperative to examine whether the procedure prescribed in the Bill is just and fair or is in any respect arbitrary or oppressive. The Court by majority held that the provisions of the Bill are unfair and unjust in three important respects. *Firstly* there is no provision in the Bill for the transfer of cases from one Special Court to another. The manner in which a judge conducts himself may dissolve a bias, in which case the interest of justice would require that the trial of case ought to be withdrawn from him. *Secondly*, clause 7 of the Bill empowers the Government to appoint retired judges of the High Court to preside over a Special Court. While sitting judge enjoys, a security of tenure a retired judge will hold office as a judge of the Special Court during the pleasure of the Government. The pleasure doctrine is subversive of judicial independence. Clause 7 thus violates Art. 21 of the Constitution and is, therefore, void. *Thirdly*, Cl. 7, empowers the Central Government to appoint judge of the special courts 'in consultation' with the Chief Justice of India. The process of 'consultation' has its own limitations, and may not act as an effective check on the Executive. There is no provision to obtain his 'concurrence'.

These are the three procedures of infirmities from which the Bill suffers and which are violative of Art. 21, in the sense that they make the procedure prescribed by the Bill unjust and unfair to the accused. This Bill is valid in all other respects.

If the above mentioned three procedural changes are made in the Bill it would be valid, *firstly* that only sitting and not retired High Court Judges would be appointed to the special courts, *secondly*, such appointments must be made with the "concurrence" and not simply "in consultation" with the Chief Justice of India; *thirdly* the accused must be given right to apply to the Supreme Court to get his case transferred from one Special Court to another Special Court. All these three amendments, the majority held; would render the procedure prescribed in the Bill "fair and just". All three procedural amendments required by the court were acceptable to the Central Government. Since the Government had accepted the court's suggestion on all three points there was no question that the proposed measure would be unjust or arbitrary. Justice P. N. Singh, who concurred with the majority view on most aspects, gave a dissenting judgment on the point of the status of the Special Courts to try emergency cases referred by the Government. He held that the two clauses of the Bill Cl.—(5) and (7) are unconstitutional because they enabled the Central Government to decide which of its nominated judges shall try which accused" and as such amounts to a "serious transgression on the independence of the judiciary. He preferred the creation of additional courts of the same category as the "ordinary criminal courts" with necessary procedural changes to avoid delay in the trials. He observed that a successor Government ordering trial of their adversaries should do all that could convince everyone including the accused that they had the best of intentions and provided not only a fair procedure but the cleanest of judges. Justice Singh's "thoughtfull observation were commended by the Chief Justice in the main opinion of the Court. The majority, however, contended itself by suggesting, that the trial of the emergency personalities is not best" done by investing the High Courts with special jurisdiction. Instead of the Government nominating a particular judge, the Chief Justice of a High Court could exclusively assign a Judge.

(e) **Administrative Discretion.**—Many a times the Act or statute instead of making the classification itself leaves this matter to the Executive officers. In such cases if the Act has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the manner of selection or making classification then the statute conferring such power is not void as offending Art. 14. But where there is no policy or principle laid down for the exercise of the discretion by executives under the Act, the court will declare the law invalid. However, if the officer to whom the discretion is given himself acts arbitrarily in exercising the discretion then what has to be struck down is the statute itself but the executive action.<sup>1</sup>

In *Anwar Ali's case*,<sup>2</sup> discussed above, we have noted that a law was struck down by the Supreme Court on the ground that it did not lay down any definite policy or principle for guidance of the exercise of discretion by Government while in the *Kathi Ranning's case*,<sup>3</sup> similar law was upheld by the Supreme Court because the Court found in the statute a definite principle or objective clearly stated "to provide for public safety, maintenance of public order and preservation of peace and tranquillity in the State" for the guidance of Govern-

1. *Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 S. C. 538.

2. AIR 1952 S. C. 75.

3. AIR 1952 S. C. 123.

ment or its officers in the exercise of their discretionary powers. The principle applied by the Court in both the cases is the same, namely, the laws should lay down the policy in clear and definite terms for the guidance of exercise of discretion by the executive officers.

The *Kerala Education Bill* gave a broad power to the Government to control private schools. According to the Bill, the Government could recognise or not a newly established school, or it could take over any schools. It was contended that the wide discretion given to the Government offended Art. 14 of the Constitution. The Court rejected this contention and held that the general policy of the Bill was laid down in its preamble and title. The power given to the Government to take over schools could be exercised only for the purposes mentioned in the Bill and hence it is not hit by Art. 14 unless in implementing the policy, discrimination is in fact made.<sup>1</sup>

In *Organo Chemical Industries v. Union of India*,<sup>2</sup> the petitioner challenged the validity of an order passed by the Regional Provident Fund Commissioner by which he imposed a penalty on him as damages under section 14 B of the Employee's Provident Funds Act, 1952, for delayed remittance of the employee's provident fund, on the ground that the power conferred on the P. F. Commissioner is unguided, arbitrary and hence is violative of Article 14 of the Constitution. The Supreme Court held that the power conferred under section 14 B of the Act on the Provident Fund Commissioner to impose damages on an employer defaulting in payment of contributions to the provident fund is not unguided nor arbitrary and hence, is not violative of Article 14. The power of the P. F. Commissioner to impose damages under section 14 B is a quasi-judicial function and must be exercised after notice to the defaulter and after giving him reasonable opportunity of being heard. The discretion to award damages could only be exercised within the limits fixed by the Act. An order under section 14 B must be a 'speaking order' containing the reasons in support of it. While fixing the amount of damages, the P. F. Commissioner usually takes into consideration various factors the word damage in section 14B lays down sufficient guidelines for him to levy damages. The mere absence of provision for an appeal does not imply that the P. F. Commissioner is vested with arbitrary or uncontrolled power, without any guidelines. It is dependent on existence of certain facts. There has to be an objective determination, not subjective. The P. F. Commissioner has not only to apply his mind to the requirement of section 14 B but is cast with the duty of making a "speaking order" after conforming to the rules of natural justice.

(f) A single individual may constitute a class.—*Chiranji Lal v. The Union of India*<sup>3</sup> is the leading case on this point. The facts of the case were that owing to mismanagement in Sholapur Spinning and Weaving Company Limited the management threatened to close down the Mill. The Government of India passed the Sholapur Spinning and Weaving Co. (Emergency Provision) Act empowering the Government to take-over the control and management of the company and its properties by appointing their own directors. The Act was challenged by a shareholder of the company on the ground that a single company and its shareholder is being denied equality before the law, because the Act treated them differently *vis-a-vis* other companies and their shareholders. It was pointed out that the law in the case has selected one particular company

1. In re, Kerala Education Bill, AIR 1958 S. C. 956.

2. AIR 1979 S. C. 1803.

3. AIR 1951 S.C. 41. See also *Ram Krishna Dalma v. Justice Tendolkar*, AIR 1958 S. C. 538.

and its shareholders and has taken away from them the right to manage their own affairs but the same treatment has not been meted out to all other companies or shareholders in an identical manner.

The Supreme Court held the Act valid. It said that a law may be constitutional even though it applies to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class itself, unless it is shown that there are others who are similarly circumstanced. The presumption is always in the favour of the enactment and the burden is on the petitioner who attacks the validity of the legislation to place all materials before the Court which would show that the selection is arbitrary and unreasonable. The legislature is free to recognise the degree of harm and it may confine its restrictions to those cases where the need is deemed to be the clearest.<sup>1</sup> In the present case the Sholapur Company formed a class by itself, because the mismanagement of the Company's affairs prejudicially affected the production of an essential commodity and had caused a serious unemployment amongst labourers. Mukherjee, J., observed, "we should bear in mind that a corporation, which is engaged in production of a commodity vitally essential to the community, has a social character of its own and it must not be regarded as the concern primarily or only of those who invest their money in it. If its possibilities are large and it had a prosperous and useful career for a long period of time and is about to collapse not for any economic reason but through sheer perversity of the controlling, one cannot say that the legislature has no authority to treat it as a class by itself and make special legislation applicable to it alone in the interest of the community at large."

The picking of Bakshi Ghulam Mohammad out of the entire cabinet for the purpose of enquiry is not discriminatory or violative of Art. 14. The notification under section 3 of Jammu and Kashmir Inquiry Act of 1962 whereby an Enquiry Commission was appointed to go into the charges of corruption cannot be called bad as 'violating equality before law'. It was held that Bakshi Ghulam Mohammad formed a class by himself and there was no question of violation of Art. 14. of the Constitution.<sup>2</sup>

In *Ammeerunnisa Begum v. Mahboob Begum*,<sup>3</sup> on the death of the Nawab of Hyderabad a dispute between two rival parties regarding succession to his property arose which resulted in protracted litigation. In order to put an end to this long-standing litigation the Hyderabad Legislature passed the Wali-ud-Dowla Succession Act, 1950. By this Act the claims of one party, i.e., two ladies was dismissed and the property was adjudged to the other party. The Act was challenged on the ground that it deprived the petitioners the right to enforce their claims in a court of law and thus discriminated them from the rest of the community in respect of a valuable right which the law secures to all. The Government justified the classification mainly on the ground that the Act was passed to put an end to a long-standing litigation. The object of the Act was thus to put an end to this long-standing dispute. The Supreme Court held the Act unconstitutional on the ground that it did not furnish any reasonable basis for the discrimination made by it. The Court said that the continuance of a dispute even for a long time between two sets of rival claimants to the property of a private person is not such an unusual circumstance by

1. *Radice v. New York*, 264 U. S. 290 at 292.

2. *State of J. and K. v. Bakshi Ghulam Mohammad*, AIR 1967 S. C. 122. See also *B. K. Dev v. State of Orissa*, AIR 1964 S. C. 1501.

3. AIR 1953 S. C. 91.

itself justifying its differentiation from all other cases of succession disputes. The exceptional circumstances which were present in the *Chiranji Lal's* case were not present in this case. Where the law affects the community as a whole the court will assume the existence of some reasonable ground for sustaining the classification made by it. In *Chiranji Lal's* case, the Court justified its decision on the ground that the closure of the company had affected the production of an essential commodity and caused serious unemployment amongst labourers. In the present case, the dispute was between private parties and no interest of the community was involved.

In *Ram Prasad v. State of Bihar*,<sup>1</sup> the Supreme Court applied the same principle and held the Bihar Sathi' Land (Restoration) Act, 1950, invalid. In 1946 the appellants were granted a lease of land by the Court of Wards. There was an agitation amongst the tenants of the locality against the lease held by the appellants. The matter was referred to the Congress Working Committee. In the view of the Congress Committee the settlement was illegal and accordingly the lessees were asked to vacate the land. The lessees refused to vacate the land thereupon the Bihar Legislature passed the impugned Act. By the Act the appellant's lease was cancelled. The Supreme Court held the Act unconstitutional on the ground that the dispute was a legal dispute between two private parties and it was a matter for determination by duly constituted courts in accordance with normal procedure. But what the Legislature has done was to single out certain individuals and deprived them of the right which every Indian citizen possesses to have his rights adjudicated upon by a court of law according to law applicable to him. Delivering the majority judgment of the Court Patanjali Sastri, C. J., said : "This is purely a dispute between private parties a matter for determination by duly constituted courts to which it is entrusted, in every free and civilized society ; the important function of adjudging on disputed legal rights after observing the well-established safeguards which include the right to be heard, the right to produce witnesses and so forth. This is the protection which the law guarantees equally to all persons. The appellants have been denied this protection. A political organisation of the party in power decides after making such inquiry as it thought fit that the settlement in question was contrary to the provisions of law and public policy and the State Legislature basing itself on the decision purports to declare the settlement 'null and void' and directs the eviction of the appellants and the restoration of the land to the other parties, legislation such as this is calculated to drain the validity form the rule of law which the Constitution so notably proclaims and it is hoped that the democratic process in this country will not function along these lines." On behalf of the Government the Attorney-General contended that the presumption is always in favour of the constitutionality of the enactment. But the Court said that where on the face of a statute there is no classification at all, and no attempt has been made to select any individual or group with reference to any differentiating attribute peculiar to that individual or group and not possessed by others, this presumption is of little or no assistance to the State.....and to carry the presumption to the extent of holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the protection clauses of the 14th amendment a mere rock of sand."

#### A. INSTANCES—GENERAL

*R. C. Cooper v. Union of India*<sup>2</sup> (The Bank Nationalisation case)—On July

1. AIR 1953 S. C. 215.
2. AIR 1970 S. C. 564.

19, 1969 the Central Government issued an Ordinance nationalising 14 named Commercial Banks having deposits exceeding Rs. 50 crores. On August 9, 1969, the Ordinance was replaced by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. The petitioners challenged the validity of the Ordinance and the Act on the ground, *inter alia*, that they make unreasonable classification and thereby infringe their fundamental rights guaranteed in Art. 14 of the Constitution. On behalf of the Government it was justified on the ground that the 14 named banks were selected for special treatment because they were having deposits of not less than Rs 50 crores in comparison with other banks not selected.

The Court held that by prohibiting the 14 named banks from carrying on banking business, whereas other banks— Indian as well as foreign—are permitted to carry on banking business a flagrantly hostile discrimination is practised by the State. Section 15 (2) of the Act which by the clearest implication prohibits the named banks from carrying on banking business is, therefore, liable to be struck down. The named banks are, though in theory competent, but in substance prohibited from carrying on non-banking business.

It was held that the restriction was unreasonable and the guarantee of equality is impaired by prohibiting the named banks from carrying on the non-banking business.

*K. A. Abbas v. Union of India.<sup>1</sup>*—In this case the validity of Cinematograph Act, 1952, was challenged on the ground that it makes unreasonable classification. Under the Act, cinema films are classified into two categories, viz., 'U' films and 'A' films, according to their suitability for adults or young people. 'U' films are meant for unrestricted exhibition, while 'A' films can only be exhibited to adults. It was argued that motion picture is a form of expression and therefore, entitled to equal treatment with other forms of expression. The petitioners contended that there are other forms of speech and expression besides the films but none of them have been subjected to any prior restraint. He claimed that the treatment of motion picture on different footing from other forms of art and expression is invalid classification. The Court said, "the treatment of motion picture must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its co-ordination of the visual and aural senses. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to imitate what they have seen. Therefore classification of films into two categories of 'U' films and 'A' films is a reasonable classification. It is also for this reason that motion picture must be regarded differently from other forms of speech and expression. A person reading a book or other writing or hearing a speech or viewing a painting or sculpture is not so deeply stirred as by seeing a motion picture. Therefore, the treatment of motion picture on a different footing is a reasonable classification."

#### B. NO DISCRIMINATION ON GROUNDS OF RELIGION, RACE, CASTE, ETC. (ART. 15)

Article 15 provides for a particular application of the general principle embodied in Art. 14. When a law comes within the prohibition of Art. 15 it cannot be validated by recourse to Art. 14 by applying the principle of reasonable classification.<sup>2</sup> It is when the discrimination is based upon one of

1. AIR 1971 SC 481.

2. Srinivas Aiyer v. Saraswathi Ammal, AIR 1952 Mad. 193.

the grounds mentioned in Art. 15 the reasonableness of the classification will be tested under Art. 14.

The guarantee under Art. 15 is available to *citizens* and not to every person 'whether citizen or non-citizen' as under Art. 14.

The first clause of Art. 15 directs the State not to discriminate against a citizen on grounds only of religion, race, caste, sex or place of birth or any of them. The second clause prohibits citizens as well as the states from making such discrimination with regard to access to shops, hotels, etc., and all places of public entertainment or public resort, wells, tanks, roads, etc. The first clause of Art. 15 mentions the prohibited grounds in any matter which is exclusively within the control of the State. The second clause prohibits both the State and the private individual whosoever in the control of the public places mentioned in that clause. The third clause gives power to the State to specially protect women and children. The fourth clause had been added to Art. 15 by the Constitution First (Amendment) Act, 1951, in order to give special protection to backward classes or Scheduled Castes and Scheduled Tribes and extend them an exemption from Art. 15 and Art. 19 (2).

**Clause (1)**—By clause (1) of Article 15 the State is prohibited to discriminate as between citizens on grounds only of religion, race, caste, sex, place of birth or any of them. The word 'discrimination' means to make an adverse distinction or to distinguish unfavourable from others.<sup>1</sup> If a law makes discrimination on any of the above grounds the law would be void.

This in *Nainsukhdas v. State of U.P.*,<sup>2</sup> a law which provided for elections on the basis of separate electorates for members of different religions, communities, was held to be unconstitutional.

Similarly, in *State of Rajasthan v. Pratap Singh*,<sup>3</sup> the Supreme Court invalidated a notification under the Police Act of 1851 which declared certain areas as disturbed and made the inhabitants of those areas to bear the cost of additional police stationed there but exempted all Harijans and Muslims. The exemption was given on the basis only of 'caste' or 'religion' and hence was contrary to Article 15 (1).

The word 'only' used in this Article indicates that the discrimination cannot be merely on the ground that one belongs to a particular caste, sex, etc. In other words, if other qualifications are equal, caste, religion, sex, etc. should not be a ground for preference or disability. It follows from this that discrimination on grounds other than religion, race, caste, sex or place of birth is not prohibited. It means that a discrimination based on any of these grounds and also on other grounds is not hit by Article 15 (1).

In *D. P. Joshi v. State of M. B.*,<sup>4</sup> it was held that a law which discriminates on the ground of residence does not violate Article 15 (1). In the case a rule of the State Medical College requiring a capitation fee from non-Madhy Bharat Students for admission to the college was held valid as the ground

1. *Kathi Ranning v. State of Saurashtra*, AIR 1952 S.C. 123.

2. AIR 1953 SC 384.

3. AIR 1960 SC 1208.

4. AIR 1955 SC 334 : See also *University of Madras v. Shantha Bai*, AIR 1954 Mad. 67 ; *Anjali v. State of West Bengal*, AIR 1952 Cal. 825 ; *N. Vasundara v. State of Mysore*, AIR 1971 SC 1439.

of exemption was residence and not place of birth. Place of birth is different from residence. What Article 15 (1) prohibits is discrimination based on place of birth and not that based on residence. Similarly, the requirement of a test in the regional languages for State employment does not contravene Article 15 as the test is made compulsory for all persons seeking employment.<sup>1</sup> A law relating to evacuee property is not repugnant to Article 15 (1) though actually most of the persons to whom the provisions of the law would apply are likely to be Muslims. The law did not apply to Muslims alone on the ground of religion for if a non-Muslim falls within the definition of "evacuee" then the law would equally apply to him.<sup>2</sup>

**Clause (2).**—Article 15 (2) is a specific application of the general prohibition contained in Article 15 (1). Article 15 (2) declares that no citizen shall be subjected to any disability, restriction or condition on grounds only of religion, race, caste, sex, place of birth or any of them 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. A 'place of public resort' means places which are frequented by the public like a public park, a public road, a public bus, ferry, public urinal or railway, a hospital, etc.

It is to be noted that while clause (1) of Article 15 prohibits discrimination by the State; clause (2) prohibits both the State and private individuals from making any discrimination.

The object of Article 15 (2) is to eradicate the abuses of the Hindu social system and to herald a United Nation. The Madras Removal of Civil Disabilities Act punishes social disabilities. No law, custom or usage could authorize any person to prevent any Harijans, depressed classes or the like from having access to the public places mentioned in the Act.

**Clause (3) : Special Provision for Women and Children.**—Article 15 (3) is one of the two exceptions to the application of Article 15, clauses (1) and (2). It says that nothing in Article 15 shall prevent the State from making any special provision for women and children. Women and children require special treatment on account of their very nature. Article 15 (3) empowers the State to make special provisions for them. The reason is that "women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence and her physical well-being becomes an object of public interest and care in order to preserve the strength and vigour of the race."<sup>3</sup> Thus under Article 42 women workers can be given special maternity relief and a law to this effect will not infringe Article 15 (1). Again it would not be violation of Article 15 if educational institutions are established by the State exclusively for women. The reservation of seats for women in a college does not offend against Article 15 (1).<sup>4</sup> In *Yusuf Abdul Aziz v. State of Bombay*,<sup>5</sup> section 497 of the Indian Penal Code which only punishes man for adultery and exempts the women from punish-

1. P. Raghunadha Rao v. State of Orissa, AIR 1955 Orissa 1131.

2. M. B. Namazi v. Deputy Custodian of Evacuee Property, Madras, AIR 1951 Mad. 930.

3. Muller v. Oregon, 52 L. Ed. 551.

4. Dattatraya v. State, AIR 1953 Bom. 311.

5. AIR 1954 SC 321; see also Shahjad v. Mohd. Abdurrah, AIR 1967 J. and K. 120.

ment even though she may be equally guilty as an abettor was held to be valid since the classification was not based on the grounds of sex alone.

Similar provisions apply to children. The provision of free education for children<sup>1</sup> or measures for prevention of their exploitation<sup>2</sup> would also not come within the inhibition of Article 15 (1).

It has, however, been held that Article 15 (3) provides for only special provisions for the benefit of women and children and does not require that absolutely identical treatment as those enjoyed by males in similar matters must be afforded to them.<sup>3</sup>

**Clause (4)—Special Provision for Advancement of Backward Classes.**—This clause is another exception to Cls. (1) and (2) of Article 15. It was added by the Constitution (First Amendment) Act, 1951, as a result of the decision in *State of Madras v. Champakam Dorairajan*.<sup>4</sup> In that case the Madras Government reserved seats in State Medical and Engineering Colleges for different communities in certain proportions on the basis of religion, race and caste. The State defended the law on the ground that it purported to promote the social justice for all sections of the people as required by Article 46 of the Directive Principles of State Policy. The Supreme Court held the law void because it classified students on the basis of caste and religion irrespective of merit. The Directive Principles of State policy cannot override the Fundamental Rights. In another case an order requisitioning land for the construction of a Harijan Colony was held to be void under Article 15 (1).<sup>5</sup>

To modify the effect of these two decisions, Article 15 was amended by the Constitution (First Amendment) Act, 1951. The State is by virtue of the addition of this clause empowered to make special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. After the amendment it would be possible for the State to put up a Harijan Colony in order to advance the interest of the backward classes.

The provisions made in clause (4) of Article 15 is only an enabling provision and does not impose any obligation on the State to take any special action under it. It merely confers a discretion to act if necessary by way of making special provision for backward classes. The class contemplated under the clause must be both socially and educationally backward.

What are *Backward classes* is not defined in the Constitution. Article 340 however, empowers the President to appoint a Commission to investigate the conditions of socially and educationally backward classes. On the basis of the report of the Commission, the President may specify who are to be considered as Backward Classes. The decision of the Government is, however, justiciable issue. The Court can consider whether the classification by the

- Article 45 says "The State shall endeavour to provide within a period of ten years from the commencement of the Constitution for free and compulsory education for all children until they complete the age of 14 years."
- Article 39 (f) says, "The State shall particularly direct its policy towards securing ..... that childhood and youth are protected against exploitation unsuit to their age or strength."
- Anjali Roy v. State of West Bengal*, AIR 1952 Cal. 825.
- AIR 1951 SC 226.
- Jogwant Kaur v. State of Bombay*, AIR 1952 Bom. 461.

Government is arbitrary or is based on any intelligible and tangible principle. In *Ram Krishna Singh v. State of Mysore*,<sup>1</sup> the Mysore High Court had held that the determination of backward classes made in 1959, on the basis of the Census Report of 1941, cannot be said to be based on any intelligible principle as considerable changes had taken place between 1941 and 1951.

'Backward' and 'more backward' classification is bad.—In *Balabji v. State of Mysore*,<sup>2</sup> the Mysore Government issued an order under Article 15 (4) reserving seats in the Medical and Engineering Colleges in the State as follows : Backward classes 28%. More backward classes 22%. Scheduled Castes and Tribes 18% thus 68% of the seats available in the Colleges were reserved and only 32% was made available to the merit pools. The validity of the order was challenged by candidates who had secured more marks than those admitted under the order. Though qualified on merit they had failed to get admission only by reason of the Government order. The Court held that the sub-classification made by the order between 'backward classes' and 'more backward classes' was not justified under Article 15 (4). 'Backwardness' as envisaged by Article 15 (4) must be both social and educational and not either social or educational. Though caste may be a relevant factor but it cannot be the sole test for ascertaining whether a particular class is a backward class or not. Poverty, occupation, place of habitation may all be relevant factors to be taken into consideration. Art. 15 (4) does not speak of 'castes', but only speaks of 'classes', and 'caste' and 'class' are not synonymous. The impugned order, however, proceeds only on the basis of caste without regard to other relevant factors and that is sufficient to render the order invalid. The Court said that the State was not justified in including in the list of backward classes all those castes or communities whose average of student population per thousand was slightly above or very near or just below the State average. Only those which were well below the average can be regarded as backward. Thus the main defect of the system adopted by the State is that under it 90% of the population of the State is backward. It was held that this is inconsistent with Article 15 (4). Reservation of 86 per cent of seats in all technical institutions, such as, Engineering and Medical Colleges to the exclusion of all other candidates if a single candidate from the Scheduled Tribes was available, may amount to fraud upon the Constitution. Clause (4) of Article 15 only enables the State to make special and not exclusive provision for the backward classes. The State would not be justified in ignoring altogether advancement of the rest of the society in its zeal to promote the welfare of backward classes. National interest would suffer if qualified and competent students were excluded from admission in Institutions of higher education. Speaking generally, the Court said, the special provision should be less than 50%, how much less than 50% would depend upon the relevant prevailing circumstances in each case.

In *A. Periakaruppan v. State of Tamil Nadu*,<sup>3</sup> the Supreme Court has held that classification of backward classes on basis of castes is well within the purview of Art. 15 (4) provided those castes are shown to be socially and educationally backward. But the Court has also advised that the Government should not proceed on the basis that once a class is considered as backward it should continue as backward class for all the times. Such an approach, the Court said, would defeat the very purpose of the reservation. The Govern-

<sup>1</sup> AIR 1960 Mys 335.

<sup>2</sup> AIR 1961 SC 647. Also see *Ram Krishna Ram Singh v. State of Mysore*, AIR 1963 Mys 31, *Chattisgarh v. State of Mysore*, AIR 1964 SC 1821.

<sup>3</sup> AIR 1971 SC 2933.

ment should always keep under review the question of reservation of seats and only the classes which are really, socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become vested interest. The Government decision in this regard is open to judicial review. In *State of A. P. v. U. S. V. Balaram*,<sup>1</sup> the Supreme Court has reiterated the observations made in the case of *A. Periakaruppan v. State of Tamil Nadu*.<sup>2</sup> The Court said that though the caste of a person cannot be the sole test for ascertaining whether a particular class or community is backward class or not yet if an entire caste is, as a fact, found to be socially and educationally backward their inclusion in the list of backward classes by their name is not violative of Art. 15 (4). A caste is also a class of citizens which may, as such, be socially and educationally backward. If after collecting the necessary data, it is found that the caste as a whole is socially and educationally backward the reservation made for such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average. But it does not mean that once a caste is considered backward class it will continue to be backward for all the time. If a situation arises wherein the candidate belonging to the groups included in the list of backward classes are able to obtain more seats on the basis of their own merit, it is the duty of the Government to review the question of further reservation of seats for such groups. If once a class appears to have reached a stage of progress, from which it could be safely inferred that no further protection is necessary the State will do well to review such instances and suitably revise the list of backward classes. The decision of the Government in this regard is a justiciable issue.

In *K. S. Jayasree v. Kerala*,<sup>3</sup> the State of Kerala appointed a Commission to inquire into and to report as to what sections of the people in Kerala should be treated as socially and educationally backward classes. On the basis of the report of the Commission the Government directed that candidates belonging to families whose annual income was Rs. 10,000 or above would not be eligible for seats reserved for backward classes in Medical Colleges. The Supreme Court held the Government's direction to be valid. The Court held that neither caste by itself nor poverty by itself is determining factor of social backwardness. Though poverty is not the sole test of backwardness, but it is relevant factor in the context of social backwardness. Thus both caste and poverty is relevant in determining the backwardness of citizens.

In *State of U. P. v. Pradip Tandon*,<sup>4</sup> the Uttar Pradesh Government made reservation of seats for admission to Medical Colleges in the State in favour of candidates coming from Rural Areas, Hill and Uttarakhand areas. The Supreme Court held that the reservation in favour of candidates coming from rural areas was unconstitutional but the reservation in favour of candidates coming from Hill and Uttarakhand areas was valid. The Hill and Uttarakhand areas in Uttar Pradesh are instances of socially and educationally backward classes of citizens. Backwardness is judged by the economic basis that each region has its own measurable possibilities for the maintenance of human members, standards of living and fixed property. From an economic point of view the classes of citizens are backward when they do not make effective use of resources. When large areas of land remain spares, disorderly and illiterate

1. AIR 1972 SC 1375.
2. AIR 1971 SC 2303.
3. AIR 1976 SC 2381.
4. AIR 1973 SC 563.

population whose property is small and negligible the element of social backwardness is present. When effective territorial specialisation is not possible in the absence of means, communication and technical processes as in the hill and Uttarakhand areas the people are socially backward classes of citizens. People in the hill and Uttarakhand areas are also the educationally backward classes of citizens because lack of educational facilities keeps them stagnant and they have neither means and values nor awareness for education. Where people have traditional apathy for education on account of social and environmental conditions or occupational handicaps, it is an illustration of educational backwardness. The hill and Uttarakhand areas are inaccessible. There is lack of educational institutions and educational aids. The reservation for rural areas cannot be sustained on the ground that the rural areas represent socially and educationally backward classes of citizens. The reservation is made for the majority population of the State. 80 per cent. of the population of the State in rural areas cannot be a homogeneous class by itself. They are not of the same kind. Their occupation is different. Their standards are different. Population cannot be a class by itself. Rural element does not make it a class. The special need for medical men in rural areas will not make the people in the rural areas socially and educationally backward classes of citizens. Poverty in rural areas cannot also be the basis of classification to support reservation for rural areas. Poverty is found in all parts of India.

In *Padmraj Samarendra v. State*,<sup>1</sup> the Patna High Court has upheld the reservation of "Cultural seats" for the admission to the medical colleges. In the instant case out of 670 seats 43 seats were to be filled up by nomination, 6 out of 43 seats are available for Nepalese students, 23 seats were placed at the disposal of the Government to be filled up by nomination under the head—"Cultural seats"—from out of candidates belonging to foreign countries, Nagaland, Sikkim and Bhutan for State reasons. This reservation for Napalese students cannot be said to be without any reasonable nexus. Relationship with Nepal has for State reasons to be as cordial as possible. The lack of sufficient medical education in Nepal is also well known fact. So also is the case with 23 seats to be filled up by the Central Government. Candidates of foreign countries are to be nominated by the Government of India on account of reciprocal arrangements or for other State reasons. The economic and educational backwardness of citizens in these countries is a notorious fact. The policy of appeasement and maintenance of good relationship with these three territories is equally important. None of these can be said to be unreasonably excessive.

In *Janardhan Subbaraya v. State of Mysore*,<sup>2</sup> it was held that the decision in *Balaji's* case only applied to reservations made in regard to socially and educationally backward classes; and hence reservations made by the Mysore Government order in favour of Scheduled Castes and Scheduled Tribes, were not effected by the decision. It remained valid in spite of the impugned order.

An order was made by the Kerala Government reserving seats in the Medical College of Kerala for (a) Ezahava Muslim and Latin Catholics on the ground that they belonged to socially and educationally backward classes, (b) in favour of children of registered medical practitioners, (c) for outstanding sportsmen. The reservation was challenged in *State of Kerala v. R. Jacob*,<sup>3</sup> on the ground that it violated Article 14. The Court struck down the reservation in favour of the children of medical practitioners on the ground that it was

1. AIR 1979 Patna 266 (T. II)

2. AIR 1963 SC 702.

3. AIR 1964 Kerala 316

based on a classification which had no rational relation to the object to be secured. It upheld the reservation for outstanding sportsmen on the ground that it was based on a valid classification. It also upheld the reservation in favour of Ezhavas, etc. on the ground that they belonged to socially and educationally backward classes. The reservation in their favour is permissible under Article 15 (4) and the respondent had failed to prove that they did not belong to backward classes.

But in *Chamaraja v. State of Mysore*,<sup>1</sup> an order reserving 30% of seats in professional and technical colleges for socially and educationally backward classes but making the reservation available only to the extent that they did not get adequate representation in the merit pool was held valid by the Mysore High Court. It means that if backward class students by merit can secure more seats than the number reserved under Article 15 (4) they are entitled to do so.

In *Guntur Medical College v. Mohan Rao*,<sup>2</sup> an important question arose before the Court as to whether a person belonging to Christian converts, who originally belonged to a scheduled caste, on reconversion to Hinduism can claim the benefit of reservation of seats in a medical college under Article 15 (4) of the Constitution. The Court held that a person whose parents belonged to a scheduled caste before their conversion to Christianity can, on reconversion to Hinduism is regarded as a member of the scheduled caste only if he is accepted as a member of that caste by the other members of the caste. On such acceptance he would be eligible for the benefit of reservation of seats for scheduled caste in the matter of admission to a medical college.

### C. EQUALITY OF OPPORTUNITY IN PUBLIC EMPLOYMENT (Article 16)

Clauses (1) and (2) of Article 16 guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. No citizen can be discriminated against or be ineligible for any employment or office under the State on grounds only of religion, race, caste, sex, descent, place of birth or residence. Clauses 3, 4 and 5 of Art. 16 are the three exceptions to this general rule of equality of opportunity.

It is to be noted that under Article 16 the guarantee against discrimination is limited to 'employment and appointment' under the State. Article 15, however, is more general and deals with all cases of discrimination which do not fall under Article 16. Article 16 embodies the particular application of general rule of equality laid down in Article 14 with special reference for appointment and employment under the State.<sup>3</sup>

Article 16 guarantees equality of opportunity in matters of appointment in State services. It does not, however, prevent the State from prescribing the necessary qualifications and selective tests for recruitment for Government services. The qualifications prescribed may, beside mental excellence, include physical fitness, sense of discipline, moral integrity, loyalty to the State. Where the appointment requires technical knowledge technical qualification

1. AIR 1967 Mys. 21.

2. AIR 1976 SC 1904.

3. *Sukhoandan Thakur v. State of Bihar*, AIR 1957 Pat. 617, followed in *Sampath v. State of Madras*, AIR 1962 Madras 485,

may be prescribed. The character and antecedents of candidates may be taken into consideration for appointment in Government services.<sup>1</sup>

The selective test, however, must not be arbitrary. It must be based on reasonable ground and have nexus between the qualifications and the object, that is, the post or the nature of the service. In *Pandurangarao v. Andhra Pradesh Public Service Commission*,<sup>2</sup> the petitioner who was a lawyer in some district of the State, was applicant for the selection of the posts of District Munsiffs under the State Judicial Service. He was qualified in every respect, except that he was not at that time practising as an advocate in the Andhra High Court. The Supreme Court held that the rule which required that only a lawyer practising the High Court and the notification issued thereunder were unconstitutional. There was no reasonable nexus between the qualification and the alleged object of an applicant possessing a knowledge of the local laws which could be acquired by any lawyer practising in any court. For appointment to a particular post a minimum educational qualification can be prescribed. Thus, a requirement that the professor in orthopaedics must have a postgraduate degree in that subject is valid.<sup>3</sup> An appointment to an ex-cadre selection post can be made on the ground of seniority only. The Government can appoint to such posts such persons to whom it considers as most suitable and the Court will uphold such an appointment unless it is done *mala fide*.<sup>4</sup>

Equality of opportunity in matters of employment can be predicated only as between persons who are either seeking the same employment or have obtained the same employment, and that "equality of opportunity in matters of promotion must mean equality between members of the same class of employees and not equality between members of separate independent classes." Thus in *All-India Station Master's Association v. General Manager, Central Railway*,<sup>5</sup> a rule enabling guards to be promoted to higher grade Station Master than the road side station masters was held not to be violative of Article 16 as "Road side Station Masters and Guards were recruited and trained separately and had separate avenues of promotion, they belong to two distinct and separate classes between whom there was no scope for predication equality or inequality of opportunity in matters of promotion. Similarly, Article 16 does not forbid the creation of different grades in the Government service. Thus where the rules made Income Tax Officers of Class I eligible for appointment as Assistant Commissioners, but does not make Income Tax Officers, Class II eligible for appointment as Assistant Commissioners, it was held that there can be no question of denial of equality of opportunity. But if different standards of promotion are laid down in relation to the same class of Income Tax Officers Article 16 would be violated."<sup>6</sup>

**There is no denial of equality if the service rule permits premature retirement of Government servants<sup>7</sup>**

1. *Sugatha Prasad v. State of Kerala*, AIR 1965 Kerala 19; Also see *Banarsi Das v. State of U. P.*, AIR 1956 SC 520.

2. AIR 1963 SC 268.

3. *Union of India v. Dr. S. B. Kohli*, AIR 1973 SC 811.

4. *J. N. Sharma v. Bihar*, AIR 1971 SC 1318.

5. AIR 1960 SC 384.

6. *Kishori v. Union of India*, 1962 SC 1139; Also see *State of Punjab v. Jagindra Singh*, AIR 1963 SC 913; *Champak Lal v. Union of India*, AIR 1964 SC 1854.

7. *Jaisinghan v. Union of India*, AIR 1964 Punj. 155

The expression "matters relating to employment" shows that Article 16 is not confined to initial matters but will apply to matters subsequent to appointment as well e. g., promotions,<sup>1</sup> termination of employment,<sup>2</sup> matters relating to salary, periodical increments, leave, gratuity, pension and the age of superannuation, etc.<sup>3</sup>

Equality of opportunity for all citizens in matters relating to employment is not violated by provisions for compulsory retirement of Government servants in public interest after the completion of qualifying service or attainment of a certain age because compulsory retirement does not involve any civil consequences.<sup>4</sup>

In *P. R. Naidu v. Government of A. P.*,<sup>5</sup> the petitioners were retired compulsorily in public interest. They challenged the compulsory retirement orders as violative of Article 16. It was, however, held that the provision for compulsory retirement in public interest applies to all Government servants and as such it is not open to challenge either under Article 14 or under Article 16. Article 16 does not prohibit the prescription of reasonable rules for compulsory retirement.

In *State of Orissa v. N. N. Swami*,<sup>6</sup> a private College was taken-over by the Orissa Government. The petitioners were working as Readers in different faculties in the aforesaid college in the scale of pay of Rs. 510-860, whereas scale for Readers was Rs. 600-1000. On the date of take-over each of the respondents were drawing a salary somewhere less than Rs. 600. The Government issued a Circular containing conditions governing taking over the services of the teaching staff of the College. It was provided that the cases of staff shall be referred to the Orissa Public Service Commission for determination of their suitability to hold posts. Those found suitable by the Commission shall be absorbed in respective cadre. While making reference to the P. S. C. cases of those Readers who were drawing a salary of Rs. 600 p. m. would be referred. Readers who on the date of take-over were in receipt of pay of less than Rs. 600 shall be given the post of lecturers, in the scale of Rs 260-780. The respondents contended that although they had all the requisite qualifications for appointment as Readers, before the take over but since under the aforesaid terms of take over they were drawing a salary of less than Rs. 600/- on the date of take-over, their names were not referred to the P.S.C. for consideration of their suitability for appointment as Readers. They claimed that the condition of drawing of Rs. 600 or more on the date of takeover which has been laid down in the said Circular as particular qualification for eligibility for appointment as Readers is arbitrary and discriminatory. This condition has no nexus, whatever, with the object underlying the qualification test in an educational institution having regard to the most essential question of intrinsic quality and efficiency of the teachers.

The Supreme Court held that all the respondents were eligible to be referred to the P. S. C. for the post of Readers. The Court said that there

1. General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36.

2. Union of India v. P. K. More, AIR 1962 S C 630.

3. General Manager, Southern Railway v. Rangachari, AIR 1962 S C 36.

4. Union of India v. J. N. Sinha, AIR 1971 SC 40 : Tara Singh v. State of Rajasthan, AIR 1975 SC 1487.

5. AIR 1977 SC 854 : see also Shivcharan Singh v. State of Mysore, AIR 1963 S C 280.

6. AIR 1977 S C 1237.

may be no difficulty in accepting this position that Government can screen the teachers at the time of fresh appointment in the Government service after taking over any institution from private management. It may provide stringent qualification for appointment. If the private employers did not fulfil the qualifications, experience, they may not be eligible for appointment. Such a position, if taken by the Government, is consistent with implementation of a correct 'educational policy' and will not be violation of Article 16 of the Constitution. But the question is entirely different, when the employees answering the test of educational qualifications and experience of teaching in a recognised private college are discriminated amongst the very category of Readers on an irrational and illusory consideration such as particular amount of salary, on a specified date. Denial of an opportunity to such Readers even for being considered for the post of Readers is clearly violation of Art. 16 of the Constitution. The teaching experience of the Readers in the private institutions is not completely obliterated after its take-over by the Government.

**Clause (2).**—It is to be noted that the two additional grounds "descent" and "residence" not included in Article 15 have been added in Article 16 (2). No discrimination can be made on these grounds. This is just to assure that parochialism and nepotism is eliminated in the matters of appointment in Government services. The provincial slogan 'Madras for Madrasis', 'Bengal for Bengalis' and, 'Mysore for Mysoreans' are most unhealthy for the 'growth of a truly federal democracy'. The systems of the British era have to be eliminated in independent India and hence this provision in Article 16 (2). 'Descent' is another spot for individual discrimination. In *Dasaratha Rama Rao v. State*,<sup>1</sup> the Supreme Court held that the office of the village Munisif is an office under the State : and section 6 (1) of the Madras Act which required the Collector to select persons from among the last holder of the office discriminates on the grounds of descent only and hence void for contravening Article 16 (2).

**Clause (3).**—Article 16 (3) is an exception to clause (2) of this Article which forbids discrimination on the ground of residence. However, there may be good reasons for reserving certain posts in a State for the residents only. This Article empowers Parliament to regulate by law the extent to which it would be permissible for a State to depart from the above principle. In exercise of powers conferred by Article 16 (3), Parliament has passed the Public Employment (Requirement as to Residence) Act, 1957. It provides that no one will be disqualified on the ground that one is not the resident of a particular State. However, the Act makes an exception for employment in Himachal Pradesh, Manipur, Tripura and Telangana. This exception is for a period of five years and because of the backwardness of these areas.

In *Narasimha Rao v. State of A. P.*,<sup>2</sup> the Supreme Court held that part of the Act unconstitutional which prescribed 'residence' as qualification for Government services in Telangana area of the State of Andhra Pradesh. The word 'State' in Article 16 (3) signifies the whole of the State and not parts of a State and therefore residential qualification can be prescribed for the whole of the State. Though Parliament can reserve certain posts in Andhra Pradesh for the residents of the State, but it cannot reserve posts in Telangana for the residents of Telangana only, which is a part of the State.

1. AIR 1961 SC 564 : Also see *Balkrishna Hegde v. Shankara Hegde*, AIR 1962 Mys. 233.

2. AIR 1970 SC 422.

rules for promotion of employees working in the Registration Department from the lower division clerks to the higher post of upper division clerks. The promotion depended on passing departmental tests within two years. Rule 133-A however empowered the State Government to further exempt for a specified period members of the Scheduled Castes and Scheduled Tribes from passing the test. Pursuant thereto the Government passed the impugned order granting exemption for two years to pass the test. This exemption was challenged as discriminatory under Art. 16 (1). A seven member Bench of the Supreme Court (each delivering a separate judgment) by a majority of 5 : 2 held that the classification of employees belonging to Scheduled Castes and Scheduled Tribes for allowing them an extended period of two years for passing tests for promotion is a just and reasonable classification having rational nexus to the object of providing equal opportunities for all citizens in matters relating to employment or appointment to the public office. The temporary relaxation of test qualification made in favour of Scheduled Castes and Scheduled Tribes is warranted in the services and their over all backwardness. Rule does not impair the test of efficiency in administration in as much as members of Scheduled Castes and Scheduled Tribes who are promoted will have to acquire the qualification of passing the test. The only relaxation is that they are granted two years more time to acquire the qualification. Rule 13 AA and the orders made thereunder are therefore valid.

The minority (Khanna and Gupta, JJ.,) held that the principles of classification cannot be extended to give Scheduled Castes and Scheduled Tribes preferential treatment outside Art. 16 (4). In no case the Court has upheld under Art. 16 (1) the classification and differential treatment for the purpose of promotion among employees who possessed the same educational qualifications and were initially appointed as in the present case to the same category of posts. Khanna, J., said that exemption granted to a class of employees, even though for a limited period from passing departmental test prescribed for promotion would obviously be subversive of efficiency of service. To promote 34 out of 51 persons although they have not passed the departmental test and at the same time not to promote those who have passed the departmental test can hardly be conducive to efficiency, Khanna, J., pointed out. It is submitted that the minority view expressed by Khanna, J. is correct. It would be dangerous to extend the limits of protection against the operation of principle of equality of opportunity in this field beyond its express constitutional authorization by Art. 16 (4). The minority view is also correct that Art. 16 (1) is a facet of the general principles embodied in Art. 14. Article 16 (4) is an exception to Art. 16 (1). Art. 16 (1) has a different content from equality under Art. 14. So Scheduled Castes and Scheduled Tribes can not be given preferential treatment outside Art. 16 (4). The majority view will make Art. 16 (4) redundant. On this point one of the majority judge Beg, J. agreed with Khanna and Gupta, JJ., that Art. 16 (1) have different content from equality under Art. 14.

backward. The appeal against the decision of the Court is pending in the Supreme Court.

The whole policy of reservation is in fact a politically motivated policy coming down from British days—the divide and rule policy. It is against the interest of the nation and it can only be desired by those vested interests who wish to see people fighting each other. It has provoked a caste war which threatens to tear our social fabric asunder.<sup>1</sup> Thus both legally and socially the policy of reservation can not be justified.<sup>2</sup>

**Clause (5).**—Article 16 (5) is the third exception to the general rule laid down in Article 16 (1) and (2) which forbids discrimination in public employment on the ground of religion. Article 16 (5) says that a law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination shall not be treated to be repugnant to this Article.

#### D. ABOLITION OF UNTOUCHABILITY—Art. 17

Article 17 abolishes "untouchability" and forbids its practice in any form. The enforcement of any disability arising out of untouchability is to be an offence punishable in accordance with law. It does not stop with a mere declaration but announces that this forbidden 'untouchability' is not to be henceforth practised in any form. If it were so practised it shall be dealt with as an offence punishable in accordance with the law.

'Untouchability' is neither defined in the Constitution nor in the Act. The Mysore High Court has however held that the term is not to be understood in its literal or grammatical sense but to be understood as the 'practice as it had developed historically' in this country. Understood in this sense, it is a product of the Hindu caste system according to which particular section amongst the Hindus had been looked down upon as untouchables by the other sections of that society. A literal construction of the term would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as, suffering from infectious diseases or on account of social observance such as are associated with birth or death or on account of social boycott resulting from caste or other dispute. In either case such persons can claim the protection or benefit either of Article 17 or of the 1955 Act.<sup>3</sup>

In exercise of the powers conferred by Article 35, Parliament originally enacted the Untouchability (Offences) Act, 1955. This Act prescribes punishment for the practice of untouchability. This Act has been amended by the Untouchability (Offences) Amendment Act, 1976, in order to make the laws more stringent to remove untouchability from the society. It has also been renamed as—*The Protection of Civil Rights Act, 1955*. Under the amended Act any discrimination on the ground of untouchability will be considered an offence. It also imposes a duty on public servants to investigate such offences. It provides that if a public servant wilfully neglects the investigations of any offence punishable under this Act he shall be deemed to have abetted an offence punishable under this Act.

1. The Hindustan Times, Feb. 11, 1980.

2. Parasbigha and Dohia Villages in the Jehanabad Sub-division of Bihar.

3. Devarajah v. Padmanna, AIR 1958 Mys. 84.

**Clause (4) Reservation for backward classes.**—Article 16 (4) is the second exception to the general rule embodied in Article 16 (1) and (2). It empowers the State to make special provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State are not adequately represented in the services under the State.

Thus, Article 16 (4) applies only if two conditions are satisfied :—

1. the class of citizens is backward *i. e.*, socially and educationally, and
2. the said class is not adequately represented in the service of the State.

The second test cannot be the sole criterion.<sup>1</sup>

The expression "*Backward Classes*" in Art. 16 (4) has been used in the same sense as in Art. 15 (4). The Supreme Court has considered the meaning and scope of the expression in a number of decisions. From these pronouncements the following propositions emerge :

1. Articles 15 (4) and 16 (4) speak of 'classes' only and, do not speak of 'caste'.
2. 'Caste' by itself cannot be determining factor of backwardness, though it may be one amongst several factors. So, reservation can be made in favour of "backward classes" and not 'backward caste'. 'Caste' and 'class' are different expressions.
3. The backward classes in the matters of backwardness comparable to Scheduled Caste and Scheduled Tribes.
4. The backwardness must be both social and educational and not either social or educational.
5. Social backwardness is in ultimate analysis the result of poverty. But poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness.
6. Reservation should not be excessive.
7. Reservation can be made at the cost of efficiency in administration.

In *Balaji's*<sup>2</sup> case the Supreme Court held that the 'Caste' of a person cannot be the sole test for ascertaining whether a particular class is a backward class or not. Poverty, occupation, place of habitation may all be relevant factors to be taken into consideration. Though the caste of a person cannot be the sole test for determining the backwardness of a class, but if an entire caste is found to be socially and educationally backward it may be included in the list of Backward classes. However, the Court said that it does not mean that once a caste is considered backward class then it should continue to be backward for all the time. The Government should review the test and if a class reaches the state of progress where reservation is not necessary it should delete that class from the list of the backward classes.<sup>3</sup>

Art. 164 (4) being an exception and should be construed strictly. It can-

not be interpreted so as to destroy the guarantee in Cl. (1) of Art. 16. It must be interpreted in the light of Art. 335 which says that the claims of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration.

The reservation for backward classes should not be unreasonable. It should be considered having regard to the employment opportunities of the general public.

The scope of Article 16 (4) was considered by the Supreme Court in *Devadasan v. Union of India*.<sup>1</sup> In this case the constitutional validity of the "carry-forward rule", framed by the Government to regulate appointment of persons of backward classes in Government services was involved. This rule provided that if sufficient number of candidates belonging to the Scheduled Castes and Scheduled Tribes were not available for appointment to be reserved quota, the vacancies that remained unfilled would be treated as unreserved and filled by the fresh available candidates; but a corresponding number of posts will be reserved in the next year for Scheduled Castes and Scheduled Tribes in addition to their reserved quota of the next year. The result was to carry forward the unutilised balance, that is, unfilled vacancies in the second and third years at one time.<sup>2</sup> In actual effect 68 per cent. of the vacancies were reserved for Scheduled Castes and Scheduled Tribes.

The Supreme Court by a majority of 4 to 1 struck down the "carry-forward" rule as unconstitutional on the ground that the power vested in the Government under Article 16 (4) cannot be so exercised as to deny reasonable equality of opportunity in matters of public employment for members of classes other than backward. The Court said that each year of recruitment must be considered by itself and the reservation for backward communities each year should not be excessive as to create a monopoly or to interfere unduly with the legitimate claims of other communities. Accordingly the Court held that the reservation ought to be less than 50 per cent. but how much less than half would depend upon prevailing circumstances in each case.

In *Venkataraman v. State of Madras*,<sup>3</sup> an order of Madras Government which reserved posts not only for Harijans and Backward classes, but also for other communities, namely, Muslims, Christians, non-Brahmins and Brahmins, was held to violate Article 16.

The power of reservation which is conferred on the State under Article 16 (4) can be exercised by the State not only for providing reservation of appointment but also for providing for reservation of selection posts.<sup>4</sup> Thus selection posts can also be reserved for backward classes. In the matter of filling selection posts, the question of seniority is not relevant. The selection is made solely on the basis of merit.<sup>5</sup>

In *State of Kerala v. N. M. Thomas*,<sup>6</sup> important question came up for consideration of the Court as to whether it was permissible to give preferential treatment to Scheduled Castes and Scheduled Tribes under Art. 16 (1), outside the exception clause that is, Art. 16 (4). The Kerala Government framed

1. AIR 1964 SC 179, followed in *B. N. Tewari v. Union of India*, AIR 1965 SC 1430.

2. AIR 1961 SC 229.

3. *General Manager, Southern Railway v. Raonachari*, AIR 1962 SC 36.

4. *Dr. J. N. Mishra v. State of Bihar*, AIR 1971 SC 1318.

5. AIR 1976 SC 490 : (1976) 2 SCC 310.

rules for promotion of employees working in the Registration Department from the lower division clerks to the higher post of upper division clerks. The promotion depended on passing departmental tests within two years. Rule 133-A however empowered the State Government to further exempt for a specified period members of the Scheduled Castes and Scheduled Tribes from passing the test. Pursuant thereto the Government passed the impugned order granting exemption for two years to pass the test. This exemption was challenged as discriminatory under Art. 16 (1). A seven member Bench of the Supreme Court (each delivering a separate judgment) by a majority of 5 : 2 held that the classification of employees belonging to Scheduled Castes and Scheduled Tribes for allowing them an extended period of two years for passing tests for promotion is a just and reasonable classification having rational nexus to the object of providing equal opportunities for all citizens in matters relating to employment or appointment to the public office. The temporary relaxation of test qualification made in favour of Scheduled Castes and Scheduled Tribes is warranted in the services and their over all backwardness. Rule does not impair the test of efficiency in administration in as much as members of Scheduled Castes and Scheduled Tribes who are promoted will have to acquire the qualification of passing the test. The only relaxation is that they are granted two years more time to acquire the qualification. Rule 13 AA and the orders made thereunder are therefore valid.

The minority (Khanna and Gupta, JJ.,) held that the principles of classification cannot be extended to give Scheduled Castes and Scheduled Tribes preferential treatment outside Art. 16 (4). In no case the Court has upheld under Art. 16 (1) the classification and differential treatment for the purpose of promotion among employees who possessed the same educational qualifications and were initially appointed as in the present case to the same category of posts. Khanna, J., said that exemption granted to a class of employees, even though for a limited period from passing departmental test prescribed for promotion would obviously be subversive of efficiency of service. To promote 34 out of 51 persons although they have not passed the departmental test and at the same time not to promote those who have passed the departmental test can hardly be conducive to efficiency, Khanna, J., pointed out. It is submitted that the minority view expressed by Khanna, J. is correct. It would be dangerous to extend the limits of protection against the operation of principle of equality of opportunity in this field beyond its express constitutional authorization by Art. 16 (4). The minority view is also correct that Art. 16 (1) is a facet of the general principles embodied in Art. 14. Article 16 (4) is an exception to Art. 16 (1). Art. 16 (1) has a different content from equality under Art. 14. So Scheduled Castes and Scheduled Tribes can not be given preferential treatment outside Art. 16 (4). The majority view will make Art. 16 (4) redundant. On this point one of the majority judge Beg, J. agreed with Khanna and Gupta, JJ., that Art. 16 (1) have different content from equality under Art. 14.

On the basis of the propositions made in the various decisions of the Court it is submitted that the recent reservation policy pursued by Janata Governments in the State of Bihar and Uttar Pradesh cannot be legally justified. 26 per cent reservation in Government jobs for backward castes were made in the State of Bihar and 15 per cent in Uttar Pradesh. The purpose of reservation under Art. 16 (4) was to help the weaker sections of society. But the 'Castes' mentioned as 'backward' both in U. P. and Bihar were not as whole poor. Many Ahirs, Kurmis, etc. are rich farmers. The Allahabad High Court has held that those castes are not socially and economically

backward. The appeal against the decision of the Court is pending in the Supreme Court.

The whole policy of reservation is in fact a politically motivated policy coming down from British days—the divide and rule policy. It is against the interest of the nation and it can only be desired by those vested interests who wish to see people fighting each other. It has provoked a caste war which threatens to tear our social fabric asunder.<sup>1</sup> Thus both legally and socially the policy of reservation can not be justified.<sup>2</sup>

**Clause (5).**—Article 16 (5) is the third exception to the general rule laid down in Article 16 (1) and (2) which forbids discrimination in public employment on the ground of religion. Article 16 (5) says that a law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination shall not be treated to be repugnant to this Article.

#### D. ABOLITION OF UNTOUCHABILITY—Art. 17

Article 17 abolishes "untouchability" and forbids its practice in any form. The enforcement of any disability arising out of untouchability is to be an offence punishable in accordance with law.<sup>3</sup> It does not stop with a mere declaration but announces that this forbidden 'untouchability' is not to be henceforth practised in any form. If it were so practised it shall be dealt with as an offence punishable in accordance with the law.

'Untouchability' is neither defined in the Constitution nor in the Act. The Mysore High Court has however held that the term is not to be understood in its literal or grammatical sense but to be understood as the 'practice as it had developed historically' in this country. Understood in this sense, it is a product of the Hindu caste system according to which particular section amongst the Hindus had been looked down upon as untouchables by the other sections of that society. A literal construction of the term would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as, suffering from infectious diseases or on account of social observance such as are associated with birth or death or on account of social boycott resulting from caste or other dispute. In either case such persons can claim the protection or benefit either of Article 17 or of the 1955 Act.<sup>4</sup>

In exercise of the powers conferred by Article 35, Parliament originally enacted the Untouchability (Offences) Act, 1955. This Act prescribes punishment for the practice of untouchability. This Act has been amended by the Untouchability (Offences) Amendment Act, 1976, in order to make the laws more stringent to remove untouchability from the society. It has also been renamed as—*The Protection of Civil Rights Act, 1955*. Under the amended Act any discrimination on the ground of untouchability will be considered an offence. It also imposes a duty on public servants to investigate such offences. It provides that if a public servant wilfully neglects the investigations of any offence punishable under this Act he shall be deemed to have abetted an offence punishable under this Act.

1. The Hindustan Times, Feb. 11, 1980.

2. Parashiga and Dohia Villages in the Jehanabad Sub-division of Bibar.

3. Devarajah v. Padmann, AIR 1958 Mys. 84.

*The Protection of Civil Rights Act* prescribes punishment which may extend to imprisonment upto six months and also with a fine which may extend to five hundred rupees or both for anyone enforcing, on the ground of "untouchability" religious disabilities like—preventing any person from entering any place of public worship or from worshipping or offering prayers therein (section 3) or social disabilities like (S. 7) access to any shop, public restaurants, hotels or places of public entertainment (S. 4) and refusing to admit persons to hospitals (S. 5) and refusing to sell goods or render services to any person (S. 6) or for other offences, arising out of 'untouchability' (S. 7).

It should be noted that Article 15 (2) also helps in the eradication of untouchability. Thus on the grounds of untouchability no person can be denied access to shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing ghats, road and places of public resort, maintained wholly or partly out of State funds or dedicated to the use of general public.

#### E. ABOLITION OF TITLES—Art. 18

Article 18 prohibits the State to confer titles on any body whether a citizen or a non-citizen. Military and academic distinctions are however exempted from the prohibition for they are incentive to further efforts in the perfection of the military power of the State so necessary for its existence, and for the scientific endeavours so necessary for its prosperity. Clause (2) prohibits a citizen of India from accepting any title from any foreign State. Clause (3) provides that a foreigner holding any office of profit or trust under the State cannot accept any title from any foreign State without the consent of the President. This is to ensure loyalty to the Government he serves for the time being and to shut out all foreign influence in Government affairs or administration. Clause (4) provides that no person holding any office of profit or trust under the State shall accept, without the consent of the President any present, emolument or office of any kind from or under any foreign State.

The recent confirment of titles as "Bharat Ratna", "Padma Vibhuhsan", "Padma Shri", etc are not prohibited under Art. 18 as they merely denote State recognition of good work by citizens in the various fields of activity. These awards seem to fit in within the category of "academic distinctions". These national awards are given on the Republic Day in recognition of exceptional and distinguished services of the high integrity in any field. These awards which were abolished by the Janta Government in 1977 have been revived by the Congress Government in 1980.

It is to be noted that there is no penalty prescribed for infringement of the above prohibition. Article 18 is merely directory. It is, however, open to Parliament to make a law for dealing with such persons who accept a title in violation of the prohibition prescribed in Article 18. No such law has been passed by Parliament so far.

## 9

## **Right to Freedom (Arts. 19 to 22)**

**Introduction.**—Personal liberty is the most important of all Fundamental Rights. Articles 19 to 22 deal with different aspects of this basic right. Taken together these four Articles form a Chapter of personal liberties which provides the backbone of the Chapter on Fundamental Rights.

The foremost amongst these are the seven fundamental rights in the nature of freedoms, which are guaranteed to the citizens by Article 19 of the Constitution.

**The Six Freedoms.**—Article 19 of the Constitution guarantees to the citizens of India the following six fundamental freedoms :

- (a) Freedom of Speech and Expression.
- (b) Freedom of Assembly.
- (c) Freedom to form Associations.
- (d) Freedom of Movement.
- (e) Freedom to reside and to settle.
- \*[(f) \*\*\*\*, Omitted by 44th Amendment Act, 1978.]
- (g) Freedom of profession, occupation, trade or business.

These 'six freedoms' are, however, not absolute. Absolute individual rights cannot be guaranteed by any modern State. An organised society is the pre-condition of civil liberties. There cannot be any right which is injurious to the community as a whole. If people were given complete and absolute liberty without any social control the result would be ruin.<sup>1</sup> Liberty has got to be limited in order to be effectively possessed. For liberty of one must not offend the liberty of others. Patanjali Shastri, J., in *A. K. Gopalan's case*,<sup>2</sup> observed, "man as a rational being desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. The guarantee of each of the above rights is, therefore, restricted by the Constitution itself by conferring upon the State a power to impose by law reasonable restrictions as may be necessary in the larger interest of the community. The restrictions on these freedoms are provided in clauses 2 to 6 of Article 19 of the Constitution.

The restrictions which may be imposed under any of the clauses must be reasonable restrictions. The restriction cannot be arbitrary. Hence, a restriction to be constitutionally valid must satisfy the following two tests :—

- (1) the restriction must be for the purposes mentioned in clauses 2 to 6 of Article 19 ;
- (2) the restriction must be a reasonable restriction.

\*Originally Cl. (f) stood as "Freedom to acquire, hold and dispose of property." It has been omitted by Constitution (44th Amendment) Act, 1978.

1. Willms : Constitutional Law and the United States, 477

2. A. K. Gopalan v. State of Madras, AIR 1951 SC 21 : (1950) SCR 85.

**Meaning of Reasonable Restriction.**—The phrase "reasonable restriction" in Art. 19 (6) means that the restrictions imposed on a person in the enjoyment of his right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation which reason dictates. A law which arbitrarily or excessively invades the right of a person cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the right guaranteed in Art. 19 (1) and the social control in Art. 19 (6), it must be held to be wanting in that quality.<sup>1</sup> The requirement that a restriction should be 'reasonable' means that it is for the courts to determine whether any restriction is reasonable or not. If the courts are of the opinion that a particular restriction is not reasonable then it will declare it void. The word 'reasonable' thus widens the scope of judicial review and the determination by the Legislature as to what constitutes a reasonable restriction is not final and conclusive but subject to the supervision by the Supreme Court.<sup>2</sup> However, there is no definite or absolute test to judge the reasonableness of a restriction. Each case is to be judged on its own merits. The Supreme Court has laid down the following guidelines for determining the questions of reasonableness of a 'restriction':—

1. It is the courts and not the Legislature which has to judge finally whether a restriction is reasonable or not.<sup>3</sup>

2. The term "reasonable restriction" in Art. 19 (6) connotes that the limitation imposed on a person in the enjoyment of his right should not be arbitrary or of an excessive nature, beyond what is actually required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice, of a course which reason dictates. The expression seeks to strike a balance between the individual rights guaranteed by Article 19 and the social control permitted by 'clauses (2) to (6)' of Article 19. Therefore, the restriction must have a reasonable relation with the object which the legislation seeks to achieve and must never exceed it. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19 and the social control permitted by Cl. (6) of Art. 19 it must be wanting in that quality.<sup>4</sup>

3. There is no exact standard or general pattern of reasonableness that can be laid down for all cases. Each case is to be judged on its own merit. The standard varies with the nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and the urgency of the evil sought to be remedied, the disproportion of the imposition, the prevailing condition at the time. These factors have to be taken into consideration for any judicial verdict.<sup>5</sup>

4. The restriction must be reasonable from the substantive as well as procedural standpoint.<sup>6</sup> The court should consider not only the duration and extent of the restriction but also the circumstances under which, and the manner in which that imposition has been authorised.

1. Chintamani Rao v. State of M. P., AIR 1951 SC 118.

2. Ibid.

3. Ibid.

4. Ibid.

5. State of Madras v. V. G. Row, AIR 1952 SC 196.

6. N. B. Khare v. State of Punjab, AIR 1950 SC 211.

5. A restriction which is imposed for securing the objects laid down in the Directive Principles of State Policy may be regarded as reasonable restriction.<sup>2</sup>

6. The court must determine the reasonableness of a restriction by objective standard and not by subjective one. In other words, the question is not if the court feels the restrictions to be reasonable but what a normal reasonable man would regard the restriction to be reasonable. It is this need of objectivity which prompted the Supreme Court to warn the judges not to be guided by their own economic and social philosophy. It said "In evaluating such elusive factors and forming their own conceptions of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restriction, considered them to be reasonable."<sup>3</sup>

7. A restriction to be reasonable must have a rational relation with the object which the Legislature seeks to achieve and must not be in excess of that object.<sup>4</sup> The grounds for which the Legislature can impose restrictions are mentioned in clauses (2) to (6) of Article 19.

8. It is the reasonableness of the restriction which is to be determined by the court and not the reasonableness of the law. The court has only to see whether the restrictions imposed on citizens' rights are reasonable. The question whether a provision of the Act provides adequate safeguard against the abuse of power given to the executive authority to administer the law, is not at all relevant. Mere possibility of the abuse of the power by the executive authority is not test for determining the reasonableness of the restriction.<sup>4</sup>

9. Reasonable restrictions may also amount to *prohibition*. Therefore, under certain circumstances, a law depriving a citizen of his fundamental right may be regarded as reasonable restriction only, in cases of dangerous trades such as that of liquor or cultivation of narcotic plants or trafficking in women, it would be a reasonable restriction to prohibit the trade or business altogether. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed proper by the governing authority of the country essential to the safety, health, peace or decency and morals of the community. But where a restriction reaches the stage of prohibition, special care has to be taken by the court to see that the test of reasonableness is satisfied.<sup>5</sup>

**Rights available to Citizen only.**—The rights granted by Art. 19 are available only to citizens and not to an alien or a foreigner. A foreigner is not a citizen of India and therefore he cannot claim a right under Art. 19.<sup>6</sup>

1. Pathumma v. State of Kerala, AIR 1978 SC 771 ; State of Bombay v. Balssra, AIR 1951 SC 318 ; Hanif Qureshi v. State of Bihar, AIR 1958 SC 731.
2. State of Madras v. V. G. Row, AIR 1952 SC 166 : (1952) SCR 597.
3. Arunachala Nadar v. State of Madras, AIR 1959 SC 300.
4. N. B. Khare v. State of Delhi, AIR 1950 SC 211 (217) ; 1950 SCR 519.
5. Narendra Kumar v. Union of India, AIR 1960 SC 430 ; K. K. Kochuni v. State of Madras, AIR 1960 SC 1080 ; Romesh Thapar v. State of Madras, AIR 1950 SC 124.
6. Anwar v. State of J & K, AIR 1971 SC 337.

A corporation or company can also not claim a right under Art. 19, because they are not natural persons. 'Citizens' under Art. 19 mean only natural persons and not legal persons, such as corporations or companies.<sup>1</sup>

But now there is a definite change in the judicial attitude on this point. In *Bank Nationalisation Case*<sup>2</sup> and the *Newspaper case*,<sup>3</sup> the court has held, that though a company cannot claim a right under Art. 19, but its shareholders can claim the rights guaranteed by Art. 19, if by the State action the rights of the company as well as of the shareholder is impaired. The Fundamental rights of shareholders as citizens are not lost when they associate to form a company.

#### A. FREEDOM OF SPEECH AND EXPRESSION [ARTS. 19 (1) (A) & 19 (2)]

Freedom of speech and expression is indispensable in a democracy. In *Romesh Thapper v. State of Madras*,<sup>4</sup> Patanjali Sastri, J., rightly observed that :

"Freedom of Speech and of the Press lay at the foundation of all democratic organisations, for without free political discussion no public education so essential for the proper functioning of the process of popular Government is possible."

Article 19 (1) (a) says that all citizens shall have the right to freedom of speech and expression. But this right is subject to limitations imposed under Article 19 (2) which empowers the State to put 'reasonable' restrictions on the following grounds, e. g., security of the State, friendly relations with foreign States, public order, decency and morality, contempt of court, defamation, incitement to offence and integrity and sovereignty of India.

**Meaning and scope.**—Freedom of speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. It thus includes the expression of one's ideas through any communicable medium or visible representation, such as, gestures, signs and the like.<sup>5</sup> The expression connotes also publication and thus the freedom of the press is included in this category. Free propagation of ideas is the necessary objective and this may be done on the platform or through the press. The freedom of propagation of ideas is secured by freedom of circulation. Liberty of circulation is an essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value.<sup>6</sup>

The 'freedom of speech and expression' includes the liberty to propagate not one's own views only. It also includes the right to propagate or publish the views of other people,<sup>7</sup> otherwise this freedom would not include the freedom of the press.

**Territorial Extent of fundamental freedom.**—There are no geographical limitations to freedom of speech and expression guaranteed under Art. 19 (1)

1. *Tata Engineering Co. v. State of Bihar*, AIR 1965 SC 40.
2. AIR 1970 SC 40.
3. AIR 1973 SC 106.
4. AIR 1950 SC 124.
5. *Lowell v. Griffin*, (1938) 303 U.S. 444.
6. *Romesh Thapper v. State of Madras*, AIR 1950 SC 124.
7. *Srinivas v. State of Madras*, AIR 1931 Ma 1 70.

(a), and this freedom is exercisable not only in India but outside and if State action sets up barriers to its citizens freedom of expression in any country in the world, it, would violate Art. 19 (1) (a) as much as if it inhibited such expression within the country. In *Mineka Gandhi v. Union of India*<sup>1</sup> the Union of India contended that the fundamental rights guaranteed by the Constitution were available only within the territory of India. How could the fundamental rights be intended to be operative outside the territory of India when their exercise in foreign territory could not be protected by the State? The Supreme Court rejected these contentions and held that the right to freedom of speech and expression has no geographical limitations. Freedom of speech and expression carries with it the right to gather information as also to speak and express one self at home and abroad and to exchange thoughts and ideas with others not only in India but also outside.

**Freedom of the press.**—The fundamental right of the freedom of the press implicit in the right of the freedom of speech and expression, is essential to political liberty and proper functioning of democracy. The American Press Commission has said, "Freedom of the press is essential to political liberty. When men cannot freely convey their thoughts to one another, no freedom is secured, where freedom of expression exists the beginning of a free society and a means for every retention of liberty are already present. Free-expression is therefore, unique among liberties." The Indian Press Commission has also expressed a similar view. It says that "Democracy can thrive not only under the vigilant eye of its Legislature, but also under the care and guidance of public opinion and the press is *par excellence*, the vehicle through which opinion can become articulate." Unlike the American Constitution, Article 19 (1) (a) of the Indian Constitution does not expressly mention the liberty of the press but it has been held that liberty of the press is included in the freedom of speech and expression.<sup>2</sup> The "press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager are merely exercising the right of the expression, and therefore, no special mention is necessary of the freedom of the press".<sup>3</sup>

"The liberty of the press" as defined by *Lord Mansfield* "consists in printing without any licence subject to the consequences of law". Thus the liberty of the press means liberty to print and publish what one pleases, without previous permission. The freedom of the press is not confined to newspapers and periodicals. It includes also pamphlets and circulars and every sort of publication which affords a vehicle of information and opinion.<sup>4</sup>

**Pre-Censorship invalid.**—The imposition of censorship on a journal previous to its publication would amount to an infringement of Article 19 (1) (a). The question of validity of censorship came up for consideration in the case of *Brij Bhushan v. State of Delhi*.<sup>5</sup> In that case the Chief Commissioner of Delhi, in pursuance of section 7 of the East Punjab Public Safety Act, 1949, issued an order against the printer, publisher, editor of an English Weekly of Delhi, called the Organiser, directing them to submit for scrutiny in duplicate before publication till further orders, all communal matters and news and views, about Pakistan including photographs and cartoons other than those

1. AIR 1978 SC 597.

2. *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129.

3. Dr. Ambedkar's Speech in Constituent Assembly Debates, VII, 780.

4. *Lowell v. Griffin*, (1938) 303 U.S. 444; *Sakal Papers Ltd. v. Union of India*, AIR 1962 SC 303; See also *Janmanison v. State of Texas* 37 L.ed. 869.

5. AIR 1950 SC 129; *Tilok Chand v. The State*, AIR 1951 Ajmer 100.

derived from official sources or supplied by the news agencies. The Court struck down the order, observing : "...the imposition of pre-Censorship of a journal is a restriction on the liberty of the press which is an essential part of the freedom of the speech and expression declared by Article 19 (1) (a)." Similarly, prohibiting newspaper from publication of its own views or the views of correspondents about the burning topic of the day is a serious encroachment on the valuable right of freedom of speech and expression.<sup>1</sup>

In an American case *The New York Times Case*,<sup>2</sup> two leading American newspapers had published some secrets about certain Government documents containing informations about America's involvement in the Vietnam War, which were alleged to have been stolen from President's Office. The Government requested the court to restrain them from publishing these documents on the ground that their publication was likely to endanger the security of the country. The newspaper owners contended that these documents contain such facts as to how the country got involved in the Vietnam War and how it had to suffer a great loss of men, material and prestige. They claimed that the publication was in the interest of public and the Government has no legal right to impose pre-Censorship under the Constitution. The Court, by a 6 to 3 majority, held that the pre-Censorship is unconstitutional, for, the Government had failed to prove that the publication of these documents threatened the security of the country.

In *Express Newspapers v. Union of India*,<sup>3</sup> the Supreme Court held that a law which imposes pre-censorship or curtails the circulation or prevents newspapers from being started or requires the Government to seek Government aid in order to survive is violative of Article 19 (1) (a). In this case the validity of the Working Journalists Act, 1955, was challenged. The Act was enacted to regulate conditions of service of persons employed in newspaper industry, e. g., payment of gratuity, hours of work, leave, fixation of wages, etc. It was contended that the Act would adversely affect the financial position of newspaper which might be forced to close down and would curtail circulation and thereby narrow the scope for dissemination of information and hence violative of Art. 19 (1) (a). The Court held the Act valid. It said that press is not immune from laws of general application or ordinary forms of taxation, or laws of industrial relations. The Act was passed to ameliorate the service conditions of workmen in the newspaper industry and therefore, imposes reasonable restriction on the right guaranteed by Art. 19 (1) (a).

In *Romesh Thapper v. State of Madras*,<sup>4</sup> a law-banning entry and circulation of journal in a State was held to be invalid. The petitioner was a printer, publisher and editor of a weekly journal in English called 'Cross Road' printed and published in Bombay. The Government of Madras, in exercise of their powers under section 9 (1-A) of the Maintenance of Public Order Act, 1949, issued an order prohibiting the entry into or the circulation of the journal in that State. The court said that there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. Liberty of circulation is an essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value. Restrictions on freedom of speech and

1. *Virendra v. State of Punjab*, AIR 1957 S. C. 896.

2. See American Reporter, July 14, 1971. p. 10.

3. AIR 1958 S. C. 578.

4. AIR 1950 S. C. 124.

expression can only be imposed on grounds mentioned in Article 19(2) of the Constitution. A law which authorises imposition of restrictions on grounds of 'public safety' or the 'maintenance of public order' falls outside the scope of authorised restrictions under clause (2) and therefore void and unconstitutional.<sup>1</sup>

In *Sakal Papers Ltd. v. Union of India*,<sup>2</sup> the Daily Newspapers (Price and Control) Order, 1960, which fixed a minimum price and number of pages which a newspaper was entitled to publish was challenged as unconstitutional by the petitioner on the ground that it infringed the liberty of the press. The petitioners were required to increase the price of their newspaper without increasing the pages. An increase in price without any increase in number of pages would reduce the volume of circulation. On the other hand, any decrease in the number of pages would reduce the column space for news, views or ideas. The order, therefore, acted as double-edged knife. It cuts circulation by a price rise or publication or dissemination of news, ideas and knowledge by restricting column space consequent to decrease in the number of pages. The State justified the law as a reasonable restriction on a business activity of a newspaper in the interests of the general public.

The Court struck down the order rejected the State's argument. It said that the right of freedom of speech and expression cannot be taken away with the object of placing restrictions on the business activity of a citizen. Freedom of speech can only be restricted on the grounds mentioned in clause (2) of Article 19. It cannot, like the freedom to carry on business, be curtailed in the interests of the general public.

In *Bennet Colman and Co. v. Union of India*,<sup>3</sup> the validity of the Newsprint Control Order which fixed the maximum number of pages (10 pages) which a newspaper could publish was challenged as violative of fundamental rights guaranteed in Articles 19 (1) (a) and 14 of the Constitution. The Government defended the measure of limiting to all papers at 10 pages level on the grounds that it would help small newspapers to grow and to prevent a monopolistic combination of big newspapers. The Court held that the newsprint policy is not reasonable restriction within the ambit of Art. 19 (2). The newsprint policy abridges petitioner's right of the freedom of speech and expression. The newspapers are not allowed, their right of circulation. They are not allowed right of page growth. The common ownership units of newspapers cannot bring out newspapers or new editions. The newspapers operating above 10 pages level (and newspapers operating below 10 pages) have been treated equally for assessing the needs and requirements of newspapers which are not their equals. Once the quota is fixed and direction to use the quota is in accordance with the newsprint policy is made applicable, the big newspapers are prevented any increase in page number. Both page number and circulation are relevant for calculating the basic quota and allowances for increase. In the garb of distribution of newsprint the Government has tended to control the growth and circulation of newspapers. Freedom of the press is both qualitative and quantitative. Freedom lies both in circulation and in content. The newsprint policy which permits newspapers to increase circulation by reducing the number of pages, page area and periodicity, prohibits them to increase the number of pages, page area and

1. Romesh Thapar's case, AIR 1950 S. C. 124.

2. AIR 1962 S. C. 305.

3. AIR 1973 S. C. 106.

periodicity by reducing circulation. These restrictions restrict the newspapers in adjusting their page number and circulation.

The Government also sought to justify the reduction in the page level on the ground that the big dailies devote high percentage of space to advertisements and therefore the cut in pages will not be felt by them if they adjusted their advertisement space. The Court held that the fixation of page-limit will not only deprive the petitioners of their economic viability but also restrict the freedom of expression by compulsive reduction of page level entailing reduction of circulation and the area of coverage for news and views. If as a result of reduction in pages the newspapers will have to depend on advertisement as their main source of income they will be denied dissemination of news and views. That will also deprive them of their freedom of speech and expression. On the other hand, if as a result of restriction on page limit the newspapers will have to sacrifice advertisements and thus weaken the link of financial strength, the organisation will crumble. The loss of advertisement may not only entail the closing down but also effect the circulation and thereby infringe on freedom of speech and expression. In our view, these features were rightly said by the petitioners to be not newsprint control but newspapers control in the guise of equitable distribution of newsprint.

**Direct and inevitable 'effect'—Test.**—The direct and inevitable effect of the rationing of newsprint were to control newspaper. It was contended on behalf of the Government of India that the subject-matter of the newsprint policy was to regulate and control the newsprint and not to control newspapers. In other words, it was urged that the test to be applied to ascertain whether a law violates Art. 19 (1) (a) is to look into the subject-matter of a law and not its effect on a particular right. The Supreme Court rejected this contention and approved that test whether the "effect" of the impugned law is to abridge a fundamental right. The Court held that if the direct effect of the impugned law is to abridge a fundamental right, its object or subject-matter will be irrelevant. In the instant case the Court held that although the subject-matter of the newsprint policy was different, its direct effect was newspaper control.

"Although the freedom of the press is implicit in the freedom of speech" it does not stand on higher footing than the freedom of speech and expression of a citizen. It is subject to same limitations as are imposed by Article 19 (2) of the Constitution. Thus in *Express Newspaper's* case,<sup>1</sup> the Supreme Court upholding the validity of the Working Journalists Act, observed that the press was not immune from ordinary forms of taxation for the general support of the Government nor from the application of general laws relating to industrial relation or laws regulating the payment of wages.

**Advertisements.**—An advertisement of 'commercial nature' is not protected under Article 19 (1) (a). Such advertisements have an element of trade and commerce.

In *Hamdard Dawakhana v. Union of India*,<sup>2</sup> the validity of the Drug and Magic Remedies (Objectionable Advertisement) Act, which put restrictions on advertisement of drugs in certain cases and prohibited advertisement of drugs having magic qualities for curing diseases was challenged on the ground that the restriction on advertisement abridged the freedom of speech. The Supreme Court held that an advertisement is no doubt a form of speech but every advertisement is not a matter dealing with the freedom of speech and expres-

1. AIR 1958 S. C. 578.

2. AIR 1960 S. C. 554.

sion of ideas. In the present case the advertisement was held to be dealing with commerce or trade and not to propagating ideas. Advertisement of prohibited drugs would thus not fall within the scope of Article 19 (1) (a).

**Demonstration, Picketing.**—Demonstration or picketing are visible manifestation of one's ideas and in effect a form of speech and expression. Demonstrations or picketings are protected under Article 19 (1) (a) provided they are not violent and disorderly.<sup>1</sup> But it has been held that there is no fundamental right to resort to strike. Right to strike is not included within the ambit of freedom of speech.<sup>2</sup>

**Film Censorship valid.**—*K. A. Abbas v. Union of India*,<sup>3</sup> is the first case in which the question as to whether censorship of films is included in Art. 19 (2) of the Constitution came for consideration before the Supreme Court of India. The Court held that censorship of films including (pre-censorship) is justified under Articles 19 (1) (a) and (2) of the Constitution. Articles 19 (1) (a) and (2) contain the guarantee of the right and the restraints that may be put upon that right by a law made by Parliament. The petitioner contended that the freedom is absolute and pre-censorship is not permissible under the Constitution. It was said that pre-censorship is inconsistent with the rights guaranteed by Art. 19 (1) (a) of the Constitution. It is clear from this that some restraint is contemplated by clause (2) and in the matter of censorship only two ways are open to Parliament to impose restrictions. One is to lay down in advance the standards for the observance of film producers and then to test each film produced against those standards by a previous censorship of the film. The other is to let the producer observe those standards and make the infraction an offence and punish a producer who does not keep within the standards. The petitioner claimed that the former offends the guaranteed freedom but reluctantly conceded the latter. He also reinforces his argument by contending that there are other forms of speech and expression besides the film and none of them is subject to any prior restraint in the form of pre-censorship and claims equality of treatment with such other forms. He contended that there is no justification for different treatment.

The Supreme Court held that the censorship imposed on the making and exhibition of films is in the interest of society. If the regulations venture into something which goes beyond this legitimate opening to restrictions they can be challenged on the ground that a legitimate power is being abused. What the Act authorises is within the permissible restriction provided by clause (2) of Article 19.

#### Grounds of Restrictions.

Clause (2) of Art. 19 contains the grounds on which restrictions on the freedom of speech and expression can be imposed :

- (a) Security of the State.
- (b) Friendly Relations with foreign States.
- (c) Public Order.
- (d) Decency or Morality.

1. *Karneshwar Singh v. State of Bihar*, AIR 1962 S. C. 1166; *O. K. Ghosh v. E. X. Joseph*, AIR 1963 S. C. 812.
2. *O. K. Ghosh v. E. X. Joseph*, AIR 1963 S. C. 812. See also *Radhey Shyam v. P. M. G*, Nagpur, AIR 1965 S. C. 311.
3. AIR 1971 S. C. 481.

- (e) Contempt of Court.
- (f) Defamation.
- (g) Incitement of an offence.
- (h) Sovereignty and integrity of India.

(a) Security of the State.—Under clause (2) of Art. 19 reasonable restrictions can be imposed on freedom of speech and expression in the interest of security of the State. In *Romesh Thapper v. State of Madras*,<sup>1</sup> the Supreme Court had occasion to interpret the meaning of the words "security of the State". The Court said that there are different grades of offences against 'public order'. Every public disorder cannot amount to be regarded as threatening the security of the State. The term 'security of the State', refers only to serious and aggravated forms of public disorder, e. g., rebellion, waging war against the State, insurrection and not to ordinary breaches of public order and public safety as unlawfull assembly, riot, affray. Thus speeches or expressions on the part of an individual which incite to or encourage the commission of violent crimes, such as, murder are matters which would undermine the security of the State.<sup>2</sup>

The words "in the interests of" before the words 'security of the State' clearly imply that the actual result of the act is immaterial. Thus acts which may indirectly bring about an overthrow of the State would come within the expression.

An incitement to an armed revolution, though infructuous ultimately, is enough to attract the term 'security of the State'.

(b) Friendly relations with Foreign States.—This ground was added by the Constitution (First Amendment) Act, 1951. The object behind the provision was to prohibit unrestrained malicious propaganda against a foreign friendly State which may jeopardise the maintenance of good relations between India and that State. No similar provision is present in any other Constitution of the world. But the laws of each country have adequate provisions to safeguard peaceful relations with foreign States.

In India, the *Foreign Relations Act, (XII of 1932)* provides punishment for libel by Indian citizens against foreign dignitaries. Again, the *Foreign Recruiting Act (IV of 1874)* empowers the Executive to prohibit recruitment of any citizen of India to the army of foreign States.

But the interests of friendly relations with foreign States, would not justify the suppression of fair criticism of foreign policy of the Government.

It is to be noted that members of the Commonwealth including Pakistan is not a "foreign State" for the purposes of this Constitution. The result is that freedom of speech and expression cannot be restricted on the ground that the matter is adverse to Pakistan.

(c) Public Order.—This ground was added by the Constitution (First Amendment) Act, 1951, in order to meet the situation arising from the Supreme Court's decision in *Romesh Thapper's case*.<sup>3</sup> In that case it was held that ordinary or local breaches of public order were no grounds for restriction on the freedom of speech, expression guaranteed by the Constitution. In

1. AIR 1950 SC 124.

2. *State of Bihar v. Shaibal Devi*, AIR 1952 SC 329.

3. AIR 1950 SC 124.

*Romesh Thapper's* case, the Supreme Court had said that 'public order' is an expression of wide connotation and signifies 'that state of tranquillity which prevails among the members of a political society as result of internal regulations enforced by the Government which they have established. In that case the Supreme Court struck down a law banning the entry of a journal in the State of Madras in the interest of 'public order' because Art. 19 (2) did not contain the expression 'public order'. It was held that restrictions could only be imposed on the grounds mentioned in Art. 19 (2). As a result of this decision the expression 'public order' was added to Art. 19 (2) as one of the grounds for imposing restrictions on the freedom of speech and expression.

Public order is what the French call *ordre publique* and is something more than ordinary maintenance of law and order. 'Public order' is synonymous with public peace, safety and tranquillity. The test for determining whether an act affects law and order or public order is to see whether the act leads to the disturbances of the current of life of the community so as to amount to a disturbance of the public order or whether it affects merely an individual living the tranquillity of the society undisturbed.<sup>1</sup>

In *Kishori Mohan v. State of W. B.*<sup>2</sup> the Supreme Court explained the differences between the three concepts : law and order, public order, security of State. The difference between these concepts, the court said, can be explained by three fictional concentric circles, the largest representing law and order the next public order, and the smallest the security of the State. Every infraction of law must necessarily effect order but not necessarily public order and an act may effect public order but not necessarily security of the State and an act can fall under two concepts at the same time affecting public order and security of the State.

One act may affect individual in which case it would affect law and order while another act though of a similar kind may have such an impact that it would disturb even the tempo of the life of the community in which case it would be said to affect public order, the test being not the kind but the potentiality of the act in question.

Anything that disturbs public tranquillity or public peace disturbs public order.<sup>3</sup> Thus communal disturbances<sup>4</sup> and strikes promoted with the sole object of causing unrest among workmen<sup>5</sup> are offences against public order.

Public order thus implies absence of violence and an orderly state of affairs in which citizens can peacefully pursue their normal advocacy of life.<sup>6</sup>

Public order also includes public safety.<sup>7</sup> Public safety means the safety of the community from the external and internal dangers. Thus creating internal disorder or rebellion would affect public order and public safety.<sup>8</sup> But mere criticism of Government does not necessarily disturb public order.<sup>9</sup> In

1. *Kanu Biswas v. State of W. B.*, AIR 1972 SC 1656.
2. AIR 1972 SC 1749 ; *Dr. Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740.
3. *Om Prakash v. Emperor*, AIR 1948 Nag. 199.
4. *Noor Mohammad v. Rex*, AIR 1949 All. 120.
5. *Om Prakash v. Emperor*, AIR 1948 Nag. 199.
6. *Basudev v. Rex*, AIR 1949 All. 513 (F. B.).
7. *Romesh Thapper v. State of Madras*, AIR 1950 SC 124.
8. *Brij Bhusan's case*, AIR 1950 SC 129
9. *Raj Bahadur Gond v. State of Hyderabad*, AIR 1953 Hyd. 277.

its external aspect 'public safety' means protection of the country from foreign aggression. Under 'public order' the State would be entitled to prevent propaganda for a State at war with India.<sup>1</sup>

The words 'in the interest of public order' include not only such utterances as are directly intended to lead to disorder, but also those that have the tendency to lead to disorder. Thus a law punishing utterances made with deliberate intention to hurt the religious feelings of any class of persons is valid because it imposes a restriction on the right to free speech in the interest of public order. Since such speech or writing has the tendency to create public disorder even if in some cases those activities may not actually lead to a breach of peace.<sup>2</sup> But there must be reasonable and proper nexus or relationship between the restriction and the achievement of public order. In *Superintendent, Central Prison v. Dr. Ram Manohar Lohia*,<sup>3</sup> section 3 of U. P. Special Powers Act, 1932 which punished a person if he incited a single person not to pay or defer the payment of Government dues was held to be invalid because there was no proximate nexus between the speech and public order. The Court said that fundamental right cannot be controlled on such "hypothetical and imaginary considerations". The Court rejected the argument that instigation of a single individual not to pay tax would itself destroy public order.

In *Sodhi Shamsher v. State of Pepsu*,<sup>4</sup> a vitriolic attack upon the character and integrity of the Chief Justice of a High Court was held to have no rational connection with the maintenance of law and order.

An action in advance to maintain public order is not prohibited. In *Babul Parate v. State of Madras*,<sup>5</sup> section 144 of the Cr. P. C. was challenged on the ground that it imposed unreasonable restriction on the right of freedom of speech and expression. The Court upheld the section, holding that anticipatory action to prevent disorder is within the ambit of clause (2) of Article 19. Under section 144, Cr. P. C., if a magistrate is of the opinion that there is sufficient ground for immediate danger of breach of peace can by a written order direct a person or persons to abstain from certain acts if he considers that such direction is likely to prevent or tend to prevent a disturbance of public tranquillity, or a riot or affray.

(d) Decency or Morality.—The words "morality or decency" are words of wide meaning. The word 'obscenity' of English law is identical with the word 'decency' under the Indian Constitution.

The test of obscenity is whether the tendency of matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort is likely to fall. Thus a publication is obscene if it tends to produce lascivious thoughts and arouse lustful desire in the minds of substantial numbers of that public into whose hands the book is likely to fall. This test was laid down in an English case of *R. v. Hicklin*.<sup>6</sup>

1. *Rex. v. Amir Hussain*, AIR 1949 F. C. 152.

2. *Ramjilal Modi v. State of U. P.*, AIR 1957 SC 620; see also *Ramjilal Modi v. State of U. P.*, AIR 1959 SC 620.

3. AIR 1960 SC 633.

4. AIR 1954 SC 276.

5. AIR 1961 SC 884.

6. L. R. 3 Q. B. 360 (The test laid down in this case has been followed in number of cases in India) *Ranjit D. Udehi v. State of Maharashtra*, AIR 1965 SC 881.

Sections 292 to 294 of the Indian Penal Code provide instances of restrictions on the freedom of speech and expression in the interest of decency and morality. These sections prohibit the sale or distribution or exhibition of obscene matter or doing of obscene acts or singing of obscene songs or uttering obscene words, etc., in public places. But the Indian Penal Code does not lay down any test to determine obscenity. In *Ranjit D. Udeshi v. State of Maharashtra*,<sup>1</sup> the Supreme Court accepted the above test to judge the obscenity of a matter. In this case the Court upheld the conviction of the appellant, a book-seller, who was prosecuted under section 292, I. P. C. for selling and keeping the book. "The Lady Chatterley's Lover". Applying the above test, the Court held the novel as obscene.

It is submitted that the Court has erred in not rejecting Hicklin Rule which has become obsolete. It lays down a vague and arbitrary standard for judging obscenity and has a tendency to curtail the guaranteed right to freedom of speech.<sup>2</sup> No fixed standard can be laid down as to what is moral and indecent. The standard of morality varies from time to time and from place to place. Birth control which was once considered immoral is now considered proper as a means to check over-population. On these considerations, we may submit that the court should revise its opinion as soon as it gets an opportunity to do so and reject the rule laid nearly hundred years ago by an English Judge.

(e) **Contempt of Court.**—Restriction on the freedom of speech and expression can be imposed if it exceeds the reasonable and fair limit and amounts to contempt of Court.

*The Contempt of Courts Act, 1971*, now defines the expression 'Contempt of Court'. as follows : According to section 2 'Contempt of Court' may be either 'civil contempt' or 'criminal contempt'.

(a) 'Civil contempt' means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an under-taking given to a court.

(b) 'Criminal contempt' means the publication (whether by words spoken or written, or by signs or by visible representations or otherwise) or any matter or the doing of any other act whatsoever which—

- (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court ; or
- (ii) prejudices, or interferences or tends to interfere with the due course of any judicial proceedings ; or
- (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

The following acts are however not Contempt of Courts :

- (a) Innocent publication and distribution of any matter ;
- (b) Publication of fair and accurate report of judicial proceedings ;
- (c) Fair criticism of judicial act ;
- (d) Complaint against Presiding Officers made in good faith ;

1. AIR 1965 SC 881

2. Dr. V. N. Shukla—The Constitution of India, 1969 edition, p. 67.

(e) Publication of fair information relating to proceedings in chambers or *in camera*;

Under the Act, the Contempt of Courts is punishable with simple imprisonment for a term of 6 months, or with fine which may extend to Rs. 2,000, or with both.

A judge, magistrate or any person acting judicially shall also be liable for contempt of his court in the same manner as any other individual is liable under this Act.

Thus judges have no general immunity from criticism of their judicial conduct provided it is made in good faith and is a fair criticism of his judicial act.

The terminology used in the definition is borrowed from the English law of contempt and embodies concepts which are familiar to that law which by and large, was applied in India. The expressions "scandalise" "lowering the authority of the court", "interference", "obstruction" and "administration of justice" are therefore to be understood by our courts with the aid of English law.

In *Baradakant v. Registrar, Orissa*,<sup>1</sup> the appellant, a senior Judicial Officer, was convicted and sentenced under the Contempt of Courts Act, 1971 by a Full Bench of Orissa High Court. The facts of the case were that on March 28, 1972, a disciplinary proceeding was started against him and he was placed under suspension. On receiving the suspension order the appellant wrote three letters, two to the High Court and one to the Government. It is the contents of these letters on which the present contempt proceedings were launched against him and he was punished. The Supreme Court held that contempt allegations made with reference to the administrative functions of High Court amount to criminal contempt. Administration of justice is closely associated with the Court of Justice which have to perform multifarious functions for due administration of justice. Any lapse from the strict standards of rectitude in performing these functions is bound to effect administration of justice. The whole set up of a court is for the purpose of justice and the control exercised by a judge over his assistants have also the object of maintaining the purity of justice. It is therefore important for the superior Court to be vigilant about the conduct and behaviour of the subordinate Judge as a Judge to administer the law. Adjudication of cases between parties is not the whole administration of justice. Disciplinary control is a function as conducive to proper administration of justice as laying down the law or doing justice between the parties. Thus when the High Court under Art. 235 functions in disciplinary capacity it does so in furtherance of administration of justice.

It was held that the defamatory criticism of a Judge functioning as a judge even in purely administrative or non-adjudicatory matters amounts to criminal contempt. The imputations in the above-mentioned letters have grossly vilified the High Court and has substantially interfered with the administration of justice and therefore the appellant was rightly convicted of the offence of criminal contempt.

(f) Defamation.—A statement which injures a man's reputation amounts to defamation. Defamation consists in exposing a man to hatred, ridicule, or

<sup>1</sup> AIR 1974 SC 710; also see *G. H. Verma v. Hargovind Dayal*, AIR 1975 All. 52.

contempt. In India, section 499 of the Indian Penal Code, contains the criminal law relating to defamation. It recognises no distinction between the defamatory statement addressed to the ear or eye, i. e., slander and libel. These sections are saved as being reasonable restrictions on the freedom of speech and expression.<sup>1</sup> The civil law relating to defamation is still uncodified in India and subject to certain exceptions follows generally the English law.

(g) **Incitement to an offence.**—This ground was also added by the Constitution (First Amendment) Act, 1951. Obviously, freedom of speech and expression cannot confer a licence to incite people to commit offence. The word 'offence' used here is not defined in the Constitution. It is, however, defined in the General Clauses Act, as meaning "Offence shall mean any act or omission made punishable by any law for the time being in force". What constitutes 'incitement' will, however, have to be determined by the court with reference to the facts and circumstances of each case.

(h) **Integrity and Sovereignty of India.**—The ground was added to clause (2) of Article 19 by the Constitution (Sixteenth Amendment) Act, 1963. Under this clause freedom of speech and expression can be restricted so as not to permit any one to challenge the integrity or sovereignty of India or to preach secession of any part of India from the Union.

**Sedition.**—As understood in English law, sedition embraces all those practices whether by word, or writing which are calculated to disturb the tranquillity of the State and lead ignorant persons to subvert the Government.<sup>2</sup> Thus the gist to the offence of sedition is incitement to violence. Mere criticism of the Government is no offence.

"In India, section 124-A of the Indian Penal Code, defines the offence of sedition as follows :

"Whoever by words either spoken or written, or by signs, or by visible representation or otherwise brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India shall be punished."

*Explanation 3* to section 124-A states that more comment expressing disappropriation of Government is no offence if it does not excite or attempt to excite 'disaffection towards Government established by law'.

In *Niharendu v. Emperor*,<sup>3</sup> the Federal Court had held that mere criticism or even ridicule of the Government is no offence unless it is calculated to undermine respect for the Government in such a way as to make people cease to obey it and obey the law, so that only anarchy can follow.....Public disorder is the gist of the offence. But the Privy Council overruled this decision and held that the offence of sedition is not confined to only incitement to violence or disorder.

It is to be noted that sedition is not mentioned in clause (2) of Article 19 as one of the grounds on which restriction on freedom of speech and expression may be imposed. But it has been held in *Devi Soren v. State*,<sup>4</sup> that sections 124-A and 153-A of I. P. C. impose reasonable restriction in the interest of public order and is saved by Article 19 (2).

1. Dr. Suresh Chandra v. Pandit Goals, AIR 1951 Cal, 176.
2. R. N. Sullivan, (1868) 11 Cox Cases 55.
3. AIR 1942 FC 22.
4. AIR 1954 Pat, 254.

In *Kedar Nath v. State of Bihar*,<sup>1</sup> the constitutional validity of section 124-A, I. P. C., was considered by the Supreme Court. The Court upheld the view taken by the Federal Court in *Niharendu's case*,<sup>2</sup> that the gist of the offence of sedition is that the words written or spoken have tendency or intention of creating public disorder and held the section constitutionally valid.

### B. FREEDOM OF ASSEMBLY—Art. 19 (1) (b) & 19 (3)

Article 19(1) (b) guarantees to all citizens of India right "to assemble peaceably and without arms". The right of assembly includes the right to hold meetings and to take out processions. This right is, however, subject to the following restrictions :

1. The assembly must be peaceable ;
2. It must be unarmed ;
3. Reasonable restrictions can be imposed under clause 3 of Article 19.

The right of assembly is implied in the very idea of the democratic Government. The right of assembly thus includes right to hold meetings and to take out processions. This right, like other individual rights, is not absolute but restrictive. The assembly must be non-violent and must not cause any breach of public peace. If the assembly is disorderly or riotous then it is not protected under Article 19 (1)(b) and reasonable restrictions may be imposed under clause (3) of Article 19 in the interests of 'sovereignty and integrity of India' or 'public order'.

**When a lawful Assembly becomes unlawful.**—Article 19 (1) (b) saves existing Indian law regulating public meetings in the interest of public order if the restrictions are reasonable. If an assembly becomes unlawful it can be dispersed. Chapter VIII of the Indian Penal Code lays down the conditions when an assembly becomes "unlawful". Under section 141 of the Indian Penal Code, an assembly of five or more persons becomes an unlawful assembly if the common object of the persons composing the assembly is—

- (a) to resist the execution of any law or legal process,
- (b) to commit any mischief or criminal trespass,
- (c) obtaining possession of any property by force,
- (d) to compel a person to do what he is not legally bound to do or to omit which he is legally entitled to do,
- (e) to overawe the Government by means of criminal force or show of criminal force or any public servant in the exercise of his lawful powers.

An assembly which was not unlawful when assembled may subsequently become unlawful, if it becomes violent or is likely to result in disturbance. Under section 129 of the Criminal Procedure Code, 1973 such an assembly may be ordered to be dispersed if the disturbance to the public peace is reasonably apprehended. Section 151 of the Indian Penal Code makes it

1. AIR 1952 SC 955.

2. AIR 1942 F. C. 22.

an offence not to disperse after a lawful command to disperse has been given.

Section 107 of the Criminal Procedure Code empowers a Magistrate to obtain security for keeping the peace from any person who is likely to commit a breach of peace.

Section 144, Criminal Procedure Code, 1973 empowers the Magistrate to restrain an assembly, meeting or procession if there is a risk of obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray. The Police Act, 1861, empowers a police officer to direct the conduct and prescribe the route and time of all assemblies and processions in the interest of public order. Under section 30 of this Act a prior licence has to be taken by a member of the public to take out a procession. A law conferring authority on the Magistrate to grant or refuse a licence to hold a meeting or a law imposing a restriction that no public procession could be taken out without a licence from a Magistrate has been held to be valid.<sup>1</sup>

Unlike the American Constitution, which guarantees to the people the right to keep and bear arms, the Indian Constitution does not guarantee any general right to carry arms to any assembly, lawful. However, the existing Arms Act prohibits possession and carrying of unlicensed offensive weapons. The Prevention of Seditious Meeting Act, 1911 prohibits public meeting likely to promote sedition or to cause a disturbance of public tranquillity. It empowers the State Government to declare the whole or any part of the State to be a 'proclaimed area'. Thereupon, no public meeting for the furtherance or discussion of any subject likely to cause disturbance or for the excitement, or for the exhibition or distribution of any writing or printed matter relating to any such subject, shall be held in any such proclaimed area, (a) unless written notice of the intention to hold such meeting and of the time and place of such meeting has been given to the District Magistrate or the Commissioner of Police, as the case may be, at least three days previously, (b) unless permission to hold such meeting has been obtained in writing from the above Officers as the case may be.

All the above mentioned statutory provisions impose reasonable restrictions under clause (3) of Article 19 on the right to freedom of assembly.

#### C. FREEDOM TO FORM ASSOCIATION—Art. 19 (1) (c) & 19 (4)

Article 19 (1) (c) of the Constitution of India guarantees to all its citizens the right "to form associations and unions" under clause (4) of Article 19, however, the State may by law impose reasonable restrictions on this right in the interest of public order or morality or the sovereignty and integrity of India.

The right of association pre-supposes organisation. It is an organisation of permanent relationship between its members in matters of common concern. It thus includes the right to form companies, societies, partnership, trade unions<sup>2</sup> and political parties.

1. Dasappa v. Dy. Additional Commissioner, AIR 1960 Mys. 57 : Brahmanand v. State of Bihar, AIR 1959 Pat. 425.
2. Kulkarni v. State of Bombay, AIR 1931 Bom. 105.

The right guaranteed is not merely the right to 'form' association but also to continue with the association as such. The freedom to form association implies also the freedom to form or not to form, to join or not to join,<sup>1</sup> an association or union.

In *Damayanti v. Union of India*,<sup>2</sup> the validity of Hindi Sahitya Sammelan Act, 1962 was challenged as violative of Art. 19 (1) (c). The petitioner was a member of an association. The Act changed the composition of the association and introduced new members. The result of this alteration was that the members who voluntarily formed the association were now compelled to act in that association with other members in whose administration they had no say.

The Supreme Court held that the Act violates the rights of the original members of society to form an association guaranteed under Article 19 (1) (c) "The right to form an association" the court said "necessarily implies that the persons forming the association have also the right to continue to be associated with only those whom they voluntarily admit in the association. Any law by which members are introduced in the voluntary association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association". The Hindi Sahitya Sammelan Act does not merely regulate the administration of the affairs of the original society, what it does is to alter the composition of the society itself. The result of this change in the composition is that the members who voluntarily formed the association are now compelled to act in that association with other members who have been imposed as members by the Act and in whose admission to membership they had no say. Such alteration in the composition of the association itself clearly interferes with the right to continue to function as members of the association which was voluntarily formed by the original founders. The Act, therefore, violates the right of the original members of society to form an association guaranteed under Article 19 (1) (c).

As regards the plea that the Act imposes reasonable restriction under clause (4) of Art. 19, the court said that clause (4) cannot be called in to claim validity for the Act. Under Clause (4) of Article 19 reasonable restrictions can be imposed only in the interest of the sovereignty and integrity of India or in the interests of public order or morality. The alteration of the constitution of the society in manner laid down by the Act is not in the interests of the sovereignty and integrity of India or in the interests of public order or morality.

**Right of Association and Armed Forces.**—In *O. K. A. Nair v. Union of India*,<sup>3</sup> an important question arose whether 'civilian' employees, designated as 'non combatants' such as cooks, chowkidars, laskers, barbers, mechanics, boot makers, tailors, etc. attached to the Defence Establishments have a right to form associations or unions. The appellants were members of the civil employees unions in the various centres of the Defence Establishment. The Commandant declared their unions as unlawful associations. They challenged that the impugned action was violative of their fundamental right to form associations or unions under Art. 19 (1) (c) of the Constitution. They contended that the members of the unions, though attached to the Defence Establishments, are civilians and their service conditions are regulated by Civil Service

1. *Surya Pal Singh v. State of U. P.*, AIR 1951 All 674; *V. G. Row v. State of Madras*, AIR 1951 Mad 147.
2. AIR 1971 S. C. 966.
3. AIR 1976 S. C. 1179.

Rules and therefore they could not be called "members of the Armed Forces" within the meaning of Art. 33 of the Constitution. The Supreme Court, however, rejected the arguments of the appellants and held that the civilian employees of the Defence Establishments answer the description of the members of the Armed Forces within the meaning of Art. 33 and therefore are not entitled to form trade unions. It is their duty to follow or accompany the Armed Personnel on active service, or in camp or on march. Although they are non-combatants and in some matters governed by the Civil Service Rules, yet they are integral to Armed Forces. Consequently, under the Army Act the Central Government was competent to make rules restricting or curtailing their fundamental right under Art. 19 (1) (c).

**Restrictions on the Freedom of Association.**—The right of association, like other individual freedom, is not unrestricted. Clause (4) of Article 19 empowers the State to impose reasonable restrictions on the right of freedom of association and union in the interest of "public order" or "morality" or "sovereignty or integrity of India."<sup>1</sup> It saves existing laws in so far as they are not inconsistent with fundamental rights of association.

The Criminal Law Amendment Act, 1908, as amended by the Madras Act, 1950, provides that if the State Government is of opinion that any association interferes with the administration of law or with the maintenance of law and order or that it constitutes a danger to the public peace it may by notification in the official Gazette declare such association to be unlawful. Such a notification was to be placed before an Advisory Board. Representation against such a notification could be made. If the Advisory Board was of opinion that the association was not unlawful the Government was to cancel the notification.

The validity of the above Act was challenged in the case of *State of Madras v. V. G. Roy*.<sup>2</sup> The Supreme Court held that the restrictions imposed by section 16 (2) (b) of the Act as unreasonable. The test under it was subjective satisfaction of the Government and the factual existence of the grounds was not a justiciable issue. Therefore, the vesting of power in the Government to impose restrictions in this right without allowing the grounds tested in a judicial enquiry was a strong element to be taken into consideration in judging the reasonableness of the restrictions on the right to form association or union. The existence of an advisory board could not be a substitute for judicial inquiry.

In *Haji Mohd. v. District Board, Malda*,<sup>3</sup> a restriction requiring a teacher to take prior permission to engage in political activities was held to be a reasonable restriction. It aimed at preventing teachers from getting mixed up with political institutions. For, a teacher is not merely a citizen but he has to be under certain terms and discipline of employment.

But a Government order requiring municipal teachers not to join unions other than those officially approved was held to impose prior restraint on the right to form association and union, which was in the nature of administrative censorship, and hence invalid.\* In *G. K. Ghose v. E. X. Joseph*,<sup>5</sup>

1. This ground was added to clause (4) of Article 19 by the Constitution (16th Amendment) Act, 1963.
2. AIR 1952 S. C. 196.
3. AIR 1958 Cal 401. See also *Hanumanthappa v. Special Officer, Distt. Board*, AIR 1960 A.P. 342.
4. *Ramkrishna v. President, District Board, Nellore*, AIR 1952 Mad. 253.
5. AIR 1963 S.C. 812.

Rule 4-B of the Central Civil Service (Conduct) Rules, 1955, which required a Government servant not to join or continue to be a member of the Association of Government servants as soon as recognition given to such association is withdrawn or if after the association is formed, no recognition is granted to it within six months. In other words, the right to form an association was conditioned as the existence of recognition of the said association by the Government. The Court said that the condition of recognition made the right under Art. 19 (1)(c) ineffective or illusory. If the association obtains the recognition and continues to enjoy it, Government servants can become members of the said association, if the association does not secure recognition from the Government or recognition granted to it is withdrawn, the Government servants must cease to be the members of the said association. Under Art. 19 (4) reasonable restrictions can be imposed on the right in the interest of public order, but in the instant case, restrictions were not reasonable as the recognition could be refused on grounds which had no connection with the public order.

In *Balakotiah v. Union of India*,<sup>1</sup> the services of the appellant were terminated under Railway Service Rules for his being a member of Communist Party and a trade unionist. The appellant contended that the termination from service amounted in substance to a denial to him the right to form association. The appellant had no doubt a fundamental right to form association but he had no fundamental right to be continued in the Government service. It was, therefore, held that the order terminating his services was not in contravention of Article 19 (1) (c) because the order did not prevent the appellant from continuing to be in Communist Party or trade unionist.

The right to form union does not carry with it the right to achieve every object. Thus the trade unions have no guaranteed right to an effective bargaining or right to strike or a right to declare a lock-out.<sup>2</sup>

#### D. FREEDOM OF MOVEMENT—Art. 19 (1) (d) and 19 (5)

Article 19 (1) (d) guarantees to all citizens of India the right "to move freely throughout the territory of India". This right is, however, subject to reasonable restrictions mentioned in clause (5) of Art. 19, i. e., in the interest of general public or (2) for the protection of the interest of any Scheduled Tribe.

Article 19 (1) (d) of the Constitution guarantees to its citizens a right to go wherever they like in Indian territory without any kind of restriction whatsoever. They can move not merely from one State to another but from one place to another within the same State. This freedom cannot be curtailed by any law except within the limits prescribed under Article 19 (5). What the Constitution lays stress upon is that the entire territory is one unit so far the citizens are concerned.<sup>3</sup> Thus the object was to make Indian citizens national minded and not to be petty and parochial.

**Grounds of Restrictions.**—The State may under clause (5) of Article 19

1. AIR 1958 SC 232.

2. *All India Bank Employees Association v. The National Industrial Tribunal*, AIR 1962 SC 171; *Raghubar Dayal v. Union of India*, AIR 1962 SC 263.

3. *N B Khare v. State of Delhi*, AIR 1950 SC 211.

impose 'reasonable' restrictions on the freedom of movement on two grounds—

- (1) in the interests of general public,
- (2) for the protection of the interest of any Scheduled Tribe.

In *N. B. Khare v. State of Delhi*,<sup>1</sup> the petitioner was served with an order of externment by the District Magistrate, Delhi, to remove himself immediately from Delhi district and not to return there for a period of three months. The order was made under the East Punjab Safety Act, 1949. The petitioner contended that the order imposed unreasonable restrictions on his right to move freely, because (a) the externment order depended on the subjective satisfaction of the Executive, and (b) the Act did not fix any maximum time beyond which the order cannot continue.

The Supreme Court held that the mere fact that the power to make the order of externment was given to the State Government or District Magistrate whose satisfaction was final did not make the restriction unreasonable because the desirability of passing such an individual order in emergency has to be left to an officer. The second contention was rejected on the ground that the Act was of limited duration, therefore, there was no possibility of an order of externment being made for indefinite period. But a law providing for externment of dangerous character from a particular locality cannot be called reasonable if it does not specially define as to what is meant by dangerous character as it gives the administrative authority arbitrary power to determine as to whether a citizen is of dangerous character or not.<sup>2</sup>

In *State of Uttar Pradesh v. Kaushalya*,<sup>3</sup> the Supreme Court has held that the right of movement of prostitutes may be restricted on grounds of public health and in the interest of public morals.

The right of a citizen to move freely may also be restricted for the protection of the interest of "Scheduled Tribes". This was to protect the original tribes which are mostly settled in Assam. These tribes have their own culture, language, customs and manners. It was considered necessary to impose restriction upon the entry of outsider to these areas. It was feared that uncontrolled mixing of the tribe with the people of other areas might produce undesirable effect upon the tribal people.

#### E. FREEDOM OF RESIDENCE—Art. 19 (1) (e) and 19 (5)

According to Article 19 (1) (e) every citizen of India has the right "to reside and settle in any part of the territory of India". However, under clause (5) of Article 19 reasonable restrictions may be imposed on this right by law in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

The object of the clause is to remove internal barriers within India or any of its parts. The words 'the territory of India' as used in this Article indicate freedom to reside anywhere and in any part of the State of India.

It is to be noted that the right to reside, and right to move freely

1. AIR 1950 SC 211.
2. *State of M. P. v. Baldeo*, AIR 1961 SC 293.
3. AIR 1964 SC 416; see also *Kamala Chhina v. State*, AIR 1963 Punj. 36.

throughout the country are complementary and often go together. Therefore most of the cases considered under Art. 19 (1) (d) are relevant to Article 19 (1) (e) also. This right is subject to reasonable restrictions imposed by law in the interest of general public or for the protection of the interests of any Scheduled Tribe. Thus where a prostitute, under the Suppression of Immoral Traffic in Women and Girls Act, 1956, was ordered to remove herself from the limits of a busy city or the restriction was placed on her movement and residence it was held to be a reasonable restriction.<sup>1</sup>

The freedom of movement and residence may be curtailed and suspended during an emergency. In the case of a foreigner it can be restricted under the Foreigners Acts of 1964 and 1966. A foreigner may be ordered to remove himself from India. The important case on this point is *Ebrahim Wazir v. State of Bombay*.<sup>2</sup> Section 7 of the Influx from Pakistan (Control) Act, 1949, empowered the Central Government to direct the removal from India of any person including an Indian citizen who had committed or against whom reasonable suspicion existed of having committed an offence under the Act, i.e., to enter India without permit or valid passport. The appellant in the above case came to India without permit and was arrested and deported to Pakistan under the instant Act. The court held the order of removal invalid on the ground that it imposed unreasonable restriction upon the fundamental right of a citizen to reside and settle in the country. The coming of a citizen to his home land even without a permit could not be so grave an offence as to justify his expulsion from the country.

In *State of M. P. v. Bharat Singh*,<sup>3</sup> section 3 (1) of the M. P. Public Security Act, 1959, empowered the State Government to issue an order requiring a person to reside or remain in such a place as may be specified in the order or to ask him to leave the place and go to another place selected by authorities, in the interests of security of the State or public order. The Supreme Court held that section 3 (1) (b) of the Act imposes unreasonable restriction on the right guaranteed by Article 19 (1) (b) and therefore, void. The Act did not give an opportunity to the person concerned of being heard about the place where he was asked to reside. The place selected for him might have no residential accommodation and no means of livelihood, etc. The section did not indicate the extent of the place or area, its distance from the residence of the person extorted.

#### **E. FREEDOM OF PROFESSION, OCCUPATION, TRADE OR BUSINESS—Art. 19 (1) (g) and 19 (6)**

Article 19 (1) (g) guarantees that all citizens shall have the right "to practise any profession, or to carry on any occupation, trade or business". However, the right to carry on a profession, trade or business is not unqualified. It can be restricted and regulated by authority of law. Thus the State can under clause (6) of Article 19 make any law—

(a) imposing reasonable restriction on this right in the interest of general public.

(b) prescribing professional or technical qualification necessary for practising any profession or carrying on any occupation, trade or business,

1. *State of U.P. v. Kaushalya*, AIR 1964 SC 416.

2. AIR 1954 SC 299.

3. AIR 1967 SC 1170.

(c) enabling the State to carry on any trade or business to the exclusion of citizens wholly or partially.

The right to carry on a business includes the right to close it at any time the owner likes.<sup>1</sup> So, the State cannot compel a citizen and stop him from closing his business. But as no right is absolute, the right to close a business is also not an absolute right. It can be restricted, regulated or controlled by law in the interest of public. The right to close down a business can not be equated or placed at par as high as the right not to start and carry on business. If one does not start a business at all, then, under no circumstances, he can be compelled to start one. But if one has started or carrying on a business, he has no absolute right to close it. He can be compelled not to close down his business in the interests of general public. These principles have been laid down by the Supreme Court of India in the recent case of *Excel Wear v. Union of India*.<sup>2</sup> In that case the petitioners "Excel Wear" was a registered firm, It has a factory at Bombay where it manufactured garments for exports. Due to serious labour trouble, the factory was running into a recurring loss. The petitioners finding it almost impossible to carry on business of the factory, served a notice on the State Government for previous approval for its closure. The Government refused approval in the public interest. The Government refused approval under Secs. 25-O, Sec. 25 R. of the Industrial Disputes Act, 1947, Sec. 25-O- provides for taking permission for closure. Sec. 25-R, provides punishment for violation of Sec. 25-O. In the instant case the Court held that Sec. 25-O of the Act as a whole and Sec. 25 R in so far as it relates to the awarding punishment for violation of the provisions of Sec. 25-O are unconstitutional and invalid for violation of Art. 19 (1) (g) of the Constitution. The Court said that no body has got a right to carry on the business if he cannot pay even the minimum wages to the labour. He must then close down his business. The refusal not to close down business even if he can not pay, is not a reasonable restriction in the public interest within the meaning of Art. 19 (6) of the Constitution.

To prohibit lock-outs and strikes, is however, different as this is within the prohibitory powers of Government in the interests of the general public, e. g. to keep the utility services running.<sup>3</sup>

The right to practise any "profession" does not include right to carry on any illegal or any immoral profession. The State has no right to prohibit trades, which are illegal or immoral or injurious to the health and welfare of the public.

#### Grounds of Restrictions

Under clause (6) of Article 19 the State is authorised to impose reasonable restrictions on the right to carry on a trade, profession and business. The condition is that the restrictions must be (1) 'reasonable' and (2) in the interest of general public. The right to carry on business being a fundamental right, its exercise is subject only to the restrictions imposed by law in the interest of the general public under Article 19 (6). In *Nagar Rice and Flour Mills v. N. T. G. and Bros.*,<sup>4</sup> the Government issued an order under section 8 (3) (c) of the Rice Milling Industry (Regulation) Act, 1958, sanctioning the

1. *W & S E N (Private) Ltd. v. E. N. (Pr.) Ltd.*, AIR 1961 Madras 331 ; *Hathising Mfg. Co. v. Union of India*, AIR 1960 SC 923.

2. AIR 1979 SC 25.

3. *Indian M. M Corporation v. Industrial Tribunal*, AIR 1953 Mad. 93,

4. AIR 1971 SC 246.

change in the location of the rice mill from its original site to the new site. The respondent challenged the order on the ground that appellant's mill was moved to a place in the vicinity of 'their' rice mill and in consequence of the removal of the appellant's mill their business was likely to be adversely affected and amounts to unreasonable restriction on his right to carry on business. The Court held the order valid. The owners of the rice mill shifted its existing location and obtained the necessary permission for the change of location from the Director of Food and Civil Supplies. Even if it be assumed that the previous sanction has to be obtained from the authorities before the machinery is moved from its existing site the competitor in business (owner of another rice mill) can have no grievance against the grant of permission, permitting the installation on a new site. The exercise of right under Art. 19 (1) (g) is subject only to the restrictions imposed in the interest of 'general public' and not that it *adversely affects* other's business.

In order to determine the reasonableness of the restriction for the purposes of clause (6) of Article 19 regard must be had to the nature of the business and condition prevailing in the particular trade. It is obvious that nature of business must differ from trade to trade and no hard and fast rules concerning all trades can be laid down. The facts and circumstances present in trade, the type of the evil attempted to be remedied, the degree of harm likely to be caused to the citizens should determine the scope of restrictions to be imposed by the State. All the attendant circumstances should enter into legislative prescription of reasonableness of a restriction.<sup>1</sup>

There is no fundamental right to do trade or business in intoxicants. Thus trade in noxious and dangerous goods, adulterated food, trafficking in women may be prohibited altogether by the State in the interest of the general public. The trades which are neither immoral nor injurious to the health and public welfare cannot be suppressed or prohibited. They can only be regulated and their evil effects, if any, be mitigated. Some occupations by their very nature of being noisy and dangerous may require regulation to the locality in which they should be practised and special conditions in which they should be carried on. No citizen has right to carry on his business at place of his choice, if his doing so is injurious to the public health or even causes inconvenience to others. The State has power to enforce an absolute prohibition of manufacture for sale of intoxicating liquor. The State has the exclusive right or privilege to manufacture, store and sale of liquor and to grant that right to its licence holders on payment of consideration, with such conditions and restrictions for its regulation as may be necessary in the public interest.<sup>2</sup>

**Instances of Reasonable Restriction.**—(1) There is no right to carry on business at a particular place. The State may impose reasonable restrictions in the interest of general public. Thus a competent authority may reasonably fix a place for a bus stand,<sup>3</sup> a cinema house,<sup>4</sup> or a liquor shop.<sup>5</sup>

1. Mineral Development Ltd. v. State of Bihar, A. I. R. 1960 S. C. 468; Narendra Kumar v. Union of India, A. I. R. 1960 S. C. 430; Hathisingh Manufacturing Company v. Union of India, A. I. R. 1960 S. C. 923; Cooverji v. Excise Commissioner, A. I. R. 1954 S. C. 220; Chintamanrao v. State of M. P., A. I. R. 1955 S. C. 118.
2. Lakhnial v. State of Orissa, A. I. R. 1977 S. C. 722; Nahirwar v. State of M. P., A. I. R. 1975 S. C. 360.
3. T. Ibrahim v. Regional Transport Authority, A. I. R. 1953 S. C. 79.
4. Ranchhorlalji v. Revenue Divisional Commissioner, A. I. R. 1960 Orissa 88.
5. Cooverji v. Excise Commissioner, A. I. R. 1954 S. C. 220,

(2) The Minimum Wages Act empowered the Government to fix minimum wages to be given to the labourers in a particular industry. In *Bijay Cotton Mills Ltd. v. State of Ajmer*,<sup>1</sup> the Act was challenged as being in violation of Article 19 (g). The Court held the restrictions imposed by the Act to be reasonable as being imposed in the interest of general public. The Court observed :

"In an under-developed country which faces the problem of unemployment on a very large scale, it is not unlikely that labour may offer to work even on starvation wages. The policy of the Act is to prevent the employment of such sweated labour in the interest of general public."<sup>2</sup>

(3) The fixation of maximum prices of commodities essential to the life of the community, control on their production, distribution and setting of their stocks are reasonable restrictions on the freedom of trade. The Essential Supplies Act, 1946, and the Essential Commodities Act, empowered the Government to control production, supply and distribution of essential commodities, the object being to secure equitable distribution, availability at fair price and regulation of the transport, distribution and acquisition of essential commodities.<sup>3</sup> These Acts were held to be valid.

(4) The Punjab Trade Employees Act, 1949, provided that shops and establishments shall remain closed for a day in a week. In *Monohar Lal v. State of Punjab*,<sup>4</sup> the Supreme Court held the restriction to be reasonable because the purpose of the Act is to improve the health and efficiency of the workers who form an essential part of the community and in whose welfare the community is vitally interested. The contention of the petitioner that the Act did not apply to him because he did not employ any other person and was conducting the business himself was also rejected by the Court. Similarly, if the idea is to improve the condition of working classes and with that end in view the State Government imposes a condition that workman will be entitled to bonus for the past period, the law can be held valid as imposing reasonable restrictions in the interest of general public.<sup>5</sup>

(5) Imposition of licence fee as a requirement for the grant of licence to a citizen who wants to carry on a trade or business or profession does not amount to an unreasonable restriction. But the condition for granting licence must be reasonable and must not give arbitrary power to the licensing authority. Thus a fee for obtaining a licence or a permit is not unreasonable. It is neither a tax nor unreasonable condition for the grant of licence.<sup>6</sup>

(6) Creation of monopoly rights in favour of a few persons is not unreasonable. Thus in *Cooverji v. Excise Commissioner*,<sup>7</sup> law which created a monopoly to sell liquor in favour of a few persons was held valid. The Court said that sale of intoxicating liquors cannot be claimed as a right by every

1. A. I. R. 1955 S. C. 33.

2. U. Unichoyi v. State of Kerala, A. I. R. 1962 S. C. 12 at p. 17.

3. State of Rajasthan v. Nath Mal, A. I. R. 1954 S. C. 307; Dwarka Pd. v. State of U. P., A. I. R. 1954 S. C. 224.

4. A. I. R. 1961 S. C. 418.

5. State of U. P. v. Basti Sugar Mills, A. I. R. 1961 S. C. 420.

6. Ram Bax Chaturbhuj v. State of Rajasthan, A. I. R. 1953 S. C. 351; Md. Yasin v. Town Area Committee, A. I. R. 1952 S. C. 115; Dwarka Prasad v. State of Uttar Pradesh, A. I. R. 1954 S. C. 224.

7. A. I. R. 1954 S. C. 220.

citizen. Elimination and exclusion is inherent in such business as that of liquor.

(7) The word 'restriction' includes 'prohibition' also. In *Narendra Kumar v. Union of India*,<sup>1</sup> the Non-Ferrous Metal Order, 1958, which completely excluded the dealers in a trade of imported coffee, was held valid as imposing reasonable restriction in the interests of general public. The Court said that prohibition is only a kind of restriction provided it satisfies the test of reasonableness.

(8) In *Shree Meenakshi Mills v. Union of India*,<sup>2</sup> the validity of Cotton Textile (Control) Order, 1948 was challenged. The Order confers power to impose control over distribution of yarn. The object of the order was to secure proper distribution of cloth. The order required producer to deliver yarn only to the five channels of distribution mentioned therein. The producers of yarn are prohibited from selling or delivering yarn to any person other than the five channels mentioned in the order. The channels of distributions are agencies of the State for distribution purposes. It was contended that the order created monopoly in favour of specified persons and imposed unreasonable restriction on their right to carry on business under Article 19 (1) (f) & (g) of the Constitution.

The Court held that the distribution control is intended to ensure availability of yarn at reasonable fair price. Profiteering, hoarding, cornering are the evils to be eliminated. It is not that all dealers in yarn have been denied the right to carry on trade. It is those whose carrying on trade in yarn would not in the opinion of the Textile Commissioners ensure availability of yarn to actual consumers at the fair price would be subjected to such restriction. Black marketing is to be weeded out in this manner. The selection of traders is made on the basis of ensuring availability of yarn at a fair price. Elimination of persons who have hoarded or cornered or are unscrupulous in distribution are intended in the public interest. This is a reasonable restriction in the interest of the general public and is contemplated in Art. 19 (1) (g) of the Constitution.

In fixing prices the Textile Commissioner is guided by the provisions of clause 30 of the Order as well as by section 3 of the Essential Commodities Act. Prices are fixed with limited profit to traders. An aggrieved person can appeal to the Central Government.

It was contended that the prices are fixed arbitrarily and without caring for the changes in the cost of production of yarn. The Court said that mere suggestion that no provision is made for adjustment on account of changes in the cost of production does not amount to infringement of fundamental right to carry on business and to hold and dispose of property. It cannot be said that increase in yarn prices was on account of cost of production. The fixing of controlled price is much more than a fair price to the producer on the date it is fixed. Even if there is increase in the cotton prices, the controlled prices fixed is more fair to the producer. If he sustains alleged losses for some time, it will be a reasonable restriction because the object of the price control is to hold the price line or reduce the prices to normal levels and make available cotton yarn to the handloom and powerloom weavers at a fair price which will enable them to withstand competition from mill-made cloth. The controlled

1. A. I. R. 1960 S. C. 430 ; *Krishna Kumar v. State of J. & K.*, A. I. R. 1967 S. C. 1368.

2. A. I. R. 1974 S. C. 366,

price is not so grossly inadequate that, it not only result huge losses but also is a threat to the supply position of yarn. The controlled price is in the interest of the country as a whole for just distribution of basic necessities. The controlled price is neither arbitrary nor an unreasonable restriction.

(9) In *Vishnu Dayal v. State of U. P.*,<sup>1</sup> the Government issued an order under the U. P. Krishi Utpadan Mandi Adhiniyam, 1964, as amended by Act of 1970 requiring the petitioners to provide storage facilities to the producers for their agricultural produce going to the market. The Court held that the provision of the Act which requires traders to provide storage space to the producers for their agricultural produce going to the market is not unreasonable restriction on the fundamental rights of traders. The rule prescribing the mode of sale, viz. by open auction and thus protecting private sale cannot be said to be an unreasonable restriction on the right to trade. Sale by auction is a well-known mode of sale by which the producers, for whose interest the Act has been made, can obtain the best price for their commodities.

(10) In *Chandra Kant Saha v. Union of India*,<sup>2</sup> it has been held that sections 5 and 6 of the Rice Milling Industry (Regulation) Act, 1958 as amended in 1968 which require the petitioners, the owners of existing rice mills, to make an application for obtaining a licence for a new husking rice, imposes reasonable restrictions on the right to carry on their trade and business. Sec. 5 requires permits to be taken for a new or defunct rice mill. Sec. 6 requires the owner of an existing rice mill to make an application to the licensing officer for the grant of a licence for carrying on Rice Milling operation in the rice mill. The petitioners contended that the provisions of the Act which require the petitioners to take licence for operating the mills amount to complete destruction of their right to carry on business. The Supreme Court however held that the provisions of Secs. 5 and 6 are purely regulatory in character and are in public interest and is meant to carry out the purposes of the Act, (that is to say, to preserve and protect the indigenous and hand pounding industry of rice growers) and hence amount to unreasonable restriction on the right to carry on their trade and business. The Act does not leave any discretion in the licensing officer to grant or to refuse to grant a licence. He has a mandatory duty under Sec. 6 (3) to grant a licence, if the conditions required by the Act are complied with, as is clear from the word "shall" used in that section. Section 7 lays down the conditions on which the licensing officer can revoke or suspend the licence, after giving the licensee an opportunity to show cause, against the action proposed, to be taken. Thus the provisions of the Act contain sufficient guidelines for the exercise of the power given to the licensing officer.

In *Kharki Ahmad v. Ludhianwa Municipality*,<sup>3</sup> the petitioner was refused a licence for opening a meat shop by the Municipality under a bye-law which gave power to the municipality to grant or to refuse licences. The licence was refused on the ground that there were already three licensed meat shops including one who is the father of the petitioner, and it is quite conceivable that the fourth to the petitioner will be more than necessary in such a small municipality. Moreover the court cannot dismiss as irrelevant the consideration of the strong feeling of the local people resulting in law and order problem. No person has right to chose a particular spot for opening his shop. The local authorities are the best judge whether a licence is to be given to a person

1. AIR 1974 SC 1489.

2. AIR 1979 SC 314.

3. AIR 1979 SC 418.

to open a meat shop at a particular place. The ground on which the municipal body had refused licence was not irrelevant and can not be described as unreasonable within the meaning of Art. 19 (6) of the Constitution. The bye-laws permitting the municipality as the licensing authority to refuse license on the above grounds were therefore valid.

**Instances of Unreasonable Restrictions.**—(1) In *Chintaman Rao v. State of M. P.*,<sup>1</sup> law authorised the Government to prohibit all persons residing in certain areas from engaging themselves in the manufacture of *biris* during the agricultural season. The object of the law was to provide adequate labour for agricultural purposes in *biri*-making areas. The Supreme Court held the law invalid as it imposed unreasonable restriction on the *biri*-making business of the area. The Act is much in excess of the object which the law seeks to achieve. It not only compels those who are engaged in agricultural work from taking other vocation but also prohibits persons, such as infirm, disabled, old women and children incapable of working as agricultural labourers from engaging themselves in the business of *biri*-making and thus earning their livelihood, it was arbitrary and wholly unreasonable.

(2) A law or order which gives arbitrary powers to the Government and its officials to grant, refuse or cancel a licence without assigning any reason and without giving any opportunity to the applicant to be heard impose unreasonable restriction on the right of the citizens to carry on any profession, trade or business. Thus in *Dwarka Prasad v. State of U. P.*,<sup>2</sup> the U. P. Coal Control Order, 1953, required a person to take a licence for stocking, selling or storing for sale of coal. Under the Order the licensing authority (the District Magistrate) may "grant, refuse to grant, renew or refuse to renew a licence and may suspend, cancel, revoke, or modify any licence on any terms thereof". The Court held the order invalid, on the ground that it gave unrestricted discretionary power to the licensing authority, who could grant, refuse or cancel licences in any way he liked. "There was nothing in the order which could check him in arbitrarily exercising his powers. Any uncontrolled, arbitrary administrative discretion to restrict a citizen's right in respect of trade, business, industry cannot be permitted as it would be imposing an unreasonable restriction outside the scope of clause (6) of Article 19.<sup>3</sup>

(3) In *Oudh Sugar Mills Ltd. v. Union of India*,<sup>4</sup> the Government issued a Sugar Control Order under the Essential Commodities Act, 1955 releasing sugar for sale in open market and allowed the sugar company for disposal of sugar within 26 days. Due to the non-availability of railway wagons sugar could not be disposed of within 26 days. The company applied for the extension of time which was refused by the Government. The question for consideration in the present case was whether the Central Government was justified in refusing extension of time to the appellants to clear sugar released in the open market.

The Supreme Court held that the period of 26 days could not be consi-

1. AIR 1955 SC 118.
2. AIR 1954 SC 224.
3. *Corporation of Calcutta v. Calcutta Tramways Ltd.*, AIR 1964 SC 1279; *Govindji v. Deputy Controller of Imports & Exports*, 1969 SCJ 93; *Kishan Chand v. Commissioner of Police*, AIR 1961 SC 705; *Fedco (P) Ltd. v. Bilgrami*, AIR 1960 SC 415.
4. AIR 1970 SC 1070.

dered as reasonable in view of the fact that the sugar would have to be sent out of States in which it was produced and transported through railway. The restrictions imposed on the appellants was, therefore, unreasonable. The Court said that the right to trade is a guaranteed freedom which can be restricted only by law and not by exclusive order. Accordingly, it is not only the law restricting the freedom which should be reasonable, but the orders made on the basis of that law should also be reasonable.

(4) In *R. H. Hegde v. Market Committee, Sirsi*,<sup>1</sup> the Government issued a notification in 1965 under section 4-A of the Bombay Agricultural Produce Market Act, 1939, declaring certain area a principal market yard in supersession of its earlier notification issued in 1954. The petitioner challenged the validity of the order on the ground that it imposed unreasonable restriction on his fundamental right to carry on business. The Supreme Court held that the order is violative of petitioners' fundamental right to carry on business of dealers who have to shift their business from the old notified principal market yard within a short period of 10 days.

**Taxation not restriction.**—The fundamental right of a citizen to practise any profession or carry on any trade or business is not wholly free from the taxing power of the State. No citizen has right to carry on his trade without paying taxes lawfully levied by the Government. In *Kailash Nath v. State of U. P.*,<sup>2</sup> it was held that a tax law 'otherwise valid' creates no unreasonable restriction.

**Professional and Technical Qualifications.**—The State can by law prescribe professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. For example, it can prescribe that one who wants to set up in medical practice should have studied a course in medicine and surgery and should have passed M.B.B.S. examination or one who wishes to be a lawyer must have passed LL. B. examination from any established university. Following are some of the existing Indian Acts which regulate professions requiring qualification, discipline, etc.

1. The Advocates Act.
2. The Bar Councils Act.
3. The Legal Practitioners Act.
4. Indian Medical Degrees Act.
5. Indian Medical Councils Act.
6. Pharmacy Act.
7. The Provincial Moneylenders Act.
8. The Usurious Loans Act.
9. The Bengal Touts Act.
10. The Bengal Dentists Act.

**State Trading and Notification.**—Clause (6) (ii) enables States to nationalise any trade or business and carry it on itself to the exclusion of all citizens, wholly or partially. This clause was added by the Constitution (First Amendment) Act, 1951. This amendment had become necessary as a result of the decision in the case of *Motilal v. Uttar Pradesh Government*.<sup>3</sup> In this case the

1. AIR 1971 SC 1017.  
2. AIR 1957 SC 790.  
3. AIR 1951 All 257.

Government of Uttar Pradesh refused to issue permits to private owners of road transport vehicles in order to enable the State to take over particular services. The Motor Vehicles Act required private owners of road transport vehicles to obtain permits from the regional authority. But it exempted the State-owned buses from the necessity of taking permit. The Allahabad High Court held that if the State carries on a commercial undertaking it cannot claim any special treatment and refusal of permit by the State was held to be in violation of equal protection guaranteed by Article 14. The creation of a State monopoly could neither be justified under the power of regulation of traffic nor under the cover of putting restrictions under clause (6) of Article 19 except in the interest of the general public. Nationalisation of the road transport business, it was declared, could not be brought about by indirect means and abuse of statutory discretion to grant new permits, or to renew the existing permits under the Motor Vehicles Act, 1939.

The amended clause (6) of Article 19, now provides that "nothing...shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to..(ii) the carrying on by the State or by a corporation owned or controlled by the State of any trade, business, industry or services, whether to the exclusion complete or partial, of citizens or otherwise." This clause makes it possible for a State to create a monopoly in its favour in respect of any trade or business by excluding similar rights of citizens. It removes the obligation of the State to justify its monopoly in trade or business as a reasonable restriction on citizen's right to carry on the same business or trade. The amendment excludes all argument in regard to the ouster of private citizens from any trade or business which the State decides to carry on itself to the entire or partial exclusion of the citizens.<sup>1</sup> This means that the creation of State monopolies shall not be considered to deprive a citizen of the freedom of trade or occupation. The validity of a law creating State monopoly or permitting nationalisation of a trade or business shall not be open to challenge either on the ground that the restriction imposed by it are unreasonable or that they are not in the interest of the general public.<sup>2</sup> Thus the right of the citizen is constitutionally subjected to the overriding right of the State to create a monopoly in any trade or business.<sup>3</sup>

1. *Ram Chandra v. State of Orissa*, AIR 1956 SC 298.

2. *Akadasi v. State of Orissa*, AIR 1963 SC 1047 ; see also *Saghir Ahmad v. State of U.P.*, AIR 1954 SC 728 ; *Ramchandra Palai v. State of Orissa*, AIR 1956 SC. 298.

3. *Prabhani Transport Co-operative Society v. G. V. Bedekar*, AIR 1960 Bom. 278.

## **Protection in Respect of Conviction for Offences (Art. 20)**

Article 20 of the Indian Constitution provides the following safeguards to the persons accused of crimes :—

- (a) *Ex post facto* law : Clause (1) of Article 20.
- (b) Double jeopardy : Clause (2) of Article 20.
- (c) Prohibition against self-incrimination : Clause (3) of Article 20.

**A. Protection against *Ex post facto* law.**—Clause (1) of Art. 20 of the Indian Constitution says that "no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

Article 20 (1) imposes a limitation on the law-making power of the Legislature. Ordinarily, a Legislature can make prospective as well as retrospective laws, but clause (1) of Article 20 prohibits the Legislature to make retrospective criminal laws. However, it does not prohibit imposition of civil liability retrospectively, i. e., with effect from a past date.<sup>1</sup> So, a tax can be imposed retrospectively.<sup>2</sup>

An *ex post facto* law is a law which imposes penalties retrospectively i. e., on acts already done and increases the penalty for such acts. The American Constitution also contains a similar provision prohibiting *ex post facto* laws both by the Central and the State Legislatures.

The first part of clause (1) provides that no person shall be convicted of any offence except for violation of 'law in force' at the time of the commission of the act charged as an offence. This means that if an act is not an offence at the date of its commission it cannot be offence at the date subsequent to its commission.<sup>3</sup> In *Pareed Lubha v. Nilambaram*,<sup>4</sup> it was held that if the non-payment of the Panchayat Tax was not an offence on the day it fell due the defaulter cannot be convicted for the commission to pay under a law passed subsequently even if it covered older dues. The protection afforded by clause (1) is available only against conviction or sentence for a criminal offence under *ex post facto* law and not against the trial. Under the American law the prohibition applies even in respect of trial. The guarantee in American Constitution is thus wider than that under the Indian Constitution. The protection of Cl. (1) of Art. 20 cannot be claimed in cases of preventive detention,<sup>5</sup> or demanding security from a person.<sup>6</sup> The prohibition is just for conviction and sentence only and not for prosecution and trial under a retrospective law. So, a trial under a procedure different from what it was at the time of the commission of the offence or by a special court constituted after the commission of the offence cannot *ipso facto* be held unconstitutional.<sup>7</sup>

1. *Hathi Singh Manufacturing Co. v. Union of India*, AIR 1960 SC 923.

2. *Sundararamer & Co. v. State of Andhra Pradesh*, AIR 1958 SC 468.

3. *Chief Inspector of Mines v. K. C. Thapper*, AIR 1961 SC 838.

4. AIR 1967 Ker. 155.

5. *Prahlad Krishna v. State of Bombay*, AIR 1952 Bom. 1.

6. *State of Bihar v. Shaillabala*, AIR 1952 SC 329.

7. *Shiv Bahadur Singh v. State of Vindhya Pradesh*, AIR 1963 SC 394; *Venkataraman v. Union of India*, AIR 1954 SC 375; *Union of India v. Sukumar*, AIR 1966 SC 1206.

Government of Uttar Pradesh refused to issue permits to private owners of road transport vehicles in order to enable the State to take over particular services. The Motor Vehicles Act required private owners of road transport vehicles to obtain permits from the regional authority. But it exempted the State-owned buses from the necessity of taking permit. The Allahabad High Court held that if the State carries on a commercial undertaking it cannot claim any special treatment and refusal of permit by the State was held to be in violation of equal protection guaranteed by Article 14. The creation of a State monopoly could neither be justified under the power of regulation of traffic nor under the cover of putting restrictions under clause (6) of Article 19 except in the interest of the general public. Nationalisation of the road transport business, it was declared, could not be brought about by indirect means and abuse of statutory discretion to grant new permits, or to renew the existing permits under the Motor Vehicles Act, 1939.

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- (b) Double jeopardy : Clause (2) of Article 20.
- (c) Prohibition against self-incrimination : Clause (3) of Article 20.

A. *Protection against Ex post facto law*.—Clause (1) of Art. 20 of the Indian Constitution says that "no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

Article 20 (1) imposes a limitation on the law-making power of the Legislature. Ordinarily, a Legislature can make prospective as well as retrospective laws, but clause (1) of Article 20 prohibits the Legislature to make retrospective criminal laws. However, it does not prohibit imposition of civil liability retrospectively, i. e., with effect from a past date.<sup>1</sup> So, a tax can be imposed retrospectively.<sup>2</sup>

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The first part of clause (1) provides that no person shall be convicted of any offence except for violation of 'law in force' at the time of the commission of the act charged as an offence. This means that if an act is not an offence at the date of its commission it cannot be offence at the date subsequent to its commission.<sup>3</sup> In *Pareed Lubha v. Nilambaram*,<sup>4</sup> it was held that if the non-payment of the Panchayat Tax was not an offence on the day it fell due the defaulter cannot be convicted for the commission to pay under a law passed subsequently even if it covered older dues. The protection afforded by clause (1) is available only against conviction or sentence for a criminal offence under *ex post facto* law and not against the trial. Under the American law the prohibition applies even in respect of trial. The guarantee in American Constitution is thus wider than that under the Indian Constitution. The protection of Cl. (1) of Art. 20 cannot be claimed in cases of preventive detention,<sup>5</sup> or demanding security from a person.<sup>6</sup> The prohibition is just for conviction and sentence only and not for prosecution and trial under a retrospective law. So, a trial under a procedure different from what it was at the time of the commission of the offence or by a special court constituted after the commission of the offence cannot *ipso facto* be held unconstitutional.<sup>7</sup>

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7. *Shiv Bahadur Singh v. State of Vindhya Pradesh*, AIR 1963 SC 394; *Venkatarman v. Union of India*, AIR 1954 SC 375; *Union of India v. Sukumar*, AIR 1966 SC 1206.

The second part of clause (1) protects a person from 'a penalty greater than that which he might have been subjected to at the time of the commission of the offence.' In *Kedar Nath v. State of West Bengal*,<sup>1</sup> the accused committed an offence in 1947, which under the Act then in force was punishable by imprisonment or fine or both. The Act was amended in 1949 which enhanced the punishment for the same offence by an additional fine equivalent to the amount of money procured by the accused through the offence. The Supreme Court held that the enhanced punishment could not be applicable to the act committed by the accused in 1947 and hence set aside the additional fine imposed by the amended Act.

But the accused can take the advantage of the beneficial provision of the *ex post facto* law. Thus in *Rattan Lal v. State of Punjab*,<sup>2</sup> a boy of 16 years was convicted for committing an offence of house-trespass and outraging the modesty of a girl aged 7 years. The Magistrate sentenced him for 6 months of rigorous imprisonment and also imposed fine. After the judgment of the Magistrate, the Probation of Offenders Act, 1958, came into force. It provided that a person below 21 years of age should not ordinarily be sentenced to imprisonment. The Supreme Court by a majority of 2 to 1 held that the rule of beneficial interpretation required that *ex post facto* law could be applied to reduce the punishment. So an *ex post facto* law which is beneficial to the accused is not prohibited by clause (1) of Art. 20.

**B. Protection against Double Jeopardy—Clause (2)**—Article 20 (2) of our Constitution says that "no person shall be prosecuted and punished for the same offence more than once". This clause embodies the Common law rule of "*nemo debet vis revari*," which means that no man should be put twice in peril for the same offence. If he is prosecuted again for the same offence for which he has already been prosecuted he can take complete defence of his former acquittal or conviction.

The American Constitution incorporates the same rule in the Fifth Amendment that "no person shall be twice put in jeopardy of life or limb." The protection under clause (2) of Art. 20 is narrower than that given in American and British laws. Under the American and the British Constitution the protection against double jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial. But under Article 20 (2) the protection against double punishment is given only when the accused has not only been 'prosecuted' but also 'punished' and is sought to be prosecuted second time for the same offence. No protection is given if the accused is acquitted in the first instance after the prosecution. The use of the word 'prosecution' thus limits the scope of the protection under clause (1) of Article 20. If there is no punishment for the offence as a result of the prosecution, the Supreme Court has said, clause (2) of Article 20 has no application and an appeal against an acquittal if provided by the procedure is in substance a continuance of the prosecution.<sup>3</sup> The word 'prosecution' as used with the word 'punishment' embodies the following essentials for the application of double jeopardy rule. They are :

(1) The person must be accused of an 'offence'. The word 'offence' as defined in General Clauses Act means 'any act or omission made punishable by law for the time being in force'.

1. AIR 1953 SC 404.

2. AIR 1965 SC 444.

3. Smt. Kalawati v. H. P. State, AIR 1953 SC 131 at p. 152.

(2) The proceeding or the prosecution must have taken place before a "court" or "judicial tribunal".

(3) The person must have been 'prosecuted' and 'punished' in the previous proceedings.

(4) The 'offence' must be the same for which he was 'prosecuted and punished' in the previous proceedings.

In *Maqbool Husain v. State of Bombay*,<sup>1</sup> the appellant brought some gold into India. He did not declare that he had brought gold with him to the Customs authorities on the airport. The customs authorities confiscated the gold under the Sea Customs Act. He was later on charged for having committed an offence under the Foreign Exchange Regulations Act. The appellant contended that second prosecution was in violation of Article 20 (2) as it was for the same offence, i. e. for importing gold in contravention of Government notification for which he had already been prosecuted and punished as his gold had been confiscated by the customs authorities. The Court held that the Sea Custom Authorities was not a court or judicial tribunal and the adjudging of confiscation under the Sea Customs Act did not constitute a judgment of judicial character necessary to take the plea of double jeopardy. Hence the second prosecution, under the Foreign Exchange Regulation Act, is not barred.

Similarly, proceedings before departmental and administrative authorities cannot be a proceeding of judicial nature.

In *Venkataraman v. Union of India*,<sup>2</sup> the appellant was dismissed from service as a result of an inquiry under the Public Service Enquiries Act, 1960, after the proceedings were held before the Enquiry Commissioner. Later on, he was prosecuted for having committed the offence under Indian Penal Code and the Prevention of Corruption Act. The Court held that the proceedings taken against the appellant before the Enquiry Commissioner did not amount to a prosecution for an offence. The enquiry held by the Commissioner was in the nature of fact finding to advise the Government for disciplinary action against the appellant. It cannot be said that the person has been prosecuted. Hence, the second prosecution of the appellant was held not to attract the application of the double jeopardy protection guaranteed by Article 20 (2).

Article 20 (2) will have no application where punishment is not for the same offence. Thus if the offences are distinct the rule of double jeopardy will not apply. A person was prosecuted and punished under Sea Customs Act ; and was later on prosecuted under the Indian Penal Code for criminal conspiracy. It was held that the second prosecution was not barred since it was not for the same offence.<sup>3</sup>

Likewise, clause (2) of Art. 20 does not apply where the person is prosecuted and punished for the second time and subsequent proceeding is a mere continuation of the previous proceedings, e. g. in the case of an appeal against acquittal.<sup>4</sup> Thus where a number of persons were punished for smuggling currency notes, arms and ammunition, and were later prosecuted for criminal conspiracy for carrying out their trade, it was held that the second prosecution

1. AIR 1953 SC 325 ; See also *H. H. Advani v. State of Maharashtra*, AIR 1971 SC 41.

2. AIR 1954 SC 375.

3. *Leo Roy v. Superintendent, District Jail*, AIR 1958 SC 119.

4. *State of M. P. v. Veereshwar*, (1957) SCR 868.

was not forbidden although it related to the same offence, i. e. smuggling currency notes, etc. for which they had already been prosecuted and punished.<sup>1</sup>

**C. Prohibition against self-incrimination—Clause (3).**—Clause (3) of Art. 20 provides that ‘no person accused of any offence shall be compelled to be a witness against himself’. Thus Article 20 (3) embodies the general principle of English and American jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime. The cardinal principle of criminal law which is really the bed rock of English jurisprudence is that an accused must be presumed to be innocent till the contrary is proved. It is the duty of the prosecution to prove the offence. The accused need not make any admission or statement against his own free will. The Fifth Amendment of the American Constitution declares that “no person.....shall be compelled in any criminal case to be a witness against himself”.

The fundamental rule of criminal jurisprudence against self-incrimination has been raised to a rule of constitutional law in Article 20 (3). This guarantee extends to any person accused of an offence, and prohibits all kinds of compulsion to make him a witness against himself. Explaining the scope of this clause in *M. P. Sharma v. Satish Chandra*,<sup>2</sup> the Supreme Court observed that this right embodies the following essentials :

- (1) It is a right pertaining to a person who is “accused of an offence”.
- (2) It is a protection against “compulsion to be a witness”.
- (3) It is a protection against such compulsion resulting in his giving evidence “against himself”.

**1. Accused of an offence.**—The words ‘accused of an offence’ make it clear that this right is only available to a person accused of an offence. A person is said to be an accused person against whom a formal accusation relating to the commission of an offence has been levelled which in normal course may result in his prosecution and conviction.<sup>3</sup> It is not necessary that the actual trial or inquiry should have started before the court. Thus in *M. P. Sharma v. Satish Chandra*,<sup>4</sup> it was held that a person, whose name was mentioned as an accused in the first information report by the police and investigation was ordered by the Magistrate, can claim the protection of this guarantee.

The mere fact that at the relevant time the person was arrested on suspicion of having committed an offence under section 124 of the Bombay Police Act and a *panchnama* had been prepared seizing the goods were immaterial when neither the case was registered nor the F. I. R. was recorded by the police. Thus where a custom officer arrests a person and informs him of the grounds of his arrest for the purpose of holding an inquiry into the violation of the provisions of the Sea Customs Act there is no formal accusation of an offence.<sup>5</sup>

This shows that the guarantee in our Constitution is narrower than that in the American Constitution. In America the protection of self-incrimination

1. *G. D. Bhattar v. State*, AIR 1957 Cal 483 at p. 492; *Saharanpur Municipality v. K. Ram*, AIR 1965 All. 160.
2. AIR 1954 SC 300; *Raja Narain Lal v. M. P. Mistry*, AIR 1961 SC 29.
3. *Narayan Lal v. M. P. Mistry*, AIR 1961 SC 29; *R. K. Dalmia v. Delhi Administration*, AIR 1962 SC 1821; *K. Joseph v. Narayanan*, AIR 1964 SC 1552.
4. AIR 1954 SC 300; See also *R. B. Shah v. D. K. Guha*, AIR 1971 SC 1196.
5. *Veera Ibrahim v. State of Maharashtra*, AIR 1976 SC 1167.

is not confined to the accused only. It is also available to witness.<sup>1</sup> The position is the same in English law. But the protection under clause (3) of Article 20 is only available to the accused.

**2. To be a witness.**—The protection is against compulsion "to be a witness". "To be a witness" the Court observed in *M. P. Sharma v. Satish Chandra*,<sup>2</sup> means nothing more than "to furnish evidence" and such evidence can be furnished through lips or by production of a thing or of a document or in other modes. In short, it includes oral, documentary and testimonial evidence. The protection under Article 20 (3) covers not merely testimonial compulsion in a court-room but also compelled testimony previously obtained —any compulsory process for production of evidentiary document which are reasonably likely to support the prosecution against him. The Court accepted the definition given in the Indian Evidence Act that a person can be 'a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness or the like.

If this interpretation of the phrase "to be a witness" adopted by the court in *M. P. Sharma's* case was to be followed ; the compulsory taking of finger impressions or specimen handwriting of an accused would come within the mischief of Article 20 (3). This broad interpretation, it was thought would certainly hamper the effective administration of crime and efficient administration of criminal justice:

In *State of Bombay v. Kathi Kalu*,<sup>3</sup> the Supreme Court held that the interpretation of the phrase to be witness "given in *Sharma's* case was too broad and required a qualification". "To be a witness" is not equivalent to "furnishing evidence", that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused. Self-incrimination can only mean conveying information based upon personal knowledge of the person giving information and cannot include merely the mechanical process of producing documents in court which may throw light on any point in controversy, but which do not contain any statement of the accused based on his personal knowledge. Thus when a person gives his finger impression or specimen writing or signature, though, it may amount to furnishing evidence in the large sense is not included within the expression "to be a witness". In these cases he is not giving any personal testimony. They are merely materials for comparison. Hence, neither seizures made under search-warrant,<sup>4</sup> nor the compulsory taking of photographs, finger-prints or specimen writing of an accused would come within the prohibition of Article 20 (3).<sup>5</sup> What is forbidden under Article 20 (3) is to compel a person to say something from his personal knowledge relating to the charge against him.

It has been held that the information given by an accused person after his arrest to a police officer which leads to the discovery of a fact under section 27 of the Evidence Act is admissible in evidence under section 20 (3) of the

1. Willis 'Constitutional Law', (1936), p. 419.

2. AIR 1954 SC 300 ; See also Sec. 132, Indian Evidence Act.

3. AIR 1961 SC 1808.

4. *M. P. Sharma v. Satish Chandra*, AIR 1954 SC 300 at p. 304.

5. *State of Bombay v. Kathi Kalu*, AIR 1961 SC 1808,

Constitution. In *Parshadi v. U. P. State*,<sup>1</sup> an accused who was charged with committing a murder stated to the police that he would give the clothes of the deceased which he had placed in a pit and thereafter he dug out the pit in presence of witnesses and took out the clothes which were identified as the clothes belonging to the deceased. The Supreme Court held that the statement of the appellant was admissible in evidence.

3. Compulsion to give evidence 'against himself'.—The protection under Article 20 (3) is available only against the compulsion of accused to give evidence 'against himself'. But left to himself he may voluntarily waive his privilege by entering into the witness-box or by giving evidence voluntarily on request. Request implies no compulsion; therefore evidence given on request is admissible against the person giving it.<sup>2</sup> To attract the protection of Article 20 (3) it must be shown that the accused was compelled to make the statement likely to be incriminative of him. Compulsion means 'duress' which includes threatening, beating or imprisoning of the wife, parent or child of a person. Thus where the accused makes a confession without any inducement, threat or promise, Article 20 (3) does not apply.

The phrase 'compelled testimony' means evidence procured not only by physical threats or violence but by psychic (Mental) atmospheric pressure, environmental coercion, titling interrogative prolixity, overbearing and intimidatory methods and the like.<sup>3</sup> Thus compelled testimony is not limited to physical torture or coercion, but extends also to techniques of psychological interrogation which can cause mental torture in a person subjected to such interrogation.

In *Mohd. Dastgir v. State of Madras*,<sup>4</sup> the appellant went to the bungalow of Deputy Superintendent of Police to offer him bribe in a closed envelope. The Police officer on opening it found the envelope containing currency notes. He threw it at the face of the appellant who took it. Thereafter the police officer asked the appellant to hand over the envelope containing the currency notes. The appellant took out some currency notes from his pocket and placed it on the table which was seized by the police officer. The appellant contended in appeal before the Supreme Court that the currency notes should not be produced in evidence as he was compelled by the police officer to give to him. The Supreme Court held that the accused was not compelled to produce the notes as no duress was applied on him to produce the notes. Moreover, the appellant was not an 'accused' at the time the currency notes were seized from him.

In the case of *Yusufalli v. State of Maharashtra*,<sup>5</sup> the scope of Article 20 (3) was further limited. In this case a tape-recorded statement made by the accused though made without knowledge of the accused but without force or oppression was held to be admissible in evidence.

In the recent case of *Nandini Satpathi v. P. L. Dhani*,<sup>6</sup> the Supreme Court has interpreted clause (3) of Art. 20 widely. The appellant was a former

1. AIR 1957 SC 211.
2. *State of Bombay v. Kathi Kalu*, AIR 1961 SC 1803.
3. *Nandini Satpathi v. P. L. Dhani*, AIR 1978 SC 1025.
4. AIR 1960 SC 756.
5. AIR 1968 SC 147; *S. K. Singh v. V. V. Girli*, AIR 1970 SC 2077.
6. Supra, Note, 2.

Chief Minister of Orissa. Certain charges of corruption were levelled against her and in the course of inquiry she was called upon to attend at a Police Station and to answer certain written questions. The appellant refused to answer questions and claimed the protection of Art. 20 (3). She was prosecuted under Sec. 179, IPC for refusing to answer questions put by a lawful authority. According to the Court, self-incrimination is less than "relevant" and more than 'confessional'. Irrelevance is impermissible but relevance is licit, but when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. The accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation, actual or imminent, even if the investigation is not with reference to that. However, he is bound to answer where there is no clear tendency to incriminate.

The Court held that the prohibitive sweep of Art. 20 (3) was not confined to evidence given in the Court room but available from the stage of police interrogation. This means that the protection is available when police examines the accused during investigation under section 161 of the Cr. P. C. Further the right to silence is not limited to the case for which he is examined but extends to the accused in regard to other offences pending or imminent which may deter him from voluntary disclosure of discriminatory matter.

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## Protection of Life and Personal Liberty (Art. 21)

**Introduction**—Article 21 of the Constitution says that :

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

Prior to *Maneka Gandhi's* decision Art. 21 assured personal liberty of citizen's only against the arbitrary action on the part of the Executive. The State cannot interfere with the liberty of a citizen unless it can support its action by a valid law. But after the *Maneka Gandhi's* decision it now protects life and personal liberty of citizens not only from executive action but from an unreasonable, unjust law.

But in no country citizens enjoy absolute liberty. Liberty has got to be limited in order to be effectively possessed. If people were given complete and absolute liberty without any social control, the result would be ruin.....  
..... Law is a scheme of social control as distinct from self-control ; so that when we are concerned with law we are concerned only with the question of how much personal liberty is best and how much social control is best.....  
....."<sup>1</sup> This is the principle embodied in our Constitution when it says that life and personal liberty are subject to "the procedure established by law". Thus the purpose of this Article is not to impose a limitation on the authority of Legislature but only to protect individuals against any arbitrary or illegal action by the Executive.

The Fifth Amendment of the American Constitution says that 'no person shall be deprived of his life or personal liberty, except according to procedure established by law'. The Fourteenth Amendment imposes a similar limitation on the State authorities.

The right guaranteed in Art. 21 is available to 'citizens' as well as 'non-citizens'

**Personal liberty.**—The words "personal liberty" under Article 21 if interpreted widely are capable of including the rights mentioned in Article 19. But in *Gopalan's* case the Supreme Court took a very literal view and interpreted these words very narrowly. The Court took the view that since the word "liberty" is qualified by the word 'personal' which is a narrower concept and does not include all that is implied in the term 'liberty'. So interpreted it means nothing more than the liberty of the physical body—freedom from arrest and detention, from false imprisonment of wrongful confinement. In *Gopala'n* case,<sup>2</sup> 'personal liberty' was said to mean only liberty relating to, or concerning the person or body of the individual and in this sense it was antithesis of physical restraint or coercion. It was further limited to freedom from punitive and preventive detention. The meaning accepted for purposes of Article 21 of the Constitution was restricted to limits set by *Dicey*,<sup>3</sup> according to whom 'personal liberty' means a personal right

1. Willis—Constitutional Law and the United States, pp. 477-82.

2. A. K. Gopalan v State of Madras, AIR 1950 S C 27.

3. Dicey on Constitutional Law, Edn. 9, pp. 207-208.

not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification.

But this restrictive interpretation in *Gopalan's* case has not been accepted by the Supreme Court in its later decisions. In *Kharak Singh's* case<sup>2</sup> the Supreme Court took the view that 'personal liberty' is not only limited to bodily restraint itself or confinement to prisons only, but is used as a comprehensive term including within itself all the varieties of rights which go to make up the personal liberty of man other than those dealt with in Article 19 (1). In other words, while Article 19 (1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue. And finally in *Maneka Gandhi v. Union of India*,<sup>3</sup> the Supreme Court has overruled *Gopalan's* case. In that case the Supreme Court has not only upheld the decisions in *Kharak Singh* and *Satwant Singh* cases but has further widened the scope of the word 'personal liberty' in Art. 21 of the Constitution. The Court has said "the expression 'personal liberty' in Art. 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Art. 19. The correct way of interpreting the provisions conferring fundamental rights, the Court said, is that "the attempt of the court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction." The Court has, as provided by Art. 21 of the Constitution' laid great stress on the procedural safeguards. The procedure must satisfy the requirement of natural justice, i. e. it must be just, fair and reasonable.

In *Kharak Singh v. State of U. P.*,<sup>4</sup> the petitioner, Kharak Singh, had been charged in a dacoity case but was released as there was no evidence against him. Under the U. P. Police Regulations the Police opened a history sheet for him and he was kept under Police surveillance which included secret picketing of his house by the police, domiciliary visits at night and verification of his movements and activities. 'Domiciliary visits' mean visits by the police in the night to the private house for the purpose of making sure that the suspect is staying home or whether he has gone out. The Supreme Court held that the domiciliary visits of the policemen were an invasion on the petitioner's personal liberty. By the term 'life' as used here something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg.<sup>5</sup> It is true that in Article 21 the word 'liberty' is qualified by the word 'personal' but this qualification is employed in order to avoid overlapping between those incidents of liberty which are mentioned in Article 19. An unauthorised intrusion into a person's home and the disturbance caused to him is the violation of the personal liberty of the individual. Hence, the Police Regulation authorising domiciliary visits is plainly violative of Article 21 as there was no law on which it could be justified and it must be struck down as unconstitutional.

But in *Govind v. State of M. P.*,<sup>6</sup> the Supreme Court has held that M. P. Police Regulations 855 and 856 authorising domiciliary visits are constitutional.

1. *Kharak Singh v. State of U. P.*, AIR 1963 SC 1295.
2. AIR 1978 SC 597. Also see *M. H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1549.
3. AIR 1963 SC 1295.
4. *Munn v. Illinois*, (1876) 94 U. S. 113.
5. AIR 1975 SC 1379.

as they have the force of law. These Regulations were framed by the Government under section 46 (2) (e) of the Police Act. The petitioner challenged the validity of those Regulations on the ground that they are violative of his fundamental right guaranteed in Art. 21 which also includes the right of privacy'. The Supreme Court held that Regulations 855 and 856 have the force of law and, therefore, they are valid. As regards the 'right of privacy' the Court said that the right to privacy will necessarily have to go through a process of case by case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which can be characterised as a fundamental right, the right is not absolute. Depending upon the character and antecedents of the person subjected to surveillance and the object and limitations under which surveillance is made, it cannot be said that surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. The impugned Regulation 855 empowers surveillance only of persons against whom reasonable material exist to induce the opinion that they show '*a determination to lead a criminal life*'. The petitioner was shown to be a dangerous criminal whose conduct shows that he is determined to lead a criminal life. The Regulations impose reasonable restrictions on the fundamental right of petitioner guaranteed in Article 21 and, therefore, they are valid.

It is to be noted that in *Kharak Singh's case*,<sup>1</sup> the validity of a similar Police Regulation was challenged. In that case the Regulations were declared unconstitutional because they did not have the force of law. On the other hand in *Govind's case* the Court held that the Regulations have the force of law and therefore they are not violative of the fundamental right of the petitioner guaranteed in Art. 21. It was held that the petitioner was deprived of his personal liberty in accordance with the procedure established by law.

A detainee can be subjected only to such restrictions on his personal liberty as are authorised by or under the law of preventive detention and imposition of any unauthorised restriction, therefore, will violate Article 21. For example, in *State of Maharashtra v. Prabhakar Pandurang*,<sup>2</sup> the petitioner was detained in jail under the Preventive Detention Act. He wrote a scientific book in prison and sought permission from the Government to send it to his wife for publication. The Government refused permission to him. The Court held that this was an infringement of his personal liberty as the restriction was not authorised by the Preventive Detention Act.

In *Satwant Singh v. Assistant Passport Officer, New Delhi*,<sup>3</sup> the Supreme Court further extended the scope of this Article and held that the right to go abroad is part of a person's 'personal liberty' within the meaning of Art. 21 of the Constitution. In that case the petitioner who was a citizen of India had to frequently travel abroad for business purposes. Since it had been decided to withdraw the passport facilities granted to him he was informed by the Government of India to surrender the passport issued to him. He challenged the action of the Government on the ground that it violated his fundamental rights under Article 21. His contention was that right to leave India or travel abroad and return to India was part of his personal liberty which could be restricted only by authority of law. Hence the Union Government, 'in the absence of any law', in the exercise of its executive power cannot

1. AIR 1963 SC 1295.

2. AIR 1966 SC 424.

3. AIR 1967 SC 1836

deny him a passport without which he cannot exercise his right to travel abroad. The contention of the Union Government was that the right to travel is not included in 'personal liberty' and that a passport is a political document to which no one has a legal much less a constitutional right. The Supreme Court accepted the contention of the petitioner and held that the right to travel abroad is part of a person's 'personal liberty' within the meaning of Article 21 and, therefore, no person can be deprived of his right to travel abroad except according to procedure established by law. In fact there was no such law on which the Government could justify its action. The Court observed that the expression 'liberty' in Article 21 is a comprehensive term. 'Personal liberty' in Article 21 takes in the right of locomotion—to go where and when one pleases, and to travel abroad. It only excludes the ingredients of liberty mentioned in Article 19.

In *Maneka Gandhi v. Union of India*,<sup>1</sup> the meaning and content of the words 'personal liberty' again came up for the consideration of the Supreme Court. In this post-Emergency decision the Court has given a widest possible interpretation to the words 'personal liberty'. The Supreme Court has not only upheld its earlier decisions that the right to travel abroad (and hence) entitled to a passport) was a Fundamental Right which could not be arbitrarily denied but has laid great emphasis on the procedural safeguards to be complied with before an individual is deprived of his personal liberty.

In that case, the petitioner was issued a passport on 1st June, 1976 under the Passport Act, 1967. On 4th July, 1977, the petitioner received a letter from the Regional Passport Officer, Delhi, intimating to her that it has been decided by the Government of India to impound her passport under section 10 (3) (c) of the Act 'in public interest' and she was, therefore, required to surrender her passport within seven days from the receipt of the letter. She wrote a letter to the Passport Officer requesting him to furnish a copy of the statement of reason for making the order. The Government of India declined "in the interest of the general public" to furnish the reasons for its decision. The petitioner filed a writ-petition under Art. 32 of the Constitution challenging the validity of the said order on the following grounds that :

1. Section 10 (3) (c) in so far as it empowers the passport authority to impound a passport "in the interests of the general public" is violative of Art. 14, since it confers vague and undefined power on the passport authority.
2. Section 10 (3) (c) is void as conferring an arbitrary power since it does not provide for a hearing of the holder of the passport before the passport is impounded.
3. Section 10 (3) (c) is violative of Art. 21. Since it does not prescribe 'procedure' within the meaning of that Article and if it could be said that there is some procedure prescribed, it is arbitrary and unreasonable.
4. Section 10 (3) (c) is violative of Art. 19 (1) (a) and (g) since it permits imposition of restrictions not provided in clause (2) or (6) of Art. 19.

The reasons for the order were, however, disclosed in the counter-affidavit filed on behalf of the Government. The disclosure stated that the petitioner's presence was likely to be required in connection with the proceedings before a Commission of Inquiry. Regarding the opportunity to be heard the Attorney-General filed a statement that the petitioner could make a representation in

1. AIR 1978 SC 597.

respect of impounding passport and that the representation would be dealt with expeditiously.

The Supreme Court by majority held that the Government was not justified in withholding the reasons for impounding the passport from the petitioner. Delivering the majority judgment, Mr. Justice Bhagwati asked—"Does Art. 21 merely require that there must be some semblance of procedure, however arbitrary and fanciful, prescribed by law before a person can be deprived of the personal liberty or the procedure must satisfy certain requisites in the sense that it must be fair and reasonable?....*Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirement?* He then held that the procedure contemplated in Art. 21 could not be unfair or unreasonable. And this principle of reasonableness which was an essential element of equality or non-arbitrariness, pervaded Art. 14 like a brooding omnipresence and the procedure contemplated in Art. 21 must answer the test of reasonableness in order to be in conformity with Art. 14. Hence, any procedure which permitted impairment of individuals right to go abroad without giving him a reasonable opportunity to be heard could not but be condemned as unfair and unjust. The order withholding reasons for impounding the passport was therefore not only in breach of statutory provisions (Passport Act) but also in violation of the rule of natural justice embodied in the maxim "*audi alteram partem*" (that no one shall be condemned unheard). Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the Common law will supply this omission of Legislature. The power conferred under section 10 (3) (c) of the Act on the passport authority to impound a passport is a *quasi-judicial* power. The rules of natural justice would therefore be applicable in the exercise of this power. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice. Fairness in action, therefore, demands that an opportunity to be heard should be given to the person affected. A provision requiring giving of such opportunity to the affected person can and should be read by implication in the Passport Act, 1967. If such provisions were held to be incorporated in the Act by necessary implication, the procedure prescribed for impounding passport would be right, fair and just and would not suffer from the vice of arbitrariness or unreasonableness. It must therefore be held that the procedures 'established' by the Act for impounding a passport is in conformity with the requirement of Art. 21 and is not violative of that Article.

However, in view of the statement of the Attorney-General that the Government is agreeable to consider the representation which would be made by the petitioner, it was held by the majority of the Supreme Court (Beg, CJ dissenting and it rightly) that the defect of the order was removed and the order was therefore passed by the passport authority in accordance with the procedure established by law. It is clear from the language of Art. 21 that the protection provided by it is limited one. It safeguards the right to go abroad against executive interference which is not supported by law. In the instant case, the petitioner was deprived of her right to go abroad in accordance with the procedure established by law (Passport Act, 1967). The procedure prescribed by the Act is not arbitrary or unreasonable. The Act lays down proper guidelines for the exercise of the powers by the passport authority. The power conferred on the Passport Authority is not unguided or unfettered. The grounds denoted by the words 'in the interests of general public' have a clearly well-defined meaning and cannot be said to be as vague or undefined. These words are in fact taken from Art. 19 (5) of the Constitution. Section 10 (3) (c)

of the Passport Act is therefore not violative of Arts. 14, 19 (1) (a) or (g) or Art. 21.

As regards the argument that the right to go out of India is an integral part of the right of freedom of speech and expression the Court held that the right to go abroad cannot be regarded as included in freedom of speech and expression guaranteed by Art. 19. In fact, the right to go abroad is clearly not a fundamental right under any clause of Art. 19 (1). However, the court held that it is not necessary that a right must be specifically named in Art. 19. Even if a right is not specifically named in Art. 19 (1) it may still be a fundamental right covered by some clause of that Article if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right. The test in such cases is whether the right claimed by the petitioner is an integral part of a named fundamental right or part of the same basic nature and character as the named fundamental right. If this is the correct test, the right to go abroad cannot be regarded as included in freedom of speech and expression. It is no doubt true that going abroad may be necessary in a given case for exercise of freedom of speech and expression, but that does not make it an integral part of the right of free speech and expression. Since the right to go abroad is not a guaranteed right under any clause of Art. 19 (1), therefore, the imposition of restrictions on this right under section 10 (3) (c) by impounding the passport can be held to be void as offending Art. 19 (1) (a) or (g) as its direct impact is on the right to go abroad and not on the right of free speech and expression or the right to carry on trade, business, profession or calling.

**Prisoner's and Art. 21.**—In *D. B. M. Patnaik v. State of A. P.*,<sup>1</sup> the Supreme Court extended the protection of Art. 21 even to convicts. The petitioners, who were naxalite under-trial prisoners, were undergoing the sentence in the Central Jail, Vishkhapatnam. They contended that the armed police guards posted around the Jail and the live-wire electrical mechanism fixed on the top of the Jail is an infringement of their right to 'life' and 'personal liberty' guaranteed under Art. 21 of the Constitution. The Court held that the convicts are not by mere reason of their conviction deprived of all the fundamental rights which they otherwise possess. Following the conviction, if a convict is put into the Jail he may be deprived of fundamental freedoms like the right to move freely throughout the territory of India or the right to "practise" a profession. But the Constitution guarantees to them other freedoms like the right to acquire, hold and dispose of property for the existence of which detention can be no impediment. Likewise, even a convict is entitled to the precious right guaranteed by Art. 21 and he shall not be deprived of his life or personal liberty except according to procedure established by law. In this case, however, it was held that the convicts have not been deprived of their fundamental rights by the posting of police guards immediately outside the Jail. 146 naxalite prisoners were lodged in Jail as a result of which usual watch and ward arrangement proved inadequate. Some prisoners had escaped from the prison. It was decided thereafter to take adequate measures preventing the escape of prisoners from jail. The Court said, 'A convict has no right more than any one else to dictate where guards to be posted to pre-

1. AIR 1974 SC 2092; Also see *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1976.

vent the escape of prisoners. The installation of live-wire mechanism does not offend their right. It is a preventive measure intended to act as a deterrent and cause death only if a prisoner causes death by scaling the wall while attempting to escape from lawful custody. The installation of live-wire does not by itself cause the death of the prisoner.

In *Babu Singh v. State of U. P.*,<sup>1</sup> it has been held that refusal to grant bail in a murder case without reasonable ground would amount to deprivation of personal liberty. In that case six appellants were convicted by the Sessions Judge on Nov. 4, 1972 in a murder case. In appeal by State the High Court convicted the appellants and sentenced them to life imprisonment. Five appellants had suffered sentence of 20 months and the sixth was on bail. These appellants were the entire male members of their family and all of them were in jail. As such, their defence was likely to be jeopardised. During appeal before the High Court, the State did not press for their custody. Moreover, there is nothing to show that during the long period of five years when the appellants had been out of prison pending appeal before High Court there had been any conduct on their part suggestive of disturbing the peace of the locality, threatening any one in the village or otherwise thwarting the life of the community or the course of justice. The appellants applied for bail during pendency of their appeal before the Supreme Court. The Court held that refusal to grant bail would amount to deprivation of personal liberty of an accused. Personal liberty, Krishna Iyer, J., held, is too precious a value of our Constitutional system recognised under Art. 21 and the crucial power to negate it is a great trust exercisable not casually but judicially with lively concern for the cost to the individual and the community. After all, personal liberty of an accused or convict is fundamental and can be taken away only in terms of 'procedure established by law'. So, deprivation of personal freedom ephemeral or enduring, must be founded on the most serious considerations relevant to the welfare objectives of the society specified in the Constitution.

Deprivation of liberty is a matter of great concern and permissible only when the law authorising it is reasonable. Reasonableness predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bifocal interest of justice to the individual involved and society effected. In the circumstances of the case, the Court therefore held that the appellants were subject to certain safeguards, entitled to be released on bail.

In *M. H. Hoskot v. State of Maharashtra*,<sup>2</sup> the Supreme Court applied the rulings of *Meneka Gandhi's* case. In that case the petitioner, who was a Reader holding M. Sc. and Ph. D. Degrees, was convicted for the offences of attempting to issue counterfeit university degrees. The scheme was, however, foiled. He was tried by the Sessions Court which found him guilty of grave offences but took a very lenient view and sentenced him to simple imprisonment till the rising of the court. The High Court allowed the State appeal and enhanced the punishment to three years. The High Court Judgment was pronounced in Nov. 1973, but the Special leave petition was filed in the Supreme Court by the petitioner after 4 years. The petitioner had undergone his full term of punishment. The explanation given by him for the condonation of delay was that he was given the copy of the judgment of 1973 only in 1978. It was disclosed however that although a free copy of the order had been sent promptly by the High Court, meant for the app-

1. AIR 1978 SC 527.

2 AIR 1978 SC, 1548.

licant, to the Superintendent of the Jail but he claimed that he never received it. The Superintendent claimed that the copy had been delivered to him but later it was taken back for the purpose of enclosing it with a mercy petition to the government for remission of sentence. The Supreme Court although dismissed the special leave application because of the settled practice that the court could not interfere with the concurrent finding of the two lower courts but it thought 'it to make the legal position clear. The Court held that a single right of appeal on facts, where the conviction is fraught with long loss of liberty, is basic to civilised jurisprudence. It is integral to fair procedure, natural justice and Every step that makes the right of appeal fruitful is obligatory and every action or inaction which stultifies it is unfair and therefore offended Art. 21. There are two ingredients of a right of appeal—(1) service of a copy of a judgment to the prisoner in time to enable him to file an appeal, and (2) provision of free legal service to a prisoner who is indigent or otherwise disabled from securing legal assistance. Both these are State responsibilities under Art. 21. Any jailor who by indifference or vendetta, withholds the copy thwarts the court process and violates Art. 21 and may make the further imprisonment illegal. He suggested that the Jail Manuals should be updated and should include this mandate and the courts must make available a copy of the judgment to the prisoner. All the obligations are necessarily implied in the right of appeal conferred by the Code read with the commitment to the procedural fairness in Art. 21. A second ingredient of fair procedure is a right to secure a free legal service. "This" said Krishna Iyer, J., who delivered the majority judgment, "is the State's duty and not Government's charity". If a prisoner is unable to exercise his constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, there is implicit in the court under Art. 142, read with Arts. 21 and 39-A of the Constitution, power to assign counsel to the prisoner provided he does not object to the lawyer named by the court. Equally is the implication that the State which sets the law in motion must pay the lawyer an amount fixed by the court.

In *Sunil Batra v. Delhi Administration*,<sup>1</sup> the important questions raised before the Supreme Court was whether solitary confinement imposed upon prisoners who were under sentence of death is violative of Arts. 14, 19, 20 and 21 of the Constitution. In this case the two convicts who were confined in Tihar Central Jail filed two petitions under Art. 32, challenging the validity of S. 30 and S. 56 of the Prison Act. Sunil Batra was sentenced to death by the District and Sessions Judge and his sentence was subject to the confirmation by the High Court and to a possible appeal to the Supreme Court. Batra complained that since the date of his conviction by Session Judge that is on 6th July, 1976 he was kept in solitary confinement till the Supreme Court intervened on 24th Feb., 1978. Charles Sobrji a foreigner, an under-trial prisoner challenged the action of the Superintendent of jail putting him into bar fettters. He was arrested on 6th July, 1976 and detained under section 3 of MISA. Since the time he was lodged in Jail he was put in bar fettters, notwithstanding of the recommendation of the Jail doctor that bar fettters be removed. It was contended that Section 30 does not authorise prison authorities to impose the punishment of solitary confinement. The Supreme Court accepted the argument of the petitioners and held that S. 30 of the Prison Act, does not empower the prison authorities to impose solitary confinement upon a prisoner under sentence of death under S. 73 and S. 74, I. P. C., solitary confinement is itself a substantive

1. AIR 1978 SC 1675.

Const. 19

punishment which can be imposed by a court of law. It cannot be left within and caprice of prison authorities. The Court held that the expression "*prisoner under sentence of death*" in the context of S. 30 (2) can only mean the prisoner whose sentence of death has become final and cannot be annulled or violated by any judicial or constitutional procedure. Thus a prisoner was not under sentence of death till he has the right to appeal against his sentence or to appeal for mercy. If by imposing solitary confinement there is total deprivation of comaraderie (friendship) amongst co-prisoners, comingling and talking and being talked to, it would offend Art. 21 of the Constitution. The liberty to move, mix, mingle, talk, share company with co-prisoners, if substantially curtailed would be violation of Art. 21 unless the curtailment has the backing of law. Although solitary confinement was held to be violative of Art. 21, section 30 was held to be valid because the procedure prescribed under it for the curtailment of prisoner's liberty in jail was fair and just within the meaning of Article 21. If S. 30 is interpreted in this manner its abnoxious element is removed and it cannot be said that there is deprivation of personal liberty without the authority of law. In case of *Charles Sobhraj* it was contended that S. 56 of the Prison Act justified putting him in bar fetter. The petitioner contended that S. 56 is violative of Arts. 14 and 21 as it confers unguided and arbitrary powers on the Superintendent to confine a prisoner in irons. The Court held that continuously keeping a prisoner in fetters day and night reduces the prisoner from a human being to an animal and that this treatment is cruel and unusual that the use of bar fettters is against the spirit of the Constitution. Section 56 lays down certain conditions under which it can be done. Since those conditions were not present in the instant case therefore putting bar fetter can not be justified. Section 56 is valid. The petitions were therefore dismissed.

In *Hussainara Khatoon v. Bihar*<sup>1</sup> (No. 1) a petition for a writ of *habeas corpus* was filed by number of under-trial prisoner who were in jails in the State of Bihar for years awaiting their trial. The Supreme Court held that the right to a reasonably speedy trial was a part of the fundamental right guaranteed by Art. 21. Speedy trial is of the essence of criminal justice. In United States speedy trial is one of the constitutionally guaranteed right. Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial".

Bhagwati, J. held, "although, unlike, American Constitution, speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Art. 21 as interpreted in, *Maneka Gandhi's Case*. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just'. For this reason the Court ordered the Bihar Government to release forthwith the under-trial prisoners on their personal bonds. In *Hussainara Khatoon v. Bihar*,<sup>2</sup> (No. 2) the Supreme Court reiterated the principle that the accused has a right of a speedy trial. In *Hussainara Khatoon v. Bihar*<sup>3</sup> (No. 3) the Court held that where undertrial prisoners remained in jail without trial for periods longer than the maximum term for which they could have been sentenced, if convicted, their continued detention was illegal and in violation of their fundamental right under Art. 21 and, as such, they must be released forthwith. A procedure for depriving a person of life or personal liberty must be 'reasonable, fair and just'. A procedure which does not make

1. AIR 1979 SC 1360.

2. AIR 1979 SC 1369.

3. AIR 1979 SC 1377.

available legal service to an accused person who was too poor to afford a lawyer and who would have to go through the trial without legal assistance cannot be regarded as 'reasonable, fair and just'. The Court referred to the directive in the newly added Art. 39A which directs the State to provide legal service to an accused person who is too poor to engage a lawyer.

**Sentence of death and Arts. 21, 14—**In *Jagmohan Singh v. Uttar Pradesh*,<sup>1</sup> the petitioner challenged the validity of death sentence on the ground that it was violative of Art. 21 because it did not provide any procedure. It was contended that the procedure prescribed under Criminal Procedure Code was confined only to findings of guilt and not awarding of death sentence. The Supreme Court held that the choice of awarding death sentence is done in accordance with the procedure established by law. The Judge makes the choice between capital sentence or imprisonment of life on the basis of circumstances and facts and nature of crime brought on record during trial. Accordingly, a five member Bench of the Court held that capital punishment was not violative of Arts. 14, 19 and 21 and was therefore constitutionally valid. After this decision the Constitutional validity of death sentence was not open to doubt. But in the recent case of *Rajendra Prasad v. U. P.*,<sup>2</sup> Krishna Iyer, J. has held that capital punishment would not be justified unless it was shown that the criminal was dangerous to the society. He held that giving discretion to the judge to make choice between death sentence and life imprisonment on "special reasons" under Sec. 354 (3), Cr.P.C. would be violative of Art. 14 which condemns arbitrariness. He pleaded for the abolition of death penalty and retention of it only for punishing "white collar offences". Sen, J., in his dissenting judgment held that the question whether the death sentence should be abolished or the scope of S. 302, I. P. C. and S. 354 (3) should be curtailed is a question to be decided by Parliament and not by the Court. Sen, J. held that it was constitutionally and legally impermissible while hearing a special leave petition on a question of sentence to restructure the I. P. C. and the Cr. P. C. so as to limit the scope of the sentence of death provided by Sec. 302, I.P.C. for the offences of murder. It is submitted that the minority judgment is correct because after the amendment in the Cr. P. C. and the decision in the *Jagmohan Singh's* case the death penalty is only an exception and the life imprisonment is the rule. The discretion to make choice between the two punishments is left to the Judges and not to the Executive.

#### <sup>1</sup> Inter-relation of Arts. 14, 19 and Art. 21.

**Old View :—**In *Gopalan's case* Supreme Court had held that Art. 19 had no application to the Preventive Detention Laws. The Court marked the following points of distinction between "personal liberty" occurring in Article 21 and "liberty" occurring in Article 19 : (1) Articles 19 and 21 deal with different subjects. Article 19 deals only with certain (seven freedoms) important individual rights of personal liberty and the restrictions that can be imposed on them. Article 21, on the other hand, enables the State to deprive individual of his life and personal liberty in accordance with procedure established by law. In short, Art. 19 deals with "restrictions" and Article 21 with "deprivation"; (2) Article 19 guarantees to the citizens the enjoyment of certain liberties while they are free. Article 19 thus postulates a legal capacity to exercise the rights guaranteed by it. But if a citizen loses the freedom of his person by being lawfully detained as a result of conviction for an offence or as a result of preventive detention under Articles 21 and 22, loses his capacity to

1. AIR 1973 SC 947.

2. AIR 1979 SC 916.

exercise those rights and therefore cannot claim the rights under Art. 19 ; (3) Article 19 is available to citizens only but Article 21 is available to both citizens and non-citizens ; (4) The validity of deprivation of law made under Art. 21 cannot be judged under the test of "reasonableness" in Art. 19—Article 19 does not apply to a law of preventive detention even though as a result of an order of detention the rights of a citizen under Article 19 may be restricted or abridged. Thus the view taken by the majority in *A. K. Gopalan's case* was that so long as a law of preventive detention satisfies the requirements of Art. 22, it would not be required to meet the challenge of Art. 19.

**Present view :—**The view taken by the Court in *Gopalan's case* that the validity of a preventive detention law cannot be challenged on the ground that it does not satisfy the requirements of Art. 19 (imposes reasonable restrictions) has now been overruled. The law is now settled that Art. 21 does not exclude Art. 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Art. 21 such a law in so far as it abridges or takes away any fundamental right under Art. 19 would have to meet the challenges of Art. 19. Thus a law depriving a person of 'personal liberty' has not only to stand the test of one or more of the fundamental rights conferred under Art. 19, but also be liable to be tested with reference to Art. 14.<sup>1</sup>

**'Procedure' and 'Law'.—**The question for interpretation of Article 21 came for consideration before the Supreme Court in the leading case of *A. K. Gopalan v. State of Madras*.<sup>2</sup> In that case the petitioner A. K. Gopalan, a Communist leader, was detained under the Preventive Detention Act, 1950. The petitioner challenged the validity of the Preventive Detention Act and his detention thereunder on the following grounds : (1) that it violates his right to move freely throughout the territory of India which is the very essence of personal liberty guaranteed in Article 19. The detention under this Act was not 'a reasonable detention' under Cl. (5) of Art. 19 and hence the Act is void ; (2) that the Act is in conflict with Art. 21 of the Constitution inasmuch as it provides for deprivation of the personal liberty of a man not in accordance with a 'procedure established by law'. It was argued that the word 'law' in Article 21 should be understood, not in the sense of an enactment but as signifying the universal principles of natural justice and a law which does not incorporate these principles cannot be valid ; (3) that the expression "procedure established by law" meant the same thing as the phrase "due process of law" in the American Constitution.

The petitioner argued that the expression 'procedure established by law' was synonymous with the expression 'due process of law' of the American Constitution. It was contended that the Indian Constitution gives the same protection with the only difference that while the due process clause has been interpreted in America to cover both substantive and procedural law, only the protection of procedural law is guaranteed in India. The contention was that the omission of the word 'due' made on difference to the interpretation of Article 21 ; the word 'established' was not equivalent to 'prescribed', but had a wider meaning ; the word 'law' did not mean enacted law, but it meant principles of natural justice.

1. *Maneka Gandhi v. Union of India*, AIR 1978 SC 594 ; *R. C. Cooper v. Union of India*, AIR 1970 SC 564 ; *Shambhu Nath Sarkar v. State of West Bengal*, AIR 1973 SC 1423 ; *Dardhan Saha v. State of West Bengal*, AIR 1974 SC 2154.
2. *A. K. Gopalan v. State of Madras*, AIR 1950 SC 27.

But the Supreme Court rejected the aforesaid contentions and held that the 'procedure established by law' did not mean 'due process of law' as understood in America. There was no justification for adopting the meaning of the word 'law as interpreted by the Supreme Court of America in the expression 'due process of law' merely because the 'word law' is used in Article 21. This is clear from the report of the Drafting Committee of the Constituent Assembly in respect of Article 21. The Report of the Drafting Committee shows that Constituent Assembly had formerly used the American expression 'due process of law' but they deliberately dropped it in favour of the expression 'procedure established by law', which is more specific. In *Gopalan's* case, the majority held that the expression 'procedure established by law' must mean procedure prescribed by the law of the State. The Court observed that it was not proper to consider this expression in the light of the meaning given to the expression 'due process of law' in the American Constitution by the American Supreme Court. The interpretation put on the due process clause by American Supreme Court has been characterised by the utmost vagueness and that it means just what the five Judges of that Court say it means. If the Constitution makers wanted to preserve in India the same protection as is given in America there was nothing to prevent the Constituent Assembly from adopting that phrase.

But in *Maneka Gandhi v. Union of India*,<sup>1</sup> the Supreme Court has overruled *A. K. Gopalan's* case<sup>2</sup> and has held that the mere prescription of some kind of procedure is not enough to comply with the mandate of Art. 21. The procedure prescribed by law has to be *fair, just and reasonable* and not fanciful, oppressive or arbitrary; otherwise, it should be no procedure at all and all the requirements of Art. 21 would not be satisfied. What is fair or just? A procedure to be fair or just must embody the principles of natural justice. Natural justice is intended to invest law with fairness and to secure justice, the Court said.

By accepting the concept of natural justice as one of the essential component of law, it is submitted that the Court has imported the American concept of 'due process of law' into our Constitution. Like due process of law, natural justice is also not a rigid or mechanical concept. The rules of natural justice are to be applied in the context of the situations in which it is to be applied. The court itself quoted the observations of Magarry, J., who describes natural Justice "as a distillate of due process of law". And now in *Sunil Batra v. Delhi Administration*,<sup>3</sup> Justice Krishna Iyer observed: "True, our Constitution has no 'due process' clause or the VIII Amendment (of the American Constitution) but in this branch of law, after Cooper and *Maneka Gandhi's* cases the consequence is the same".

#### Natural Justice.

In *Gopalan's* case it was argued that the word 'law' in Art. 21 does not merely mean an enacted piece of law but it incorporates the principles of natural justice, and a law which deprives a person of his personal liberty without complying with the rules of natural justice cannot be held to be valid under Art. 21. Rejecting the argument the Court held that the 'law' in Art. 21 must mean a law enacted by the Legislature and not the law in the abstract or

1. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *M. H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1549.

2. AIR 1950 SC 27.

3. AIR 1978 SC 1675.

general sense embodying the principles of natural justice as interpreted by the U. S. Supreme Court.

The present view.—In *Maneka Gandhi's case*,<sup>1</sup> the Supreme Court has held that the word 'law' in Art. 21 does not mean merely an enacted piece of law but a reasonable law, i. e., which embodies the principles of natural justice.

**Emergency and Art. 21.**—The Constitution provides for the suspension of the rights guaranteed by Art. 21 during emergency. Article 359 empowers the President to suspend the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the Presidential order, when the Proclamation of Emergency is made under Art. 352 by the President.

For the first time, Art. 21 was suspended during the Emergency arising out of the Chinese attack in 1962. In 1971 it was suspended for the second time when Pakistan attacked India. In 1976 this Article was again suspended when Indira Gandhi's Government declared emergency on the ground of internal disturbance.

✓ In *A. D. M. Jabalpur v. S. Sukla*,<sup>2</sup> popularly known as the *habeas corpus* case the question as to what is the true scope and content of the right conferred by Article 21 was again raised before the Supreme Court. The facts of the case were as follows : On June 25, 1975, the President issued a Proclamation under Article 352 (1) declaring that a grave emergency existed whereby the security of India was threatened by internal disturbance. On November 16, 1976 the President issued an Order under Art. 359 (1) and suspended the right to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution. The petitioners were detained under section 3 of the Maintenance of Internal Security Act, 1971 (a preventive detention law). They filed writ-petitions in different High Courts for the issue of the writ of *habeas corpus*. The Government raised a preliminary objection to their maintainability on the ground that in view of the Presidential order their petitions were not maintainable. The High Courts, however, rejected the preliminary objection for one reason or another. The State appealed to the Supreme Court.

It was contended on behalf of the detainees that the object of the Presidential Order was to bar the Supreme Court under Art. 32 for the enforcement of certain suspended rights without effecting in any manner the enforcement of Common law and statutory right to personal liberty under Art. 226 before the High Courts. In other words, the question was whether Art. 21 is the sole repository of the right to personal liberty. The detainees contended that the right to life and personal liberty is not only guaranteed by Art. 21 but are also protected under Common law and statutory law. The right to personal liberty is contained in Articles 19, 20, 22 and therefore, Art. 21 is not the sole repository to personal liberty. It was argued that personal liberty is not a conglomeration of positive rights but is merely a negative concept denoting an area of free action and does not confer any right and hence is outside the scope and ambit of Art. 359 (1) and consequently outside the Presidential order.

The Supreme Court, however, rejected these contentions of the respondents and held that Article 21 is the sole repository of rights to life and

1. AIR 1978 SC 594.

2. AIR 1976 SC 1207.

personal liberty against the State. It embraces all aspects of personal liberty. The right to personal liberty is neither a Common law right nor a statutory right nor a natural right. The effect of suspension of enforcement of Art. 21 by the Presidential Order is that no one can move any court for enforcement of the right conferred by Art. 21, while the Presidential Order is in operation.

Khanna, J., however, delivered a dissenting judgment. He held that Art. 21 is not the sole repository of the right to life and personal liberty. Even in absence of Art. 21 in the Constitution, the State has got no power to deprive a person of his life or personal liberty without the authority of law. That is the essential postulate and basic assumption of the rule of law in every civilised society. According to the law in force in India before the coming into force of the Constitution no one could be deprived of his life or personal liberty without the authority of law. Such a law continued to be in force after the coming into force of the Constitution in view of Art. 372 of the Constitution.

Prior to this case, the Supreme Court had held that notwithstanding the suspension of Art. 21 the detenu could challenge the validity of his detention order on the ground that the order was without authority of law or in excess of authority or *mala fide* or based on extraneous considerations.<sup>1</sup>

The above view has been overruled in the *habeas corpus* case and it has been held that when Art. 21 is suspended no person has any *locus standi* (legal right) to move for the writ of *habeas corpus* under Art. 226 before High Court or under Art. 32 before the Supreme Court challenging the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by *mala fide* or based on extraneous considerations.

#### 44th Amendment and Art. 21.

The 44th Amendment has amended Art. 359 which now provides that the enforcement of the right to life and liberty can not be suspended by the Presidential Order. This amendment is intended to prevent the reoccurrence of the situation in future which arose in the *habeas corpus* case.

1. *Makhan Singh v. State of Punjab*, AIR 1964 SC 381.

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1. *Makhan Singh v. State of Punjab*, AIR 1964 SC 331.

## Safeguards against Arbitrary Arrest and Detention (Art. 22)

**Introduction.**—According to Article 21 no person can be deprived of his life or personal liberty except according to procedure established by law. This means that a person can be deprived of his life or personal liberty provided his deprivation was brought about in accordance with the procedure prescribed by law. It was held in *Gopalan's case*<sup>1</sup> that this article gave the Legislature full authority to make law and prescribe any procedure it liked. Article 22 provides those procedural requirements which must be adopted and included in any procedure enacted by the Legislature. If these procedural requirements are not complied with it would then be deprivation of personal liberty which is not in accordance with the procedure established by law. Thus Article 22 prescribes the minimum procedural requirements that must be included in any law enacted by the Legislature in accordance with which a person may be deprived of his life and personal liberty. Kania, J. in *Gopalan's case*<sup>2</sup> has stated that Article 21 has to be read as supplemented by Article 22. Article 22 deals with two separate matters (1) persons arrested under the ordinary law of crimes, and (2) persons detained under the law of 'Preventive Detention'. The first two clauses of Article 22 deal with detention under the ordinary law of crimes and lay down the procedure which has to be followed when a man is arrested and the remaining (clauses 3, 4, 5, 6) deal with the detention under Preventive Detention and lay down the procedure which is to be followed when a person is detained under that law.

**Art. 22 not a complete Code.**—At one time it was thought that Art. 22 was a complete Code in regard to laws providing for preventive detention and that the validity of an order of detention should be determined strictly according to the terms and within the four corners of Art. 22. It was held in *Gopalan's case* that a detenu may not claim that the freedoms guaranteed by Art. 19 (1) (d) was infringed by his detention, and that the validity of the preventive detention law was not to be tested in the light of the reasonableness of the restrictions imposed thereby on the freedom of movement, nor on the ground that his right to personal liberty was infringed otherwise than according to procedure established by law. This view has now been shown to be wrong in *R. C. Cooper v. Union of India*. Although the case is concerned with Art. 31 (2) but now in *Maneka Gandhi's case* the Court has applied it in relation to Art. 21 also. According to this view a law relating to preventive detention must now satisfy requirement of both Arts. 19 and 22. In other words, the validity of a preventive detention law will also be tested on the ground that it imposes 'reasonable restriction' under Art. 19.

### Clauses (1) and (2).

Clauses (1) and (2) of Article 22, guarantee four rights to the persons who are arrested under an ordinary law—

1. Mohd. Yousuf v. State of J. & K., AIR 1979 SC 1925.
2. AIR 1950 SC 27.

- (a) the right to be informed 'as soon as may be' of ground of arrest,
- (b) the right to consult and to be represented by a lawyer of his own choice,
- (c) the right to be produced before a Magistrate within 24 hours,
- (d) the freedom from detention beyond the said period except by the order of the Magistrate.

The above four fundamental rights guaranteed to arrested persons by clauses (1) and (2) of Article 22 are available to both *citizens* and *non-citizens* and to persons arrested and detained under any law providing for preventive detention.

(a) The rights to be informed of grounds of arrest.—This is necessary to enable the arrested person to know the grounds of his arrest and to prepare for his defence. Article 22 is in the nature of a directive to the arresting authorities to disclose the grounds of arrest of a person immediately. The words used in Article 22 (1) are 'as soon as may be' which mean 'as nearly as is reasonable in the circumstances of a particular case.' If the grounds of arrest is delayed it must be justified by 'reasonable circumstances'. This right of being informed of the grounds of arrest is not dispensed with by offering to take bail to the arrested person.<sup>2</sup>

(b) Right to be defended by a lawyer of his own choice.—In America, if a person is arrested he must be afforded opportunity to consult lawyer of his own choice and if he is unable to employ a counsel it is the duty of the court to employ a lawyer for him.<sup>3</sup> In India however, the court is not bound to employ a lawyer unless a request is made by him.

In *Hussainara Khatoon v. State of Bihar*,<sup>4</sup> the Supreme Court has held that it is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as property, indigence or incomunicado situation, to have free legal services proved to him by the State and the State is under constitutional duty to provide a lawyer to such person if the needs of justice so require. If free legal services are not provided the trial itself may be vitiated as contravening Art. 21.

In *State of M. P. v. Shobharam*,<sup>5</sup> the respondent was arrested without warrant on a charge of criminal trespass under section 447, I. P. C. He was released on bail. His trial was held in the court of Nyaya Panchayat which sentenced him to a fine of Rs. 75. He was not permitted at the trial to be defended by a lawyer, because under the Madhya Pradesh Panchayat Act no lawyer could appear before a Nyaya Panchayat. The Supreme Court agreed with the reasoning of the M. P. High Court and held that the trial was not legal and declared the relevant provisions of M. P. Panchayat Act unconstitutional for being violative of Article 22 (1). However, in *Ram Swarup v. Union of India*,<sup>6</sup> it was held that there was no denial of the right guaranteed to the accused where he did not make a request to the court for engaging a lawyer of his own choice to defend him.

The protection of this Article is also not available to a person who has been convicted by a competent court and detained.<sup>7</sup>

1. *Tarapada v. State of West Bengal*, AIR 1951 SC 174.

2. *State of M. P. v. Shobharam*, AIR 1966 SC 1910.

3. *Powell v. Alabama*, 247 US 45.

4. AIR 1979 SC 1377.

5. AIR 1966 SC 1910; *K. N. Sarkar v. State*, 1968 Cr. LJ 121.

6. AIR 1965 SC 247.

7. *Keshav Singh v. The Speaker of U. P. Assembly*, AIR 1965 All. 349.

(c) Right to be produced before a Magistrate.—In addition to the furnishing of the grounds of arrest the arrested person must be produced before the Magistrate within 24 hours of his arrest. It can be extended beyond 24 hours only under the judicial custody. It affords a possibility if not an opportunity for immediate release in case the arrest is not justified.

(d) No detention beyond 24 hours except by order of the Magistrate.—This means that if there is necessity of detention beyond 24 hours it is only possible under judicial custody.

The expression "arrest and detention" in Article 22 (1) and (2) was held not to apply to a person arrested under a warrant issued by the court on a criminal or quasi-criminal complaint or under security proceedings. Article 22 is designed to give protection against the act of the Executive or other non-judicial authorities and applies to a person who has been accused of a crime or of offence of criminal or quasi-criminal nature or some act prejudicial to the State or public interest. In *State of Punjab v. Ajai Singh*,<sup>1</sup> the Supreme Court held valid the Abducted Persons (Recovery and Restoration) Act, 1949, under which an abducted person was arrested and delivered to the officer in charge of the nearest Camp. The arrest of an abducted person under the Act was held not to constitute "arrest and detention" because the person was not accused of any offence of a criminal or quasi-criminal nature. Likewise, the removal of a minor girl from a brothel under the Bengal Suppression of Immoral Traffic Act, 1923, was held not to constitute 'arrest and detention' under Article 22.<sup>2</sup> The reason is that person who is arrested under a warrant of a court is informed of the grounds of his arrest.

#### Exceptions to Cls. (1) and (2).

Clause (3) of Art. 22 provides two exceptions to the rule contained in clauses (1) and (2). It says that the rights given to arrested persons under clauses (1) and (2) are not available to the following persons :

1. An enemy alien.
2. A person arrested and detained under a preventive detention law.

An enemy alien may, however, seek the protection under clauses (4) and (5) of Art. 22 if arrested under a law of Preventive Detention, but subject to the law passed by the Parliament.

### PREVENTIVE DETENTION LAWS

Clauses (4) to (7) of Art. 22 provide the procedure which is to be followed if a person is arrested under the law of Preventive Detention. There is no authoritative definition of the term 'Preventive Detention' in Indian law. The word 'preventive' is used in contra-distinction to the word 'punitive'. It is not a punitive but a preventive measure. While the object of the punitive detention is to punish a person for what he has already done, the object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge is formulated. The sole justification of such detention is suspicion or reasonable probability of the detainee committing some act likely to cause harm to the society or endanger the security of the Government, and not criminal conviction which can only be warranted by legal evidence.<sup>3</sup>

1. AIR 1953 SC 10.

2. *Raj Bahadur Singh v. Legal Remembrancer*, AIR 1955 Cal. 522.

3. *A. K. Gopalan v. State of Madras*, AIR 1950 SC 27 at p. 91 (Mukherjee, J.).

**Necessity of such provision.**—Preventive detention laws are repugnant to democratic Constitution and they are not found in any of the democratic countries of the world. No country in the world has made these laws integral part of the Constitution as has been done in India. There is no such law in U. S. A. It was resorted to in England only during war time. In England for the first time during the First World War certain regulations framed under the Defence of Realm Act provided for preventive detention at the satisfaction of Home Secretary as a war measure and they ceased to have effect at the conclusion of hostilities. The same thing happened during the Second World War. These regulations were upheld by British Courts.<sup>1</sup> Indian Constitution, however, recognises preventive detention in normal times also. In *A. K. Gopalan v. State of Madras*,<sup>2</sup> Patajali Shastri, J., explaining the necessity of this provision said, "The sinister looking feature, so strangely out of place in democratic Constitution, which invests personal liberty with the sacrosanctity of a fundamental right and incompatible with the provisions of its preamble, is doubtless, designed to prevent the abuse of freedom by antisocial and subversive element which might imperil the national welfare of the infant republic."

**The Preventive Detention Act, 1950.**—The Preventive Detention Act was enacted by the Parliament on 26th February, 1950. The object of the Act was to provide for detention with a view to prevent any person from acting in a manner prejudicial to the defence of India, the relation of India with foreign powers the Security of India or a State or the maintenance of public order, the maintenance of supplies and services essential to the community. The main provisions of the Act were contained in Secs. 3, 7, 8, 9, 10, 11, 12 and 14. Section 3 empowered the Central and the State Governments and certain officers under them to make orders of detention if they were satisfied that it was necessary to detain a person with a view to prevent him from acting in any manner prejudicial to the things mentioned above. Thus the order of detention could be made on the subjective satisfaction of the Executive. When the order of detention was made by any subordinate officer he was to report the fact to the State Government together with grounds on which the order of detention was made and such other particulars which in his opinion was necessary to make detention order. Section 7 directs the detaining authority to communicate the grounds of detention to the detenu without delay and to afford him the earlier opportunity to make representation against the order. However, the authority was not bound to disclose facts which in his opinion was against the public interest. Section 8 provides for the constitution of the Advisory Boards. Section 9 directs the appropriate Government, within 6 weeks from the detention order, to place before the Advisory Board the grounds of order of detention and any representation made by the detenu for its opinion. Section 10 lays down the procedure to be followed by the Advisory Board. It requires the Advisory Board to consider the material before it and submit report to the appropriate Government within 10 weeks from the date of detention order, whether or not there is sufficient reason for the detention of the detenu. If the Advisory Board reports that the detention is justified the Government may confirm the detention order and continue the detention for such period as it thinks fit. Section 12 provides detention for a longer period than 3 months without consulting the Advisory Board. Such period, however, cannot exceed more than one year. An order of detention could be revoked or modified at any time before the expiry of the period of detention. The

1. See *Liverside v. Anderson*, (1942) AC 206; *Rex v. Holiday*, (1917) AC 260. (Held, personal liberty can be sacrificed for the national success in war)

2. AIR 1950 SC 27.

revocation shall not be a bar to the making of fresh detention order. Section 14 barred the jurisdiction of the court to look into the question whether grounds are supplied to the detenu or not. The section was declared to be unconstitutional in *Gopalan's case*.<sup>1</sup>

The Act was purely a temporary measure and was to cease to have effect on 1st April, 1951. But its life was extended from time to time till it lapsed on December 31, 1969. The Preventive Detention Law was revived in the form of Maintenance of Internal Security Act, 1971, in less than two years' time after the lapse of the first Preventive Detention Act, 1950. This Act continued to be in operation upto the year 1977. When the Congress Government headed by Smt. Indira Gandhi was defeated in the Lok Sabha elections the Act was repealed by the Janata Government, on 3rd August, 1978.

But in less than two years time after the repeal of the MISA the Care-taker Government headed by Mr. Charan Singh again revived the preventive detention law in the form of *Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Ordinance, 1979*. The ordinance has now been replaced by an Act. It provides for preventive detention for preventing black marketing and hoarding of essential commodities.<sup>2</sup> It requires the detaining authority to furnish grounds of detention within a period of 5 days from the date of detention, extendable to 10 days in exceptional cases. Within 3 weeks the Government is required to place grounds of detention along with detainees' representations before the Advisory Board. The Board must submit its report to the Government within 7 weeks from the date of detention. The maximum period for which a person could be detained after the confirmation by the Advisory Board has been restricted to 6 months from the date of detention. The aggrieved person will have the right to move the courts under Art. 32 and 226 of the Constitution.

**Constitutional Safeguards against Preventive Detention Laws.**—Though the Constitution has recognised the necessity of laws as to preventive detention, it has also provided safeguards to mitigate their harshness by placing fetters on legislative power conferred on the Legislature. The power of preventive detention is acquiesced in by the Constitution as a necessary evil and therefore hedged in by diverse procedural safeguards to minimise as much as possible the danger of its misuse. It is for this reason that Article 22 has been given a place in the Chapter on "guaranteed rights".<sup>3</sup> Clauses (4) to (7) guarantee the following safeguards to a person arrested under preventive detention law :

- (a) Review by Advisory Board ;
- (b) Grounds of Detention and Representation ;
- (c) Composition and Procedure of Advisory Board.

**(a) Review by Advisory Board.**—Clause (4) of Art. 22 has now been amended by the Constitution (44th Amendment) Act, 1978. The effect of the Amendment has been discussed below :

**Position Prior to 44th Amendment Act, 1978.**—Clause (4) provided that no law providing for preventive detention shall authorise the detention of a person for a longer period than 'three months' unless an Advisory Board constituted of persons who are or have been or qualified to be High Court Judges has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. If in the opinion of

1. AIR 1950 SC 27.

2. *Pankaj Kumar v. State of West Bengal*, AIR 1970 SC 97,

Advisory Board the detention was not justified the Government was bound to revoke the detention order.<sup>1</sup> If the Advisory Board reports that the detention is justified then the detaining authority will determine the period of detention. However, the period of detention cannot be indefinite. Clause (4) (b) says that the detention cannot exceed in any case beyond the maximum period prescribed by any law made by Parliament for that class of detenue under sub-clause (b) of clause (7). Any law providing for detention for a longer period of months without obtaining the opinion of the Advisory Board must provide the class or classes of cases and also the circumstances under which a person may be detained for more than 3 months. It means that the Parliament must provide both (a) the classes of cases, and (b) the circumstances under which detention for a longer period of 3 months can be made.<sup>2</sup> It is, therefore, a crucial requirement of Article 22 (4) that the appropriate Government has to take action on the report of the Board, because on that action would depend the revocation of the order and his release or the continuance of the detention beyond 3 months. It would, therefore, *prima facie*, appear that action should be taken immediately after the receipt of the opinion of the Board or at any rate within 3 months from the day of detention. If the order of detention is not confirmed within 3 months from the date of the detention further detention of detenue after the expiry of 3 months will be without the authority of law and hence will make the detention illegal. Any subsequent action by the appropriate Government after three months cannot have the effect of extending the period of detention.<sup>3</sup>

In *S. N. Sarkar v. Union of India*,<sup>4</sup> the validity of section 17A of the Maintenance of Internal Security Act, 1971, was involved. This Act was passed in 1971 with a view to cope with the special situation created by the refugee influx from East Bengal, now Bangladesh. It contains more stringent provisions against certain type of foreigners entering the country as spies with the intention of undermining the security of the State. The Preventive Detention Law which was allowed to lapse on December 31, 1969, provided for a maximum detention period of one year. The present Act provides for a period of detention for 2 years without consulting an Advisory Board as required by Article 22 (4) of the Constitution. In that case, the petitioner Shambhu Nath Sarkar was detained under section 17-A of the Maintenance of Internal Security Act. The petitioner challenged the validity of section 17-A on the ground that it violated his fundamental rights guaranteed by Article 22 (7) of the Constitution. The Supreme Court held that section 17-A of the Act providing for detention for a period longer than 3 months without obtaining the opinion of the Advisory Board was unconstitutional because it did not satisfy the requirements laid down in Art. 22 (7) of the Constitution. Under clause (7) the Parliament is empowered in special cases to enact a law providing preventive detention for more than 3 months without the opinion of the Advisory Board provided it simultaneously defines the circumstances as well as the cases or classes of cases in which such a law would apply.

The Court also overruled the majority view in the *A. K. Gopalan's case*, viz. that a law made by a Parliament providing detention for a period longer

1. *Shibban Lal v. State of U. P.*, AIR 1954 SC 198.

2. *S. N. Sarkar v. Union of India*, AIR 1973 SC 1425.

3. *Nirman Kumar v. Union of India*, AIR 1978 SC 1155 (a case under COFFPQSA); *D. S. Roy v. State of W. B.*, AIR 1972 SC 1924; see also *Madan Malick v. State of W. B.*, AIR 1972 SC 1878; *Ala Mohan v. State of W. B.*, AIR 1972 SC 1456; *S. Mukherjee v. State of W. B.*, AIR 1972 SC 1356. In all these cases the validity of sections 12 & 13 of W. B. (Prevention of Violent Activities) Act, 1970 was questioned.

4. AIR 1973 SC 1425.

5. AIR 1950 SC 27.

than 3 months could specify either the circumstances or alternatively the cases or classes of cases to which such law would apply.

But even when the Advisory Board reports that the detention is justified it cannot continue the detention for indefinite period because according to clause (4) (b) it cannot exceed in any case beyond the maximum period prescribed by a law of Parliament for that class of detenu.

Clause (7) of Article 22, embodies an exception to clause (4). It empowers Parliament only, not the State Legislature, to enact a law by which a person may be detained for more than three months without the opinion of an Advisory Board. But such a law must firstly provide for the class or classes of cases and the circumstances under which a person may be detained for a longer period than 3 months, and secondly, it must also lay down the maximum period for which any person in any class or classes of cases be detained. It means that in all cases of preventive detention exceeding three months, if the detenu under Parliamentary Legislation is denied the benefit of the investigation of his case by the Advisory Board the period for which a detenu of that class can be kept in custody must always be specified by the law.

Thus the opinion of the Advisory Board was not necessary in two cases—(1) when the period of detention does not exceed three months (after 44th Amendment, 1978 only two months) and (2) when Parliament by a law prescribes the maximum period for which a person may be detained under Cl. (4) (b) and Cl. (7) (a) (b).—{deleted}.

**Position After the 44th Amendment Act, 1978.**—The 44th Amendment Act, 1978, has amended clauses (4) and (7) of Art. 22. The newly substituted clause (4) now reduces the maximum period for which a person may be detained without obtaining the opinion of the Advisory Board from 3 months (in unamended article) to '2 months'. The detention of a person for a longer period than two months can only be made after obtaining the opinion of the Advisory Board.

The Amendment has changed the composition of the Advisory Board. The Advisory Board shall be constituted in accordance with the recommendation of the Chief Justice of the appropriate High Court. It shall consist of a Chairman and not less than two other members. The Chairman of an Advisory Board shall be a sitting Judge of the appropriate High Court and the other members shall be sitting or retired Judges of any High Court. Thus an Advisory Board as envisaged under the Amendment Act of 1978 shall now be an independent and impartial body i. e., free from executive control.

The Amendment abolishes the provision for preventive detention without reference to an Advisory Board as provided in unamended sub-clause (a) of clause (7) of Art. 22. The amendment therefore deletes sub-clause (a) of clause (7) of Art. 22. Under Art. 22 (7) (a) Parliament was empowered to make law for preventive detention without obtaining the opinion of an Advisory Board beyond the period of three months. After the 44th Amendment a person can be detained beyond the period of two months only after obtaining the opinion of an Advisory Board. This deletion of clause (a) of Art. 22 (7) has thus removed the greatest blot on preventive detention in India.\*

(b) **Grounds of detention must be communicated to the detenu.**—Article 22 (5) gives two rights to the detenu : (a) the authority making the order of detention must "as soon as may be" communicate to the person detained the grounds of his arrest, that is, the grounds which led to the subjective satis-

1. *Seervai Constitutional Law of India*, 11 ed., III Vol., page 1899.

tion of the detaining authority, and (b) to give the detenu "the earliest opportunity" of making a representation against the order of detention, that is, to be furnished with sufficient particulars to enable him to make a representation.

Thus clause (5) imposes an obligation on the detaining authority to furnish to the detenu the grounds for detention "as soon as possible". The grounds of detention should be very clear and easily understandable by the detenu. The sufficiency of the particulars conveyed to a detenu is a justiciable issue, the test being whether they are sufficient to enable the detenu to make an effective representation. Thus where the detenu did not know sufficient English to understand the grounds communicated to him, it was held that there was no sufficient compliance with the requirements laid down in the Constitution.<sup>1</sup> The grounds of detention must be in existence at the time of making the order. No part of such ground can be held back nor can new ground be added thereto.<sup>2</sup>

In *Shibban Lal v. State of U. P.*,<sup>3</sup> the petitioner had been supplied with two grounds of his detention. But later on the detaining authority revoked one of the grounds communicated to him earlier. The detenu challenged the detention as illegal. The State contended that the remaining ground was sufficient to sustain the detention. The Court held the detention illegal and observed, "To say that the other ground, which still remains, is quite sufficient to sustain the order would be substituted on objective judicial test for the subjective decisions of the executive authority which is against the legislative policy underlying the statute. In such cases, we think, the position would be the same as if one of these grounds was irrelevant for purposes of the Act or was wholly illusory and this would vitiate the detention order "as a whole".

In *Kishori Mohan v. State of W. B.*,<sup>4</sup> the petitioner was detained under section 3 of the Maintenance of Internal Security Act, 1971, "with a view to prevent his acting in any manner prejudicial to the maintenance of the public order or security to the State." The grounds of detention supplied to the petitioner were as follows :—

(1) that you along with your associates held a meeting at a place and decided to kill Jotedars and richmen of the locality;

(2) that you along with your associates attacked S. K. Ismail and tried to assault him by the *tango* and dagger with intent to kill him;

(3) that you and your associates addressed a meeting and impressed upon the gathering to use arson to establish common Raj in the country and for the same purpose urged killing policemen and collect guns and arms and ammunition from them, etc.

The Court said that the detention order stating that the detention was necessary to prevent the detenu from acting in a manner prejudicial to the "maintenance of public order or security of State" shows that either the magistrate was not certain whether the activities of the detenu endangered public order or security of the State or that he merely reproduced mechanically the language of section 3 of the Maintenance of Internal Security Act. The Court held that when such equivocal language is used in an order and the detenu is not told whether his alleged activities set out in grounds of

1. *Hari Krishna v. State of Maharashtra*, AIR 1962 SC 911.

2. *State of Bombay v. Atma Ram*, AIR 1954 SC 157.

3. AIR 1954 SC 179 : see also *Dwarika Prasad v. State of Bihar*, AIR 1972 SC 134.

4. AIR 1972 SC 1749

detention fall under one head or the other or both, it is not difficult to appreciate that a detenu might find it hard to make an adequate representation to the Government and the Advisory Board. The inclusion of an extraneous ground of detention vitiates the detention order since it is impossible to predicate whether without it the requisite satisfaction by the authority making the order could have been reached. The ground No. (2) was clearly extraneous to any of the heads and therefore the detention was invalid.

The grounds supplied to the detenu must not be 'vague' or 'irrelevant' or *non-existent*. If the grounds are vague or irrelevant to the object of the legislation the right of detenu under clause (5) is violated. A ground is said to be irrelevant when it has no connection with the satisfaction of the authority making the order of detention. The inclusion of an irrelevant or non-existent ground among other relevant grounds is an infringement of the rights of a detenu. The inclusion of even a single irrelevant or obscure grounds is an invasion of the detenu's constitutional right because it precludes the court from adjudicating upon the sufficiency of the grounds.<sup>1</sup>

In *Ram Bahadur v. State of Bihar*,<sup>2</sup> it has been held that where the order of detention is founded on distinct and separate grounds, if any of the grounds is vague or irrelevant the entire order must fail. In *Fogle & S. K. Jallil v. State of Bengal*,<sup>3</sup> where one of the reasons for detention was not communicated to the detenu, the Court held that the detenu had no opportunity to make an effective representation to the Government and therefore the detention is violative of Art. 22 (5) and must be set aside.

(c) Right of Representation.—The other right given to the detenu is that he should be given the earliest opportunity of making a representation against the detention order. It means that the detenu must be furnished with sufficient particulars of the grounds of his detention to enable him to make a representation which on being considered may give him relief.<sup>4</sup>

The 'grounds' under Art. 22 (5) mean 'all the basic facts and materials which have been taken into account by the detaining authority in making the order of detention and on which, therefore, the order of detention is based. Nothing less than all the basic facts and materials which influenced the detaining authority in making the order of detention must be communicated to the detenu. This is the plain requirement of the first safeguard in Article 22 (5). The second safeguard in Article 22 (5) requires that the detenu shall be afforded the earliest opportunity of making representation against the order of detention. No avoidable delay, no shortfall in the materials communicated shall stand in the way of the detenu in making an earlier, yet comprehensive and effective representation in regard to all basic facts and materials which may have influenced the detaining authority in making the order of detention depriving him of his freedom. These are the legal safeguards enacted by the Constitution-makers against arbitrary or improper exercise of the vast powers of preventive detention which may be vested in the Executive by a law of preventive detention such as the Maintenance of Internal Security Act, 1971.<sup>5</sup>

The reason why grounds are required to be communicated 'as soon as possible' is two-fold. Firstly, it acts as a check against arbitrary and capricious exercise of power. The detaining authority cannot whisk away a person

1. *Mohd. Yousuf v. State of J. & K.*, AIR 1979 SC 1925.

2. AIR 1975 SC 223.

3. AIR 1975 SC 245.

4. *Lawrence D'Souza v. Bombay State*, AIR 1956 SC 531. Also see *Mohd. Yousuf v. State of J & K*, AIR 1979 SC 1925.

5. *Khudiram Das v. State of W. B.*, AIR 1975 SC 550.

and put him behind bars at its own sweet will. It must have grounds for doing so. Secondly, the detenu has to be afforded an opportunity of making a representation against the order of detention. But if the grounds are not supplied to him it is not possible for him to make representation and in fact the right to make representation would become illusory.

Under Article 22 (5) the Government is bound to consider the petitioner's representation as expeditiously as possible. Delay in deciding detenu's representation will make the detention illegal.<sup>1</sup> Delay in considering the representation of the detention must be properly explained otherwise it will make the detention illegal. In a case under the West Bengal (Prevention of Violent Activities) Act, 1970, the Supreme Court held that the unexplained delay of 19 days between receipt of a representation from a detenu and Government decision on it would render such detention illegal. The detenu had made his representation on July 9, 1971, but the Government kept it till July 27, 1971, before sending it to the Advisory Board which rejected it.<sup>2</sup> Whether the representation has been disposed off expeditiously or not will be determined by the Court on the facts and circumstances of each case. Thus where the State Government receives detenus representation only one day before the expiry of 30 days from the date of his detention within which the Government has to refer his case to the Advisory Board under section 10 of the West Bengal (Prevention of Violent Activities) Act, 1970, together with his representation it is practically impossible for the State Government to consider the representation properly and *bona fide* and arrive at its decision thereon before it refers the case to the Advisory Board.<sup>3</sup>

Thus the detenu has dual right to have representation considered by the appropriate Government and also by Advisory Board. In *Punkaf Kumar v. State of W. B.*,<sup>4</sup> the Supreme Court said, "It is clear from the clauses (4) and (5) of Art. 22 that there is a dual obligation on the appropriate Government and a dual right in favour of the detenu, namely, (1) to have his representation, irrespective of the length of detention, considered by the appropriate Government, and (2) to have once again the representation in the light of the circumstances of the case considered by the Board before it gives its opinion. If in the light of that representation the Board finds that there is no sufficient cause for detention, the Government has to revoke the order of detention and set the detenu at liberty. Thus whereas the Government considers the representation to ascertain whether the order is in conformity with its power under the relevant law, the Board considers such representation from the point of view of arriving at its opinion whether there is sufficient cause for detention. The obligation of the appropriate Government to afford to the detenu the opportunity to make representation and to consider that representation is distinct from the Government's obligation to constitute a Board and to communicate the representation amongst other materials to the Board to enable it to form its opinion. The above conclusion is strengthened by the provisions of the Preventive Detention Act, 1950, made in conformity

1. *Satyadeo Prasad v. State of Bihar*, AIR 1957 SC 367.

2. See *Northern India Patrika*, 4th May, 1972.

3. *J. N. Roy v. State of W. B.*, AIR 1972 SC 2141.

4. AIR 1970 SC 97.

with clauses (4) and (5) of Art. 22. Consequently, the detenu has a constitutional right and there is on the Government a corresponding constitutional obligation to consider his representation irrespective of whether it is made before or after his case is referred to the Advisory Board.

In *Jayanarain Sukul v. State of West Bengal*,<sup>1</sup> the Court held that the language of Art 22 (5) of the Constitution makes it obligatory of the State Government to consider the representation of the detenu as soon as it is received by it. The opinion of Advisory Board is no substitute for the consideration of the representation by the Government the Court has enunciated the following four principles to be followed in regard to the representation of the detenu : (1) The appropriate authority is bound to give an opportunity to the detenu to make representation and to consider the representation as early as possible. (2) The consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board, including the consideration of the representation by the Board. (3) There should not be any delay in the matter of consideration. (4) The appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu it will not send the matter to the Advisory Board. If the Government will not release, it will send the case along with detenu's representation to the Board. If the Board reports in favour of release the Government will release. If the Board expresses its opinion against the representation the Government may still exercise the power to release the detenu.

Thus where the detenu made a representation against the order of his detention and the State Government without considering the representation confirmed the order of detention it was held that the State Government failed in its obligation and that the confirmation of detention was in violation of section 7 of the Maintenance of Internal Security Act, and Art. 22 (5) of the Constitution and therefore invalid. The subsequent consideration and rejection of the representation could not cure such invalidity of the confirmation of the order of detention and consequently the detention was illegal and void.<sup>2</sup>

In *Balchand Chorasia v. Union of India*,<sup>3</sup> the representation was filed by the detenu through his counsel. The Government did not consider the representation and approved the detention on the ground that it was not filed by the detenu. The Court held that the High Court was wrong in construing that the representation was not made by the detenu himself but by his counsel. The lawyer had filed the representation on the instruction of the detenu. The Supreme Court said that in matters where the liberty of the individual is concerned and a highly cherished right is involved the representation should be construed liberally and not technically so as to frustrate or defeat the concept of liberty which is guaranteed by Art. 21 of the Constitution. As the representation was not considered at all by the Government which it was duty bound to consider, the detention order is vitiated and detenu is to be released forthwith.

**Conservation of Foreign Exchange, Prevention of Smuggling Activities Act, 1974 and Art. 22 (5).**—Parliament has also passed the COFEPOSA to provide

1. AIR 1970 SC 675 ; see also *S. K. Sakawat v. State of W. B.*, AIR 1975 SC 64.

2. *S. K. Sakawat v. State of W. B.*, AIR 1973 SC 64.

3. AIR 1973 SC 297.

for preventive detention for preventing smuggling and conserving foreign exchange. The Constitutional safeguards embodied in Art. 22 (5) of the Constitution are available to a person detained under the Conservation of Foreign Exchange Prevention of Smuggling Activities Act, 1974 (COFEPOSA). Merely because there is no express provision in Sec. 8 (b) of the (COFEPOSA) Act Placing an obligation to forward the representation made by the detenu along with the reference to the Advisory Board, unlike those contained in S. 9 of the Preventive Detention Act, 1950, and S. 10 of the MISA 1971 it cannot be said that there is no obligation cast on the Government to consider the representation made by the detenu before forwarding it to the Advisory Board. The repeal of MISA and retention of the COFEPOSA does not imply that preventive detention can be freely used without any power of judicial review and without any checks and balances against persons engaged in anti-social and economic offences. The courts have always viewed with disfavour the detention without trial whatever be the nature of offence.<sup>1</sup> The Court reaffirmed its view expressed in its earlier decisions that the Government is bound to consider the representation made by the detenu without waiting for the opinion of Advisory Board.

#### Exception

Under Article 22 (6) disclosure of facts which are considered to be against public interest may not be furnished to the detenu. Hence it follows that both the obligations to furnish particulars and the duty to consider whether the disclosure of any facts involved therein is against public interest, are vested in the detaining authority, not in any other.<sup>2</sup>

**Advisory Board**—Clause (7) (c) of Article 22 gives the Parliament power to prescribe the procedure to be followed by the Advisory Board in an inquiry under clause (4) (a). The procedure enacted by the Parliament will prevail over the procedure enacted by the State law. The 44th Amendment has changed the Composition of the Advisory Board. It shall be constituted in accordance with the recommendation of the Chief Justice of the appropriate High Court. It shall consist of a Chairman and no less than two other members. The Chairman of an Advisory Board must be a sitting judge of the appropriate High Court and the other members may be sitting or retired Judges of any High Court. Thus an Advisory Board as provided by the 44th Amendment shall be a body free from executive control and will be an independent and impartial body. It would thus provide a greater protection to persons detained under Preventive Detention laws.

**The Maintenance of Internal Security Act, 1971.**—The preventive detention law was revived in 1971 in the form of *The Maintenance of the Internal Security Act, 1971*. The Act MISA was passed on 2 July, 1971, to provide detention for the purpose of maintenance of internal security. The Act was repealed by the Janata Government on 3rd July, 1978.

Section 3 authorised the Central and State Governments and some executive officers under them to exercise the power of detention. When the order of detention was made by subordinate officers they were required to report the fact to the State Government together with grounds on which the order of detention is based and such other particulars which in his opinion was necessary to make detention order. Unless approved by the State Government, such order

1. *Narendra v. B. B. Gujral*, AIR 1979 SC 420.

2. *Puran Lal Takhar Pal v. Union of India*, AIR 1958 SC 163.

could not remain in force more than 12 days when such order was made or approved by the State Government, it could, within 7 days' report the fact to the Central Government together with grounds of detention and such other particulars which had a bearing on the necessity for the order. Section 8 directed the detaining authority to communicate the grounds of detention to the detenu without delay and to afford him the earliest opportunity to make representation against the order. The detaining authority was, however, not bound to disclose facts which in his opinion was against public interest. Section 9 provided for the Constitution of Advisory Board. Section 10 directed the appropriate Government, within 30 days, to refer the case of detenu to the Advisory Board the grounds of detention and the representation of the detenu for its opinion. Section 11 directed the Advisory Board to give its report to the appropriate Governments within 10 weeks from the date of detention. Section 13 provided that the maximum period of detention shall be 12 months. Section 17 provided for detention of a foreigner without obtaining the opinion of the Advisory Board up to the maximum period of 2 years. Section 17-A, which provided for detention up to the maximum period of 2 years was declared unconstitutional as it did not satisfy the requirements of Art. 22 (7) which restricted Parliament's power of making preventive law.

**Subjective satisfaction of detaining authority.**—The language used in section 3 of the Maintenance of Internal Security Act, 1971, makes it clear that the power of detention was to be exercised on the subjective satisfaction of the detaining authority, that with a view to prevent a person from acting in a prejudicial manner as provided in section 3 of the Act, it is necessary to detain such person. Thus, the court would not normally examine the decision of the detaining authority.<sup>1</sup> However, the subjective satisfaction of the detaining authority is not wholly immune from judicial scrutiny. The Courts have, by judicial decisions, carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subject to judicial scrutiny. The basic postulate on which the courts have proceeded is that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the executive, the courts can always examine whether the requisite satisfaction is arrived at by the authority, if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of power would be bad.<sup>2</sup>

The subjective satisfaction of the detaining authority can be challenged on the grounds, namely, *mala fide* or vagueness and irrelevant or non-existent grounds or mechanical application of mind of detaining authority.

The Act thus gives extraordinary powers of high potency to the executive. If these powers are exercised with due discretion and care it may prove to be an effective weapon for fighting social evils, encompassed by the statute that are eating into the vitals of the nation and pose a threat to its stability. But if wielded casually and capriciously, the power may turn into an engine of oppression posing a threat to the democratic way of life itself. The need for utmost good faith and caution in the exercise of this power therefore cannot be over-emphasised.<sup>3</sup>

In *Srilal Shaw v. State of West Bengal*,<sup>4</sup> the petitioner was detained under

1. *Khudiram Das v. State of W. B.*, AIR 1957 SC 530.
2. *S N. Sarkar v. Union of India*, AIR 1973 SC 1425.
3. *Bankatali v. State of Rajasthan*, AIR 1975 SC 522.
4. AIR 1975 SC 393; see also *Abdul Gaffar v. State of West Bengal*, AIR 1975 SC 1496.

the provisions of the Maintenance of Internal Security Act, 1975, for unlawful possession of railway property. The detenu was prosecuted under the Railway Property (Unlawful Possession) Act, 1966. But the case was not proceeded with because according to District Magistrate, witnesses did not dare to give witness against detenu for fear of their lives and therefore the case was dropped. The Supreme Court held the detention invalid. However, the Court made an important observation. It said, 'this is a typical case in which for no apparent reason a person who could easily be prosecuted and punished under the punitive law is being preventively detained. The Railway Property Act confers extensive powers to bring to book persons who are found in unlawful possession of railway property.'

However, the Courts have upheld the detention valid even on *isolated grounds* if they are so serious to effect the whole community. In *Babulal v. State of West Bengal*,<sup>1</sup> the Court upheld the detention of detenus under MISA valid on the ground that they were members of a gang which committed an organised dacoity in a running train equipped with fire-arms and putting innocent passengers to peril to life and property.

Subsequently, the following amendments were made in the MISA :—

(1) The Act was made applicable to smugglers and smuggling activities,

(2) A new section 16-A was added to it which forbids disclosure of grounds and information in the possession of the detaining authority. It says that "no one shall communicate the grounds of arrest" and "no person is entitled to the communication of such grounds."

(3) A new section 18 was also inserted which provides that "no person (including a foreigner) detained under this Act shall have, any right to personal liberty by virtue of natural law or common law, if any".

(4) On June 26, 1976 section 16-A was again amended by an Ordinance which extended the period of detention from 12 months to 24 months. This means that the persons detained under this Act may continue in detention for two years.

The Constitution (39th Amendment) Act, 1976 enacted by Parliament on August 10, 1975 inserted the Maintenance of Internal Security Act, 1971, in the Ninth Schedule to the Constitution and thus barred the courts to examine the validity of the provisions of the Act.

In *habeas corpus* case,<sup>2</sup> the constitutional validity of section 16-A of the MISA (Now Repealed) was challenged. It was contended on behalf of the detenu that it is violative of Article 226 inasmuch as it prevents the High Courts from exercising the jurisdiction under the Article to issue writs of *habeas corpus* and examining whether the detention under the Act is based on proper satisfaction of executive authority or not.

The Court by 4 : 1 majority (Khanna, J. not expressing any opinion on the question) held that section 16-A is constitutionally valid. The Court held, "it is a rule of evidence and it is not open either to the detenu or to the Court to ask for grounds of detention." Section 16-A does not affect the jurisdiction of High Courts under Art. 226. The jurisdiction to issue writs is neither abrogated nor abridged. It is

1. AIR 1975 SC 606.

2. ADM. Jabalpur v. S. Shukla, AIR 1976 SC 1207.

a rule of evidence. Therefore, when detaining authority is bound by section 16-A and forbidden absolutely from disclosing grounds of arrests no question can arise for adverse inference against the authority that the power was exercised *mala fide* or not on subjective satisfaction. Even if a detenu makes out a *prima facie* case that the detention was *mala fide* the affidavit of the authority will be the answer, and judicial inquiry will be closed. The Court cannot insist on the production of the file or hold that the case of detenu stands unrebuted by reason of non-disclosure of grounds of arrest. 'To hold otherwise', Ray, C. J., held, would be to induce, reckless averment of *mala fides* to force production of the file which is forbidden by law'.

The effect of this decision is that the Court would not be empowered to examine the questions of *mala fides* of the order of detention or *ultra vires* character of the orders of detention or that the order was not passed on the subjective satisfaction of the detaining authority. .

The decision of the Supreme Court overrules impliedly a vast majority of its earlier decisions in which it had held that it could examine the validity of the detention order on the ground either that the order was not passed on the subjective satisfaction of the detaining authority or the detention was made *mala fide* or the detention was made not for the purposes of the preventive detention laws.<sup>1</sup>

It is interesting to note that section 14 of the Preventive Detention Act, 1951 which was similar to the present section 16-A of the MISA, was declared unconstitutional by the Supreme Court in the case of *A. K. Gopalan v. State of Madras*,<sup>2</sup> on the ground that it foreclosed the judicial inquiry of the legality of detention under the said Act.

1. *Makhan v. State of Punjab*, AIR 1964 SC 381.

2. AIR 1950 SC 27.

## Right Against Exploitation (Arts. 23 and 24)

**Prohibition of 'Traffic in Human Beings and Forced Labour.**—Article 23 of the Constitution prohibits traffic in human beings and *begar* and other similar forms of forced labour. The second part of this Article declares that any contravention of this provision shall be an offence punishable in accordance with law. Clause (2) however permits the State to impose compulsory services for public purposes provided that in making so it shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

'Traffic in human beings, means selling and buying men and women like goods. The term 'traffic in human beings' includes slavery and immoral traffic in women and children for immoral or other purposes.<sup>1</sup> Under Article 35 of the Constitution Parliament is authorised to make laws for punishing acts prohibited by this Article. In pursuance to this Article Parliament has passed the Suppression of Immoral Traffic in Women and Girls Act, 1956, for punishing acts which result in traffic in human beings.

"Begar" and "other forms of forced labour" are prohibited by this Article. "Begar" means involuntary work without payment. What is prohibited by this clause is the making of a person to render service where he was lawfully entitled not to work or to receive remuneration for the services rendered by him. This clause, therefore, does not prohibit forced labour as a punishment for a criminal offence. The protection is not confined to "begar" only but also to "other forms of forced labour". It means to compel a person to work against his will. But a voluntary agreement to do extra work is not 'begar' or forced labour.<sup>2</sup>

In *Dubar Goola v. Union of India*,<sup>3</sup> the petitioners, who were licensed porters at Howrah Railway Station, voluntarily entered into an agreement to do 2 hours extra work for the railway administration. They were paid some remuneration for their two hours labour. They challenged the validity of this agreement and asked the court to restrain the railway administration from compelling the porters to perform *begar* or forced labour. The Calcutta High Court held that "the petitioners could not be said to be doing begar or forced labour within the meaning of Article 23." The very idea that the petitioners had voluntarily agreed to do extra work by entering into a contract to that effect repeals the idea of their work being a forced labour. There was no element of force or illegality in the system of licence or in realizing the fees for such licences. The Railway authorities had the power to regulate the use of station. The petitioners are paid some remuneration for their two hours labour. Further, they get the benefit of a reduced licence fee, and in addition they are allowed the privilege of free use of the Railway premises for earning their livelihood. In the circumstances the extra work done by them is not forced labour within the meaning of Art. 23 (1).

1. *Raj Bahadur v. Legal Remembrancer*, AIR 1953 Cal. 522. See also *Dubar Goola v. Union of India*, AIR 1952 Cal 496. In this case it was held that though slavery was not expressly mentioned in Art. 23, it was included in the expression "Traffic in human beings".

2. *Shama Bai v. State of U. P.*, AIR 1959 All 57.

3. AIR 1952 Cal. 496.

In *Kahason Thangkhul v. Simiri Shaili*,<sup>1</sup> a custom required that each householder of the village should offer one day's free labour to the Headman of the village. It was held that the custom was violative of Article 23 (1) of the Constitution which prohibits *begar* and other forms of forced labour.

In *Chandra v. State of Rajasthan*,<sup>2</sup> an order of the Sarpanch of a village calling one person from each family to come with spade and ironpan for making the embankment of the village tank and providing for a fine to be imposed upon person who failed to come was held to be violative of Article 23 (1).

The various State laws make it an offence to compel a person to work against his will or without payment of wages to do any work. For instance, Section 3 of the U. P. Removal of Social Disabilities Act, 1947, provides that "no person shall refuse to tender to any person merely on the ground that he belongs to a scheduled caste, any service which such person already renders to other Hindus on the terms on which such service is rendered in the ordinary course of business." A person contravening provisions of this Act is liable to be punished with imprisonment and fine. In *State v. Banwari*,<sup>3</sup> the appellants challenged the validity of the U. P. Removal of Social Disabilities Act. The appellants, who were *barbers* and *dhabies*, had refused to shave and wash clothes of *Harijans*. They were, therefore, convicted under section 6 of the above Act. It was held that the Act does not contravene Article 23 of the Constitution. The Court said that when a person is prohibited from refusing to render service merely on the ground that the person asking for it belongs to a scheduled caste he is not thereby subjected to forced labour. Likewise, the Payment of Wages Act, 1936, provides that every employer is responsible for payment of wages to his employees.

The Thirteenth Amendment to the Constitution of America contains a similar provision. It says that "neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction". Americans had to fight a civil war to eradicate this evil of slavery from their country.

It is to be noted that the protection of this Article is available to *both* citizens as well as *non-citizens*.

**Compulsory service for public purposes.**—Clause (2) of Article 23 contains an exception to the above general rule. Under this clause the State is empowered to impose compulsory service for public purposes. But in imposing such compulsory service the State cannot make any discrimination on grounds only of religion, race, caste or class or any of them. For example, compulsory military service or social services can be imposed because they are neither *begar* nor traffic in human beings.<sup>4</sup>

**Prohibition of employment of children in factories, etc.**—Article 24 of the Constitution prohibits employment of children below 14 years of age in factories and hazardous employment. This provision is certainly in the interest of public health and safety of life. Children are assets of the nation. That

1. AIR 1961 Manipur 1.

2. AIR 1959 Raj. 186.

3. AIR 1951 All. 615; see also Bihar Harijans (Removal of Social Disabilities) Act, 1949, which contains a similar provision.

4. *Dulal Samanta v. D. M. Howrah*, AIR 1958 Cal. 365.

is why Article 39 of the Constitution imposes upon the State an obligation to ensure that the health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

In pursuance to the above duty State has enacted Employment of Children Act, 1938, the Children (Pledging of Labour) Act, 1933.

The Employment of Children Act, 1938, prohibits employment of children below 14 years of age in the railways and other means of transport. The Indian Factories Act and the Mines Act, 1952, prohibit their employment in the mines and factories.

This Article, however, does not prohibit their employment in any innocent or harmless job or work.

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## Right to Freedom of Religion (Arts. 25 to 28)

The Republic of India is a Secular State.—The concept of secularism is implicit in the Preamble of the Constitution which declares the resolve of the people to secure to all its citizens "liberty of thought..... belief, faith and worship". The Supreme Court had also observed, "although the words 'secular State' are not expressly mentioned in the Constitution but there can be no doubt that our Constitution-makers wanted to establish such a State. Accordingly, the provisions of (Arts. 25 to 30), were made in the Constitution." The 42 Amendment 1976, inserted the word 'Secular' in the Preamble. The amendment is intended merely to spell out clearly this concept of 'secularism' in the Constitution. There is no mysticism in the secular character of the State.<sup>1</sup> This is clear from the Preamble which declares a resolve of the people to ensure to all its citizens 'liberty of thought, expression, belief, faith and worship'. In India, a Secular State was never considered as an irreligious or atheistic State. It only means that in matters of religion it is neutral. It is the ancient doctrine in India that the State protects all religions but interferes with none.<sup>2</sup> Secularism is thus neither anti-God, nor pro-God, it treats alike the devout, the antagonistic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion.<sup>3</sup> The State can have no religion of its own. It should treat all religions equally. The State must extend similar treatment to the Church, the Mosque and the Temple. In a Secular State the State is only concerned with the relation between man and man. It is not concerned with the relation of man with God. It is left to the individual's conscience. Every man should be allowed to go to Heaven in his own way. Worshipping God should be according to the dictates of one's own conscience.<sup>4</sup> Man is not answerable to the State for the variety of his religious views.<sup>5</sup> The right of worship was granted by God for man to worship as he pleased. There can be no compulsion in law of any creed or practice of any form of worship.<sup>6</sup>

The First Amendment of American Constitution says : "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof....." Interpreting this clause in *Everson v. Board of Education*,<sup>7</sup> the American Supreme Court observed : "The establishment of religion clause of the First Amendment means at least this. Neither a State nor the Federal Government can set up a Church. Neither can they pass laws which aid one religion, aid all religions or prefer one religion over another.....No tax, in amount of large or small, can be levied to support any religious activities or institutions whatever form they may adopt to teach or practise religion.

1. St. Xavier's College v. State of Gujarat, AIR 1974 SC 1389, as per Khanna, J., at p. 1414.

2. Vasudev v. Vamaoji, ILR 1881 Bom. 80.

3. St. Xavier's College v. State of Gujarat, supra at p. 1414.

4. Downes v. Bidwell, (1901) 182 US 244.

5. United States v. Ballard, (1944) 322 US 78.

6. Cantwall v. Connecticut, (1931) 310 US 295.

7. (1947) 330 US 1.

Neither a State nor the Federal Government can openly or secretly participate in the affairs of any religious organizations or groups and *vice versa*.

**Freedom of Religion in India.**—Article 25 (1) guarantees to every person the freedom of conscience and the right to profess, practise and propagate religion. This right is, however, subject to public order, morality and health and to the other provisions of Part III of the Constitution. Also, under sub-clauses (a) and (b) of clause (2) of Article 25 the State is empowered by law—

(a) to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice;

(b) to provide for (i) social welfare and reform, and (ii) to throw open Hindu religious institutions of a public character to all classes and sections of Hindus.

**What is Religion.**—The term 'religion' is not defined in the Constitution. The Supreme Court has defined it broadly. Religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion conducive to their spiritual well being, but it will not be correct to say that religion is nothing else but a doctrine or belief. A religion may only lay down a Code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and those forms and observances might extend even to matters of food and dress.<sup>1</sup> Religion is thus essentially a matter of personal faith and belief. Every person has right not only to entertain such religious belief and ideas as may be approved by his judgment or conscience but also exhibit his beliefs and ideas by such overt acts which are sanctioned by his religion. Thus, under Art. 25 (1) a person has a two-fold freedom :—

(a) freedom of conscience ;

(b) freedom to profess, practise and propagate religion.

The freedom of 'conscience' is absolute inner freedom of the citizen to mould his own relation with God in whatever manner he likes. When this freedom becomes articulate and expressed in outward form it is "to profess and practise religion".

To 'profess' a religion means to declare freely and openly one's faith and beliefs. He has right to practise his belief by practical expression in any manner he likes.

To 'practise' religion is to perform the prescribed religious duties, rites and rituals, and to exhibit his religious beliefs and ideas by such acts as prescribed by religious order in which he believes.

To 'propagate' his religion means to spread and publicise his religious views for the edification of others. But the word 'propagation' only indicates persuasion and exposition without any element of coercion. The right to propagate one's religion does not give a right to convert any person to one's own religion. There is no fundamental right to convert any person to one's own religion. What Art. 25 (1) guarantees is not right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. Article 25 guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion. It therefore

1 Commr., H. R. E v. L. T. Swamier, AIR 1954 SC 282 at p. 290.

postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike.<sup>1</sup>

The protection of Articles 25 and 26 is thus not limited to matters of doctrine or belief. They extend also to acts done in pursuance of 'religion' and, therefore, contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. What constitutes an essential part of religion or religious practice has to be decided by the courts with reference to a doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.<sup>2</sup>

### Restrictions on Freedom of Religion

1. Religious liberty subject to public order, morality and health.—In the name of religion no act can be done against public order, morality and health of the public. Thus section 34 of the Police Act, prohibits the slaughter of cattle or indecent exposure of one's person in public place. These acts cannot be justified on plea of practice of religious rites. Likewise, in the name of religion 'untouchability or traffic in human beings' e.g. system of Devadasis (as prevalent in South India) cannot be tolerated. This freedom is also subject to the "other provisions of this Part". e. g. right to freedom of speech and expression, freedom of assembly and association, freedom to carry on a profession, trade and business. The freedom to practise religion cannot affect the exercise of these freedoms by others. These rights are subject to the reasonable restrictions under clause (2) of Art. 19. For instance, a citizen's freedom of speech and expression in matters of religion is subject to reasonable restrictions under Art. 19 (2).

Right to propagate one's religion does not give right to any one to "forcibly" convert any person to one's own religion. Forceful conversion of any person to one's own religion might disturb the public order and hence could be prohibited by law.

In *Rev. Stainislaus v. State of M. P.*<sup>3</sup> the validity of the two Act—the Madhya Pradesh Dharma Swatantra Adhiniyam, 1968, and the Orissa Freedom of Religion Act, 1967—passed by State Legislatures of Madhya Pradesh and Orissa respectively were challenged on the ground that they were violative of the fundamental right of the appellant guaranteed under Art. 25 (1) of the Constitution. These Acts were passed to prohibit forcible conversion of any person to one's own religion. The appellant was prosecuted for the commission of offences under the Madhya Pradesh Act. He contended that the right to 'propagate' one's religion means the right to convert a person to one's own religion and is a fundamental right under Art. 25 (1) of the Constitution. Secondly, he argued that the State Legislature had no competence to enact such a law as it did not fall within the purview of Entry 1 of List II and Entry 1 of List III of Seventh Schedule. It is covered by Entry 97 of List I so Parliament alone had the power to make the law and not the State Legislature.

1. *Rev. Stainislaus v. State of M. P.*, AIR 1977 SC 908.
2. *Commr., Hindu Religious Endowments, Madras v. J. T. Swamiar*, AIR 1954 SC 282; *Jagannath Ramanuj Das v. State of Orissa*, AIR 1954 SC 400; *Dargah Committee, Ajmer v. Syed Hussain Ali*, AIR 1961 SC 1402; *E. R. J. Swami v. State of Tamil Nadu*, AIR 1972 SC 1586,
3. AIR 1977 SC 908.

Rejecting the contentions of the appellant, the Supreme Court held that these impugned Acts fall within the purview of Entry 1 of List II as they are meant to avoid disturbances to the public order by prohibiting conversion from one's religion to another in a manner reprehensible to the conscience of the community. These two Acts do not provide for the regulation of religion and therefore do not fall under Entry 7 of List I. Dealing with the meaning of the word public order the Court held that, "if a thing disturbs the current of the life of the community, and does not merely affect an individual it would amount to disturbance of the public order. Thus if an attempt is made to raise communal passions, e. g. on the ground that some one has been "forcibly" converted to another religion, it would, in all probability, give rise to an apprehension of a breach of the public order, affecting the community at large. Therefore, legislation prohibiting forcible conversion of one's own religion in the interest of public order can be passed and is valid.

**2. Regulation of economic, financial, political and secular activities associated with religious practices—Clause (2) (a).**—The freedom to practise extends only to those activities which are the essence of religion. It would not cover secular activities which do not form the essence of religion. It is not always easy to say which activities fall under religious practice or which are of secular, commercial or political nature associated with religious practice. Each case must be judged by its own facts and circumstances. In *Mohd Hanif Quareshi v. State of Bihar*,<sup>1</sup> the petitioners claimed that the sacrifice of cows on the occasion of Bakrid was an essential part of his religion and therefore the State law forbidding the slaughter of cows is violative of his right to practice religion. The court rejected this argument and held that the sacrifice of cow on the Bakrid day was not an essential part of Mohammadan religion and hence could be prohibited by State under clause (2) (a) of Article 25. In *Adelaid Co. v. Commonwealth*,<sup>2</sup> it was held that a person could not be allowed in exercise of his freedom of religious practice and profession to carry on an anti-war propaganda in the guise of religion when the nation is at war. Thus the political activities though arising out of religious belief by a particular organisation were held not to be protected by the Constitution.

**3. Social Welfare and Social Reforms—Clause (2) (b).**—Under clause (2) (b) of Art. 25 the State is empowered to make laws for social welfare and social reform. Thus under this clause the State can eradicate social practices and dogmas which stand in the path of the country's onward progress. Such laws do not affect the essence of any religion. This clause declares that where there is conflict between the need of social welfare and reform and religious practice, religion must yield. In *State of Bombay v. Varanji Baparnali*,<sup>3</sup> an Act which prohibited bigamy was held valid under clause (2) (b). Polygamy is not an essential part of the Hindu religion, therefore it can be regulated by law. In an American case of *Reynolds v. United States*,<sup>4</sup> a State law made it a criminal offence to marry with another while having a living spouse. The appellant was punished for attempting to take a second wife under the sanction and command of his religion. The Supreme Court held that his punishment was valid under the statute which prohibited bigamy. The Court said, 'Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive

1. AIR 1958 SC. 731.

2. (1943) 67 CLR 116.

3. AIR 1952 Bom. 84.

4. 98 US 145 : L. Ed. 244 (1878).

of good order". Prohibition of evil practices such as Sati or system of Devadasi has been held to be justified under this clause.<sup>1</sup>

Under this sub-clause, State is empowered to throw open all Hindu religious institutions of a 'public character' to all classes and sections of Hindus. It ensures an individual's legal right to enter into a temple unobstructed irrespective of his caste, untouchability, social inequality or under-privileged class. The Hindu Temples, the Sikh Gurdwaras, the Jain Temples and Budh Vihars can be thrown open to all sections of Hindus. The expression "Hindu" includes Jain, Sikh and Buddhists.

The right protected under this clause is a right to enter into a temple for the purpose of worship. But it does not follow from this that, that right is, absolute and unlimited in character. No one can claim that a temple must be kept open for worship at all hours of the day and night or that he should be permitted to perform those services personally which the Acharya alone could perform.<sup>2</sup> The State cannot regulate the manner in which the worship of the deity is performed by the authorised *pujaris* of the temple or the hours and days on which the temple is to be kept open for *darshan* or *puja* for devotees.<sup>3</sup>

The right of Sikhs to wear and carry *Kirpans* is recognised as a religious practice in Explanation 1 of Article 25. This does not mean that he can keep any number of *Kirpans*. He is entitled to keep only one sword. He cannot possess more than one *Kirpan* without a licence.

**Freedom to manage religious affairs—Art. 26.**—Article 26 says that, subject to public order, morality and health, every religious denomination or any section of it shall have the following rights—

- (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,
- (d) to administer such property in accordance with law.

The right guaranteed by Article 25 is an individual right while the right guaranteed by Article 26 is the right of an 'organised body' like the religious denomination or any section thereof. In Webster's Dictionary, the word 'denomination' has been defined as a "collection of individuals, classed together under the same name" generally a religious sect or body having a common faith and organisation is designated by a distinctive name. Thus in the large sense 'Hinduism' is a denomination in contradistinction to Christians and Muslims. In a limited "sense" the various philosophies governing the Hindu Society, such as, Advaitas, Dwaitas, Vishistadwaitas and Saivites can also be termed as denominations.<sup>4</sup>

**Right to establish and maintain Institutions for Religious and Charitable purposes.—**Under clause (a) of Art. 26 every religious denomination has right to 'establish and maintain' institutions for religious and charitable purposes. The words "establish and maintain" in Art. 26 (a) must be read together and therefore it is only those institutions which a religious denomination estab-

1. *Saiuddin v. State of Bombay*, AIR 1962 SC 853.

2. *Venkatarangana Devaru v. State of Mysore*, AIR 1958 SC 255.

3. *Vaguapurushadji v. Muldas*, AIR 1966 SC 1119.

4. *Commr., H. R. E. v. L. T. Swamini*, AIR 1954 SC 282.

lishes which it can claim to maintain it. Thus in *Azees Basha v. Union of India*,<sup>1</sup> the Supreme Court held that the Aligarh University was not established by the Muslim minority, therefore they cannot claim the right to 'maintain' it. It was established under statute passed by Parliament.

**Right to Manage 'matters of Religion'.**—Under Article 26 (b) a religious denomination or organisation is free to manage its own affairs in 'matters of religion'. The State cannot interfere in the exercise of this right unless they run counter to public order, health or morality. Accordingly, every religious denomination or organisation enjoys complete freedom in the matters of deciding what rites and ceremonies are essential according to the tenets of the religion they hold. The court, however, has the right to determine whether a particular rite or ceremony is regarded as essential by the tenets of a particular religion.<sup>2</sup>

The right is, it is to be noted, confined to 'matters of religion'. The term 'matters of religion' includes religious practices, rites and ceremonies considered essential for practice of religion. The right is, however, subject to the regulatory power of the State under clause (2) (b) of Art. 25. This means that secular activities connected with religious institutions can be regulated by State by law.

In *Saifuddin Saheb v. State of Bombay*,<sup>3</sup> the petitioner, who was the head of the Dawoodi Bohra community, challenged the constitutionality of the Bombay Prevention of Ex-Communion Act, 1949, on the ground that the provisions of the Act infringe his rights guaranteed in Arts. 25 and 26. The petitioner claimed that as the Head of the Dawoodi Bohra Community he has the right to ex-communicate a member and this power is an integral part of the religious faith and belief of the Dawoodi Bohra Community. The Supreme Court struck down the impugned provision as violative of Articles 25 and 26 of the Constitution. The majority said that where an ex-communication is itself based on religious grounds such as lapse from the orthodox religious creeds or doctrine or breach of some practice considered as an essential part of religion by a community it forms part of the management by the community, through its religion's head, "of its own affairs in matters of religion". The impugned enactment which takes away this right of the Head of the Community to ex-communicate even on religious grounds is violative of Art. 26 (b). The position of the Dai-ul-Mutlaq is an essential part of the creed of the Dawoodi Bohra sect. Faith in his spiritual mission and in the efficacy of his administration is one of the bonds that hold the community together as a unit. The power of ex-communication is vested in him for the purpose of enforcing discipline and keep the denomination together as an entity. The purity of fellowship is secured by the removal of persons who had rendered themselves unfit and unsuitable for membership of the sect. The majority observed, "The mere fact that certain civil rights which might be lost by members as a result of ex-communication made on religious grounds which the Act protects, does not offer sufficient basis for a conclusion that it is a law "proving for social welfare and reform" within Art. 25 (b)".

But the Chief Justice, Mr. B. P. Sinha gave a dissenting judgment. He was of the view that the right of ex-communication is not a purely religious matter and that it had its social implications in making the ex-communicated person

1. AIR 1968 SC 662

2. Mohd. Hanif Qureshi v. State of Bihar, AIR 1953 SC 731

3. AIR 1962 SC 853.

a sort of "untouchable" in his community, which will be contrary to the injunctions mentioned in Article 17 of the Constitution by which untouchability has been abolished. This decision has been criticised by jurists.<sup>1</sup>

In *Bira Kishore Dev v. State of Orissa*,<sup>2</sup> the Shri Jagannath Temple Act took the management of secular activities of the temple from the Raja of Puri and vested it in Committee constituted under the Act. The court held the Act valid as it did not effect the religious aspect.

**Right to administer property owned by denomination.**—Under clauses (c) and (d) of Art. 26 a religious denomination has the right to acquire and own property and to administer such property in accordance with law. The right to administer property owned by a religious denomination is a limited right, and it is subject to the regulatory power of the State in clause (2) (a) of Art. 25 and also any general property law. Thus there is a clear distinction between the right to manage its own affairs in 'matters of religion' and the right to 'manage its property' by a religious denomination. The former is a fundamental right which cannot be taken away except on grounds mentioned in Art. 25, while the latter can be regulated by laws.

It is to be noted that the rights under clauses (c) and (d) of Art. 26, are confined to the existing rights to administer its property where they had already been vested in a religious denomination. Clauses (c) and (d) do not create any new rights but they simply protect the continuance of the existing rights. The existing rights to administer its property by a religious denomination cannot be destroyed or taken away completely. It can only be regulated by law with a view to improve the administration of property for the better utilization of the endowment property.

Thus the law must leave the right of administration of property to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. Thus in *Ratil Lal v. State of Bombay*,<sup>3</sup> a law which took away the right of administration altogether from religious denomination and vested it any other secular authority was held to be violative of the right guaranteed by Article 26 (d). However, if the right to administer property had never, vested in the denomination or had been validly surrendered by it or had otherwise been lost, Article 26 will not create any such right in religious denomination.<sup>4</sup>

Thus as regards the administration of its property the religious denomination has been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no Legislature can take away while the former can be regulated by laws which the Legislature can validly impose.<sup>5</sup>

**Freedom from taxes for promotion of any particular religion—Art. 27.**—Article 27 provides that no person shall be compelled to pay any tax for the promotion or maintenance of any particular religion or religious denomination.

1. See P. K. Tripathi—Secularism and Judicial Review, (1966) I L. I. 164. Dr. Tripathi supports the minority opinion. Derrett, Freedom of Religion under the Indian Constitution. Ex-communication, (1963) 12 Int. and Comp. LQ 693.
2. AIR 1964 SC 1501.
3. AIR 1954 SC 388; Commr., H. R. E. v. L. T. Swamjiar, AIR 1955 SC 282.
4. Dargah Committee, Ajmer v. Husain Ali, AIR 1961 SC 1402. See also Azeez Basha v. Union of India, AIR 1968 SC 662.
5. Sri Govindlal v. State of Rajasthan, AIR 1963 SC 1638.

This Article emphasises the secular character of the State. The public money collected by way of tax cannot be spent by the State for the promotion of any particular religion.

The reason underlying this provision is that India being a Secular State and there being freedom of religion guaranteed by the Constitution, both to individual and groups it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of the particular religion or religious denominations.<sup>1</sup>

It is to be noted here that what this Article prohibits is the levying of tax and not of fee. In *Rati Lal v. State of Bombay*,<sup>2</sup> the Supreme Court has held that "A tax is in the nature of a compulsory exaction of money by a public authority for public purposes. The imposition is made for public purpose to meet the general expenses of the State without reference to any special advantage to be conferred upon the tax-payer. Tax is a common burden and the only return which the tax-payer gets is a participation in the common benefits of the State. Fees are, on the other hand, payments primarily in public interest but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. On the basis of this distinction between tax and fee the Supreme Court in *Sri Jagannath v. State of Orissa*,<sup>3</sup> held that the levy under the Orissa Hindu Religious Endowments Act, 1939, was in the nature of a fee and not tax. The payment was demanded only for the purposes of meeting the expenses of the Commissioner and his office which was the machinery set up for due administration of the affairs of the religious institution. The object of the contribution was not the fostering or preservation of Hindu religion or of the denomination within it, but to see that religious institutions were properly administered.

The prohibition is of aid to any particular religion. This means that if State aid is extended to all religious institutions along with secular ones alike without any discrimination, Article 27 will not be applicable.

**Prohibition of Religious Instruction in State-aided Institutions—Article 28.**  
—According to Article 28 (1) no religious instruction shall be imparted in any educational institution wholly maintained out of State funds. But this clause shall not 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. Under clause 1 (3) no person attending any educational institution recognised by the State of receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institutions or to attend any religious worship that may be conducted in such institution or to any premises attached thereto unless such person or if such person is a minor his guardian has given his consent thereto.

Thus Article 28 mentions four types of educational institutions :

- (a) Institutions wholly maintained by the State.
- (b) Institutions recognised by the State.
- (c) Institutions that are receiving aid out of the State fund.
- (d) Institutions that are administered by the State but are established under any trust or endowment.

In the Institutions of (a) type no religious instructions can be imparted. In (b) and (c) type of institutions religious instructions may be imparted only with the consent of the individuals. In the (d) type institutions, there is no restriction on religious instructions.

1. Commr., H. R. E. v. L. T. Swamiar, AIR 1954 SC 282.

2. AIR 1954 SC 383.

3. AIR 1954 SC 400.

## 15

### **Cultural and Educational Rights (Arts. 29 and 30)**

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. Therefore, the right to establish and maintain institutions of their choice is necessary concomitant to the right to preserve its distinctive language, script or culture. This right is guaranteed to them by Article 31 (1) which says that all minorities whether based on religion or language shall have the right to establish and administer educational institutions of their choice. This right is further protected by Article 30 (2) which prohibits the State in granting aid to educational institutions from discriminating against any educational institutions on the ground that it is under the management of a minority whether based on religion or language. This right is, however, subject to clause (2) of Article 29, according to which no citizen shall be denied admission into any educational institutions maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. This Article applies to both citizens and non-citizens.

Articles 29 and 30 thus confer four distinct rights<sup>1</sup> :

- (a) Right of any sections of citizens to conserve its own language, script or culture [Art. 29 (1)].
- (b) Right of all religious and linguistic minorities to establish and administer educational institutions of their choice [Art. 30 (1)].
- (c) Right of an educational institution not to be discriminated in matters of State aid on ground that it is managed by a religious or linguistic minority [Art. 30 (2)].
- (d) Right of the citizen not to be denied admission into any State-maintained or State-aided institution on ground of religion, caste, race or language [Art. 29 (2)].

**Relation between Article 29 (2) and Article 15 (1).**—It is to be noted that Article 15 (1) also prohibits discrimination on grounds of religion, race, caste, sex or place of birth. However, it differs from Article 29 (2) in many respects :

- (1) Article 15 protects all citizens against the State whereas the protection of Article 29 (2) extends against the State or anybody who denies the right conferred by it.
- (2) Article 15 protects all citizens against discrimination generally but Article 29 (2) is protection against a particular species of wrongs, namely, denial of admission into educational institutions of the types mentioned therein.
- (3) Article 15 is quite general and wide in its terms and applies to all citizens whether they belong to the majority or minority groups, and gives

1. St. Xaviers College v. State of Gujarat, AIR 1974 SC 1389.

protection to all citizens against discrimination by the State on certain specific grounds. Article 29 (2) confers a special right on citizens for admission into educational institutions maintained or aided by the State.

(4) Article 15 (1) prohibits discriminations on the grounds of sex or place of birth whereas Article 29 (2) does not mention these grounds.<sup>1</sup> Thus under Article 29(2) a girl student can be denied admission in educational institutions.<sup>2</sup>

The right to admission into an educational institution conferred by Article 29 (2) is a right of an individual given to him as a citizen and not as a member of any community.<sup>3</sup>

Article 29 (2) is quite general and wide in terms and applies to all citizens whether they belong to majority or minority groups. Therefore a school run by a minority, if it is aided by the State funds, cannot refuse admission to boys belonging to their communities. The State cannot direct such school to restrict admissions to their own community.

In *State of Madras v. Chamapakam Dorairajan*,<sup>4</sup> an order of Madras Government had fixed the proportion of students of each community that could be admitted into the State Medical and Engineering Colleges. The order was challenged on the ground that it denied admission to a person only on the ground of religion or caste. The petitioners in this case were denied admission only because they were Brahmins. The Supreme Court held the order invalid for being violative to Article 29 (2).

After this case Article 15 (2) was amended by the Constitution (First Amendment) Act, 1954. The amendment empowers the State to make special provisions for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes. Accordingly the State can now reserve seats in public institutions for member of backward classes.

In *State of Bombay v. Bombay Educational Society*,<sup>5</sup> the Supreme Court struck down an order of the Bombay Government banning admission of those whose language was not English into schools having English as a medium of instruction because it denied admission solely on the ground of language. The order, the Court said, would not be valid, even if the object for making it was the promotion or advancement of national language.

The protection of Article 29 (2) does not apply where the student is expelled from an institution on grounds of indiscipline,<sup>6</sup> and where he is refused admission on the grounds of his not possessing requisite qualification.<sup>7</sup>

**Right of Minorities to establish and manage Educational Institutions.**—Article 30 (1) guarantees to all linguistic and religious minorities the 'right to establish' and the 'right to administer' educational institutions of their own choice. The right is conferred by this clause on two types of minorities—reli-

1. *State of Bombay v. Bombay Education Society*, AIR 1954 SC 561.
2. *University of Madras v. Shaniba Bal*, AIR 1954 Mad. 67.
3. *Joseph Thomas v. State of Kerla*, AIR 1958 Ker. 33 ; *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.
4. AIR 1951 SC 226.
5. AIR 1954 SC 561.
6. *Ramesh Chandra v. Principal, B. B. I. College*, AIR 1953 All. 90.
7. *Nageshwara Rao v. Principal, Medical College*, AIR 1962 AP 212.

gious and linguistic minorities. The right conferred upon the above minorities is to establish and administer educational institutions of their choice. The word "establish" indicates the right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. The administration connotes management of the affairs of the institution. The management must be free of control so that the founders of their nominees can mould the institution as they think fit in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served.<sup>3</sup> Thus it leaves it to the choice of the minority to establish such educational institutions as will serve both purposes, namely, the purpose of preserving their religion, language or culture, and the purpose of giving through good general education to their children in their own language.<sup>4</sup>

In *D. A. V. College, Bhatinda v. State of Punjab*,<sup>5</sup> the university declared that Punjabi would be the sole medium of instruction in the affiliated colleges. The Court held that the right of the minority to establish and administer educational institutions of their choice includes the right to have a choice of medium of instructions also. The right under Article 30 (1) is available to both the pre-Constitution and post-Constitution institutions.

Clause (2) of Art. 30 prohibits the State from making discrimination in the matter of grant of aid to any educational institution on the ground that it is managed by a religious minority or linguistic minority.

#### The Constitution (44th Amendment) Act, 1978

This Amendment has abolished the right to property as fundamental right guaranteed by Arts. 19 (1) (f) and 31 of the Constitution. Consequently, Art. 19 (1) (f) and Art. 31 have been omitted from Part III of the Constitution. However, it has been ensured that the removal of property from the list of fundamental right would not affect the right of minorities to establish and administer educational institutions of their choice. For this purpose, the Amendment has inserted a new clause (1-A) in Article 30 of the Constitution. Clause (1-A) says that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

**Relationship between Arts. 29 (1) and 30 (1).**—The inter-relation of Arts. 29 (1) and 30 (1) was elaborately examined by the Supreme Court in the recent case of *St. Xaviers College v. State of Gujarat*.<sup>6</sup> In this case the validity of sections 33A, 40, 41, 51-A, 52-A of the Gujarat University Act, 1949, as amended by Act of 1973 was questioned by the petitioners who is running St. Xaviers College of Arts and Commerce in Ahmedabad. The petitioners contended that the Act infringed their rights guaranteed in Article 30 (1) of the Constitution. On behalf of the State, it was contended that the protection to minorities guaranteed by Art. 30 (1) is not available to this College because it was not founded for the conservation of language, script or culture, as mentioned in Article 29 of the Constitution.

1. *St. Xaviers College v. State of Gujarat*, AIR 1974 SC 1389, per Khanna, J.

2. *In re, Kerala Education Bill*, AIR 1958 SC 956.

3. AIR 1971 SC 1731.

4. AIR 1974 SC 1389.

The court, after reviewing its earlier decisions,<sup>1</sup> held that "Article 30 (1) covers institutions imparting general secular education. The object of Article 30 is to enable children of minorities to go out in the world fully equipped. It will be wrong to read Article 30 (1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities. Articles 29 and 30 create two separate rights though it is possible that the rights might meet in a given case." 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 to establish educational institutions of their choice. The Court pointed out the following distinction between these two Articles :

(1) While Art. 29 (1) confers right on any section of the citizens which will include the majority section, Art. 30 (1) confers the right only on minorities based on religion or language.

(2) While Article 29 (1) is concerned with only three subjects, viz., language, script or culture, Article 30 (1) deals with minorities of the Nation based on language or religion.

(3) While Article 29 (1) is concerned with the right of conserve language, script or culture, Article 30 (1) deals with the right of minorities to establish and administer educational institutions of their choice.

(4) While Article 29 (1) does not deal with education as such, Article 30 (1) deals only with the establishment and administration of educational institutions. Thus conservation of language, script or culture under Art. 29 (1) may be by means wholly unconnected with educational institutions and similarly establishment and administration of educational institutions by a majority under Art. 30 (1) may be unconnected with any motive to conserve language, script or culture.

**Power of Government to regulate minority run educational institutions.—** The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining educational character and content of minority institutions similarly regulatory measures are necessary for ensuring, orderly, efficient and sound administration. The right to administer is not the right to maladminister.<sup>2</sup> The right to administer implies a correlative duty to good administration.

In *re Kerala Education Bill*,<sup>3</sup> the Supreme Court said that the fundamental right given to all minorities under Article 30 (1) to establish and administer educational institutions of their choice does not militate against the claim of the State to insist that in granting aid the State may not prescribe reasonable regulations to ensure the excellence of the institutions to be aided. Accordingly, the court in this case upheld certain conditions designed to give protection and security to the ill-paid teachers who were rendering service to the Nation, and to protect backward classes, as permissible restrictions which the State can impose on minorities as a condition for granting aid to their edu-

1. In *re, Kerala Education Bill*, AIR 1958 SC 956 ; W. Proost v. State of Bihar, AIR 1969 SC 475 ; Sidhrabhai v. State of Gujarat, AIR 1963 SC 540.
2. St. Xaviers College v. State of Gujarat, AIR 1974 SC 1389.
3. AIR 1958 SC 956.

tional institutions. However, the conditions for granting aid should not be imposed in such a manner so as to take away the rights of minority guaranteed by Article 30 (1).

In *Sidhrajbhai v. State of Gujarat*,<sup>1</sup> the Court held that though the right conferred by Article 30 (1) is absolute in terms, it is open to the State to impose such regulations upon the exercise of this right which will secure the proper functioning of the institution in the matters of education. Regulations can be made to prevent the housing of an educational institution in unhealthy surroundings or for preventing setting up for continuation of an institution without qualified teachers. Thus regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may be imposed. Such regulations are not restrictions on the substance of the right. Their main object is to secure to proper functioning of the institutions in the matters of education.

Though a regulation can be made to prevent maladministration in minority run educational institution but at the same time it has to be ensured that under the regulatory power nothing is done which would destroy the character of the institution as minority institution. The right conferred by Article 30 (1) is intended to be real and effective and not a mere pious and abstract sentiment. Such a right cannot be allowed to be whittled down by any measure in the guise of a regulation. Regulations which may lawfully be imposed as a condition of receiving grant or of recognition must be directed to making the institution effective as educational institution, while retaining its character as minority institution. Such regulations, must satisfy dual test, (1) they must be reasonable, and (2) they are regulative of the educational character of the institution and is conducive in making the institution an effective vehicle of education for the minority community or other persons who resort to it.

In *Sidhrajbhai's case*,<sup>2</sup> the Bombay Government issued an order reserving 80 per cent. of the seats to the nominees of the Government in the minority run training colleges. The order also provided that refusal to admit Government nominated teachers would result in withholding recognition and stoppage of grant-in-aid to such institutions. The Court held that the order threatening to withhold grant-in-aid and recognition of College were violative of Article 30 (1) as they were not imposed to make the institution as an effective vehicle of education.

In *St. Xaviers College v. State of Gujarat*,<sup>3</sup> Supreme Court has reviewed all its earlier decisions on Article 30 (1) of the Constitution. The facts of the case were briefly as follows—The petitioner, a Jesuit Society of Ahmedabad, is running St. Xaviers College of Arts and Commerce in Ahmedabad which is affiliated to the Gujarat University. They challenged the validity of sections 33-A, 40, 41, 51-A and 52-A of the Gujarat University Act, 1949, as amended by the Act of 1973 as violative of their right guaranteed by Article 30 (1) of the Constitution. Section 33-A provides that every College shall be under the management of a governing body which shall include amongst its members, a representative of the university nominated by the Vice-Chancellor and represen-

1. AIR 1963 SC 540.

2. AIR 1963 SC 540.

3. AIR 1974 SC 1389.

tatives of teachers, non-teaching staff and students of the college. It also provides for a selection committee for recruitment of the Principal and the members of the staff. It will consist of a representative nominated by the Vice-Chancellor. These provisions in effect displace the managing committee of the College. Section 40 provides that teaching and training shall be conducted by the university and shall be imparted by teachers of the university. Section 41 provides that all colleges affiliated to the university shall be the constituent colleges of the university. It also confers power on the university to approve the appointment of the teachers made by the College. Section 51-A provides that no member of the teaching or non-teaching staff of the affiliated college shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges and given a reasonable opportunity of being heard and to make representation against such penalty proposed to be inflicted, and the penalty is approved by the Vice-Chancellor or any officer of the university authorised by him. Section 52-B provides for reference of any dispute connected with conditions of service between the governing body and members of the teaching staff to an arbitration consisting of one member nominated by the governing body of the college—one nominated by the member concerned and an umpire appointed by the Vice-Chancellor.

The Constitutional validity of these provisions was challenged by the petitioner on the ground that they amount to violation of the right of minority to administer educational institutions of their choice. On behalf of the State, it was argued that these measures were intended to prevent maladministration of minority institution.

The Court held that these provisions abridge the right of the minority to administer the educational institutions of their choice and therefore do not apply to minority institutions. The governing body of the college is a part of its administration. The right to administer is the right to 'conduct' and 'manage' the affairs of the institution. This right is exercised through a body of persons in whom the founder has faith and confidence and full autonomy in that sphere. Autonomy in administration means right to administer effectively the affairs of the institutions. The choice in the personnel of management is a part of the administration. It also includes right to choose teachers of its choice. The right however is subject to permissible regulatory measures. The regulatory measure should not restrict the right of administration but facilitate it through the instrumentality of the management of the minority institution. If administration is to be imposed it should be done through the instrument of the existing management not by displacing it. If administration goes to a body in the selection of whom the founders have no say the administration would be displaced. The Court said that these provisions have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost. These provisions cannot therefore apply to minority institutions.<sup>1</sup>

The next question which arose for consideration was whether minority institutions have a fundamental right to affiliation. The petitioners contended the right to establish educational institutions of their choice will be without any meaning of affiliation is denied. The Court, however, held that there is no fundamental right of minority to affiliation to a university. When a minority institution applies to a university to be affiliated, it expresses its choice to

1. See W. Proost v. State of Bihar, AIR 1969 SC 465 ; SK Patro v. State of Bihar, AIR 1970 SC 259 ; DAV College v. State of Punjab, AIR 1970 SC 1731.

participate in the system of general education and course of instruction prescribed by that university. It agrees to follow the uniform course of study. Affiliation is regulating the educational character and content of the minority institution. These regulations are not only reasonable in the interest of general secular education but also conduct to the improvement in the strength of the minority institutions. Therefore measures which will regulate the course of study, the qualifications and appointment of teachers, the conditions of employment of teachers, the health and hygiene of students, facilities for libraries and laboratories are all compared in matters germane to affiliation of minority institutions. These regulatory measures for affiliation are for uniformity, efficiency and excellence in educational courses and do not violate any fundamental right of the minority institutions under Article 30. Though there is no fundamental right to recognition or affiliation, but to deny affiliation or recognition to minority institutions except upon certain terms and conditions tantamount to the surrender of their right to administer educational institutions of their choice would in effect deprive them of their right under Article 30 (1).

*Dwivedi, J.*, did not agree with the majority opinion, on all points, and delivered a dissenting judgment. According to him institutions imparting secular general education may be subject to greater regulation than those which are imparting religious, cultural and linguistic instructions solely. The students do not belong only to the minorities ; they belong also to the Nation. The over-accentuated argument of imparting secular general education in a religious atmosphere seems to me to overlook this important national aspect. Secular general education should be the Nation's first concern, he said.

He did not agree with the majority that a regulation must improve the excellence of the minority institutions. The State may prescribe the curriculum and syllabus for the minority educational institutions and they may not necessarily be calculated to improve the excellence of the institution. Curriculum and syllabus is prescribed not for the excellence but for uniform standard of institutions. A uniform standard is necessary owing to the different calibre of students coming from different developed and undeveloped State of society and from different developed and undeveloped geographical regions of the country.

The right under Article 30 (1) is subject to Article 29 (2) which says that no citizen shall be denied admission into any educational institutions maintained or aided by the State on the grounds only of religion, race, caste, language or any of them. So a State-aided institution established by minority must not refuse admission to a member of any other community. It does not cease to be a minority institution only by admitting members of any community.

In *Mark Netto v. Govt. of Kerala*,<sup>1</sup> the appellant, who was manager of a Roman Catholic Mission School, Trivendrum for boys, applied to the Education Authorities in Kerala for permission to admit girl students in their High School although there was already in existence a facility for the education of the girls in the locality (Muslim Girls High School). Education Authorities refused to give sanction for admission of the girl students under Kerala Education Rules, 1959 mainly on the grounds that (1) the said school

1. AIR 1979 SC 83.

was not established as mixed school and it was purely a boys school and (?) there was also facility for the education of the girls of the locality in the near Muslim girls school situated within radius of one mile. The appellant contended that Kerala Education Rules 1959 is violation of Art. 30 (1) of the Constitution as it interferes with the right of the Christian community to administer educational institution of their choice. He argued that the Christian community in the locality for various reasons wanted their girls also to receive their education in the school of their community. They did not think it in their interest to send them to the Muslim girls school.

The Supreme Court held that the Rule must be interpreted narrowly and is inapplicable to a minority educational institution. The Rule does not authorise Educational Authorities to refuse permission to admit the girl students of their community in the school of their community. If the Rule is interpreted widely it would sanction the withholding of permission for admission of girl students in the boys minority school, and would thus be violative of Art. 30. If so widely interpreted it crosses the barrier of regulatory measures and comes in the region of interference with the administration of the minority institution. The permission for admission of girls in the boys minority school was refused not on the ground of any apprehension of deterioration of morality or discipline if co-education is permitted in the school but mainly in the interest of the existing Muslim girls school, and therefore it violates the freedom guaranteed to minority to administer the educational institution of their choice.

In *Lily Kurian v. Sr. Lewina*<sup>1</sup> the validity of the Ordinance 33 (4) issued under the Kerala University Act, 1957 was challenged as violative of Art. 30 (1) of the Constitution. Under the Ordinance 33 (4) a teacher has right to appeal to the Vice-Chancellor against any disciplinary action taken by the managing Committee of minority educational institution. The appellant Smt. Lily Kurian, was appointed as principal of the St. Joseph's Training College for Women, Ernakulam. The college was established by a religious society of Nuns, belonging to the Roman Catholic Church and was affiliated to the University of Kerala. As a result of certain incidents a disciplinary inquiry was held against the appellant and she was found guilty of misconduct. The Head of the religious society by virtue of her office as the President of Managing Board, dismissed the appellant from service. The appellant filed an appeal before the Vice-Chancellor under Ordinance 33 (4) who quashed the order of dismissal and directed the Management to allow her to function as Principal.

The Supreme Court held that the Ordinance 33 (4) is violative of the right of the minority to administer educational institution of its own choice guaranteed by Art 30 (1) of the Constitution. The conferral of a right of appeal to an outside authority like the Vice-Chancellor under Ordinance 33 (4) takes away the disciplinary power of a minority educational authority. The Vice-Chancellor has power to veto its disciplinary control. This is a clear interference with the disciplinary power of the minority institution. The State may "regulate the exercise of the right to administration but it has no power to impose any restriction" which is destructive of the right itself. The conferral of such wide powers on the Vice-Chancellor amounts, in reality, to a fetter on the right to administration under Art 30 (1). This would so affect the descriptive control of a minority educational institution as to be subversive of its institutional right and can hardly be regarded as a "regulation" or a "restriction" in the interest of the institution.

1. AIR 1979 SC 57.

## Saving of Certain Laws (Arts. 31-A, 31-B & 31-C)

Constitution 44th Amendment Act, 1978.—The Sub-heading—Right to Property—and Art. 31, under which the right to property was a fundamental right, have been omitted by the Constitution (44th Amendment) Act, 1978. The Amendment takes away right to property as a fundamental right and makes it only a legal right which will be regulated by ordinary law. Consequently, Art. 31 has been deleted and a new Chapter IV namely—Right to Property—after Chapter III in Part XII of the Constitution has been inserted.

The commentary on Art. 31 is therefore transferred to Chapter 29 of this book.

### Saving of laws providing for acquisition of estates, etc.—Art. 31-A.

According to Article 31-A no law providing for acquisition of estate, etc., can be challenged on the ground that they are inconsistent with any of the provisions of Part III of the Constitution. They are laws for—

- (a) acquisition by the State of any estate, or
- (b) the taking over of the management of any property by the State for a limited period,
- (c) the amalgamation of two or more corporations,
- (d) the extinguishment or modification of rights of persons interested in corporations.
- (e) the extinguishment or modification of rights accruing by virtue of any agreement, lease or licence relating to any mineral or mineral oil.

The Constitution (7th Amendment) Act amended Art. 31-A and further extended the scope of the word "estate" which now includes any jagir, inam or muafi or other similar grant and in the State of Madras and Kerala janman right. The above four categories of legislation (clauses b,c,d,e,) were also added by this amendment which shall not be challenged as infringing Articles 14, 19 and 31.

The Constitution (44th Amendment) Act, 1978, has omitted the word "Article 31" from Art. 31-A. This means that the laws providing for acquisition of estates can not now be challenged on the ground that they violate Art. 31.

The object of Article 31-A was to facilitate agrarian reforms. Hence, the protection is not applicable to a law which seeks to modify the right of the owner without any reference to agrarian reforms. Thus it has been held that the Land Acquisition (Madras Amendment) Act, 1961, was not a law for agrarian reform and therefore not protected under Art. 31-A of the Constitution. The Act was not passed only to clear slum but for housing scheme and the creation of modern suburbs and therefore could not be regarded as agrarian reform.<sup>1</sup>

1. Vajaravelu v. Special Deputy Collector, AIR 1965 SC 1017.

**Validation of certain Acts and Regulations—Article 31-B.**—This Article was added by the Constitution (First Amendment) Act, 1951. It says that none of the Acts and Regulations mentioned in the Ninth Schedule shall be deemed to be void on the ground that such Acts or Regulations are inconsistent with any of the rights conferred by Part III of the Constitution. However, the legislature is competent to amend and repeal these Acts. But the validity of the amended and repealed Acts, if not saved under Article 31-A can be examined by the Court on merits.<sup>1</sup> Originally sixty-four such laws were added to the Ninth Schedule. It was later on amended by the Fourth and the Seventeenth Constitution Amendment Acts of 1955 and 1964 respectively by which certain more Acts were added to the Ninth Schedule.

The Constitution (29th Amendment) Act 1972, added Kerala Land Reforms Act, 1969 and the Kerala Land Reforms Act, 1971 to the Ninth Schedule. The validity of this Amendment has been upheld by the Supreme Court in *Kesavanand v. State of Kerala*.<sup>2</sup>

The Constitution (34th Amendment) Act, 1974 amended the Ninth Schedule for the fourth time and added 17 land reforms laws. With the addition of these Acts' the number of Acts in the Ninth Schedule rose to 86.

It was again amended by the Constitution (39th Amendment) Act, 1975 which added 38 Acts to the Schedule making the total number 124. The important Central Acts included in the Schedule were the Representation of Peoples Act, 1951 and the Representation of Peoples (Amendment) Act, 1974, the Election Laws (Amendment) Act, 1975 and the Maintenance of Internal Security Act, 1971 (now repealed). The Constitution (42nd Amendment) Act, 1976, further added 64 Central and States Land Reforms laws to the Ninth Schedule. After the addition of these 64 Acts, the total number of Acts included in the Ninth Schedule was 188. During the discussion on the Bill in Parliament, some members criticised the inclusion of certain Acts. The Law Minister justified the inclusion of these laws in the Ninth Schedule. He said that Art. 31-B provides protection to not only laws of agrarian reforms but also the non-agrarian legislations which are progressive and required in the public interest. On the apprehension expressed by some members that inclusion of these Acts was not justified and was likely to be misused, the Minister said that there was no such possibility because adequate safeguards were provided in the Act. It is submitted that these laws are not laws providing for agrarian reforms and therefore their inclusion was not desirable and justified. On the basis of progressive Legislation any law can be included in the Ninth Schedule and thus the very purpose of judicial review as provided in Art. 13 for the protection of fundamental rights would be frustrated.

*The 44th Amendment Act 1978, has amended the Ninth Schedule and omitted Entry 87 (the Representation of Peoples Act, 1951 of the Representation of Peoples (Amendment) Act, 1974, and the Election Laws (Amendment) Act, 1975 Entry 92 (MISA) and Entry 130, (Prevention of Publication of Objectionable Matter Act, 1976).*

1. *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

2. AIR 1973 SC 1461.

## Right to Constitutional Remedies (Arts. 32 to 35)

"If I was asked to any particular Article in this Constitution as the most important—an Article without which this Constitution would be a nullity—I could not refer to any other Article except this one. It is the very heart of it"—Dr. Ambedkar.

**Introduction.**—It is true that a declaration of fundamental right is meaningless unless, there is an effective machinery for the enforcement of the rights. It is the remedy which makes the right real. If there is no remedy there is no right at all. It was, therefore, in the fitness of the things that our Constitution-makers having incorporated a long list of fundamental rights have also provided an effective remedy for the enforcement of these rights under Article 32 of the Constitution. Article 32 is itself a fundamental right.

Article 32 (1) guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution. Clause (2) of Art. 32 confers power on the Supreme Court to issue appropriate direction or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo-warranto* and *certiorari*, for the enforcement of any of the rights conferred by Part III of the Constitution. Under Clause (3) of Art. 32 Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). Clause (4) says that the right guaranteed by Article 32 shall not be suspended except as otherwise provided for by the Constitution.

**Who can apply.**—The right to move Supreme Court is only available to those whose fundamental rights are infringed.<sup>1</sup> Article 31 (1) guarantees the right to move Supreme Court for the enforcement of fundamental rights. It is clear from the language of Article 32 that the sole object of this Article is the enforcement of fundamental rights guaranteed by the Constitution. To make out a case under Article 32 it is obligatory upon the petitioner to establish that the law complained affects or invades his fundamental rights guaranteed by the Constitution. The power vested in the Supreme Court can only be exercised for the enforcement of the fundamental right.<sup>2</sup> Hence, the Supreme Court cannot order the release of a person from detention on a writ of *habeas corpus* until it is satisfied that a petitioner's detention is really unwarranted by law. This means that in case of detention under the Maintenance of Internal Security Act, 1971, the petitioner has to show a violation of either Article 21 or Art. 22 of the Constitution. If he fails to show that he had been denied the protection of these Articles he cannot seek the remedy provided in Article 32.<sup>3</sup> A challenge to a Government order forbidding re-appointment of com-

1. In the matter of Madhu Limye, AIR 1969 SC 1014, See also Andhra Industrial Works v Chief Controller, Imports, AIR 1974 SC 1539.

2. Romesh Thapar v. State of Madras, AIR 1950 SC 124 at p. 126.

3. Ram Bali v. State of W. B., AIR 1975 SC 623,

pulsorily retired persons as a stigma is not an infringement of fundamental rights and, therefore, a petition under Art. 32 challenging such order is not maintainable.<sup>1</sup> The writ under which the remedy is asked under Article 32 must be correlated with one of the fundamental rights sought to be enforced. In short, the remedy sought for must be through appropriate proceedings.

Petition to enforce right under agreement or award is not maintainable under Article 32 of the Constitution. This article is reserved exclusively for the enforcement of a fundamental right.<sup>2</sup>

The granting of an appropriate relief under Article 32 is not discretionary. The citizens are ordinarily entitled to appropriate relief under Article 32, once it is shown that their fundamental rights have been illegally or unconstitutionally violated.<sup>3</sup>

**The Supreme Court as protector and guarantor of Fundamental Rights.**—Under Clause (2) of Article 32 the Supreme Court is empowered to issue appropriate directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo-warranto* and *cetiorari* for the enforcement of any fundamental right guaranteed by Part III of the Constitution. By this Article the Supreme Court has been constituted as protector and guarantor of fundamental rights and once a citizen has shown that there is infringement of his fundamental right the court cannot refuse to entertain petitions seeking enforcement of fundamental rights.<sup>4</sup> In discharging the duties assigned to protect fundamental rights the Supreme Court in the words of Patanjali Sastri, J., has to play a role of a sentinel on the *qui vive*.<sup>5</sup> Again in *Daryao v. State of U. P.*,<sup>6</sup> the Supreme Court took it as its solemn duty to protect the fundamental right zealously and vigilantly.

The powers of the Supreme Court in protection of the constitutional right are of the widest amplitude and there is no reason why the Court should not adopt activist approach similar to Courts in America and issue to the State directions which may involve taking of positive action with a view to securing enforcement of the fundamental right. In *Hussainara Khatoon v. State of Bihar*,<sup>7</sup> the Supreme Court held that speedy trial is an essential and integral part of the fundamental right to life and liberty enshrined in Art. 21. In Bihar there were number of under-trial prisoners kept in jail for years together without trial. The Court ordered that all such prisoners whose names were submitted to the Court, should be released forthwith. Since speedy trial was held to be a fundamental right guaranteed by Art. 21 the Supreme Court considered its constitutional duty to enforce this right of the accused persons.

**Extent of Supreme Court power under Article 32 (2).**—The language used in Article 32 (2) is very wide. The power of the Supreme Court is not confined to issuing of writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo-*

1. *P. R. Naidu v. Government. of AP.*, AIR 1977 SC 854.
2. *M. V. Kurikose v. State of Kerala*, AIR 1977 SC 1509.
3. *Daryao v. State of UP*, AIR 1961 1457.
4. *Romesh Thapar v. State of Madras*, AIR 1950 SC 124 at p. 126.
5. *State of Madras v. V. G. Row*, AIR 1952 SC 196.
6. AIR 1961 SC 1457 at p. 1461.
7. AIR 1979 SC 1367.

## **Right to Constitutional Remedies (Arts. 32 to 35)**

"If I was asked to any particular Article in this Constitution as the most important—an Article without which this Constitution would be a nullity—I could not refer to any other Article except this one. It is the very heart of it"—Dr. Ambedkar.

**Introduction.**—It is true that a declaration of fundamental right is meaningless unless, there is an effective machinery for the enforcement of the rights. It is the remedy which makes the right real. If there is no remedy there is no right at all. It was, therefore, in the fitness of the things that our Constitution-makers having incorporated a long list of fundamental rights have also provided an effective remedy for the enforcement of these rights under Article 32 of the Constitution. Article 32 is itself a fundamental right.

Article 32 (1) guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution. Clause (2) of Art. 32 confers power on the Supreme Court to issue appropriate direction or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo-warranto* and *certiorari*, for the enforcement of any of the rights conferred by Part III of the Constitution. Under Clause (3) of Art. 32 Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). Clause (4) says that the right guaranteed by Article 32 shall not be suspended except as otherwise provided for by the Constitution.

**Who can apply.**—The right to move Supreme Court is only available to those whose fundamental rights are infringed.<sup>1</sup> Article 31 (1) guarantees the right to move Supreme Court for the enforcement of fundamental rights. It is clear from the language of Article 32 that the sole object of this Article is the enforcement of fundamental rights guaranteed by the Constitution. To make out a case under Article 32 it is obligatory upon the petitioner to establish that the law complained affects or invades his fundamental rights guaranteed by the Constitution. The power vested in the Supreme Court can only be exercised for the enforcement of the fundamental right.<sup>2</sup> Hence, the Supreme Court cannot order the release of a person from detention on a writ of *habeas corpus* until it is satisfied that a petitioner's detention is really unwarranted by law. This means that in case of detention under the Maintenance of Internal Security Act, 1971, the petitioner has to show a violation of either Article 21 or Art. 22 of the Constitution. If he fails to show that he had been denied the protection of these Articles he cannot seek the remedy provided in Article 32.<sup>3</sup> A challenge to a Government order forbidding re-appointment of com-

1. In the matter of Madhu Limye, AIR 1969 SC 1014. See also Andhra Industrial Works v Chief Controller, Imports, AIR 1974 SC 1539.

2. Romesh Thapar v. State of Madras, AIR 1950 SC 124 at p. 126.

3. Ram Bali v. State of W. B., AIR 1975 SC 623,

pulsorily retired persons as a stigma is not an infringement of fundamental rights and, therefore, a petition under Art. 32 challenging such order is not maintainable.<sup>1</sup> The writ under which the remedy is asked under Article 32 must be correlated with one of the fundamental rights sought to be enforced. In short, the remedy sought for must be through appropriate proceedings.

Petition to enforce right under agreement or award is not maintainable under Article 32 of the Constitution. This article is reserved exclusively for the enforcement of a fundamental right.<sup>2</sup>

The granting of an appropriate relief under Article 32 is not discretionary. The citizens are ordinarily entitled to appropriate relief under Article 32, once it is shown that their fundamental rights have been illegally or unconstitutionally violated.<sup>3</sup>

**The Supreme Court as protector and guarantor of Fundamental Rights.—** Under Clause (2) of Article 32 the Supreme Court is empowered to issue appropriate directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari* for the enforcement of any fundamental right guaranteed by Part III of the Constitution. By this Article the Supreme Court has been constituted as protector and guarantor of fundamental rights and once a citizen has shown that there is infringement of his fundamental right the court cannot refuse to entertain petitions seeking enforcement of fundamental rights.<sup>4</sup> In discharging the duties assigned to protect fundamental rights the Supreme Court in the words of Patanjali Sastri, J., has to play a role of a sentinel on the *qui vive*.<sup>5</sup> Again in *Daryao v. State of U. P.*,<sup>6</sup> the Supreme Court took it as its solemn duty to protect the fundamental right zealously and vigilantly.

The powers of the Supreme Court in protection of the constitutional right are of the widest amplitude and there is no reason why the Court should not adopt activist approach similar to Courts in America and issue to the State directions which may involve taking of positive action with a view to securing enforcement of the fundamental right. In *Hussainara Khatoon v. State of Bihar*,<sup>7</sup> the Supreme Court held that speedy trial is an essential and integral part of the fundamental right to life and liberty enshrined in Art. 21. In Bihar there were number of under-trial prisoners kept in jail for years together without trial. The Court ordered that all such prisoners whose names were submitted to the Court, should be released forthwith. Since speedy trial was held to be a fundamental right guaranteed by Art. 21 the Supreme Court considered its constitutional duty to enforce this right of the accused persons.

**Extent of Supreme Court power under Article 32 (2).—**The language used in Article 32 (2) is very wide. The power of the Supreme Court is not confined to issuing of writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo-*

1. P. R. Naidu v. Government. of AP., AIR 1977 SC 854.
2. M. V. Kuriakose v. State of Kerala, AIR 1977 SC 1509.
3. Daryao v. State of UP. AIR 1961 1457.
4. Romesh Thapper v. State of Madras, AIR 1950 SC 124 at p. 126.
5. State of Madras v. V. G. Row, AIR 1952 SC 196.
6. AIR 1961 SC 1457 at p. 1461.
7. AIR 1979 SC 1369.

*warranto* and *certiorari*.<sup>1</sup> These writs are all of English origin. The Supreme Court of India may not only issue the above writs but also directions, orders or writs, similar to the above so far as to fit in with any circumstances peculiar to India. The Supreme Court is not bound to follow the procedural technicalities of English law, but it has been held that in granting these writs it will follow the broad and fundamental principles. This is clear from the observation made by the Supreme Court in the case of *T. G. Basappa v. T. Nagappa*<sup>2</sup>:

"In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by Judges, we can make an order or issue a writ in the nature of *certiorari*, in all appropriate cases and in appropriate manner. So long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

Thus, the wording of Article 32 (2) is so elastic that it permits all necessary adoption without legislative sanction from time to time so as to enable effective enforcement of the fundamental rights. Even if a proper writ has not been prayed for by the petitioner in a case his application cannot be thrown out. Article 32 permits large discretion to the Supreme Court to give the appropriate relief. The Court can frame such writs as the exigencies of a particular case demand.<sup>3</sup>

In *K. K. Kochuni v. State of Madras*,<sup>4</sup> the Court held that Article 32 (2) itself being a fundamental right if the existence of a fundamental right and a breach thereof, either actual or theoretical established, the Court will give relief notwithstanding the existence of an alternative remedy. The Court's power under Article 32 (2) are wide enough to order the taking of evidence, if necessary on disputed questions of fact, and so give appropriate relief to the petitioner by issuing the writ or order so as to suit the exigencies of the case.

**Delay or Laches.**—The remedy under Article 32 must usually be sought within a reasonable time. If the claims made by the petitioner are stale the Supreme Court cannot examine them after the delay of about a decade or two. This question arose for the first time in the case of *Tilokchand Motichand v. H. B. Munshi*.<sup>5</sup> The main question before the Court was whether there is any period of limitation within which the remedy under Art. 32 can be invoked. In the instant case the petitioner filed the petition in the Supreme Court after the lapse of 10 years after his petition under Art. 226 was dismissed by the High Court. The Court rejected the petitioner's petition on the ground of delay. However, the judges differed on the question as to what should be the reasonable time for invoking the remedy under Art. 32. Justice Mitter favoured the application of the Limitation Art. (3 years). Sikri, J., favoured a limitation of one year for entertaining petitions under Art. 32. Justice Hegde, however, took the view that there should be no prescribed period of limitation for entertaining petitions under Art. 32. He said that the Court cannot refuse to

1. *Rashid Ahmad v. Municipal Board, Kairana*, AIR 1950 SC 163.

2. AIR 1954 SC 440 at p. 433.

3. *Charanjit Lal v. Union of India*, AIR 1951 SC 41.

4. AIR 1960 SC 1080.

5. *Tilokchand Motichand v. H. B. Munshi*, AIR 1970 SC 898; *RS Deodhar v. State of Maharashtra*, AIR 1974 SC 259; *Har Swarup v. G.M., Central Rly.*, AIR 1975 SC 202.

entertain a petition on the ground of delay and the provisions of the Limitation Act has no relevance to the proceedings under Art. 32.

Hidayatullah, C. J., felt that no hard and fast rule can be adopted in this matter. He said, "The question is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit. A case may be brought within the Limitation Act by reason of some article but this Court need not necessarily give the total time to the litigant to move this Court under Article 32. Similarly, in a suitable case this Court may entertain such a petition even after a lapse of time. It will all depend on what the breach of the fundamental right and the remedy claimed are and why the delay arose :

"The correct approach seems to be the one adopted by Chief Justice Hidayatullah. According to him the Court would not be bound by the analogy of the statute of limitations. No upper or lower limit can be prescribed for petitions under Article 32. It is a matter to be left to the sound exercise of judicial discretion. The overriding principle should be that stale claims should not be allowed to be agitated to the detriment of rights which have come into existence in the period of interregnum when the aggrieved party slept over his rights. Though Article 32 is itself a guaranteed right, it could not be contended that the Supreme Court does not have the discretion to deny relief. Undoubtedly, Article 32 guarantees the right to approach the Supreme Court but that does not restrict the Court's discretion to grant relief. One of the considerations relevant for the exercise of such discretion is laches."<sup>1</sup>

**Relation between Articles 32 and 226.**—It is to be noted that under Article 226, the High Court has also been given power of issuing writs in the nature of *habeas corpus*, etc. But the power of the High Court is wider than the power conferred by Article 32 on the Supreme Court inasmuch as the High Courts have the power to issue writs not only for the enforcement of fundamental rights, but for the enforcement of rights other than fundamental rights whereas Article 32 can be invoked only for the enforcement of fundamental rights. Parliament can however empower the Supreme Court with such a power under Article 139. But the power of the High Court to issue writs cannot be in derogation of that of the Supreme Court under Article 226. In other words, an order under Article 32 will supersede the orders of the High Court previously passed.

An application under Article 32 may always be made first to the Supreme Court since Article 32 is itself a fundamental right. It is a substantive right not a mere procedural right. There is no need to resort to Article 226 before approaching the Supreme Court under Article 32.<sup>2</sup>

**Res Judicata.**—If a question has been once decided by the Supreme Court under Article 32 the same question cannot be re-opened<sup>3</sup> again under Article 226. In *Daryao v. State of U. P.*,<sup>4</sup> it was held that where the matter had been 'heard' and 'decided' by the High Court under Article 226 the writ under Article 32 is barred by the rule of *judicata* and could not be entertained.

But in *Gulam Sarvar v. Union of India*,<sup>5</sup> the Court held that the rule of *res*

1. Alice Jacob, *Laches : Denial of Judicial Relief*, JILI, Vol. 16, p. 352.
2. *Romesh Thapar v. State of Madras*, AIR 1956 SC 124.
3. *Jagannath Baksh Singh v. State of UP.*, AIR 1962 SC 1563.
4. AIR 1961 SC 1457. See also *Virudhunagar Steel Rolling Mills v. Government of Madras*, AIR 1968 SC 196; *Har Swarup v. G. M. Central Ry.*, AIR 1975 SC 202.
5. AIR 1967 SC 1335.

*judicata* is not applicable in the writ of *habeas corpus* and where the petitioner has been refused a writ from the High Court he may file a petition for the same writ under Article 32.

**Clause (3)**—Under clause (3) Parliament is authorised by law to empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2). The words "any other court" can only mean any other court than the High Court because High Courts have already been invested with such powers under Article 226.

**Clause (4)**—According to this clause the right to move the Supreme Court for the enforcement of the fundamental right shall not be suspended except as otherwise provided by the Constitution.

There is only one situation when this right can be suspended. When a proclamation of emergency under Article 352 is declared the President is empowered under Article 359 to declare that the right to move any court for the enforcement of such right conferred by Part III may remain suspended for the period during which the proclamation of emergency is in operation.

The critics say that since the right can be suspended under Article 359 it has been robbed of its inherent and fundamental values, and it takes away with one hand what is given by the other. But this argument of critics is hardly valid in the context of our circumstances. Our fundamental rights are not absolute. They strike balance between the needs of the individual and the needs of society. In abnormal circumstances the life of the State itself jeopardy and if the State does not take drastic steps to protect itself the individual will lose his very existence. Hence, during emergency when the very existence of the State is threatened from internal or external disturbance, this fundamental right may be suspended.

**Restrictions of fundamental Rights of Members Armed forces.**—Article 33 is an exception to the fundamental rights conferred by Part III of the Constitution. This Article empowers the Parliament to restrict or abrogate by law fundamental rights in the application to the members of the armed forces or the forces charged with the maintenance of public order. The power is conferred on Parliament and not on State Legislatures. The object of this restriction under this Article is to ensure the proper discharge of their duties and maintenance amongst them.

This Article is an exception to the operation of Article 13, clause (2) which prohibits taking away or abridgement of the rights guaranteed by Part III of the Constitution. Hence, a law passed under Article 33 cannot be challenged under Article 13, clause (2).

The power under Article 33 is only exercisable by Parliament<sup>1</sup> and not by State Legislatures.

**Restriction on Fundamental Rights while Martial Law is in force in any area.**—Article 34 provides that notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him for the maintenance or restoration of order in any area where Martial Law was in force. The indemnity validates any sentence passed, punishment inflicted, forfeiture ordered or other act done under Martial Law in such area,

1. *Dalbir Singh v. State of Punjab*, AIR 1962 SC 1105.

It offers an indemnity to members of armed forces or those (civil authorities or police) connected with the maintenance or restoration of order within India for all acts done within an area where Martial law is in force. So an Act of indemnity passed by Parliament cannot be challenged on the ground that it violates fundamental rights.

This power of Parliament is, however, subject to two restrictions (1) the act must be done for the maintenance of restoration of order, and (2) Martial Law was in force in that area where the act was done.

**Martial Law.**— In the Wharton's Law Lexicon<sup>1</sup> Martial Law is defined as meaning the suspension of ordinary law and the government of the country or part of it by Military Tribunals. It must be clearly distinguished from Military law, and (2) from the Martial Law which forms part of laws and usages of war. The term Martial Law is sometimes used as meaning the Common Law right of the Crown to repel force by force in the case of insurrection, invasion or riot and to make such exceptional measures as may be necessary for the purpose of restoring peace and order. This power is necessary, otherwise any act done during such time by executive or military authorities in pursuance of maintaining or restoring order can be challenged in ordinary court of law where peace is restored. This may defeat the very object for which the power is vested in military and civil authorities during such time.

The question is—Under what Article of the Constitution the Executive can declare Martial Law, and secondly whether the Presidential Order under Article 359 (1) amounts to declaration of Martial Law.

There is no express provision in the Indian Constitution which confers power on the Executive to declare Martial Law. However, it is implicit in the text of Article 34 of the Constitution under which martial law can be declared in any area within the territory of India.<sup>2</sup>

In the *Habeas Corpus* case the Supreme Court distinguished the Presidential order under Art. 359 (1) and the Martial Law which may be declared under Art. 34. A Presidential Order under Art. 359 (1) according to Beg. J., "ordinarily have a wide range and effect throughout the country than the existence of Martial Law in any particular part of the country. The Presidential proclamations are meant generally to cover the country as a whole. Martial Law is generally of a locally restricted application. Secondly, the conditions in which Martial Law may result in taking over by military court of powers even to try offences. Such a taking over by military courts is certainly outside the provisions of Art. 359 (1). It could perhaps fall under Presidential powers under Articles 53 and 73 read with Article 355." But declaration of martial law does not automatically deprive the court to issue the writ of *habeas corpus* or other process for the protection of the individual's life and liberty. The court can examine the legality of the action of military or executive authorities on his ground of *mala fide*. If courts are to be prevented to exercise such power, during martial law, this could be done only by Presidential Order issued under Art. 359 (1) and in no other way.<sup>3</sup>

1. Wharton's Law Lexicon, (1906) 18 Laws ed. 281 (295).

2. *Habeas Corpus* case, AIR 1976 SC 1207 at p. 1318, per Bhagwati and Beg. JJ

3. Ibid., Bhagwati, J., at p. 1369.

## Directive Principles of State Policy (Arts. 36-51)

**Introduction.**—The Directive Principles of State Policy contained in Part IV of the Constitution set out the aims and objectives to be taken up by the States in the governance of the country. This novel feature of the Constitution is borrowed from the Constitution of Ireland which had copied it from the Spanish Constitution.

The idea of a welfare State envisaged by our Constitution can only be achieved if the States endeavour to implement them with a high sense of moral duty.

At one time it was thought that the State was mainly concerned with the maintenance of law and order and the protection of life, liberty and property of the subject. Such a restrictive role of the State is no longer a valid concept. Today we are living in an era of a welfare State which has to promote the prosperity and well being of the people. The Directive Principles lay down certain economic and social policies to be pursued by the various Governments in India ; they impose certain obligations on the State to take positive action in certain directions in order to promote the welfare of the people and achieve economic democracy.

**Underlying object behind the Directive Principles.**—The Directive Principles are the ideals with the Union and State Governments must keep in mind while they formulate policy or pass a law. They lay down certain social, economic and political principles, suitable to peculiar conditions prevailing in India. In the words of Sri G. N. Joshi "they constitute a very comprehensive political, social and economic programme for a modern democratic State" Dr. B. R. Ambedkar aptly describes them as a "novel feature" of the Constitution of India. They, in fact, inscribe the objectives of a welfare State. The underlying objectives of the Directive Principles can better be understood from the speech of Dr. Ambedkar in the Constituent Assembly. He said :

"...Our Constitution lays down what is called parliamentary democracy. By Parliamentary democracy we mean 'one man, one vote'. We also mean that every Government shall be on the anvil, both in its daily affairs and also at the end of a certain period when the voters and the electorate will be given an opportunity to assess the work done by the Government. The reason why we have established in the Constitution a political democracy is because we do not want to instal by any means whatsoever a perpetual dictatorship of any particular body of people. While we have established political democracy, it is also the desire that we should lay down as our ideal economic democracy. We do not want merely to lay down a mechanism to enable people to come and capture power. The Constitution also wishes to lay down an ideal before those who would be forming the Government. That idea is economic democracy, whereby, so far as, I am concerned, I understand to mean one man, one vote. The question is, have we got any fixed idea as to how we should bring about economic democracy ? There

are various ways in which people believe that economic democracy can be brought about ; there are those who believe in individualism as the best form of economic democracy ; there are those who believe in having a socialistic state as the best form of economic democracy ; there are those who believe in the communistic idea as the most perfect form of economic democracy.

Now, having regard to the fact that there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used, in the directive principles, something which is not fixed or rigid. We have left enough room for people of different ways of thinking, with regard to the reaching of the idea of economic democracy, to strike in their own way, to persuade the electorates that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act.

It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and at times keep on changing. It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down that our ideal is *economic democracy*. Because we did not want merely a parliamentary form of Government to be instituted through the various mechanism provided in the Constitution, without any direction as to what our economic ideal or as to what our social order ought to be, we deliberately included the Directive Principles in our Constitution. I think if the friends who are agitated over this question bear in mind what I have said just now that our object in framing this Constitution is really two-fold (1) to lay down the form of political democracy and, (2) to lay down that our ideal is economic democracy and also to prescribe that every Government whatsoever is in power, shall strive to bring about economic democracy."

Thus, it is clear that the main object in enacting the directive principles appears to have been to set standards of achievements before the Legislature and the Executive, the local and other authorities, by which their success or failure can be judged. It was also hoped that those failing to implement the directives might receive a rude awakening at the polls. It should, however, be noted that the directive principles do not impose any particular brand or pattern of economic or social order. They lay down the goals which may be achieved through various means which have to be devised from time to time.

**Classification of the Directives.**—The Directives may be classified into the following groups :

#### A—Social and Economic Charter

1. **Social order based on Justice.**—Article 38 (1) provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice—social, economic and political shall inform all the institutions of national life. This directive only reaffirms what has already been said in the Preamble according to which the function of the Republic is to secure to all its citizens social, economic and political justice.

1. Constituent Assembly Debates, Vol. VIII, pp. 494-95

The Constitution (41st Amendment) Act, 1978 has inserted a new directive principles in Article 38 of the Constitution. The new clause (2) provides that the State shall, in particular, strive to minimise inequalities in income and endeavour to eliminate inequalities in status facilities and opportunities not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

**2. Principles of Policy to be followed by the State for securing economic justice.**—Article 39 specifically requires the State to direct its policy towards securing the following principles :—

- (a) Equal right of men and women to adequate means of livelihood.
- (b) Distribution of ownership and control of the material resources of the community to the common good.
- (c) To ensure that the economic system should not result in concentration of wealth and means of production to the common detriment.
- (d) Equal pay for equal work for both men and women.
- (e) To protect health and strength of workers and tender age of children and to ensure that they are not forced by economic necessity to enter avocations unsuited to their age or strength.
- (f) 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.

Clause (f) was modified by the Constitution (42nd Amendment) Act, 1976 with a view to emphasise the constructive role of the State with regard to children. The changes made by the amendment does not change the content and the spirit of unamended clause (f). The object intended to be achieved by the amendment could have been fulfilled even under the unamended clause (f) of Art. 39.

**3. Equal justice and free legal aid to economically backward classes.<sup>1</sup>**—Article 39-A directs the State to ensure that the operation of the legal system promotes justice, on a basis of equal opportunities 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. With a view to implement the new policy of the Government to give legal aid to economically backward classes of people, the amendment has been enacted.

**4. Participation of workers in management of Industries.<sup>1</sup>**—Art. 43-A requires the State to 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.

**5. Right to work, education and public assistance in certain cases.**—Article 41 directs the State to ensure to people within the limit of its economic capacity and development : (a) employment, (b) education, and (c) public assistance in cases of unemployment, old age, sickness, and disablement and in other cases of undeserved want.

1. Added by the 42nd Amendment, 1976.

6. Just and human condition of work.—Art. 42 directs the State to make provision for securing just and human conditions and for maternity relief.

7. Living wage for workers.—Art. 43 requires the State to try 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.

8. Free and compulsory education for children.—Art 45 requires the State to make provision within 10 years, for free and compulsory education for all children until they complete the age of 14 years. The object is to abolish illiteracy from the country.

9. Duty to raise the standard of living and improvement of health.—Art. 47 imposes duty upon the State to raise the level of nutrition and the standard of living of its people and the improvement of public health. In particular, the State should bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

10. Promotion of educational and economic interests of weaker section.— Art. 46 enjoins the State to promote with special care the education and economic interest of the weaker sections of the people, and, in particular of the Scheduled Castes and Scheduled Tribes, and to protect them from social injustice and of all forms of exploitation.

11. Uniform Civil Code.—Art 44 requires the State to strive to secure for the citizens a uniform Civil Code throughout the territory of India.

12. Organisation of agriculture and animal husbandry.—Art. 48 directs the State to take steps to organise agriculture and animal husbandry on modern and scientific lines. In particular, it should take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle.

13. Protection and improvement of forests and wild life.—Art. 48-A requires the State to take steps to protect and improve the environment and to safeguard the forests and wild life of the country.

14. Protection of monuments and places and objects of national importance.—Art. 49 requires the State to protect every monument or place or object of artistic or historic interest (declared by or under law made by Parliament), to be of national importance from spoilation, disfigurement, destruction, removal, disposal or export.

15. Separation of Judiciary from Executive.—Art. 50 requires the State to take steps to separate the Judiciary from the Executive in the public services of the State. To promote the rule of law, this is very essential.

16. Promotion of International peace and security.—Art. 51 provides that the State should strive to (a) promote international peace and security ; (b) maintain just and honourable relations between nations ; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another and (d) encourage settlement of international disputes by arbitration.

### Relation between Directive Principles and Fundamental Rights

The directive principles differ from fundamental rights in the following aspects :

(1) Fundamental Rights are justiciable, directives, non-justiciable.

According to Article 37, Directive Principles, though they are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making law, are expressly made non-justiciable. The fundamental rights are enforceable by the courts.<sup>1</sup> and the courts are bound to declare as void any law that is inconsistent with any of the fundamental rights. The Directive Principles on the other hand, are not so enforceable by the courts,<sup>2</sup> nor can the courts declare as void any law which is otherwise void on the ground that it contravenes any of the directives. For instance, if a person is illegally detained, a writ of *habeas corpus* can be obtained by the detenu. But, if the Government does not separate judiciary from the executive or introduce free and compulsory education the courts cannot help the aggrieved. In *State of Madras v. Champakam Dorairajan*,<sup>3</sup> the Supreme Court observed as follows :

"The Directive Principles of the State Policy, which by Article 37 are expressly made unenforceable by Court cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made, enforceable by appropriate writs, orders or directions under Article 32. The Chapter of Fundamental Rights is sacrosanct and not liable to be abridged by legislative or executive act or orders, except to the extent provided in the appropriate Articles in Part III. The Directive Principles of State Policy have to conform and to run as subsidiary to the Chapter of Fundamental Rights. In our opinion that is the correct approach in which the provision found in Parts III and IV have to be understood. However so long as there is no infringement of any fundamental right to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the directive principles set out in Part IV, but subject again to the legislative and executive powers and limitations conferred on the State under different provisions."

Thus in case of any conflict between fundamental rights and Directive Principles fundamental rights shall prevail. But a year later, when the court dealt with Zamindari Abolition cases its attitude was considerably modified. In the *State of Bihar v. Kameshwari Singh*,<sup>4</sup> the Court relied on Article 39 in deciding that a certain Zamindari Abolition Act had been passed for a public purpose within the meaning of Article 31. Finally, in *Re Kerala Education Bill*,<sup>5</sup> the Supreme Court observed that though the directive principle cannot override the fundamental rights, nevertheless in determining the scope and ambit of fundamental rights the court may not entirely ignore the directive principles but should adopt "the principles of harmonious construction and should attempt to give effect to both as much as possible". Likewise, State should make cattle protection laws prohibiting slaughter of cows and calves and other cattle have been upheld because they are meant to give effect to Article 48 of

1. Article 32.

2. Article 37.

3. AIR 1951 SC 228.

4. AIR 1952 SC 352.

5. AIR 1957 SC 956.

the Constitution.<sup>1</sup> Again, Article 44 has been referred to in upholding validity of the Excise Rules empowering the Central Government to grant exemption from payment of duty to small co-operative societies of weavers producing cotton fabrics on powerlooms.<sup>2</sup> While Part III contains negative injunctions to the State not to do various things. Part IV contains positive commands to the State to promote what may be called a social and welfare State.

Though these directives are not enforceable by the courts, yet these principles have been declared to be fundamental in the governance of the country.<sup>3</sup> It is the duty of the State to apply these principles in making laws. If any Government ignores them they will certainly have to answer for them before the electorate at the time of election. The directive principles are not intended to be merely moral precepts was made clear by Dr. Ambedkar when he said :

"If any Government ignores them, they will certainly have to answer them before the electorate."

It is, therefore, not correct to criticise these principles as meaningless and useless. It is wrong to say that there is no sanction behind them. In this age of democracy vigilant public opinion is the real force behind an institution which stands for the benefit of the individual. The Government in a parliamentary system is under a constant fire of criticism. The actions of the Government are subject to scrutiny by the masses and the distinguished leaders of the different parties. If the Government pursues a policy in accordance with the principles of the Constitution, people tolerate it, otherwise they oust it in the next elections. Since the Directive Principles have been embodied in the Constitution, the Government are apt to implement them. They may not be the legal force behind them but the highest tribunal—the public opinion—stands behind them. No Government can afford to ignore these directives, if it is not keen to doom its future for all time to come.<sup>4</sup>

There is no anti-thesis between the Fundamental Rights and the Directive Principles. They are meant to supplement one another. *Granville Austin*<sup>5</sup> has described the fundamental rights and the directive principles as the "conscience of our Constitution". *Shelat and Grover, JJ.* in *Keshavanand Bhartia*<sup>6</sup> case observed, "Fundamental Rights and the Directive Principles are meant to supplement one another. It can well be said that the directive principles prescribed the goal to be attained and the fundamental rights lay down the means by which that goal was to be achieved.

The Directive Principles are also relevant to consider what are reasonable restrictions under Article 19. Article 19 permits the imposition of reasonable restrictions on the fundamental rights. A restriction which promotes any objective embodied in the Directive Principles is usually considered reasonable by courts of law. Thus, in the *State of Bombay v. Balsara*,<sup>7</sup> the Supreme Court gave weight of Article 47 which directs the State to bring about prohibi-

1. *Mohd. Hanif Quraishi v. State of Bihar*, AIR 1958 SC 731.

2. *Orient Weaving Mills v. Union of India*, AIR 1963 SC 98.

3. Article 37.

4. Constitutional History of India and Indian Constitution by Vishnu Bhagwan, 1969, pp. 73-74.

5. Cornerstone of a Nation (Indian Constitution) by Granville Austin, p. 75.

6. AIR 1973 SC 1461.

7. AIR 1951 SC 318 at p. 329.

tion of consumption of intoxicating drinks except for medical purposes—to support its decision that the restriction imposed by the Bombay Prohibition Act was a reasonable restriction on the right to engage in any profession or carry on any trade. In *Bijoy Cotton Mills v. State of Ajmer*,<sup>1</sup> the Supreme Court upheld the constitutional validity of the Minimum Wages Act, 1948, by taking into consideration (Article 43). In the opinion of the Court, the fixation of wages for labourers did not violate freedom of trade under Article 19 (5). Shri M. C. Setalwad (Ex-Attorney-General of India) has beautifully summed up the utility of the Directive Principles in this field :

"these fundamental axioms of State policy though of an effect have served as useful beacon light to courts..... Restrictions imposed by law on the freedom of citizens may well be reasonable if they are imposed in furtherance of the directive principles."<sup>2</sup>

**Art. 31-C and Directives.**—Art. 31-C was added to the Constitution by the Constitution 25th Amendment, 1971. This Amendment has considerably enhanced the utility of Directive Principles. The first part of Article 31-C provides that no law which is intended to give effect to the directive principles contained in Arts. 39 (b) and (c) shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 or 31 (Art. 31 has been deleted by 44th Amendment Act, 1978) of the Constitution. The second part of Art. 31-C provided that "no law containing a declaration that it is for giving effect to such policy can be called in question on the ground that it does not in fact give effect to such policy."

Thus, the Amendment for the first time placed the Directive Principles contained in Article 39 (b) and (c) above fundamental rights. The validity of first part of Article 31-C had been upheld in the *Fundamental Rights case*.<sup>3</sup> But the second part of this Article, which barred the judicial scrutiny of laws passed to give effect to directives contained in clauses (b) and (c) of Article 39, was declared unconstitutional.

Art. 31-C was again amended by the 42nd Amendment Act, 1976. The Amendment has widened the scope of Art. 31-C so as to cover all directive principles. For this purpose, the amendment has substituted the words, "all or any of the principles laid down in Part IV" for the words "the principles specified in clause (b) or (c) of Article 39" in Article 31-C of the Constitution. The amendment thus gives precedence to all the directive principles over the fundamental rights of citizens. If a law is enacted for giving effect to any of the directives mentioned in Part IV its validity cannot be challenged in the Courts on the ground that it is inconsistent with or takes away or abridges any of the rights guaranteed by Articles 14, 19 or 31 of the Constitution. However, the Court will still have power to examine whether the law is really intended to give effect to directives, to achieve some other purpose.

Art. 31-C, according to the objects of the Amendment, was necessary to achieve the "socio-economic reform" or "revolution, which would end poverty and ignorance". On behalf of the Government it was said that this has been done in order to restore the primacy of the Directive Principles over the Fundamental Rights as was intended by the framers of the Constitution. But this assertion is wrong as it is clear from the discussion in the Assembly that

1. AIR 1955 SC 33.

2. Quoted in Constitutional History of India by Vishnu Bhagwan, 1969, p. 76.

3. *Kesavanand v. State of Kerala*, AIR 1973 SC 1461.

the framers did not intend to give the Directive Principles any primacy over the Fundamental Rights. On the other hand, they made the Fundamental Rights, justiciable rights (Art. 13) and the Directives non-justiciable rights. (Art. 37). The intention of the framers of the Constitution as reflected from the discussion in the Assembly and the final draft, therefore is that both the goals of individual liberty and social welfare should be achieved by reading them together, without silencing either of them. No Court could possibly say, in the face of Arts. 13 and 37 that non-justiciable rights should prevail over the justiciable rights.<sup>1</sup>

Recently, in the case of *Minerva Mills v. Union of India* (unreported)<sup>2</sup> the Supreme Court by 4 to 1 majority has struck down Art. 31C as unconstitutional on the ground that it destroys the "basic features" of the Constitution. The Court held that Art. 31C is beyond the amending power of the Parliament and is void since it destroys the basic features of the Constitution by a total exclusion of challenge to any law on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Arts. 14 or 19 of the Constitution. The Court will give its reasons later on. The decision of the Court is in accordance with the spirit of the Constitution. There is no conflict between the Directive Principles and the Fundamental Rights. They are complementary to each other. It is not necessary to sacrifice either of them for the sake of the other. As described by Gramvill Austin, the fundamental rights and the directive principles are the "*Conscience of our Constitution*". It can well be said that the directive principles prescribed the goal to be attained and the fundamental rights lay down the means by which that goal is to be achieved.

**Implementation of Directives.**—Guided by the Directives the Central and the State Governments have tried to the best of their resources to implement a large number of Directives. Under Article 39 (b) the Governments have abolished the old institution of hereditary proprietors, such as Zamindars, Jagirdars, etc. and made the tillers of the soil real owners of the land. This reform has, by this time, been carried out almost completely throughout India. Side by side with this, laws have been enacted in many States for the improvement of the condition of the cultivators. In order to prevent concentration of land holdings even in actual cultivation many States have enacted legislation fixing a ceiling, that is to say, a maximum area of land which may be held by an individual owner. Untouchability, the age-old curse of the Indian Society, has not been made an offence punishable by law. The Government has fixed minimum wages for our workers, modernised our labour laws and improved the conditions of labour. A large number of laws have been enacted to implement the directives contained in Article 40. Panchayats have been established in the remotest villages of our country. They have been vested with the powers of civil administration, such as, medical relief, maintenance of village roads, streets, tanks and wells, provisions for primary education, sanitation and the like. They also exercise some judicial powers. For the promotion of cottage industries the Government has established several boards, viz. All India Khadi and Village Industries Board, Small Scale Industries Board, Silk Board, All India Handicrafts Board, All India Handloom Board, etc. Many States have passed laws for compulsory education. Slaughter of cows and calves in some of the States have been prohibited. In some States as Andhra Pradesh, Gujarat,

1. D.D. Basu, Constitutional Law of India, 1977 edition, p. xlvi.

2. The Hindustan Times, May 12, 1980.

Haryana, Punjab, Kerala, Madras, Mysore and Maharashtra Judiciary has been separated from the Executive.

After the 1971 Lok Sabha mid-term poll the Congress Government came forward with much more radical policies towards implementation of the Directive Principles. Fourteen major banks of the country were nationalised. Privy purses and privileges of the princes were abolished. The privileges of I. C. S. Officers were taken away. The Constitution was amended by the 25th Amendment Act, 1971, so as to enable the Government to implement more speedy socio-economic reforms. This Amendment added a new article : Article 31-C to Article 31 of the Constitution. The new Article provides that no law which is intended to give effect to the principles contained in Articles 39-B and 39-C, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Articles 14, 19 or 31 of the Constitution. The validity of the 25th Amendment Act had been upheld by the Supreme Court in the *Fundamental Rights case*.<sup>1</sup>

This amendment, according to the Government, was made to facilitate the socio-economic reforms to be introduced by the Government. It was alleged that courts were standing in the way of implementing the Directive Principles and hence the amendment became necessary.

It is submitted that this allegation is untenable. In an interesting article Mr. Justice K. S. Hegde of the Supreme Court of India has said : "There is no truth in the allegation that the Courts are standing in the way of implementing the Directive Principles. No judicial pronouncement has impeded the implementation of the Directive Principles contained in Articles 40 to 51. One may ask whether any judicial pronouncement come in the way of the State in implementing the mandate contained in Article 44 requiring the State to secure to the citizens a uniform Civil Code throughout the territory of India—a mandate of considerable significance for consolidating and strengthening the nation. I am not aware of any judicial pronouncement which has come in the way of the State securing equal pay for equal work for both men and women and protecting the health and strength of workers : men and women. Nor has any judicial decision interfered with the duty of the State to see that the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength and the childhood and youth are protected against exploitation and against moral and material abandonment." Then referring the complaint that some of the decisions<sup>2</sup> of the Supreme Court have impeded the efforts of the State to secure and protect a just social order he said : "This complaint is an ill-informed one. While the Constitution has laid down that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice social, economic and political, shall inform all the institutions of the national life : it has also prescribed the method by which the social order contemplated should be achieved.<sup>3</sup> In view of these observations, it is submitted that the Constitution (25th Amendment) Act was not at all necessary.

Though much has been achieved still much more is to be achieved. Political influences and economic and social disparities still exist, standard of living of the people is yet to be raised. Unemployment is yet to be implemented. But with all this it can be safely concluded that efforts of Government of the Union and of States are really very encouraging and substantial in the implementation of these objectives.

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1. *Kesavanand v. State of Kerala*, A. J. R 1973 S. C. 1461.
  2. The Bank Nationalisation Case and The Privy Purse Case The 25th Amendment was enacted after these decisions of the Supreme Court.
  3. Northern India Patrika, 24th March, 1971.

## Fundamental Duties (Article 51-A)

The new Part IV-A which consists of only one Article 51-A was added to the Constitution by the 42nd Amendment, 1976. This article for the first time specifies a Code of ten fundamental duties for citizens. Article 51-A says that 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 achievements.

**Need for Fundamental Duties.**—Rights and duties are correlative. The fundamental duties, are, therefore, intended to serve as a constant reminder to every citizen that while the Constitution specifically conferred on them certain fundamental rights, it also requires citizens to observe certain basic norms of democratic conduct and democratic behaviour. It was claimed by the ruling party, the Congress, that what the framers failed to do is being done now. The omission is being rectified by providing a Chapter on the citizen's duties. It was argued that in India people lay emphasis only on rights and not on duties.

It is submitted that this view is entirely wrong. The performance of ones duties even in partial disregard of ones rights and privileges has been traditional in this country. Since time immemorial the emphasis in Indian Society in accordance with the dictates of the ancient scriptures has been on the individuals "Kartavya", that is, performance of ones duty towards society, the country and especially towards one's parents. The Gita and the Ramayana enjoin people to perform their duties without caring for their rights or (fruits).

These traditional duties have been given constitutional sanction. "If one takes care to see, he will discover in the Constitution not only his rights but also his duties. A look at the Constitution will also thus answer the complaint

of some persons that Constitution has conferred rights on the individual but has not set out the duties of the individuals towards the society.<sup>1</sup> By the Preamble the Constitution secures to all the citizens : "liberty of thought, expression, belief, faith and worship." These are fundamental rights of the citizens. The rest of the preamble emphasis only the duties, "justice, social, economic and political". In addition to this, the fundamental rights guaranteed by the Constitution are not absolute rights. The State is empowered to impose reasonable restriction and curtail these rights in the interests of society. Restrictions may sometimes amount to 'prohibition'.<sup>2</sup>

**Source of fundamental duties.**—It is significant to note that none of the constitutions of western countries specifically provide the duties and obligations of citizens. Among the democratic constitutions of the world, we find mention of certain duties of the citizens in the Japanese Constitution. In Britain, Canada and Australia the rights and duties of citizens are governed largely by Common law and judicial decisions. The French Constitution makes only a passing reference to duties of citizens. The American Constitution provides only for fundamental rights and does not refer to duties of citizens. It does not mean that the people of these countries behave in an irresponsible manner. In all these countries the citizens are imbued with a high sense of patriotism as a result of education and training in the elementary duties and obligations of citizenship.

The Constitution of Socialist countries however lay great emphasis on the citizens' duties. Article 32 of the Yugoslavian Constitution lays down, "The freedom and rights shall be achieved in solidarity among the people by the fulfilment of their duties towards each other." Article 36 says, "The right to work and the freedom to work are guaranteed and whoever will not work, though he is fit to do so, shall not enjoy the rights and the social protection that man enjoys on the basis of work". Article 66 lays down, "Every citizen shall conscientiously discharge any public or social office vested in him and shall be personally accountable for discharging it."

But among the Socialist countries, the Soviet Constitution contains a comprehensive Chapter on the citizen's duties. Chapter X of the Soviet Constitution lays down fundamental rights and duties. Article 130 of the Soviet Constitution lays down, "It shall be the duty of every citizen of the USSR to abide by the Constitution of the Union of Soviet Socialist Republics to observe the laws, to maintain labour discipline, honesty to perform public duties, and to respect the rules of the Socialist community". Article 131 lays down, "It is the duty of every citizen of the USSR to safeguard and fortify public socialist property as the sacred and inviolable foundation of the Soviet system, as the source of the prosperity and culture of all the working people." Persons committing offences against public socialist property are enemies of the people. Article 132 makes military service compulsory, which says universal military service in the Armed Forces of the USSR is an honourable duty of the citizens of the USSR. Article 133 says, "It shall be the sacred duty of every citizen of the USSR to defend the country." Treason to the motherland, violation of the oath of allegiance, desertion to the enemy, impairing the military power of the State, espionage is punishable with all the severity of the law as the most heinous of crimes.

Thus the Soviet Constitution imposes upon the people definite duties towards society and towards the State. These duties can be summed up as follows

1. V. S. Deshpande : Rights and Duties under the Constitution, J. I. L. I., Vol. 15, p. 95.
2. Narendra v. Union of India, AIR 1960 SC 430.

observance of the Constitution and laws to maintain labour discipline, honest performance of public duties, respect for the rules of socialist society which govern conduct of citizens in relation to society and each other, safeguarding of public socialist property, universal military service and defence of the country.

Like the Soviet Constitution, Chapter II of the Constitution of the Republic of China lays down specific duties upon the people. Article 118 lays down, "Citizens of the USSR have the right to work, that is, the right to guaranteed employment and payment for their work in accordance with its quantity and quality."

It is interesting to note that while all the aforesaid constitutions specifically lay down duties of the people, they also guarantee the 'right to work' to every citizen. This is an important omission in the Indian Constitution even to-day. Poverty is a curse. Necessity knows no law. A poor, an unemployed cannot be expected to perform his duties towards the society if the society fails to discharge its obligation towards individuals. The right to work should therefore be guaranteed to every citizen, who are expected to do certain duties to the Nation.

**Enforcement of duties.**—The duties incorporated in the Constitution by the 42nd Amendment are statutory duties and shall be enforceable by law. Parliament, by law, will provide penalties to be imposed for failure to fulfil these duties and obligations. The success of this provision would, however, depend much upon the manner in which and the persons against whom these duties would be enforced.

For the proper enforcement of duties, it is necessary that it should be known to all. This should be done by a systematic and intensive education of the people, that is, by publicity or by making it a part of the syllabi and curriculum of education. The Law Minister has himself suggested this. Most of the people of this country are illiterate and not politically conscious of what they owe to society and country. Homes, Universities, offices and their places of work should all be made centres for imparting training in the performance of their obligations.

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## The Union Executive, The President, Vice-President and Council of Ministers (Arts. 52-78 and 123)

**Parliamentary form of Government.**—In India, the Constitution establishes a parliamentary form of Government as distinguished from the American Presidential type of Government. The essence of the parliamentary type of government is that the head of the State is the constitutional head and the real executive powers are vested in the Council of Ministers. The Prime Minister is the head of the Council of Ministers. The Council of Ministers is responsible to the House of the People. Though the executive power is vested in the President but he exercises this power with the aid and advice of the Council of Ministers. The members of the Council of Ministers are all elected by the people and they are members of the Legislature.

### THE PRESIDENT

Article 52 of the Constitution says that there shall be a President of India. He is the head of the Government. The executive power of the Union, Article 53 says, shall be vested in the President and it shall be exercised by him in accordance with the Constitution either directly or through officers subordinate to him. It has been held in *Emperor v. Sionath Banerji*,<sup>1</sup> that the expression 'officers subordinate to him, includes a minister also'. The expression 'executive power' is not defined in the Constitution. Article 73 provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws and includes the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. Thus the executive power of the Union which is exercisable by the President is co-extensive with the legislative powers of the Union. In *Ram Jawaya v. State of Punjab*,<sup>2</sup> the Supreme Court has considered the meaning and scope of the executive power. The Court said, "It may not be possible to frame an exhaustive definition of what executive functions means and implies. Ordinarily, the executive power connotes the residue of Governmental functions that remain after legislative and judicial functions are taken away." The executive power is not confined merely to administration of laws but it includes determination of the Government policy, initiation of legislation, maintenance of law and order, promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State. The executive power of the Union however does not extend to a matter in the Concurrent List unless (1) expressly provided in the Constitution itself, e. g. Articles 256, 257, 298, 353 and 356, or (2) expressly entrusted by a law made by Parliament. Clause (2) of Art. 73 is an exception to the rule laid down in clause (1). This clause provides that until otherwise provided by Parliament, a State may continue to exercise executive power on matters (now included in the Union or Concurrent List) which it was authorised to exercise before the commencement of the Constitution. It should not, however, encroach upon any legal or fundamental rights of the citizen.

1. AIR 1945 P. C. 156 at p. 163.

2. AIR 1955 SC 549.

**1. Qualifications.**—Article 58 lays down the qualifications which a person must possess for being elected to the Office of the President of India :

(a) He must be a citizen of India.

(b) He must have completed the age of 35 years.

(c) He must be qualified for election as a member of the House of the People (*i. e.*, he must be registered as a voter in any Parliamentary Constituency).<sup>1</sup>

(d) He must not hold any office of profit under the Government of India, or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

But the following persons shall not be deemed to hold any office of profit and hence qualified for being a candidate for Presidentship. They are (a) the President and Vice-President of the Union, (b) the Governor of any State, (c) the Minister of the Union or of any State.<sup>2</sup>

**2. Conditions of President's Office**—According to Art. 59 of the Constitution the President cannot be member of either House of Parliament or of a House of the Legislature of any State. If a member of either House of Parliament or of a State Legislature is elected President he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President. The President shall not hold any other office of profit.

**3. Salary and Emoluments.**—The President shall be entitled to use his official residence free of rent. He is also entitled to such emoluments, allowances and privileges, as may be determined by Parliament. His salary at present is fixed at Rs. 10,000 per month. His salary and allowances cannot be diminished during his term of office.<sup>3</sup> On the expiration of his term or resignation, the President is entitled to an annual pension of Rs. 15,000.<sup>4</sup> He is permitted to spend a total amount of Rs. 15,26,000 a year on travel, entertainment, discretionary grants, staff, household expenses and his own allowances.

**Election of President.**—The President of India is not directly elected by the people. Art. 54 provides that the President shall be elected by an electoral college consisting of :—

(a) the elected members of both Houses of Parliament ; and

(b) the elected members of the Legislative Assemblies of the States.

The nominated members of the above Houses at the Centre and the States do not have voting rights in the election of the President. The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote.<sup>5</sup> The system adopted for voting is secret ballot. The Constitution provides as far as practicable there shall be uniformity in the scale of representation among different States *inter se* as well as parity between the States as a whole and the Union at the election of the President.<sup>6</sup>

1. Section 4, Representation of the People Act, 1951.

2. Article 58.

3. Article 59 (3).

4. President's Pension Act, 1951.

5. Article 55 (3).

6. Article 55 (1).

In order to secure uniformity among the States and parity between the Union and States the following formula is adopted :

Every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of 1000 in the quotient obtained by dividing the population of the State by the total number of the elected members of Assembly. The number of votes which each M. L. A. of a State Legislative Assembly gets is as follows :

Population of the State

1

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Total number of elected members of the State	1000
Legislative Assembly	

If by this division the remainder is 500 or more it will be counted as one and the vote of each member is increased by one. Thus the number of votes which a M. L. A. is entitled to cast in the Presidential election is based on the ratio of population of the State.

The number of votes which each elected member of Parliament is entitled to cast shall be obtained by adopting the following formula :

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Total number of votes of M. L. A.'s of State Assemblies.

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Total number of elected members of both Houses of Parliament.

If by this division the remainder exceeds one-half it will be counted as one. This formula secures parity of votes between the members of Parliament and of the Legislative Assemblies of the States.

The illustration given below will make above formula clear. Thus suppose the population of Bombay is 208,49,840. The total number of elected members of the Bombay Legislative Assembly is 208 (one member representing one lakh of population).

How to obtain the number of votes which every member will get is to divide 208,49,840 (population of Bombay) by 208 (total number of elected members of the State) and then to divide the quotient by 1000, i. e.,

$$\frac{20849840}{208} \div 1000 = \frac{100.239}{1000} = 100 \text{ (rejecting the remainder)}$$

239 being less than 500.)

Thus each member of Bombay Legislative Assembly will get 100 votes and the total votes cast by Bombay Legislative Assembly would be :  
 $= 100 \times 208 = 20,800$ .

Now suppose the total number of votes of elected members of Legislative Assembly of all States in accordance with the above calculation is 74,940 and the total of elected members of both the Houses of Parliament is 750. The number of votes which each member of Parliament is entitled to cast would

$$\frac{74,940}{750} = 99 \frac{23}{25} \text{ (since the fraction } \frac{23}{25} \text{ exceeds one half it will be counted as one), and will be added to the total numbers i. e., } 99 + 1 = 100.$$

Under the Constitution, the election of the President must be held in accordance with the system of proportional representation by means of the single transferable vote. The system adopted for voting is secret ballot. The voting system works in following manner :

Let us suppose that there are 4 candidates A, B, C, D, and the total number of valid votes is 15,000. A candidate must secure at least 7,501 first preference votes, that is, more than half the valid votes—to be declared elected. In the first count A, B, C, D, have polled as follows :

A—5,250	}	Total 15,000
B—4,800		
C—2,700		
D—2,200		

Here no candidate has secured a minimum of 7501 votes. In this case D having obtained the least number of votes would be the first to be eliminated and the second preference votes recorded in his favour will be transferred to the remaining candidates A, B and C. Suppose that the second preference votes recorded in the votes of D are as follows :—A—300, B—1050 and C—900. These would be transferred and added to the first preference votes in favour of A, B, C as follows :

$$A—5250 + 300 = 5550.$$

$$B—4800 + 1050 = 5850.$$

$$C—2700 + 900 = 3600.$$

Even in the second count no candidate could secure a minimum of 7501. Here C having obtained the least number of votes is eliminated and the third preference votes recorded in his favour will once again be transferred to A and B. Suppose the third preference votes on the ballot paper recorded in favour of A and B are 1700 and 1900, respectively. The result of this second transfer would be as follows :

$$A—5550 + 1700 = 7250.$$

$$B—5850 + 1900 = 7750.$$

In this illustration, B having obtained the maximum votes, that is, more than half of the valid votes, will be a successful candidate though he had secured fewer first preference votes than A.<sup>1</sup>

This process will be repeated again and again till a candidate secures more than half the valid votes.

The electoral college as envisaged in clause 2 of this Article is to be readjusted after each new census. The expression 'population' in this Article means the population as ascertained at the previous census. The *42nd Amendment Act, 1976*, has amended this Article and added a new explanation which provides that the number of seats in Lok Sabha and the State Assemblies will be determined on the basis of the 1971 census, and will be frozen till the year 2000. This means that there will be no increase in the electoral college till the year 2001. This has been done in accordance with the new population policy of the Government.

S. Disputes regarding the election.—Article 71 provides that all doubts and disputes arising out of or in connection with the election of the President or Vice-President shall be 'inquired' into and 'decided' by the Supreme Court whose decision shall be final. But if the election of a President or Vice-President is declared void by the Supreme Court acts done by President or Vice-President in the exercise of their powers before the date of the decision of the

1. The Hindustan Times, 1969.

Supreme Court,<sup>1</sup> shall not be invalidated by reason of that declaration. Further, subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to the election of the President or Vice-President.<sup>2</sup> Clause (4) of Art. 71 makes it clear that the election of the President or Vice-President cannot be called in question on the ground that there exists any vacancy for whatever reason in the electoral college electing him.

In *Dr. N. B. Khare v. Election Commissioner of India*,<sup>3</sup> the petitioner challenged the holding of the election on the ground that since the general election in certain parts of Punjab and Haryana had not taken place till that time and the electoral college (as envisaged by Articles 54 and 55) for that purpose would be incomplete, therefore the election of the President should take place only after that. The court held that the election of the President could only be challenged after the completion of the election, i. e., after the candidate is declared elected.

Clause (4) of Article 71 which was added by the Constitution (Eleventh Amendment) Act, 1961, makes it clear that the election of the President or Vice-President cannot be challenged on the ground that there exists any vacancy in a particular electoral college for whatever reasons.

After the election was over, in *Dr. N. B. Khare v. Election Commissioner of India*,<sup>4</sup> he again challenged the validity of the election. The Court held that since under section 14 of the Presidential and Vice-Presidential Act an election can only be questioned by a candidate at such election or by 10 or more voters therefore Dr. Khare who was neither a candidate nor an elector was not entitled to challenge the validity of election of the President.

To discourage light minded persons from contesting Presidential and Vice-Presidential elections Parliament has amended the Presidential and Vice-Presidential Election (Amendment) Act, 1974, which now provides that name of the Presidential candidate must be proposed by at least 10 electors and be seconded by 10 electors and the name of Vice-Presidential candidates must be proposed by 5 electors and be seconded by 5 electors. A Presidential and Vice-Presidential candidate is also required to deposit a security deposit of two thousand and five hundred rupees.

In *In re, Presidential Election*,<sup>5</sup> the holding of the election of the President was again challenged on the ground that the electoral college as mentioned in Articles 54 and 55 would be incomplete because the Gujarat State Legislative Assembly was dissolved. It was contended that the Presidential election should be postponed until fresh elections are held in the State of Gujarat.

The Supreme Court held that the election to the office of the President, must be held before the expiration of the term of the President, notwithstanding the fact that at the time of such election the Legislative Assembly of a State is dissolved. The election to fill the vacancy of the office of the President is to be held and completed having regard to Articles 62 (1), 54, 55 and the provisions of the Presidential and Vice-Presidential Elections Act, 1952. Only such persons who are elected members of both Houses of Parliament and the Legislative Assemblies of the States on the date of the election to fill the

1. Article 71 (2).

2. Art. 71 (3).

3. AIR 1957 SC 694 : 1957 SCR 1081.

4. AIR 1958 SC 139 : 1958 SCR 648.

5. AIR 1974 SC 1682.

vacancy caused by the expiration of the term of office of the President will be entitled to caste their votes at the election. Article 56 (1), Proviso (c) applies to a case where successor has not entered on his office and only in such circumstances can a President whose term has expired, continue. Article 56 (1), Proviso (c) and Art. 62 (1) should be read together to give effect to the constitutional intent and content that the election to fill the vacancy caused by the expiration of the term of the President must be completed before the expiration of the term. The elected members of a dissolved Legislative Assembly of a State are no longer members of the electoral college as provided in Art. 54 and, therefore, they are not entitled to cast votes at the Presidential election. The vacancies caused by the dissolution of an Assembly or Assemblies will be covered by Article 71 (4). The Court said that Article 71 (4) was really introduced in 1961 to shut out any challenge to the election on the ground that there was any vacancy among members of the electoral college. The language of Art. 71 (4) is of wide amplitude, *riz.* existence of any vacancy for any reasons whatever among the members of the electoral college. It will take in any case where a person who as an elected member of the House of Parliament or the Legislative Assembly of a State became entitled to be member of the electoral college but ceased to be an elected member at the relevant date of the election and therefore became disentitled to cast vote at the election and that vacancy among members of the electoral college was not filled up.

The Supreme Court, however, refrained from expressing any opinion on the question as to what would happen if there is a "mala fide dissolution" of a State Legislative Assembly or Assemblies or if there is, after the dissolution of the Assmeby or Assemblies a *mala fide* refusal to hold election, thereto within reasonable time before the Presidential election. Likewise, it did not express any opinion on the effect of the dissolution of a substantial member of the State Legislative Assemblies before the Presidential election.

**6. Oath by the President**—According to Article 60, before entering upon his office, the President has to take an oath or an affirmation in the presence of the Chief Justice of India, and in his absence the seniormost Judge of the Supreme Court, "*to preserve, protect and defend the Constitution and the law and to devote himself to the service and well-being of the people of India*".

**7. Term of Office of the President**.—Article 56 says that the President shall hold office for a term of five years from the date on which he enters upon his office. Even after the expiry of his term he shall continue in office until his successor enters upon his office. He is also eligible for re-election. He may be elected for any number of terms. But in America after 22nd Amendment of the U. S. A. Constitution a person cannot be elected to the office of the President more than twice. The President in India may, however, resign his office before the expiry of his normal term of five years by writing to the Vice-President. He may be removed from his office for the violation of the Constitution by the process of impeachment.

**8. Procedure for Impeachment of the President**.—Article 61 of the Constitution lays down the procedure for the impeachment of the President. The President can be removed from his office by a process of impeachment for the "violation of the Constitution". The impeachment charge against him may be initiated by either House of Parliament. The charge must come in the form of a proposal contained in a resolution signed by not less than  $1/4$ th of the total number of the members of the House and moved after giving at least 14 days advance notice. Such a resolution must be passed by a majority of not less than  $2/3$ rd of the total membership of the House. The charge is then

investigated by the other House. The President has right to appear and to be represented at such investigation. If the other House after investigation passes a resolution by 2/3rd majority declaring that the charge is proved, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

Under Art. 11, section 4 of the American Constitution, the President and all Civil Officers of the United States can be removed from office on impeachment for, and conviction of, "Treason, Bribery, or other high crimes and misdemeanours". In America the power to initiate the impeachment proceedings lies with the Lower House which appoints a committee to investigate the charges. The findings of the House are then sent to the Senate for action. The Senate which hears the impeachment is presided over by the Chief Justice of the Supreme Court of America. If the Senate by 2/3rd majority of the members present at the trial agrees to the charges, the President is convicted and removed.

**9. Privileges of the President.**—Article 361 of the Constitution guarantees the following privileges to the President :

(1) The President shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise of those powers and duties. However, the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either Houses of Parliament for the investigation of the charge in impeachment proceedings. Thus the immunity afforded to the President will not restrict the right of any person to bring suits against the Government of India.

(2) No criminal proceedings whatsoever shall be instituted and continued against the President in any court during his term of office.

(3) No process for the arrest or imprisonment of the President shall be issued from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity whether before or after he had entered upon his office until (a) a notice in writing has been given to the President, (b) two months have passed after the service of such notice, and (c) the notice states the nature of proceedings, the cause of action, the name, residence and description of the party taking the proceedings and the relief claimed.

**10. Filling the casual vacancy.**—According to Article 62 (2) an election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal or otherwise shall be held as soon as possible and in no case later than six months from the date of occurrence of the vacancy, the vacancy is filled up by election. Article 65 (1) provides that the Vice-President shall act as the President. If the Vice-President is not available for any of the above reasons, the Chief Justice of India and the seniormost Judge of the Supreme Court available will be in the line of succession to discharge the function of the President.<sup>1</sup>

In *In re Presidential Election case*,<sup>2</sup> the question which was referred to the

1. President Succession Act, 1969.

2. AIR 1974 SC 1682.

Supreme Court for its opinion was whether the election to fill the vacancy caused on the expiry of the term of office of the President must be completed before the expiry of the term of office notwithstanding the fact that the Legislative Assembly of Gujarat was dissolved. The Court held that the election to fill the vacancy in the office of the President must be held before the expiration of the term of the President having regard to articles 62 (1), 54 and 55 of the Constitution.

**The Vice-President.**—There shall be a Vice-President of India.<sup>1</sup> The Vice-President is elected by the members of both Houses of Parliament at a joint session by secret ballot in accordance with the system of proportional representation by means of single transferable vote. The qualifications of the Vice-President are the same as those of the President except that he must be eligible for election to the Rajya Sabha.<sup>2</sup> The term of the Vice-President is five years. He may, however, resign from his office before the expiry of the normal term, or may be removed by a resolution of the Rajya Sabha passed by a simple majority of all the then members of the House and agreed to by a simple majority of the Lok Sabha.<sup>3</sup>

**Functions of the Vice-President.**—The Vice-President of India shall be ex-officio Chairman of the Rajya Sabha.<sup>4</sup> His normal function is to preside over meetings of the Rajya Sabha. But since he is not the member of the Rajya Sabha, he has no right to vote.

His importance in the Constitution is that whenever any vacancy occurs in the office of the President, he acts as President until a new President is elected.

### POWERS OF THE PRESIDENT

**Executive Powers.**—The Constitution has conferred extensive executive powers on the President. The executive power of the Union of India is vested in him. He is the Head of the Indian Republic. All executive functions are executed in the name of the President, and authenticated in such manner as may be prescribed by rules to be made by the President (Article 77). He has power to appoint the Prime Minister and on his advice other Ministers of the Union, the Judges of the Supreme Court, and the High Courts, the Governors of the States, the Attorney-General, the Comptroller and Auditor-General, the Chairman and Members of the Public Service Commission, the Members of the Finance Commission and Official Commissions, Special Officer for Scheduled Castes and Scheduled Tribes, Commission to report on the administration of Scheduled Areas, Commission to investigate into the conditions of backward classes, Special Officer for linguistic minorities.

The President shall have power to remove his Ministers, the Governors, the Attorney-General, Judges and Chief Justice of the Supreme Court, Chairman and Members of the Union Public Service Commission and that of the State Public Service Commission, though in accordance with a prescribed procedure. It is to be noted that he has to exercise his executive powers on the advice of the Prime Minister who is the head of the Council of Ministers.

**Military powers**—The President is the Supreme Commander of the

1. Article 63.

2. Article 66 (3) (c).

3. Article 67.

4. Article 64.

Defence Forces of the country. He has powers to declare war and peace. However the exercise of these powers by the President is "regulated by law". The Parliament is empowered to regulate or control the exercise of the military powers by the President. The military power of the President is thus subordinate to his executive power which is exercisable by him on the advice of the Prime Minister.

**Diplomatic powers.**—As the Head of the State, the President sends and receives Ambassadors and other diplomatic representatives. All treaties and international agreements are negotiated and concluded in the name of the President though subject to ratification by Parliament.

**Legislative Powers**—The President of India is a component part of the Union Parliament. In theory he possesses extensive legislative powers. He has power to summon and prorogue the Parliament and he can dissolve the Lok Sabha. Article 85 (1), however, imposes a restriction on this power. The President is bound to summon Parliament within six months from the last sitting of the former session. If there is a conflict between the two Houses of Parliament over an ordinary Bill he can call a joint sitting of both Houses, to resolve the deadlock.<sup>1</sup> At the commencement of each session the President addresses either House of Parliament or a joint session of a Parliament. In his address to a joint session of Parliament he outlines the general policy and programme of the Government. His speech is like that of the king in England and is prepared by the Prime Minister. He may send messages to either Houses of Parliament.<sup>2</sup>

Every bill passed by both Houses of Parliament is to be sent to the President for his assent.<sup>3</sup> He may give his assent to the bill, or withhold his assent or in the case of a bill other than a money bill, may return it to the House for reconsideration on the line suggested by him. If the bill is again passed by both the Houses of the Parliament with or without amendment, he must give his assent to it when it is sent to him for the second time. A bill for the recognition of a new State or alteration of State boundaries can only be introduced in either House of the Parliament after his recommendation.<sup>4</sup> The State Bills for imposing restrictions on freedom of trade and commerce require his recommendation.<sup>5</sup>

He nominates 12 members of the Rajya Sabha from among persons having special knowledge or practical experience of Literature, Science, Art and Social Services [Art. 80 (3)]. He is authorised by the Constitution to nominate two Anglo-Indians to the Lok Sabha, if he is of opinion that the Anglo-Indian community is not adequately represented in that House (Art. 331).

The President has to lay before the Parliament the Annual Finance<sup>6</sup> Budget, the report of Auditor-General, the recommendations of the Finance Commission, report of the Union Public Service Commission, and reports of the Special Officer for Scheduled Castes and Scheduled Tribes, the report of the Commission of the backward classes and the report of the Special Officer for linguistic minorities.

1. Art. 103.

2. Art. 86.

3. Art. 111.

4. Art. 3.

5. Art. 304.

6. Art. 112.

The Ordinance-making power of the President—Article 123.—The most important legislative power of the President is his Ordinance-making power. If at any time, when both Houses of the Parliament are not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may issue such Ordinance as the circumstances appear to him to require. The Ordinances issued by him shall have the same force as an Act of Parliament. Such Ordinances, however, must be laid before both Houses of Parliament and shall cease to operate, at the expiry of six weeks from the date of re-assembly of Parliament, unless a resolution disapproving it is passed by both Houses before the expiration of six weeks. The President may, if he likes, withdraw such an Ordinance at any time.

The Ordinance making power is exercised by the President on his own 'satisfaction'. The court cannot inquire into the reasons for the subjective satisfaction of the President or into the sufficiency of those reasons.<sup>1</sup> However, in *R. C. Cooper v. Union of India*,<sup>2</sup> the Supreme Court had observed that in issuing Ordinances the satisfaction of the President is not final. But the court did not specify as to when it will interfere.

An Ordinance can be issued only when both the Houses of the Parliament are not in session. It follows from this that an Ordinance can be issued when only one House is in session because a law cannot be passed by one House alone.

It is to be noted that the 'satisfaction' is not the personal satisfaction of the President. In reality, it is the satisfaction of the Cabinet on whose advice the President exercises his Ordinance-making power.

The Ordinance-making power of the President is co-extensive with the legislative power of the Parliament, that is to say, that it may relate to any subject in respect of which Parliament has power to legislate. Hence, an Ordinance will be void in so far as it makes any provision which under the Constitution, the Parliament is not competent to make [Article 123 (3)]. Thus an Ordinance cannot violate the fundamental rights.

In no country, except India, the Executive is vested with legislative power. The Indian Constitution expressly confers power to make Ordinances on the President. The power to make Ordinances is justified on the ground that the President must be armed with powers to meet with serious situation when the Houses of Parliament are not in session. It is not difficult to imagine the cases when ordinary law-making powers may not be able to deal with a situation which may suddenly and immediately arise. In such circumstances, the executive must have power to take immediate action by issuing Ordinances.

With all the constitutional safeguards, there is possibility of abuse of the Ordinance-making power by the Executive.

**The Pardoning power.**—The President has power to grant pardons, reprieves, respite or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence (1) by Court Martial; (2) an offence against any law relating to a matter to which the executive power of the Union extends; or (3) in all cases in which the sentence is one of death. (Article 72). The object of conferring this "judicial" power on the President is to correct possible judicial errors, for no human system of judicial adminis-

1. *Prem Narain v. State of U. P.*, AIR 1960 All 205; *Emperor v. Benoari Lal Sharma*, AIR 1945 P C 48.

2. AIR 1970 S. C. 364.

tration can be free from imperfections.<sup>1</sup> A *pardon* completely absolves the offender from all sentences and punishments and disqualifications and places him in the same position as if he had never committed the offence. *Commutation* means exchange of one thing for another. Here it means substitution of one form of punishment for another of a lighter character, e. g. for rigorous imprisonment—simple imprisonment. *Remission* means reduction of the amount of sentence without changing its character, e. g. a sentence of one year may be remitted to six months. *Respite* means awarding a lesser punishment on some special grounds, e. g. the pregnancy of a woman offender. *Rerieve* means temporary suspension of death sentence, e. g. pending a proceedings for pardon or commutation.

In America, the President can grant pardons for offences against United States, except in cases of impeachment.<sup>2</sup> In *Nanavati's case*,<sup>3</sup> the Supreme Court held that in view of the language of Arts. 72 and 161, which was similar to that used in section 295 (2) of the Government of India Act, 1935, and also similar to that used in Art. 2. Section 2 of the American Constitution, the President and the Governors, in India had the same powers of pardon both in its nature and effect, as it enjoyed by the King in Great Britain and the President in the United States. The pardoning power therefore, can be exercised before, during and after trial.

The distinction between the pardoning power of the Governor and the President has been discussed in detail under the Chapter entitled "The State Executive".

The power to pardon is exercised by the President on the advice of the Council of Ministers.

**Emergency powers.**—Part XVIII (*i. e.*, Articles 352 to 360)\* of the Constitution arms the President with enormous emergency powers. The emergencies envisaged under the Constitution are of three kinds : (1) emergency arising out of war, external aggression or armed rebellion, (2) emergency due to failure of constitutional machinery in the State, and (3) financial emergency.

If the President is satisfied that the security of India is threatened by foreign attack, armed rebellion or war<sup>4</sup> or if either on the receipt of report of the Governor of the State or otherwise he is satisfied that a situation has arisen in which the Government of a State cannot be carried on in accordance with the Constitution<sup>5</sup> or a situation has arisen whereby the financial stability of India is threatened<sup>6</sup> he may proclaim an emergency. A proclamation of emergency may be revoked by a subsequent proclamation. Such a proclamation must be laid before each House of Parliament and ceases to operate at the expiration of one month unless approved by the two Houses. The President may, during the period of emergency suspend the right to move the courts for the enforcement of fundamental rights,<sup>7</sup> (except Art. 21 and 22). He may

1. Basu : Introduction to the Constitution of India, 3rd Edition, 1964, Part II, p. 21.
2. Article VI, section 2 of the American Constitution.
3. AIR 1961 S.C. 112.
4. Article 352 (1).
5. Article 356 (1).
6. Article 360 (1).
7. Article 359.

\* Emergency Provisions have been vitally modified by the 44th Amendment Act, 1978  
See Relevant Chapter.

give directions to any State as to the manner in which the State should exercise its executive powers.

In case of the emergency arising out of constitutional failure of machinery in the State the President may assume any of the powers vested in the Governor. The power of State Legislature shall be exercised by or under the authority of Parliament. Such a proclamation ceases to operate at the expiry of two months unless approved by both Houses of State Legislature.<sup>1</sup> Under the proclamation of financial emergency the Union Government may give such financial direction to the State as it deems fit. The President may direct the reduction of salaries of any class of State officials, the Judges of the Supreme Court and the High Courts. He may require all State money bills to be reserved for consideration of the President.

The emergency powers of the President has been discussed in detail in Chapter 33 of the book.

### POSITION OF PRESIDENT

Prior to the 42 Amendment Act of 1976.—Article 53 (1) says that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Originally, Article 74 provided that there shall be a Council of Ministers with the Prime Minister at the head, to aid and advise the President in the exercise of his functions. Article 74 (2) says that the question whether any, and if so, what advice was tendered by the Ministers to the President shall not be enquired into in any court. Article 75 says that the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister. The Ministers shall hold office during the pleasure of the President.<sup>2</sup>

Now, a purely literal and legalistic interpretation of these articles conveys the impression that the President, if he so desires, can become a dictator. Article 53 (1) leaves a clear scope for the President, if he chooses, to become a real ruler and not to remain mere nominal head of the Union. It is true that there shall be a Council of Ministers with a Prime Minister as a head to aid and advise him in the exercise of his executive powers. But prior to the Constitution (42nd Amendment) Act, 1976 there was no clear provision in the Constitution that the President was bound by the ministerial advice. Consequently, *Allen Gladhill*<sup>3</sup> was of the view that the Constitution could under certain circumstances make the President a dictator. He can easily manage to seize all executive powers by dissolving the Parliament and declaring state of emergency thereby suspending fundamental rights. As a Supreme Commander of the Armed Forces, he can use military to suppress the civil forces. Even without violating the Constitution, an ambitious President can become the real ruler of India.<sup>4</sup>

1. Articles 356, 357.

2. Article 75 (2).

3. Allen Gladhill—*The Republic of India*, p. 107.

4. Constituent Assembly Debates, Vol. VII, p. 33.

This literal interpretation is not in tune with the spirit of the Constitution. No sane President would like to be so ambitious as depicted by Gladbill. None can dispute the fact that the form of Government adopted by the Constitution is a Parliamentary one. It is the essence of the Parliamentary Governments that the real executive powers should be exercised by the Council of Ministers responsible to the Lok Sabha. The President cannot exercise his powers without the aid and advice of a Council of Ministers, i. e., the existence of a Council of Ministers is obligatory. According to Dr. Ambedkar :

"Under the Draft Constitution the President occupies the same position as the King under the English Constitution. He is the Head of the State but not of the Executive. He represents the nation but does not rule the nation. He is the symbol of the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known. He will be generally bound by the advice of the Ministers. He can do nothing contrary to their advice, nor can do anything without their advice."

The President of the Constituent Assembly, Dr. Rajendra Prasad, expressed a similar view in these words :

"Although there is no specific provision of the Constitution itself making it binding on the President to accept the advice of his ministers, it is hoped that the convention under which in England the King always acted on the advice of his ministers, would be established in this country also and the President would become constitutional President in all matters."

The Supreme Court of India has consequently taken the view that the powers of the President and the Governors are similar to the powers of the Crown under the British Parliamentary system.

In *Ram Jawaya v. State of Punjab*,<sup>1</sup> the Court observed, "Under Article 53 (1) of our Constitution the executive power of the Union is vested in the President but under Article 74 there is to be a Council of Ministers with the Prime Minister as the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the Executive and the real executive powers are vested in the Ministers or the Cabinet..... In the Indian Constitution, therefore, we have same system of Parliamentary Executive as in England, and the Council of Ministers consisting, as it does, of the members of the Legislature is, like the British Cabinet "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part". The cabinet enjoying, as it does, a majority in the Legislature, concentrates in itself the virtual control of both legislative and executive functions....."

In *U. N. Rao v. Indira Gandhi*,<sup>2</sup> the Supreme Court held that even after the dissolution of the Lok Sabha the Council of Ministers does not cease to hold office. Article 74 (1) is mandatory, and therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers. Any exercise of executive power without such aid and advice will be unconstitutional in view of Article 53 (1). The facts of the case were as follows :—After the dissolution of the Lok Sabha the Prime Minister, Indira Gandhi, and her Council of Ministers continued to hold office. The appellant

1. AIR 1955 S. C. 549 at p. 556, see also *A. Sanjeeva Naidu v. State of Madras*, AIR 1970 S. C 1102 at p. 1106; *T. K. N. Kajgopal v. T. M. Karunanidhi*, AIR 1971 S. C. 1551.

2. AIR 1971 S. C. 1002.

opinions of judicial authorities and previous decisions of the Supreme Court the court said, "our Constitution embodies generally the parliamentary or cabinet system of Government on the British Model, both for the Union and the States. It is a fundamental principle of English Constitutional law that Ministers must accept responsibility for every executive act. In England the sovereign never acts on his own responsibility, the power of the sovereign is constituted by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisors must have the confidence of the House of Commons. This rule of English Constitutional Law is incorporated in our Constitution.

The Court also overruled the judgment delivered in case of *Sardari Lal v. Union of India*,<sup>1</sup> in which it had held that :

"Where the President or Governor, as the case may be, if satisfied makes an order under Article 311 (2) proviso (c) the satisfaction of the President or Governor is his personal satisfaction."

The framers of the Indian Constitution relied more on constitutional conventions which had developed in England and therefore they did not make any specific provision that the President was to be bound to accept the advice of the Council of Ministers. However certain important safeguards have also been incorporated in the Constitution which support the view that the President was never intended to be either a dictator or an autocrat. They are :—

(1) The Council of Ministers is responsible to the Lok Sabha. If the President ignores the advice of Minister enjoying the confidence of a Parliament it may resign and create a constitutional crisis. It is obligatory on the President to have always a Council of Ministers. If the same person again gains majority and forms a Ministry it would be difficult for the President to work with that ministry.

(2) If he dismisses any ministry having solid support of Lok Sabha, they may bring impeachment proceeding against the President. This power of impeachment of Parliament serves as a deterrent against the President assuming real power.<sup>2</sup>

(3) The power of taxation, legislation and appropriation of funds from Consolidated Funds can be made only by Parliament's authorisation.

(4) The working of the Constitution since 1950 has established that President is a nominal Head and the real executive power vests in the Council of Ministers.

After the 42nd Amendment Act, 1976.—This amendment now removes all doubts about position of the President under the Indian Constitution. It has amended Art. 74 of the Constitution which makes it clear that the President shall be bound by the advice of the Council of Ministers. It says, "there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in exercise of his functions act in accordance with such advice."

In view of the Constitution 42nd Amendment Act, 1976 the President could not play even the role of an advisor or a guide.

1. AIR 1971 SC 1547.

2. Gladhill—*Republic of India, Commonwealth Services*, p. 100.

44th Amendment Act, 1978.—This amendment has inserted the following proviso in clause (1) of Article 74 :

*"Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration."*

This Amendment is intended to prevent the recurrence of the situation which arose in 1975 when President had to sign the Emergency proclamation only on the advice of the Prime Minister Indira Gandhi without consulting her Cabinet Colleagues.

It is submitted that it would have never been the intention of the framers of the Constitution to make the President a puppet. Though they were clear that the President would be a constitutional head, but they never intended that he would be a passive spectator. In view of the oath which he takes under the Constitution "to preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well being of the people of India" he is duty bound to advise, to guide and exert his influence on the decision taken by the Prime Minister. Indeed, this is the real spirit of the Constitution and it is hoped that the holders of that highest office would always abide by it.

The 44th Amendment recognises this limited, but essential role of the President, under the Indian Constitution.

But the weak position of the President does not mean that his office is superfluous. He is the symbol of Indian National Unity. He plays a vital role in the working of the Government. Being impartial and above party politics, he exerts or is likely to exert his influence on the decisions of the Prime Minister. The influence of the President, however, will depend on his sterling character, magnetic personality and selfless devotion to the nation.

In the ultimate analysis, Dr. M. P. Jain observes, it is the Council of Ministers which will prevail and not the President. The President's role at best may be advisory, he may act as the guide, philosopher and friend to Ministers, but cannot assume to himself the role of their master—a role which is assigned to the Prime Minister.'

'Indian President and American President.—The American President is the real executive head and is directly responsible to the people of his country. While Indian President is the nominal head, the real Executive is the Council of Ministers.

The members of the cabinet are appointed by the President in America are responsible to him. In India, the President has no choice but to appoint the leader of the majority party in the Lok Sabha as the Prime Minister.

Dr. Ambedkar, the Chairman of the Drafting Committee, summed up the true position of Indian President in the following words :

"In the Draft Constitution there is placed at the head of the Indian Union a functionary who is called the President of the Union. The title of the functionary reminds one of the Presidents of the United States. But beyond identity of names there is nothing in common between the form of Government prevalent in America and the form of Government proposed under the Draft Constitution. The

American form of Government is called the Presidential system of Government, what the Draft Constitution proposes is the Parliamentary System."

Under the Presidential System of America, the President is the Chief head of the Executive. The administration is vested in him. Under the Indian Constitution the President occupies the same position as the King under the English Constitution. He is head of the State but not the Executive. He represents the nation but does not rule the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known.<sup>1</sup>

Thus his position is more comparable to the King or Queen in England than to the President of America.

### THE COUNCIL OF MINISTERS

Originally, Article 74(1) provided that "there shall be a Council of Ministers with the Prime Minister as its head to aid and advise the President in the exercise of his functions". After the 42nd Amendment, 1976, the language of Art. 74 (1) is as follows—"There shall be a Council of Ministers with the Prime Minister as its head to aid and advise the President who shall, in exercise of his functions, act in accordance with such advice." According to Article 75(1), the Prime Minister shall be appointed by the President and other Ministers shall be appointed by the President on the advice of the Prime Minister.

The Council of Ministers consists of three categories of Ministers,—Cabinet Ministers, State Ministers and Deputy Ministers. The *Cabinet rank Ministers* are the heads of their departments. All Cabinet Ministers are not members the Cabinet. They attend the meetings of the Cabinet when specially invited by the Prime Minister and when the matter concerning their department is discussed by the Cabinet. The *Ministers of State* are formally of Cabinet status and are paid the same salary as the Cabinet Ministers and they hold independent charge of their departments.<sup>2</sup> The *Deputy Ministers* are paid lesser salary than the Cabinet rank Ministers and have no separate charge of a Department. Their task is to assist the Ministers with whom they are attached to in their administrative duties.

The Cabinet is the smaller body of the Council of Ministers. Though the Indian Constitution nowhere mentions the word Cabinet but it does incorporates the essentials of a Cabinet system of British Government. In Britain, the Cabinet is a child of chance and is essentially based upon conventions, i. e., unwritten rules. The Cabinet is thus an extra-constitutional growth based upon convention. The Cabinet is the supreme policy-making body. The Council of Ministers never meet as a whole and it never discusses policy matters. All seniormost Ministers are the members of the Cabinet.

he must become member of Parliament within the period of six months. If he is not elected within the time mentioned above he is bound to resign from the legislature. Before a Minister enters his office, the President shall administer to him the oath of office and of secrecy.<sup>1</sup>

The Ministers shall hold office during the pleasure of the President.<sup>2</sup> The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine.<sup>3</sup>

The Constitution of India thus makes it obligatory for the President to appoint a Council of Ministers and he must exercise his functions with the aid and advice of the Ministers. The relations between the President and the Council of Ministers are confidential because Art. 74 (2) of the Constitution provides that the nature of advice tendered by Ministers shall not be enquired into by the courts.

**Appointment of Prime Minister.**—The Prime Minister is head of the Council of Ministers.<sup>4</sup> Art. 75 says that "the Prime Minister shall be appointed by the President<sup>5</sup> and the other Ministers shall be appointed by the President on the advice of the Prime Minister. The Council of Ministers shall be collectively responsible to the House of the People." But in appointing the Prime Minister the President can hardly exercise his discretion since we have adopted the English Cabinet System which works on conventions. One of the well-established convention in England is that the leader of the majority party of the Lower House is appointed Prime Minister. Hence, the provisions relating to the Council of Ministers should be interpreted in the light of British experience, so the President's choice to select Prime Minister is restricted to the leader of the party in majority in the Lok Sabha or, a person who is in a position to win the confidence of the majority in that House. Thus when a single political party has gained an absolute majority in the Lok Sabha and has an accepted leader the President's choice of selecting a Prime Minister is a mere formality.

But in case of multiple party system as it prevails in India, if none is in a position to gain absolute majority and a coalition Government is to be formed, the President can exercise a little discretion and select the leader of any party who in his opinion can form a stable ministry. But it has been suggested that even in such a situation the President's action should be guided by certain conventions. *Firstly*, convention in England is that in case of the defeat of the Government in the House the President should invite the leader of the opposition in the House to explore the possibility of forming a stable ministry. *Secondly*, he should invite the largest single party in the Lok Sabha to form a Government. *Thirdly*, if two or more party form a coalition before the elections and secure the majority in the Lok Sabha then also he has no option but to invite the leader of the coalition to form the Government.

The last two precedents have been followed in the States. But they had not been practised uniformly in all the States by the Governors. In some States the Governors had called the leader of the largest single party to form the government and rejected the claim of the leader of the coalition, (for

1. Article 75 (4).
2. Article 75 (2).
3. Article 75 (6).
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5. Article 75 (1)

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The Council of Ministers shall be collectively responsible to the House of the People. The Minister must be a member of either House of Parliament. A Minister who for any period of six consecutive months is not a member of either House of Parliament shall cease to be a Minister at the expiration of that period.<sup>3</sup> In England there is no legal requirement that a Minister must be a member of Parliament. An outsider may be appointed a Minister but

1. Constituent Assembly Debates, Vol. VII, pp. 33-34.

2. A minister (including State minister) is paid a salary of Rs. 2250 p. m. and a deputy minister is paid a salary of Rs. 1750 p. m.—See The Salaries and Allowances of Ministers Act, 1952 (as amended by Act of 1970).

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Following a British precedent, the President invited the leader of the opposition Mr. Y.B. Chavan, who had moved the no-confidence motion, to form a Government. After four days of hectic activities, Mr. Charan Singh informed the President that he was not able to form a Government. Until now, the President's action was not subject to any criticism. Thereafter the President adopted an unusual course and asked both Mr. Charan Singh the leader of the alliance and Mr. Desai the leader of the largest single party to submit the list of their supporters. The list submitted by Mr. Charan Singh showed that he had the support of 262 members while Mr. Desai's list contained only 236 members. From this it was clear that even Mr. Charan Singh did not have an absolute majority in the House (which should be 270). On the ground that Mr. Charan Singh had the support of larger number of members than that of Mr. Desai, the President invited him to form an alternative Government. But since the President knew that Mr. Charan Singh had no absolute majority he asked him to seek a vote of confidence in the House within three weeks time. The Janata Party was still the largest single party in the House consisting of 205 members. The party headed by Mr. Charan Singh was a party of defectors and was not recognised as a party in the Lok Sabha. It is submitted that the President was not justified in ignoring the claim of the leader of the largest single party and inviting the leader of the coalition formed after elections to form a government. In no sense, Mr. Charan Singh's Ministry could be a "cohesive" and 'stable' Ministry as desired by the President. A leader of a party of 205 members was more likely to form a stable Government than the leader of a party of 77 members.

Consequently, Mr. Charan Singh's Ministry did not last long. Before facing the Lok Sabha Mr. Charan Singh tendered his resignation to the President because one of his coalition partner (Congress (I)) withdrew its support to his Government and advised the President to dissolve the Lok Sabha and order a mid-term poll.

At the time of dissolution the position of different parties in the Lok Sabha was as follows :

Janata	205		
Congress (O)	83	P W P	6
Janata (S)	77	U P F	4
Congress (I)	64	R S P	4
C P M	22	Forward Block	3
A I A DMK	17	Muslim League	2
Akali (J)	8	N Conference	2
C P I	7	Independent and others	31.

Total Seat 554—Vacant 8 Speaker 1.

The President carried on discussions for a number of days presumably exploring the possibility of making an alternative arrangement. The Janata Party was still the largest single party and its leader Jagjivan Ram claimed that he was in a position to form a ministry. He was also the leader of the opposition at the time Mr. Charan Singh tendered resignation of his Ministry. In both the capacity, Mr. Jagjivan Ram was entitled to be invited to form a Government. The President did not follow the convention of calling the leader of the opposition which he had himself laid down earlier. The President had said that he did not want to encourage defections by calling upon

example, in Rajasthan in 1967 and Madras in 1951.) On the other hand, the Governors in some States had invited the leader of the coalition to form the Government and rejected the claim of the largest single party. Punjab in 1967, Bihar in 1968, West Bengal in 1970, Maharashtra in 1978 and July 1978.]

In 1951, the Governor of Madras invited Mr. Rajagopalachari of Congress party the leader of the largest single party to form a government and rejected the claim of Mr. T. Prakasam who had formed a new party united having the support of 167 members in a House of 375 members. The Congress had a strength of 155 only. The Governor said, "The Head of the State is perfectly within his rights—in fact it is his duty—to call in these circumstances, the leader of the largest group to form the Government. If all the other parties join together and defeat the Government, then and then only, can the Head of the State call the person whom these parties together may choose as their leader to take charge of the Government. I do not think a Governor can take into cognizance any new party that may be said to have been formed after the elections and before the legislature meets. He can only accept the nomenclature of parties as they were given before the elections. It was quite clear in my opinion that the Congress, having the largest following, should be invited to form a Government".

In 1967 in Rajasthan the Governor Sampurnanand invited Mohanlal Sukhadia, though it had a strength of 91 in a House of 184, because it was the largest single party. He rejected the claim of the leader of the coalition formed after election. In 1967 in Punjab after the fall of the United Front Government led by Gurnam Singh the Governor invited Lachman Singh Gill of the Janata Party (a break away group from U. F.) which had a strength of only 17 in the Assembly (out of 104) to form the Government. In Bihar, in 1968 after the fall of the United Front Ministry the Governor invited Mr. B. P. Mandal of Soshit Dal, who had 38 members in a House of 318, to form a Ministry.

In Maharashtra, after the 1978 elections the Janata Party was the largest single party in the Assembly having secured 133 seats in house of 288, but the Governor ignored the claim of the Janata Party and invited the leader of the Congress—Congress (I) coalition to form the Government. Again in July 1978, in Maharashtra, after the fall of the Congress—Congress (I) Ministry the Governor invited Mr. Sharad Pawar who defected from Congress and formed a coalition.

In 1979 for the first time such a situation arose at the Centre after the fall of the Janata Government led by Mr. Morarji Desai. In 1977 several parties joined to form a united party namely the Janata Party to contest Parliamentary Elections. The Janata Party had a landslide victory and the Congress was totally routed. But the differences between the various political parties which constituted the Janata Government widened and finally the followers of Mr. Charan Singh left the party. The defectors formed a new party, the Janata (S). A no-confidence motion was moved in the Lok Sabha by the leader of the opposition, Mr Chavan against the Janata Government headed by Mr. Morarji Desai. While the no-confidence motion was being discussed in the Lok Sabha, the Prime Minister, Mr. Morarji Desai having lost his majority due to defection tendered his resignation to the President.

The situation created by Mr. Desai's resignation has no constitutional precedent to guide the President as to the formation of a new Government. Legal experts have expressed divergent opinions as to the procedure the President should adopt in selecting the leader of the successor Government.

**Dissolution of Lok Sabha.**—Article 85 (b) of the Constitution provides that "The President may from time to time dissolve the House of the People". Thus the power to dissolve the Lok Sabha is vested in the President. But in this respect also he does not have unfettered discretion and is always bound to act on the advice of the Council of Ministers. In England the King is bound to dissolve the House when advised by the Prime Minister. This is a well-settled convention in England. The position in India is the same. So long as the Prime Minister and his Cabinet enjoys the confidence of the Lok Sabha the President is bound to dissolve the House when advised by the Prime Minister.

The question is—*Is the President bound to dissolve Lok Sabha on the advice of the Prime Minister or Council of Minister who does not enjoy the confidence of the majority in the House?*

One view is that the President is bound to dissolve the Lok Sabha on the advice of the Prime Minister, whether he is in majority or reduced to minority. This view is based on a well-established convention in England, though there may be exceptions to this rule in exceptional circumstances.<sup>1</sup> In England it has been a uniform practice for more than a century that the sovereign should not refuse a dissolution when advised by the Prime Minister. Even a Prime Minister who is defeated in a no confidence motion can advise the King to dissolve the House of Commons. The recent precedent in Britain was the resignation of the former Prime Minister Mr. James Callaghan who was defeated in the House of Commons in a no-confidence motion and he advised the King to dissolve the House. The King dissolved the House on his advice.

This precedent can not be applied in the Indian situation, firstly, because of the multiplicity of political parties and secondly, in view of the country's economic situation which can not face frequent elections and thirdly, political immaturity of the electors.

There are number of precedents in various States where the Governors had refused to dissolve the Legislative Assembly on the advice of the Chief Ministers who were defeated in the House in a vote of confidence or were reduced to a minority due to defections. In 1970, the Governor of Uttar Pradesh refused to dissolve the Assembly on the advice of the Chief Minister, Mr. Charan Singh (the present Prime Minister) when he was reduced to a minority because of the defections in the B K D—Congress Coalition Ministry.

The overwhelming juristic opinion is that the advice of the Prime Minister or Chief Minister for the dissolution of Parliament or State Assembly will not be binding on the President in the following four cases :—

- (1) when he loses his majority, or
- (2) when he is unable to prove his majority, or
- (3) when a vote of no-confidence is passed against the ministry, or
- (4) when he is not facing the Parliament (or Assembly), but the President (or Governor) has a proof that the ruling party does not have a majority.

In the above mentioned circumstances the President must try to find out whether any alternative ministry can be possible.<sup>2</sup> He should make all possible efforts to avoid a mid-term poll. Dr. Ambedkar had said in the Constituent Assembly, "The President of Indian Union will test the feelings

1. See Jenning's Cabinet Government, 3rd ed. pages 412, 423.

2. The Hindustan Times December 21, 1969.

*Mr. Jagjivan Ram as the leader of the party of 205 members. This appears to be fantastic because he made a great defector, Mr. Charan Singh as Prime Minister.*

"It is submitted that the President's action was not only improper and discriminatory but led to a situation in which he should never have placed the country. He set up a Government which never commanded the confidence of the House of the People at all, that Government was to remain in power for a period of over 4 months. The President of India has thus presented to the world the humiliating spectacle of a great democratic country being ruled by a Government which never commanded the confidence of the House of the People."<sup>1</sup>

Thus it is clear that though in the above circumstances the President can exercise his discretion in appointing the Prime Minister but it will certainly be better to lay down certain conventions in this matter so as to avoid the situation created by the unconstitutional action of the President. It is, therefore, suggested that in the matter of the appointment of the Prime Minister the President should follow the following principles :

1. He should invite the leader of the opposition if the government is defeated in the House on a no confidence motion.
2. He should call the leader of the coalition formed before the elections.
3. He should invite the leader of the largest single party in the House.
4. He should invite the leader of the coalition or alliance formed after the election.

Thus the leader of the coalition or alliance formed after the elections should be given chance in the last, because such a coalition is not formed on any common principles and policies but only with the object of getting into power. More so, when the coalition is formed with the help of the defectors from the ruling party and other parties join it simply to topple the Government. The President instead of following the precedent set by himself earlier and calling upon the leader of opposition Mr. Jagjivan Ram, decided to dissolve the Lok Sabha ordering a mid-term poll with Mr. Charan Singh as caretaker Prime Minister. It is submitted that by doing so the President acted against all known constitutional conventions and accorded honour and recognition to a person who has usurped the Prime Ministership by defection. The Lok Sabha has never recognised him as the leader of the House.

**Advice of the caretaker Prime Minister.**—The Constitution does not provide for a caretaker Government at the Centre but at the same time it does not also envisage a situation when the country will be without a popular Government. Articles 74 and 75 of the Constitution provide for a Council of Ministers at the Centre to aid and advise the President. The wording of Art. 74 that "there shall be a Council of Ministers" makes it clear that, there can not be at any time a vacuum. The inference is that even when Parliament is dissolved the administration has to be carried on by the President with the aid of a Council of Ministers or a caretaker Government. A caretaker Prime Minister is not barred from taking major decisions if the situation so demands. But the Caretaker Prime Minister can not take such policy decisions which would benefit his party in the coming elections.

1. Seervai, Constitutional Law of India, Vol. III, page 1826.

to the Lok Sabha. The principle of collective responsibility means that the Council of Ministers is as a body responsible to the Lok Sabha for the general conduct of affairs of the Government. The Council of Ministers work as a team and all decisions taken by the Cabinet are the joint decisions of all its members. No matter whatever be their personal differences of opinion within the Cabinet, but once a decision has been taken by it, it is the duty of each and every Minister to stand by it and support it both in the Legislature and outside. Lord Salisbury explained this principle of collective responsibility.

'For all that passes in the Cabinet each member of it who does not resign is absolutely and irretrievably responsible, and has no right afterwards to say that he agreed in one sense to a compromise while in another he was persuaded by his colleagues.'<sup>1</sup>

Thus the only alternative before a Minister who is not prepared to support and defend the decision of the Cabinet is to resign. This is a great weapon in the hands of the Prime Minister through which he maintains unity and discipline in his colleagues (Cabinet). A Minister who does not agree with Prime Minister or the Cabinet has the only alternative, that is, to resign from the Cabinet.

According to this rule, the Council of Ministers is collectively responsible to the Lok Sabha, hence as soon as a Ministry loses the confidence of the House or is defeated on any question of policy, it must resign.

**Minister's individual responsibility.**—Along with the principle of collective responsibility the principle of individual responsibility of each Minister to the Parliament also works. Every Minister is responsible for the acts of the officers of his department. He has to answer question regarding the affairs of his department in the Parliament. He cannot throw the responsibility of his department either on his officials or another Minister. As Wade and Phillips say 'for every act or neglect of his department a Minister must answer'. If the Minister has taken action with the approval of the Cabinet the principle of collective responsibility applies and the whole Cabinet should support and defend his actions. However, if the Minister has taken action without the Cabinet's approval, the Cabinet may and may not support him. If the Cabinet does not support his action, in that case, then the Minister has to go and not the whole Cabinet. But the Cabinet cannot retain the Minister at and the same time contend that the responsibility is all his."<sup>2</sup>

**Constitutional duties of the Prime Minister.**—Article 78 provides that it shall be the duty of the Prime Minister (1) to communicate to the President "all decisions" of the Council of Ministers relating to the administration of the affairs of the Union and proposal for legislation, (2) to furnish such information relating to administration of the affairs of the Union and proposals for legislation as the President may call for, and (3) if the President so requires to submit for the consideration of the Council of Ministers any matter on which 'a decision' has been taken by a Minister but which has not been considered by the Cabinet.

Thus it is clear that the Prime Minister communicates the decisions<sup>1</sup> and not merely renders advice to the President. The President in fact is bound to accept the decisions taken by the Cabinet. The decision is taken by the Cabinet

1 Life of R. B. Salisbury, Vol. II, pp. 219-20.

2 Ram Jawaya v. State of Punjab, AIR 1933 SC 549.

of the House whether the House agrees that there should be dissolution or whether the House agrees that the affairs should be carried on with some other leader without dissolution."

In view of the abovementioned principles and the spirit of the Constitution, it is submitted the President was not bound to dissolve the Lok Sabha on the advice of Mr. Charan Singh. Mr. Charan Singh's Government did not at any time either have the mandate from the people or enjoy the confidence of the Lok Sabha. His appointment was conditional which was to be complete on having obtained the vote of confidence of the Lok Sabha.

If he had been able to obtain a vote of confidence then only he would have become competent to tender any advice to the President for dissolution of the House. But before facing the Lok Sabha he tendered his resignation and after tendering the resignation of his Ministry he had no right to recommend for the dissolution of the House. The overwhelming legal opinion was that the President was not bound by the advice of Mr. Charan Singh.

The fact that he carried on discussions for a number of days with political leaders after the resignation of Mr. Charan Singh's Government makes it clear that the President did not think that he was bound by the advice of Mr. Charan Singh and yet he dissolved the House and allowed an unconstitutional Ministry to continue in office for 5 months. The President has nowhere said that he came to his decision to dissolve the House because of Mr. Charan Singh advice. Even if one concedes that the President was right in holding that no stable Government was possible in the prevailing circumstances, he had an obligation to prove without the shadow of doubt that his assessment was indeed correct. The President would have stayed above controversy if he had given an opportunity to Jagjivan Ram to prove his majority in the Lok Sabha. The Janata Party was still the largest single party consisting of 205 members. No rational reason has been given as to why the President did not give a chance to Mr. Jagjivan Ram to form a Government. If he could call leaders of 70 M P's and 80 M P's to form a government why could he not ask the leader of 205 M Ps (Mr. Jagjivan Ram) to prove his majority on the floor of the Lok Sabha. Whether he proved his majority or not the controversy would have lost nothing by testing his claim.<sup>1</sup> There can be no doubt that the Constitution gives the President no power to carry on the Government of the country by the aid of a Ministry which he may choose to appoint but which never commanded the confidence of the House of the People.<sup>2</sup>

The other Ministers are to be appointed by the President on the advice of the Prime Minister. Thus the Prime Minister has the final word to choose the members of his team (Cabinet). He must have such Cabinet colleagues who can work together and can secure the support of the Lok Sabha.

This power of the Prime Minister is also essential for the proper functioning of the principle of collective responsibility.

**Principle of collective responsibility.**—The basic principle of Parliamentary form of Government is the principle of collective responsibility. In England, this principle works on well-established conventions. In India, this principle is ensured by making specific provisions in the Constitution. Article 75 (3) provides that the Council of Ministers shall be collectively responsible

1. The Hindustan Times : August 20, 1979, page 6.

2. Srivastava, Constitutional Law of India, Vol. III, page 1831.

"He (the King) would be justified in refusing to assent to a policy which subverted the democratic basis of the Constitution by unnecessary or indefinite prolongation of the life of Parliament by gerrymandering of the Constituencies in the interest of one party, or by fundamental modifications of the electoral system to the same end."<sup>1</sup>

No ministry has been dismissed in England on this ground. But in India there are examples. Before the commencement of the Constitution the Khan Saheb Ministry was dismissed by the Governor of North-West Frontier Provinces on the above ground.

There are two such instances after the Constitution of India came into force. In 1959 the Communist ministry in the State of Kerala was dismissed on the ground that it had lost the confidence of the people, although it enjoyed the confidence of the Legislature.

In 1977 the Congress ministries in the nine States were dismissed on the ground that they had lost the confidence of the electorates. Again in 1980 the Janata ministries in the nine States were dismissed on the ground that they had lost the confidence of the people and also not co-operating with the Centre.

Professor V. N. Shukla,<sup>2</sup> has rightly observed that it is no violation of constitutional practice if the President dismisses a ministry when he is satisfied on reasonable grounds that it has lost the support of the people. The will of the people must in the end prevail and the President will be violating the Constitution if he allows the discredited ministry to continue in office only because it has succeeded in managing to keep the members of the Legislature in its favour.

But the real problem is how to know the will of the people. It is open to him from the views of the press and the result of bye-elections. But these methods are not free from difficulties. No doubt there is difficulty in obtaining the true information but if the President is clear and his decision is based on reasonable and proper grounds, there should be no difficulty in taking the action.

### THE ATTORNEY-GENERAL OF INDIA

The Attorney-General of India is appointed by the President. The person to be appointed as Attorney-General must be qualified to be appointed as a Judge of the Supreme Court.<sup>3</sup> He holds office during the pleasure of the President. He shall get such remuneration as the President may determine.<sup>4</sup>

**Functions of Attorney-General.**—The Attorney-General is to give advice to the Government of India upon such legal matters as may, from time to time, be referred or assigned to him by the President. He perform such other duties of a legal character which may be assigned to him by the President from time to time. He has also to discharge the functions conferred on him by the Constitution or by any other law.<sup>5</sup>

1. Jennings's Cabinet Government, p. 201 at p. 307.

2. Dr. V. N. Shukla—The Constitution of India, 1972 ed., p. 214.

3. Article 76 (1).

4. Article 76 (4).

5. Article 76 (2).

whose head is the Prime Minister and it is binding on the President because it is the Prime Minister and his Cabinet which is responsible to the House of People. There is no provision in the Constitution which makes the President responsible to the Parliament. Indeed, it is anomalous to suggest that the Cabinet Ministers are answerable for the acts and policies of the Government in the making of which they only advise, while the final decisions are taken by the President.

According to Article 78 (e), it shall be the duty of the Prime Minister, if the President so requires, to submit for consideration of the Council of Ministers any matter on which "a decision" has already been taken by a Minister but which has not been considered by the Cabinet. This is very necessary for the successful working of the principle of collective responsibility.

**Dismissal of a Minister.**—According to Article 75 (2) Ministers hold office during the pleasure of the President. But the President is bound to exercise his pleasure in accordance with the advice given by the Prime Minister. It is true that the President appoints the Prime Minister but other Ministers are appointed by him on the advice of the Prime Minister. It is the Prime Minister who selects the men of his team with whom he has to work. Moreover, for the effective realisation of the rule of the collective responsibility it is necessary that he should have unfettered discretion to select and to drop any Minister. If he thinks that the presence of any Minister is detrimental to the efficiency, integrity or policy of the Government he may drop him from the Cabinet or advise the President to dismiss him from the Cabinet. Dr. Ambedkar said, "No person shall be retained as member of the Cabinet, if the Prime Minister says that he shall be dismissed. It is only when members of the Cabinet, if both in the matter of their appointment as well as in the matter of the dismissal, are placed under the Prime Minister that it should be possible to realize the idea of collective responsibility."<sup>1</sup> Shri M C. Chagla, Shri T. T. Krishnamachari, Shri Ashok Mehta and Shri Morarji Desai had to resign as they had their differences with the Prime Minister. "The Prime Minister is really the keystone of the arch of the Cabinet and unless and until we create that office and endow that officer with statutory authority to nominate and dismiss Ministers there can be no collective responsibility."<sup>2</sup>

**Dismissal of the Cabinet.**—It is an established convention of Parliamentary type of Government that a ministry that has lost the confidence of the Lok Sabha must resign. If it insists on to remain in office the President, no doubt, can dismiss that ministry.

*What about a ministry which though enjoys the confidence of Lok Sabha but has lost the support of the people. Can the President dismiss such ministry?* There are two views on this point. According to Professor Dicey, the King can dismiss such a Ministry which though enjoys the confidence by the House of Commons but has lost the support of the people. On the other hand, Dr. Jennings,<sup>3</sup> says that the King has no right to dismiss a ministry as long as it enjoys the confidence of the House of Commons. But he accepts one exception to the above rule, viz. if existing Ministry postpones the general election. Dr. Jennings says :

1. Constituent Assembly Debate, Vol. VII, p. 1159.
2. Constituent Assembly Debates, Vol. VII, p. 1159; Dr. Ambedkar, the Chairman of Drafting Committee.
3. Jennings's Cabinet Government, p. 201.

## 21

# The Parliament (Arts. 79 to 122)

**Composition of Parliament.**—Parliament of India consists of three organs, the President, the Council of State (the Rajya Sabha) and the House of the People (the Lok Sabha). Though President is not a member of either House of Parliament yet, like the British Crown, he is an integral part of the Parliament and performs certain functions relating to its proceedings. The President of America is not the integral part of the Legislature. In India, the President summons the two Houses of Parliament, dissolves the House of People and gives assent to Bills.

It is to be noted that, though the Indian Constitution provides for the Parliamentary form of Government but unlike Britain, the Parliament is not supreme under the Indian Constitution. In India, the Constitution is supreme. In England, laws passed by the Parliament can not be declared unconstitutional while the Indian Constitution expressly vests this power in the Courts.

### 1—THE RAJYA SABHA

The Rajya Sabha or the Council of States is the Upper House of the Union Parliament. The maximum membership of the Rajya Sabha is fixed at 250 of whom (a) 12 shall be nominated by the President, and the remainder, i. e., 238 shall be representatives of States and the Union Territories.<sup>1</sup>

The representatives of States are elected by the members of the Legislative Assemblies in accordance with the system of proportional representation by means of the single transferable vote. The representatives from the Union Territories are chosen in such a manner as Parliament may by law determine. The allocation of seats to each States or Union Territory and number of seats allotted to each in the Rajya Sabha are specified in the Fourth Schedule.

The 12 nominated persons are chosen by the President from amongst the persons having special knowledge or practical experience in Literature, Science, Art and Social Service.<sup>2</sup> The nominated members do not participate in the election of the President of India.

The present allocation of seats in the Council of States, among the States and Union Territories as given in the Fourth Schedule is as follows:

Andhra Pradesh 18, Assam 7, Bihar 22, Gujarat 11, Haryana 5, Kerala 9, Madhya Pradesh 16, Tamil Nadu 18, Maharashtra 19, Karnataka 12, Orissa 10, Punjab 7, Rajasthan 10, Uttar Pradesh 34, West Bengal 16, Jammu and Kashmir 4, Nagaland 1, Himachal Pradesh 3, Manipur 1, Tripura 1, Meghalaya 1, Sikkim 1<sup>3</sup>, Delhi 3, Pondicherry 1, Mizoram 1, Arunachal Pradesh 1 = Total 232

The Rajya Sabha is permanent House. It is not subject to dissolution. Its members are elected for a period of six years but one-third of its members retire after every two years.

1. Article 80 (1).

2. Article 80 (3).

3. Sikkim was admitted into the Union of India as the 22nd State by the Constitution (36th Amendment) Act, 1975.

According to the rules<sup>1</sup> made by the President under this Article the Attorney-General is required to appear on behalf of the Government of India in all cases in the Supreme Court in which the Government of India is concerned. He may also be required to appear in any High Court in any case in which the Government of India is concerned. He shall neither advise nor hold a brief against the Government of India in cases in which he is called upon to advise the Government of India. Nor defend accused persons for criminal prosecutions without the permission of the Government of India. He is prohibited to take appointment as a director in any company.

In the performance of his duties he has right of audience in all Courts in the territory of India.<sup>2</sup> He has right to speak and take part in proceedings of either House of Parliament without a right to vote.<sup>3</sup> He is entitled to all the privileges and immunities as a member of Parliament.<sup>4</sup>

The office of Attorney-General in England, and few other countries is a Political Office. He is a member of the Cabinet and comes and goes with the ministry. But the practice in India is different. The Attorney-General of India is not, as in England, a member of the Cabinet. There is a Minister of Law in the Cabinet to deal with legal affairs of Government level.

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1. See Notification No. F. 43-50E, dated January 26, 1930, Gazette of India, Extraordinary, Vol. VII, pp. 33-34.
2. Article 76 (3).
3. Article 83.
4. Article 105 (3).

The Constitution (36th Amendment) Act has admitted Sikkim into the Union of India as the 22nd State of the Indian Union and has allotted one seat in the Lok Sabha to Sikkim representative.

**Territorial constituencies.**—For the purpose of election of the Lok Sabha each State is divided into territorial constituencies in such manner that the ratio between the population of the constituency and the number of seats allotted to, so far as practicable is the same throughout the State.<sup>1</sup> Each State is allotted a number of seats in the Lok Sabha in such manner that ratio between that number and its populations, so far as practicable is the same for all States.<sup>2</sup> Clause (2) of Article 81, thus provides for uniformity of representation in two respects : (a) as between the different States, and (b) as between the different constituencies in the same State. The population for this purpose will be ascertained on the basis of the last preceding census. After the completion of each census (a) allocation of seats in the Lok Sabha to the States, and (b) the division of each State into territorial constituencies shall be readjusted in such manner as Parliament may by law prescribe.<sup>3</sup>

The 42nd Amendment, 1976 amended Arts. 81 (3) and 82 of the Constitution and added new proviso to these Articles. The new explanation to Art. 81 says "the population for the purpose of Article 81 shall be ascertained on the basis of the 1971 census and will be frozen till the year 2000. The new proviso to Art. 82 says that provided further that such re-adjustment shall take effect from such date as the President may by order, specify and until such re-adjustment takes effect, any election to the House may be held on the basis of the territorial constituencies existing before such re-adjustment.

This means that there will be no re-adjustment of the territorial constituencies on the basis of new census till the year 2000. The re-adjustment of the constituencies may be taken up after the year 2000 and until this is done the allocation of seats in the Lok Sabha will be done on basis of the 1971 census. This Amendment has been made in pursuance of the new population policy of the Government of India. It is difficult to understand how this amendment would be able to check the growth of population in the country. This would, it was hoped, discourage people to produce more children and thus check the growth of population, in the country. Whether re-adjustment of the constituencies, and consequently the re-allocation of seats in the House of the People would be necessary after the year 2000 will be decided by the President.

**Tenure of Lok Sabha.**—The Lok Sabha shall continue for five years from the commencement of its first session.

The President may, however, dissolve it even earlier. But while a proclamation of emergency is in operation the life of the House of People may be extended by law of Parliament for one year at a time. The Lok Sabha, whose life has been so extended cannot continue beyond a period of six months after the proclamation of emergency has ceased to operate.<sup>4</sup>

The Lok Sabha in India is composed of on almost similar lines as the Lower Houses in England, America, Canada and Australia. In England

1. Article 81 (2) (b).

2. Article 81 (2) (a).

3. Article 82.

4. Article 83 (1).

**Position in England.**—The Upper House in England is known as House of Lords. Like our Rajya Sabha it is also a permanent House not subject to dissolution, but it differs from House of Lords in the sense that while House of Lords consists of mostly of hereditary lords created by the Crown, the Rajya Sabha is an elected body, though the election is indirect. Secondly, the membership of the House of Lords is for life but membership of Rajya Sabha is not for life but for six years only.

**Position in U. S. A.**—The Upper House in U. S. A. is known as the Senate. Each State sends two Senators in Senate irrespective of its size, population wealth or importance. Its membership is 100. Terms of Senators, is six years but one-third of its members retire after every two years. Originally, the Senators were elected by the State Legislatures. But this method was ended by the Constitution 17th Amendment in 1913 which now provides for direct election of members of the Senate from people. But in Rajya Sabha the members are elected on population basis. Like Indian Rajya Sabha it is a continuing body and one-third of its members retire after every two years. Its tenure is for six years.

In Australia, the Senate, is composed of ten members from each of the six States. The term of a Senator is six years, half of them are elected every three years.

**Importance of the Rajya Sabha.**—The Rajya Sabha fulfils the following purposes :

(1) It is considered useful because senior politicians and statesmen might get an easy access in it without undergoing the ordeal of general elections necessary for the members of Lok Sabha so that experience and talent is not lost to the country and they may discuss questions of public interest.

(2) The Rajya Sabha acts as a revising House over the Lok Sabha which being a popular House may be tempted to act rather hastily in keeping view of public opinion. The existence of Rajya Sabha stops the drastic changes in the law of the country made in the heat of momentary passion and affords opportunity for its reconsideration by delaying its adoption for a limited period.

(3) The Rajya Sabha is a House where the States are represented keeping with the federal principles.<sup>1</sup>

The Vice-President shall be the *ex officio* Chairman of the Rajya Sabha.

## 2—THE LOK SABHA

The Lok Sabha is a popular House. Its members are directly elected by the people. The maximum number of its membership is fixed at 545,<sup>2</sup> out of whom, (a) not more than 525 are elected by the votes in the States, (b) not more than 20 to represent the Union territories.

The representatives of States are elected directly by the people of the States on the basis of adult franchise. Every citizen of India, male or female, who is not less than 21 years of age and is not disqualified on the grounds of non-residence unsoundness of mind, crime or corrupt or illegal practice, is entitled to vote at election of the Lok Sabha.<sup>3</sup>

1. Article 83 (a), (b).

2. The Constitution (31st Amendment) Act, 1972.

3. Article 326.

(6) dismissal from Government service for corruption or disloyalty to the State.

**Decision on questions of disqualifications of Members.**—Article 103 provides that if any question arises to whether a member of either House of Parliament has become subject to any disqualification mentioned under Article 102 the question shall be referred to the President whose decision shall be final. However, the President is required to obtain the opinion of the Election Commission before giving any decision on matter of qualifications and shall act according to it.<sup>1</sup>

The words 'has become' in Art. 103 refer to disqualifications incurred by the members subsequent to the election. This Article does not deal with the disqualifications which arise at the time of the election. The question whether a person is disqualified at the time of election could only be decided by the Courts.<sup>2</sup>

According to Article 101 when a sitting member becomes subject to a disqualification after his election he will *ipso facto* cease to be a member, and his seat shall become vacant. No person can be a member of both Houses of Parliament at the same time. If a person is elected member of both Houses of Parliament, the Parliament may provide by law in which House he will vacate his seat. No person can be a member of both the Parliament and the State Legislature. If a person is so elected then at the expiry of such time as the President may by rules specify, that person's seat in the Parliament shall become vacant unless he has previously resigned his seat in the State Legislature.<sup>3</sup>

The Representation of Peoples Act, 1951, provides that if a person is elected to both Houses of Parliament, he must intimate within 10 days from the publication of the election result in which House he desires to serve. In default of such intimation within ten days, his seat in the Rajya Sabha at the expiry of such period, becomes vacant. If a person is already a member of Lok Sabha, is elected to Rajya Sabha, his seat in the Lok Sabha shall become vacant. If a person is already a member of Rajya Sabha and subsequently elected to Lok Sabha, his seat in Rajya Sabha shall become vacant.

According to the Prohibition of Simultaneous Membership Rules, 1950, if a person is elected to both Parliament and House of the Legislatures of State, his seat in Parliament becomes vacant after 14 days, unless he has resigned his seat in the State Legislature. If a person is elected to the Legislatures of two or more States, his seat in the Legislature of such States becomes vacant within 10 days unless he has previously resigned his seat in the Legislature of all but one of the States. So according to section 68 of the Representation of Peoples Act, 1951, if a person is elected to more than one seat in either House of Parliament or in the House he is to choose only one seat in which he wants to serve.

**Vacation of seats.**—A member of either House of Parliament may resign his seat by writing to the Chairman or the Speaker as the case may be. His seat shall then become vacant.<sup>4</sup> If a member of either House of Parliament without the permission of the House, absents himself from all meetings, of the House for a period of sixty days the House may declare his seat vacant.<sup>5</sup> A

1. Article 103 (1) (2).
2. *Election Commission v. Saka Venkata Subba Rao*, AIR 1953 S. C. 210.
3. Article 101 (2).
4. Article 101 (3) (b).
5. Article 101 (4).

the House of Commons, like the Lok Sabha is elected directly by people for five years on adult suffrage. It can be dissolved by the Crown even earlier. The House of Representatives in U. S. A. like our Lok Sabha is elected directly by the people. Its tenure is fixed for two years. The House of Representative differs from our Lok Sabha in one respect, that is not subject to dissolution before the expiry of its normal period of 4 years. The Lok-Sabha in India may be dissolved even before the expiry of its normal period of 5 years.

**Qualification for membership of Parliament.**—A person for being chosen as a member for Parliament must be—

(a) a citizen of India,

(b) not less than 30 years of age in the case of the Council of States and not less than 25 years of age in the case of House of the People,

(c) possessing such other qualifications as may be prescribed by Parliament,

(d) taken on oath before some person authorised in that behalf by the Election Commission according to form set out for the purpose in Third Schedule.

The Representation of Peoples Act, 1951, requires that a person's name should be registered as voter in any Parliamentary Constituency.

**Disqualifications.**—A person is disqualified for being chosen and for continuing as a member of Parliament if he suffers from following disqualifications :

(a) If he holds any office of profit under Central or the State Government, other than an office declared by Parliament by law not to disqualify its holder.<sup>1</sup>

(b) If he is of unsound mind and a competent court has declared him to be so.

(c) If he is an undischarged insolvent.

(d) If he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or under any acknowledgment of allegiance or adherence to a foreign State.

(e) If he is so disqualified under any law made by Parliament. Parliament has presented the necessary disqualifications in the Representation of Peoples Act, 1951.

A Minister in the Central or the State Government is not considered as holding the office of profit.<sup>2</sup>

The disqualifications under the Representation of Peoples Act are—

(1) corrupt practice at an election,

(2) conviction for an offence resulting in imprisonment for two or more years,

(3) failure to lodge an account for election expenses, —

(4) having an interest or share in the contract for supply of goods or execution of any work or performance of a service to the Government,

(5) being a director or managing agent or holding an office of profit in a Corporation in which the Government has 25% share,

1. Article 102 (1).

2. Article 102 (2).

consideration the Speaker, and when it is against the Deputy Speaker, the Deputy Speaker shall not preside at the sittings of the House, though he may be present.<sup>1</sup> The Speaker and Deputy Speaker will get such salaries and allowances as are fixed by Parliament by law and until a provision is so made as specified in the Second Schedule.<sup>2</sup>

The office of the Speaker is one of great responsibility. He upholds the dignity and privileges of the House. Once elected, he must rise above party interests. In England, it is a convention that the Speaker has to resign from his party. This is necessary to maintain impartiality on his part. The Constitution of India contains certain provisions for maintaining independence and impartiality of the Speaker. His salary is charged on the Consolidated Fund of India and is not subject to the annual vote by Parliament. He cannot be removed from his office except by a resolution passed by a special majority.

For Powers and Functions of Speaker—See under Chapter 'State Legislature'.

#### Sessions of Parliament

The President shall from time to time summon each House of the Parliament to meet at such time and place as he thinks fit. But the right of the President to summon the House is subject to the condition that six months should not intervene between its last sitting in one session and the date appointed for its sitting in the next session.<sup>3</sup>

In *Smt. Indira Nehru Gandhi v. Raj Narain*,<sup>4</sup> the validity of the Constitution (39th Amendment) Act, 1975, was challenged on the ground that the constitution of the House which passed the Amendment was illegal. It was contended that the sessions of the Lok Sabha and Rajya Sabha were invalid. It was said that a number of members of Parliament were detained by Presidential order after 26th June, 1975 and before the summoning of a session of the Parliament. Unless the President convenes a session of the full Parliament by giving all members thereof an opportunity to attend the session and exercise their right of speech and vote, the convening of the session would be illegal and unconstitutional and cannot be regarded as a session of the two Houses of Parliament.

The Supreme Court rejected this argument of the respondent and held that the constitution of the House which passed the Constitution (39th Amendment) Act was not illegal on the ground that a number of members of Parliament of the two Houses were detained by the executive order. The contention that the sittings of the two Houses were not valid essentially relates to the validity of the proceedings of the two Houses of Parliament. These are the matters which are not justiciable and pertain to the internal domain of the two Houses (Art. 122). The Court cannot go into the question as to whether the sittings of the Houses of Parliament were not constitutionally valid because some members of those Houses were prevented from attending and participating in the discussion in those Houses.

At the commencement of the first session after the general election to the Lok Sabha and at the commencement of the first session of every year, the President shall address both Houses of Parliament assembled together and shall inform the causes of its summons.<sup>4</sup> The Presidential address like the speech

1. Article 96 (1).

2. Article 97.

3. Article 85 (1).

4. Article 87 (1).

declaration to this effect is necessary otherwise the seat will not become vacant.<sup>1</sup>

The Constitution (33rd Amendment) Act, 1974, has amended Art. 101 and Art. 190, which provides that if a member of legislature resigns his seat the Speaker or the Chairman shall not accept his resignation, if, on inquiry, he is satisfied that such resignation is not voluntary and genuine. The amendment was an outcome of the Gujarat movement where members were compelled to resign their seats from the Legislative Assembly.

Before taking seat in the House every member of a House of Parliament has to take an oath and affirmation before the President or some person appointed by him for this purpose according to the form specified in the Third Schedule.<sup>2</sup> Unless an elected member takes the oath, he does not become member of the House and so long he is not a member, he cannot sit in the House. If a person sits and votes as a member of either House of Parliament before he has taken oath under Article 99 or when he knows that he is not qualified to be a member of the House, or when he knows that he is disqualified to be a member of the House, or when he knows that he is prohibited from doing so (sitting or voting) by reason of any law made by Parliament, he shall be liable to penalty of 500 rupees for each day on which he sits or votes in the House.<sup>3</sup>

Members of either House of Parliament shall get such salaries and allowances as may from time to time be determined by Parliament by law.<sup>4</sup>

**Speaker and Deputy Speaker of Lok Sabha.**—The Lok Sabha chooses two of its members as Speaker and Deputy Speaker. The Speaker is the Chief Officer of the Lok Sabha. He presides over its sitting and controls its working. When the office of Speaker is vacant the Deputy Speaker performs the duties of Speaker's office.<sup>5</sup> However, if the office of Deputy Speaker is also vacant, the duties of the Speaker shall be performed by such member of the House as the President may appoint for the purpose.<sup>6</sup> The Deputy Speaker also acts as the Speaker when the Speaker is absent from any sitting of the House. If, however, he is also absent, such person as may be determined by the rules of the House, and if no such person is present, such other person as may be determined by the House shall act as Speaker.<sup>7</sup>

The Speaker and Deputy Speaker remain in office so long as they are members of the House. As soon as they cease to be members of the House they have to vacate their offices. However, the Speaker continues in his office, even if the Lok Sabha is dissolved, till newly elected Lok Sabha meets. The Speaker and Deputy Speaker may resign their offices or they may be removed from their offices by a resolution of the House of the People, passed by a majority of all the then members of the House.<sup>8</sup> Such a resolution cannot be moved unless at least 14 days' notice has been given of the intention to move the resolution.<sup>9</sup> When the resolution for removal of the Speaker is under

1. *Ansumali v. State of West Bengal*, AIR 1952 Cal. 637.

2. Article 99.

3. Article 104.

4. Article 106.

5. Article 93.

6. Article 95 (1).

7. Article 95 (2).

8. Article 94 (a) (b) (c).

9. Article 94, proviso.

consideration the Speaker, and when it is against the Deputy Speaker, the Deputy Speaker shall not preside at the sittings of the House, though he may be present.<sup>1</sup> The Speaker and Deputy Speaker will get such salaries and allowances as are fixed by Parliament by law and until a provision is so made as specified in the Second Schedule.<sup>2</sup>

The office of the Speaker is one of great responsibility. He upholds the dignity and privileges of the House. Once elected, he must rise above party interests. In England, it is a convention that the Speaker has to resign from his party. This is necessary to maintain impartiality on his part. The Constitution of India contains certain provisions for maintaining independence and impartiality of the Speaker. His salary is charged on the Consolidated Fund of India and is not subject to the annual vote by Parliament. He cannot be removed from his office except by a resolution passed by a special majority.

For Powers and Functions of Speaker—See under Chapter 'State Legislature'.

#### Sessions of Parliament

The President shall from time to time summon each House of the Parliament to meet at such time and place as he thinks fit. But the right of the President to summon the House is subject to the condition that six months should not intervene between its last sitting in one session and the date appointed for its sitting in the next session.<sup>3</sup>

In *Smt. Indira Nehru Gandhi v. Raf Narain*,<sup>4</sup> the validity of the Constitution (39th Amendment) Act, 1975, was challenged on the ground that the constitution of the House which passed the Amendment was illegal. It was contended that the sessions of the Lok Sabha and Rajya Sabha were invalid. It was said that a number of members of Parliament were detained by Presidential order after 26th June, 1975 and before the summoning of a session of the Parliament. Unless the President convenes a session of the full Parliament by giving all members thereof an opportunity to attend the session and exercise their right of speech and vote, the convening of the session would be illegal and unconstitutional and cannot be regarded as a session of the two Houses of Parliament.

The Supreme Court rejected this argument of the respondent and held that the constitution of the House which passed the Constitution (39th Amendment) Act was not illegal on the ground that a number of members of Parliament of the two Houses were detained by the executive order. The contention that the sittings of the two Houses were not valid essentially relates to the validity of the proceedings of the two Houses of Parliament. These are the matters which are not justiciable and pertain to the internal domain of the two Houses (Art. 122). The Court cannot go into the question as to whether the sittings of the Houses of Parliament were not constitutionally valid because some members of those Houses were prevented from attending and participating in the discussion in those Houses.

At the commencement of the first session after the general election to the Lok Sabha and at the commencement of the first session of every year, the President shall address both Houses of Parliament assembled together and shall inform the causes of its summons.<sup>4</sup> The Presidential address like the speech

1. Article 96 (1).

2. Article 97.

3. Article 85 (1).

4. Article 87 (1).

from the throne in England, is review of general policies of the Government and indication of its future programmes to be taken up by the Government. It is not a private speech of the President. The speech is prepared by the Cabinet. The President is empowered to address either House or both Houses assembled together at any time and for that purpose require the attendance of members.<sup>1</sup> The President may send message to either House of Parliament whether with respect to a Bill pending in Parliament or otherwise. The House to which any message is sent shall consider any matter by the message to be taken into consideration. This practice may be justified in U. S. A., where the President sends message to Congress. President's advisers are not members of the Congress, therefore, the message constitutes a means of communication between the President and the Congress. This provision can hardly be justified in India where the President acts on the advice of the Cabinet.

**Prorogation.**—Prorogation merely ends a session. Prorogation does not end the life of the House. The House meets again after prorogation. The power to prorogue the House is vested in the President. In England prorogation brings to an end all Bills or business then pending before the House. But in India a pending Bill or business does not lapse on the prorogation of a session. It only means that the House ceases to do a business at a particular time. It takes up pending business for consideration when it meets after prorogation. An *Adjournment* terminates a sitting of the House. It is an act of the House and is exercised by the presiding officer at any time. An adjournment does not affect the incompletely worked out business before the House. The House may resume its business when it meets again after the adjournment.

**Dissolution.**—A dissolution ends the very life of the House and general election then must be held to elect a new Lok Sabha. It is to be noted that it is the Lok Sabha which is subject to dissolution. The Rajya Sabha is a permanent body and not subject to dissolution. A dissolution ends the very life of the House while a prorogation ends a session.

The power to dissolve the Lok Sabha is vested in the President. But in this respect he also acts on the advice of the Prime Minister. In England the sovereign can dissolve the House when advised by the Prime Minister. This is a well-settled convention in England. The position in India is the same. So long as the Prime Minister and his Cabinet enjoys the confidence of the Lok Sabha the President is bound to dissolve the House when advised by the Prime Minister.

*Is the President bound to dissolve a House on the advice of the Prime Minister who does not enjoy the confidence of the majority in the House?* One view is that he must in all circumstances accept the advice of the Prime Minister. The other view is that the President is not bound to dissolve the House if he can find out an alternative stable ministry. The first view is based on a well-established convention in England. In England it has been a uniform practice for more than a century that the sovereign should not refuse a dissolution when advised by the Prime Minister. Even a Prime Minister who is defeated in a no-confidence motion can advise the King to dissolve the Parliament. In England, the King has always accepted the advice of such a Prime Minister. The recent precedent in Britain is the resignation of the former Prime Minister James Callaghan. He was defeated in a no-confidence motion. The King dissolved the Parliament on his advice.

In this respect, the position in India is the same. The President is bound

I. Article 86 (1).

to dissolve the Lok Sabha on the advice of the Prime Minister who enjoys the support of the majority of the members of the Lok Sabha.

However, where a ministry is defeated in the House in a no-confidence motion or a ministry does not command the majority of the House, the President is not bound by the advice of the Prime Minister. If he can find out an alternative ministry he may refuse to dissolve the House.

In 1979, Prime Minister Mr. Morarji Desai who headed the Janata Government at the Centre, resigned from the Prime Ministership due to mass defection. A no-confidence motion was pending against the Government before the Lok Sabha. Before voting could take place on the no-confidence motion, the Prime Minister, realising that he was reduced to a minority, tendered his resignation. The Prime Minister, however, did not advise the President to dissolve the Lok Sabha.

There is no precedent in the Centre. However, there are precedents in the States where the advice tendered by the defeated Chief Minister has not been accepted by the Governors of the States.

If not dissolved earlier the House stands dissolved at the expiry of its normal period of five years. But in emergency its life is extended for one year at a time, six months after the withdrawal of emergency the House is automatically dissolved leading to a fresh election.

**Effect of dissolution on the business pending in the House.**—When the Lok Sabha is dissolved (1) a Bill pending in the Rajya Sabha but not passed by the Lok Sabha does not lapse, (2) a Bill pending in the Lok Sabha lapses, (3) a Bill passed by the Lok Sabha but pending in Rajya Sabha lapses, unless it is saved by President's intention to call a joint sitting of the two Houses.

#### Functions of Parliament

The most important function of the Parliament is the making of laws. The legislative procedure is initiated in the form of a Bill.

#### Ordinary Bill

An ordinary Bill, i. e. a Bill other than Money Bill and financial bills may originate in either House of the Parliament. The Bill must be passed by both the Houses of Parliament and then only it can be sent for President's assent. It becomes a law when it is assented to by the President. Each House has laid down a procedure for the passage of a Bill. According to the procedure of a House a Bill to pass through three stages commonly known as Readings : First Reading, Second Reading and Third Reading. At first stage the Bill is introduced in the House. At this stage no discussion takes place. The second is the consideration stage when the Bill is discussed clause by clause. At this stage amendments may be moved. At the third reading stage a brief general discussion of the Bill takes place and the Bill is finally passed. When the Bill is passed by one House it is sent to the other House, where a similar procedure is repeated. If there is any disagreement between the Houses over any Bill, the Bill cannot be deemed as have been passed.<sup>1</sup> If the two Houses do not agree a deadlock is created. To resolve such a deadlock the Constitution provides the method of joint sitting of the two Houses.

**Joint Session of House.**—According to Article 103 when a Bill passed by one House and sent to other House—

1. Kerala and in Madhya Pradesh.

- (1) is rejected by the House ; or
- (2) the House disagrees as the amendment to be made in the Bill ; or
- (3) the other House does not pass the Bill and more than six months have passed the President may summon a joint session of both the Houses.

The President, however, cannot summon a joint sitting if the Bill in question has lapsed by reason of a dissolution of the Lok Sabha. If the dissolution takes place after the President has notified his intention to summon a joint sitting, such sitting will be held notwithstanding the dissolution. The President may notify to the House by sending a message of his intention to summon them for a joint sitting for the purpose of deliberation and voting on the Bill in dispute. If the Houses were not in session the President may express his intention by a public notification. When the President has notified his intention of summoning the Houses to meet in a joint session neither shall proceed further with the Bill.

If at the joint sitting of the two Houses the Bill is passed by a majority of the total number of members of both Houses present and voting it shall be deemed to have been passed by both the Houses.<sup>1</sup>

At a joint sitting of two Houses, no new amendment shall be proposed to the Bill except such which are made necessary by the delay in the passage of the Bill. If at all any amendment is necessary the decision of the presiding officer will be final.<sup>2</sup>

At a joint sitting of the two Houses the Speaker of the Lok Sabha or in his absence such person as may be determined by rules or procedure presides.<sup>3</sup>

This provision does not apply to a Money Bill. The Lower House has exclusive power over Money Bill. The Rajya Sabha has no power to amend, modify or reject a Money Bill, passed by the Lok Sabha. The Money Bill can become law without the concurrence of the Rajya Sabha, therefore, no question arises for summoning the joint sitting of the two Houses for removing a deadlock.

**President's assent.**—No Bill can become law without the assent of the President even if it has been passed by both the Houses of Parliament. Article 111 says that when a Bill has been passed by both Houses of Parliament, it is sent to the President for his assent. The President may either—

- (a) give his assent to the Bill, or
- (b) he may withhold his assent, or
- (c) he may return a Bill if it is not a Money Bill, to the House for reconsideration with or without a message suggesting such amendments as he may recommend. When a Bill is so returned, the Houses shall reconsider in the light of the Presidential message. However, if the Bill is again passed by the Houses with or without amendment and presented to the President for assent, the President shall not withhold his assent.

But if he withholds the Bill, in case of (b) this will amount to vetoing the Bill, which the Constitution permits. But it is to be noted that this power to

1. Article 108 (4)
2. Article 108 (4) (b).
3. Article 118 (4).

veto the Bills is to be exercised on the advice of the Ministry. It is, indeed, unthinkable that the Government would wish to veto Bills for the passage of which it was responsible.<sup>1</sup> In England a similar power was vested in the Crown to give assent to a Bill, but it has now fallen into disuse and as a matter of convention, he assents to a Bill on ministerial advice.<sup>2</sup> But if the President does not veto the Bill, but sends it to the Houses for reconsideration the power of veto is gone.

### Money Bill

Article 110 (1) defines Money Bill as a Bill which contains only provision dealing with all or any of the following matters—

(a) the imposition, abolition, remission, alteration or regulation of any tax,

(b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India,

(c) the custody of the Consolidated Fund or the Contingency Fund, the payment or withdrawal of money from such Fund,

(d) the appropriation of money out of the Consolidated Fund of India,

(e) the declaring of any expenditure to be charged on the Consolidated Fund of India,

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India, or the custody or issue of such money or the audit of the accounts of the Union or of a State,

(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

But a Bill is not Money Bill which deals with—

(a) the imposition of fines or other pecuniary penalties, or

(b) the payment of fees for licence or fees for service rendered, or

(c) imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.<sup>3</sup>

If any question arises whether a Bill is a Money Bill or not the decision of the Speaker of the House of the People shall be final. So when a Bill is sent to the Rajya Sabha or presented to the President for assent, a certificate of the Speaker shall be endorsed on it that it is a Money Bill.<sup>4</sup>

A Money Bill can only be introduced in the Lok Sabha. It cannot be introduced in Rajya Sabha.<sup>5</sup> A Money Bill shall not be introduced or moved except on the recommendation of the President, that is to say, the Cabinet. However, no recommendation of the President is necessary under clause (1) of

1. The Pepsu Appropriation Bill was vetoed by the President on the advice of the Ministry, merely on technical ground. This is the only case.

2. Wade—Constitutional Law, 16th Ed., p. 125.

3. Article 110 (2).

4. Article 110 (4).

5. Article 109 (1).

this Article for the moving of an amendment making provision for the reduction or abolition of any tax.<sup>1</sup>

After a Money Bill has been passed by the Lok Sabha, it is sent to the Rajya Sabha for its recommendations. The Rajya Sabha must return the Bill to the Lok Sabha within 14 days from the receipt of the Bill with its recommendations. The Lok Sabha may either accept or reject all or any of the recommendations of the Rajya Sabha. If the Lok Sabha accepts any of the recommendations of the Rajya Sabha the Money Bill shall be deemed to have been passed by both Houses with the amendments by the Rajya Sabha and accepted by the Lok Sabha. If a Money Bill passed by the Lok Sabha and sent to the Rajya Sabha for its recommendation is not returned to the Lok Sabha within 14 days, the Bill shall be deemed to have been passed by both Houses at the expiration of the said (14 days) period in the form in which it was passed by the Lok Sabha. Thus the Rajya Sabha can at most detain a Money Bill for 14 days only.<sup>2</sup> If the Lok Sabha rejects all the recommendations of the Rajya Sabha, the Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the Lok Sabha. Then it will be presented for President's assent.

The Lok Sabha may accept or reject the amendments suggested by the Rajya Sabha. It has final say with regard to the passing of a Money Bill.

**Financial Bills.**—Financial Bills are of three kinds :

- (1) Money Bills—Article 110 (1).
- (2) Other Financial Bill—Article 117 (1).
- (3) Bills involving expenditure—Article 117 (3).

**Distinction between Money Bill, Financial Bill and Bill involving expenditure.**—(1) A Money Bill is a bill which contains solely matters mentioned in Article 110 (1). A Financial Bill, apart from dealing with one or more of the matters mentioned in Article 110 (1), deals with other matters also. Thus a Financial Bill is a Money Bill to which provisions of general legislation are also added apart from one or more matters of Article 110 (1). All Money Bills are thus financial Bills but all financial Bills are not Money Bills.

(2) In two matters the Money Bill and the Financial Bill do not differ—(i) A Financial Bill, like the Money Bill, can only originate in the Lok Sabha, (ii) like Money Bill, the Financial Bill also cannot be introduced without the recommendation of the Parliament.<sup>3</sup>

(3) Financial Bill and other Bills involving expenditure differ from a Money Bill in so far as the former can be amended or rejected by the Rajya Sabha like any ordinary Bill. The Rajya Sabha cannot amend or reject Money Bill. And if there is a deadlock between the Houses it can be resolved by joint session of the Houses. Thus the Rajya Sabha has some control over Financial and other Bills involving expenditure.

(4) As regards the procedure for its passing is concerned, a Financial Bill is as good as an ordinary bill except that a Financial Bill cannot be introduced without President's recommendation and it can only be introduced in

1. Article 117 (1), 'Proviso'.

2. Article 109.

3. Article 117 (1).

the Lok Sabha. Thus a Financial Bill is passed according to the ordinary procedure provided for passing of an ordinary Bill.

As far as Presidential assent is concerned in case of Money Bill, the President may either give his assent or refuse his assent. In case of a Financial Bill he may, however, in addition, refer it back to the House with a message for reconsideration.

**Annual Financial Statement : (Budget)—Articles 112 to 116.**—According to Article 112 the President shall in respect of every financial year cause to be laid before both the Houses of Parliament an annual financial statement, commonly known as the Budget. This statement gives out the estimated income and expenditure for that year. This estimated expenditure is shown separately under two heads—(a) the sums charged upon the Consolidated Fund of India and (b) the sums required to meet other expenditure out of the Consolidated Fund of India. The expenditure or revenue account should also be distinguished from the other expenditures.

The following expenditures are charged on the Consolidated Fund of India :

- (1) The salary and allowances of the President and other expenditure relating to his office.
- (2) Salaries and allowances of the Chairman and Deputy Chairman of the Rajya Sabha and the Speaker and the Deputy Speaker of the Lok Sabha.
- (3) Debt charges for which the Government of India is liable.
- (4) Salaries, allowances and pensions payable to Judges of the Supreme Court, the Comptroller and Auditor-General of India, Judges of the High Courts and Federal Courts.
- (5) Any sums required to satisfy any judgment, decree or award of any court or tribunal.
- (6) Any other expenditure declared by this Constitution or by Parliament by law to be so charged.

**Discussion and voting on Budget.**—According to Article 113 the expenditure which is charged on the Consolidated Fund of India shall not be submitted to the vote of Parliament. However, Houses are not prevented from discussing any of these items of expenditure. The estimates which relate to the expenditure must be submitted to the Lok Sabha in the form of demands for grants. The Lok Sabha has power to assent or refuse to assent to and demand, or to assent to any demand subject to the reduction of the amount specified therein. No demand for a grant is to be made except on the recommendation of the President.

**Appropriation Bills.**—No money can be taken out from the Consolidated Fund of India unless the Appropriation Act, is passed.<sup>1</sup> Therefore, after the demands for grants under Art. 113 are passed by the Lok Sabha, a Bill known as Appropriation Act is introduced in the Lok Sabha. The Bill specifies all the grants made by the Lok Sabha, the expenditure charged on the Consolidated Fund of India as shown in the previous statement before Parliament.

1. Article 114 (3).

But no amendment shall be proposed to the Appropriation Bill which will have the effect of varying the amount or altering the distinction of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of India.

**Supplementary Grants (Article 115).**—If the amount authorised by the Appropriation Act to be expended for a particular service is found to be insufficient for the purposes of that year or when a need has arisen for any additional expenditure, a supplementary grant is made by Parliament. The procedure is the same for both the Appropriation Act and the Supplementary grant.

**Votes on Account—Votes on Credit and Exceptional Grant.**—Before the Appropriation Act is passed no money is to be withdrawn from the Consolidated Fund of India. But the Government may need money to spend before it is passed. Accordingly under Article 116 (a) the Lok Sabha can grant a limited sum from the Consolidated Fund of India to the Executive to spend till the Appropriation Act is passed by Parliament.

**Votes on Credit.**—Under clause (b) the Lok Sabha has made a grant for meeting an unexpected demand upon the resources of India when on account of the magnitude or the indefinite character of the service, the demand can be stated with details ordinarily given in the Annual Financial Statement.

**Exceptional Grant.**—Under clause (3) the Lok Sabha has the power to make exceptional grant which forms no part of the current service of any financial year.

However, it is necessary that Parliament shall make a law for withdrawal of money from the Consolidated Fund of India for the purpose the Lok Sabha has sanctioned the grants either by Annual Appropriation Act or Supplementary Grant, Excess Grant, Votes on Account, Votes on Credit or Exceptional Grant.

**General Rules of Procedure.**—Article 118 empowers each House of Parliament to make rules for regulating its procedure and the conduct of its business. This rule-making power of the Houses is, however, subject to the provisions of this Constitution.

Parliament may, for the purpose of the timely completion of financial business, regulate by law the procedure and conduct of business, in each Houses of Parliament in relation to any financial matter or to any Money Bill.<sup>1</sup>

The business of Parliament shall be transacted in Hindi or in English. However, the Chairman of the Rajya Sabha or the Speaker of the Lok Sabha, as the case may be, may permit any member who cannot adequately express himself in Hindi or in English to address the House in his mother tongue.

**Restrictions on discussion in Parliament.**—Article 121 prohibits any discussion in Parliament with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties except when resolution is presented to the Parliament for the removal of a judge. The object of this Article is to ensure the independence of judiciary.

**Courts not to inquire into proceedings of Parliament.**—Article 122 lays down that the validity of any proceedings in Parliament cannot be called in

1. Article 119.

question in any Court on the ground of any alleged irregularity of procedure. No officer or member of Parliament who has authority to regulate the procedure on the conduct of business or for maintaining order in the House is subject to the jurisdiction of any Court in respect of the exercise by him of those powers. The Courts cannot issue a writ against the Speaker from presiding over a meeting of the House<sup>1</sup> or stop the passage of a Bill.<sup>2</sup> The courts cannot go into the question as to the validity of the proceedings in the Houses of Parliament.<sup>3</sup>

**The Comptroller and Auditor-General of India (Articles 148–151).**—There shall be a Comptroller and Auditor-General of India. He is appointed by the President of India. He has to take oath before entering upon his office before the President or some other person appointed by the President for that purpose. His salary is charged on the Consolidated Fund of India and cannot be varied to his disadvantage. After he has ceased to hold his office, he shall not be eligible to hold any office under Central or State Government. He may be removed from his office in the same manner and on similar grounds (proved misbehaviour or incapacity) as a Judge of the Supreme Court is removed from his office.<sup>4</sup>

**Duties and Powers.**—The Comptroller and Auditor-General is to perform such duties and exercise such powers in relation to the accounts of the Union and of States as may be prescribed by or under any law made by Parliament. Until such a law is passed, he shall perform such duties and exercise powers as were exercisable by the Auditor-General of India immediately before the commencement of the Constitution.<sup>5</sup> He performs two duties. As an Accountant he controls all withdrawal of money disbursed by Central or State Governments. He shall keep the account of the Union and of the States in the manner prescribed by the President.<sup>6</sup>

Art. 150 provides that the accounts of the Union and of the States shall be kept in such form as the President may on the advice of the Comptroller and Auditor-General of India prescribe. Thus it empowers the President to prescribe the form in which the accounts of the Union and of the State shall be maintained.

The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union shall be submitted to the President who shall cause them to be laid before the Parliament. He shall submit reports of accounts of State to the Governor of the State who must lay it before the Legislature of the State.<sup>7</sup>

1. Hemchandra Sen Gupta v. The Speaker, AIR 1956 Cal. 378.

2. Chhockey Lal v. State of U. P., AIR 1951 All. 228.

3. Smt. Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299; see also M. S. M. Sharma v. Sri Krishna Singh, AIR 1960 SC 1186.

4. Article 148.

5. Article 149.

6. Article 150.

7. Article 151.

## The Union Judiciary—The Supreme Court

### (Arts. 124 to 147)

"The Judiciary was to be an arm of the social revolution upholding the equality that Indians had longed for."

**Supreme Court—The Guardian of the Constitution**—The essence of a Federal Constitution is the division of powers between the Central and State Governments. This division is made by the written Constitution which is the Supreme Law of the Land. Since language of the Constitution is not free from ambiguities and its meaning is likely to be interpreted differently by different authorities at different times. It is, therefore, natural that in any federation disputes might arise between the Central and its constituent units regarding their respective powers. Therefore, in order to maintain the supremacy of the Constitution, there must be an independent and impartial authority to decide disputes between the Centre and the States, or the States *inter se*. This function can only be entrusted to a judicial body. The Supreme Court under our Constitution is such an *obiter*. It is the final interpreter and the guardian of the Constitution.

The Supreme Court under the Indian Constitution, in addition to the above function of maintaining the supremacy of the Constitution, is also the guardian of the Fundamental Rights of the people. Really, the Supreme Court has been called upon to safeguard civil and minority rights and play the role of "guardian of the social revolution".<sup>1</sup> It is the great tribunal which has to draw the line between individual liberty and social control.<sup>2</sup> It is also the highest and final interpreter of the general law of the country. It is the highest Court of Appeal in civil and criminal matters.

**Composition of the Court.**—The Supreme Court of India consists of a Chief Justice and, until Parliament may by law prescribe a larger number, not more than seven other Judges. Under this power, the Parliament has now increased the number of Judges to 18 including the Chief Justice.<sup>3</sup> Thus the Supreme Court, at present consists of the Chief Justice of India and 17 other Judges. The Constitution does not provide for the minimum number of Judges.

**Appointment of the Judges.**—Judges of the Supreme Court are appointed by the President. The Chief Justice of the Supreme Court is appointed by the President with the consultation of such of the Judges of the Supreme Court and the High Courts as he deems necessary for the purpose. But in appointing other Judges, the President shall always consult the Chief Justice of India. He may consult such other Judges of the Supreme Court and High Courts as he may deem necessary.<sup>4</sup> It should, however, be noted that the power of the President to appoint Judges is purely formal because in this matter he acts on the advice of the Council of Ministers. But there was an apprehension that such a body may bring politics in the appointment of Judges. The Indians

1. Austin, G.—The Indian Constitution Cornerstone of Nation, p. 169.

2. Sri Alladi Krishnaswamy Aiyer, Member of Drafting Committee.

3. The Supreme Court (Number of Judges) Amendment Act, 48 of 1977.

4. Article 124 (2).

Constitution, therefore, does not leave the appointment of Judges on the discretion of the Executive. The Executive under this Article is required to consult persons who are *ex hypothesis* well qualified to give proper advice in matters of appointment of judges.<sup>1</sup>

Under Article 124 (2) the President, in appointing other judges of the Supreme Court is bound to consult the Chief Justice of India. But in appointing the Chief Justice of India he is not bound to consult anyone. The word 'may' used in Article 124 makes it clear that it is not mandatory on him to consult anyone.

The practice up to 1973 was to appoint the seniormost Judge of the Supreme Court as the Chief Justice of India. This practice had virtually been transformed into a convention which had been followed by the Executive without any exception.

In 1956, however, the Law Commission headed by the then Attorney-General, M. C. Setalvad criticised this practice and recommended that in appointing the Chief Justice of India the *experience of a person as a Judge, his administrative competence and merit should be judged and seniority should not only be the main consideration*. The Law Commission's 14th Report<sup>2</sup> says:

"For the performance of the duties of Chief Justice of India, there is needed, not only a judge of ability and experience, but also a competent administrator, capable of handling complex matters that may arise from time to time, a shrewd judge of men and personalities and above all, a person of sturdy independence and towering personality who would, on the occasion arising, be a watchdog of the independence of the Judiciary. It is well accepted that the qualifications needed for a successful Chief Justice are very different from the qualifications which go to make an erudite and able judge. The considerations which must, therefore, prevail in making the selection to this office must be basically different from those that would govern the appointment of other judges of the Supreme Court."

"In our view, therefore, the filling of a vacancy in the office of the Chief Justice of India should be approached with paramount regard to the considerations mentioned above. It may be that the seniormost puisne judge fulfils these requirements. If so, there could be no objection to his being appointed to fill the office. But *very often that will not be so*. It is therefore, necessary to set a healthy convention that appointment to the office of the Chief Justice rests on special considerations and does not as a matter of course go to the seniormost puisne judge. If such a convention were established it could be no reflection on the seniormost judge, if he is not appointed to the office of the Chief Justice. We are in another place suggesting that such a convention should be established even in the case of appointment of Chief Justice of High Court. Once such a convention is established it will be the duty of those responsible for the appointment to choose a suitable person for that high office, if necessary, from among persons outside the Court. Chief Justice of High Courts, puisne judges of High Courts of outstanding merit and distinguished senior members of the Bar should provide an ample recruiting ground."

The reports of the Law Commission were published as far back as in 1956.

1. C. A. D. Vol. 8, p. 285.
2. Law Commission of India, 14th Report, pp. 39, 40.

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The Supreme Court under the Indian Constitution, in addition to the above function of maintaining the supremacy of the Constitution, is also the guardian of the Fundamental Rights of the people. Really, the Supreme Court has been called upon to safeguard civil and minority rights and play the role of "guardian of the social revolution".<sup>1</sup> It is the great tribunal which has to draw the line between individual liberty and social control.<sup>2</sup> It is also the highest and final interpreter of the general law of the country. It is the highest Court of Appeal in civil and criminal matters.

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"For the performance of the duties of the Chief Justice of India, there is needed, not only a judge of ability and experience but also a *Competent Administrator*, capable of handling complex matters that may arise from time to time, shrewd judge of men and personalities and above all, a person of *sturdy independence* and towering personality who could on the occasion arising be a *watchdog of the independence of the judiciary*..... It may be that the seniormost puisne judge fulfils these requirements. If so there could be no objection to his being appointed to fill the office.

"It is therefore, necessary to set a healthy convention that appointment to the office of the Chief Justices rests on special considerations and does not as a matter of course go to the seniormost puisne judge. If such a convention were established it would be no reflection on the seniormost puisne judge if he be not appointed to the office of the Chief Justice."

Thus when the Law Commission recommended for appointing the Chief Justice of the Supreme Court on merit and not no seniority it did not mean that merit from the view point of the Executive. The three senior and eminent judges, were superseded not because they did not possess the qualifications recommended by the Law Commission but because they decided cases against the Government.

The Law Commission also recommended for establishing a healthy convention before any such appointments are made.

In the present case, the appointment was made without establishing a new convention : "If the Government merely wanted to carry out the recommendations it could have declared the new convention in advance and taken the Bar and the Public into confidence but instead the letter and the spirit of the Commission Report were flouted and the Judges were passed over merely because their decision went against the Government."<sup>1</sup>

Thirdly, it is argued that the Executive is entitled to take into consideration the mental outlook or the social philosophy of Judges. The Government in a democracy is run on the party basis. This means that a Judge should subscribe to the social philosophy of the ruling party. This has virtually been claimed by the Government. Defending the supercession policy Mr Kumara-manglam said "we are entitled to come to the conclusion that the philosophy of this Judge is 'forward looking' and of that Judge is 'backward looking' and to decide that we will take the forward-looking judge and not the backward-looking judge."

It is true that in deciding cases the social philosophy of judges play an important part. But the question arises as to what kind of social philosophy a Judge is to subscribe to ?—Evidently, the philosophy of the Constitution. The Preamble in the Constitution embodies the social philosophy. Thus it is clear that the Supreme Court Judges are bound to the social philosophy of the Constitution and not to the philosophy of the ruling party. The Constitution is the supreme law of the land. It is meant for generations. A party which forms the Government remains in power only for five years. Then, again in various States different parties may be in power. A party in power may not believe in the philosophy of the Constitution.<sup>2</sup> In the circumstances is it

1. K. Subba Rao—The Supersession of Judges. The Price of Executive Interference Souvenir, published by Bar Council, U. P. p. 43.
2. This had happened in West Bengal when Communist Government was in power.

Since then 17 years had passed but no attempt had been made on the part of the Government to implement them. Rather, the Government followed the principle of appointing the Chief Justice of India on the basis of seniority as matter of rule.

**Controversy over the appointment of the Chief Justice of India.**—On April 25, 1973, however, this 22 years old practice was suddenly broken by the Government within few hours of the delivery of the judgment in the Fundamental Rights case. Mr.A.N. Ray was appointed as Chief Justice of India superseding three of his senior colleagues, Justices Shetal, Hegde and Grover. And eight hours after the swearing in ceremony of Mr. A. N. Ray, as the Chief Justice of India, the three judges resigned from the Supreme Court. The action of the Government aroused a great controversy. The Supreme Court Bar Association by a unanimous resolution strongly condemned the action of the Government in superseding the three eminent Judges of the Supreme Court. The resolution characterised the appointment as purely political having 'no relation whatever to merits.' According to the resolution, the Government's action was a blatant and outrageous attempt and undermining the independence and impartiality of the judiciary and lowering the prestige and dignity of the Supreme Court . The action clearly showed that the Government could not tolerate and countenance an independent judiciary. On the other hand, the Government justified its action on the following grounds:

The first reason given by the Government was that under the Constitution the President has absolute discretion to appoint any one whom he finds suitable for the post of the Chief Justice of India. We all agree that there is such a power vested in the President. But during the period of over 22 years the President had never exercised his discretion. He rather chose to follow the practise of appointing the seniormost judge as the Chief Justice of India. This practise had virtually been converted into a convention. According to Mr. Kumaramangalam, "one of the staunch supporters of the supersession of the Judges, a convention which was considered wrong at the time by the Law Commission does not become right only on the ground that it has been observed for a long time "<sup>1</sup> We are entitled to ask him why this wrong convention was allowed to be observed for such a long time ? It is strange that the President realised his mistake only on April 25, 1973, and that too after the judgment of the Supreme Court in the great Constitutional case. This certainly created doubts in the mind of the people about the propriety of its action which the Government had failed to dispel.

Secondly, it was argued that the Government followed the recommendations of the Law Commissions in appointing the Chief Justice and superseding the three senior judges. Here also the Government's case fails. Firstly, the Reports of the Law Commission were published in 1956 but it was not implemented for about 17 years. Thus in the words of K Subba Rao, the former Chief Justice of India, the report was impliedly rejected by long inaction but was revived suddenly on April, 25, 1973, to sustain an indefensible action.<sup>2</sup> Secondly, the report of the Law Commission itself destroys the Government's case. Had the Government followed the recommendations of the Commission the three senior judges would not have been superseded. The report of the Commission itself lays down the qualifications of the Chief Justice of the Supreme Court. It says :

1. See Kumaramanglam's Judicial Appointments, p. 14.
2. K. Subba Rao—The Supersession of Judges. The Price of Executive Interference, Souvenir, published by Bar Council of U. P., p. 43.

may by law provide.<sup>1</sup> A judge may, however, resign his office by writing to the President.<sup>2</sup> Under Cl. (b) it is not clear whether a resignation sent to the President is final or whether it becomes effective only when accepted by the President or can it be withdrawn before it is accepted by the President? This question was raised before the Supreme Court in the case of *Union of India v. Gopal Chandra Mishra*.<sup>3</sup> Although the case is based on Art. 217 relating to the resignation of a High Court Judge, but it applies to Art. 124 (6) also because Art. 124 (6) is in similar terms. The Court has held that in the absence of a legal, contractual or constitutional bar a "prospective" resignation can be withdrawn before it becomes effective and it becomes effective when it operates to terminate the employment or the office tenure of the resignor. 'Resignation' takes place when a judge of his own volition chooses to sever his connections with his office. If in terms of his writing he resigns *in presenti* the resignation terminates his office-tenure forthwith, and cannot therefore be withdrawn or revoked thereafter. But, if by such writing he chooses to resign from a future date, the act of resigning is not complete because it does not terminate his tenure before such date and the Judge can at any time before the arrival of that prospective date on which it was intended to be effective, withdraw it, because the Constitution does not bar such withdrawal.

A judge may be removed from his office by an order of the President only on grounds of *proved misbehaviour or incapacity*. The order of the President can only be passed after it has been addressed to both Houses of Parliament in the same session. The address must be supported by a majority of total membership of that House and also by a majority of not less than two-thirds of the members of that House present and voting.<sup>4</sup> The procedure for the presentation of an address for investigation and proof of the misbehaviour or incapacity of a judge will be determined by Parliament by law.<sup>5</sup> The security of the tenure of the Supreme Court Judges has been ensured by this provision of the Constitution. In America, the Judges of Supreme Court hold office for life. They can, however, be removed by impeachment in cases of treason, bribery or other high crimes and misdemeanours.

The Constitution prohibits a person who has held office as a judge of the Supreme Court from practising or acting as a judge in any court before any authority within the territory of India. But under Article 128, the Chief Justice may appoint the retired judges to act as *ad hoc* judges in the Supreme Court.

**Acting Chief Justice.**—When the office as the Chief Justice in India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of his office shall be performed by such one of the other judges of the Supreme Court as the President may appoint.<sup>6</sup>

**Ad hoc Judge.**—If at any time the quorum of the Judges to hold and continue any session of the Court, the Chief Justice of India with the previous sanction of the President requests a judge of the High Court to act as *ad hoc* Judge. The *ad hoc* judge should be qualified to be appointed as a judge of the Supreme Court.<sup>7</sup>

1. Article 124 (2-A).
2. Article 124 (21(a)).
3. A. I. R. 1978 S. C. 694.
4. Article 124 (1) (b) and clause (4).
5. Article 124 (5).
6. Article 126.
7. Article 127.

the duty of a Judge to uphold the philosophy of the Constitution or the philosophy of the ruling party? Surely a judge is to uphold the philosophy of the Constitution to which he owes his allegiance.

The independence and impartiality of the judiciary is one of the hallmarks of the democratic set up of Government. To give to the Executive an unfettered discretion to decide the philosophy of the judges is to make the judiciary subservient to the Executive. Every judge who desires to be elevated to the highest post of the Chief Justice of India will try his best to become a 'forward-looking judge' in the eye of the Government.

It is, therefore, essential to evolve and establish a healthy convention, so as to exclude the arbitrary interference of Executive in the matter of appointment of the Chief Justices of the Supreme Court and the High Courts. It is, therefore, suggested that a Committee, consisting of the Attorney-General, Law Minister, the President of the Bar Council of India, the President of the Supreme Court Bar Association and the Retiring Chief Justice of India, may be constituted and authorised to suggest a panel of names for the appointment of the Chief Justice of the Supreme Court and the various High Courts.

**Position after the assumption of Janata Government at the Centre.**—After the general election in March, 1977, the Janata Government assumed office at the Centre. The members of the Janata party had criticised the policy of the supersession of the Judges of the Supreme Court. Consequently, they have again revived the old practice of appointing the Chief Justice of the Supreme Court on the basis of seniority. It is submitted that the rule of seniority, though a mechanical rule, is beyond controversy and will definitely ensure independence of judiciary.

**Qualification of Judges.**—A person to be qualified for appointment as a Judge of the Supreme Court must be a citizen of India; and (1) has been a Judge of a High Court at least for five years, (2) has been for at least ten years an advocate of a High Court, (3) is, in the opinion of the President, a distinguished jurist.<sup>1</sup> Thus, a non-practising or an academic lawyer may also be appointed as a Judge of the Supreme Court if he is, in the opinion of the President, a distinguished jurist.

There are precedents in America where non-practising lawyers had been appointed as Judges of the American Supreme Court.<sup>2</sup> The appointment of Mr. Felix Frankfurter to the Supreme Court of America may be cited as an example. Mr. Frankfurter was a Professor of Law at Harvard University before his appointment to the Supreme Court. In India, so far, no non-practising lawyer has been appointed as a Judge of the Supreme Court.

Every person who is appointed as a Judge of the Supreme Court before entering upon his office has to make and subscribe an oath or affirmation before the President, or some other person appointed in that behalf by him.<sup>3</sup>

**Tenure and Removal of Judges.**—A judge of the Supreme Court shall hold office until he attains the age of 65 years. The age of Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament

1. Article 124 (6).

2. Law Commission of India, Report on Reform of Judicial Administration, Vol. I, pp. 36-37—See C. A. D., Vol. III, p. 254. View of Annadurai Ayyengar who had supported the provision.

3. Article 124. (6).

contempt of his own court or of any other court in the same manner as any other individual is liable. However, this section shall not apply to any observations or remarks made by him regarding a subordinate court in an appeal or revision pending before him.

The following acts or publications will not amount to contempt—

- (a) Innocent publication and its distribution,
- (b) Fair and accurate report of judicial proceedings,
- (c) Fair criticism of judicial act
- (d) Complaint made in good faith against presiding officers of subordinate courts (below High Court).
- (e) Publication of fair and accurate report of a judicial proceeding before a court sitting *in camera*.

A Contempt of Court may be punished with simple imprisonment for a term which may extend to 6 months or with fine which may extend to Rs. 2,000 or with both.

**2. Original Jurisdiction—Article 131.**—The Supreme Court has original jurisdiction in any dispute :—

- (a) between the Government of India and one or more States,
- (b) between the Government of India and any State or States on one side and one or more other States on the other,
- (c) between two or more States.<sup>1</sup>

The Supreme Court in its original jurisdiction cannot entertain any suits brought by private individuals against the Government of India. The dispute relating to the original jurisdiction of the Court must involve a question (whether of law or fact) on which the existence of a legal right depends. This means that the Court has no jurisdiction in matters of political nature. The term 'legal right' means a right recognised by law and capable of being enforced by the power of a State but not necessarily in a court of law.<sup>2</sup>

In *State of Karnataka v. Union of India*,<sup>3</sup> the Central Government appointed a Commission of Inquiry against the Chief Minister of Karnataka under section 3 of the Commissions of Inquiry Act, 1952, on charges of corruption, nepotism, favouritism and misuse of Government power. The plaintiff State of Karnataka filed a suit under Art. 131 of the Constitution for a declaration that the appointment of Inquiry was illegal and *ultra vires* on the grounds (1) that the Commission of Inquiry Act, 1952, does not authorise the Central Government to constitute such a commission in regard to matters falling exclusively within the sphere of State Legislative and executive powers, and (2) that if the provisions of the Act do so empower, they are *ultra vires* for the contravention of the terms of Constitution as well as the federal structure implicit and accepted as an inviolable basic feature of the Constitution. The defendant Union of India raised a preliminary objection that since the inquiry is against the Chief Minister and certain other Ministers as individuals and not against the State of Karnataka, the suit under Art. 131 is not therefore maintainable.

The Supreme Court by a majority of 4—3 held that plaintiff's suit is

1. Article 131.

2. *United Province v. Governor-General*, A. I. R. 1939 F. C. 58.

3. (1978) 11 S. C. J. 190.

**Salaries and allowances.**—The judges shall be paid such salaries as are specified in the Second Schedule. He shall also be entitled to such privileges and allowances as may be determined by Parliament by law. Until such law is passed by the Parliament they are entitled to such allowances and privileges which are specified in the Second Schedule.<sup>1</sup>

**Seat of the Supreme Court.**—The seat of the Supreme Court is Delhi. However, the Chief Justice of India may require it to sit in such other places with the previous permission of the President.<sup>2</sup>

### JURISDICTION OF THE SUPREME COURT

**(I) A Court of Record.**—Article 129 makes the Supreme Court a 'court of record' and confers all the powers of such a court including the power to punish for its contempt. A Court of Record is a court whose records are admitted to be of evidentiary value and they are not to be questioned when they are produced before the court. Once a court is made a Court of Record, its power to punish for contempt necessarily follows from that position.<sup>3</sup> The power to punish for Contempt of Court has been expressly conferred on the Supreme Court by our Constitution.

Prior to the enactment of the Contempt of Courts Act, 1971, the expression 'Contempt of Court' was to be defined by the Courts. The definition given by the court was very wide. It was feared that this wide power was likely to be misused by the Courts. Out of the zeal to protect and maintain the dignity of the court and of its judges, the court may exercise this power on flimsy grounds. In an unreported case a lower court in Uttar Pradesh punished a lawyer for contempt of court for chewing betel while cross-examining witnesses in a criminal case, because in the opinion of the judge this was an interference with the proper administration of justice. It was, therefore, suggested that the scope of expression "Contempt of Court" must be defined as soon as possible. This extraordinary power must be sparingly exercised only where the public interest demands.<sup>4</sup>

Consequently, the Contempt of Courts Act, 1971, was enacted by the Parliament. The Act defines the powers of courts for punishing contempt of courts and regulates their procedure. It also provides for judges to be tried for Contempt of Court. According to section 2 of the Act, 'Contempt of Court' includes both 'civil' and 'criminal' contempt. 'Civil contempt', means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court. 'Criminal contempt' means the publication (whether by words, spoken or written or by signs or by visible representations or otherwise) of any matter or doing of any act whatsoever which—(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court, or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding, or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice to any other manner.

A judge or magistrate or other person acting judicially shall be liable for

1. Article 125—At present the Chief Justice's salary is fixed at Rs. 5,000 p. m. and other judges get Rs. 4,000 p. m.
2. Article 130.
3. C. A. D., Vol. VIII, p. 852 (882).
4. *Hira Lal v. State of U. P.*, A. I. R. 1954 S. C. 743 at p. 747.

contempt of his own court or of any other court in the same manner as any other individual is liable. However, this section shall not apply to any observations or remarks made by him regarding a subordinate court in an appeal or revision pending before him.

The following acts or publications will not amount to contempt—

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1. Article 131.

2. *United Province v. Governor-General*, A. I. R. 1939 F. C. 58.

3. (1973) 11 S. C. J. 190.

maintainable. The Union of India, acting through the Central Government, could be said to represent the whole of the people of each individual State and their interests. When differences arise between the representative of the State and those of the whole people of India on questions of interpretation of the Constitution, Beg, C. J. said it appears to be too technical an argument to be accepted that a suit does not lie under Art. 131 of the Constitution. It is true that there is a distinction between the "State" and the "State Government." But it cannot be accepted that any action or incapacity of the Government may not affect the State and the State would not be interested in it. There is integral relationship between the "State" and the "State Government". Any action which affects the State Government or the Ministers in their capacity as Ministers would raise a matter in which the State would be concerned. The claims of the State Government are the claims of the State. The State acts through its Ministers. The acts of Ministers are acts of the State.

It is not necessary under Art. 131 that the plaintiff should have some legal right of its own to enforce. It only requires that the dispute must be one which involves a question "on which the existence or extent of legal right depended." The plaintiff must of course be a party to the dispute and obviously it cannot be a party to the dispute unless it is affected by it. The State has sufficient interest to maintain a suit under Art. 131 because the action of the Central Government against the State effect the interest of the Ministers who exercise its powers. The word "right" is used in Art. 131, Bhagwati, J., said, "in a generic sense and not according to its strict meaning. In its generic sense it includes not only right in the strict sense, but "any advantage or benefit conferred upon a person by a rule of law."

As regards the contention of *ultra vires* the Supreme Court held that the appointment of Commission of Inquiry against the Chief Minister and other Ministers of the State under section 3 of the above Act is valid and does not effect the federal structure as implicit in the basic feature of the Constitution. In democratic countries the statute can provide for inquiries of the kind which are meant to be conducted under the Commission of Inquiry Act. The object of the Act is to enable the machinery of the democratic Government to function more efficiently and effectively. It could hardly be construed as an Act meant to thwart democratic method of Government. The kind of federation established in India has a strong unitary bias with power given to the Central Government of supervision in certain circumstances of State Government. Hence, it cannot be said that the Centre can take no action which results in interference with Governmental functions of a State Government. The Central Government, has power under Art. 356 to order an inquiry for the purposes of the satisfaction required by Art. 356. The machinery provided by the Commission of Inquiry Act could be utilised to decide whether action under Art. 356 is really called for.

The original jurisdiction of the Supreme Court, however, does not extend to the following matters :

- (1) The jurisdiction of the Supreme Court shall not extend a dispute arising out of any treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was executed before the commencement of the Constitution and continues to be in operation or which provides that the jurisdiction of the Supreme Court shall not extend to such a dispute. (Art. 131, Proviso).
- (2) Under Article 262 Parliament may by law exclude the jurisdiction

of the Supreme Court in disputes with respect to the use, distribution or control of the water of any inter-State river or river valley.

- (3) Matters referred to the Finance Commission are also excluded from the original jurisdiction of the Supreme Court (Article 280).
- (4) The adjustment of certain expenses between the Union and the State (Article 290).

**Enforcement of Fundamental Rights.**--Article 32 confers original jurisdiction on the Supreme Court to enforce Fundamental Rights. Under clause (1) of Article 32 every citizen has a right to move the Supreme Court by appropriate proceedings for the enforcement of his Fundamental Rights. Under clause (2) the Supreme Court is given power to issue directions or orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition and *certiorari* whichever may be appropriate.

Article 32 provides a quick remedy for the enforcement of the Fundamental Rights. Under this Article a person can directly go to the Supreme Court. The Supreme Court has thus been constituted the protector and guarantor of the Fundamental Rights.

### APPELLATE JURISDICTION

**Article 132.**--The Supreme Court is the highest Court of Appeal in the country. The writ and decrees of this Court run throughout the country. It can be truly said that the jurisdiction and powers of the Supreme Court in their nature and extent are wider than those exercised by the High Courts of any country in the Commonwealth or by the Supreme Court of the U. S. A.

**Principle of affirmative action to be followed in exercise of writ jurisdiction.**--In exercise of the writ jurisdiction the Supreme Court, should not adopt a rigid attitude of negativity, e. g., stop striking down a law, but it should adopt affirmative attitude, i. e., suggest ways and means to remedy the situation arising out of its decision. This principle of affirmative action has been laid by the Supreme Court in the recent case of *State of Kerala v. T. P. Rosna*.<sup>1</sup> In that case a Government scheme of admission to medical colleges was declared unconstitutional by the Court. The Court, however, did not stop at the stage of declaring the scheme invalid but it suggested possible methods for implementing its judgment. Speaking for the majority Mr. Justice Krishna Ayer, observed, "we are unable to stop with merely declaring that the scheme of admission is *ultra vires* and granting relief to the petitioner of admission to the medical college. The need for controlling its repercussions call for judicial response." "Had we left the judgment of the High Court in the conventional form of merely quashing the formula of admission", the Court said, "the remedy would have aggravated the malady, confusion, agitation, paralysis. The root of the grievance and the fruit of the writ are not individual but collective". While the 'adversary system' (parties) makes the judge a mere umpire, traditionally speaking, the community orientation of the judicial functions, so desirable in the Third World remedial jurisprudence, transforms the courts power into affirmative structuring of redress so as to make it personally meaningful and socially relevant. Frustration of invalidity is part of the judicial duty; fulfilment of legality is complementary. This principle of affirmative action is within our jurisdiction under Art. 136 and 32.

The Appellate Jurisdiction of the Supreme Court can be divided into four main categories :—

1. A. I. R. 1979 S. C. 765.

- (a) constitutional matters,
- (b) civil matters,
- (c) criminal matters,
- (d) special leave to appeal.

**1. Appeal in constitutional matters.**—Under Article 132 (1) an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court whether in civil, criminal or other proceedings, if the High Court certifies under Art. 134 A (*added by the 44th Amendment Act, 1978*) that the case involves a substantial question of law as to the interpretation of the Constitution. Where such a certificate is given (or such leave is granted) any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided [and, with the leave of the Supreme Court, on any other ground]—Bracketed portion has been omitted by the *Constitution 44th Amendment Act, 1978*.

The object of the 44th Amendment is to avoid delay in granting certificate by the High Court for appeal to the Supreme Court. Under the new Article 134A the High Court can grant a certificate for appeal to the Supreme Court under Art. 132 either on its own motion or on 'oral' application of the aggrieved party immediately after passing the judgment, decree or final order. The Amendment therefore omits Cl. (2) of Art. 132 relating to grant of special leave by the Supreme Court in cases where the High Court refuses to give a certificate. Such cases will be regulated by Art. 136 under which the Supreme Court may grant special leave to appeal. Prior to this, the High Courts could do so only on the application of the aggrieved party. Under the new Article, it can now grant a certificate on its own motion if it deems fit.

Under Art. 132 (1) three conditions are necessary for the grant of certificate by the High Court :—

- (1) the order appealed must be against a judgment, decree or final order made by the High Court in civil, criminal or other proceedings,
- (2) the case should involve a question of law as to the interpretation of the Constitution, and
- (3) the question involved in such constitutional interpretation must be a question of law.

The words 'other proceedings' include all proceedings other than civil and criminal; they include 'revenue proceedings' which includes proceedings under the State Tax Act or the Income Tax Act, etc. Secondly, the case must involve a substantial question of law as to the interpretation of the Constitution. A question is not a substantial question of law which has been decided by the Supreme Court in a previous case but if there is a difference of opinion on any question of law among High Courts and there is not direct decision of the Supreme Court on that point it would be a substantial question of law.<sup>1</sup>

An appeal against High Court's decision would only lie to the Supreme Court when its decision amounts to a *final order*. No appeal lies against an order of the High Court unless the order amounts to a final order, i.e. the

1. Krishnaswami v. Governor-General-in-Council, A.I.R. 1947 F. C. 37.

order which puts to an end to the suit or other proceedings. If after the order, the suit is still alive, *i. e.* in which the right to be still determined, no appeal would lie.

In *The Election Commission v. Venkata Rao*,<sup>1</sup> a question was raised as to whether appeal lay to the Supreme Court from a decision of a *single judge*. The Supreme Court answered the question in affirmative. But this can only be done in very exceptional cases, where direct appeal to the Supreme Court is necessary and in view of the grave importance of the case an early decision is required in public interest.<sup>2</sup>

In an appeal before the Supreme Court, the appellant is not entitled to challenge the propriety of the decision of the High Court appealed against on the ground other than that on which the certificate was granted by the High Court, except with the leave of the Supreme Court.<sup>3</sup> Such leave would normally be granted by the Supreme Court where the trial before the High Court has resulted in the grave miscarriage of justice.<sup>4</sup> Even after the certificate is granted by the High Court, the Supreme Court may refuse to hear the appeal if it is satisfied that the appeal is not competent.<sup>5</sup>

**2. Appeal in Civil Cases—Article 133.**—Prior to the 30th Amendment Act, 1972, under Article 133 an appeal could go to the Supreme Court in civil cases from any judgment, decree or final order of the High Court if the High Court certified (a) that the amount or value of the subject-matter of the dispute both in the first instance and also on an appeal is not less than Rs. 20,000 ; or (b) that the judgment, decree or final order involves directly or indirectly same claim or question respecting property of the like amount or value, *i. e.* Rs. 20,000 ; or (c) that the case is a fit one for appeal to the Supreme Court.

Article 133 as amended by the *Constitution 30th Amendment Act, 1972*, provides that an appeal shall lie to the Supreme Court only if the High Court certifies under Article 134-A (*added by the 44th Amendment Act, 1978*)—

- (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.

Thus the amendment removes the condition of monetary value that an appeal could go to the Supreme Court only when the amount or value in dispute was not less than Rs. 20,000. After this amendment an appeal can go to the Supreme Court only if the High Court certifies that the case involves the substantial question of law of general importance.

The amendment seeks to give effect to the recommendations of the law Commission in the 44th and 45th report in Civil Appeals by the Supreme Court. According to the Law Commission 'the amendment' would curtail the number of appeals which are filed in Supreme Court merely on the valuation being satisfied without any merit in them.

1. *Election Commission v. Venkata Rao*, A.I.R. 1953 S. C. 210 at p. 212.
2. *Union of India v. Jyoti Prakash*, A. I. R. 1971 S. C. 1093.
3. *Darshan Singh v. State of Punjab*, A. I. R. 1953 S. C. 83.
4. *Than Singh v. Superintendent*, A. I. R. 1964 S. C. 1419.
5. *Syedana Taher v. State of Bombay*, A. I. R. 1958 S. C. 253.

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- (1) the order appealed must be against a judgment, decree or final order made by the High Court in civil, criminal or other proceedings,
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The words 'other proceedings' include all proceedings other than civil and criminal; they include 'revenue proceedings' which includes proceedings under the State Tax Act or the Income Tax Act, etc. Secondly, the case must involve a substantial question of law as to the interpretation of the Constitution. A question is not a substantial question of law which has been decided by the Supreme Court in a previous case but if there is a difference of opinion on any question of law among High Courts and there is not direct decision of the Supreme Court on that point it would be a substantial question of law.<sup>1</sup>

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1. Krishna Swami v. Governor-General-in-Council, A.I.R. 1947 F. C. 37.

by the High Court on the ground that the conclusions of the High Court were based on a misleading evidence and that important material evidence was ignored. In this case the findings of the High Court were different from those of the trial court.

In an appeal under Art. 133 the appellant cannot be allowed to raise new grounds not raised before the Lower Court<sup>1</sup>

**3. Appeal in Criminal cases—Article 134**—According to Article 134 an appeal lies to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the following two ways:—

(1) without a certificate of the High Court, (2) with a certificate of the High Court.

(a) Without a certificate—Article 134 (a) (b).—An Appeal lies to the Supreme Court without the certificate of the High Court if the High Court:—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death.

(b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death.

But if the High Court has reserved the order of conviction and has ordered the acquittal of an accused, no appeal would lie to the Supreme Court.

(b) With a certificate—Article 134 (c).—Under clause (c) an appeal lies to the Supreme Court if the High Court certifies under Article 134-A(*added by the 44th Amendment Act, 1978*) that it is a fit case for appeal to the Supreme Court.

The power of the High Court to grant fitness certificate in the criminal cases is a discretionary power, but the discretion is a judicial one and must be judicially exercised along with the well established lens which govern these matters.<sup>2</sup> The Supreme Court has laid down entire guiding principles for the High Courts to follow in granting certificates. The High Court should grant certificate only where there has been exceptional circumstances, e. g., where substantial and grave injustice has been done. Thus a certificate cannot be granted by the High Court on mere question of fact,<sup>3</sup> where no substantial question of law is involved. Normally the Court does not review evidence in criminal appeals unless there is some illegality or grave irregularity or some serious lapse on the part of courts below in marshalling evidence which justifies in reviewing it in the larger interests of justice. Thus in *P. Uka Narain v. K. Karson*,<sup>4</sup> the Court held that the concurrent findings of two courts below when not tainted with any infirmity are binding on the Court.

It is to be noted that under Article 134 (1) (c), the Supreme Court is not constituted as general court of criminal appeal. It would entertain appeals from the High Courts only on the above principles. A limited criminal appellate

1. *Mangal Ram v. State of Orissa*, A. I. R. 1977 S. C. 1455; *Ajodhya Bhagat v. State of Bihar*, A. I. R. 1974 S. C. 1886; *Lila Ram v. Union of India*, A. I. R. 1975 S. C. 2112.

2. *Nar Singh v. State of U. P.*, A. I. R. 1954 S. C. 457.

3. *Sidheswar Ganguly v. State of West Bengal*, A. I. R. 1958 S. C. 143.

4. A. I. R. 1971 S. C. 759.

The requirement of giving certificate under Article 133 has now become very stringent in view of the amendment of clause (1) by the Constitution (30th Amendment) Act, 1971. It is not now sufficient if the case involves a substantial question of law of general importance but in addition to it the High Court should be of the opinion that such question needs to be decided by the Supreme Court. Further, the word 'needs' suggests that there has to be necessity for a decision by a Supreme Court on the question, and such a necessity can be said to exist when, for instance, two views are possible regarding the question and the High Court takes one of the said views. Such a necessity can also be said to exist when a different view has been expressed by another High Court. It is thus apparent that there must be some imperative necessity arising from the fact and circumstances of the case before the Court can certify it to be fit one to prefer an appeal to Supreme Court.<sup>1</sup>

The pecuniary value of the subject-matter of the suit is of no consideration at all. There may be cases where the point in dispute cannot be measured in terms of money and yet the decisions may have far-reaching results,<sup>2</sup> e. g. where the case is one of great public or private importance.<sup>3</sup>

The certificate of the High Court is not obtainable as a matter of right. It depends solely on the discretion of the High Court. But the discretion is a judicial one and must be judicially exercised on well-established lines which govern these matters. But mere grant of certificate does not make it obligatory on the Supreme Court to entertain the appeal. It is still entitled to determine whether the certificate was rightly granted and whether the conditions prerequisite to grant were satisfied. In *Nar Singh v. State of U. P.*,<sup>4</sup> it was held that if on the face of the order it is apparent that the Court has misdirected itself and considered that its discretion was fettered when it was not, or that it had none, then the Supreme Court may either remit the case or exercise its discretion itself.<sup>5</sup>

**Civil Proceedings.**—The expression 'civil proceeding' means proceedings in which a party asserts the existence of a civil right. A civil proceeding is one in which a person seeks to remedy by an appropriate process the alleged infringement of his civil rights against another person or the State and which, if the claim is proved, would result in the declaration expressly or impliedly of the right claimed and relief, such as, payment of debt, damages, compensation, etc. There is no ground for restricting the expression 'civil proceedings' only to those proceedings which arise out of civil suits in proceedings which are tried as civil suits. Accordingly, a proceeding before a High Court under Article 226 for a grant of writ constitutes a civil proceeding.<sup>6</sup>

Under Article 133 the Supreme Court does not interfere with the concurrent findings of fact by the lower courts and the High Courts unless it is shown that important and relevant evidence has been overlooked, or unless it is fully unsupported by evidence on record.<sup>7</sup> Thus in *M. M. B. Catholics v. T. Paulo Avira*,<sup>8</sup> the Supreme Court interfered with the finding of fact made

1. *Union of India v. Hafiz Mohd.*, A. I. R. 1975 Delhi 77.
2. *Madan Gopal v. State of Orissa*, A. I. R. 1956 Orissa 71.
3. *Inda Devi v. Board of Revenue*, A. I. R. 1957 All. 116
4. A. I. R. 1954 S. C. 457.
5. *Rajendra Chand v. Mst. Sukhi*, A. I. R. 1957 S. C. 289.
6. *Narain Raw v. Ishwar Lal*, A. I. R. 1965 S. C. 1818.
7. *D. C. Works Ltd. v. State of Saurashtra*, A. I. R. 1957 S. C. 264.
8. A. I. R. 1959 S. C. 31 at p. 50.

consider the question of granting certificate immediately on the delivery of the judgment, decree, final order, or sentence concerned either on oral application by the party aggrieved or, if it deems fit to do so, on its own motion.

Prior to this, High Court could grant certificate only on the formal application of the aggrieved party, whereas under the new Article, the High Court can grant a certificate *suo motu* if it thinks fit.

**Transfer of cases from one High Court to another and withdrawal of cases from High Courts to Supreme Court**—The new Article 139-A added by the (42nd Amendment) Act, 1976, empowers the Supreme Court to transfer cases from any High Court to another High Court if it is expedient to do so for the end of justice. Clause (?) of Art. 139-A provides that if on an application made by the Attorney-General the Supreme Court is satisfied that involves the same questions of law or such questions are substantial questions of general importance which is pending before it and before one or more High Courts may withdraw the case and decide them itself.

The 44th Amendment Act, 1978, retains this provision subject to the following modifications. It has substituted a new clause (l) for clause (l) of Art. 139-A which empowers the Supreme Court to withdraw cases from the High Courts "suo motu" i. e. itself, in addition to the power to withdraw cases on the application of the Attorney-General. Prior to this, the court could do so only on the application of the Attorney-General.

**Federal Court's jurisdiction to be exercised by the Supreme Court—Article 135.**—It is to be noted that before the commencement of the Constitution there was a Federal Court in India. It was created by the Government of India Act, 1935. The Federal Court has now been abolished by the Constitution. Article 135 was included in the Constitution to enable the Supreme Court to exercise jurisdiction in cases which were not covered by Articles 133 and 134, in respect of matters where the Federal Court had jurisdiction to entertain appeals, etc. from the High Courts under the previously existing law.<sup>1</sup> But the Supreme Court shall exercise its jurisdiction under Article 135 if two conditions are satisfied :

(1) Articles 133 and 134 do not apply to the case.

(2) It is a case in regard to which the Federal Court had the jurisdiction to entertain appeals.

**Appeal by special leave—Article 136.**—Under Article 136 the Supreme Court is authorised to grant in its discretion special leave to appeal from (a) any judgment, decree, determination, sentence or order, (b) in any cause or matter, (c) passed or made by any court or tribunal in the territory of India. The only exception to this power of the Supreme Court is with regard to any judgment, etc. of any court or tribunal constituted by or under any law relating to the Armed Forces.

This Article vests very wide powers in the Supreme Court. The power given under this Article is in the nature of a special or residuary power which are exercisable outside the purview of ordinary law (Articles 132 to 135 deal with ordinary appeals to the Supreme Court) in cases where the needs of justice demand interference by the highest Court of the land. This Article is worded in the widest possible terms. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals by granting spe-

J. Janardhan Reddi v. The State, A. I. R. 1951 S. C. 124.

jurisdiction is conferred upon the Supreme Court by Article 134. It is limited in the sense that even the Supreme Court has been constituted as a court of criminal appeal in exceptional cases where the demand of justice requires interference by the highest Court of the land.

Parliament is, however, empowered under Article 134 (2) to extend the appellate jurisdiction of the Supreme Court in criminal matters. In exercise of the powers under clause (2) of Art. 134 Parliament enacted the *Supreme Court enlargement of Criminal Appellate Jurisdiction Act 1970*. Section 2 of the above Act provides as follows—

"Without prejudice to the powers conferred on the Supreme Court by clause (1) of Article 134 of the Constitution, an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

- (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than ten years;
- (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than ten years."

Thus under clause (2) of the Act an accused, who have been convicted for an offence under section 302/34 I. P. C.; can prefer an appeal to the Supreme Court as a matter of right. But in an appeal by special leave under Art. 136 the Supreme Court does not undertake to reappreciate evidence. However, in a situation where the Sessions Judge register the entire prosecution evidence as unworthy of belief, but the High Court implicitly relies on almost the entire evidence, the Supreme Court would be bound to examine the evidence for the purpose of ascertaining whether there has been any such error of law or fact as to vitiate the findings in the impugned judgment.<sup>1</sup>

**Certificate for appeal to Supreme Court—Art. 134-A—** The *Constitution (41st Amendment) Act*, has amended Articles 132, 133 and 134 and inserted a new Article 134-A for regulating the grant of the certificate for appeal to the Supreme Court by the High Courts. The object of this new provision is to avoid delay in cases going to the Supreme Court in appeal from the judgment, decree, final order or sentence of the High Court. Article 134-A is as follows :

"Every High Court, passing or making a judgment, decree, final order or sentence, referred to in clause (1) of Articles 132 or 133 or 134—

- (a) may, if it deems fit so to do, on its own motion, and
- (b) shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence,

determine as soon as may be after such passing or making, the question whether a certificate of the nature referred to in clause (1) of Articles 132, 133 or sub-C1. (c) of clause (1) of Art. 134, may be given in respect of that case."

Thus under the new Article 134-A it is obligatory on the High Court to

1. *Muthu Naicker v. State of T. N., A. I. R. 1978 S. C. 647.*

and 'own possession' used in S. II (I) (b) of the J. & K. Houses and Shops Rent and Control Act and thus misapplied the law and overlooked some of the essential features of the eviction Act, the Supreme Court had to enter into the merit of the case in order to prevent grave and substantial injustice to the appellant who was evicted as a result of the above interpretation of the law.<sup>1</sup>

In an appeal under Article 136 the Supreme Court does not allow the appellant to raise new plea for the first time.<sup>2</sup>

**In criminal cases.**—The power of the Supreme Court under Article 136 has more frequently been invoked in criminal appeals. In criminal cases the Court will not grant special leave to appeal unless it is shown that special and exceptional circumstances exist, or it is established that grave injustice has been done and that the case in question is sufficiently important to warrant a review of the decision by the Supreme Court. In *Haripada Dey v. State of West Bengal*,<sup>3</sup> the Supreme Court held that it will grant special leave only if there has been gross miscarriage of justice or departure from legal procedure, such as, which vitiates the whole trial or if the finding of fact were such as shocking to the judicial conscience of the Court.

Article 136 is worded in wide terms and the power conferred by it is not hedged in by any technical hurdles. This overriding and exceptional power is however to be exercised sparingly and only in furtherance of cause of justice. Thus when the judgment under appeal has resulted in grave miscarriage of justice by some misapprehension or mistake in the reading of evidence or by ignoring material evidence then it is not only empowered but is excepted to interfere to promote the cause of justice.<sup>4</sup> Article 136 merely confers discretionary power on the Court to scrutinise and to go into the evidence in special circumstances in order to see that substantial and grave injustice has not been done. It does not confer a right of appeal on the party.<sup>5</sup>

In *Balak Ram v. State of U. P.*,<sup>6</sup> the Court held that though the powers vested in the Supreme Court under Art. 136 are wide but in criminal appeals the Court does not interfere with the 'concurrent findings of fact' save in exceptional circumstances.

The Supreme Court does not function as a regular court of appeal in every criminal case. Normally, the High Court is a final Court of appeal and the Supreme Court is only a court of special jurisdiction. The Supreme Court would not therefore re-appraise the evidence to determine the correctness of findings unless there are exceptional circumstances where there is manifest illegality or grave and serious miscarriage of justice, for example, the forms of legal process are disregarded or principles of natural justice are violated or substantial and grave injustice has otherwise resulted.

The High Courts have wide powers in appeals against acquittal as well as conviction but if two views of the evidence are reasonably possible the High

1. *Bega Begum v. Abdul Ahmad Khan*, A. I. R. 1979 S. C. 272.
2. *Mani Subba Rao v. Ganeshappa*, A. I. R., 1978 S. C. 1061 ; *Rukmani Bai v. State of M. P.*, A. I. R. 1975 S. C. 991.
3. A. I. R. 1956 S. C. 757 ; *Matru v. State of U. P.*, A. I. R. 1971 S. C. 1050.
4. *Subedar v. State of U. P.*, A. I. R. 1971 S. C. 125.
5. *Matru v. State of U. P.*, A. I. R. 1971 S. C. 1050.
6. A. I. R. 1974 S. C. 2165 ; *Duli Chand v. Delhi Administration*, A. I. R. 1975 S. C. 1960.

cial leave against any kind of judgment or order made by any Court or Tribunal (except a Military Tribunal) in any proceedings and the exercise of this power is left entirely to the discretion of the court unfettered by any restrictions and this power cannot be curtailed by any legislation short of amending the Article itself.<sup>1</sup>

**Distinction between Art. 136 and Arts. 132-135.**—The power of the Supreme Court under Article 136 is not fettered with any of the limitations contained in Articles 132 to 135—

(1) Under Articles 132 to 135 appeal can be entertained by the Supreme Court only against the 'final order' but under Article 136, the word 'order' is not qualified by the adjective 'final' and hence the court can grant special leave to appeal even from interlocutory order.

(2) Under Articles 132 to 134 appeal lies only against the final order of the High Court; while under Article 136 the Supreme Court can grant special leave for appeal from "any Court", i.e. from any subordinate court below the High Court, even without following the usual procedure of filing appeal in the High Court or even where the law applicable to the dispute does not make provision for such an appeal.<sup>2</sup>

From the above, it is clear that the Supreme Court is vested with very wide discretionary power. It is in the fitness of things that it should have such a wide power as the highest Court of the country. But how this discretionary power is to be exercised has been explained by the Supreme Court itself in *Pritam Singh v. The State*:<sup>3</sup>

"The wide discretionary power with which this Court is vested under it is to be exercised in granting special leave to appeal in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this Article. By virtue of this Article, we can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which can come up before different kinds of tribunals and in a variety of other cases." In *D. C. Mills v. Commissioner of Income-tax, W. B.*,<sup>4</sup> the Court held that "it being an exceptional and overriding powers, it has to be exercised sparingly and with caution and only in special extraordinary situations. Beyond that, it is not possible to fetter the exercise of this power by any set formula or rule."

Normally the Supreme Court does not interfere with concurrent findings of the trial court and the High Court unless there is sufficient ground to do so.<sup>5</sup> But where the High Court as also the trial court have made a legally wrong approach to the instant case and committed a substantial and patent error of law interpreting the scope and ambit of the words "reasonable requirement"

1. Basu, D. D.—An Introduction to the Constitution of India, p. 233.
2. Bharat Bank v. Employees of Bharat Bank, A. I. R. 1950 S. C. 188; Rajgarh Jute Mills v. Eastern Railway, A. I. R. 1958 S. C. 225. See also Durga Shankar v. Raghuvar Singh, A. I. R. 1954 S. C. 520; D. C. Mills Ltd. v. Commissioner of Income-tax, West Bengal, A. I. R. 1955, S. C. 63; Sangram Singh v. Election Tribunal, Kotah A. I. R. 1953 S. C. 425.
3. A. I. R. 1950 S. C. 169.
4. A. I. R. 1955 S. C. 65.
5. Sultan Ahmad v. State of Bihar, A. I. R. 1975 S. C. 1828; Mehtab Singh v. State of M. P., A. I. R. 1975 S. C. 274.

Court ought not to interfere with the order of acquittal passed by the trial court. If the High Court has set aside an order of acquittal the Supreme Court in appeal under Art. 136 will examine the evidence only if the High Court has failed to apply correctly the principles governing appeals against acquittal. Thus where the Supreme Court found that the judgment of the High Court was manifestly wrong it re-appraised the evidence and acquitted the accused giving him benefit of doubt.<sup>1</sup> In *M. R. Dhawan v. Pratap Bhanu*,<sup>2</sup> the appellant was tried by the trial Magistrate and was discharged on the ground that no *prima facie* case was established against him. The Sessions Judge affirmed the order of the Magistrate. The appellant filed a revision before the High Court. The High Court, on the facts and circumstances of the case, arrived at a finding of fact that a *prima facie* case made out and set aside the order of discharge passed by the Magistrate and upheld by the Sessions Judge and directed that the appellant be committed to the Court of Session. The Supreme Court held that when it is obvious that the High Court has applied its mind to the facts and circumstances of the case, it is not for the Supreme Court to go into the sufficiency of the material before the Magistrate which may afford justification for passing an order of discharge. This Court would not normally interfere with the discretion exercised by the High Court.

When leave is limited to certain grounds it would not be appropriate to put a very narrow and grammatical construction of the grounds. More often grounds set out in special leave applications are overlapping and often repeated and even occasionally vague. Therefore, as far as possible the grounds should not be very strictly construed or should not be construed in such a manner as to make the special leave guarantee under Art. 136 self-defeating. Attempt of the Court must be to find out what was the grievance or contention and the discretion should not be exercised to refuse the leave on the ground that the grounds cannot be ascertained.<sup>3</sup>

In petty matters the Court may refuse to decide even on a question of law. It is not as if once special leave is granted the Court is bound to decide every question of law, be it big, small or petty.<sup>4</sup>

In *Charan Singh v. State of Punjab*,<sup>5</sup> where in an appeal against conviction in a murder case and also the reference under section 374, Cr. P. C., for confirmation of death sentence, the High Court without considering the evidence of the witness observed that all the witness examined discussing evidence of the eye-witness after making only a general reference by the prosecution inspired full confidence the Supreme Court considered it proper to examine the evidence itself. It was essential for the High Court to have re-appraised the evidence adduced in the case and come to an independent conclusion as to whether the guilt of the accused has been proved or not.

When special leave is obtained by making false and misleading statement of material fact the Supreme Court will be justified in revoking the leave to appeal.<sup>6</sup>

1. *Mohd. Ilyas v. State of U. P.*, A. I. R. 1974 S. C. 1980.
2. A. I. R. 1978 S. C. 1011.
3. *Balai Chandra v. Shewdhare Jadav*, A. I. R. 1978 S. C. 1062.
4. *Management of D. T. C. v. Majalay*, A. I. R. 1978 S. C. 764.
5. A. I. R. 1975 S. C. 246.
6. *Udai Chand v. Shanker Lal*, A. I. R. 1978 S. C. 765.

### Tribunal.

Under Article 136 the power of the Supreme Court to grant special leave to appeal is not confined to orders or determination of a court of law, but includes 'tribunals' also. Several tests have been laid down by the Supreme Court to determine whether a particular body or authority is a tribunal within the ambit of Art. 136. The tests are not exhaustive in all cases. It is not necessary that all the tests laid down may be present in a given case while some tests may be present others may be lacking. It is, however, absolutely necessary that the authority in order to come within the ambit of Art. 136 (1) as tribunal must be constituted by the State and is vested with some function of judicial powers of the State. This particular test must be present while some of the other tests may or may not be present at the same time.<sup>1</sup> Thus a tribunal is a body of authority although not a court having all the attributes of a court, which is vested with judicial power to adjudicate on question of law or fact affecting the rights of citizens in a judicial manner<sup>2</sup>. However, it does not include a tribunal which have purely administrative or executive functions or a Tribunal having only legislative functions without any quasi-judicial functions.<sup>3</sup> *Industrial Tribunals, Income Tax Tribunals, Labour Appellate Tribunals, Election Commission, Railway Rates Tribunals, etc* are few examples of such Tribunals which though not a court of law in the strict sense, are invested with certain functions of courts of justice.

In *A. P. H. L. Conference Shillong v. W. A. Sangma*,<sup>4</sup> it has been held that the *Election Commission* is a tribunal as it is created under the Constitution and is invested under the law with not only administrative power but also with certain judicial power of the State, however fractional it may be. The Commission exclusively resolves disputes *inter alia*, between rival parties with regard to claims for being recognised political party for the purpose of the electoral symbol. Therefore the Commission fulfils the essential tests of a tribunal and falls within the ambit of Art. 136 (1) of the Constitution.

In *Clerks of Calcutta Tramways v. Calcutta Tramways Co. Ltd.*,<sup>5</sup> it was held that the Supreme Court can normally interfere with the decisions arrived at by these Tribunals on the following grounds, where :—

- (1) the tribunal act in excess of the jurisdiction conferred upon it under the statute or regulation creating it or where it ostensibly fails to exercise a patent jurisdiction ;
- (2) there is an apparent error on the face of the decision ;
- (3) the awards are made in violation of principles of natural justice causing substantial and grave injustice to parties ;
- (4) the Tribunal has erroneously applied well-accepted principles of jurisdiction.

In *Jaswant Sugar Mills v. Lakshmi Chand*,<sup>6</sup> the Supreme Court held that

1. *A. P. H. L. Conference, Shillong v. W. A. Sangma*, A. I. R. 1977 S. C. 2155.
2. *Bharat Bank v. Employees of Bharat Bank*, A. I. R. 1950 S. C. 188.
3. *Durga Shankar v. Raghu Raj Singh*, A. I. R. 1954 S. C. 530; *Express Newspaper Ltd. v. Union of India*, A. I. R. 1958 S. C. 578.
4. A. I. R. 1978 S. C. 2155.
5. *A. L. R. 1957 S. C. 78*; *D. C. Mills Ltd. v. Commissioner of Income Tax, W. H. A. I. R. 1955 S. C. 63*; *Hindustan Antibiotics v. Workmen*, A. I. R. 1967 S. C. 947; *Alembic Chemical Works v. Workmen*, A. I. R. 1961 S. C. 647; A. I. R. 1967 S. C. 948; *Hindustan Tin Works v. Its Employees*, A. I. R. 1979 S. C. 75.
6. A. I. R. 1963 S. C. 677

the Conciliation Officer exercising power under the U. P. Industrial Disputes Act is not a tribunal because it does not possess attributes of a court of justice. The Conciliation Officer is not required to sit in public, and formal pleading is required before him, he cannot examine witnesses, compel production of document, etc. He is not capable of giving a final judgment affecting the rights and obligation of the parties. In civil cases the special leave to appeal under Article 134 would not be granted unless some substantial question of law or general public interest is involved.

**Advisory Jurisdiction (Article 143).**—Art. 143 provides that if at any time it appears to the President that—

- (a) a question of law or fact has arisen or is likely to arise, and
- (b) the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question for the advisory opinion of the Court.

The Court may after such hearing, as it thinks fit, report to the President its opinion thereon. Under clause (2), if the President refers to the Supreme Court matters which are excluded from its jurisdiction under the proviso to Article 131, the Court shall be bound to give its opinion thereon.

There is no provision similar to this in the Constitution of the United States of America or in the Australian Constitution. Accordingly, the American Supreme Court and the High Court of Australia have refused to give advisory opinions to the Executive. They have held that the jurisdiction and powers of the Court extend only to the decisions of the concrete cases which come before the Court. But in Canada under section 60 of the Canadian Supreme Court Act, 1906, the Governor-General in Council may refer important question of law concerning certain matters to the Supreme Court for its advisory opinion. The Indian Supreme Court, like the Canadian Supreme Court, exercises the powers to give advisory opinion to the President. The Government of India Act, 1935, empowered the Governor-General to consult the Federal Court. Till the year 1978, seven references have been made to the Supreme Court under Art. 143 (1). They are (1) *In re Delhi Laws Act case*<sup>1</sup> in 1951 ; (2) *In re Kerala Education Bill*<sup>2</sup> in 1958 ; (3) *In re Berubari*<sup>3</sup> in 1956 ; (4) *In re The Sea Customs Act*<sup>4</sup> in 1962 ; (5) *Keshav Singh case*<sup>5</sup> in 1965 ; (6) *In re Presidential Poll*<sup>6</sup> in 1974 and (7) *The Special Court Reference case*<sup>7</sup> in 1978.

The use of the word "may" in Article 143 (1) indicates that the Supreme Court is not bound to answer a reference made to it by the President. *In re Kerala Education Bill*,<sup>8</sup> the Supreme Court laid down the following principles to be followed in such cases :

- (1) The Supreme Court has under clause (1) a discretion in the matter and in a proper case and for good reason refuse to express any opinion on the question submitted to it.

1. A. I. R. 1951 S. C. 332.
2. A. I. R. 1958 S. C. 956.
3. A. I. R. 1960 S. C. 843.
4. A. I. R. 1963 S. C. 1760.
5. A. I. R. 1965 S. C. 745.
6. A. I. R. 1974 S. C. 1682.
7. Hindustan Times, 2 Dec. 1978.
8. A. I. R. 1958 S. C. 956.

- (2) It is for the President to decide what question should be referred to the Court, and if he does not entertain any serious doubt on the other provisions it is not for any party to say that doubts arise also out of them.

Accordingly, the President may formulate for advisory opinion of the Supreme Court questions of fact and law relating to the validity of provisions of the existing laws or in regard to the validity of provisions proposed to be included in the Bills which would come before the Legislature, or in respect of any other question of constitutional importance.<sup>1</sup>

In some decisions the Court had expressed the view that the advisory opinion of the Supreme Court under Art. 143, though entitled to great respect was not binding on Courts, because it was not law within the meaning of Art. 141 and hence it was not binding on Courts.

This view has now been changed in the recent *Special Reference Case*.<sup>2</sup>

In the recent *Special Court Reference case*,<sup>3</sup> under Art. 143 the Supreme Court has held that the Court is obliged to give its advisory opinion under Art. 143 of the Constitution. In that case the question referred to the Court for its opinion was whether Parliament is empowered to establish Special Courts for the trial of emergency offences. A seven-member constitution bench of the Supreme Court by 6-1 majority held that Parliament has power to establish Special Courts for trial of emergency offences, subject to certain procedural safeguards. The President had sought the opinion of the Court on the private member's Bill introduced in the Lok Sabha empowering the Government to set up Special Courts for the trial of emergency offences. The three procedural changes suggested by the Court are—(1) that only sitting and not retired High Court Judges should be appointed to the Special Court; (2) appointments must be made with "the concurrence of" and not simply "in consultation with" the Chief Justice; and (3) the accused must be given right to apply to Supreme Court for transfer of his case from one Special Court to another if he alleges bias. If these changes are made in the Bill it would render the procedure "fair and just". All these amendments were acceptable to the Government.

The Court rejected the preliminary objection that it is not bound to hear the reference. It was held that the Court is obliged to answer the reference under Art. 143 of the Constitution.

The Supreme Court also made it clear that the view of the court expressed in the exercise of its advisory jurisdiction is binding on all courts. This implies that the legislation (establishing Special Court) can only be challenged in the Supreme Court. The judges said "It would be strange that a decision given by this Court on a question of law in a dispute between two private parties should be binding on all courts in this country but the advisory opinion should bind no one at all even if, as in the instant case, it is given after issuing notice to all interested parties, after hearing every one concerned who desired to be heard, after the full consideration of the questions raised in the reference."

1. *In re under Article 143 of the Constitution (Special Reference No. 1 of 1964)*, A. I. R. 1965 S. C. 745 at p. 756.

2. A. I. R. 1971 S. C. 448.

3. *Ibid.*

However, the Supreme Court has strongly suggested that the reference should not be vague and general but must be made on 'specific questions', otherwise the court would not be bound to answer.

**Law declared by the Supreme Court to be binding on all courts—Article 141.**—The judgment of the Supreme Court will be binding on all courts in India.

**Is Supreme Court bound by its own decisions?**—The expression 'all courts' in the territory of India clearly means courts other than the Supreme Court. Thus the Supreme Court is not bound by its own decisions and may in proper cases reverse its previous decisions.

The question was considered in detail by the Supreme Court in the case of *Bengal Immunity Co. v. State of Bihar*.<sup>1</sup> In this case the Court held "there is nothing in the Indian Constitution which prevents the Supreme Court departing from its previous decisions if it is convinced of its error and its beneficial effect on the general interest of the public." The Court also laid down the guidelines for overruling its earlier decisions. The Court said, "The Supreme Court should not lightly dissent from its previous decision. Its power of review must be exercised with due care and caution and only for advancing the public well-being in the light of surrounding circumstances of each case brought to its notice but it is not right to confine its power within rigidly fixed limits. If on a re-examination it comes to the conclusion that the previous majority decision was plainly erroneous then it will be its duty to say so and not to perpetuate its mistake."

The doctrine of *stare decisis*, the Court said, is not an inflexible rule of law and cannot be permitted to perpetuate errors of the Supreme Court to the detriment of the general welfare of the public. More so, the doctrine has hardly any application to an isolated and stray decision of the Court very recently made and not followed by a series of decisions based thereon. In this case the Court has reconsidered its previous decision given in the case of *United Motors v. State of Bombay*.<sup>2</sup>

In *Golaknath v. State of Punjab*,<sup>3</sup> the Supreme Court had reversed two of its previous decisions, i. e., *Shankari Prasad's* case and *Sajjan Singh's* case. In both the cases, the court had held that the power to amend the Constitution was contained in Article 368 and the word 'law' in Article 13 did not include an amendment of the Constitution which is made in exercise of constituent power of Parliament. In *Golaknath's* case, however, the Supreme Court reversed its decisions in the above cases and held that the power to amend the Fundamental Rights is not found in Article 368, but in the residuary power of Legislation, hence a law made under Article 368 is subject to Article 13. In that case the Court had applied the rule of prospective overruling.

The recent instance that the court is not bound by its previous decisions is furnished by the decision in the *Fundamental Rights case*(*Kesavanand v. State*

1. A. I. R. 1955 S. C. 661.

2. A. I. R. 1953 S. C. 352.

3. A. I. R. 1967 S. C. 1643.

of Kerala).<sup>1</sup> In that case the Supreme Court reconsidered its decision in *Golak Nath's* case and overruled it. The majority held that the *Golak Nath's* case was wrongly decided and the word 'law' in Article 13 did not include an amendment of the Constitution passed under Article 368.

Thus it is clear that the doctrine of Precedent (*stare decisis*) is followed in India to a limited extent. It is to be noted that this is in line with the modern practice. Till recently the House of Lords strictly adhered to the doctrine of Precedent. But in one of its recent decisions the House of Lords has held that it is not bound by its own decisions.<sup>2</sup> The observation of the *House of Lords* is worth quoting here :

"Their Lordships, nevertheless recognise that two rigid adherence to precedent may lead to injustice in a particular case also unduly restrict the proper development of law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

The Allahabad,<sup>3</sup> Bombay<sup>4</sup> and Karnataka<sup>5</sup> High Courts have held that the *obiter dicta* of the Supreme Court is also 'law' within the meaning of Article 141 and hence is binding on all courts.

The judgement of the Supreme Court based on concession and not on any analysis or examination of the relevant provisions will not help as judicial precedents. So, if in a case it was conceded on behalf of the State that in the absence of a sanction the prosecution of the appellant must fail and hence there was no need to analyse the relevant provisions of law, it could not be cited as a judicial precedent.<sup>6</sup>

**Power of Supreme Court to review its judgments.**—Under Article 137 the Supreme Court has expressly been given the power to review its judgment. However, this is subject to any law passed by the Parliament. This power is exercisable under rules made by the Court under Article 145, on grounds mentioned in Order 47, Rule 1 of C. P. C. A review will lie in the Supreme Court on :

- (1) discovery of new and important matters or evidence ;
- (2) mistake or error apparent on the face of the record ; and
- (3) any other sufficient reason.<sup>7</sup>

In *R. D. Sagar v. V. Nagary*,<sup>8</sup> the Supreme Court has held that a judgment of the final court of the land is final. A review of such a judgment is an exceptional phenomenon, permitted only where a grave and glaring error or other well-established ground is made out. In the present case, the petitioner

1. A. I. R. 1973 S. C. 1461.

2. Judicial Committee of Privy Council in England and Supreme Court in U. S. A. See also *Phanindra Chandra v. The King*, A. I. R. 1940 P. C. 117. Practice Statement (Judicial Precedent) issued by the House of Lords in (1966) 1 W. L. R. 1234.

3. *Ram Surat v. Ram Murari*, A. I. R. 1955 Bom. 220.

4. *K. P. Doctor v. State of Bombay*, A. I. R. 1955 Bom. 220.

5. *State v. South Central Railway*, A. I. R. 1977 Kant. 168.

6. *Lakshmi Shanker v. State (Delhi Administration)*, A. I. R. 1973 S. C. 451.

7. *Lokenath Tolaram v. B. N. Rangman*, A. I. R. 1975 S. C. 279.

8. A. I. R. 1976 S. C. 2183.

sought the review of an earlier judgment on the ground that certain observations in the judgment amounted almost branding him as unindicted criminal, that is, guilty of abetting forgery and perjury which were unmerited and should, therefore, be obliterated. The court declined to cancel the above observations. However, it modified its rigour by making certain observations.

Article 38 empowers Parliament to invest the Supreme Court with such additional jurisdiction and powers with respect to any of the matters mentioned in the Union List as it thinks fit.

**Ancillary Powers of Supreme Court.**—Under Article 140 Parliament may by law confer such supplementary power on the Supreme Court as made to appear to be necessary to enable it to perform effectively the functions placed upon it under the Constitution. But such supplementary powers should not be inconsistent with any of the provisions of the Constitution.

The decrees passed or order made by the Supreme Court shall be enforceable throughout the territory of India. All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court (Art.144).

Under Article 145 the Supreme Court has power, with the approval of the President, to make rules to regulate its own procedure. This is, however, subject to any law made by Parliament. As a result of the insertion of new Article 139-A by the *Constitution (42nd Amendment) Act, 1976* some consequential changes have been made in Art. 145 of the Constitution.

### INDEPENDENCE OF JUDICIARY—HOW MAINTAINED UNDER THE CONSTITUTION ?

Only an impartial and independent judiciary can protect the rights of the individual and provide equal justice without fear or favour. It is, therefore, very necessary that the Supreme Court should be allowed to perform its functions in an atmosphere of independence and be free from all kinds of political pressures. The Constitution has made several provisions to ensure independence of judiciary :

- (1) **Security of tenure.**—The Judges of the Supreme Court have security of tenure. They cannot be removed from office except by an order of the President and that also only on the ground of proved misbehavior or incapacity, supported by a resolution adopted by a majority of total membership of each House and also by a majority of not less than 2/3 of the members of the House present and voting. Parliament may, however, regulate the procedure for presentation of the address and for investigation and proof of the misbehaviour or incapacity of a judge. But Parliament cannot misuse this power, because the special procedure for their removal must be followed.
- (2) **Salaries of Judges fixed, not subject to vote of Legislature.**—The salaries and allowances of the Judges of the Supreme Court are fixed by the Constitution and charged on the Consolidated Fund of India. They are not subject to vote of Legislature. During the term of their office, their salaries and allowances cannot be altered to their disadvantage except in grave financial emergency.
- (3) **Parliament can extend, but cannot curtail the jurisdiction and power of the Supreme Court.**—In respect of its jurisdiction, Parliament may change pecuniary limit for appeals to the Supreme Court in

civil cases, enhance the appellate jurisdiction of the Supreme Court, confer supplementary power to enable it to work more effectively, confer power to issue directions, order or writs including all the prerogative writs for any purpose other than those mentioned in Article 132. The point to be noted in all these provisions is that the Parliament can exceed, but cannot curtail the jurisdiction and power of the Supreme Court.

- (4) No discussion in Legislature on the conduct of the Judges.—Neither in Parliament nor in a State Legislature a discussion can take place with respect to the conduct of a Judge of the Supreme Court in discharge of his duties (Art. 211).
- (5) Power to Punish for its Contempt.—The Supreme Court and the High Courts have the power to punish any person for its contempt. (Art. 129 and 215). This power is very essential for maintaining the impartiality and independence of the judiciary.
- (6) Separation of Judiciary from executive—Art. 50 directs the State to take steps to separate the judiciary from the executive in the public services of the State. It emphasises the need of securing the judiciary from the interference by the executive.
- (7) Judges of the Supreme Court are appointed by the Executive with the consultation of Legal Experts.—The Constitution does not leave the appointment of the Judges of the Supreme Court to the unguided discretion of the Executive. The Executive is required to consult Judges of the Supreme Court and High Courts in the appointment of the Judges of the Supreme Court. The independence of the High Court is emphasised by Art. 229 which provides that appointment of officers and servants shall be made by the Chief Justice or such other Judge or officer as he may appoint.

Thus the position of the Supreme Court is very strong and its independence is adequately guaranteed. However, the present practice of appointing retired judges in various capacities might pose a serious danger to judicial independence. The Law Commission has pointed out dangers of the prevailing practice in the following words :

"It is clearly undesirable that the Supreme Court Judges should look forward to other Government employment after their retirement. The Government is a party in a large number of cases in the highest Court and the average citizens may well get the impression that a Judge, who might look forward to being employed by the Government after his retirement, does not bring to bear on his work that detachment of outlook which is excepted of a Judge in case in which Government is a party. We are clearly of the view that the practice has a tendency to effect the independence of the judges and should be discontinued."<sup>1</sup>

1. Law Commission, XIV Report, p. 46.

Cons. 35

## The State Executive (Arts. 153 to 167)

**The Governor.**—The pattern of Government in the State is the same as that for the Union, that is, a parliamentary system. The Executive Head is Constitutional Head, who is to act according to the advice of the Council of Ministers. The Constitution of India, by Article 153, creates the office of the Governor. Thus each State shall have a Governor. However, one person can be appointed Governor for two or more States.<sup>1</sup> The executive power of the State is vested in the Governor. He shall exercise the executive power either directly or through officers subordinate to him.<sup>2</sup> The expression "officers subordinate to him" include 'a Minister of the State'.<sup>3</sup>

**Appointment of a Governor.**—The Governor of a State is appointed by the President of India.<sup>4</sup> He is neither elected by the direct vote of the people nor by an indirect vote by a specially constituted Electoral College as is the case with the President. He is a nominee of the Central Government.

The office of Governor of a State is not an employment under the Government of India and it does not, therefore, come within the prohibition of Cl. (d) of Art. 319.<sup>5</sup>

**Qualifications**—According to Article 157 a person to be eligible to be appointed as Governor must be (a) citizen of India, and (b) must have completed the age of 35 years.

The Governor must not be a member of either House of Parliament or of a House of the Legislature of any State. If a member of either House of Parliament or of a House of the Legislature of any such State is appointed as Governor, he shall be deemed to have vacated his seat in the House on the date on which he enters upon his office as Governor. He shall not hold any other office of profit (Art. 158).

The Governor is entitled to such emoluments, allowances and privileges as may be determined by Parliament by law. The salary of the Governor at present is fixed at Rs. 5,500. He is also entitled to free use of his official residence. The salary and allowances of the Governor cannot be reduced during his term of office (Art. 158 (4)).

The Governor, before entering upon his office, is required to take an oath or affirmation in the presence of the Chief Justice of the High Court or if he is not present, in the presence of the senior most Judge of the High Court.

**Tenure and Removal.**—Article 156 of the Constitution says that the Governor shall hold office, during the pleasure of the President. Subject to

1. Art. 153 Proviso.
2. Art. 154.
3. Emperor v. Sibnath Banerjee, A. I. R. 1945 P. C. 102
4. Art. 155.
5. Hargovind v. Raghukul, A. I. R. 1979 S. C. 1109.

this rule, the tenure of the office of the Governor is fixed for five years from the date on which he enters upon his office. He may be removed from his office at any time by the President. The President acts on the advice of the Cabinet. The Governor may, however, resign his office by writing to the President.

**Discharge of his functions in certain contingencies.**—Under Article 160 the President is authorised to make such provision as he thinks fit for the discharge of the functions of the Governor of a State.

### POWERS OF THE GOVERNOR

"Shortly speaking, the powers of the Governor of a State are analogous to those of the President excepting that the Governor has no diplomatic, military or emergency power. The powers of the Governor can be classified under four heads : Executive, Financial, Legislative and Judicial."<sup>1</sup>

**1. Executive power.**—The executive power of the State is vested in the Governor and is to be exercised by him directly or through officers subordinate to him.<sup>2</sup> Article 162 defines the extent of the executive power which extends to matters with respect to which the legislature of the State has power to make laws. All executive actions of the Government of a State shall be expressed to be taken in the name of the Governor. Orders and instruments, made and executed in the name of the Governor, shall be authenticated in the manner specified in the rules made by the Governor. The validity of an order of instrument which is so authenticated shall not be called in question on the ground that it was not made or executed by the Governor.<sup>3</sup>

The provisions of Article 166 (1) and (2) are, however, directory and not mandatory. This means that even if an order is not expressed in the way mentioned in these provisions, it is not invalid. In such a case, it should be proved that it was made by the proper authority, under clause (3) of Article 166. If not proved then the order can be challenged in the Court on grounds mentioned in clause (2) of the Article. Authentication only signifies that the order is made by the Governor but if in making the order the Governor has not acted according to law the order can be challenged.<sup>4</sup>

Under Article 166 (3) the Governor is authorised to make rules for the more convenient transaction of the business of the Government of the State and for its allocation among Ministers.<sup>5</sup>

The Supreme Court in *Ram Jawaya Kapur v. State of Punjab*,<sup>6</sup> held that our Constitution has adopted the British system of Parliamentary form of Government and the basic principle of this type of Government is that the Presidents and Governors are constitutional heads and the real executive powers are vested in the Council of Ministers.

In *Shamsher Singh v. State of Punjab*,<sup>7</sup> the Supreme Court held that the

1. Batu, D. D.: *Commentary on the Constitution of India*, Vol. II, p. 233.
2. Article 154.
3. Article 166 (1) (2).
4. Article 166 (1).
5. *B. L. Cotton Mills v. State of W. B.*, A. I. R. 1967 S. C. 1145.
6. A. I. R. 1955 S. C. 549.
7. A. I. R. 1974 S. C. 2193.

President and the Governors are only constitutional heads and they exercise their powers and functions with the aid and advice of the Council of Ministers and not personally save in cases where the Governor is required by the Constitution to exercise his functions in his discretion. The Governor exercises his discretion in harmony with his Council of Ministers. The appointment as well as removal of the members of the Subordinate Judicial Service is an executive action of the Governor to be exercised on the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution. That way any action by any servant of the Union or the State in regard to appointment or dismissal is brought against the Union or the State and not against the President or the Governor. Wherever the Constitution requires the 'satisfaction' of the President or the Governor, the satisfaction is not the personal satisfaction of the President or the Governor but in the constitutional sense of the cabinet system of Government it is the satisfaction of the Council of Ministers. The Court was disposing of appeals filed by two probationer judicial officers of Punjab whose services were terminated by concerned Ministers without making any reference to the Governor. The appellants contended that removal is a personal power of the Governor and is incapable of being delegated to concerned Minister or Chief Minister. They relied on the decision in *Sardari Lal v. Union of India*,<sup>3</sup> in which it was held that where the President or the Governor, if satisfied, make an order under Art. 311 (2) proviso (c) the satisfaction of the President or Governor is his personal satisfaction.

The Court rejected their contentions and overruled the judgment delivered in *Sardari Lal's* case. The Court said, "A Governor can allocate the business of the Government to the Ministers and such allocation is no delegation, and it is an exercise of executive powers by the Governor through the Council of Ministers or officers under the rule of business," The appellant's contention that termination orders were passed by the Chief Minister or concerned Minister without the formal approval of the Governor is therefore untenable. The decision of any Minister or Officer under rules of business made under any of the Arts. 77 (3) and 166 (3) is the decision of the President or the Governor, respectively. These Articles do not provide for any delegation. Therefore, the decision of Minister or officer is the decision of the President or the Governor.

Tracing the historical background of the Indian Constitution and citing opinions of judicial authorities and previous decisions of the Supreme Court the Judges said, "our Constitution embodies generally the Parliamentary or the cabinet system of Government on the British model, both for the Union and the States". It is fundamental principle of English constitutional law that Minister must accept responsibility for every executive act. In England the sovereign never acts on his own responsibility, the power of the sovereign is conditional by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisors must have the confidence of the House of Commons. This rule of English constitutional law is incorporated in our Constitution.

The Indian Constitution envisages a parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government. The powers of the Governor and the constitutional head are not different than that of the President at the Centre.

2. Financial powers —A money Bill cannot be introduced in the Legislative Assembly of the State without the recommendation of the Governor. No

<sup>3</sup> I. A I.R. 1971 S. C. 1517.

demand of grants can be made except on the recommendation of the Governor.<sup>1</sup> The Governor is required to cause to be laid before the House or Houses of the Legislature the '*annual financial statement*', known as Budget.<sup>2</sup>

3. Legislative powers.—The Governor summons the Houses or each House of the Legislature of the State to meet at such time and place as he thinks fit. However, six months must not lapse between the last sitting in one session and the first in the next session. He may prorogue the House or either House and dissolve the Legislative Assembly.<sup>3</sup> He has right to address the State Legislature. No Bill can become law without the assent of the President. He has right to reserve certain bills for the assent of the President.<sup>4</sup> He nominates 1/6 of the members of the Legislative Council.<sup>5</sup>

The most important Legislative power of the Governor is his Ordinance-making power. His Ordinance-making power is similar to that of the President. Under Article 213, whenever the Legislature is not in session and if the Governor is satisfied that circumstances exist which require him to take immediate action he may legislate by Ordinances. However, the Governor cannot issue an Ordinance without previous instructions from the President in cases in which (a) Bill would have required his previous sanction, or (b) required to be reserved under the Constitution for the assent of the President.

Every Ordinance is to be laid before both Houses of the State Legislature and shall cease to operate at the expiry of six weeks from the re-assembly of the Legislature or earlier than six weeks if a resolution disapproving it is passed by the Legislative Assembly. The Governor may withdraw the Ordinance at any time before the expiry of six weeks.<sup>6</sup>

The Ordinance issued by the Governor shall have the same validity as an Act of the Legislature.

4. The Pardoning Power.—Article 161 says that the Governor shall have the Powers to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to matters to which the executive power of the State extends. The executive power of the State extends to matters with respect to which the Legislature of the State has power to make laws.<sup>7</sup>

A similar power is conferred by Article 72 on the President of India. But there is a difference between the pardoning power of the President under Article 72 and the pardoning power of the Governor of a State under Article 161. Under Art. 72 the President's power is wider than that of the Governors of States. Firstly, the President has exclusive power to grant pardon in cases where the sentence is a sentence of death—while the Governor cannot grant pardon in case of a death sentence. Secondly, the President can pardon punishments or sentences inflicted by Courts Martial. The Governors have no such power. In respect of suspension, remission and commutation of sentence of death both have concurrent power.

1. Article 203 (3).
2. Article 202.
3. Article 174 (1) and (2).
4. Article 200.
5. Article 171.
6. Article 213.
7. Article 162.

A pardon is an act of grace, and therefore, it cannot be demanded as a matter of right. The effect of pardon is that it not only removes that punishment but in the eye of law places the offender in the same position as if he had never committed the offence.

The executive can exercise the pardoning power at any time after commission of an offence, either before legal proceedings are taken or during their pendency or either before or after conviction.<sup>1</sup>

*K. M. Nanavati v. State of Bombay*,<sup>2</sup> the petitioner was convicted of murder and was sentenced to imprisonment for life by the Bombay High Court. At the time of the decision of the High Court the petitioner was in naval custody. Soon after the judgment was pronounced by the High Court the petitioner made an application for leave to appeal to Supreme Court. On the same day the Governor issued an order under Article 161 suspending the sentence subject to this that the accused shall remain in the Naval Jail Custody till the disposal of his appeal by the Supreme Court. The warrant issued for the arrest of the accused was returned unserved.

The question involved was : Should the accused surrender to his sentence as required by Rules of the Supreme Court under O. 21, R. 5 or should remain in naval custody in pursuant to the order made by the Governor under Article 161.

The Court held that power to suspend a sentence by the Governor under Article 161 is subject to the rules made by the Supreme Court with respect to cases which are pending before it in appeal. The power of Governor to suspend the sentence of a convict was bad in so much as it came in conflict with the rule of the Supreme Court which required the petitioner to surrender himself to his sentence. It is open to the Governor to grant a full pardon at any time even during the pendency of the case in the Supreme Court in exercise of what is ordinarily called mercy jurisdiction. But the Governor cannot exercise his power of suspension of the sentence for the period when the Supreme Court is seized of the case. The order of the Governor could only operate until the matter became *sub judice* in the Supreme Court and it did become so on the filing of the petition for special leave to appeal. After the filing of such a petition and till the judicial process is over the power of the Governor cannot be exercised.

**The Council of Ministers.**—Article 163 (1) says that there shall be a Council of Ministers with the Chief Minister as the head to 'aid and advise' the Governor in exercise of his functions. The Council of Ministers in the States is constituted and functions in the same way as the Union Cabinet.

The Chief Minister is appointed by the Governor.<sup>3</sup> As a matter of a well-established convention, it is the leader of the Legislative Assembly who should be appointed as the Chief Minister. Thus in normal circumstance the choice of the Governor is limited to the leader of the majority party. But there may be circumstances where the Governor would have to exercise his discretion in selecting the Chief Minister. The other Ministers are appointed by the Governor on the advice of the Chief Minister. In the appointment of other Ministers the Chief Minister has the final say because it is the Chief

1. *In re Channugadu*, A. I. R. 1954 Mad. 911 at p. 917.

2. A. I. R. 1961 S. C. 112.

3. Article 164.

Minister who has to run the Government. This is, indeed, necessary in order to ensure the successful operation of the rule of collective responsibility.

The Governor may appoint a person as a Chief Minister or a Minister who is not a member of either House of the State Legislature. But he must be elected to the Houses of State Legislature within the period of six months. If he does not become member of the Legislature within six months of his appointment as the Chief Minister or Minister he will cease to be Chief Minister or Minister.<sup>1</sup> Before a Minister enters upon his office the Governor is to administer to him the prescribed oath of office and secrecy.

According to Article 164 (1) the Ministers shall hold office *during the pleasure* of the Governor. But this pleasure is to be exercisable by the Governor on the advice of the Chief Minister. This follows from clause (2) of Article 164 which says that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. So long as the ministry commands the confidence of the Lower House of a State Legislature the Governor is bound to accept the advice of the Chief Minister. Indeed, it would be strange that a Minister who is responsible for its acts and policies to the legislature can be dismissed by the Governor. This means that a Minister holds office during the pleasure of the Chief Minister. The Governor is bound to dismiss a Minister as and when advised by the Chief Minister. It is only then that the smooth functioning of the principle of collective responsibility can be maintained.<sup>2</sup>

Under Article 167 (a) it is the duty of Chief Minister of State to communicate all decisions of the Council of Ministers relating to the administration of the State and proposal for legislation. If the Governor asks him to furnish such information it is the duty of the Chief Minister to do so. The Chief Minister, if required by the Governor, will also submit for consideration of the Cabinet any matter on which a decision has been taken by a Minister which has not been considered by the Cabinet.<sup>3</sup>

It is to be noted that Article 167 (c) further strengthens the rule of collective responsibility and gives power to the Chief Minister to review the decision taken by any Minister individually. When a decision is taken by any Minister without reference to the Cabinet, the Governor may require it to be considered by the Cabinet. However, the Governor cannot override decision of a Minister. If the Cabinet stands behind him the Minister remains and the Governor is bound to accept his decision. If, however, the cabinet does not uphold his decision he will have to quit the ministry. If he insists to remain he will be dismissed by the Governor on the advice of the Chief Minister. It is a safeguard which ensures the working of the principle of the collective responsibility and the powers of the Chief Minister and not a power which interferes with the Governor.

**Relationship between the Governor and Council of Ministers.**—In general, the relation between the Governor and his Ministers is the same as that between the President and his Ministers, with this important difference that while the Constitution does not empower the President to exercise any function 'in his discretion' it authorises the Governor to exercise some functions 'in his discretion.'

1. Article 164 (4).
2. Article 167 (a).
3. Article 167 (c)

Article 163 says that there shall be Council of Ministers with the Chief Minister as the head to aid and advice the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

In exercise of discretionary powers the Governor is not required to act on the advice of his Ministers or even to seek such advice. This is made clear from clause (2) of this Article which says that if any question arises whether any matter is or is not a matter as regards which the Governor is required by the Constitution to act in his discretion, the decision of the Governor shall be final, and the validity of anything done by the Governor shall not be called into question on the ground that he ought or ought not to have acted in his discretion.

The Constitution does not define as to what are the discretionary powers of the Governor. This raises a question whether the Governor, like the President, is merely a constitutional head who is to exercise his powers in accordance with the advice of his Ministers responsible to the Lower House or whether he has some real power. It is to be noted that the language of Article 163 is a partial reproduction of section 50 (1) of the Government of India Act, 1935. Indeed, the discretionary powers of the Governor seemed alarming to the Members of the Constituent Assembly. They before them had, in fact, the image of imperialist authority and repository of arbitrary authority under the Government of India Act, 1935. Hence, they grew suspicious of the Governor's role even under the new Constitution when they found the same language of 1935 Act, being repeated, through its Articles. Their suspicion, however, was unfounded in view of the Parliamentary form of Government adopted in the Constitution. When a Cabinet collectively responsible to the legislature is to give advice to the Governor in the discharge of his functions, occasions are almost non-existent for him to act contrary to their advice. In the case of *Sunil Kunar v. Government of West Bengal*,<sup>1</sup> the Calcutta High Court observed :

"The Governor under the present Constitution cannot act except in accordance with advice of his Ministers. Under the Government of India Act, 1935, the position was different.....Under the present Constitution, the power to act in his discretion or in his individual capacity has been taken away and the Governor, therefore, must act on the advice of his Minister....."

The Governor can act in his discretion only in matters in which he is expressly required by or under the Constitution to do so.

The only case in which the Governor is expressly required to exercise his functions under the Constitution in his discretion are paras. 9 and 18 of the 6th Schedule to the Constitution, regarding the administration of tribal areas in Assam. Normally, thus, he will act only as constitutional head in accordance with the advice of the Council of Ministers. But in times of crisis the Governor can effectively and constitutionally utilize this provision and act in his discretion particularly in cases where there might be conflict between the Governor and the Council of Ministers on any issue. In view of the responsibility of the Governor to the President and of the fact that the Governor's decision as to whether he should act in his discretion in any particular matter is final, it would be possible for the Governor to act without ministerial advice

1. A.I.R. 1950 Cal. 274.

in certain other matters according to the circumstances, even though they are not specifically mentioned in the Constitution as discretionary functions.

The following are the circumstances where the Governor will be called upon to exercise his discretion : (1) appointment of the Chief Minister, (2) the dismissal of a Ministry, (3) the dissolution of the Legislative Assembly, (4) advising the President for the proclamation of an emergency under Article 356 of the Constitution.

(i) Appointment of the Chief Minister.—The Chief Minister is appointed by the Governor.<sup>1</sup> As a matter of a well-established convention the leader of the majority party in the Lower House should be appointed as the Chief Minister. In normal circumstances the Governor need have no doubt as to who is the leader of the majority party in the Lower House. But circumstances may arise when it may be doubtful as to who is the proper person, *i.e.* leader of the majority party in the House. There is no dearth of examples in India. In fact this had happened in many States after the third General Election, when there was no recognised leader in the House or either parties claiming majority without having such majority. In such circumstances the Governor may have to exercise his discretion in selecting the Chief Minister. After the Fourth General Election in 1967 the power of the Governor to appoint a Chief Minister became a matter of controversy.

In the State of Rajasthan no party could get majority in the Legislature. The Congress was a single largest party in the Assembly having 88 members. Against this, there was a coalition of non-congress parties. It had 80 members in the Assembly. There were 15 independents. Both the groups claimed the support of the independents and they asked the Governor to invite their leader to form the Government.

The members of the coalition group even paraded before the Governor and the President to prove their majority. But the Governor excluded the independents for the purpose of ascertaining the majority and invited the leader of the largest single party to form the Government. The coalition criticised the action of the Governor. According to them the action of the Governor was politically motivated and it was done in order to install the Congress ministry. In support of his action the Governor cited an old precedent. In 1952 Sri Prakash, the Governor of Madras, had invited the leader of the single largest party to form the Government. But this precedent had not been followed consistently by the Governors in different States. In 1965 though the Communist party was the largest single party in Kerala yet it was not invited to form the Government.

In view of the above, it is advisable that leader of the largest single party should first be invited to form the Government. Such a convention, according to Dr. M. P. Jain, will make the Governor's task of appointing, the Chief Minister, by and large, non-political and non-controversial.<sup>2</sup> Mr. S. N. Misra, while agreeing with the above rule, accepts one exception to the above suggestion. According to him "if some political parties form a united front before the election, the leader of the united front, if its combined strength forms the largest group in the House, should be called to form the Government". Regarding a coalition formed after the election he says that there seems no difficulty as to why the leader of such a coalition be not invited to form the Government but in such a situation the Governor himself has to

1. Article 164.

2. Jain M.P.—Indian Constitutional Law, 2nd edition, 1970, p. 220.

take the responsibility of assessing the situation, particularly when the strength of the largest single party in the House happens to be very close to the coalition and such party does not enter into any coalition. To say that the Governor is not constitutionally bound to assess the situation, while making the appointment of Chief Minister does not appear to be correct. The Governor is the custodian of the Constitution. As such it is his sacred duty to appoint that person as Chief Minister who is in a position to carry the House with him; a duty which can properly be discharged only after assessment of the situation. Of course, there are no express provisions in the Constitution requiring the Governor to make an assessment of the situation, but for practical reasons it is very difficult to appoint a person as Chief Minister without ascertaining that such a person commands the support of the majority of the members of the House. It is a fact that the consideration of which cannot be ignored by any Governor.<sup>1</sup>

In *H. S. Verma v. T. N. Singh*,<sup>2</sup> the appellant challenged the validity of appointment of Mr. T.N. Singh, as Chief Minister of Uttar Pradesh, on the ground that he was not a member of either House of the Legislature at the time of his appointment. The Supreme Court held that the appointment cannot be challenged on the above ground. The Court said that Clause (4) of Art. 164 must be interpreted in the context of Arts. 163 and 164 of the Constitution. Article 163 (1) provides that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. Under clause (1) of Article 164 the Chief Minister has to be appointed by the Governor and the other Ministers have to be appointed by him on the advice of the Chief Minister. They all hold office during the pleasure of the Governor. Clause (1) does not provide any qualification for the person to be selected by the Governor as the Chief Minister or Minister, but (2) makes it essential that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. This is the only condition that the Constitution prescribes in this behalf. Also, he need not be a member of the Upper House. A member of the Upper House may also be appointed as a Chief Minister, for example, C. Rajagopalachari in Madras and Morarji Desai in Bombay in 1952, C. B. Gupta in Uttar Pradesh in 1960 and Mandal in Bihar in 1968 were appointed as Chief Ministers of their respective States and they were all members of Upper House of the State Legislature.

Further, it is not necessary that the Chief Minister or a Minister shall always be a member of the Legislative Assembly. A non-member may also be appointed a Chief Minister or a Minister. Mr. C. B. Gupta was appointed as Chief Minister in Uttar Pradesh in 1960 without being member of either Houses of the State Legislature. The Allahabad High Court upheld the constitutionality of his appointment,<sup>3</sup> but he must be in a position to command the support of the majority of the members of the Legislature.

**Ministers—Public Servants.—**In *M. Karunanidhi v. Union of India*<sup>4</sup> the question raised before the Supreme Court was whether the Chief Minister

1. Misra, S.N.—The "Governor, under the Constitution of India", Allahabad University Studies, 1971.
2. A.I.R. 1971 S.C. 1331.
3. *Hari Sharan v. Chandra Bhau*, A.I.R. 1962 All. 301.
4. A.I.R. 1979 S.C. 899.

or a Minister are a public servant within the meaning of section 21 (12) of the Indian Penal Code.

The Court held that the first part of section 21 (12) I. P. C. signifies a relationship of master and servant and not applicable to a Chief Minister. But the second part of section 21 (12) namely, "in the pay of the Government" is of a much wider amplitude so as to include within its ambit to even public servant who may not be a regular employee receiving salary from his master. A Chief Minister or a Minister are in the pay of the Government and therefore, public servants within the meaning of section 21 (12) of the I. P. C.

Article 164 and 167 of the Constitution makes it clear. Art. 164 says that Ministers are appointed or dismissed by the Governor and therefore they are subordinate to him. They get salary for the public work or public duty performed by them. Their salary is paid from the Government funds.

(2) Dismissal of a ministry.—According to Article 164 the Ministers shall hold office during the pleasure of the Governor. This does not mean that the Governor can dismiss his ministers at any time at his sweet will. The expression 'during the pleasure' under a Parliamentary form of Government means the confidence of the majority in the Legislature. He is to exercise his pleasure in accordance with the advice of the Council of Ministers. This follows from the provision in Article 164 (2) which makes the Council of Ministers collectively responsible to the Legislative Assembly of the State. This means that till a ministry enjoys the confidence of the majority in the Lower House, the Governor should not dismiss it. This convention had been followed in England without any exception. In India, however, this convention has not been uniformly followed by the Governors.

In West Bengal the Governor dismissed the Ajoy Mukherjee's ministry in 1967, only on doubts having been raised about the support of the majority in House. The Governor justified his action on the ground that the ministry had lost the majority. He was of the view that he could dismiss the Council of Ministers "on the basis of any material or information available to him even if such information or material might be extraneous to the proceedings in the Assembly". If on such extraneous information he is satisfied that the Council of Ministers has lost the support of the Majority of the House, he would be justified to exercising his discretionary powers and dismiss the ministry. This view of the Governor was upheld by the Calcutta High Court in *Mahabir Prasad v. Profulla Ghanda*.<sup>1</sup> The Court said that Article 164 (1) does not impose any restriction to condition upon the powers of the Governor to appoint a Chief Minister and to dismiss a ministry. This is a matter entirely in the discretion of the Governor. The right of the Governor to withdraw the pleasure during which the Ministers hold office, is absolute and unrestricted. While interpreting the provisions of the Indian Constitution the Court heavily relied on a Nigerian precedent,<sup>2</sup> which was neither necessary nor desirable. The provisions in the Nigerian Constitution as well as the circumstance prevailing in India were quite different and cannot be compared with the provisions in the Indian Constitution and the circumstances prevailing in India. It is, therefore, submitted that the Nigerian precedent is not at all helpful in interpreting the provisions of the Indian Constitution.

It is submitted that the Governor's view was not correct. His action

1. A.I.R. 1969 Cal. 189.

2. Alhaji Adegbayo v. Akintok, 1963 AC 628.

had also been criticised by constitutional jurists. According to a well-established convention if a ministry enjoys the confidence of majority in the House it should not be dismissed. Now the important question which arises as to how it can be tested that a ministry has confidence of the majority in the House. This is again a matter which is based on a well-established convention. The majority of the ministry can only be decided on the floor of the House. A ministry is to seek vote of confidence in the House. If a no-confidence motion is passed against a ministry this is a clear proof that the ministry has lost the confidence of the majority in the House. The majority of the ministry cannot be judged on the basis of information or material extraneous to the proceedings in the Assembly.

The Governor should have waited till the ministry had been voted out of the office by the House itself. In Rajasthan and Madhya Pradesh the Governors have followed this practice and when doubts were raised about the majority of the ministry in these States they did take notice of the extraneous materials and waited until a vote of no-confidence was passed against the ministry in the House. On the other hand, the Governor of West Bengal dismissed the Mukherjee's ministry on the extraneous information that it has lost its majority in the Legislative Assembly and the Chief Minister was not ready to summon the Assembly on an earlier date as suggested by him. Thus we see that the Governors have acted differently in different States, more so in similar circumstances. His exercise of discretionary powers in the present case was clearly a flagrant violation of the constitutional conventions.

The next important constitutional controversy arose in the State of Uttar Pradesh in 1970. The Governor dismissed the Charan Singh's ministry and recommended for the imposition of President Rule in the State, as no party was in his opinion able to form a stable Government. In support of his action the Governor has propounded a new philosophy relating to the functioning of the coalition Governments. In other words, in his opinion, the Chief Minister or a coalition Government cannot be treated at a par with the Chief Minister of a single party majority Government in the matter of removal of ministers or reconstitution of Council of Ministers, which involves a fundamental change in the complexion of the Government. On such occasions, according to him, the Chief Minister should first resign then reconstitute the Government.

There is considerable merit in the Governor's argument particularly in view of the Indian experience of coalition Governments. But this new philosophy has yet to crystallise and it needs to be properly evolved and more precisely defined so that it can be adopted as a constitutional practice.

Regarding the question, whether the Chief Minister had lost the confidence of the Legislature, the Governor argued that after the withdrawal of the support by the coalition partner the Charan Singh Ministry was reduced to a minority. So far as the question of majority is concerned it does not make any difference whether the coalition partner withdrew its support or the majority party Government is reduced to minority by a large scale defections. The loss of majority of the Chief Minister by reason of the dissolution of the coalition should not be equated by the Governor with the loss of support of confidence of a majority in the House. This is a question which was only to be decided in the House. The Congress (R) Government at the Centre headed by Smt. Indira Gandhi was admittedly a minority Government after the split in the Congress party. But it enjoyed the support of the majority in the Parliament with the support of the Communist party. In Punjab, when the coalition partner the Jan Sangh withdrew its

support the Badal Ministry was reduced to a minority, but it proved its majority in the House with the support of the Congress (R). In the case of Uttar Pradesh soon after the Congress withdrew its support, other parties extended their support to the Charan Singh's Ministry in the House. If there was nothing unconstitutional about what happened in the Punjab, surely the heavens would not have fallen if Charan Singh's strength was allowed to be decided by the Assembly. This case can also not be equated with the West Bengal case. In West Bengal the Chief Minister was unwilling to face the Legislative Assembly at an early date to have its majority tested. In Uttar Pradesh, on the other hand, the Chief Minister had already summoned the Assembly to meet on October 6, 1970 and was also ready to further advance the date if Governor so desired. But the Governor did not care to wait till the fate of the ministry was decided in the House and dismissed it.

The Governor has certainly treaded on the domain of the Legislature in coming to his subjective judgment that the Charan Singh's Ministry had lost the confidence of the majority without its strength being actually tested on the floor of the House. To have dissolved the ministry through a Presidential proclamation amounted to bypassing the Legislature to which alone the ministry was collectively responsible. That this should have been done when the State Legislative Assembly had been convened to meet within the next four days naturally shocked the conscience of many as a grave impropriety and as having no parallel or precedence whatsoever.<sup>1</sup>

-After the constitutional crisis in Uttar Pradesh, the President appointed 'a Committee of Governors' to study and formulate norms on the role of Governors under the Constitution. The recommendations of the Committee are as follows :

(1) "A Governor has the right to dismiss a ministry if the Chief Minister shirks his primary responsibility of facing the Assembly within the shortest time to test the confidence of the Legislature in him."

(2) The test of confidence in the ministry should normally be left to a vote in the Assembly. A Chief Minister's refusal to test his strength on the floor of Assembly can well be interpreted as a *prima facie* proof of his no longer enjoying the confidence of the Legislature.

(3) If an alternative ministry can be formed which in the Governor's view can command a majority in the Assembly, he must dismiss the ministry in power and install an alternative ministry in office.

(4) If formation of such a ministry is not possible the Governor will be left with no alternative but to make a report to the President under Article 356 and to recommend at the same time the dissolution of the Assembly.

(5) The Chief Minister in a coalition, the Committee feels, deprives his pre-eminence solely from the agreement among the partner. When the Chief Minister heads a single party Government, his pre-eminence is unquestioned. A Chief Minister is the key-stone of the arch of the cabinet but this can apply only when he heads a team which collectively has a majority support in the Legislature. Thus the Chief Minister in a coalition cannot claim the right of advising the Governor with matter of appointment or dismissal of Ministers, in such a manner as to break the arch yet claim the right to continue as Chief Minister.

1. Northern India Patrika, October 5, 1970.

(6) On the Governor's discretion, the Committee observes that right from the commencement of the Constitution, it has been recognised that in the choice of the Chief Minister, the Governor's decision under Article 161 (1) is final and based entirely on his unfettered judgment.

(7) Regarding political defections the Committee feels that though there is a demand for legislation banning defections, such legislation would offend the provisions of Articles 19 (1) (c), 102 and 191 of the Constitution and would interfere with the right of dissent.<sup>1</sup>

In view of the circumstances it is submitted that constitutional conventions governing the exercise of discretionary powers of the Governor in India may be allowed to develop. It is also suggested that till such conventions are evolved and developed for guidance, the discretionary powers of the Governor should be codified and clearly laid down in the Constitution by necessary amendments.

**3. Dissolution of the Legislative Assembly.**—According to Article 174 the Governor summons, prorogues and dissolves the Legislative Assembly. In normal circumstances the Legislative Assembly is not dissolved by the Governor, till the expiry of its normal tenure of five years. But where Ministry has lost the majority and no alternative stable Ministry is possible he may dissolve the House. *Is the Governor bound to accept the advice of the defeated ministry to dissolve the House?* In this case he can act according to his discretion. He may or may not dissolve the House. One view is that he is always bound to accept the advice of the defeated Chief Minister and dissolve the House.

The other view is that he may not dissolve the House and try to find out a person who may form an alternate State Ministry. There are many examples where the Governors have refused to accept the advice given by the defeated Chief Minister to dissolve the House. In 1955 in Travancore Cochin a defeated Minister advised the Governor to dissolve the Assembly, but the Governor refused to accept its advice. Thus it is clear that in these circumstances the Governor can dissolve the Legislative Assembly in his discretion.

**4. Advising the President for the proclamation of an emergency under Article 356 of the Constitution.**—Under Article 356 the Governor is to report to the President that a situation has arisen in which the Government of the State cannot be carried out in accordance with the provisions of the Constitution. Such a report may sometimes be against a Ministry in power, for example, if it attempts to misuse its power to subvert the Constitution. It is clear that in such cases the report cannot be made according to ministerial advice. Moreover no such advice will be available where a ministry has resigned and another alternative ministry cannot be formed.

Thus in making report to the President under Article 356 the Governor exercises his discretion.

## 24

### **The State Legislature (Arts. 168 to 212)**

**State Legislature.**—The Constitution provides for a Legislature for every State in the Union. The Legislature of every State consists of the Governor and House or Houses. The Legislatures in the State are either bicameral (consisting of two Houses) or unicameral (consisting of one House). The Legislature in Andhra Pradesh, Bihar, Maharashtra, Madhya Pradesh, Tamil Nadu, Karnataka and Uttar Pradesh, is bicameral. In the remaining States the Legislature is unicameral consisting of only one House, i. e. the Legislative Assembly.<sup>1</sup>

**Creation and Abolition of Legislative Councils.**—Under Article 169 Parliament may by law provide for the abolition of the Legislative Council in a State where it already exists and also for the creation of such a Council in a State. Where such a Council does not exist, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting. No such law-making provision for the creation and abolition of the Legislative Council shall be deemed to be an amendment of the Constitution and, thererore, it can be passed like an ordinary piece of legislation.<sup>2</sup>

#### **COMPOSITION OF THE HOUSES**

(i) **Legislative Assembly (Vidhan Sabha).**—The Legislative Assembly in a State is popular House. The minimum number of seats of the Legislative Assembly is fixed at 60 and the maximum number is fixed at 500. The members of Legislative Assembly are chosen directly by the people on the basis of adult franchise from territorial constituencies in the State.<sup>3</sup> The representation in the Houses is on basis of population in respect of each territorial constituency in the State. The 'population' is to be ascertained at the last preceding census. After the completion of exact census, the number of seats in Legislative Assembly of each State and the division of each State into territorial constituencies is to be readjusted by such authority and in such manner as Parliament by law determine.

*The Constitution (42nd Amendment) Act, 1976 has amended Art. 170 and added a new Explanation. According to this explanation, the number of seats in State Assemblies will now be determined on the basis of the 1971 census and will be frozen till the year 2000. The re-determination of the constituencies, undertaken after each census, will take effect hereafter on dates fixed by the President. Thus persons becoming eligible as voters as a result of census undertaken in future would be deprived of exercising their right to send their representatives till the year 2000. The President may by order specify that allocation of seats in the Legislative Assembly may be readjusted on the basis of census taken after the year 2000.\**

1. Article 168.
2. Article 168 (b).
3. Article 170 (1), (2).
4. Article 170, Explanation and Cl. (3).

In the Legislative Assembly of every State, seats will be reserved for the Scheduled Tribes and Scheduled Castes on the basis of population.<sup>1</sup> And also, if the Governor of a State is of opinion that the Anglo-Indian community is not adequately represented in the Legislative Assembly he may nominate such member of the community to the Assembly as he considers appropriate.<sup>2</sup> Originally all such reservation of the seats for the Scheduled Castes, the Scheduled Tribes and the representative of the Anglo-Indian community were to cease after ten years from the commencement of the Constitution. The Constitution (8th Amendment) Act, 1959, extended all such reservations, nominations for another ten years. Thus all such reservations was for 20 years and was to cease to have effect on the expiry of 20 years from the commencement of the Constitution.<sup>3</sup> The Constitution (23rd Amendment) Act, 1969, has further extended this period from 20 years to 30 years.

**Its Tenure.**—The normal tenure of the Legislative Assembly of every State is of five-years but it may be dissolved earlier by the Governor.<sup>4</sup> During the proclamation of emergency the life of the Assembly may be extended by an Act of Parliament for a period of one year at a time, but in no case beyond a period of six months after the proclamation has ceased to operate.<sup>5</sup>

(ii) **Legislative Council (Vidhan Parishad).**—The total number of members in the Legislative Council of a State having such a Council shall not exceed one-third of the total number of members in the Legislative Assembly of that State. But the total number of members in the Legislative Council of a State shall in no case be less than 40.

Parliament may by law provide for the composition of the Legislative Council. Until Parliament passes such a law, the composition of the Legislative Council shall be as follows :—

Of the total number of members in the Legislative Council of a State—

(a)  $\frac{1}{3}$  are to be elected by electorates consisting of members of Municipalities, District Boards and other local authorities in the State as Parliament by law specify,

(b)  $\frac{1}{2}$  are to be elected by electorates consisting of graduates of three years' standing residing in the State,

(c)  $\frac{1}{2}$  are to be elected by electorates consisting of persons who have been teaching for at least three years in educational institutions not lower in standard than secondary school,

(d)  $\frac{1}{3}$  are to be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly,

(e) the remainder i. e.  $\frac{1}{6}$  are to be nominated by the Governor from persons having special knowledge or practical experience in respect of such matters as Literature, Science, Art, Co-operative movement and social service.

**Its Tenure.**—The Legislative Council is not subject to dissolution but after every two years  $\frac{1}{3}$  of its members retire. Like the Rajya Sabha in the Centre it is a permanent body.

1. Article 332.
2. Article 333.
3. Article 334.
4. Article 172.
5. Ibid.

**Qualifications for Membership.**—A person to be qualified to be chosen as a member in the State Legislature—

- (a) must be a citizen of India,
- (b) must not be less than 25 years of age in the case of the Legislative Assembly and not less than 30 years in case of the Legislative Council,
- (c) must possess such other qualifications as may be prescribed by Parliament by law.<sup>1</sup>

**Disqualifications for membership.**—A person is disqualified for being chosen as a member of the Legislature of a State—

- (a) if he holds any office of profit under the Central or State Government, or
- (b) if he is of unsound mind,
- (c) if he is an undischarged insolvent,
- (d) if he is not a citizen of India or has voluntarily acquired the citizenship of a foreign State or is under any acknowledgment of allegiance or adherence of a foreign State,
- (e) if he is so disqualified by or under any law of Parliament.<sup>2</sup> The necessary qualifications and disqualifications are prescribed by Parliament in the Representation of the Peoples Act, 1951.

Article 190 deals with the disqualifications incurred by a member after he has been elected as member. It says that "no one can be a member of both the Houses of the Legislature of a State or a member of the Legislature of two or more States at the same time." If a person is chosen a member of the Legislature of two or more States then at the expiry of the specified period under rules made by President his seat in the Legislature shall fall vacant unless he resigns his seat in all but one of the States. If a member of a State Legislature absents himself, without the permission of the House from all meetings for a period of sixty days (excluding the period for which the House is prorogued or is adjourned for more than four consecutive days) the House may declare his seat vacant.<sup>3</sup> If a member becomes disqualified under Cl. (1) of Art. 191 his seat shall become vacant.

**Decision on questions of disqualifications.**—Article 192 says that if any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause 4 of Art. 191 the question shall be referred to the Governor and his decision shall be final. However, the Governor is required to obtain the opinion of the Election Commissioner before giving his decision on such question.

If he resigns and his resignation is accepted his seat shall become vacant. The Constitution (32<sup>nd</sup> Amendment) Act, 1974 amended Art. 190 which directs the Speaker or Chairman not to accept resignations of members automatically but to inquire about its genuineness and then accept it. If he finds that the resignation is not voluntary he shall not accept it. The amendment

1. Article 173.
2. Article 191.
3. Article 190 (3), (4).

is an outcome of the Gujarat Student Movement where the MLAs were compelled to tender their resignations under threat and coercion.

Before taking seat in the House, every member of State Legislature has to take oath or affirmation before the Governor or some person appointed by him for that purpose in the prescribed form.<sup>1</sup> Member of a State Legislature shall be entitled to receive such salaries and allowances as may from time to time be determined by the Legislature of the State by law.<sup>2</sup>

**Sessions of the State Legislature.**—According to Article 174 the Governor shall from time to time summon a House of the Legislature to meet at such time and place as he thinks fit. But six months should not intervene between its last sitting in one session and the date appointed for its sitting in the next session. This means that the Assembly must meet at least twice a year and not more than six months must elapse between two sessions.

The Governor may from time to time prorogue the House or either Houses.<sup>3</sup> But where there is a prorogation of the House, the new session must be called within six months. It is not necessary for the Governor to summon or prorogue the two Houses of the Legislature together.

The Governor may dissolve the Legislative Assembly of a State.<sup>4</sup> In case of dissolution and prorogation the Governor can exercise his discretion to some extent. His discretion is non-justiciable and cannot be challenged even on ground of *mala fide*.<sup>5</sup>

Under Article 175 the Governor has right to address either House of the Legislature of a State or both Houses assembled together. He may send messages to the Houses or House of the Legislature in respect of a Bill pending in the Legislature or otherwise. When a message is so sent, it is the duty of the House to consider any matter required by the message to be taken into consideration.

At the commencement of the first session after each general election of the Legislative Assembly and also at the commencement of the first session of each year the Governor shall address the Legislative Assembly or both Houses assembled together if a State has two Houses and inform the Legislature of the causes of its summons.<sup>6</sup>

Articles 175 and 176 are exactly similar to those of Articles 86 and 87 relating to the functions of the President. Thus the position of the Governor in relation to State Legislature is the same as that of the President in relation to Parliament.

**Speaker and Deputy Speaker.**—The Speaker is the Chief Presiding Officer of the Legislative Assembly of a State. He is elected by the members of the

1. Article 188.

2. Article 195.

3. Article 174 (2) (a).

4. Article 174 (2) (b).

5. *In re Veerabhadrayya*, A. I. R. 1950 Mad. 243.

6. Article 176 (1).

Assembly from their own members. The Assembly elects its Deputy Speaker also from its own members.<sup>1</sup> The Deputy Speaker performs the duties of the Speaker when the Speaker is absent or while the office of the Speaker is vacant.<sup>2</sup> But if the office of the Deputy Speaker is also vacant, the duties of the office of the Speaker are performed by such member of the Assembly as the Governor may appoint for the purpose.

Both Speaker and the Deputy Speaker vacate their offices when they cease to be members of the Assembly. They may also resign from their offices. They can be removed from their offices, by the resolution of the Assembly passed by a majority of all the members of the Assembly.<sup>3</sup> For moving such a resolution fourteen days' notice is required.

The Speaker does not vacate his office on the dissolution of the Assembly. He continues in office until a new Speaker is elected before the new House meets.

**Powers and Functions of Speaker.**—The position, duties and powers of the Speaker of a State Legislature are the same as those of the Speaker of the Lok Sabha. Once elected to this high office, he has to be above party politics. The Speaker is an impartial and independent presiding officer. The importance of his office can be seen from the functions he performs and the powers he exercises to ensure the proper decorum in the Assembly. He presides over the meetings of the House, and regulates proceedings of the House. He is vested with disciplinary powers comparable with those of the Speaker of the House of Commons. He maintains decorum in the House during debates. He interprets the rules of the Assembly and decides all points of order and questions of procedure. As such, he can ask a member to withdraw from the House for any violation of the rules of the House. He can suspend him for the whole session if the member disregards the authority and rulings of the chair. He can adjourn or suspend the session of the House in case of grave disorder. He certifies whether a Bill is a Money Bill or not. His rulings on the above points are final and cannot be challenged in the court of law. In short, the Speaker is the custodian of the dignity of the House and an impartial arbitrator in its proceedings. It cannot be denied that the Speaker of a Legislature in India is vested with the same powers as are enjoyed by the Speaker of the House of Commons in England. But the High traditions of this office and the honour and dignity with which this office is looked upon in England has not been maintained in India. The conduct of the Speaker in West Bengal, Punjab and recently in Tamil Nadu has given rise to a demand that the Constitution be amended and the powers of the Speaker may be clearly laid down. The Speaker in these States have ruled that the Governments in these States were illegally constituted. In pursuance of their ruling, they adjourned the Assemblies of these States *sine die*. They based their rulings on the ground that persons selected as Chief Minister by the Governor to form the ministry were not the leaders of the majority party and hence the Government headed by them was illegal.

It is submitted that the legality or illegality of the Governor's choice for a person for Chief Ministership cannot be decided by the Speaker. It is the House only which can decide by majority whether a person called by the Governor as Chief Minister commands the majority of the House or not. The

1. Article 178.

2. Article 180 (1).

3. Article 179.

rulings of the Speaker in the two States were motivated by political considerations.

It is a naked truth that the Speakers in these States have acted against the well-established high traditions of this dignified office. They have misused their powers to adjourn the Assembly. It is the House which is Supreme and not the Speaker. He is simply a presiding officer and maintains order in the Assembly. Who is he to decide whether a Government is illegally constituted or not. This is clear from the practice of the House of Commons in England.

**Chairman and Deputy Chairman of Legislative Council.<sup>1</sup>**—The Legislative Council of each State elects its Chairman and Deputy Chairman from among its own members. Like the Vice-President in the Rajya Sabha, the Governor is not the ex-officio Chairman of the Legislative Council.

Like the Speaker and Deputy Speaker, the Chairman and Deputy Chairman may resign from their office, vacate their office when they cease to be member of the Council and may be removed from their offices. Provisions regarding their powers and functions are similar to those of the Council of States in the Centre.

The officers of the Legislative Assembly and the Legislative Council are paid such salary and allowances as may be fixed by the Legislature of the State by law.<sup>2</sup> Till such a law is passed by the State Legislature they will get such salary and allowances as are specified in the Second Schedule.

#### Legislative Procedure—Article 196.

**Ordinary Bills.**—The procedure of legislation in a State Legislature is broadly similar to that in the Parliament under Article 107. All Bills, except a Money Bill or a Financial Bill, may originate in either House of the State Legislature. As is the case in the Centre, a Bill must be passed by both the Houses, either without amendments or with such amendments only as are agreed to by both the Houses, except in the case of deadlock.

If a Bill has been passed by the Legislative Assembly and transmitted to the Legislative Council (a) is rejected by the Council, (b) more than three months passed from the date on which the Bill is laid before the Council, without the Bill being passed by it, (c) the Bill is passed by the Council with amendments to which the Legislative Assembly does not agree, the Assembly passes the Bill again in the same or in a subsequent session, with or without amendments suggested by the Council. If after a Bill has so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council which (a) rejects the Bill, (b) does not pass it within one month from the date on which it is laid before the Council, or (c) passes the Bill with amendments to which the Legislative Assembly does not agree, the Bill will be deemed to have been passed by both Houses in the form in which it was passed by the Assembly for the second time.<sup>3</sup>

Thus the decision of the Lower House prevails in regard to any Bill and the Upper House has only a suspensive vote for some time.

A Bill pending in the Legislature of a State does not lapse by the reason to the prorogation of the House or Houses. A Bill pending in the Legislative

1. Articles 182, 183, 184, 185.

2. Article 186

3. Article 197 (1) (2).

Council of a State which has not been passed, does not lapse on the dissolution of the Assembly. However, a Bill pending in the Legislative Assembly, or having been passed by it, is pending in the Legislative Council does not lapse on the dissolution of the Legislative Assembly.<sup>1</sup>

**Money Bills.**—The definition given in Article 199 is similar to those in Article 110 relating to the Union Legislation. Like Union Legislature, a Money Bill must originate in the Lower House of the State Legislature (Legislative Assembly). A Money Bill cannot originate in the Legislative Council. After a Money Bill has been passed by the Legislative Assembly, it shall be transmitted to the Legislative Council for its recommendations. The Legislative Council must return the Bill to the Legislative Assembly with its recommendations within a period of 14 days from the date of its receipt of the Bill. The Legislative Assembly may either accept or reject all or any of the recommendations of the Legislative Council. If the Legislative Assembly accepts any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses. With the amendments recommended by the Legislative Council and accepted by the Legislative Assembly, if the Legislative Assembly rejects all the recommendations of the Council, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly. But if a Bill is not returned by the Council within 14 days, it shall be deemed to have been passed by both Houses at the expiration of such period in the form in which it was originally passed by the Legislative Assembly.<sup>2</sup>

If any question arises whether a Bill is a Money Bill or not the decision of the Speaker of the Legislative Assembly shall be final.<sup>3</sup> There shall be endorsed on every Bill when it is sent to the Legislative Council and presented to the Governor for assent, the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.<sup>4</sup>

**Assent to Bills—Article 200.**—When a Bill has been passed by both the Houses the Bill is sent to the Governor for his assent. He may declare either that :

- (a) he assents to the Bill,
- (b) he withholds his assent,
- (c) he reserves the Bill for the consideration of the President. At least in one case, where a Bill is likely to affect the powers of the High Court of a State, the Governor must reserve it for the consideration of the President,
- (d) he may return the Bill to the Houses for reconsideration.

In the last case when a Bill, returned by the Governor for the reconsideration of the Houses, is passed again by the Houses with or without amendments and presented to the Governor for assent, the Governor shall not withhold assent second time. This means that he cannot reject the Bill. He must either give his assent or reserve the Bill for the consideration of the President.

In case of (c), i. e., when a Bill has been reserved by the Governor for

1. Article 196 (3) (4) (5).
2. Articles 198 and 199.
3. Article 199 (3).
4. Article 199 (4).

the consideration of the President, the President may take one of the three courses :

(i) he may assent to the Bill ;

(ii) he may withhold assent ;

(iii) he may, where the Bill is not a money Bill, direct the Governor to return the Bill to the House or Houses of the State Legislature for reconsideration. When a Bill is so returned, the House then must reconsider the Bill within a period of six months from the date of receipt. If it is again passed by the Houses, with or without amendment, it shall be presented again to the President for his consideration.<sup>4</sup>

When a Bill is presented for the second time after reconsideration, the President may assent to the Bill or reject it.

**Procedure in financial matters—Articles 202 to 207.**—In financial matters the procedure in the State is similar to that in Union. The procedure for the submission of the Annual Financial Statement, or the passing of the 'Annual Appropriation Act,' 'Votes of Credit', 'Votes on Accounts' and supplementary grants, etc., is analogous to that in the Union under Article 112.

**General Rules of procedure.**—As in the case of the Centre, a House of the Legislature of a State has right to make rules for regulating its procedure and conduct of its business. These rules are subject to the provisions of the Constitution.<sup>2</sup> Article 208 was amended by the Constitution (42nd Amendment) Act, 1976, which empowered the Houses of the State Legislatures to make rules for regulating its procedure and the quorum for the meeting of the Houses. The 44th Amendment Act, 1978, has again restored the original position as it stood before the 42nd Amendment Act, 1976. The amendment omits the words added to Article 208 by the 42nd Amendment Act. The validity of any proceedings in the Legislature shall not be called in question on the grounds of alleged irregularity of the Procedure.<sup>3</sup>

No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.<sup>4</sup>

**Ordinance making power of the Governor.**—The Ordinance making power of the Governor under Article 213 is similar to that of the President under Article 123 :

(1) The Governor can only issue Ordinances when the State Legisl and in the States having two Houses, both the Houses, is not in session.

(2) The Governor must be satisfied that circumstances exist which it necessary for him to take immediate action. The Court cannot question the validity of the Ordinance on the ground that there was no necessity or sufficient ground for issuing the Ordinance by the Governor. The existence of necessity is not a justiciable issue.<sup>5</sup> However the exercise of Ordinance m-

1. Article 201.

2. Article 208.

3. Article 212.

4. Article 211.

5. Upendra Lal v. Narayani Devi, A. I. R. 1968 M. P. 90.

power is not discretionary. The Governor exercises this power on the advice of the Cabinet.

(3) The Ordinance must be laid before both Houses of the State Legislature when they assemble, and shall cease to operate at the expiration of six weeks from the re-assembly of the Legislature, unless it is approved earlier by the Legislature. The Ordinance may be withdrawn at any time by the Governor.

(4) The Ordinance making power of the Governor is co-extensive with the Legislative powers of the State Legislature. He can only issue Ordinances on the subjects on which the State Legislature is empowered to make laws, e. g., State list and Concurrent list. Both Central and State Legislature can make laws on subject mentioned in the Concurrent list. According to Article 213 (3) therefore, an Ordinance will be invalid to the extent, it makes any provision which would be invalid if enacted by the State Legislature. But such an Ordinance will not be invalid if it has been issued by the Governor in pursuance of instructions from the President.

(5) The Governor cannot issue an ordinance without the instructions from the President in the following cases, (a) a Bill containing the same provision would have required the provisions sanction of the President for its introduction into the Legislature, (b) he would have deemed it necessary to reserve a Bill for the consideration of the President, (c) an Act of the Legislature of the State containing the same provisions would have been invalid unless having been reserved for the consideration of the President and had received the assent of the President.

An Ordinance shall have the same force and effect as an Act of the Legislature. It can override the judgment of the High Court under Article 226.<sup>1</sup>

In *Satya Pal Dang v. State of Punjab*,<sup>2</sup> on March 8, 1968, the Speaker of the Punjab Legislative Assembly adjourned the House for two months making it impossible to pass the Appropriation Bill before the end of the financial year. The Governor, in order to overcome the crisis prorogued the Assembly on 11th March had promulgated an Ordinance on March 13, prescribing the procedure for passing the budget and the Appropriation Bill, purporting to make the law for the timely completion of financial business contemplated by Article 209. The Ordinance provided that the House could be adjourned by a resolution of the House. The Assembly was re-summoned to meet on March 18. When the House met in session the Speaker ruled the session to have been illegally called and that his adjournment order of March 8, was still good. He then left the Chamber. Thereafter the Deputy Speaker occupied the chair and estimates and the Appropriation Bill was passed. The Deputy Speaker certified the Appropriation Bill which was considered by the Legislative Assembly and approved. The Bill was then assented to by the Governor.

The questions involved were—

(1) Whether the Governor was entitled under the Constitution to promulgate an Ordinance in the circumstances?

(2) Whether a law contemplated by Article 209 can be prescribed by an Ordinance?

the consideration of the President, the President may take one of the three courses :

- (i) he may assent to the Bill ;
- (ii) he may withhold assent ;

(iii) he may, where the Bill is not a money Bill, direct the Governor to return the Bill to the House or Houses of the State Legislature for reconsideration. When a Bill is so returned, the House then must reconsider the Bill within a period of six months from the date of receipt. If it is again passed by the Houses, with or without amendment, it shall be presented again to the President for his consideration.<sup>1</sup>

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2. Article 208.

3. Article 212.

4. Article 211.

5. Upendra Lal v. Narayani Devi, A. I. R. 1968 M. P. 90.

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(2) Whether a law contemplated by Article 209 can be prescribed by an Ordinance?

the consideration of the President, the President may take one of the three courses :

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- (ii) he may withhold assent ;

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1. Article 201.

2. Article 208.

3. Article 212.

4. Article 211.

5. *Upendra Lal v. Narayani Devi*, A. I. R. 1968 M. P. 90.

## The State Judiciary (Arts. 214 to 237)

The Judiciary in States consists of a High Court and a system of courts subordinate to the High Court. Article 214 says that there shall be a High Court in each State. However, under Article 231 (1) Parliament can establish by law a common High Court for two or more States or for two or more States and a Union Territory. The High Court stands at the head of the judiciary in the State.

**Appointment of Judges.**—Every High Court consists of a Chief Justice and such other Judges as the President may from time to time determine.<sup>1</sup> Thus the Constitution does not fix any maximum number of Judges of a High Court. The Judges of the High Court are appointed by the President. The President appoints the Chief Justice of a High Court after consultation with the Chief Justice of India and the Governor of the State concerned.<sup>2</sup> In case of appointment of a Judge other than the Chief Justice he may consult even the Chief Justice of the High Court concerned.

**Additional and acting Judges.**—The President may under Article 223 appoint one of the Judges of the High Court as acting Chief Justice, when the office of the Chief Justice falls vacant or he is unable to perform his duties,<sup>3</sup> by reason of absence or otherwise. The President may appoint duly qualified persons to be additional judges of the court for a temporary period not exceeding two years, in order to clear off the arrears of work in a High Court.<sup>4</sup> The President may also appoint an acting Judge when any Judge of a High Court other than Chief Justice is unable to perform his duties by reason of absence or for any other reason, or is appointed to act temporarily as Chief Justice. An acting Judge is to hold office until the permanent judge has resumed his duties.<sup>5</sup> Under Article 224-A the Chief Justice of a High Court may at any time with the previous permission of the President request retired judges of the High Court to sit and act as judges of the High Court.

In actual practice, however, the appointment of the judges are made by the President on the advice of the Council of Ministers.

**Transfer of a Judge from one High Court to another.**—Article 222 (1) empowers the President after consultation with the Chief Justice of India to transfer a Judge from one High Court to any other High Court. Clause (2) makes provision for the grant of compensatory allowance to a Judge who goes on transfer to another High Court.

*Is the power of the President under Art. 222 unfettered? What are the conditions for the exercise of such a discretionary power? In other words, what is the scope and nature of consultation with the Chief Justice as envisaged in Art. 222 (1)? These questions were considered by the Supreme Court in*

1. Article 216.
2. Article 217.
3. Article 223.
4. Article 224.
5. Article 224 (2).

(3) Whether the Speaker had power to question the validity of the Ordinance?

(4) Whether the Appropriation Bill passed by the Legislature could be challenged on the ground that the proper procedure had not been followed?

The Supreme Court held that the two Appropriation Acts passed by the Legislative Assembly on March 18, 1968, and the Governor's Ordinance regulating the proceedings of the House were constitutionally valid. The power of the Governor to prorogue the House under Article 174 of the Constitution was absolute. This power was invoked by the Governor in order to overcome the Speaker's ruling, adjourning the House which was aimed at filibustering, or otherwise to delay the business of the House. If there was on occasion for the regulation of financial business by law under Article 209 of the Constitution it was this. The Legislature could not be allowed to hibernate for two months while financial business and the constitutional machinery and democracy itself were wrecked.

The Governor's re-summoning the Legislature immediately after the prorogation was also a step in the right direction as it set up once again the democratic machinery in the State which had been immediately disturbed by the action of the Speaker. This action of the Governor respected the democratic right of the Legislature.

The power of the Governor to prorogue the House and promulgate an Ordinance was untrammelled by the Constitution. In the present case, an emergency had arisen and the action was perfectly understandable. The position in Punjab was that the Assembly was in Session, but it was in a state of inaction due to the Speaker's ruling. As the time was running out, to pass the budget the Governor had to act quickly to put back the Legislative machinery of the State into life and he could do so only by the constitutional powers vested in him.

Commenting on the ruling of the Speaker that the House could not be re-summoned by the Governor when the House was adjourned the Supreme Court said 'this ruling was based on the wrong assumption.'

The Speaker cannot pronounce upon the validity of the Governor's Ordinance. It can only be challenged by the Legislative Assembly by a resolution.

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though consultation with the Chief Justice of India is obligatory, it would not be strictly binding on the President.

**Qualifications.**—A person to be qualified for appointment as Judge of a High Court—(a) must be a citizen of India, (b) must have held a judicial office for at least ten years, in the territory of India, (c) must have been an advocate of High Court for at least ten years.<sup>1</sup>

The Constitution (44th Amendment) Act, 1978, has amended the Explanation to clause (2) for the purpose of removing an anomaly. Under the present clause (a) of the Explanation any period during which a person has, after becoming an advocate, held judicial office or the office member of a tribunal or any post, under the Union or a State, requiring special knowledge of law will be included in computing the period during which he has been an advocate for the purpose of determining his eligibility for appointment as a judge of a High Court. There is no corresponding provision in the Explanation in relation to a person who started as a Judge without being an advocate or a member of a tribunal or the holder of any post under the Union or a State requiring special knowledge of law. This anomaly is being removed by adding a new clause which provides that in computing the period during which a person had held judicial office at any period shall be included during which the person had been an advocate of a High Court or member of a Tribunal or held any post under the Union or a State requiring a special knowledge of law.

**Term and removal of Judges.**—A Judge of the High Court shall hold office until he attains the age of 62 years. If a question arises as to the age of a Judge of a High Court, then it shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.<sup>2</sup> A Judge may, however, be removed from the office by the President in the same manner and on the same grounds as a Judge of the Supreme Court. The office of a Judge falls vacant by his being appointed by President to be Judge of the Supreme Court or being transferred to any other High Court. A Judge may also resign his office by writing to the President.<sup>3</sup>

**Restriction after Retirement.**—Article 220 prohibits a person who has held office as a permanent Judge of a High Court to plead from acting or pleading in any court or before any authority in India except the Supreme Court and the other High Courts. This prohibition is necessary in order to maintain the independence of the Judiciary.

**Salaries and Allowances.**—The Judges of the High Court are paid such salaries as are specified in the Second Schedule. The Chief Justice at present gets a salary of Rs. 4,000 and other Judges Rs. 3,500 per month. They are also entitled to such allowances in respect of leave and pension as Parliament may determine by law from time to time. Their salaries, allowances and pensions are charged on the Consolidated Fund of India cannot be varied to their disadvantage after their appointment.<sup>4</sup>

Before entering upon his office a Judge of a High Court shall have to take an oath in the prescribed form before the Governor of that State or some person appointed by him for that purpose affirming that he will bear true faith and allegiance to the Constitution of India and will perform the duties of his office without fear and favour, affection or ill-will and will uphold the Constitution and the laws.

1. Article 217 (1) and (2).
2. Article 217 (3).
3. Article 220.
4. Article 221 (1) and (2).

the case of *Union of India v. Sankalchand*.<sup>1</sup> In this case the constitutionality of a notification issued by the President by which Justice Sankalchand Sheth of the Gujarat High Court was transferred to the High Court of Andhra Pradesh, was challenged on the ground that the order was passed without the consent of the Judge and against public interest and without effective consultation of the Chief Justice of India. The Supreme Court by a majority of 3 to 2 (Bhagwati and Untawalia, JJ. dissenting) held that a Judge of a High Court can be transferred under Art. 222 (1) without his consent. If consent were imported in Art. 222 so as to make condition precedent to transfer a Judge from one High Court to another then a Judge by withholding consent could render the power contained in Art. 222 wholly ineffective and nugatory. The power to transfer a High Court Judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a Judge who does not toe its line or who, for some reason or the other, has fallen from its grace. The extraordinary power which the Constitution has conferred on the President by Art. 222 (1) cannot be exercised in a manner which is calculated to defeat or destroy in one stroke the object and purpose of the various provisions conceived with such care to insulate the judiciary from the influence and pressures of the executive. Once it is appreciated that a High Court Judge can be transferred on the ground of public interest only, the apprehension that the executive may use the power of transfer for its own ulterior ends and thereby interfere with the independence of the judiciary, loses its force. Also, Art. 222 (1) casts an absolute obligation on the President to consult the Chief Justice of India before transferring a judge from one High Court to another. That is the condition precedent to the actual transfer of the Judge. The consultation with the Chief Justice of India must be effective one. It means that while consulting the Chief Justice the President must make the relevant data available to him on the basis of which he can offer to the President, the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because, in casting on the President the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President to this constitutional obligation to place full facts before the Chief Justice and the performance by the latter of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process are complementary to each other. Consultation within the meaning of Art. 222 (1), therefore, means full and effective, not formal or unproductive consultation.

*Bhagwati and Untawalia, JJ.* delivered a dissenting judgment and held that a Judge of a High Court cannot be transferred without his consent. Bhagwati, J., said that the word 'transfer' is a neutral word which can mean consensual as well as compulsory transfer and if the independence of superior judiciary is from all forms of Executive interference is to be achieved the word 'transfer' must be read in a limited sense of consensual transfer. If a High Court Judge could be transferred without the consent then it would give the executive dangerous power to punish a judge by transferring him from one High Court to another if he decides cases against the Government. That would greatly undermine the independence of Judiciary. It is no doubt true that previous consultation with the Chief Justice of India is a condition precedent to the exercise of power by the Executive but it does not afford sufficient protection to the High Court Judge against unjustified transfers. It is settled law that

I. A. I. R. 1977 S. C. 2328.

employee by the Industrial Tribunal was wrongful or justified. The Supreme Court held that the High Court cannot interfere with the decision of the Tribunal. In the words of the Supreme Court "Unless there was grave miscarriage of justice or flagrant violation of law the High Court could not interfere. The power should not ordinarily be exercised if some alternative remedy is available. However, the existence of alternative remedy is no bar if without High Court's interference, flagrant violation of law is likely to result if the alternative remedy is not effective or speedy."<sup>1</sup>

**Transfer of certain cases to High Courts.**—Under Article 228 the High Court has power to withdraw a case from a subordinate Court to it, if it is satisfied that a case pending in a subordinate Court involves a substantial question of law as to the interpretation of the Constitution. It may then either dispose of the case itself or may determine the said question of law and return the case to the subordinate Court with a copy of its judgment. The subordinate Court will then decide the case in conformity with the High Court judgment.

The 42nd Amendment Act, 1976, has amended Art. 228 of the Constitution. The Amendment has put an important restriction on the power of the High Court to withdraw cases from subordinate courts.

The High Courts will now exercise their powers subject to the new Article 131-A, which gives exclusive jurisdiction to the Supreme Court to decide the validity of central laws to the exclusion of the High Courts. It means that if in a proceeding before a subordinate court the question of validity of any central laws are involved the High Court will have no power to withdraw such a case and decide.

It is to be noted that under the Amendment the High Court must be satisfied that the determination of that question is necessary for the disposal of the case.

Under Article 235 the High Court has disciplinary jurisdiction over subordinate Courts.

It has been held that the Government had no jurisdiction to take disciplinary action against a District Judge. It is the High Court alone which is competent to exercise disciplinary power against a judge of the inferior court.<sup>2</sup> In *State of Haryana v. Inder Prakash*,<sup>3</sup> the High Court quashed an order of the Governor compulsorily retiring a senior subordinate judge under Rule (c) of Punjab Civil Service Rules or on the ground that the order was passed by the Governor against the recommendation of the High Court. The Court held that the recommendation of the High Court was binding on State Government. It was also held that the transfer of District Judge was outside the power of the Governor and had to be made by the High Court under the power vested in it by Article 235.<sup>4</sup> Article 235 unlike Article 228 does not mention 'Tribunals'. The power under Article 235, therefore, cannot be exercised over Tribunals.

#### (c) Writ jurisdiction of the High Court—Article 226.

Article 226 provides that notwithstanding anything in Article 32 every High Court shall have power, throughout the territorial limits in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* or any of them for the enforcement of fundamental

1. *In re Annamali Mudaliar*, A. I. R. 1953 Mad. 262; *Dhian Singh v. Deputy Secretary*, A. I. R. 1960 Punj. 41.

2. *State of West Bengal v. Nripendra Nath Bagchee*, A. I. R. 1966 S. C. 447.

3. A. I. R. 1976 S. C. 1841.

4. *State of Assam v. Ranga Mohammad*, A. I. R. 1967 S. C. 903.

## JURISDICTION OF THE HIGH COURT

(a) **A Court of Record.**—Article 215 declares that every High Court shall be a Court of record and shall have all powers of such a court including the power to punish for its contempt. The scope and nature of the power of High Court under this Article is similar to the powers of the Supreme Court under Article 129..

(b) **General Jurisdiction.**—Article 225 says that subject to the provisions of the Constitution and to the provisions of any law of the appropriate Legislature (a) the jurisdiction of the High Court, (b) the law administered in the existing High Court, (c) the powers of the Judges in relation to the administration of justice in the courts, (d) the power to make rules of the High Court shall be the same as immediately before the commencement of this Constitution. Thus the pre-Constitutional jurisdiction of the High Court is preserved by the Constitution. Art. 225 thus gave jurisdiction over revenue matters. In pre-Constitution period the decisions of the Privy Council were binding on all the High Courts under section 212 of the Government of India Act. The effect of the present Article is the same and they are still binding on the High Courts unless it is reversed by the Supreme Court or by a law of the appropriate Legislature.

This means that the jurisdiction and powers of the High Courts can be changed both by the Union Parliament and the State Legislatures.

(c) **Powers of superintendence over all courts by the High Courts.**—Under Article 227 every High Court has the power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. For this purpose, the High Court may call returns from them, make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts and prescribe forms in which books, entries and accounts are to be kept by the officers of such courts, and settle table of fees to be given to the sheriff, clerks, officers, attorneys, advocates and pleaders. However, this power of superintendence of High Court does not extend over any Court or Tribunal constituted by any law relating to the armed forces.

The power of superintendence conferred on the High Court by this Article is a very wide power. This power is wider than the power conferred on the High Court to control inferior courts through writs under Art. 226. It is not confined to administrative superintendence but also judicial superintendence over all subordinate Courts within its jurisdiction.<sup>1</sup> This power of superintendence conferred on the High Court by Article 227 being extraordinary to be exercised most sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere error of fact, however, erroneous those may be.<sup>2</sup> The main grounds on which the High Court usually interferes are when the inferior courts act arbitrarily or act in excess of jurisdiction vested in them, or fail to exercise jurisdiction vested in them,<sup>3</sup> or act in violation of principles of natural justice,<sup>4</sup> or if there is error of law apparent on the face of record. In *D. N. Banerji v. P. R. Mukherji*,<sup>5</sup> the question was whether on the facts of the case the dismissal of an

1. *Waryam Singh v. Amarnath*, A. I. R. 1954 S. C. 215 ; *Hari Vishnu v. Ahmad Israque*, A. I. R. 1955 S. C. 233 ; *Babbulmal v. Laxmibai*, A. I. R. 1975 S. C. 1297.

2. *India Pipe Filling Co. v. Fakruddin*, A. I. R. 1978 S. C. 45 ; *Waryam Singh v. Amarnath*, A. I. R. 1954 S. C. 215.

3. *Ibid.*

4. *Santosh v. Mool Singh*, A. I. R. 1958 S. C. 321

5. A. I. R. 1951 S. C. 58 at p. 59

These prerogative writs are borrowed from English law but in view of the express provisions in our Constitution the Courts in India are not bound to look back to early history or the procedural technicalities of those writs in English Law. They can exercise this power keeping in view the broad fundamental principles of these writs followed in the English law.<sup>1</sup> The power of High Court is not confined only to issuing of the writs, it can issue a suitable 'direction' or 'order' to any person or authority within its jurisdiction. Thus Article 226 enables the High Court to examine the action of administrative and executive officials and to give relief to an aggrieved person.

Generally speaking, administrative orders confer no justiciable right. There are, however, exceptions. There are administrative orders which confer rights and impose duties. The Orissa State Urban Land Settlement Rules of 1959, however, confer no rights on a person whose application for grant of a *nazul* plot of land is disposed of fairly by the Revenue authorities.<sup>2</sup>

**2. Territorial extent of writ-jurisdiction.**—Article 226 imposes two-fold limitation on the power of the High Court to issue writs. Firstly, the power is to be exercised throughout the territory in relation to which it exercises jurisdiction, that is to say, the writs issued by the High Court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority against which the writ is issued must be "within those territories" which implies that they must be amenable to the jurisdiction of the Court by reason of residence or location within those territories.

In *Election Commission of India v. Venkata Rao*,<sup>3</sup> the Madras High Court had issued a writ against Election Commission having its office permanently located at New Delhi. The Court held that the Madras High Court had no power to issue a writ against Election Commission which is outside its jurisdiction. The mere fact that the effects of the order of a person or authority are produced within the territory of the High Court if the cause of action arises within its jurisdiction is not sufficient to invest the High Court with jurisdiction under Article 226 to issue a writ.<sup>4</sup> The Punjab High Court can only issue a writ to Central authorities which are located in Delhi. As a result of the Supreme Court decision relief against the Central Government could only be sought in Delhi.

The Law Commission had expressed the view that these limitations had reduced the utility of Article 226 and, in fact they had defeated the very purpose of this Article. The Commission had recommended the removal of these limitations on a person seeking relief under Article 226.<sup>5</sup> Accordingly, the Constitution was amended by the Constitution (15th Amendment) Act, 1963. Article 226 now permits High Court within whose jurisdiction the cause of action in whole or in part arises to issue directions, orders or writs to any Government or authority notwithstanding that the authority or the Government is located in Delhi if the cause of action in whole or in part arises in its jurisdiction.

**3. Discretionary remedy.**—The remedy provided for in Article 226 is a

1. T. C. Basappa v. Nagappa, A. I. R. 1954 S. C. 440; Dwarka Nath v. I. T. O., A. I. R. 1966 S. C. 81.
2. A. I. R. 1963 S. C. 210. See also *Madan Gopal v. Secretary to Government of Orissa*, A. I. R. 1962 S. C. 1513.
3. A. I. R. 1975 S. C. 434.
4. H. Ismail v. Competent Officer, A. I. R. 1967 S. C. 1244.
5. See Law Commission Report XIV, p. 66.

discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere.<sup>1</sup> This remedy cannot be claimed as a matter of right. The High Court must exercise its discretion on judicial consideration and on well-established principles unless the High Court is satisfied that the normal statutory remedy is likely to be too dilatory or difficult to give reasonable, quick relief, it should be loath to act under Art. 226. The High Court should be careful to be extremely circumspect in granting these reliefs especially during the pendency of criminal investigations. The investigation of a criminal case is a very sensitive phase where the investigation authority has to collect evidence from all odd corners and anything that is likely thwart its course may inhibit the interests of justice.<sup>2</sup> But the rule that it may refuse to grant any writ where alternative remedy is available as only a rule of direction and not a rule of law,<sup>3</sup> and instances are numerous where a writ had been issued in spite of the fact that the aggrieved party had other adequate legal remedy.<sup>4</sup>

The existence of an alternate adequate remedy is, however, no bar to the exercise of writ-jurisdiction where the relief is involved in case of infringement of fundamental rights<sup>5</sup> or where there is complete lack of jurisdiction<sup>6</sup> or where the order has been passed in violation of natural justice by the subordinate court.<sup>7</sup> Existence of alternative remedy is also no ground to refuse to issue writ where the action is being taken under any invalid law or arbitrarily without sanction of a law.<sup>8</sup>

The High Court will not go into the disputed question of fact in exercise of its writ-jurisdiction.<sup>9</sup>

It has been held by the Supreme Court that the High Courts cannot use the Article for the purpose of giving interim relief. The existence of legal right is the basis of the exercise of jurisdiction of court under the Article. If the High Court is of opinion that there was no other convenient or adequate remedy open to the petitioner, it may proceed to investigate the case on the merit and come to the conclusion that the petitioner has succeeded in establishing that his legal right has been infringed which entitled him to a writ pending such determination of the legal right on merit, it may make suitable interim order of maintaining the status quo ante.<sup>10</sup>

The power conferred on the High Court by Article 226 cannot be taken away or abridged by any law except by an amendment of the Constitution.<sup>11</sup>

#### **Effect of laches or delay in filing petition under Article 226.—The remedy**

1. *Rashid Ahmad v. Income-tax Investigation Commission*, A. I. R. 1954 S. C. 207 : C.A. Abraham v. I. T. Officer, A. I. R. 1961 S. C. 609.
2. *Assistant Collector, Central Excise v. J. H. Industries*, A. I. R. 1979 S. C. 1889.
3. *A. V. Venkateswaram v. R. S. Wadhwani*, A. I. R. 1961 S. C. 1506.
4. *State of U. P. v. Mohd. Nooh*, A. I. R. 1958 S. C. 86.
5. *Himmat Lal v. State of U. P.*, A. I. R. 1954 S. C. 403.
6. *A. V. Venkateswaram v. R. S. Wadhwani*, A. I. R. 1961 S. C. 1506.
7. *State of U. P. v. Mohd. Nooh*, A. I. R. 1958 S. C. 86.
8. *Tata Engineering and Locomotive Co. v. Assistant Commissioner, Commercial Taxes*, A. I. R. 1967 S. C. 1401.
9. *Burmah Construction Co. v. State of Orissa*, A. I. R. 1967 S. C. 1320.
10. *State of Orissa v. Madan Gopal*, A. I. R. 1922 S. C. 12.
11. *Sangram Singh v. Election Tribunal*, A. I. R. 1955 S. C. 425.

provided under Art. 226 should be sought within a reasonable time. Inordinate delay in invoking the jurisdiction of the Court may be good ground for refusing to grant relief. It is not that there is any period of limitation for the Courts to exercise their powers under Art. 226, nor is it that there can never be a case where the courts cannot interfere in a matter after the passage of certain length of time. But it would be a sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Article 226 in case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to forward stale claims and try to unsettle matters. The aforesaid observations were made by the Supreme Court in *P. S. Sadasivaswamy v. State of Tamil Nadu*.<sup>1</sup> In this case the Court held that where a Government servant slept over the promotions of his juniors over his head for 14 years then approached the High Court challenging the relaxation of relevant rules in favour of the junior, the writ-petition is liable to be dismissed *in limine*. Such an aggrieved person should approach the Court at least within six months or at the most a year of promotion of his juniors.

In *Lachmandas v. Union of India*,<sup>2</sup> the appellant was dismissed from service by an order by the Court Martial, dated May 17, 1966. He filed an appeal from that order to the Chief of the Army Staff who by his order dated Dec. 21, 1966 set aside the order of dismissal and substituted in its place an order of discharge with retrospective effect from July 11, 1968. Four years thereafter the appellant filed a writ-petition in the High Court, i. e. on Sep. 22, 1970, which was dismissed *in limine* by the High Court. He filed the present appeal in the Supreme Court against the High Court's order. The Supreme Court held that writ-petition was filed after a gross delay (4 years) for which there is no explanation, and therefore, the High Court was justified in dismissing it summarily.

### WRITS

**I. Habeas Corpus.**—“Habeas Corpus” is a Latin term which literally means “you may have the body”. The writ is issued in form of an order calling upon a person by whom another person is detained to bring that person before the Court and to let the Court know by what authority he has detained that person. If the cause shown discloses that there is no legal justification for detention the Court will order immediate release of the detained person. Thus the main object of the writ is to give quick and immediate remedy to a person who is unlawfully detained by the person whether in prison or private custody.

In *Kanu Sanyal v. District Magistrate, Darjeeling*,<sup>3</sup> the Supreme Court held that while dealing with the application of writ of *habeas corpus* production of the body of the person detained is not essential. In that case the top-ranking Naxalite leader, Kanu Sanyal, was arrested in 1971 and was detained without trial in the Visakhapatnam Jail. He moved the Supreme Court for a writ under Article 32 of the Constitution challenging the legality of his detention and praying for the Court's order for his production before the Court. The Court issued the rule *nisi*, but not the production of the detenu. Council

1. A. I. R. 1974 S. C. 2271. See also *I. G. N. Sahakari Samiti v. State of Rajasthan*, A. I. R. 1974 S. C. 2055; *Allatoot v. L. R. Governor, Delhi*, A. I. R. 1974 S. C. 2077.

2. A. I. R. 1977 S. C. 1979.

3. A. I. R. 1974 S. C. 510.

appearing for the detenu, contended the production of the body of person alleged to be illegally detained was an essential feature of writ of *habeas corpus* under Article 32 of the Constitution and that the Court can dispose of the petition only after the petitioner was produced in person before it.

Bhagwati, J., held that in a writ of *habeas corpus* under Article 32, the Court may not require the body of the person detained to be brought before the Court. The production of the body of the person detained is not essential to the jurisdiction of the Supreme Court to deal with the application. The Court may deal with the legality of the detention on the hearing of the rule *nisi* without requiring the person to be brought before the Court, and if detention is found unlawful, order him to be released forthwith.

The Court said there was no reason in principle why that which was merely a slip in the procedure for determining the legality of the detention and securing the release of a subject unlawfully restrained should be elevated to the basic and essential feature of writ. "Why should we hold ourselves in fetters by a practice which originated in England about 300 years ago on account of certain historical circumstances which have ceased to be valid even in that country and which have certainly no relevance in ours." His Lordship observed :

"The practice followed in United States of releasing a person found to be illegally detained without requiring him to be brought before the Court discloses a pragmatic approach to the problem, the Court said, 'for it concerns itself more with the accomplishment of the primary purpose of the proceedings than with competence with its superfluous element'. The Constitution makers could never have intended that while dealing with an application for a writ under Article 32, the Supreme Court should shut its eyes to the development in the law in regard to the writ of *habeas corpus* in the last 200 years in the country of its origin and the manner in which the jurisdiction in regard to the writ of *habeas corpus* is exercised in the country of its adoption across the Atlantic and, ignoring the facts of history allow itself to the petrified in the age of the Tudors and the Stuarts when the writ was struggling to emerge as an effective weapon for the protection of person's liberty."

**Who can apply for the writ.**—The general rule is that an application can be made by a person who is illegally detained. But in certain case, an application for writ of *habeas corpus* can be made by any person on behalf of the prisoner i. e. a friend or a relation.

**When it will lie.**—The writ of *habeas corpus* will lie if the power of detention vested in an authority was exercised *mala fide* and is made for collateral or ulterior purposes.<sup>1</sup> But if the detention is justified the High Court will not grant the writ of *habeas corpus*. If the following conditions are satisfied the detention is not illegal (a) if the detention is made in accordance with the procedure established by law. The law must be valid law and the procedure must be strictly followed.<sup>2</sup> (b) The detention is lawful if the conditions laid down in Article 22 are complied with.

The detention becomes unlawful if a person who is arrested is not produced before the Magistrate within 24 hours of his arrest and he will be entitled to be released on a writ of *habeas corpus*.

1. A. K. Gopalan v. State of Madras, A. I. R. 1950 S. C. 27.

2. Article 21.

The legislature which deprives a person of his personal liberty by law must be competent to make that law. If the law is unlawful the detention will be unlawful.

An appeal lies against an order of the High Court granting or rejecting the application for issue of the *habeas corpus* under Articles 132, 133, 134, or 136.<sup>1</sup>

**2. Mandamus.**—The word "mandamus" means "the order". The writ of *mandamus* is thus an order by a superior court commanding a person or a public authority (including the Government and public corporation) to do or forbear to do something in the nature of public duty or in certain cases of a statutory duty.<sup>2</sup> For instance a licensing officer is under a duty to issue a licence to an applicant who fulfils all the conditions laid down for the issue of such licence. But despite the fulfilment of such conditions if the officer or the authority concerned refuses or fails to issue the licence the aggrieved person has a right to seek the remedy through a writ of *mandamus*.

**When it will lie.**—Thus the writ or order in the nature of a *mandamus* would be issued when there is a failure to perform a mandatory duty. But even in cases of alleged breaches of mandatory duty the party must show that he has made a distinct demand to enforce that duty and the demand was met with refusal.<sup>3</sup>

- (1) The writ of *mandamus* can only be granted when there is in the applicant a right to compel the performance of some duty cast upon the authority.<sup>4</sup> The duty sought to be enforced must be a public duty, that is, duty cast by law. A private right cannot be enforced by the writ of *mandamus*.
- (2) The writ of *mandamus* can be issued to a public authority to restrain it from acting under a law which has been declared unconstitutional.

Thus a writ of *mandamus* can be granted only in cases where there is a statutory duty imposed upon the officer concerned, and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunal and officers exercising public functions within the limits of their jurisdiction. It follows, therefore, that an order for *mandamus* may be issued to compel the authorities to do something which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.

**When it will not lie.**—A writ of *mandamus* will not be granted in the following circumstances :

(1) When the duty is merely discretionary in nature the writ of *mandamus* will not lie. In *State of M. P. v. Mandawara*,<sup>5</sup> the M. P. Government made a rule making it discretionary to grant dearness allowance to its employees at

1. *R. v. Home Secretary, Ex-parte O'Brien*, (1923) 2 K. B. 361 at p. 354.

2. See A. T. Markos : *Judicial Control of Administration—Control Administrative Action in India*, p. 364.

3. *Saraswati Industrial Syndicate Ltd. v. Union of India*, A. I. R. 1975 S. C. 460 ; *Halsbury's Laws of England*, 3rd ed., Vol. 13, p. 106.

4. *State of M. P. v. G. C. Mandawara*, A. I. R. 1954 S. C. 431

5. *Ibid*

a particular rate. The Supreme Court held that the writ of *mandamus* could not be issued to compel the Government to exercise its power.

(2) A writ of *mandamus* does not lie against a private individual or any private organisation because they are not entrusted with a public duty.<sup>1</sup>

(3) A writ of *mandamus* cannot be granted to enforce an obligation arising out of a contract.<sup>2</sup>

**3. Prohibition.**—A writ of prohibition is issued primarily to prevent an inferior court or tribunal from exceeding its jurisdiction, or acting contrary to the rules of natural justice. It is issued by a superior Court to inferior courts for the purpose of preventing inferior courts from usurping a jurisdiction with which it was not legally vested, or in other words to compel inferior courts to keep within the limits of their jurisdiction.<sup>3</sup>

Thus the writ is issued in both cases where there is excess of jurisdiction and where there is absence of jurisdiction.<sup>4</sup>

**Prohibition and certiorari Distinguished.**—Prohibition has much in common with *certiorari*. Both the writs are issued with the object of restraining the inferior courts from exceeding their jurisdiction. The difference between the two writs was explained by the Supreme Court in the following words :

"When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior Court for a writ of *prohibition* and on that an order will issue forbidding the inferior court from continuing the proceedings. On the other hand, if the court hears the cause or matter and gives a decision, the party aggrieved would have to move the superior Court for a writ of *certiorari* on that an order will be made quashing the decision on the ground of jurisdiction."

When the case is pending before the Court but it has not finally been disposed of, the superior court has to apply both *prohibition* and *certiorari*—*prohibition* to prevent the court to proceed further with the case and *certiorari* for quashing what had already been decided.<sup>5</sup> Thus the object of the writ of *prohibition* is in short prevention rather than cure, while *certiorari* is used as a cure.

Where the defect in the jurisdiction is not apparent, where the appellant is guilty of suppression of material fact, or where the writ would be futile, the court may refuse to grant the writ. But it can be granted almost as a matter of right where it is shown that the inferior tribunal is acting in excess of its jurisdiction.<sup>6</sup>

Prohibition, like *certiorari*, lies only against judicial and quasi-judicial bodies. It does not lie against a public authority which acts purely in an executive or administrative capacity, nor to a legislative body.

1. *Barada Kanta v. State of West Bengal*, A. I. R. 1963 Cal. 161.
2. *Bihar E. G. F. Co-operative Society v. Sipahi Singh*, A. I. R. 1977 S. C. 2149.
3. *East India Commercial Co. v. Collector of Customs*, A. I. R. 1962 S. C. 1893.
4. *S. Govinda Menon v. Union of India*, A. I. R. 1967 S. C. 1274.
5. *Hari Vishnu Kamath v. Ahmad Ishaque*, A. I. R. 1955 S. C. 233.
6. *Bengal Immunity Co. v. State of Bihar*, A. I. R. 1955 S. C. 661; *Madan Gopal v. Union of India*, A. I. R. 1951 Raj. 94.

**4. Certiorari.**—A writ of *certiorari* is issued by a superior Court (Supreme Court and High Courts) to an inferior court or body exercising judicial or quasi-judicial functions to remove a suit from such inferior court or body and adjudicate upon the validity of the proceedings or body exercising judicial or quasi-judicial functions. It may be used before the trial to prevent as excess or abuse of jurisdiction and to remove the case for trial to higher court. It is invoked also after trial to quash an order which has been made without jurisdiction or in violation of the rules of natural justice. Speaking on the scope of the writ the Supreme Court in the *Province of Bombay v. Khushaldas*,<sup>1</sup> held that :

- (1) Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, acts in excess of their legal authority, a writ of *certiorari* lies. It does not lie to remove merely ministerial acts or to remove or cancel executive or administrative acts.
- (2) For this purpose, the term 'judicial' does not necessarily mean acts of a judge or a legal tribunal sitting for determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances and imposing liability or affecting the right of others.

**Writ lies Against Judicial bodies.**—One of the fundamental principles in regard to the issuing of a writ of *certiorari* is that the writ can be availed of only to remove or to adjudicate upon the validity of judicial acts. The expression "judicial acts" includes the exercise of quasi-judicial functions by administrative bodies or authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts.<sup>2</sup> Whether a body is to act in a judicial manner or not is a question to be decided in each case in the light of the circumstances of the case. The Supreme Court has laid down two propositions for ascertaining whether an authority is to act judicially :—

- (1) if a statute empowers an authority to decide disputes arising out of a claim made by one party under the statute, which claim is opposed by another party, then *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act ; and
- (2) if a statutory authority has power to do any act which will pre-judicially affect the subject, then although there are not two parties apart from the authority and the contest is between the authority, proposing to do the act and the subject opposing it, the final determination of the authority will be a quasi-judicial act provided the authority is required by the statute to act judicially.<sup>3</sup>

**Grounds on which writ can be issued.**—The writ of *certiorari* is issued to a judicial or quasi-judicial body on the following grounds :

- (a) Where there is want or excess of jurisdiction ;

1. A. I. R. 1950 S. C. 221.
2. T. C. Basappa v. T. Nagappa, A. I. R. 1954 SC 440 at p. 444.
3. Province of Bombay v. Khushaldas, A. I. R. 1950 SC 222; T. C. Basappa v. Nagappa, A. I. R. 1954 S. C. 440; Shivaji Nathubhai v. Union of India, A. I. R. 1960 S. C. 606.

- (b) Where there is violation of procedure or disregard of principles of natural justice;
- (c) Where there is error of law apparent on the face of the record but not error of a fact.

(a) Want or excess of jurisdiction.—The writ of *certiorari* is issued to a body performing judicial or quasi-judicial functions for correcting errors of jurisdiction, as when an inferior court or tribunal acts without jurisdiction, or in excess of it, or fails to exercise it.<sup>1</sup> The want of jurisdiction may arise from the nature of subject-matter, so that the inferior court had no authority to enter on the enquiry or upon some part of it. Want of jurisdiction may also arise from the absence of some preliminary proceedings or upon the existence of some particular facts which are necessary to the exercise of court's power and the court wrongly assumes that particular condition exists.<sup>2</sup>

2. For Correcting Error of law apparent on the face of record.—The writ is also issued for correcting an error of law apparent on the face of record. It cannot be issued to correct an error of fact. What is an error of law apparent on the face of record is to be decided by the Courts on the facts of each case.<sup>3</sup> In *Hari Vishnu v. Ahmad Ishaque*,<sup>4</sup> the Supreme Court held that no error could be said to be error on the face of the record if it was not self-evident and if it required an examination or argument to establish it. An error of law which is apparent on the face of the record can be corrected by a writ of *certiorari* but not an error of fact, however grave it may appear to be.<sup>5</sup> The reason for the rule is that the Court issuing a writ of *certiorari* acts in a supervisory jurisdiction and not appellate jurisdiction. Accordingly, it cannot substitute its own decisions on the merits of the case or give direction to be complied with by the inferior court or tribunal.<sup>6</sup>

3. Disregard of principles of natural justice.—A writ of *certiorari* also lies against a court or tribunal when it acts in violation of the principles of natural justice. Two principles of natural justice are generally accepted—(1) the court or tribunal should be free from bias and interest, and (2) *audi alteram partem*, i. e. the parties must be heard before the decision is given. The principle that the adjudicator should not have an interest or bias in the case, is that (a) no man shall be a judge in his own cause; and (b) justice should not be done but manifestly and undoubtedly seen to be done. The reason for this rule is to enable the tribunal to act independently and impartially without any bias towards one side or the other.<sup>7</sup>

The second principle is that the judicial or quasi-judicial body must give a reasonable opportunity to the parties concerned presenting their case. Both the sides must have full and fair hearing and no man should be condemned unheard—is important rule of civilized justice. This principle infers many

1. State of U. P. v. Mohd. Nooh, A. I. R. 1958 S. C. 86.

2. Ebrahim Aboobaker v. Custodian-General, A. I. R. 1952 S. C. 319.

3. Hari Vishnu v. Ahmad Ishaque, A. I. R. 1955 S. C. 223; Inder Singh v. Chief Commissioner, Punjab, A. I. R. 1963 S. C. 1581.

4. A. I. R. 1955 S. C. 233.

5. Syed Yakoob v. Radhakrishnan, A. I. R. 1964 S. C. 477.

6. Hari Vishnu v. Ahmad Ishaque, A. I. R. 1955 S. C. 223. See also Syed Yakoob v. Radhakrishnan, A. I. R. 1964 S. C. 477.

7. A. P. S. R. T. Corp. v. Satya Natayan Transports, A. I. R. 1965 S. C. 1303; Mineral Development Ltd v. State of Bihar, A. I. R. 1960 S. C. 1373.

things : that the parties affected must be given sufficient opportunity to meet the case against them,<sup>1</sup> that the parties must be apprised of the evidence or any information on which the case against them is based and be given an opportunity to contradict these materials,<sup>2</sup> and that evidence must not be given behind the back of the other party but in their presence.

But if a party does not avail of himself that opportunity and fails to place his case before the court or tribunal either personally or through lawyer, there would be no denial of justice and he is himself to blame if he allows the opportunity of being heard to slip away.<sup>3</sup>

When it will not lie :—The writ of *certiorari* cannot be issued against a private body. Co-operative Electricity Supply Society Limited incorporated under the Co-operative Societies Act, is a private body and not a public body discharging public function. The writ-petition is, therefore, not maintainable against the private society.<sup>4</sup>

5. **Quo Warranto.**—The word '*quo warranto*' means 'what is your authority.' By this writ a holder of an office is called upon to show to the court under what authority he holds the office. The object of the writ of *quo warranto* is to prevent a person to hold an office which he is not legally entitled to hold. If the inquiry leads to the finding that the holders of the office has no valid title to it, the Court may pass an order preventing the holder to continue in office and may also declare the office vacant. If the holder of a public office was initially disqualified to hold that office, the writ of *quo warranto* would not be issued if at a subsequent stage that disqualification was removed and after the removal of the disqualification the incumbent concerned could have been appointed on the same post. The doctrine is that in cases where the initial disqualification is removed it would be open to the authorities concerned to appoint the same person immediately even if the court grants the writ of *quo warranto* as desired by the petitioner. The general principle is that the court would not pass any writ or any decree which becomes futile.<sup>5</sup>

**Who can apply.**—A writ of *quo warranto* can be claimed by a person if he satisfies the Court that :—

- (1) the office in question is a public office, and
- (2) it is held by a person without legal authority.<sup>6</sup>

The writ of *quo warranto* is not issued in respect of an office of a private character. Thus in *Jamalpur Arya Samaj Sabha v. Dr. D. Ram*,<sup>7</sup> the High Court refused to issue a writ of *quo warranto* against the members of the working committee of the Bihar Arya Samaj Sabha, a private association.

An application for the writ of *quo warranto* challenging the legality of an appointment to an office of a public nature may lie at the instance of any

1. *Gopalan v. State of Madras*, A. I. R. 1950 S. C. 27; *Sangram Singh v. Election Tribunal*, A. I. R. 1955 S. C. 425
2. *D. C. Mill v. Commissioner of Income-tax*, A. I. R. 1955 S. C. 65.
3. *Ram Narayan v. Dinapur Cantt. Board*, A. I. R. 1958 S. C. 71.
4. *A. Ranga Reddy v. General Manager Coop. Electric Supply Society Ltd.*, A. I. R. 1977 N. O. C. 232 (Andhra Pradesh).
5. *Dr. Het Ram Kalia v. Himachal Pradesh University, Shimla*, A. I. R. 1977 N. O. C. 246 (Him. Pra.).
6. *University of Madras v. Govind Rao*, A. I. R. 1965 S. C. 491.
7. A. I. R. 1954 Pat. 297.

private person, although he is not personally aggrieved or interested in the matter. It is not necessary that the petitioner for *quo warranto* must have legal right in the office. Any member of public can challenge the right of a person to hold a public office. In *G. D. Karkare v. T. L. Shevde*,<sup>1</sup> the appointment of Advocate-General of M. P. was challenged by a private individual who had no legal interest in that office. The Court issued a writ of *quo warranto* against the Advocate-General.

A writ of *quo warranto* is never issued as a matter of course and it is always within the discretion of the court to decide after having considered the facts and circumstances of each case, whether the petitioner concerned is the person who could be entrusted with such a writ which is always issued only in the interest of the public in general. The Court may refuse to grant a writ of *quo warranto* if it is vexatious or where the petitioner is guilty of laches, or where he has acquiesced or concurred in the very act against which he complains or where the motive of the relator is suspicious.<sup>2</sup> Thus where the holder of an office has been continuing in office for a long time and there is no complaint against him the court refused the writ as it would have been vexatious.<sup>3</sup>

**Extension of jurisdiction of High Court.**—Under Article 230 Parliament can by law extend the jurisdiction of a High Court over any Union Territory. The Legislature of a State cannot also increase, restrict or abolish the jurisdiction.

### SUBORDINATE COURTS

**Articles 233 to 237.\***—In every State there is a system of subordinate courts below the High Court. The Constitution secures the independence of subordinate Judiciary from the Executive.

Art. 233 provides that the appointment, posting and promotion of District Judges shall be made by the Governor of the State in consultation with the High Court.

A person already in the service of the Union or of the State shall only be eligible to be appointed as a District Judge if he fulfils two conditions, namely, (1) he must be an advocate or a pleader for 7 years and (2) his name is recommended by the High Court for appointment (Article 233). It follows from this that a person can be appointed to the post of District Judge by the Governor only in consultation with the High Court.

In *Chandra Mohan v. U. P.*,<sup>5</sup> the validity of the U. P. Higher Judicial Service Rules was involved. Under these rules, the Governor appointed a Selection Committee for selecting candidates for the appointment of District Judges, but not in consultation with the High Court as provided by Art. 233 (1). The Supreme Court declared the U. P. Higher Judicial Service Rules are unconstitutional, contravening the clear mandate of Cls. (1) and (2) of Art. 233, and the appointments made under these Rules are therefore illegal. It

1. A. I. R. 1952 Nag. 330.
2. Dr. Het Ram Kalia v. Himachal Pradesh University, Simla, A. I. R. 1977 N. O. C. 247 (Him. Pra.).
3. Baij Nath v. State of U. P., A. I. R. 1965 All. 151.
4. These Articles do not apply to the State of Jammu & Kashmir.
5. A. I. R. 1966 S. C. 1987. See also Assam v. Ranga Mohammad, A. I. R. 1997 S. C. 903.

also held that the Rules empowering the Governor to appoint District Judges from "judicial officers" are unconstitutional because the word "the service" in Art. 233 (2) can only mean the judicial service and not other services. This is a mandatory provision and not directory. The Court said that the object of consultation is apparent. The High Court is expected to know better than the Governor the suitability of candidates to be appointed as a District Judge.

To remove the difficulties created by this decision, the Constitution was amended by the Constitution (20th Amendment) Act, 1966. The amendment added a new Art. 233-A to the Constitution which retrospectively validated all appointments and judgments delivered by certain District Judges.

The initial appointment of District Judges under Art. 233 is within the exclusive jurisdiction of the Government after consultation with the High Court. The Governor is not bound to act on the advice of the High Court. The High Court recommends the names of the persons for appointment, but it is not obligatory on the Governor to accept the recommendation. Nor is the Government bound to give reasons for not accepting the recommendations of the High Court.<sup>1</sup>

Article 235 vests the control over district and subordinate courts in the High Courts. In *Assam v. Ranga Mohammad*,<sup>2</sup> the Supreme Court held that the transfer of District Judge is a matter included in 'control' exercisable by High Court under Art. 235 and the State Government has no authority in the matter. Under Art. 233 the Governor is only concerned with appointment, promotion and posting to the cadre of District Judges but not with the transfer of District Judges already appointed or promoted and posted to the cadre. In *State of W.B. v. Nripendra Nath*,<sup>3</sup> the Supreme Court held that the control vested in the High Court under Art. 235 includes disciplinary jurisdiction also. The High Court can therefore hold inquiries and impose punishment other than dismissal or removal which falls under the purview of the Governor. The High Court alone can institute a disciplinary proceeding against a District Judge and not the Government. In *State of Orissa v. Sudhansu Shekhar*,<sup>4</sup> it has been held that persons holding judicial posts cannot be appointed to administrative posts without the consent of the High Court.

In *Punjab and Haryana High Court v. State of Haryana*,<sup>5</sup> the Supreme Court declared Rule 10 of the Punjab Superior Judicial Service Rules which conferred on the Governor the power to confirm a District Judge as unconstitutional. It was held that the confirmation of a District Judge is within the control of the High Court. The initial appointment as well as promotions are with the Governor. After they are appointed and promoted to be District Judges the entire control is vested in the High Court. The power of the Government ceases after appointment and promotion. Confirmation of an officer on successful completion of his period of probation is neither a fresh appointment nor completion of appointment.

Appointments of persons other than District Judges to the judicial service of a State shall be made by the Governor of the State in accordance

1. M. S. Jain v. State of Haryana, A. I. R. 1977 S. C. 276.

2. A. I. R. 1967 S. C. 903.

3. AIR 1966 SC 447 : State of Orissa v. Sudhansu Shekhar, AIR 1968 SC 647.

4. AIR 1968 SC 647.

5. AIR 1975 SC 613

with the rules made by him in that behalf in consultation with the State Public Service Commission and with the High Court of the State (Art. 234).

The control over District Courts and subordinate courts thereto is vested in the High Courts by Article 235 including the posting and promotion and the grant of leave to officers of the State Judicial Services inferior to the post of District Judge.

In *Shamsher Singh v. State of Punjab*,<sup>1</sup> the Supreme Court held that the High Court under Article 235 is vested with the control of subordinate judiciary. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court. The request by the High Court to have the enquiry for charges of misconduct against the member of the subordinate judicial service through the Director of Vigilance was an act of self-abnegation. The High Court should have conducted the inquiry preferably through District Judges. The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity. The High Court acted in total disregard of Article 235 by asking the Government to enquire through the Director of Vigilance.

In *State of Gujarat v. Ramesh Chandra*,<sup>2</sup> it has been held that the Registrar of the Court of Small Causes is a person holding a civil judicial post inferior to the post of District Judge and is in judicial service. He exercises judicial powers, bears suits, passes decrees and an appeal is preferred from a decree of the Registrar. Consequently, the Registrar is under the disciplinary jurisdiction of the High Court. The High Court was therefore in error in holding that it had no power to order disciplinary proceedings. The question of appointing authority is irrelevant in regard to the disciplinary jurisdiction of the High Court.

At present, the State Government exercises the administrative control over the District and Subordinate Magistrates. However, Article 237 provides that the Governor may by public notification direct that any of the above-mentioned provisions relating to any class of persons appointed to the State Judicial Service will apply with such exceptions and modifications as he may deem fit. This Article thus makes possible for the separation of the Executive from the Judiciary as contemplated by Article 50 of the Directive Principles of the State Policy. Under the Article the Governor may transfer the control over the subordinate courts to the High Courts. The Law Commission has also suggested to strengthen the control of the High Court over the District Judges and the subordinate judiciary in a State. This is important to ensure the independence of the subordinate judiciary.

**High Courts for Union Territories.**—Under Article 241 Parliament is empowered to constitute a High Court for a Union Territory or declare any court in any such territory to be a High Court for all or any of the purposes of this Constitution. The provision relating to the High Courts in the States shall apply to the High Courts for Union Territories with such modifications or exceptions as may be provided by Parliament by law. According to clause (3) every High Court exercising jurisdiction immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, in relation to any Union Territory shall continue to exercise such jurisdiction until Parliament by law excludes such jurisdiction.

1. AIR 1974 SC 2192.

2. AIR 1977 SC 1619.

## Privileges of the Legislature (Art. 105 and Art. 194)

Parliamentary Privilege is defined by Sir T. F. May as :

"Some of the peculiar rights enjoyed by each House collectively as a constituent part of the Parliament and by the members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals."<sup>1</sup>

The constitutional provisions regarding privileges of the State Legislatures and Parliament are identical. Articles 105 and 194 provide for privileges of the Legislature in India. While Article 105 deals with Parliament. Article 194 deals with State Legislatures. The Constitution expressly mentions two privileges (a) freedom of speech in the Legislature and (b) right of publication of proceedings. Prior to the 44th Amendment with regard to other privileges Article 105 (3) provided that the powers, privileges and immunities of each House, until they are defined by the Parliament shall be those of the House of Commons in England. No such law defining parliamentary privileges has been passed by Parliament. After the *44th Amendment Act, Art. 105* provides that in other respects the powers, privileges and immunities of each House of Parliament until defined by Parliament shall be those of that House and of its members and committees immediately before the coming into force of the Constitution, (44th Amendment Act) 1978'. Thus the 44th Amendment completely omits any reference to the British House of Commons.

**Freedom of Speech.**—In England this privilege of the House of Commons is well established. It has been given statutory recognition by Bill of Rights in 1689 which says that the freedom of speech or debates in Parliament ought not be impeached or questioned in any court or place out of Parliament.

The Indian Constitution expressly guarantees this privilege in Article 105 which says—

"there shall be freedom of speech in Parliament and that no member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any Committee thereof."

The Article thus gives absolute immunity from courts for anything said within the four walls of the House during the course of proceedings of the House, or its Committees. So what is protected is the speech within the House. Outside the House a member of House is as good as any other citizen and if a member repeats or publishes a defamatory speech made by him within the House, he does so on his own responsibility and risk and will be held liable for prosecution under section 500 of the Indian Penal Code.<sup>2</sup>

1. May—Parliamentary Practice, 16th Edn., Ch. III, p. 42.
2. *Jatish Chandra v. Hari Sadan*, A. I. R. 1961 S. C. 613.

with the rules made by him in that behalf in consultation with the State Public Service Commission and with the High Court of the State (Art. 234).

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1. AIR 1974 SC 2192.

2. AIR 1977 SC 1619.

each House of Parliament, and of the members and the Committees of each House, shall be those of that House, and of its members and committees at the commencement of clause (3) of the Constitution (42nd Amendment) Act, 1976, "and as may be evolved by such House of Parliament from time to time".

Prior to this amendment, the privileges were to be those which were enjoyed by the members of the House of Commons in England until defined by Parliament by law. Thus under the amended clause (3) the privileges could be classified into two categories :—(1) Privileges enjoyed by the members of Parliament at the commencement of (42 Amendment) Act, 1976. Thus the amended clause (3) retained all the existing privileges. (2) Privileges which may be evolved by the House of Parliament from time to time. This meant that clause (3) deprived Parliament of the power to define Parliamentary privileges by law. A law defining Parliamentary privileges could be challenged on the ground that they were inconsistent with the provisions of the Constitution. The amendment vested exclusive power in each House of Parliament to evolve privileges from time to time. It meant that the privileges would be established, practised and precedents which would be transformed into convention.

**The (44th Amendment) Act, 1978.**—The 42nd Amendment had partially dropped the reference to the House of Commons regarding the privileges of Legislatures. The 44th Amendment repeals the amendments made by the (42nd Amendment) Act and thus restores the original Articles 105 (3) and 194 (3) of the Constitution. Further, it amends these articles so as to omit completely any reference to the House of Commons in future. For this purpose, the amendment substitutes the words "*shall be those of that House and its members and Committees immediately before the coming into force of the Constitution (44th Amendment) Act, 1978*" for the words "shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and Committees, at the commencement of this Constitution" in clause (3) of Art. 105.

The 44th Amendment, like the 42nd Amendment, thus retains all the existing privileges which were enjoyed by the Legislatures in India. As regards new privileges it restores the original position and provides that they can be defined by a parliamentary law.

A similar change has been made in clause (3) of Article 194 which relates to privileges of the State Legislature. This means that the privileges of each House of Parliament or State Legislatures will now be the same as existed immediately before the coming into force of the (44th Amendment) Act, 1978.

**(1) Freedom from Arrest.**—This privilege is also well established in England. A member of Parliament cannot be arrested or imprisoned during a session of Parliament and for 40 days before and 40 days after the session. If a member is arrested in those conditions he should be released so that he might be free to attend Parliament. This privilege is available against arrest and imprisonment on a criminal charge, or for Contempt of Court<sup>1</sup> or from preventive detention.<sup>2</sup> If a member of a House commits a crime he will be

1. May—Parliamentary Practice (15th Ed., p. 82); Ansumali Majumdar v. State of West Bengal, A.I.R. 1952 Cal. 632; V. K. Gopalan v. State of Madras, A.I.R. 1951 Cal. 27.

2. Ansumali Majumdar v. State of West Bengal, A. I. R. 1952 Cal. 632.

It is to be noted that Cl. (1) of Article 105 is expressly made "Subject to the provisions of this Constitution and to the rules and Standing Orders regulating the procedure of Parliament." One of such a constitutional restriction of freedom of speech is imposed by Article 121. Article 121 prohibits any discussion in Parliament with respect to the conduct of a Judge of the Supreme Court or a High Court in discharge of his duties, except when a motion to present an address to the President for his removal is under consideration of the House.

The freedom of speech is also subject to the rules of procedure of a House made under Article 203. Under rules 349 to 356 of the Lok Sabha use of unparliamentary language or unparliamentary conduct of a member is prohibited.

**Right of Publication of its Proceedings.**—Article 105 (2) expressly provides that no person is to be liable to any proceedings in any court in respect of publication of any report, paper, votes or proceedings by or under the authority of a House. The protection under this Article does not extend to publication made by a private person without the authority of a House.<sup>1</sup> In *Surendra v. Nebrakrishna*,<sup>2</sup> an editor of a newspaper was held guilty of committing Contempt of Court for publishing a statement, made in the House amounting to contempt of the High Court, without the authority of the House. It was held that there were many advantages to the public, which has the deepest interest in knowing what passes in Parliament, if a true report of parliamentary proceedings are published in a newspaper.<sup>3</sup> Accordingly, the Parliamentary Proceedings (Protection of a Publication) Act, 1956 was passed which provided that no person shall be liable to any proceedings civil or criminal—in any court in respect of the publication of substantially true report of the proceedings of either House of Parliament, unless it is proved that the publication of such proceeding expressly ordered to be expunged by the Speaker.<sup>4</sup> This Act was repealed by the Congress Government during 1975 Emergency. The Janata Government has now repealed the Amending Act of 1976 and restored the freedom of the Press to publish true reports of Parliamentary proceedings without prior permission of the Legislature.

**The 44th Amendment Act.**—This Amendment has now put this immunity on a very solid footing. This immunity until now, has been regulated by a Parliamentary law. The Amendment, by incorporating Art. 361A into the Constitution, gives it a constitutional protection. It has added a new Art. 361A which provides that no person shall be liable to any civil or criminal proceedings in any court in respect of the publication in a newspaper of a substantially true report of the proceedings of the either Houses of Parliament, or of a State Legislature, unless the publication is proved to have been made with malice. This immunity will also apply to broadcast by means of wireless. This will, however, not apply to the publication of any report of a secret sitting of a House.

**Other Privileges.**—The Constitution (42nd Amendment) Act, 1976, amended clause (3) of Art. 105 of the Constitution. The amended clause provided that in other respects the powers, privileges and immunities of

1. *In re under Article 143*, A. I. R. 1965 S. C. 745

2. A. I. R. 1958 Orissa 168—See the Law in England—*Stockdale v. Hansard*, (1859) 8 L. J. Q. B. 294.

3. This is in line with the decision in *Wason v. Walter*, (1868) 4 I. R. Q. B. 73.

4. M. S. M. Sharma v. Sri Krishna Sinha, A. I. R. 1959 S. C. 325.

In *S. M. Sharma v. Sri Krishna Sinha*,<sup>1</sup> the Supreme Court held that—"the validity of the proceedings in the Legislature of a State cannot be laid down by law

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contempt.—The House of member or stranger—for power is truly described as is used by the House of the question whether it cannot question the contempt of Court' is of on which obstructs or ts or interferes with any duties or which has a its, may be treated as a nce. The House can son held guilty of com its validity. However, nd is proved unlawful

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arrested like an ordinary person. In India also it has been held that the privilege does not extend to arrest or imprisonment on a criminal charge or for detention under Preventive Detention Act.<sup>1</sup>

In *K. Anandan Nambiar v. Chief Secretary, Government of Madras*,<sup>2</sup> the petitioners, who were members of Parliament, were detained under Defence of India Rules, 1962. They challenged the order of detention on the ground that a legislator can be detained so as to prevent him from exercising his constitutional rights as legislator while the legislative chamber to which he belongs is in session. The Court held that if a person is detained under a valid detention order, a member can claim no special status higher than that of an ordinary citizen and that he is as much liable to be arrested and detained under it as any other citizen. If an order of detention validly prevents a member from attending a session of Parliament, no occasion would arise for the exercise by him of the right of freedom of speech.

(2) Rights to exclude strangers from its proceedings and hold secret sessions—This right has been used by the Houses of England to go into secret sessions to discuss some important matters. The House of Parliament in India enjoy a similar power.<sup>3</sup> However, in modern times secret sessions are held only on exceptional occasions because the voters must be kept informed of what their representatives are doing in the Legislature.

(3) Right to prohibit the publication of its Reports and Proceedings.—In England, the House of Commons has the right to prohibit the publication of its report, debates or other proceedings. In the famous *Searchlight* case,<sup>4</sup> the question was whether the publication by a newspaper of those parts of the speech of a member in the House ordered to be expunged by the Speaker constituted breach of privilege of the House. The Supreme Court held that the publication of expunged portion of speech constituted a breach of the privilege of the House. The effect in law of the order of the Speaker to expunge a portion of the speech of a member may be as if that portion has not been spoken. In India, the House of Parliament have definitely the power to prohibit the publication of proceedings.

(4) Right to regulate Internal Proceedings.—The House has an exclusive right to regulate its own internal proceedings and to adjudicate upon such matters. The courts of ordinary jurisdiction will not interfere with what takes place inside the House. In *Bradlaugh v. Gossef*,<sup>5</sup> Bradlaugh was prevented to enter the House by the order of the House of Commons. The plaintiff asked the court to declare that the order of the House was invalid. The court held that the House of Commons was not subject to the control of court in matters relating to its own internal proceedings ; the House of Commons has exclusive right of being the exclusive judge of the legality of its own proceedings. No court of law can interfere in the right of the House to regulate its internal affairs.

In India, Article 122 says that the validity of the proceedings in Parliament cannot be called in question in a court of law on the ground of any alleged irregularity of procedure.

1. Lok Sabha Rules 387 ; *Smt. Indira Gandhi v. Raj Narain*, A. I. R. 1975 S. C. 2299.
2. A. I. R. 1966 S. C. 657 ; *Smt. Indira Gandhi v. Raj Narain*, A. I. R. 1975 S. C. 2299.
3. M. S. M. Sharma v. Sri Krishna Sinha, A. I. R. 1959 S. C. 395.
4. A. I. R. 1959 S. C. 395.
5. (1824) 12 Q. B. D. 271, followed in the *King v. S. G. Campbell*, (1936) 1 K. B. 594.

prohibits any discussion in a State Legislature with respect to the conduct of any Judge of the Supreme Court or High Court in discharge of his duties.

Article 194 (3) is in two parts. The first part empowers the Legislatures to define by law their own powers, privileges and immunities. If such a law is passed under Article 194 (3) it will be subject to Article 13 (2) and the court would be competent to examine its validity. If such a law gives any power to the House which is inconsistent with fundamental rights it would be declared invalid under Article 13. The second part of Article 194 (3) says that until defined by any law made by the Legislature the powers, privileges and immunities shall be those of the House of Commons in England at the commencement of the Constitution.

Article 194 (3) was amended by the *Constitution (42nd Amendment) Act, 1976*, which provided that other privileges, powers and immunities of each House of State Legislature shall be those which were in existence at the commencement of the Constitution (42nd Amendment) Act, 1976 and those which may be evolved by the Houses from time to time. The Legislature need not pass a law for defining parliamentary privileges. They will be established by an evolutionary process. The Amendment partially dropped the reference to the House of Commons regarding the privileges of Legislatures. Article 194 (3) has again been amended by the *Constitution (44th Amendment) Act, 1978*. The 44th Amendment omits completely any reference to the British House of Commons. The effect of these amendments is that the privileges of the Legislature in India shall now be those which existed before the coming into force of the (44th Amendment Act, 1978).

The powers that the House can claim must be shown to have subsisted in the House of Commons on the 26th January, 1950, and it should be further shown that such claim was recognised by the English Courts. Secondly, not all the powers and privileges which belonged to the House of Commons on 26th January, 1950, can only be claimed by the State Legislature under Article 194 (3).

It cannot be disputed that in matters of privileges the House is the sole and exclusive Judge provided such privilege can be found in Article 194 (3). The question whether a privilege as claimed by the House is provided by Article 194 (3) or not is a matter for the Court to decide. In other words, the determination of nature and scope of Article 194 (3) lies with the court. In support of the above view, the court drew a distinction between British and Indian Parliament. The former is sovereign and the latter is subject to the provisions of the Constitution. Ours being a federal Constitution, the interpretation of the Constitution, is judicial function, including the interpretation of the privileges of the Legislature. The question whether the privileges and immunities enjoyed by Legislature under the latter part of Article 194 (3) are subject to the provisions of Part III of the Constitution was not discussed by the court in general terms. The Supreme Court has, however, made a simple observation that such privileges are necessarily subject to Articles 21 and 22 of the Constitution.

105 is an independent right and is not subject to restrictions under clause (2) of Article 19 (1). Thus it is clear that the freedom of speech under Article 105 is different from the freedom of speech under Article 19 which is subject to restrictions.

**Privileges and the Court.**—This matter came up for consideration before the Supreme Court in the famous advisory opinion of *In re under Article 143*.<sup>1</sup> In this case one Keshava Singh who was not a member of the U. P. Assembly, was held guilty of contempt of the House and was sentenced to imprisonment for 7 days. On behalf of Keshava Singh, Mr. Soloman, his advocate, moved an *habeas corpus* petition alleging that his detention was illegal and *mala fide*. The petition was heard by the Bench of two Judges of the Allahabad High Court which granted bail to Keshava Singh and he was released.

The Assembly then passed a resolution that the two Judges, Keshava Singh and his advocate Soloman, had committed contempt of the House and directed that Keshava Singh be immediately taken into custody and the two Judges and the advocate be brought into custody before the House.

On this, the two judges and the advocate separately moved the petition under Article 226 in the High Court contending that the resolution amounted to Contempt of Court and that it be set aside and its implementation be stayed by interim order. The petition was heard by the Full Bench which passed an interim order directing the stay of implementation of the Resolution of Assembly. At this stage the President of India referred the matter to the Supreme Court under Article 143 for its advisory opinion.

The main question involved in this controversy was—whether the Legislature is the sole and exclusive judge of its privileges and whether it is competent to punish a person for its contempt taking place outside the Legislature? Whether the High Court who entertained a petition of *habeas corpus* challenging the validity of the detention of a person sentenced by the Assembly under a general or unspeaking warrant had committed a contempt of the Legislature?

The Supreme Court by a majority of 6 to 1 held that the Courts in India can examine into the validity of a detention of a person sentenced by the Assembly under a general or unspeaking warrant. As regards the contention of the Assembly that the Courts in England cannot examine the validity of a general warrant issued by the House of Commons, the Court held that such a right is not conferred on a Legislature in India. The House of Commons is the highest Court in England and as a result a general warrant issued by it is not subject to scrutiny by other courts. In India, Legislatures never discharged any judicial functions and their historical and constitutional background does not support the claim to be regarded as courts of record. Hence, the very basis on which the English courts treat a general warrant issued by the House of Commons is absent in India.

In construing the powers and privileges under Article 194 (3), other provisions of the Constitution must also be considered harmoniously. Article 226 confers wide power on High Courts to issue writ of *habeas corpus* against any authority which according to Article 12 includes the Legislature and so the High Court can exercise its power even against the Legislature. Article 211

prohibits any discussion in a State Legislature with respect to the conduct of any Judge of the Supreme Court or High Court in discharge of his duties.

Article 194 (3) is in two parts. The first part empowers the Legislatures to define by law their own powers, privileges and immunities. If such a law is passed under Article 194 (3) it will be subject to Article 13 (2) and the court would be competent to examine its validity. If such a law gives any power to the House which is inconsistent with fundamental rights it would be declared invalid under Article 13. The second part of Article 194 (3) says that until defined by any law made by the Legislature the powers, privileges and immunities shall be those of the House of Commons in England at the commencement of the Constitution.

Article 194 (3) was amended by the *Constitution (42nd Amendment) Act, 1976*, which provided that other privileges, powers and immunities of each House of State Legislature shall be those which were in existence at the commencement of the Constitution (42nd Amendment) Act, 1976 and those which may be evolved by the Houses from time to time. The Legislature need not pass a law for defining parliamentary privileges. They will be established by an evolutionary process. The Amendment partially dropped the reference to the House of Commons regarding the privileges of Legislatures. Article 194 (3) has again been amended by the *Constitution (44th Amendment) Act, 1978*. The 44th Amendment omits completely any reference to the British House of Commons. The effect of these amendments is that the privileges of the Legislature in India shall now be those which existed before the coming into force of the (44th Amendment Act, 1978).

The powers that the House can claim must be shown to have subsisted in the House of Commons on the 26th January, 1950, and it should be further shown that such claim was recognised by the English Courts. Secondly, not all the powers and privileges which belonged to the House of Commons on 26th January, 1950, can only be claimed by the State Legislature under Article 194 (3).

It cannot be disputed that in matters of privileges the House is the sole and exclusive Judge provided such privilege can be found in Article 194 (3). The question whether a privilege as claimed by the House is provided by Article 194 (3) or not is a matter for the Court to decide. In other words, the determination of nature and scope of Article 194 (3) lies with the court. In support of the above view, the court drew a distinction between British and Indian Parliament. The former is sovereign and the latter is subject to the provisions of the Constitution. Ours being a federal Constitution, the interpretation of the Constitution, is judicial function, including the interpretation of the privileges of the Legislature. The question whether the privileges and immunities enjoyed by Legislature under the latter part of Article 194 (3) are subject to the provisions of Part III of the Constitution was not discussed by the court in general terms. The Supreme Court has, however, made a simple observation that such privileges are necessarily subject to Articles 21 and 22 of the Constitution.

prohibits any discussion in a State Legislature with respect to the conduct of any Judge of the Supreme Court or High Court in discharge of his duties.

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It cannot be disputed that in matters of privileges the House is the sole and exclusive Judge provided such privilege can be found in Article 194 (3). The question whether a privilege as claimed by the House is provided by Article 194 (3) or not is a matter for the Court to decide. In other words, the determination of nature and scope of Article 194 (3) lies with the court. In support of the above view, the court drew a distinction between British and Indian Parliament. The former is sovereign and the latter is subject to the provisions of the Constitution. Ours being a federal Constitution, the interpretation of the Constitution, is judicial function, including the interpretation of the privileges of the Legislature. The question whether the privileges and immunities enjoyed by Legislature under the latter part of Article 194 (3) are subject to the provisions of Part III of the Constitution was not discussed by the court in general terms. The Supreme Court has, however, made a simple observation that such privileges are necessarily subject to Articles 21 and 22 of the Constitution.

## **Relations Between the Union and the States (Arts. 245 to 293)**

**Introduction.**—“The distribution of powers is an essential feature of federalism. The object for which a federal State is formed involves a division of authority between the national Government and the separate States..... The tendency of federalism to limit on every side the action of the Government and to split up the strength of the State among co-ordinate and independent authorities is specially noticeable, because it forms the essential distinction between a federal system.....and a unitary system of Government”,<sup>1</sup> “A federal Constitution establishes the dual polity with the Union at the Centre and the States at a periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution”.....“The one is not subordinate to the other in its own field, the authority of one is co-ordinate with that of the other”. In fact, the basic principle of federalism is that the legislative, executive and financial authority is divided between the Centre and States not by any law passed by the Centre but by Constitution itself. This is what Indian Constitution does.

### **A. LEGISLATIVE RELATIONS**

The Constitution of India makes two-fold distribution of legislative powers :—

- (1) with respect to territory ;
- (2) with respect to subject-matter.

**Territorial Jurisdiction.**—As regards territory, Article 245 (1) provides that subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India. According to clause (2) of Article 245 a law made by Parliament shall not be deemed to be invalid on the ground that it has extra-territorial operation, i.e., takes effect outside the territory of India. In *A. H. Wadia v. Income-tax Commissioner, Bombay*,<sup>2</sup> the Supreme Court held :

“In the case of a sovereign Legislature question of extra-territoriality of any enactment can never be raised in the municipal court as a ground for challenging its validity. The legislation may offend the rules of international law, may not be recognised by foreign courts, or there may be practical difficulties in enforcing them but there are questions of policy with which the domestic tribunals are not concerned”

**Theory of Territorial Nexus.**—The Legislature of a State may make laws for the whole or any part of the State.<sup>3</sup> This means that State Laws would be void if it has extra-territorial operation, i. e. takes effect outside the State.<sup>4</sup>

1. A. V. Dicey—The Law of the Constitution, 10th Edition, 1959, pp. 151, 155.
2. AIR 1949 F. C. 18.
3. Article 245 (1)
4. *Kochuni v. State of Madras*, AIR 1960 SC 1080.

However, there is one exception to this general rule. A State law of extra-territorial operation will be valid if there is sufficient nexus between the object and the State.

In *Wallace v. Income-tax Commissioner, Bombay*,<sup>1</sup> a company which was registered in England was a partner in a firm in India. The Indian Income-tax Authorities sought to tax the entire income made by the company. The Privy Council applied the doctrine of territorial nexus and held the levy of tax valid. It said, the derivation from British India of major part of its income for a year gave to a company for that year sufficient territorial connection to justify its being treated as at home in India for all purposes of tax on its income for that year from whatever source income may be derived.

In *State of Bombay v. R. M. D. C.*,<sup>2</sup> the Bombay State levied a tax on lotteries and prize competitions. The tax was extended to a newspaper printed and published in Bangalore but had wide circulation in Bombay. The respondent conducted the prize competitions through this paper. The court held that there existed a sufficient territorial nexus to enable the Bombay State to tax the newspaper. If there is sufficient nexus between the person sought to be charged and the State seeking to tax him, the taxing statute would be upheld. But the connection between the State and the subject-matter of law must be real and not illusory and the liability sought to be imposed must be pertinent to that connection. Whether there is sufficient connection is a question of fact and will be determined by courts in each case accordingly.

In *Tata Iron and Steel Company v. State of Bihar*,<sup>3</sup> the Supreme Court applied the theory of territorial nexus to sale-tax laws.

**Legislative Power is Plenary.**—The power of the Legislature under Article 245 to enact laws is a plenary power subject only to its legislative competence and other constitutional limitations. The power of the Legislature to pass a law postulates the power to pass it prospectively as well as retrospectively. The Legislature has power to alter the existing laws retrospectively. It is within the scope of the legislative competence of the Legislature. The power to validate a law retrospectively is, subject to other constitutional limitation, an ancillary power to legislate on the particular subject.<sup>4</sup>

**Distribution of Legislative Powers.**—As has been pointed out at the outset, a federal system postulates a distribution of powers between the Centre and States. The nature of distribution varies according to the local and political background in each country. In America, the sovereign States which were keen to federate, did not like complete subordination to the Central Government hence they believed in entrusting subjects of common interest to the Central Government, while retaining the rest with them. Thus American Constitution only enumerates the powers of the Central Government and leaves the residuary power to the States. Australia followed the American pattern of only one enumeration of powers, i. e. of Central Government leaving the residuary powers to the States because their problems were similar to the Americans. In Canada there is double enumeration, Federal and Provincial leaving the residue for the Centre. The Canadians were conscious of unfortunate happening in U. S. A. culminating in Civil War of 1891. They were of the short-

comings of the weak Centre. Hence, they wanted to opt for a strong Centre. Our Constitution-makers followed the Canadian scheme obviously opting for a strong Centre. However they added one more List—the Concurrent List. The Government of India Act, 1935, introduced a scheme of three-fold enumeration, Federal, Provincial and Concurrent. The present Constitution adopts the method followed by the Government of India Act, 1935, and divides the powers between the Union and the State in three Lists—the Union List, the State List, and the Concurrent List.

The *Union List* consists of 97 subjects. The Union Parliament has exclusive power to make laws on these subjects. The subjects mentioned in the Union List are of national importance, i. e. defence, foreign affairs, banking, currency and coinage, Union duties and taxes.

The *State List* consists of 66 subjects. These are of a local importance, such as, public order and police, local Government, public health and sanitation, agriculture, forest, fisheries, education, State taxes and duties. The States have exclusive power to make laws on subjects mentioned in the State List.

The (42nd Amendment) Act, 1976,<sup>1</sup> amended the State List and has put education from it and has included it in the Concurrent List.

The *Concurrent List* consists of 47 subjects. Both Centre and the States can make laws on the subjects mentioned in the Concurrent List. But in case of conflict between the Central and the State law on Concurrent subjects, the Central law will prevail. The Concurrent List is not found in any federal Constitutions. The framers added this list to the Constitution with a view to secure uniformity in the main principles of law throughout the country. The Concurrent List was to serve as a device to avoid excessive rigidity to two-list distribution. The Concurrent List thus, in the words of *Pyle*, is "a twilight zone, as it were, for both the Union and the States are competent to legislate in this field, without coming into conflict".

**The Residuary Powers.**—Article 248 vests the residuary powers in the Parliament. It says that 'Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or the State List'. Entry 97 in the Union List also lays down that Parliament has exclusive power to make laws with respect to any matter not enumerated in the State List or the Concurrent List, including any tax not mentioned in either of these Lists. Thus the Indian Constitution makes a departure from the practice prevalent in U. S. A., Switzerland and Australia, where residuary powers are vested in the States. They reflect the leanings of the Constitution-makers towards a strong Centre.

#### LIST I—UNION LIST

1. Defence of India and every part thereof including preparation for defence and all such act as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.
2. Naval, military and air forces ; any other armed forces of the Union.
- <sup>2</sup>[2-A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power ; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.]

1 Omitted Entry Nos. 19, 20 and 29.

2 Added by the Constitution (Forty-second Amendment) Act, 1976.

3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.
4. Naval, military and air force works.
5. Arms, firearms, ammunition and explosives.
6. Atomic energy and mineral resources necessary for its production.
7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.
8. Central Bureau of Intelligence and Investigation.
9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the Security of India ; person subjected to such detention.
10. Foreign affairs : all matters which bring the Union into relation with any foreign country.
11. Diplomatic, consular and trade representation.
12. United Nations Organisations.
13. Participation in International conferences, associations and other bodies and implementing of decisions made thereat.
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
15. War and peace.
16. Foreign jurisdiction.
17. Citizenship, naturalisation and aliens.
18. Extradition.
19. Admission into, and emigration and expulsion from, India ; passports and visas.
20. Pilgrimages to places outside India.
21. Piracies and crimes committed on the high seas or in the air ; offences against the law of nations committed on land or the high seas or in the air.
22. Railways.
23. Highways declared by or under law made by Parliament to be national highways.
24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels ; the rule of the road on such waterways.
25. Maritime shipping and navigation, including shipping and navigation on tidal waters ; provisions of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.
26. Lighthouses including lightships, beacons and other provisions for the safety of shipping and aircraft.
27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

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#### LIST I—UNION LIST

1. Defence of India and every part thereof including preparation for defence and all such act as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.
2. Naval, military and air forces ; any other armed forces of the Union.
- [2-A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power ; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.]
1. Omitted Entry Nos. 19, 20 and 29.
2. Added by the Constitution (Forty-second Amendment) Act, 1976.

Regulation and development of oilfields and mineral oil resources ; petroleum and petroleum products ; other liquids and substances declared by Parliament by law to be dangerously inflammable.

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.

Regulation of labour and safety of mines and oilfields.

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.

Fishing and fisheries beyond territorial waters.

Manufacture, supply and distribution of salt by Union agencies ; regulation and control of manufacture, supply and distribution of salt by other agencies.

Cultivation, manufacture, and sale for export of opium.

Sanctioning of cinematograph films for exhibition.

Industrial disputes concerning Union employees.

The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the [Delhi University ; the university established in pursuance of article 371-E] ; any other institution declared by Parliament by law to be an institution of national importance.

Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

Union agencies and institutions for—

- (a) professional, vocational or technical training, including the training of public officers ; or
- (b) the promotion of special studies or research ; or
- (c) scientific or technical assistance in the investigation or detection of crime.

Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

Ancient and historical monuments and records and archaeological sites and remains, [declared by or under law made by Parliament] to be of national importance.

Subs. for the words "Delhi University and" by the Constitution (Thirty-Second Amendment) Act, 1973.

Subs. by the Constitution (Seventh Amendment) Act, 1956, for "declared by Parliament by law".

28. Port quarantine, including hospitals connected therewith ; seamen's and marine hospitals.
29. Airways ; aircraft and air navigation ; provision of aerodromes : regulation and organisation of air traffic and of aerodromes ; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.
30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.
31. Posts and telegraphs ; telephones, wireless, broadcasting and other like forms of communication.
32. Property of the Union and the revenue therefrom, but as regards property situated in a State [\* \* \*] subject to legislation by the State, save in so far as Parliament by law otherwise provides.

<sup>2</sup>[33.       x       x       x       x       x]

34. Courts of Wards for the estates of Rulers of Indian States.
35. Public debt of the Union.
36. Currency, coinage and legal tender ; foreign exchange.
37. Foreign loans.
38. Reserve Bank of India.
39. Post Office Savings Banks.
40. Lotteries organised by the Government of India or the Government of a State.
41. Trade and commerce with foreign countries ; import and export across customs frontiers ; definition of customs frontiers.
42. Inter-State trade and commerce.
43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.
44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.
45. Banking.
46. Bills of exchange, cheques, promissory notes and others like instruments.
47. Insurance.
48. Stock exchanges and futures markets.
49. Patents, inventions and designs ; copyright ; trade-marks and merchandise marks.
50. Establishment of standards of weight and measure.
51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.
52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

1. The words and letters "specified in Part A or Part B of the First Schedule" omitted by the Constitution (Seventeenth Amendment) Act, 1956.  
 2. Entry 33 omitted, *ibid.*

68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Survey of India ; Meteorological organisations.
69. Census.
70. Union public services ; all-India services ; Union Public Service Commission.
71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.
72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President ; the Election Commission.
73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.
74. Powers, privileges and immunities of each House of Parliament and of the members and the Committees of each House ; enforcement of attendance of persons for giving evidence or producing documents before Committees of Parliament or commissions appointed by Parliament.
75. Emoluments, the allowances, privileges and rights in respect of leave of absence, of the President and Governors ; salaries and allowances of the Ministers for the Union ; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.
76. Audit of the accounts of the Union and of the States.
77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein ; persons entitled to practise before the Supreme Court.
78. Constitution and organisation [including vocations] of the High Courts except provisions as to officers and servants of High Courts ; persons entitled to practise before the High Courts.
79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory.]
80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated ; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.
81. Inter-State migration ; inter-State quarantine.
82. Taxes on income other than agricultural income.
83. Duties of customs including export duties.
84. Duties of excise on tobacco and other goods manufactured or produced in India except—
  - (a) alcoholic liquors for human consumption,

1. Ins. by the Constitution (Fifteenth Amendment) Act, 1963 (with retrospective effect).  
 2. Subs. by the Constitution (Seventh Amendment) Act, 1956.

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this Entry.

85. Corporation tax.
86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies ; taxes on the capital of companies.
87. Estate duty in respect of property other than agricultural land.
88. Duties in respect of succession to property other than agricultural land.
89. *Terminal taxes on goods or passengers, carried by railway, sea or air* ; taxes on railway fares and freights.
90. Taxes other than stamp duties on transactions in stock exchanges and future markets.
91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares debentures, proxies and receipts.
92. Taxes on the sale or purchase of newspapers and on advertisements published therin.

<sup>1</sup>[92-A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.]

93. Offences against laws with respect to any of the matters in this List.
94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.
95. jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List ; admiralty jurisdiction.
96. Fees in respect of any of the matters in this List, but not including fees taken in any Court.
97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

#### LIST II—STATE LIST

1. Public order (but not including <sup>2</sup>[the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof] in aid of the civil power).
- <sup>3</sup>[2. Police (including railway and village police) subject to the provisions of Entry 2A of List I.]
3. <sup>4</sup>[\* \* \*] Officers and servants of the High Court ; procedure in rent and revenue courts ; fees taken in all courts except the Supreme Court.
1. Ins. by the Constitution (Sixth Amendment) Act, 1956
2. The words in brackets substituted by the Constitution (Forty-second Amendment) Act, 1976.
3. Subs. by the Constitution (Forty-second) Amendment Act, 1976.
4. Omitted by the Constitution (Forty-second Amendment) Act, 1976.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein ; arrangements with other States for the use of prisons and other institutions.
5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.
6. Public health and sanitation ; hospitals and dispensaries.
7. Pilgrimages, other than pilgrimages to places outside India.
8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.
9. Relief of the disabled and unemployed.
10. Burials and burial grounds ; cremations and cremation grounds.
11. 1[\* \* \*]
12. Libraries, museums and other similar institutions controlled or financed by the State ; ancient and historical monuments and records other than those 2[declared by or under law made by Parliament] to be of national importance.
13. Communications, that is to say, roads, bridges ferries, and other means of communication not specified in List I ; municipal tramways, ropeways ; inland waterways ; and traffic thereon subject to the provisions of List I and List III with regard to such waterways ; vehicles other than mechanically propelled vehicles.
14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.
15. Preservation, protection and improvement of stock and prevention of animal diseases ; veterinary training and practice.
16. Pounds and the prevention of cattle trespass.
17. 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.
18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents ; transfer and alienation of agricultural land ; land improvement and agricultural loans ; colonization.
19. 3[\* \* \*]
20. 3[\* \* \*]
21. Fisheries.
22. Courts of wards subject to the provisions of Entry 34 of List I, encumbered and attached estates.
23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

1. Omitted by the Constitution (Forty-second Amendment) Act, 1976.
2. Subs. by the Constitution (Seventh Amendment) Act, 1956, for "declared by Parliament by law".
3. Entries 19 and 20 omitted by the Constitution (42nd Amendment) Act, 1976.

24. Industries subject to the provisions of <sup>1</sup>[Entries 7 and 52] of List I.
25. Gas and gas-works.
26. Trade and commerce within the State subject to the provisions of Entry 33 of List III.
27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List III.
28. Markets and fairs.
29. <sup>2</sup>[\* \* \*]
30. Money-lending and money-lenders ; relief of agricultural indebtedness.
31. Inns and inn-keepers.
32. Incorporation regulation and winding up of corporations, other than those specified in List I, and universities ; incorporated trading, literary, scientific, religious and other societies and associations ; co-operative societies.
33. Theatres and dramatic performances ; cinemas subject to the provisions of Entry 60 of List I ; sports, entertainments and amusements.
34. Betting and gambling.
35. Works, lands and buildings vested in or in the possession of the State.
36. <sup>3</sup>[\* \* \*]
37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.
38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.
39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof and, if there is a Legislative Council, of that Council and of the members and the committees thereof ; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.
40. Salaries and allowances of Ministers for the State.
41. State public service ; State Public Service Commission.
42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.
43. Public debt of the State.
44. Treasure trove.
45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.
46. Taxes on agricultural income.
47. Duties in respect of succession to agricultural land.
48. Estate duty in respect of agricultural land.
49. Taxes on lands and buildings.

1 Subs. by Constitution (Seventh Amendment) Act, 1956.

2 Entry 29 omitted by the Constitution (42nd Amendment) Act, 1976.

3 Entry 36 omitted by the Constitution (Seventh Amendment) Act, 1956.

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.
51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :—
  - (a) alcoholic liquors for human consumption ;
  - (b) opium, Indian hemp and other narcotic drugs and narcotics ; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this Entry.
52. Taxes on the entry of goods into a local area for consumption, use or sale therein.
53. Taxes on the consumption or sale of electricity.
- <sup>1</sup>[54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I.]
55. Taxes on advertisements other than advertisements published in the newspapers <sup>2</sup>[and advertisements broadcast by radio or television].
56. Taxes on goods and passengers carried by road or on inland waterways.
57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of Entry 35 of List III.
58. Taxes on animals and boats.
59. Tolls.
60. Taxes on professions, trades, callings and employments.
61. Capitation taxes.
62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.
63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.
64. Offences against laws with respect to any of the matters in this List.
65. Jurisdiction and powers of all courts, except the Supreme Court, with respect of any of the matters in this List.
66. Fees in respect of any of the matters in this List, but not including fees taken in any court.

### LIST III—CONCURRENT LIST

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matter specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.
2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.
1. Subs. by the Constitution Sixth (Amendment) Act, 1956.
2. The words in brackets added by the Constitution (Forty-second Amendment) Act, 1976.

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community ; persons subjected to such detention.
4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in Entry 3 of this List.
5. Marriage and divorce ; infants and minors adoption ; wills, intestacy and succession, joint family and partition ; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.
6. Transfer of property other than agricultural land ; registration of deeds and documents.
7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.
8. Actionable wrongs.
9. Bankruptcy and insolvency.
10. Trust and trustees.
11. Administrator-General and official trustees.

[11 A. Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Courts]

12. Evidence and oaths ; recognition of laws, public acts and records, and judicial proceedings.
13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.
14. Contempt of court, but not including contempt of the Supreme Court.
15. Vagrancy ; nomadic and migratory tribes.
16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental defectives.
17. Prevention of cruelty to animals.

[17 A. Forests.

17B. Protection of wild animals and birds.]

18. Adulteration of foodstuffs and other goods.
19. Drugs and poisons, subject to the provisions of Entry 59 of List I with respect to opium.
20. Economic and social planning.

[20 A. Population control and family planning.]

21. Commercial and industrial monopolies, combines and trusts.
22. Trade unions ; industrial and labour disputes.
23. Social security and social insurance ; employment and unemployment.
24. Welfare of labour including conditions of work, provident funds, employer's liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

1. Added by the Constitution (Forty-second Amendment) Act, 1976.

- <sup>1</sup>[25. Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.]
- 26. Legal, medical and other professions
- 27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.
- 28. Charities and charitable institutions, charitable and religious endowments and religious institutions.
- 29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.
- 30. Vital statistics including registration of births and deaths.
- 31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.
- 32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.
- <sup>2</sup>[33. Trade and commerce in, and the production, supply and distribution of—
  - (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products ;
  - (b) foodstuffs, including edible oilseeds and oils ;
  - (c) cattle fodder, including oilcakes and other concentrates ;
  - (d) raw cotton, whether ginned or unginne<sup>d</sup>, and cotton seed ; and
  - (e) raw jute.]
- <sup>3</sup>[33A. Weights and measures except establishment of standards].
- 34. Price control.
- 35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.
- 36. Factories.
- 37. Boilers.
- 38. Electricity.
- 39. Newspapers, books and printing presses.
- 40. Archaeological sites and remains other than those <sup>2</sup>[declared by or under law made by Parliament] to be of national importance.
- 41. Custody, management and disposal of property (including agricultural land) declared law to be evacuee property.
- 42. Acquisition and requisitioning of property.

1. Subs. by the Constitution (Forty-second Amendment) Act, 1976.

2. Subs. by Constitution (Seventh Amendment) Act, 1956, for "declared by Parliament by law".

3. Ins. by Constitution (Forty-second Amendment) Act, 1976.

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.
44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rate of stamp duty.
45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.
46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.
47. Fees in respect of any of the matters in this List, but not including fees taken in any court.

#### Principles of Interpretation of Lists

The powers of Centre and States are divided, they cannot make laws outside their allotted subjects. It is true that a scientific division is not possible and questions constantly arise—whether a particular subject falls in the sphere of one or the other Government. This duty in a Federal Constitution is entrusted with the courts. The Indian Courts have evolved the following principles of interpretation in order to determine the respective power of the Union and the States under three Lists :

(1). Predominance of the Union List.—The opening words of Article 246 (i) "notwithstanding anything in clauses (2) and (3)" and the opening words of clause (3) "subject to clauses (1) and (2) expressly secure the predominance of the Union List over the State List and the Concurrent List and that of the Concurrent List over the State List. Thus in case of overlapping between the Union and the State List it is the Union List which is to prevail over the State List. In case of overlapping between the Union and the Concurrent List, it is again the Union List which will prevail. In case of conflict between the Concurrent List and State List, it is the Concurrent List that shall prevail.<sup>1</sup>

2. Each Entry to be interpreted broadly.—Subject to the overriding predominance of the Union List, each entry in the various Lists should be interpreted broadly. In *Calcutta Gas Co. Ltd. v. State of West Bengal*<sup>2</sup> the Supreme Court said that the "widest possible" and "most liberal" interpretation should be given to the language of each Entry. A general word used in an Entry.....must be construed to the extent to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it.<sup>3</sup> The Court should try as far as possible, to reconcile the entries and to bring harmony between them. When this is not possible only then the overriding power of the Union Legislature—the *non-odstante* clause applies and the federal power prevails.<sup>4</sup>

*Union of India v. H. S. Dhillon*<sup>5</sup> is an important judgment of the Supreme Court on the legislative relationship between the Union and States. The ques-

In *State of Bombay v. Balsara*,<sup>1</sup> the Bombay Prohibition Act, which prohibited sale and possession of liquors in the State, was challenged on the ground that it incidentally encroached upon import and export of liquors across custom frontier—a Central subject. It was contended that the prohibition, purchase, use, possession and sale of liquor will effect its import. The Court held the Act valid because the pith and substance of the Act fell under the State List and not under Union List, even though the Act incidentally encroached upon the Union Powers of Legislation.

**4. Colourable Legislation.**—In *K. C. G. Narayan Deo v. State of Orissa*,<sup>2</sup> the Supreme Court explained the meaning and scope of the doctrine of colourable legislation in the following terms :

"If the Constitution distributes the Legislative power amongst different Legislative bodies, which have to act within their respective spheres marked out by specific legislative Entries, or if there are limitations on the legislative authority in the shape of fundamental rights, question arises as to whether the Legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert or indirect, or and it is to this latter class of cases that the expression colourable legislation has been applied in judicial pronouncements. The idea conveyed by the expression is that although apparently a Legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise....In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that Legislature to legislate upon the form in which the law is clothed cannot save it from condemnation. The Legislature cannot violate the constitutional prohibitions by employing indirect methods."<sup>3</sup>

'Colourability is thus bound up with incompetency and not tainted with bad faith or evil motive. A thing is colourable which is appearance only and not in reality, what it purports to be.'<sup>4</sup>

Thus what a Legislature cannot do directly it cannot do indirectly. In these cases the Court will look in the true nature and character of the legislation and for that its object, purpose or design to make law on a subject and not its motive. If the Legislature has power to make law, motive in making the law is "irrelevant".<sup>5</sup>

*Kameshwar Singh v. State of Bihar*<sup>6</sup> is the only case where a law has been declared invalid on the ground of colourable legislation. In this case the Bihar Land Reforms Act, 1950, was held void on the ground that though apparently

1. A. I. R. 1951 S. C. 318; *State of Rajasthan v. G. Chawla*, A. I. R. 1959 S. C. 544.

2. A. I. R. 1953 S. C. 375.

3. R. D. Joshi v. Ajit Mills, A. I. R. 1977 S. C. 2279.

4. Ibid.

5. *Nageshwar v. A. P. S. R. T. Corporation*, A. I. R. 1959 S. C. 316.

6. A. I. R. 1952 S. C. 252 at p. 280.

it purported to lay down principle for determining compensation yet in reality it did not lay down any such principle and thus indirectly sought to deprive the petitioners of any compensation.

### Repugnancy between a Central Law and a State Law

Article 254 (1) says that if any provision of a law made by the Legislature of the State is repugnant to any provision of a law made by Parliament which is competent to enact or to any provision of the existing law with respect to one of the matters enumerate in the Concurrent List, then the law made by Parliament, whether passed before or after the law made by the Legislature of such State or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

Article 254 (1) only applies where there is inconsistency between a Central Law and a State Law relating to a subject mentioned in the Concurrent List.<sup>1</sup> But the question is how the repugnancy is to be determined? In *M. Karunanidhi v. Union of India*,<sup>2</sup> the Supreme Court reviewed all its earlier decisions on "repugnancy" under Article 254 and laid down the following tests:

1. "That in order to decide the question of repugnancy it must be shown that the two enactments [Central Act and State Act] contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statute continue to operate in the same field."<sup>3</sup>

The Supreme Court also laid down guide-lines for resolving the repugnancy:

1. Where provisions of the two Acts are inconsistent and absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of repugnancy.
2. But if the State Law has obtained the consent of the President under clause (2) of Art. 254 it shall prevail and the Central Act would become void.
3. Where a State Law though substantially within the scope of the Entries in the State List entrenches upon any of the entries in the Union List, the validity of the law will be upheld by applying the doctrine of pith and substance, if it appears that the law falls within the four corners of the State List and the encroachments purely incidental, or inconsequential.

1. *Prem Nath v. State of J. & K. A. I. R. 1960 S. C. 749*

2. *A. I. R. 1979 S. C. 898.*

3. *Ibid.* per Fazal Ali J. at p. 910.

4. Where, however a State law is inconsistent with a previous Central Law then such a law can be protected by obtaining the assent of the President under Art. 254 (2). The result of obtaining the assent of the President is that the State Act will prevail in the State and overrule the provisions of the Central Act so far as it applies to that State only. Such a state of affairs will exist only until Parliament may at time made a law adding to, or amending, varying or repealing the law made by the State Legislature under that proviso to Art. 254.

The above rule of repugnancy is, however, subject to the exception provided in clause (2) of this Article. According to clause (2) if a State Law with respect to any of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament, or an existing law with respect to that matter, then the State law if it has been reserved for the assent of the President and has received his assent, shall prevail notwithstanding such repugnancy. But it would still be possible for the Parliament under the proviso to clause (2) to override such a law by subsequently making a law on the same matter. If it makes such a law the State Law would be void to the extent of repugnancy with the Union Law.

In *M. Karunanidhi's* case, mentioned above, the appellant challenged the validity of a State Act, Tamil Nadu Public Men (Criminal Misconduct) Act, 1947 as amended by the Act of 1974 on the ground that it is inconsistent with Central Acts (Indian Penal Code and Prevention of Corruption Act, 1974) and hence void. A CBI inquiry was instituted against the appellant who were alleged to have abused their official position in the matter of purchase of wheat from Punjab. As a result of the inquiry a prosecution was launched against the appellant under the IPC and the Prevention of Corruption Act. The State Act was passed after obtaining the assent of the President. According to the allegation made against the appellant the acts said to have been committed by him fall within the period November 1974 to March 1975. The State Act was repealed and the President's assent to that repealing of the State Act was given on June 6, 1977. So, by the time the appeal reached to the Supreme Court the State Act no longer existed. The appellant contended that even though the State Act was repealed it was repugnant to the provisions of the IPC and the Corruption Act and by virtue of Art. 254 (2) the provisions of the Central Act stood repealed and could not be revived after the State Act was repealed. He argued that even though the State Act was repealed the provisions of the Central Acts having themselves been *pro tanto* repealed by the State Act when it was passed could not be applied for the purpose of prosecuting the appellant unless they were re-enacted by the Legislature. The question before the court was whether there was such an irreconcilable inconsistency between the State Act and the Central Act that the provisions of the Central Act stood repealed and unless re-enacted cannot be invoked even after the State Act was itself repealed.

The Supreme Court held that the State Act was not repugnant to the Central Acts and therefore it did not repeal the Central Acts which continued to be in operation even after the repeal of the State Act and can be invoked for the purpose of prosecuting the appellant. The State Act creates distinct and separate offences with different ingredients and different punishments and does not in any way collide with the Central Acts. The State Act is rather a complimentary Act to the Central Acts. The State Act itself permits the Central Acts to come to its aid after an investigation is completed and a report is submitted. The State Act provides that the public man will have to be prosecuted under the Central Acts. Thus, far from there being any inconsi-

it purported to lay down principle for determining compensation yet in reality it did not lay down any such principle and thus indirectly sought to deprive the petitioners of any compensation.

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Article 254 (1) only applies where there is inconsistency between a Central Law and a State Law relating to a subject mentioned in the Concurrent List.<sup>1</sup> But the question is how the repugnancy is to be determined? In *M. Karunanidhi v. Union of India*,<sup>2</sup> the Supreme Court reviewed all its earlier decisions on "repugnancy" under Article 254 and laid down the following tests:

1. "That in order to decide the question of repugnancy it must be shown that the two enactments [Central Act and State Act] contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field."
2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
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3. Where a State Law though substantially within the scope of the Entries in the State List entrenches upon any of the entries in the Union List, the validity of the law will be upheld by applying the doctrine of pith and substance, if it appears that the law falls within the four corners of the State List and the encroachments purely incidental, or inconsequential.

1. Prem Nath v. State of J. & K., A. I. R. 1960 S. C. 749.  
 2. A. I. R. 1979 S. C. 898.  
 3. Ibid, per Fazal Ali J. at p. 910.

(4) Parliament's power to legislate for giving effect to treaties and international agreements.—Article 253 empowers the Parliament to make any law for the whole or any part of the territory of India for implementing treaties and international agreements and conventions. In other words, the normal distribution of powers will not stand in the way of Parliament to pass a law for giving effect to an international obligation even though such law relates to any of the subjects in the State List.

5. In case of failure of Constitutional machinery in a State.—Under Article 356 Parliament is empowered to make laws with respect to all matters in the State List when the Parliament declares that the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

Thus from the above it is quite evident that the States are not vested with exclusive jurisdiction over the subjects assigned to the States by the Constitution, .....making the States to some extent subordinate to the Centre. Indeed this is a clear departure from the strict application of the federal principle followed in America and Australia. Critics of our Constitution take these provisions in support of their arguments that due to these provisions the federal character of the Indian Constitution, if not disappeared, has been greatly modified.

It is submitted that these provisions are merits rather than demerits of the Indian Constitution. They enable the Centre to legislate in exceptional circumstances on the State subjects without amending the Constitution and thus introducing a certain amount of flexibility in the scheme of distribution of powers. Moreover, they are only resorted to in most cases with the consent of the States. Again, they are invoked only where there are exceptional circumstances and that too for a limited period. Thus the framers have incorporated the federal principle in our Constitution in a modified form in the light of the experience in other federations and in view of the peculiar requirements of our country.

The plan of the distribution of legislative powers thus clearly indicates a strong tendency and towards a high degree of centralization which is deemed as a product of realism and in line with a general tendency towards centralization in all federations.

### CENTRE'S CONTROL OVER STATE LEGISLATION

In addition to the Parliament's power to legislate directly on the State subjects under the foregoing Articles, the Constitution also provides for the Centre's consent before a Bill passed by a State Legislature can become a law. The following Articles give Centre a control over State legislation.

Article 31 (3) provided that a State law providing for compulsory acquisition of private property shall have no effect unless it has received the consent of the President. Article 31 has been omitted by the Constitution, 44th Amendment Act, 1978. Article 31-A grants immunity to laws providing for agrarian reforms from Arts. 14, 19 and 31. The immunity of Art. 31-A will not be available to a State law unless it has received the assent of the President. The object of these provisions is to ensure uniformity in law providing for agrarian reforms.

Article 200 directs the Governor of a State to reserve a Bill passed by a State Legislature for the consideration of the President if in his opinion, if passed into law, would derogate the powers of the High Court so as to endanger

tency, the Central Acts are applied to a public man by the State Act after the preliminary investigation is over. The language of S. 29 of the State Act as substituted by the Act of 1974 also clearly indicates the intention of the Legislature that the State Act was passed "in addition to any other law for the time being in force" which includes the Penal Code and the Prevention of Corruption Act.

In *Deep Chand v. State of U. P.*,<sup>1</sup> the validity of U. P. Transport Service (Development) Act was involved. By this Act the State Government was authorised to make the Scheme for nationalisation of Motor Transport in the State. The law was necessitated because the Motor Vehicles Act, 1932, did not contain any provision for the nationalisation of Motor Transport Services. Later on, in 1956 the Parliament with a view to introduce a uniform law amended the Motor Vehicles Act, 1939, and added a new provision enabling the State Government to frame rules of nationalisation of Motor Transport. The Court held that since both the Union Law and the State Law occupied the same field, the State Law was void to the extent of repugnancy to the Union Law.

### PARLIAMENT'S POWER TO LEGISLATE ON STATE SUBJECTS

Arts. 249, 250, 252,<sup>1</sup> 253 and 356.—Though in normal time the distribution of powers must be strictly maintained and neither the State nor the Centre can encroach upon the sphere allotted to the other by the Constitution, yet in certain exceptional circumstances the above system of distribution is either suspended or the powers of the Union Parliament are extended over the subjects mentioned in the State List. The exceptional circumstances are :

(1) Power of Parliament to legislate in the national interest.—According to Article 249, if the Rajya Sabha passes a resolution supported by 2/3 of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated within State List, then it shall be lawful for the Parliament to make laws for the whole or any part of the territory of India with respect to that matter so long as the resolution remains in force. Such a resolution normally lasts for a year; it may be renewed as many times necessary but not exceeding a year at a time. These laws of Parliament will, however, cease to have effect on the expiration of the period of six months after resolution has ceased to operate.

(2) During a Proclamation of Emergency.—According to Article 250 while the Proclamation of Emergency is in operation the Parliament shall have power to make laws for the whole or any part of the territory of India with respect to all matters in the State List. Such a law, however, shall cease to have effect on the expiration of six months after the proclamation of emergency has ceased to operate.

(3) Parliament's power to legislate with the consent of the States —According to Article 252 if the Legislature of two or more States pass resolution of the effect that it is desirable to have a law passed by Parliament on any matters in the State List, it shall be lawful for Parliament to make laws regulating that matter. Any other State may adopt such a law by passing a resolution to that effect. Such laws can only be amended or repealed by the Act of Parliament.

<sup>1</sup> AIR 1959 SC 648; *Zaverbhai v. State of Bombay*, AIR 1954 SC 752; *Tika Ramji v. State of U. P.*, AIR 1956 SC 676

(4) Parliament's power to legislate for giving effect to treaties and international agreements.—Article 253 empowers the Parliament to make any law for the whole or any part of the territory of India for implementing treaties and international agreements and conventions. In other words, the normal distribution of powers will not stand in the way of Parliament to pass a law for giving effect to an international obligation even though such law relates to any of the subjects in the State List.

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Article 200 directs the Governor of a State to reserve a Bill passed by a State Legislature for the consideration of the President if in his opinion, if passed into law, would derogate the powers of the High Court so as to endanger

the position which the Court designed to fulfil under the Constitution. The object of the Article is to preserve the independence and dignity of a High Court which may be affected by a State law.

Article 288 (2) authorises a State to tax in respect of water or electricity stored, generated, consumed distributed or sold by any authority established by law made by Parliament. But it makes it clear that no such law shall be valid unless it has been reserved for the consideration of the President and has received his assent.

Article 304 (b) authorises a State Legislature to impose reasonable restrictions on the freedom of trade, commerce and intercourse within the State in the 'public interest'. But such laws cannot be introduced in the State Legislature without the previous sanction of the President. This provision is intended to ensure the free flow of trade and commerce which may be hampered by unreasonable restrictions imposed by a State law.<sup>1</sup> In this case, the Supreme Court struck down a law on the ground that it was passed without Centre's consent.

### B. ADMINISTRATIVE RELATIONS—Arts. 256—263

"A federal scheme involves the setting up of dual Governments and division of powers. But the success and strength of the federal policy depends upon the maximum of co-operation and co-ordination between the government."<sup>2</sup> In fact, the adjustment of administrative relations between the Union and the States is one of the knottish of the problems in a federal Government. The framers of the Indian Constitution therefore decided to include detailed provisions to avoid clashes between the Centre and the States in the administrative domain and to ensure effective Federal Executive control of matters falling within the jurisdiction of the Parliament. In order to ensure smooth and proper functioning of the administrative machinery, they made provisions for meeting all types of eventualities resulting through the working of federalism or emergence of new circumstances due to difference of opinion between the dual authorities. Moreover, the Union Government was to be responsible for maintaining peace and order in the country. Therefore co-operation and co-ordination between the Centre and the State Administrative authorities was thought indispensable. In emergency the Government of India exercises complete control over the State and functions as if it is a Unitary Government.

**Control of Union over States :** Articles 256 to 263 provide for Union control over States even in normal times through following ways :

- (a) Direction by the Union to the State Governments.
- (b) Delegation of Union functions to the States.
- (c) All-India Services.
- (d) Grant-in-aid.

**(a) Direction by the Centre to the States.**—"The idea of Union giving direction to the States is foreign and repugnant to a rule of federal system. But this idea was taken by the framers of our Constitution from the Government of India Act, 1935, in view of the peculiar conditions of this country and particularly circumstances out of which the federation emerged "<sup>3</sup>

1. *Attabari Tea Co v. State of Assam*, AIR 1951 SC 232

2. See Basu, D. D., *Introduction to the Constitution of India*, p. 263. See also Vishnu Bhagwan, *Indian Constitution*, 1<sup>st</sup> Ed., p. 227.

3. *Ibid.*

Article 256 provides that the executive power of the State shall be so exercised as to ensure compliance with the laws made by Parliament and the executive power of the Union shall also extend to the giving of such directions to a State as it may deem essential for the purpose. Thus power to give direction was necessary because, if the Centre was not vested with such power, the proper execution of the laws passed by the Parliament would become impossible. Accordingly, Article 257 enacts that the States must exercise their executive power in such a way so as not to impede or prejudice the exercise of the executive power of the Union in the State. For this purpose, the Central Government can give directions as to in which way the State should exercise its executive power. The powers of the Central Government also extend to giving directions to a State in two specific matters :—(1) the construction and maintenance of means of communication which are declared to be of national or military importance, (2) measures to be taken for the protection of the railways within the State.<sup>1</sup> This power of giving direction does not in any way affect the power of the Parliament to declare high ways or waterways to be natural high ways and waterways and to construct and maintain means of communications of part of its functions with respect to naval, military or airforce works.<sup>2</sup>

If in carrying out the directions of the Union Government the State incurs additional costs the Union Government under Article 257 (4) shall pay to the State Government such sum as may be agreed. If the Centre and States cannot come to an agreement regarding the compensation to be paid by the former to the latter, the matter is to be referred to the arbitrator to be appointed by the Chief Justice of India.

The Constitution prescribes a coercive sanction for the enforcement of its directions through Article 356. Article 356 provides that if the State has failed to comply with or to give effect to any directions given by the Central Government then the President is empowered to declare an emergency to the effect that the State Government cannot be carried on in accordance with the provisions of the Constitution and assume himself all functions of the State.

(b) Delegation of Union's function to the States.—Under Article 258 the Parliament may with the consent of the State Government entrust either conditionally or unconditionally to that Government or its officers' functions relating to any matters falling within the executive powers of the Union. Parliament is also empowered to use State machinery for the enforcement of Union Laws and for this purpose may confer powers or impose duties upon the State or its officers or authorities thereof in respect of these matters to see that the laws are made applicable to the State. It is to be noted that while under clause (1) the delegation of power is made with the consent of the State no consent of the State is necessary under clause (2).

Like the Central Government, the State Government can also delegate its power on the Union and its officers. Article 258-A lays down that the Governor of the State may with the consent of the Government of India, entrust to that Government or its officers' functions, relating to any matter to which the executive power of that Government extends. It is thus clear that where it is inconvenient for either Government to directly carry out its administrative functions it may get those functions executed through the other Government.

1. Article 257, clauses (2) and (3).

2. Article 257 (2), proviso.

(c) All-India Services.—Beside the separate services for the Union and the States the Constitution provides for the creation of an additional "All-India Service" common to the Union and the States. According to Article 312 if the Rajya Sabha passes a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest to do so, Parliament may by law provide for the creation of one or more All-India Services common to the Union and the States and also regulate the recruitment and the conditions of service of persons appointed to any service.

The object of this provision is to ensure greater inter-State co-ordination and implementation of the policies of the Central Government through these officers. This also enables the Central Government to exercise a control over State in matters of execution of Union laws.

(d) Grant-in-aid.—Under the Constitution the financial resources of the States are very limited though they have to do many work of social uplift under directive principles. In order to cope with their ever-expanding needs, the Central Government makes grants-in-aid to the States. Grants-in-aid to States thus serve two purposes, (1) through it Central Government exercises a strict control over State because grants are granted subject to certain conditions. If any State does not agree to the conditions the Central Government may withdraw the grant, and (2) it generates a Centre-state co-ordination and co-operation if a State wants to develop its welfare schemes for the people of the State it may ask for financial help from the Centre.

(e) Full faith and credit clause.—Article 261 declares that full faith and credit shall be given throughout the territory of India to public acts, records and Judicial proceedings of the Union and every State. According to clause (3) final judgment or orders delivered or passed by Civil Courts in any part of the territory of India can be executed anywhere in the country according to law.

### DISPUTES RELATING TO WATER

Article 262 authorises the Parliament to provide by law for the adjudication of any dispute or complaint with respect to the uses, distribution or control of the waters of any inter-State rivers and river valleys. Under clause (2) of this Article, Parliament may by law provide that neither the Supreme Court nor any other court shall have any jurisdiction in respect of such disputes and complaints relating to water of inter-State rivers and river valleys. Under Art. 262 Parliament has passed the River Board Act, 1956, and the Inter-State Water Disputes Act, 1956. The River Board Act is meant for the regulation and development of Inter-State rivers and river valleys. This is established on the request of the State Governments to advise the Government. The Water Disputes Act empowers the Central Government to set up a Tribunal for the adjudication of such disputes. The decision of the tribunal shall be final and binding on the parties to the dispute. Neither the Supreme Court nor any other court shall have jurisdiction in respect of any water dispute which may be referred to such a Tribunal under that Act.

(i) Inter-State Council.—Though a federal Constitution involves the sovereignty of the units within their respective territorial limits it is not possible for them to remain in complete isolation from each other and the very exercise of internal sovereignty by the units require its recognition by and co-ordination of other units of the federation. Federal Constitutions therefore generally provide certain rules for co-operation which the units are expected to take into consideration while dealing with each other.

Article 263 provides for the establishment of an Inter-State Council to effect co-ordination between States. The Inter-State Council is appointed by the President if it appears to him that the public interest would be served by its establishment. The Inter State Council is generally charged with the duty of—

(a) inquiring into and advising upon disputes which may arise between States ;

(b) investigating and discussing subjects in which some or all of the States of the Union and one or more of the States have common interest ;

(c) making recommendation on any subject and for the better co-ordination of policy and action with respect to that subject.

Though the Council can deal with legal or non-legal matters but its function is merely advisory.

The main object behind this provision is to establish a regular recognised machinery for inter-Government consultation so that departments or institutions of co-ordination and research are to be maintained at the Centre in such matters as agriculture, forestry, irrigation, education and public health.

The President has exercised this power by constituting the Central Council of Health and the Central Council of Local Self-Government.

The States Re-organisation Act, 1951 has set up five Zonal Councils, namely, (the Central Zone, the Northern Zone, the Eastern Zone, the Western Zone and the Southern Zone).

The Zonal Councils consist of the Union Home Minister who acts as an *ex-officio* Chairman of the Councils and the Chief Minister of the State and two other Ministers nominated by the Governor of the member State. The Chief Secretary of the State concerned and a person from Planning Commission are included as advisers in such Councils.

These Councils have been established for the promotion of co-operation and for making efforts to solve common problems of the member States. They are to encourage inter-State co-operation for successful implementation and execution of development projects and also act as advisory bodies in matters of common interest particularly in respect of economic and social planning.

### C. FINANCIAL RELATIONS (Arts. 264-291)

"No system of federation can be successful unless both the Union and the States have at their disposal adequate financial resources to enable them to discharge their respective responsibilities under the Constitution."<sup>1</sup> It is indeed a hard fact that if the legislative and administrative authority of the constituent units is to be maintained they must be autonomous financially. However, this principle of federation has not been fully implemented in any of the existing federations of the world. In Canada and Australia the sources of revenue allotted to the Units are so meagre that they have to be substantially assisted by Central grants. The Swiss Federation, on the other hand, makes the Centre subservient to the units as regards financial contribution from the latter to the former. The American Constitution tried its best to ensure complete financial independence for both the Union and the States, but with the passage

1. Bisu, D D—Introduction to the Constitution of India, p. 141.

of time, the increased obligation of the States due to the advent of the "positive State" made them rely on grants-in-aid from the Central Government. This has certainly led to the development of centralization and curbing of autonomy of the States in U.S.A.

In India, the scheme of distribution of sources of revenue between the Centre and the States is based on the Scheme laid down in the Government of India Act, 1935.

The framers of the Indian Constitution desired that the scheme of financial relations be flexible and adaptable to varying needs and reviewable periodically in the light of experience, of Central resources of State's needs, and available data. For this they recommended for the appointment of Finance Commission to review the whole position from time to time. The Constitution under Article 280, therefore, provides for the appointment of a Finance Commission within two years of the commencement and thereafter at the expiration of every fifteen years or earlier if the President considers it necessary. It consists of a Chairman and four other members to be appointed by the President. The Finance Commission is to recommend to the President the requisite changes to be made in the distribution of taxes between the Union and the States ; and (2) to define the principle on which the Union Government was to make grants-in-aid to the States. The Constitution of India thus introduces a unique element of flexibility while taking the problems of distribution of public revenues. "No other federal Constitution makes such elaborate provisions as the Constitution of India with respect to the relationship between the Union and the States in the financial field. In fact, by providing for the establishment of Finance Commission for the purpose of allocating and readjusting the receipts from certain sources, the Constitution has made an original contribution in this extremely complicated aspect of Federal relationship."<sup>1</sup>

**Taxation only by authority of law.**—Article 265 says that no tax can be levied or collected except by authority of law. No tax can be imposed by an executive order. The law providing for imposition of tax must be a valid law,<sup>2</sup> that is, it should not be prohibited by any provisions of the Constitution [e. g., Articles 276 (2), 286, etc]. Thus, a tax law will be void if it violates the fundamental rights to equality guaranteed by Article 14.

The prohibition that no tax can be levied or collected without the authority of law, applies only in respect of taxes. The prohibition of this Act does not apply in respect of a fee. A tax is a common burden and the only return the tax-payer gets is the participation in the common benefit of the State. A tax is compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered.<sup>3</sup>

**Double Taxation not prohibited under Art. 265.**—There is nothing in Art. 265 which prohibits the Legislature to impose a tax twice on a thing.<sup>4</sup>

1. Pylee—Constitutional Government in India, p. 544.
2. M/s. Chhotabhai v. Union of India, AIR 1962 SC 1006.
3. Commissioner H. R. E. v. L. T. Swamier, AIR 1954 SC 282 ; Sri Jagannath v. State of Orissa, AIR 1954 SC 400 ; Corporation of Calcutta v. Liberty Cinema, AIR 1965 SC 1107.
4. Avinder Singh v. State of Punjab, AIR 1979 SC 321.

### Scheme of Distribution of Revenue

Article 268 provides the scheme of the distribution of revenue between the Union and the States. The States possess exclusive jurisdiction over taxes enumerated in the State List. The Union is entitled to the proceeds of the taxes in the Union List. The Concurrent List includes no taxes. However, it is to be noted that while the proceeds of taxes within the State List are entirely retained by the States, proceeds of some of the taxes in the Union List may be allotted, wholly or partially, to the States. The Constitution mentions for categories of the Union taxes which are wholly or partially assigned to the States :

**1. Duties levied by the Union but collected and appropriated by the States.**—According to Article 268 stamp duties and duties of excise on medicinal and toilet preparations mentioned in the Union List shall be levied by the Central Government. These duties are collected by the States within which such duties are leviable. The proceeds of such duties are assigned to the States.

**Taxes levied and collected by the Union and assigned to the States.**—According to Article 269 (1) duties in respect of succession to property other than agricultural land, (2) estate duty in respect of property other than agricultural land, (3) terminal taxes on goods or passengers carried by railway, sea or air, (4) taxes on railway fares and freights, (5) taxes other than stamp duties on transactions in stock exchanges and future markets, (6) taxes on the sale or of purchase of the newspapers and advertisements published therein, (7) taxes on the sale purpose of goods in the course of inter-State commerce and trade are levied and collected by the Union of India but the net proceeds are distributed among the States in such manner as may be prescribed by Parliament by law.

**3 Taxes levied and collected by the Union but distributed between the Union and States.**—According to Article 270. Taxes on income other than agricultural income and corporation tax shall be levied and collected by the Union and is distributed between the Union and the States. After deducting sums attributable to the Union territories and to the Union emoluments a prescribed percentage of the taxes is distributed among States in such manner as may be prescribed by law.

**4. Taxes levied and collected by the Union may be distributed between the Union and States.**—Art. 272 provides that Union duties of excise other than those on medicinal and toilet preparations as are mentioned in the Union List are levied and collected by the Government of India but if Parliament by law provides the whole or any part of the net proceeds of that duty shall be distributed among those States to which the law imposing the duty extends in accordance with such principles of distribution as may be formulated by such law.

**5 Taxes for the purpose of the Union.**—Art. 271 provides that if Parliament at any time increases any of the duties or taxes mentioned in Arts. 269 and 270 by imposing a surcharge the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

**6. Grants-in-aid.**—The Constitution provides for three kinds of grants-in-aid to the States from the Union resources :—(1) under Article 273 grants-in-aid will be given to the State of Assam, Bihar, Orissa and West Bengal in lieu of export duty on jute products. The sums of such grants are pres-

cribed by the President with the consultation of the Finance Commission. These sums shall be given to the States for a period of ten years from the commencement of the Constitution. (2) Article 275 empowers Parliament to make such grants, as it may deem essential, to the States which are in need of financial assistance. The Constitution also provides for special grants given to the States which undertake schemes of development for the purpose of promoting the welfare of the Scheduled Tribes or raising the level of administration of the scheduled areas. A special grant to Assam is given for this purpose. (3) Under Article 282 both the Union and a State may make grants for any public purpose even if it relates to a subject over which it cannot make laws. The Central Government can under this Article make grants to hospitals or to schools.

Under Article 271 Parliament is empowered to increase any of the duties or the taxes mentioned in Articles 269 and 270 by a surcharge for the purposes of the Union and the entire proceeds of any such surcharge shall go to the Union and form part of the Consolidated Fund of India. According to Article 274 no Bill which imposes or varies any tax or duty in which States are interested or which varies the meaning of "agricultural income" or which affects the principle of the distribution of moneys to States, or which imposes a surcharge for the purposes of the Union, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

**7. Taxes for the purposes of States.**—Articles 276 and 277 are saving provisions. These Articles save the authority of the States to levy taxes, on subject now forming Part of the Union List, immediately before the commencement of the Constitution. Thus taxes which are being levied by a State or a Municipality or other local authority, notwithstanding that those taxes are mentioned in the Union List, continue to be levied by those authorities until Parliament by law makes contrary provision.<sup>1</sup> Art. 276 empower the States to impose taxes on professions, trades, callings and employment for the benefit of the State or of a municipality, district board, local boards or other local authorities. But the provision of Article 277 does not extend to taxes levied under a law passed after the Constitution came into force.<sup>2</sup>

In *Amraoti Municipality v. Ram Chandra*,<sup>3</sup> the Municipality of Amraoti, under a pre-Constitution law, imposed a terminal tax on certain goods. These taxes now can only be levied by the Parliament. The Municipality thereafter issued a notification imposing taxes on gold and silver which were not taxable under the pre-Constitution law. The Supreme Court held the notification as unconstitutional on the ground that Article 277 could neither permit increase in the rate nor alteration in the incidence. In *S. I. Corp. (P) Ltd. v. Secy., Board of Revenue*,<sup>4</sup> a tax was imposed under a law which was passed before but brought into force after the commencement of the Constitution. The Court held that Article 277 could only save the tax if it had actually been levied and collected before the Constitution came into force.

#### Restrictions on States Taxing Power

**Restriction on the power of the States to impose tax on the sale or purchase of goods.**—The State has, like the Union, power to levy tax on the sale and

1. *M. B S. Oushadbalaya v. Union of India*, A. I. R. 1963 S. C. 622.

2. *Liberty Cinema v. Commr., Calcutta Corporation*, A. I. R. 1959 Cal. 45,

3. A. I. R. 1964 S. C. 1166.

4. A. I. R. 1964 S. C. 207.

purchase of goods, other than newspapers. Article 286, however, imposes the following restrictions on the State's power to levy sales-tax.

(i) No State can impose a tax on the sale or purchase of goods when such sale or purchase takes place outside the State.<sup>1</sup>

This means that only the Centre can levy tax on sale and purchase of goods when it takes place in the intercourse of trade and commerce. Clause (2) empowers Parliament to lay down the principles for determining when a sale or purchase takes place outside the State or in the course of import into or export from India. The Central Sales Tax Act, 1956, passed by Parliament lays down the principles for determining the situs of the sale.

(ii) No State can impose a tax on the sale or purchase of goods where such sale or purchase takes place in the course of import of goods into or export of the goods out of the territory of India.

When can a sale or purchase be said to take place "in the course of import"?<sup>2</sup> The Central Sales Tax Act, 1956, defines such a sale. A sale or purchase of goods is in the course of export or import when it either occasions such export or import or it takes place by the transfer of document of title to the goods after they have crossed the customs barrier of India.<sup>3</sup> In both these cases the sale or purchase takes place in the course of import and, therefore, is exempted from sales-tax.

But purchases made within the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed customs frontier are not within the exemption. In *Coffee Board, Bangalore v. Jt. Commercial Tax Officer*,<sup>4</sup> it was held that the sale of coffee by the Coffee Board to its registered exporters under terms and conditions prescribed by the rules framed by the Coffee Board was not a 'sale in the course of export' within the meaning of Article 286 (1) (b) read with section 5 (1) of the Central Sales Tax Act, 1956, and as such was liable to sales-tax under the Madras General Sales Tax Act, 1959. The Court said that the phrase 'sale in the course of export' comprises three essentials, namely, (1) that there must be a sale, (2) that goods must actually be exported, and (3) that the sale must be a part and parcel of the export. The sale must occasion the export and the word 'occasion' is used as a verb and means 'to cause' or 'to be the immediate cause of'. The Court's view was that the sale which is to be regarded as exempt from tax is a sale which causes the export to take place or is the immediate cause of the export, that the introduction of intermediary between the seller and the importing buyer breaks the link, for, then and there are two sales, one to the intermediary and the other to the importer, and the first sale is not in the course of import, for the export begins from the intermediary and ends with the importer. According to the Court the test was that there must be a single sale which itself causes the export and there was no room for two or more sales in the course of import. The Court, therefore, held that though the sales by the Coffee Board were sales for export, they were not sales in the course of export. There were two sales involved in this export programme, the first sale by the Coffee Board to the

1. Article 286 (1) (a).

2. *State of Trav.-Co. v. Bombay Co. Ltd.*, A. I. R. 1952 S. C. 366; *State of Trav.-Co. v. S. V. Factory*, A. I. R. 1953 S. C. 333.

3. Article 286 (1) (b).

4. A. I. R. 1971 S. C. 870.

5. See Section 3 of the Central Sales Tax Act, 1956.

exporter and the second sale by the exporter to a foreign buyer which occasioned the movement of goods, and this latter sale alone was exempt from sales-tax as being a sale in the course of export.

In *Benami Bros. v. Union of India*,<sup>1</sup> the petitioner was an importer and dealer in non-ferrous metals like zinc, lead, copper, tin, etc. and was on the approved list of registered suppliers to the Directorate-General of Supplies and Disposals. They used to procure non-ferrous metals from various countries. Licences were issued to the petitioner for supply of these metals against contracts placed by D. G. S. and D.

The Court held that for affecting sale made by the petitioner as principal to the D. G. S. & D. the petitioner had to purchase goods from foreign sellers and it was these purchases from foreign sellers which occasioned the movement of goods in the course of import. No movement of goods took place in pursuance to the contract of sale made by the petitioner with D. G. S. & D. The petitioner's sale to D. G. S. & D. was distinct and separate from his purchases from foreign sellers. The purchases of the goods and import of goods in pursuance to the contracts of purchases were, no doubt, for sale to the D. G. S. & D. But it would not follow that the sales or contracts of sales to D. G. S. & D. occasioned the movement of goods in this country. There was no privity of contract between D. G. S. & D. and the foreign sellers. The foreign sellers did not enter into contract by themselves or through the agency of the petitioners to the D. G. S. & D. There was no obligation under the contract on the part of the D. G. S. & D. to procure import licences for the petitioner. It was the obligation of the petitioner to obtain the import licence. Therefore, even if the contract envisaged the import of goods and their supply to the D. G. S. & D. from out of the goods imported, it did not follow that the movement of the goods in the course of import was occasioned by the contracts of sale by the petitioner with D. G. S. & D.

It was held that sales by the petitioner to the D. G. S. & D. was not a 'sale in the course of import' and therefore liable to be taxed.

(iii) Sale or purchase in the course of inter-State trade or commerce.—A State cannot impose a tax on the sale or purchase of goods which takes place in the course of inter-State trade and commerce. The Sixth Amendment to the Constitution now vests exclusive power to tax on sale or purchase of goods in the course of inter-State trade and commerce. A sale or purchase of goods in the course of inter-State trade or commerce when the sale or purchase occasions movement of goods from one State to another or is effected by a transfer of documents of title to the goods during their movement from one State to another.

A State cannot impose a tax on sale and purchase of goods declared by Parliament by law of "special importance" in inter-State trade or commerce. In relation to goods of special importance the State-taxing power is subject to the restriction imposed by the Parliament.

#### Finance Commission

Art. 280 provides for the establishment of a Finance Commission. The President shall within two years from the commencement of the Constitution and thereafter at the expiration of every fifth year or at such earlier time as he considers necessary constitute a Finance Commission. The Finance Commis-

sion shall consist of a Chairman and four other members appointed by the President. Parliament may by law prescribe qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

In exercise of the powers under Art. 80 (1). Parliament has passed the Finance (Miscellaneous Provisions) Act, 1951. It provides that the Chairman of the Commission shall be selected from among persons who have had experience in public affairs. The other four members shall be selected from among persons who, (1) are, or have been, or are qualified to be appointed as Judges of a High Court ; or (2) have special knowledge of the finance and accounts of Government ; or (3) have had wide experience in financial matters and in administration, or (4) have special knowledge of economics.

The members of the Commission shall hold office for such period as may be specified in the Presidential Order and shall be eligible for appointment. The Commission is empowered to determine its procedure and shall have all the powers of a civil court in respect of summoning and enforcing the attendance of witnesses, production of any document and requisitioning any public record from any court or office.

**Duties of the Finance Commission.**—It shall be the duty of the Commission to make recommendations to the President as to—

(a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds ;

(b) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India ;

(c) any other matter referred to the Commission by the President in the interest of sound finance.

The Commission shall determine their procedure and shall have powers in the performance of their functions as Parliament may by law confer on them.

Art. 281 says that the President shall cause every recommendation of the Finance Commission to be laid before each House of Parliament together with an explanatory memorandum.

#### Inter-Governmental Tax Immunities

The doctrine of inter-Government immunities was for the first time, recognised by the American Supreme Court in the leading case of *Mechullock v. Maryland*.<sup>1</sup> The Congress had established a bank in the State of Maryland. The State of Maryland levied a tax which Mechullock, the cashier, refused to pay on the ground that a State could not tax an instrumentality of the Central Government. The Supreme Court of America held that the State had no power to levy a tax on Centre's property. Latter on the rule was applied to give immunity to State properties from Central taxation.<sup>2</sup>

This doctrine was very strictly<sup>3</sup> applied in America. However, in the latter decisions its scope has been much more restricted.<sup>4</sup> In Australia, the

1. 4 Wheaton 316 (1819).

2. *Collector v. Day*, 11 Wall 173 (1870).

3. *Indian Motor Cycle Co. v. U. S.*, 283 U. S. 570 (1931).

4. *Melbering v. Gerhardt*, 304 U. S. 405 (1938); *South Carolina v. U. S.*, 199 U. S. 437 (1905), see also *New York v. U. S.*, 326 U. S. 572 (1946).

doctrine is followed on similar lines as in America. In Canada, the doctrine is followed in a restricted sense.

In India, like Canada, the doctrine of mutual exemption from taxation is applied in a restricted sense. Its scope has been defined by the constitutional provisions. The rule of mutual exemption from taxation has been recognised by Art. 285 and Art. 289 of the Indian Constitution.

**Exemption of Union Property from State Taxation**—Article 285 imposes a restriction on the State to tax the property of the Union. Clause (1) says that, unless Parliament otherwise provides, the Union property shall be exempt from all taxes imposed by a State or any authority within a State. The word 'property' includes every kind of property, e. g. movable or immovable. Clause (2) saves the State's power to tax the property of the Union which were taxable by a State under a law passed before the commencement of the Constitution, until Parliament by law provides otherwise.

The rule of immunity from State taxation applies only to the instrumentalities of the Union of India and not to private bodies.

Article 287 prohibits a State from imposing tax on consumption or sale of electricity supplied to the Government of India or utilized for construction, maintenance or operation of any railway unless Parliament by law otherwise provides.

**Exemption of State property or income from Union Taxation**.—Article 289 exempts the property and income of a State from Union taxation. Parliament, however, can impose a tax in respect of a trade or business of any kind carried on by or on behalf of the Government of a State. However, under clause (3) of this Article Parliament may by law exempt any class of business incidental to ordinary functions of Government from Union taxation.

Thus the immunity from Centre's taxation is given only to property and income of a State from direct taxes. Immunity is not given from Union's indirect taxes, e. g., duties of customs and excise.<sup>1</sup> The immunity does not extend to commercial interests, assets and income of the State. Thus if a State runs roadways or does business in purchasing and reselling of foodgrains, etc. it acts as a private trader, businessman or an industrialist. In this capacity it does not enjoy any immunity under the Constitution. Parliament may provide for taxation of such activities.

Under Art. 285 the Centre's property is exempt from all State taxes whether it is used for commercial purposes or governmental purposes. But under Art. 289 such an exemption is not available to the States property. The Union of India can levy tax on all kinds of a State property.

instrumentalities beyond the scope of express provisions in Arts. 285, 287, 288 and 289 of the Constitution.

**Borrowing Power (Articles 292-93).**—Article 292 gives the Union unlimited power to borrow money on the security of the Consolidated Fund of India either within or outside. The Union Government can borrow within such limits as may be fixed by Parliament from time to time. It can also guarantee any debt within such limits.

Article 293 permits a State subject to any limits fixed by the State Legislature to borrow money within the territory of India on security of the Consolidated Fund of State. The borrowing power of State is thus subject to a number of restrictions, a State cannot borrow from outside India.<sup>1</sup> Limitation may be imposed by the State Legislature.

The Government of India may itself extend a loan to the State under law passed by Parliament. So long as such a loan or any part thereof remains outstanding, no fresh loan can be raised by the State without the consent of the Central Government.<sup>2</sup>

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1. Article 293.  
2. Article 293 (4).  
Const. 45

## The State Liability (Arts. 294 to 300)

**Suits by or against the State.**—Article 300 of the Constitution says that the Government of India may sue or be sued by the name of the Union of India and that State Government may sue or be sued by the name of the State. Thus, the Constitution makes the Union and the States as juristic persons liable for owning and acquiring property, making contracts, carrying on trade or business, bringing and defending legal action, just as private individuals. The legal personality of the Union of India, or a State of the Indian Union is thus placed beyond doubt by the express language of Article 300.<sup>1</sup> The Government of India can be sued "in relation to their affairs in the like cases as the Dominion of India might have been sued if this Constitution had not been enacted. The position in this respect remains the same as it existed before the commencement of the Constitution so long as Parliament does not make a law providing otherwise."<sup>2</sup> As the Union of India is a legal person it is not necessary to investigate whether the Government of India was a legal entity before the commencement of the Constitution.<sup>3</sup>

**Liability in contract.**—Article 299 authorises the Government of India to enter into contract for any purpose subject to the mode and manner provided for it in Article 299. A contract is binding on the Government of India if the following three conditions are fulfilled :—

1. it must be expressed to be made by the President or by the Governor of the State as the case may be,
2. it must be executed on behalf of the President or the Governor as the case may be, and
3. its execution must be by such person and in such manner as the President or Governor may direct or authorise.

Failure to comply with those conditions nullifies the contract and renders it void and unenforceable. There is no question of estoppel or ratification of the provisions of Art. 299 (1) of the Constitution.<sup>4</sup>

The contractual liability of the State under Indian Constitution is the same as that of an individual under ordinary law of contracts. The legal position in this respect has not changed under the present Constitution. The liability of the State is exactly the same as that of East India Company before 1858.

Although the contracts are made in the name of the President he is not personally liable in respect of any contract.

1. Calcutta Corporation v. Director of Rationing, A. I. R. 1954 Cal. 282.

2. Article 300.

3. Union of India v. Satyendra Nath, A. L. R. 1955 Cal. 581.

4. Bibar E. G. F. Co-operative Society v. Sipahi Singh, A. L. R. 1977 S. C. 2149.

**Liability in tort.**—Article 300 (1) provides that the Government of India may be sued in relation to its affairs in the like cases as the Dominion of India, subject to any law which is made by the Act of Parliament. The Parliament has not made any law and therefore the question has to be determined as to whether the suit could lie against the Dominion of India before the Constitution came into force. The legal position in this respect is the same as existed before the commencement of the Constitution.

Before the Constitution, the East India Company, and after the Government of India Act, 1858, which transferred the Government of India to Her Majesty with its rights and liabilities, the Secretary of State in Council were liable for the tortious acts of their servants committed in the course of their employment.

Section 65 of the Government of India Act, 1858, provided that the Secretary of State in Council can be sued as it could be done against the East India Company. Section 65 of the Government of India Act, 1858 was reenacted as section 32 of the Government of India Act, 1915, and as section 176 of the Government of India Act, 1935. In the present Constitution the corresponding provision is Art. 300.

The first leading case on the point is the *P. & O. Steam Navigation Co. v. Secretary of State of India*.<sup>1</sup> The facts of the case were that a servant of the plaintiff's (company) was travelling from Garden Reach to Calcutta in a carriage driven by a pair of horses. The accident took place when the coach was passing through the Kidderpore Dockyard which is a Government Dockyard. Some workmen employed in the Government Dockyard were carrying a heavy piece of iron for the purpose of repairing a steamer. The men carrying the iron-rod were walking along the middle of the road. When the carriage of the plaintiff drove up nearer the coachman gave a warning to the men carrying the iron and the coachman slowed its speed. The men carrying the iron attempted to get out of the way, those in front tried to go to the one side of the road while those behind tried to go to the other side of the road. The consequence of this was a loss of time, brought the carriage close upto them, before they had left the centre of the road. Seeing the horse and carriage close them, they got alarmed and suddenly dropped the iron and ran away. The iron fell with a great noise resulting injuries to one horse, which startled the plaintiff's horses which thereupon rushed forwards violently and fell on the iron. The Company filed a suit against the Secretary of State in Council for the damages for injury to its horse caused by the negligence of the servants employed by the Government of India.

The Supreme Court held that the Secretary of State for India in Council was liable for the damages occasioned by the negligence of Government servants, if the negligence was such as would render an ordinary employer liable. The Court drew a distinction between acts done in the exercise of "sovereign power" and acts done in the exercise of "non-sovereign power", that is, acts done in the conduct of undertakings which might be carried on by private persons—individuals without having such power. The liability could only arise in case of "non-sovereign functions". The East India Company had a two-fold character—of sovereign power and of trading company. The liability of the company could only extend to in respect of its commercial dealings and not to the acts done by it in exercise of delegated sovereign power.

1. *P. & O. Steam Navigation Co. v. Secretary of State for India*, 5 Bom. H. C. R. App. I.

In the present case, the damage was done to the plaintiff in the exercise of non-sovereign function, i. e., the maintenance of Dockyard which could be done by any private individual, without any delegation of sovereign power, and hence the Government was liable for the torts of its employees. The Secretary of State was not liable for anything done in the exercise of sovereign powers.

The above principle has been approved and applied by the Supreme Court in the following cases.

In *State of Rajasthan v. Vidyawati*,<sup>1</sup> the driver of a jeep owned and maintained by the State of Rajasthan for the official use of the Collector of a district, drove it rashly and negligently while bringing it back from the workshop after repairs and knocked down a pedestrian and fatally injured him. As a result of the injuries the pedestrian died. His widow sued the State of Rajasthan for damages. The Supreme Court held that the State was liable and awarded damages. The accident took place while the driver was bringing it back from the workshop to the Collector's residence. It cannot be said that he was employed on a task which was based on delegation of sovereign or governmental powers of the State. His act was not an act in the exercise of a sovereign function. The Court said :

"In fact, the employment of a driver of the jeep car for the use of a civil servant is itself an activity which is not connected in any manner with the sovereign power of the State at all."

The Court approved the distinction made in *Steam Navigation Company's* case between the sovereign function, and the non-sovereign function of the State. However, Sisha, C. J., made an important observation in *Vidyawati's* case. His Lordship said that the common law immunity rule based on the principle that 'the king can do no wrong' has no application and validity in this country. "There should be no difficulty in holding that the State be as much liable for tort and in respect of a tortious act committed by its servant and functioning as such, as any other employer.. In India ever since the time of East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India. Now that we have by our Constitution established a republican form of Government and one of the objections is to establish a Socialist State -----there is no justification, in principle or in public interest, that the State should not be held liable vicariously for the tortious acts committed by its servants-----"<sup>2</sup>

This observation indicates that the Supreme Court was of the view that immunity from liability of the State for tortious acts committed by its servants when exercising sovereign powers delegated to it cannot be sustained. But the Court expressed its view that in the absence of a law made by the Parliament under Article 300 (1) of the Constitution, the law in force today is the law that was in force ever since the date of the East India Company.

In *Kasturi Lal v. State of U. P.*,<sup>3</sup> a person was taken into custody on suspicion of being in possession of stolen property and taken to police station. His property including certain quantity of gold and silver was taken out from him and kept in the Makhana till the disposal of the case. The gold and silver was misappropriated by a police constable who fled to Pakistan. The

1. *State of Rajasthan v. Vidyawati*, AIR 1962 SC 933.

2. *Ibid.*

3. AIR 1965 SC 1039.

appellant sued the State of Uttar Pradesh for return of the gold and silver, and in the alternative, claimed damages for loss caused by negligence of the Meerut police. The State contended that no liability would accrue for acts committed by a public servant where such acts were related to the exercise of sovereign power of the State. The Supreme Court held that the State was not liable. The Court approved the distinction made in the *Steam Navigation* case between sovereign and non-sovereign functions of the State. Gajendragadkar, C. J., said. "If a tortious act committed by a public servant gives rise to a claim for damages, the question to ask is : was the tortious act committed by a public servant in discharge of statutory functions which are referable to, and ultimately based on the delegation of the sovereign powers of the State to such public servant. If the answer is in the affirmative the action for damages will not lie. On the other hand, if the tortious act has been committed by a public servant in the discharge of duties assigned to him not by virtue of the delegation of any sovereign powers, an action for damages would lie."

The Court held that the tortious act of the police officers was committed by them in the discharge of sovereign powers and the State was therefore not liable for the damages caused to the appellant. The Court said that the power to arrest a person, to search him, and to seize property found with him are powers conferred on the specified officers by statute and therefore, they are powers which can properly be characterised as sovereign powers.

The Court however made a strong plea for enactment of a legislation to regulate and control the claim of the State for immunity on the lines of the Crown Proceedings Act of England.

Although the principle which determines the extent of the vicarious liability of the State for the torts committed by its servants is thus well settled, it is by no means easy to apply the principle to particular cases. In modern times the distinction between sovereign and non-sovereign functions has almost been obliterated. How difficult it is to draw a line of distinction between these two functions of the State can well be illustrated by some of the cases decided by various High Courts.

In *Satyawati v. Union of India*,<sup>1</sup> an Air Force vehicle was carrying hockey team to Indian Air Force Station to play a match against a team of Indian Air Force. After the match was over, the driver was going to park the vehicle when he caused the fatal accident by his negligence. It was argued that it was one of the function of the Union of India to keep the army in proper shape and time, and that hockey team was carried by the vehicle for the physical exercise of the Air Force Personnel and therefore the Government was not liable. The Court rejected this argument and held that the carrying of hockey team to play a match can by no process of extension be termed as exercise of sovereign power and the Union of India was therefore liable for damages caused to the plaintiff.

In *Union of India v. Sugrabai*,<sup>2</sup> one Mr. Abdul Majid was knocked down by a military truck which was engaged in carrying a machine to the School of Artillery. The machine was sent for repairs to a military workshop and after repairs it was being transported to the School of Artillery. It is a machine for locating enemy guns which was for giving training to military officers. The Government pleader argued that training of army personnel is a sovereign function which in turn requires maintenance of machines, and maintenance of

1. A. I. R. 1967 Delhi 98.

2. A. I. R. 1969 Bom. 13.

machines requires that they should be kept in proper repair, and that work of repairing requires its transport from workshop to military school and therefore transporting was a sovereign function.

The Court rejected this argument that every act which is necessary for the discharge of a sovereign function involves an exercise of sovereign power. Many of these acts do not require to be done by the State through its servants, for example supply of food to army which may be transported in trucks belonging to private persons. The Court said that though the transportation of the machine from the workshop to the military school was necessary for the training of army personnel but it was not necessary to transport it through a military truck driven by defence personnel. The machine could have been carried through a private carrier without any material detriment for the discharge of, by the State of its sovereign function of maintaining army personnel. The Court accepted that in certain cases transporting of machine by a military truck can be regarded as a sovereign function, e.g., carrying machine for the immediate use of army engaged in active military duty.

In *Rooplal v. Union of India*,<sup>1</sup> the military jawans in the employment of the Union of India lifted the drift wood belonging to the plaintiff and carried it through military vehicles for purposes of camp fire and the fuel was used by them for their requirements. The Court held that the act was done by jawans in the course of the employment and the Government was liable for damages. Even assuming that the jawans found the wood lying on the river side and took them away *bona fide* thinking that it belonged to the Government, the State was liable to compensate the plaintiff when ultimately it was found to belong to the plaintiff. Reasoning was that the illegal act in carrying away the fire wood could be committed by the military jawans by carrying it through any other truck which any private person could do.

In *Baxi Amrik Singh v. Union of India*,<sup>2</sup> an army driver while driving an army truck caused accident to the plaintiff. At the time of accident the driver was deputed on duty for checking military personnel on duty for the whole day. The Court held that the accident was caused in discharge of the sovereign function of the State because only military personnel could be deputed to check the military personnel on duty. It was for this purpose that the army vehicle was placed at the disposal of the person deputed for duty and he himself drove the vehicle to go from place to place. This function cannot be entrusted to private individuals.

In *State v. Podmoloch*,<sup>3</sup> the plaintiff filed a suit for damages against the State of Orissa for injuries caused to him by the Orissa Military Police. The fact was that in apprehension of danger of attack on the office of the S. D. O. and its properties by an unlawful mob which resorted to violence, there was police cordoning in by O. M. P. under the control of supervisory officers and magistrates without any orders from the magistrate or higher authorities the police personnel assaulted members of the mob as a result of which the plaintiff received injuries. The Court held that the injuries caused to the plaintiff by the police personnel with a view to disperse the unlawful crowd were in exercise of the sovereign function of the State. As the posting of police for the protection of its officers and properties was in exercise of the delegated sovereign function, the fact that the police committed excess in dis-

1. A. I. R. 1972 J. & K. 22.

2. (1973) Punj. L. R. 1.

3. A. I. R. 1975 Orissa 41.

charge of their function without authority could not take away the illegal from the purview of delegated sovereign function. The State was held to be not liable for acts of the police.

In *Thangarajan v. Union of India*,<sup>1</sup> an army driver was deputed for collecting CO<sub>2</sub> gas from the factory and to deliver it to ship, I. N. S. Jamuna. As a result of rash driving he knocked down the appellant, a minor boy of aged about 10 years. It was held that the accident was caused to the plaintiff while the driver was driving the lorry for the purpose of supply of CO<sub>2</sub> gas to the ship, I. N. S. Jamuna, which was in exercise of sovereign function of the State for maintaining military purposes.

However, in view of the peculiar circumstances of the case, the Court strongly recommended to the Central Government to make an *ex-gratia* payment of Rs. 10,000 to the appellant. The Court said, "It is cruel to tell the injured boy who had suffered grievous injuries and was in hospital for over 6 months incurring considerable expenditure and has been permanently incapacitated that he is not entitled to any relief as he had the privilege of being knocked down by a lorry which was driven in exercise of sovereign functions of the State".

The rule of liability of the State for torts of its servants as laid down in the *Steam Navigation's* case is very outmoded. In the modern age when the activities of the State have vastly increased, it is very difficult to draw a distinction between sovereign and non-sovereign functions of the State. The increased activities of the State have made a deep impact on all facets of an individual's life, and therefore, the liability of the State should accordingly be made co-extensive with its modern role of a welfare State and not be confined to the era of *laissez faire* (individualism), which the *P. and O. Steam Navigation's* case signifies.<sup>2</sup>

1. A. I. R. 1975 Mad. 32.

2. Jain, M. P.—*Indian Constitutional Law*, 1962 edition, p. 568.

## Right to Property (Art. 300-A)

This new Chapter has been added to the Constitution by the (*44th Amendment Act, 1978*). The amendment takes away the right to property as a fundamental right and makes it only a legal right which will be regulated by ordinary law. Consequently, Arts. 19 (f) and 31 have been deleted. However, Art. 31 has reappeared, though in part, as a new Art. 300-A under the present Chapter.

Article 300-A provides that "no person shall be deprived of his property save by authority of law".

Thus the only condition to be complied with for the acquisition of private property under the new Art. 300-A will be a law of the Legislature. The purpose for which property will be taken away or whether any compensation will be paid (both these conditions were necessary under repealed Art. 31) will be determined by the Legislature.

The effect of the amendment is that for violation of his right to property under Art. 300-A a person will not be entitled to invoke the writ jurisdiction of the Supreme Court under Art. 32.

The Janata Government was committed to the electorate for the abolition of the right to property as a fundamental right.

The abolition of the right to property as a fundamental right has been criticised by constitutional Jurists. Mr. H.M. Seervai, an eminent constitutional jurist is of opinion that the abolition of the right to property as fundamental right would destroy other fundamental rights which are embodied in the Constitution. A party pledged to restore fundamental rights to the people cannot derogate a right which is essential for the existence of other valuable rights. It is enough to say, he says, that the fundamental right to the freedom of speech and expression (which includes the freedom of the press) and freedom of association, the freedom to move freely throughout the territory of India, to settle in any part of India, to carry on business, profession or vocation in any part of India would be destroyed if the right to property is not guaranteed as a fundamental right and the obligation to pay compensation for private property, acquired for public purpose is not provided for.<sup>1</sup>

Since Article 31 which dealt with the right to property now reappears as a new Art. 300-A, the commentary on the old Article is 'therefore' retained.

**Eminent Domain.**—Every Government has an inherent right to take and appropriate the private property belonging to individual citizen for public use.<sup>2</sup> This power is known as *Eminent Domain*. It is the offspring of political necessity. The right rests upon the famous maxim—*salus populi est suprema lex*—which means that the welfare of the people or the public is the paramount

1. Seervai, *The Emergency, Future Safeguards in the Habeas Corpus case*. A criticism, pp. 150, 151.
2. *Charanjit Lal v. Union of India*, A. I. R. 1951 S. C. 41 (B. K. Mukerjee, J.).

law and also on the maxim *necessita public major est quam*, which means "public necessity is greater than private".<sup>1</sup> Thus property may be needed and acquired under this power for Government offices, libraries, slum-clearance projects, public schools, colleges and universities, public highways, public parks, railways, telephone lines, dams, drainages, sewers and water systems and many other projects of public interest, convenience and welfare.<sup>2</sup> The exercise of such power (compulsory acquisition by State) has been recognised in the jurisprudence of all civilised countries as conditioned by public necessity and payment of compensation.<sup>3</sup> But the power is subject to restrictions provided in the Constitution. In America there are three limitations on the power of *Eminent Domain*—(1) there must be a law authorising the taking of property, (2) property must be taken for public purpose, and (3) just compensation should be paid.

In India, Article 31 imposed similar limitations on this power of *Eminent Domain*. The new Art. 300-A imposes only one limitation on the power of *Eminent Domain*, i. e. the authority of law.

#### **1. No deprivation of property except by authority of law.**

Article 31 (1) provided that no person shall be deprived of his property except by authority of law. This means that the State has authority to take away the property of an individual but it can do so only by authority of law. Thus Article 31 (1) guaranteed that a person cannot be deprived of his property merely by an executive fiat or order. It is only by the exercise of its legislative powers that the State can deprive a person of his property. In *Wazir Chand v. State of H. P.*,<sup>4</sup> it was held that illegal seizure of goods in possession of the petitioner in India under no authority of law at the instance of the Jammu and Kashmir police was clearly an infringement of the fundamental right under Article 31 (1).

The protection of Article 31 (1) extends to citizens as well aliens. But Article 31 (1) is not attracted where a person is deprived of his property by action of another private person.<sup>5</sup>

**Copulsory Acquisition : Art. 31 (2).**—Prior to the Constitution (Fourth Amendment) Act, it was as follows :

(2) No property movable or immovable including any interest in or in any company owning commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which and the manner in which the compensation is to be determined and given.

The Fourth Amendment substituted a new clause for clause (2) of Article 31 and also introduced an entirely new clause (2-A) which was as follows :

1. Quoted in Agarwal's Fundamental Rights and Constitutional Remedies, Vol 1, 1st edition, p. 384.
2. Dr. V. N. Shukla : The Constitution of India, 1969 Ed., p. 144.
3. *State of Bihar v. Kamleshwar Singh*, A. I. R. 1952 S. C. 252.
4. A. I. R. 1954 S. C. 415.
5. *P. D. Shambudhani v. Central Bank*, A. I. R. 1952 S. C. 59.

- (2) No property shall be *compulsorily acquired or requisitioned* for a public purpose and save by authority of law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which the compensation is to be determined and given; and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate.
- (2-A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

It is to be noted that the words used in unamended Article 31 (2) were "taken possession of or acquired" while the words used in amended Article 31 (2) were "compulsorily acquired or requisitioned".

Article 31 prior to the Fourth Amendment had been considered in *State of West Bengal v. Subodh Gopal Bose*.<sup>1</sup> In this case respondent, a purchaser of certain property at a Revenue sale, acquired under the Bengal Revenue Sales Act, 1859, the right "to avoid and annul all under-tenures and forthwith to eject all under-tenants". In a suit for eviction of under-tenants in exercise of that right he obtained a decree. While an appeal against the said decree was pending, the Act was amended. The amending Act provided that all pending suits, appeals and other proceedings which had not already resulted in delivery of possession, would abate. The respondent challenged the validity of the amending Act as abridging the right under Article 31 as it made no provision for paying compensation to the purchaser. The Court held that clauses (1) and (2) should be read together and they deal with the same subject, namely, the limitation on the State's power. The deprivation contemplated in clause (1) is not different than the acquisition or taking possession of property referred to in clause (2). If a person is "substantially dispossessed", or if his right to use and enjoy his property has been seriously impaired or the value of the property is materially reduced by the impugned law, it would amount to deprivation and then compensation must be paid to them. Any law which authorised such deprivation must provide for payment of compensation regardless whether there was a transfer of title or possession to the State or not. The Court, however, held the law valid on the ground that the abridgement of the right of the respondent was not so substantial as to amount to the deprivation of the right of the property under Art. 31.

In *Dwarkadas v. Sholapur Spinning and Weaving Co.*,<sup>2</sup> the Government by an Ordinance vested the management of the Sholapur Mills in directors appointed by the Government because there was a danger of Mill being closed down due to mismanagement. The plaintiff, a shareholder of the Company, challenged the validity of the Ordinance on the ground that it made no provision for compensation to the shareholders who had been deprived of the right of management and administration of his Company. The Government contended that the law did not infringe Article 31 (2) because the State had not acquired title in property of the Company but possession has been taken

1. A. I. R. 1954 S. C. 92.

2. A. I. R. 1954 S. C. 119, followed in *Saghir Ahmed v. State of U. P.*, A. I. R. 1954 S. C. 728.

over temporarily for the purpose of management. It had not been requisitioned for the State purpose. The Supreme Court accepted the contention of the petitioner and declared the law invalid. It was held that since the shareholders' right to manage and administer their own affairs was taken away, the action of the State amounted to deprivation of property under Article 31 (2).

The result of the decisions in *Subodh Gopal* and *Sholapur Mills*' cases was that compensation was to be paid whether there was transfer of property or possession to the State or not. The words "acquisition" and taking possession" used in Article 31 (2) had the same meaning as the word "deprivation" in Article 31 (1). Article 31 gave protection to private property as against State action, no matter by what process a person is deprived by possession of it. This meant that the State had to pay compensation even when a mere regulatory law like the Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance, 1950, curtailed the right to property of an individual. This appeared to restrict too much the capacity of the State to regulate economic affairs of the country specially in this era of nation building.<sup>1</sup>

**Fourth Amendment 1955**—was enacted to remove the difficulties arising out of the decisions in the above cases. The Amendment replaced the words "taking possession of or acquired" by "compulsorily acquired or requisitioned". A new clause (2-A) was added to Article 31 in order to explain these words. It lays down that where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisition of property, notwithstanding that it deprives any person of his property.

The Fourth Amendment—made it clear that clauses (1) and (2) of Article 31 were not the same ; they deal with different subjects. Clause (1) provided for 'deprivation' and clause (2) provided for 'compulsory acquisition or requisition'. Compensation was payable only when property was compulsorily acquired or requisitioned under clause (2). According to clause (2-A) unless a law did not provide for the transfer of the ownership or right to possession of any property to the State or Corporation owned and controlled by State it would not be deemed to provide for the compulsory acquisition or requisition of property notwithstanding that it deprived any person of his property under clause (1) he has no right to claim compensation nor there is any legal obligation on the State to pay compensation. The adequacy of compensation was made non-justiciable. Amended Article 31 (2) provided that no property shall be compulsorily acquired (1) except for a public purpose, and (2) the law authorising acquisition must either fix the amount of compensation or specify the principles on which and the manner in which the compensation is to be determined and given, and no such law shall be called in question in any court on the ground that compensation provided by that law is not adequate.

## 2. Public purpose.

As originally enacted, Article 31 (2) provided that State can acquire or requisition property only for a "public purpose". The Constitution has not defined the word "public purpose". No hard and fast definition can be laid down as to what is a public purpose as the concept has been rapidly changing

1. Jain, M. P.—*Indian Constitutional Law*, 1962 ed., p. 456.

(2) No property shall be *compulsorily acquired or requisitioned* for a public purpose and save by authority of law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which the compensation is to be determined and given; and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate.

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1. A. I. R. 1954 S. C. 92.

2. A. I. R. 1954 S. C. 119, followed in *Saghir Ahmad v. State of U. P.*, A. I. R. 1954 S. C. 728.

However, it is interesting to note the history of the dispute over the word "compensation" as originally provided by the Constitution.

Prior to 4th Amendment 1955—Prior to the Constitution (4th Amendment) the word 'compensation' was interpreted as full compensation, i. e. the full monetary value of the property acquired. *State of West Bengal v. Bella Banerjee*,<sup>1</sup> is the leading case on the unamended Article 31 (2). In this case the Government acquired certain land in 1948 under a law passed by the West Bengal Legislature for resettling refugees. The compensation payable under the law to the owners of the land acquired was not to be more than that its market value on the date of acquisition, that is, December 31st, 1946. The Court held the law invalid on the ground that the Government had fixed the rate of compensation arbitrarily which has no relation to the market value of the land on the date of acquisition which might be much more than the price fixed. According to Court the word "compensation" meant "just equivalent" that is, full and fair money equivalent, of the property taken. What is just equivalent compensation is to be determined by the courts.

After the 4th Amendment of 1955 —The decision in *Bella Banerjee's case*<sup>2</sup> made it difficult for the Government to take private property for public purpose without paying full compensation. Consequently, Article 31 (2) was amended by the Constitution (Fourth Amendment) Act, 1955, which made it clear that "no law providing for compulsory acquisition or requisition of private property shall be called in question in any court on the ground that the compensation provided by that law is not 'adequate'".

After the Fourth Amendment it was hoped that the question of adequacy of compensation was settled for ever. But unfortunately this hope was belied by the Supreme Court which preferred to stick to its pre-Fourth Amendment view. It appeared from its later decisions that so long as the word "compensation" was there it would be interpreted as meaning full and fair compensation.

The amended clause came for consideration in the case of *Vajravelu v. Special Deputy Collector*.<sup>3</sup> In this case the constitutional validity of the Land Acquisition (Madras Amendment) Act, 1961, was challenged as discriminatory with regard to the issue of compensation. It was contended on behalf of the State that after the (Fourth Amendment) Act, 1955, no court had jurisdiction to question a law for acquisition or requisition because the issue of adequacy or inadequacy of compensation has been made a non-justiciable issue. The Court held after the amendment the law of acquisition or requisition of property is not wholly immune from the scrutiny by the court. Though under amended Article a law fixing amount of compensation cannot be questioned in any court of law on the ground that the compensation fixed by that law was adequate. If, however, the compensation fixed is "illusory" or the 'principles' prescribed for determining it were not relevant to the value of the property acquired at or about the time when it was acquired, the court could declare the law in question invalid as a fraud on the Constitution.

Thus the Court accepted the meaning of the expression 'compensation' and 'principles' as defined by it in *Bella Banerjee's case*.<sup>4</sup> The court said that

1. A. I. R. 1954 S. C. 170.

2. Ibid.

3. A. I. R. 1965 S. C. 1071.

4. A. I. R. 1954 S. C. 170.

in all countries.<sup>1</sup> The concept of public purpose is not static but dynamic and depends on the needs and requirements of the public or community at a given time and place. The essence of public purpose is the public welfare. According to Das, J., "whatever is for the general interest of the community as opposed to particular interests of the individual must be regarded as public purpose". .... In the never-ending race the law must keep pace with the realities of the social and political evolution of the country as reflected in the Constitution. If, therefore, the State is to give effect to these avowed purposes of our Constitution, we must regard as public purpose all that will be calculated to promote the welfare of the people as envisaged in the Directive Principles (Articles 38 to 49) of State Policy, whatever else that expression may mean.<sup>2</sup> It is not necessary that the property taken must be made available to the public at large or that the public benefit, aimed at must apply to whole community even if the requisition benefits only certain individuals it may still be for a public purpose.

A few examples will make the subject more clear. Requisitioning of a building for accommodation for an individual having no accommodation, and requisitioning of a building for a member of the staff of a foreign consulate,<sup>4</sup> elevating the status of tenants by conferring bhoomidhatri rights,<sup>5</sup> rehabilitation and settlement of refugees have been held to be a public purpose. But the property of an individual cannot be acquired for private purposes.

**Justiciability of public purpose.**—The question whether the deprivation of private property is for a public purpose is a justiciable issue. It is the duty of the Court to see that no acquisition of property is allowed for other than a purpose. In *State of West Bengal v. Mrs. Bella Banerjee*,<sup>6</sup> the Supreme Court held that the declaration of Government is not final on the question of public purpose. The Court will determine the matter whether requisition is for public purpose or not.

### 3. Justiciability of compensation.

The third limitation on the power of the State to requisition private property for a public purpose was that it must pay 'compensation' to a person whose property is taken over. It provided that either it should fix the amount of compensation for the property acquired or requisitioned, or it should specify the principle on which and the manner in which the compensation is to be determined. It was the duty of the Legislature to lay down the principles on which compensation was to be given. This power cannot be left to the discretion of the Executive. In *State of Rajasthan v. Nath Mal*,<sup>7</sup> a law which authorised the Government to acquire or requisition the property on payment of compensation at any rate fixed at its discretion was held contrary to Article 31 (2) on the ground that it had not laid down any principles on which compensation was to be paid.

The 25th Amendment substituted the word "amount" for the word "compensation" in Art. 31 (2) of the Constitution.

1. *State of Bihar v. Kameshwar Singh*, A. I. R. 1952 S. C. 252.
2. *Moosa v. State of Kerala*, A. I. R. 1960 Ker. 355.
3. *Somavanti v. State of Punjab*, A. I. R. 1963 S. C. 151.
4. *State of Bombay v. Bhanji Munji*, A. I. R. 1955 S. C. 41.
5. *State of Bombay v. Ali Gulshan*, A. I. R. 1955 S. C. 810
6. A. I. R. 1944 S. C. 170.
7. A. I. R. 1954 S. C. 307.

justiciable. If the amount of compensation fixed by the Legislature is not liable to be canvassed before the court on the ground that is not a just equivalent, the principles of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not just equivalent. However, the principles may still be challenged on the ground that they are irrelevant to the determination of compensation but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation. It is certainly out of the question that adequacy of compensation (apart from compensation which is illusory or proceeds upon principles irrelevant to its determination) should be questioned after the amendment of the Constitution. This meant that the Court will exercise its power only where the principles were "irrelevant" to the determination of the compensation or the compensation so determined was "illusory". In the present case, however, the Court held the Act constitutional on the ground that the principles fixed by it were "relevant" to the determination of compensation and the compensation was not illusory.

It appears strange that the compensation paid at the market rate prevalent in 1942 for the property acquired in 1957 was held, in the opinion of the Court not to be illusory.

However, the effect of the *Shanti Lal Mangaldas* case did not last long. In *R. C. Cooper v. Union of India*,<sup>1</sup> popularly known as the *Bank Nationalisation* case, the Supreme Court once again reversed the process and virtually nullified the Constitution (Fourth Amendment) Act, 1955. In this case, the constitutional validity of the Bank Nationalisation Act was challenged on the ground that it did not provide for proper compensation within the meaning of Article 31 (2). Section 4 of the Act transferred the undertaking of 14 named banks to and vested it in the corresponding new banks. Section 6 (1) provided for payment of compensation for acquisition of undertaking and the compensation was to be determined in accordance with the principles specified in the Second Schedule.

The Court said that the principles specified by the law for determining compensation cannot be challenged if it is relevant to the determination of compensation. But the Court refused to accept that a principle specified by Parliament for determining compensation is conclusive. If that view be accepted Parliament will be invested with a character of arbitrariness. The principle specified must be appropriate to the determination of compensation for the particular class of property. A method appropriate to the determination of value of one class of property may be wholly inappropriate in determining the value of another class of property. If several principles are appropriate, the court will not dispute the right of Parliament to select one of them for "selection must be left to the wisdom of the Parliament". According to the court "the broad object underlying the principles of valuation is to award to the owner the equivalent of his property its existing advantages and potentialities".

The majority said that the compensation should be provided for entire undertaking as a unit and not only for some of its components. The value of components is not necessarily the value of the entire undertaking especially when the property is a going concern with an organised business. No compensation has been paid for certain items of property, such as, the goodwill

even after the amendment the provision for compensation in Art. 31 (2) is a 'necessary condition' for making a law of acquisition or requisition. The fact that Parliament has used the same expressions, namely, 'compensation' and 'principles' in the Amended Article clearly shows that it accepted the meaning of those expressions as defined by the Court in *Bella Banerjee's case*.

In *Union of India v. Metal Corporation*,<sup>1</sup> the Supreme Court made another effort to protect private property by insisting on payment of adequate compensation in case of acquisition or requisition. The Court accepted the meaning of the word 'compensation' as defined in *Bella Banerjee's case* that the compensation must mean just equivalent value of the property acquired. In this case the Metal Corporation of India (Acquisition of Undertaking) Act, 1965, was declared to be invalid on the ground that it did not provide for 'compensation' within the meaning of Article 31 (2). The Government had acquired the metal corporation under the above Act. The Act had laid down two principles for the determination of compensation :—

- (1) The used plant, machinery or other equipment at the actual costs, and
- (2) those unused and in good condition at 'written-down value' known in Income-tax law.

The Court held that the principles were not relevant for determining the compensation of the property on the date of acquisition. Subba Rao, C. J., said, "It is common knowledge that there has been an upward spiral in prices of the machinery in recent years." "The cost price of a machine purchased about 10 years ago is a consideration not relevant for fixing compensation for its acquisition in 1965. The principles must be such as to enable ascertainment of its price at or about the time of its acquisition. Nor the doctrine of written-down value accepted in Income-tax law can afford any guide for ascertaining the compensation for the used machinery acquired under the Act....." The Court said that the meaning of Article 31 (2) would be clear if the two concepts—"compensation" and "jurisdiction" of the court were kept apart. The law to justify itself has, to provide for the payment of a just equivalent to the land acquired or lay down principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary the adequacy of the resultant product cannot be questioned in a court of law.

However, in *State of Gujarat v. Shantilal Mangaldas*,<sup>2</sup> the Supreme Court overruled the *Metal Corporation* case. The case concerned with the validity of the Bombay Town Planning Act, 1955. Under the Act, the Government issued a notification in 1942 to acquire a plot of land under the town development scheme. The actual acquisition took place in 1957 but the compensation was awarded on the basis of market value prevailing in 1942. Hidayatullah, C. J., delivering the judgment of the Court on behalf of the majority held that the adequacy of the compensation fixed by the Legislature or awarded according to the principles specified by the Legislature for determination is not

1. A.I.R. 1967 S.C. 637. (In this case it was held that the written down value of buildings, machinery and plant of an undertaking cannot be its market value. The written-down value means actual cost for which a capital was acquired less the depreciation allowance given in the Income-tax assessments. It is a depreciated value much less than the market value)
2. AIR 1959 SC 634 (overruling *Union of India v. Metal Corporation*, AIR 1967 SC 637).

justiciable. If the amount of compensation fixed by the Legislature is not liable to be canvassed before the court on the ground that is not a just equivalent, the principles of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not just equivalent. However, the principles may still be challenged on the ground that they are irrelevant to the determination of compensation but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation. It is certainly out of the question that adequacy of compensation (apart from compensation which is illusory or proceeds upon principles irrelevant to its determination) should be questioned after the amendment of the Constitution. This meant that the Court will exercise its power only where the principles were "irrelevant" to the determination of the compensation or the compensation so determined was "illusory". In the present case, however, the Court held the Act constitutional on the ground that the principles fixed by it were "relevant" to the determination of compensation and the compensation was not illusory.

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1. AIR 1970 SC 564.

and the value of unexpired portions of leases. The Act provides different methods of determining compensation in 'respect of each' such component. The methods adopted for valuation of compensation for the undertaking are irrelevant to the determination of compensation and therefore, the amount of compensation determined on the basis of those methods cannot be regarded as compensation. "By giving to the expropriated owner compensation in bonds which were to mature after many years, and whose market value on the date of expropriation did not approximate the amount determined as compensation, the guarantee under Article 31 (2) was violated.

The decision in the *Bank Nationalisation* case had been criticised by jurists as well as Parliamentarians. Among the critics the so-called socio-economic politicians are on the forefront. A feverish attack has been made on the judiciary, that it suffers from conservatism, that it should interpret the constitutional provisions to suit the changing needs of society; that it has stood in the way of implementation of Government's much talked about socio-economic policies, and retarded for the development of the nation and so on and so forth. Some of them have suggested that the power of the Supreme Court should be curtailed or the fundamental right to property should be removed from the Constitution.

On the other hand, it has been acclaimed as one of the courageous judgments given by the Supreme Court. The *Mirror*, a prominent Ceylonese newspaper, while commenting on the Supreme Court's judgment in the Banks Nationalisation case, has termed it as 'courageous' decision. It said "the inflexible independence of India's Supreme Court which nullified Prime Minister Indira Gandhi's bank banditry glows with added luminance amidst the dimming lights of democracy and in the gathering darkness of disintegration on the sub-continent". The newspaper concluded : this (judgment) should convince India, as it should Ceylon, that the judiciary is supreme. It is the inviolable sacred sanctuary of individual freedom. It must be without the slightest tinge or taint not only of corruption but of weakness. For, a weak judiciary that grounds before Government is a playing of politicians, is the ruin of a nation and the destruction of the people.<sup>1</sup>

While inaugurating the Third Conference of Commonwealth Chief Justices in New Delhi, President V. V. Giri said "A Constitution is not intended to be a static document. In a developing society its provisions must lend themselves to the changing needs and requirements of the society". No one will deny the fact that the Constitution is not a static document and it is necessary from time to time to adjust constitutional provisions to the changing needs and requirements of the society. But such an adjustment is to be brought about by the Legislature through an amendment of the Constitution and not by the Judiciary. A judge interprets the Constitution ; He does not amend it. Quoting the above observation of the President, the Northern India Patrika has, in its editorial, observed<sup>2</sup> : Every written Constitution is a brake on hasty response to the "changing needs and requirements of the society" when these "needs and requirements are deeply and widely felt, constitutional amendment follow" when these reflect sectional moods or political slogans ; the written Constitution serves as a dam against misdirected enthusiasm. The role of the judiciary is to protect the Constitution in its existing form till it is amended by lawful methods.....It would be wrong in principle and dangerous in practice, to leave to the judiciary the task of interpreting the Constitution, without due

1. See *Northern India Patrika*, 15th February, 1970.

2. See *Northern India Patrika*, 9th January, 1971.

regard for its written words, in accordance with their personal assessment of "the changing requirements of the society".

Former Chief Justice Mr. M. Hidayatullah observed that a judge is not competent to change the law to suit a particular ideology. If the law and provisions of the Constitution speak in certain way a judge should say so and not try to interpret it according to any ideology.<sup>1</sup>

The Supreme Court has not denied the right of the Parliament to nationalise banks. Instead, it has advised the Government to nationalise all banks. The Court had only said that the Government should pass a law in accordance with constitutional provisions. Who will deny the fact that the action of the Government was not hasty one and was to suit a particular ideology. It is, therefore, submitted that the charge levelled against the Court that it impedes "the social programmes the Government" fails.

As regards the suggestion that the right to property should be removed from the Constitution it would be better to cite another judge of the Supreme Court. Mr. Justice Hegde who warned that the end of the right to property may make the Government reckless and would enable it to take over "every type of property from every one". He said "history has shown the popularly elected Legislatures has also at certain stages in a nation's life not hesitated to destroy the rights of citizens. There are times in a nation's life when emotions takes the place of reason and wisemen's voices are muffled." According to him the fundamental rights embodied in the Constitution were nothing but the "minimum rights" which an individual in any country should have for living in full life.

Referring to the popular criticism that some of the provisions of the Constitution and the attitudes of the Supreme Court had come in the way of implementing the directive principles, he asked "no one has told us why the State did not implement the mandates of the Constitution, to have equal pay for equal work for both men and women, to have uniform education for all children until they complete the age of 14 years and make effective provisions for securing the rights to work, to education and to public assistance in cases of unemployment, sickness and disablement and in other cases of undeserved want". A Federal Constitution would become 'meaningless' without the court. The critics of the court are only obviously those who have no faith in the fundamental rights guaranteed under the Constitution. Today, it was the wings of the court that were sought to be clipped but this very precedent might be enough in the future for doing away with those of the Legislature. If mass hysteria could be roused against one organ of the State, it could be equally roused against the others. In the end of his lecture Mr. Justice Hegde expressed the hope that the Constitution which has also been designed to be flexible enough to allow the orientation and re-adjustment necessary to administrative and judicial process "will be given a fair trial and is not condemned for our failures."<sup>2</sup>

We must agree that there are provisions in the Constitution which enable the State to prevent concentration of wealth and to curb exploitation without destroying the fundamental rights of citizens. The State had ample powers

1. See Northern India Patrika, dated 18th December, 1971.

2. Northern India Patrika, 28th March, 1972. The above observation was made by Justice Hegde while delivering a lecture on "Prospectives of the Constitution" a Part of the Babu Rajendra Prasad Memorial Lecture Series sponsored by the Bharatia Vidya Bhawan.

and the value of unexpired portions of leases. The Act provides different methods of determining compensation in 'respect of each' such component. The methods adopted for valuation of compensation for the undertaking are irrelevant to the determination of compensation and therefore, the amount of compensation determined on the basis of those methods cannot be regarded as compensation. "By giving to the expropriated owner compensation in bonds which were to mature after many years, and whose market value on the date of expropriation did not approximate the amount determined as compensation, the guarantee under Article 31 (2) was violated.

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1. See Northern India Patrika, 15th February, 1970.

2. See Northern India Patrika, 9th January, 1971.

ground that it infringes Articles 14, 19 and 31. Clauses (b) and (c) of Article 39 provide :—

- (d) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ;
- (e) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Article 31-C was the most objectionable part of the new amendment. It empowered the State to acquire private property towards securing the above principles. But who will decide whether a law is really for giving effect to the above policy or not ? The amendment bars jurisdiction of the court to examine this question. The determination of the Government was made final.

Jurists had expressed views against Article 31-C., Former Attorney-General of India, M. C. Setalvad said that the 25th Amendment in respect of Article 39 (b) and 39 (c) was an "unwise step and complete negation of rule of law". He said that the process of democracy has not yet settled down in many States and majority was converted into minority and vice versa with spate of defections every now and then. If the States were empowered to legislate on Articles 39 (b) and 39 (c) then different States could enact conflicting legislations in fulfilment of agrarian reforms and other subjects contained in the Directive Principles.<sup>1</sup>

The Law Commission had also expressed views against this Article. It had suggested that the court should be given power to judge whether a law fell within the scope of Articles 39 (b) and 39 (c). But the Government did not accept the suggestions of the Law Commission.

This Article gave very wide powers to the Government which could be used to acquire any property of anybody in the garb of giving effect to the policy contained in clause (b) or (c) of Article 39 without giving any compensation. While nobody would object to giving effect to the State policy for securing the principles specified in Article 39 (b) and 39 (c) but it is submitted that such laws should be made justiciable so that no Government can with an ulterior motive deprive a person of his property without payment of compensation. The amendment gave unfettered power to the Government to deprive a person of his property without payment of compensation and also shuts out the doors of the court to get the remedy of getting the law tested by the Judiciary. Fortunately, the second part of Article 31-C of the 25th Amendment was struck down by the Supreme Court in the *Fundamental Rights* case.

In *Keshvanand v. State of Kerala*,<sup>2</sup> popularly known as the *Fundamental Rights case*, the constitutional validity of (25th Amendment) Act, *inter alia*, was challenged. A special Constitution Bench of 13 judges was constituted to hear the case. All the judges wrote their separate judgments. The majority opinion may, however, be summarised as follows :

*Clauses 2-A and 2-B of the Constitution (25th Amendment) Act, 1972 valid.*—Clause 2-A provides that a law providing for take-over of private property cannot be challenged in a court of law on the ground that the "amount" fixed by it or determined in accordance

1. Northern India Patrika, 8th November, 1971.  
1. A. I. R. 1973 S. C. 1461.

in India to make laws to bring about all agrarian reforms unhampered by fundamental rights.

Despite jurists' opinions against it, the Government passed the Constitution (25th Amendment) Act, 1971. This Act, according to the Government, was passed to remove the difficulties created by the decision of the Supreme Court in the *Bank Nationalisation* case.

**The Constitution (25th Amendment) Act, 1971.**—After this amendment the language of clause (2) of Art. 31 stood as follows :

"No property shall be compulsorily acquired or requisitioned save for a public purpose and save by the authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or may be determined in accordance with such principles and given in such manner as may be specified in such law ; and no such law shall be called into question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash :

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2-B) Nothing in sub-clause (f) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2).

(31-C) Notwithstanding anything contained in Article 31 no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31 ; 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 :

Provided that where such law is made by the Legislature of a State, the provision of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

The changes brought about by the amendment may be summed up as follows :

- (1) It replaces the word "compensation" by "amount" thus barring the courts effectively and finally from going into the adequacy of the payment made for the acquired property. Under this Article the State can deprive a person of his property without paying any compensation. Of course it has to pay some amount which may be only nominal, but the court will not be able to go into the question whether the amount so fixed is adequate or not.
- (2) The new Article 31-C empowers the Parliament as well as State Legislatures to enact laws towards securing the principles specified in Article 39 (b) and (c). Such laws cannot be challenged on the

**42nd Amendment Act, 1976.**—This amendment amended Art. 31-C again and widened its scope so as to cover all directive principles. Article 31-C as inserted by the Constitution (25th Amendment) Act, 1971, gave precedence only two directive principles mentioned in Article 39 (b) and (c) over fundamental rights. The Constitution (42nd Amendment) Act, 1976 gives precedence to all directive principles over the fundamental rights of citizens. The effect of the (42nd Amendment) Act, 1976, is that a law passed by Parliament and the State Legislatures for giving effect to any of the directive principles cannot be challenged on the ground that it is inconsistent with or takes away or abridges the rights conferred by Articles 14, 19 and 31 of the Constitution.

**State enacted Compulsory acquisition Laws.**—Clause (3).—This clause was an additional restriction on the power of the State making laws for compulsory acquisition of private property in addition to the two restrictions on such laws—public purpose and compensation. According to this clause no such law made by the State Legislature shall have effect unless it has received the assent of the President.

**Exception to Article 31 (2).**—Clause (4) of Article 31 deals with pending Bills in a State Legislature relating to acquisition of property by the State at the commencement of the Constitution. If such a Bill is passed by the Legislature and assented to by the President it is immune from the compensation clause of Article 31 (2). This means that validity of such a law cannot be questioned on the ground that it does not provide for compensation or is not for a public purpose. It is to be noted that such a law can be challenged on the ground that it violates any other provisions of the Constitution. In *Kameshwar Singh v. State of Bihar*,<sup>1</sup> the Patna High Court held that the Bihar Land Reforms Act, 1951, contravened Article 14 for the classification of Zamindars for the purpose of payment of compensation was found to be discriminatory. The decisions in *Kameshwar Singh's* case, led to the addition of Articles 31-A and 31-B by the Constitution (First Amendment) Act, 1951, placing certain Acts and Regulations beyond the challenge that they were inconsistent with or took away or abridged any of the rights conferred by any provision of Part III of the Constitution.

Article 31 (6) saved the validity of certain existing laws enacted by a State Legislature within 18 months before the commencement of the Constitution, provided they were submitted to the President within three months from the commencement of the Constitution for the certification of the President and were certified by the President.

Clause (5) (a) of Article 31 saved from the operation of Article 31 (2) existing laws other than a law to which the provisions of clause (6) apply. Clause (5) (b) saves future law made for (a) the purposes of imposing or levying any tax or penalty, (b) promotion of public health or the prevention of danger to life or property, and (c) in pursuance of any agreement entered into between the Government of India and the Government of any country relating to evacuee property.

1. A. I. R. 1951 Pat. 91.

with principles specified in such law is not adequate or not paid in cash. Thus the new clauses by substituting the word "amount" for the word "compensation" finally makes the adequacy of compensation a non-justiciable issue which had hitherto been the main bone of contention between the Judiciary and the Legislature.

Although all the 13 judges were unanimous in upholding the validity of the above clauses however they differed on the question whether the law fixing the amount or laying down the principles for the determination of amount for the acquired property is justiciable or not.

The majority held that amount fixed or determined must have a reasonable relationship to the value of the property acquired. If the amount fixed is 'illusory' and has no relation to the property sought to be acquired or requisitioned the courts can strike down such a law as invalid. Hegde and Mukerjea, JJ., observed that the new substituted Article 31 (2) did not destroy the right to property because—

- (a) the fixation of 'amount' under that Article should have reasonable relationship with the value of the property acquired or requisitioned;
- (b) the principles laid down must be relevant for the purpose of arriving at the "amount" payable in respect of the property acquired or requisitioned;
- (c) the amount fixed should not be illusory; and
- (d) the same should not be fixed arbitrarily.

Whether "amount" fixed had been fixed arbitrarily or was illusory or the principles laid down for determining the amount was relevant to the subject-matter of acquisition or requisition at the time when the property if acquired or requisitioned are open to judicial review. But it is not open for the court to consider whether the amount fixed or to be determined on the basis of principles laid down is adequate. Though the adequacy of amount fixed or determined on the basis of the principles laid down for determining the amount is not justiciable yet if what works out after applying these principles is arbitrary or illusory the court will interfere.

As regards Article 31-C the majority held that the first part of Article 31-C is valid. The first part of Article 31-C provides that a law giving effect to the principles specified in clauses (b) and (c) of Article 39 shall not be questioned on the ground that it is inconsistent with or takes away or abridges the rights conferred by Articles 14, 19 and 31. The second part, which provides that "no law containing a declaration that it is for giving effect to such policy be called in question in any court on the ground that it does not give effect to such policy" is invalid. According to Mr. Justice Khanna the judicial review is the basic structure of the Constitution and the exclusion by the Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The Legislature has been made the final authority to decide whether the tax made by it is for the objects mentioned in Article 31-C. The vice of second part of Article 31-C lies in the fact that even if the law enacted is not for the objects mentioned in Article 31-C the declaration made by the Legislature precludes a party from showing that the law is not for that object and prevents a court from going into question as to whether the law enacted is really for the object.

In India the Constitution itself lays down restrictions on Article 301. The restrictions are contained in Articles 302 to 305. This is necessary because no freedom is 'absolute' and even in Australia the freedom is not 'absolute' but 'regulated' and 'relative'.

Article 301 applies not only to inter-State trade but also intra-State trade, commerce and intercourse. Thus Article 301 will be violated whether restrictions are imposed at the frontier of a State or at any stage prior or subsequent. The freedom guaranteed by Article 301 is freedom from all restrictions, except those which are provided for in the other provisions of Part XII, i. e. Articles 302 to 305. The freedom guaranteed by Article 301 is in the widest terms and applies to all forms of trade, commerce and intercourse. It is subject only to restrictions specified in Articles 302 to 305. These provisions clearly show that the guarantee under Article 301 cannot be taken away by an executive action.<sup>1</sup> Restrictions from which the freedom is guaranteed should be such restriction as directly and immediately restrict the free-flow of movement of trade and not from incidental or indirect restriction.<sup>2</sup>

The word 'free' in Article 301 does not mean freedom from regulation. There is a clear distinction between laws interfering with freedom to carry out the activities constituting trade and laws imposing rules of proper conduct or other restraints for the due and orderly manner of carrying out the activities. This distinction is known as regulation. The word 'regulation' has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied.

A purely regulatory and compensatory law cannot be regarded as violative of the freedom of trade and commerce. Such laws are intended merely to regulate trade and commerce, they tend to facilitate, and not restrict or restrain freedom of trade. Thus, such measures as traffic regulations, licensing of vehicles, marketing and health regulations, price control, prescribing minimum wages are purely regulatory measures. Likewise, a law which levies a tax or toll for the use of a road or bridge is not a barrier or burden on trade but in reality helps the free-flow of trade by enabling the provision of a more convenient and less expensive route. Such compensatory taxes are no hindrance to any such freedom of trade so long as they are within reasonable limits; if the amount of such taxes are unduly high it certainly would hamper trade. In this connection, the Court pointed out that the distinction between 'freedom' in Article 301 and 'restriction' in Articles 302 and 304 must be kept in mind, and that which, in reality facilitates trade cannot be a restriction while that which actually hampers trade will be a restriction.<sup>3</sup>

In *State of Mysore v. H. Sanjeeviah*,<sup>4</sup> the Government made a rule under the Mysore Forest Act, 1900, banning movement of forest produce between sunset and sunrise. The Supreme Court held the rule void as it was not a 'regulatory' but 'restrictive' measure which infringes the right guaranteed under Article 301.

In *Atiabari Tea Co. v. State of Assam*,<sup>5</sup> the validity of the Assam Taxation (or Goods Carried by Roads or Inland Waterways) Act of 1954 was

1. District Collector, Hyderabad v. Ibrahim & Co., A. I. R. 1970 S. C. 1255.
2. Automobile Transport v. State of Rajasthan, A. I. R. 1962 S. C. 1406.
3. A. I. R. 1967 S. C. 1189.
4. A. I. R. 1951 S. C. 232, Sinha, C. J., gave a dissenting judgment. He held that taxation simpliciter as opposed to discriminatory taxation was not within Article 301.

## Freedom of Trade, Commerce and Intercourse (Arts. 301 to 307)

In all federations an attempt is made through constitutional provisions to create and preserve a national economic fabric to remove and prevent local barriers to economic activity, to remove the impediments in the way of inter-State trade and commerce and thus to make the country as one single economics unit so that the economic resources of all the various units may be utilized to the common advantage of all.<sup>1</sup>

**The object of such provisions in a Federal Constitution.**—The framers of the Indian Constitution were fully conscious of the importance of maintaining the economic unity of the Union of India. Free movement and exchange of goods throughout the territory of India was essential for the economic unity of the country which alone could sustain the progress of the country. Prior to the integration of India and the new Constitution there were in existence a large number of Indian States which in exercise of their sovereign powers, had created customs barriers between themselves and the rest of India, thus hindering at several points which constituted the boundaries of those Indian States, the free-flow of commerce. Thus the main object of Article 301 was obviously to breakdown the border barriers between the States and to create one unit with a view to encouraging the free-flow of stream of trade and commerce throughout the territory of India.<sup>2</sup>

Article 301 of the Constitution of India declares that trade, commerce and intercourse throughout the territory of India shall be free. Article 301 of the Indian Constitution is modelled on section 92 of the Australian Constitution which says that....."trade and commerce and intercourse among the States whether by means of internal carriage or ocean navigation, shall be absolutely free. In its historical context this section was intended to abolish State custom barriers. But as a result of judicial decisions, it applies to both the Commonwealth as well as the States. This was recognised in the decision of *James v. Commonwealth of Australia*,<sup>3</sup> in which a Commonwealth statute requiring a licence for inter-State shipments of dried fruits, was declared unconstitutional by the Privy Council. But the freedom in India is wider than that in Australia under section 92 while section 92 refers to inter-State trade only. Article 301 includes both the freedom of inter-State and intra-State, i. e., within the territory of State trade and commerce. Thus it imposes a restriction on the legislative power of both Parliament and the State Legislature. The presence of word 'absolutely free' in Australian Constitution presented many difficulties in that country. Trade and commerce could not be regulated by the Centre. The restriction was to be spelled out by the Courts.

1. Jain, M. P. : Indian Constitutional Law.

2. *Atisbari Tea Co. Ltd. v. State of Assam*, A. I. R. 1961 S. C. 232.

3. (1936) A. C. 578. See also *Bank Nationalisation case*, (1950) A. C. 235.

conferred by the legislative entries relating to trade and commerce or production, supply and distribution of goods, but also to all laws including tax laws.

(4) Only those laws whose direct and immediate effect is to inhibit or restrict freedom of trade or commerce will come within the mischief of Article 301.

(5) Laws which are merely regulatory or which impose purely compensatory taxes, and hence intended to facilitate freedom of trade, are outside the scope of Article 301.<sup>1</sup>

In *G. K. Krishna v. State of Tamil Nadu*,<sup>2</sup> the petitioner challenged the validity of a Government Notification under the Madras Motor Vehicles Taxation Act, 1931, enhancing motor vehicles tax on omnibuses from Rs. 30 per seat per quarter to Rs. 100 per seat per quarter on the ground *inter alia* that the tax imposes restriction on the freedom guaranteed by Article 301. He claimed that the tax is neither compensatory nor regulatory in character and therefore it is a restriction on the freedom of trade, commerce and intercourse, and as the Notification is not a law passed with the previous sanction of the President, it would not be saved by Article 301 (b). On behalf of the Government it was claimed that this measure was taken with a view to avoid unhealthy competition between omnibuses and regular stage-carriage buses and to put down the misuse of omnibuses.

The Supreme Court held that the tax on contract carriages imposed by the Government Notification is compensatory in nature and could not therefore restrict the freedom guaranteed in Article 301. The Court said that regulations like rules of traffic facilitate freedom of trade and commerce, whereas restrictions impede that freedom. The collection of toll or tax for the use of roads, bridges or aerodromes, etc. do not operate as barriers or hindrance to trade. For a tax to become a prohibited tax, it has to be a direct tax, the effect of which is to hinder the movement part of the trade. If the tax is compensatory or regulatory, it cannot operate as a restriction on the freedom of trade and commerce. The petitioners submitted that the impugned tax was not a compensatory tax as it included the cost of construction of new roads also. He argued that it is only for the use of the road in existence that the vehicle tax can be levied. The Court held, 'a compensatory tax' is based on the nature and the extent of the use made of the roads as, for example, a mileage or ton mileage charge or the like, and if the proceeds are devoted to the repair, upkeep, maintenance and depreciation of the relevant roads and the collection of the taxation involves no substantial interference with the movement. The very idea of a compensatory tax is service more or less commensurate with the tax levied. No citizen has a right to engage in trade or business without paying for the spacial service he receives from the State, that is part of the cost of carrying on the business. The motor vehicles require, for their safe, efficient and economical use, roads of considerable width, hardness and durability ; the maintenance of such roads will cost the Government money. The users of public motor vehicles stand in a special and direct relation to such roads, and derive a special and direct benefit from them, and therefore it does not seem unreasonable that they should be called upon to make a special contribution to their maintenance over and above their general contribution as taxpayers of the State. The enhanced tax is therefore valid.

1. Subramaniam, N. A.—Case-law on the Indian Constitution, 1969, p. 226.

2. A. I. R. 1975 S. C. 583.

challenged on the ground that it violated Article 301 of the Constitution and was not saved by Art. 304 (b). The petitioner carried on the business of growing tea and exporting it to Calcutta via Assam. While passing through Assam the tea was liable to tax under the said Act. The Supreme Court held that the impugned law undoubtedly levies a tax directly and immediately on the movements of goods and, therefore, came within the purview of Article 301. The Act was, therefore, held void. The Court said that taxes may and do amount to restrictions they directly and immediately restrict trade. In the instant case, the tax undoubtedly affected the free-flow of trade. Imposition of a duty or tax in every case would not be tantamount *per se* to an infringement of Article 301. Only such taxes or restrictions which directly or immediately impede the free-flow of trade, commerce and intercourse would fall within the purview of Article 301. A tax may in certain cases, directly or immediately, restrict or hamper the flow of the trade, but every imposition of tax does not do so. Every case must be judged on its own facts and in its own setting of time and circumstances.<sup>1</sup>

Such taxes could only be validly levied if the requirements of Article 304 (b) are satisfied, i. e. the previous sanction of the President before the State enacts such a law. This is a safeguard to ensure that the economic unity of the country is not disrupted by the State Legislature. In the present case, the requirements of Article 304 (b) had not been complied with. The Court said that the freedom guaranteed by Article 301 would become illusory if the movement, transport or the carrying of goods was allowed to be impeded, obstructed or hampered by taxation without satisfying the requirements of Articles 302 to 304.

In *Automobile Transport Ltd. v. State of Rajasthan*,<sup>2</sup> the appellants challenged the validity of the Rajasthan Motor Vehicles Taxation Act, 1951, *inter alia*, as violating Art. 301. The State Government imposed a tax on all motor vehicles used and kept within the State of Rajasthan. The Court held the tax valid as they were only regulatory measures imposing compensatory taxes for facilitating trade, commerce and intercourse. The direct and immediate restriction test laid down in *Atiabari's* case was affirmed by the Court with a clarification that regulatory measures imposing compensatory tax do not come within the purview of the restrictions contemplated in Article 301 and therefore such measures need not comply with the requirement of provisions of Article 304 (b). The effect of the majority decision in this case is that a compensatory tax is not a restriction upon the movement part of trade and commerce.

The majority judgment in the *Atiabari Tea Co.'s* case read with the majority judgment in the *Automobile's* case lead to the following principles relating to Article 301 :

(1) Article 301 assures freedom of inter-State as well as intra-State trade, commerce and intercourse.

(2) Trade, commerce and intercourse have the widest connotation and take in movement of goods and persons.

(3) The freedom is not only from laws enacted in the exercise of the powers

1. *State of Kerala v. Mother Provincial*, A. I. R. 1970 S. C. 2079.

2. A. I. R. 1962 S. C. 1906, followed in *State of Assam v. Labanya Probha*, A. I. R. 1967 S. C. 1575.

the question whether an Act providing for State monopoly in a particular trade or business conflicts with the freedom of trade and commerce, guaranteed by Article 301, but left the question undecided. Article 19 was amended by the Constitution (First Amendment) Act in order to take out such State monopolies out of the purview of Article 19 (1) (g). But no corresponding provision was added to Article 305. It appears from the judgment of the Supreme Court that in spite of such an amendment a law introducing such State monopoly might have to be justified before the Courts as being 'in the public interest' under Article 301 or as amounting to a 'reasonable restriction' under Article 306 (b).

But the Constitution (Fourth Amendment) Act now makes existing laws and future laws providing for State monopoly in trade immune from attack on the ground of infringement of Articles 301 and 303.

Article 307 empowers Parliament to appoint such authority as it considers appropriate for carrying out purposes of Articles 301, 302, 303 and 304. It can confer on such authorities such powers and duties as it thinks necessary.

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**Restrictions of Trade and Commerce.**—Article 301 is subject to the restrictions imposed under Articles 302 to 305 :

(1) **Parliament's power to regulate trade and commerce in the public interest.**—Article 302 authorizes Parliament to impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. The question whether a restriction imposed by Parliament by law is in the public interest or not is a justiciable issue. In that case Parliament is given the sole power to decide what restrictions can be imposed in the public interest as authorized by Article 302.<sup>1</sup> It has been held that restrictions imposed on the movement of grain under the Defence of India Rules are in the interest of general public.<sup>2</sup>

The power of Parliament under Article 302 is limited by Article 302 (1). Article 303 (1) provides that Parliament shall not have power to make any law giving any preference to any one State over another by virtue of any Entry relating to trade and commerce in any of the Lists in the Seventh Schedule. But under clause (2) of this Article the Parliament may, however, discriminate among States if it is declared by a law that is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. The question whether there is a scarcity of goods in any part of India is for the Parliament to decide.

(2) **State's power to regulate trade and commerce.**—Article 304 (a) empowers the States to impose any tax on goods imported from other State if similar goods in the State are subject to similar tax so as not to discriminate between goods so imported and goods manufactured or produced in that State. In *State of Madhya Pradesh v. Bhaiyal Bhai*,<sup>3</sup> a State law imposed sales tax on imported tobacco but locally produced tobacco was not subject to such sales-tax. The Court invalidated the tax as discriminatory.

Clause (2) of this Article authorizes the State to impose such reasonable restrictions on the freedom of trade, commerce and intercourse as may be required in the public interest. But no bill or amendment for this purpose can be introduced in the Legislature of State without the previous sanction of the Parliament. A law passed by a State to regulate inter-State trade and commerce must satisfy the following three conditions under Article 304 (b)—(1) previous sanction of the President must be obtained ; (2) the law must be in the public interest ; and (3) restrictions imposed by such a law must be reasonable. From the above it is obvious that Parliament has been vested with wide powers to regulate trade and commerce. The State power is subordinate to the Parliament regulatory measures. A State cannot enact regulatory laws without the sanction of the President. In the *Atiabari*'s case,<sup>4</sup> the State tax on the movement of goods was held invalid also on the ground that it was passed without the previous sanction of the President.

(3) **Savings of Existing Laws.**—Article 305 saves existing laws and laws providing for State monopolies in so far as the President may by order otherwise direct. In *Saghir Ahmad v. State of U. P.*,<sup>5</sup> the Supreme Court raised

1. *Atiabari Tea Co v. State of Assam*, A. I. R. 1961 S. C. 232.

2. *Surajmal Roopshand & Co. v. State of Rajasthan*, A. I. R. 1967 Raj. 104.

3. A. I. R. 1964 S. C. 1006.

4. A. I. R. 1961 S. C. 232.

5. A. I. R. 1954 S. C. 728.

the question whether an Act providing for State monopoly in a particular trade or business conflicts with the freedom of trade and commerce, guaranteed by Article 301, but left the question undecided. Article 19 was amended by the Constitution (First Amendment) Act in order to take out such State monopolies out of the purview of Article 19 (1) (g). But no corresponding provision was added to Article 305. It appears from the judgment of the Supreme Court that in spite of such an amendment a law introducing such State monopoly might have to be justified before the Courts as being 'in the public interest' under Article 301 or as amounting to a 'reasonable restriction' under Article 306 (b).

But the Constitution (Fourth Amendment) Act now makes existing laws and future laws providing for State monopoly in trade immune from attack on the ground of infringement of Articles 301 and 303.

Article 307 empowers Parliament to appoint such authority as it considers appropriate for carrying out purposes of Articles 301, 302, 303 and 304. It can confer on such authorities such powers and duties as it thinks necessary.

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## 31

# Services under the Union and the States (Arts. 303 to 323)

While the independence of our country, the responsibilities of the services have become onerous. They may make or mark the efficiency of the machinery of administration, a machinery so vital for the peace and progress of the country. A country without an efficient civil service cannot progress inspite of the earnestness of the people at the helm of affairs in the country. Whatever democratic institutions exist, experience has shown that it is essential to protect the public services as far as possible from political or personal influence.<sup>1</sup>

**Recruitment and Regulation of Conditions of Services.**—Article 309 empowers Parliament and the State Legislatures to regulate the recruitment and the conditions of service of the public services and posts under the Union and the States, respectively. Until this was done, the President and the Governors may make rules for regulating the recruitment and conditions of services. The Constitution itself provides for the creation of the Public Service Commission for the Union and the States to assist in the recruitment of the public services.

The opening words of Article 309 "subject to provisions of the Constitution" make it clear that the law-making power of Legislature and the rule-making power of the Executive, must not contravene any provision of the Constitution. If any law or rule made under Article 309 for regulating the recruitment and conditions of services of civil servants, contravene and of the fundamental rights and particularly Article 14,<sup>2</sup> Article 15,<sup>3</sup> Article 16,<sup>4</sup> Article 19 or Article 11,<sup>5</sup> Article 32,<sup>6</sup> it would be unconstitutional.

**The Doctrine of Pleasure.**—In England, the normal rule is that a civil servant of the Crown holds his office during the pleasure of the Crown. His service can be terminated at any time by the Crown without assigning any reason. Even if there is a contract of employment between the Crown, the Crown is not bound by it. In other words, if a civil servant is dismissed from service he cannot claim arrears of salary or damages for premature termination of his service. The doctrine of pleasure is based on public policy.

Article 310 of the Indian Constitution incorporates the common law doctrine of pleasure. Article 310 expressly provides that all persons who are members of the Defence Services or the Civil Services of the Union or of All-India Services hold office during the pleasure of the President. Similarly, members

1. P. Subbaraya—Constituent Assembly Debates, p. 962.
2. P. Balakotiah v. Union of India, A. I. R. 1958 S. C. 232; State of Punjab v. Jagjit Singh, A. I. R. 1963 S. C. 913.
3. All-India Station Masters' Association v. General Manager, A. I. R. 1960 S. C. 384.
4. General Manager, S. Rly. v. Rangachari, A. I. R. 1962 S. C. 36.
5. Venkataramana v. Union of India, 1955 S. C. R. 1150 : A. I. R. 1954 S. C. 375.
6. Moti Ram v. North Eastern Frontier Railway, A. I. R. 1964 S. C. 600, B. N. Nagarajan v. State of Mysore, A. I. R. 1964 S. C. 1942.

of the State Services hold office during the pleasure of the Governor. But this rule of English Law has not been fully adopted in this Article. A civil servant in India could always sue the Crown for arrears of salary. (See *State of Bihar v. Abdul Majid*.<sup>1</sup>) The rule is qualified by the words "except" as "expressly provided by the Constitution".<sup>2</sup> Thus Art. 310 itself places restrictions and limitations on the exercise of the pleasure. The doctrine of pleasure under Art. 310 is limited by Art. 31 (2). The services of permanent government servants cannot be terminated except in accordance with rules made under Art. 309 subject to Art. 311 (2) of the Constitution and the fundamental rights. The above doctrine of pleasure is involved by the Government in the public interest after a Government servant attains the age of 50 years or has completed 25 years of service. This is constitutionally permissible as compulsory termination of service under F. R. 56 (b) does not amount to removal or dismissal by way of punishment. While the Government reserves its right under F.R. 56 (b) to compulsorily retire a Government servant, even against his wish, there is a corresponding right of the Government servant under F. R. 56 (c) to voluntarily retire from service by giving the Government three months' notice. There is no question of acceptance of the request for voluntary retirement by the Government when the Government servant exercises his right under F. R. 56 (c).<sup>3</sup>

**Restrictions on doctrine of Pleasure.**—The Constitution lays down the following limitations on the exercise of the doctrine of pleasure :

(1) The pleasure of the President or Governor is controlled by provisions of Article 311, so the field covered by Article 311 is excluded from the operation of the doctrine of pleasure.<sup>4</sup> The pleasure must be exercised in accordance with the procedural safeguards provided by Article 311.

(2) The tenure of the Supreme Court Judges,<sup>5</sup> High Court Judges,<sup>6</sup> Auditor-General of India,<sup>7</sup> the Chief Election Commissioner,<sup>8</sup> and the Chairman and members of the Public Service Commission,<sup>9</sup> are not dependent on the pleasure of the President or the Governor, as the case may be. These posts are expressly excluded from the operation of the doctrine of pleasure.

(3) The doctrine of pleasure is subject to the Fundamental Rights.<sup>10</sup>

**Constitutional safeguards to Civil Servants—Restrictions on the doctrine of pleasure.**—Article 311 provides the following safeguards to civil servants against any arbitrary dismissal from their posts :

(1) No person holding a civil post under the Union or the States shall be dismissed or removed by authority subordinate to that by which he was appointed.<sup>11</sup>

(2) No such person shall be "dismissed", "removed" or "reduced" in rank except after an inquiry in which he has been informed of the charges against

1. A. I. R. 1954 S. C. 245.

2. Opening words of Article 310.

3. *Dinesh Chandra v. State of Assam*, A. I. R. 1978 S. C. 17.

4. *Moti Ram v. North Eastern Frontier Railway*, A. I. R. 1964 S. C. 600 at p. 609.

5. Article 124.

6. Article 218.

7. Article 148 (2).

8. Article 324.

9. Article 317.

10. *Union of India v. P. K. More*, A. I. R. 1962 S. C. 630; *General Manager, Rangachari*, A. I. R. 1962 S. C. 36.

11. Article 311 (1).

him and given a reasonable opportunity of being heard in respect of those charges [and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation against the action proposed to be taken against him.]

The Amendment has amended clause (2) of Art. 311 and took away the right of a Government servant to make representation at the second stage of the inquiry against the penalty proposed to be imposed. For this purpose the amendment deletes the italicised words in clause (2) of Art. 311.

**'Civil Post'**—The Article is applicable only to one class of public officers, i. e. those who hold 'a civil post' under the Union or the States. These safeguards are not available to defence personnel or even a civilian employee in defence service. They can be dismissed from service without assigning any reason.<sup>3</sup> The term 'civil post' is not defined in the Constitution, but having regard to Articles 310 and 311 it appears to have been used in contra-distinction to 'defence post'. The term 'civil post' means an appointment, or office or employment on the civil side of the administration.<sup>4</sup>

In *State of U. P. v. A. N. Singh*,<sup>5</sup> the Supreme Court held that a person holds a civil post if there exists a relationship of master and servant between the State and the person holding the post. This relationship is established if the State has right to select and appoint the holder of the post, right to control the manner and method of his doing the work and the payment by it of his wages or remuneration.

**1. No removal by subordinate authority.**—Article 311 (1) says that a civil servant cannot be *dismissed* or *removed* by any authority subordinate to the authority by which he was appointed. This does not mean that the removal or dismissal must be by the same authority who made the appointment or by his direct superior. It is enough if the removing authority is of the same or co-ordinate rank as the appointing authority.<sup>6</sup> In *Mahesh v. State of U.P.*,<sup>7</sup> the person appointed by the Divisional Personal Officer, E. I. R., was dismissed by the Superintendent, power, E.I.R. The Court held the dismissal valid as both the officers were of the same rank.

In *S. Krishnamurthy v. General Manager, Southern Railway*,<sup>8</sup> the appellant was denied promotion owing to the administrative error of the Railway Administration. He was entitled to the promotion post but was not considered for the promotion post although others similarly situated like him were promoted to the high post. This injustice was discovered by the Railway Administration and was set right the error but by that time others had been absorbed in the promotion post and the appellant was not. It was held that in the circumstances he was entitled to be promoted to the higher post. However, the court did not accept his contention to promote him retrospective as those who were promoted earlier might be adversely affected if the court directed the

1. *V. K. Nambudri v. Union of India*, AIR 1961 Ker. 155.
2. *Sher Singh v. State of M. P.*, AIR 1955 Nag 175.
3. *State of U. P. v. A. N. Singh*, AIR 1965 SC 360; *State of Assam v. Kanak Chandra, A. I. R.* 1967 S. C. 884.
4. *Mahesh Prasad v. State of U. P.*, A. I. R. 1950 S. C. 70; *Purshottam Lal Dhingra v. Union of India*, A. I. R. 1958 S. C. 36.
5. *Mahesh Prasad v. State of U. P.*, A. I. R. 1955 S. C. 70; *Krishna Kumar v. Divisional Asst. E.E., Central Railway*, A. I. R. 1979 S. C. 1972; *I. R. 1977 S. C. 1858.*

the appellants appointment to the promotion post with effect from an earlier date. The Court would not put the clock back for all purposes and treat him as notionally appointed retrospectively. It could only direct the Railway Administration to promote him to the post from the date on which he came to the High Court. But his notion of service would be considered retrospectively.

**Reasonable opportunity to defend.**—Article 311 (2) lays down that a civil servant cannot be dismissed, or removed or reduced in rank unless he has been given a reasonable opportunity to show cause against the action proposed to be taken against him.<sup>1</sup> Originally, the opportunity to defend was given to a civil servant at two stages : (1) at the enquiry stage and this is in accord with the rule of natural justice that no man should be condemned without hearing ; and (2) at the punishment stage, when as a result of enquiry the charges have been proved and any one of the three punishments i. e. dismissal, removal or reduction in rank were proposed to be taken against him.

The Constitution (42nd Amendment) Act, 1976, has abolished the right of the Government servants to make representation at the second stage of the inquiry. This second opportunity was given to the Government servants under the rulings of the Courts, which was given a constitutional sanction by the Constitution (15th Amendment) Act, 1964. The newly added proviso to Art. 311 (2) by the (42nd Amendment) Act, 1976, makes it clear that if after inquiry it is proposed to impose upon a person any of the three punishments, i. e. dismissal, removal or reduction in rank, they may be imposed on the basis of the evidence given during such inquiry and he shall not be entitled to make any representation. This means that the above-mentioned punishments will be imposed on the basis of the evidence adduced during the time of inquiry of charges against the Government servant. If as a result of such inquiry the charges are proved the same evidence shall be the basis of imposing the three penalties of the Government servant. This amendment is to be welcomed as the second inquiry was redundant.

The protection of Article 311 (2) is available only where *dismissal, removal or reduction in rank* is proposed to be inflicted by way of punishment. The protection of Article 311 (2) is not available—

(1) where a person is dismissed or reduced in rank on the ground of misconduct which has led to conviction on criminal charges ;

(2) where it is impracticable to give the civil servant an opportunity to defend himself but the authority taking action against him shall record the reasons for such action ;

(3) where in the interest of the security of State, it is not expedient to give such an opportunity to the civil servant.<sup>2</sup>

In *Shyam Lal v. State of U.P.*,<sup>3</sup> the question involved was whether compulsory retirement amounted to removal or dismissal within the meaning of Article 311 of the Constitution. In this case a civil servant was compulsorily retired under Article 265 (a) of the Civil Service Regulations. He challenged the order on the ground that he was removed without giving him the reasonable opportunity to show cause against the action proposed to be taken in regard to him. The Supreme Court held that a compulsory retirement does

1. *Sukhrana Singh v. State of Punjab*, AIR 1962 SC 1711.

2. Article 311, Proviso.

3. *Shyam Lal v. State of U. P.*, AIR 1954 SC 369.

not amount to dismissal or removal as it carries no element of charge or imputation and, therefore, does not attract the provisions of Article 311.

In *Union of India v. J. N. Sinha*,<sup>1</sup> the validity of an order issued under the Service Rules by the Central Government retiring the respondent compulsorily from Government service was challenged on the ground that it violated the principles of natural justice. The Supreme Court held that rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. These rules can only operate in areas not covered by any law validly made.

But where sufficient opportunity given to the appellant to explain the conduct is not availed of the requirement of natural justice cannot be said to be violated.<sup>2</sup>

If the termination of service is in accordance with the terms of service or service rules it does not amount to dismissal or removal. In *Gopal Krishna v. Union of India*,<sup>3</sup> a railway employee was dismissed after giving one month's notice according to the terms of his agreement of service. The Court held that Article 311 (2) does not apply and, therefore, the dismissal was held valid.

**Termination of service when amounts to punishment.**—As said earlier the protection of Article 311 is available only 'when the dismissal, removal or reduction is by way of punishment'. The main question, therefore, is to determine as to when an order for termination of service or reduction in rank amounts to punishment. The Supreme Court has laid down two tests to determine whether the termination or reduction is by way of punishment—

- (1) whether the servant had a right to hold the post or the rank ;
- (2) whether he has been visited with evil consequences.

If a Government servants had a right to hold the post or rank either under the terms of any contract of service, or under any rule, governing the service, then the termination of his service or reduction in rank amount to a punishment and he be entitled to the protection of Article 311.

In *Purshottam Lal Dhingra v. Union of India*,<sup>4</sup> the appellant was appointed to officiate on a higher post. After two years' service the appellant was reversed to his original post on the ground of unsatisfactory work. It was said that the order of his reversion would not stand in the way of his being considered again for a promotion if in the future his work and conduct justified. The Supreme Court held that the appellant had no right to the post as he was merely officiating in the post and the implied term of such appointment was that it was terminable at any time on resonable notice by the Government. The appellant was not reduced in rank by way of punishment and, therefore, he cannot claim the protection of Article 311 (2). In a case where a Government servant has no right to hold the post or the rank his termination from service or reversion does not amount to punishment, since it does not forfeit any right of the servant to hold the post or the rank as he never had the right. An order of removal or reduction in rank is of evil consequence when

1. *Union of India v. J. N. Sinha*, AIR 1971 SC 40.
2. *Shahoodul Haque v. Registrar, Co-op. Societies, Bihar*, AIR 1974 SC 1894.

<sup>3</sup> *Gopal Krishna v. Union of India*, AIR 1954 SC 632.

<sup>4</sup> *Purshottam Lal Dhingra v. Union of India*, AIR 1958 SC 36.

it "entails or provides for the forfeiture of his pay or allowance, or the stoppage or postponement of his future chances of promotion." In the instant case, the order of reversion did not in any way affect the appellant's future promotion or seniority in the substantive post.

"Reduction in rank" within the meaning of Article 311 (3) means reduction from a higher to a lower rank or post and not merely loosing place in rank or cadre. In *State of Punjab v. Kishan Das*,<sup>1</sup> the respondent was a police constable in the Punjab Police Service. In 1960 he was served with a charge-sheet attributing to him arrogance and indiscipline. A departmental enquiry was held under the Punjab Police Rules. The charges against him were proved and an order was issued forfeiting his entire service. This meant bringing down his salary to Rs. 45 p.m. which would be a salary payable to a constable at the starting point of his service. The Supreme Court held that the order did not amount to reduction in rank. For punishment of forfeiture of approved service resulting in loss of higher salary or reducing the chances of promotion to higher post 'remedy lies', under relevant service rules and not under Art. 311 (2). Under the Punjab Police Service Rules, the two punishments of reduction and forfeiture are two distinct and separate punishments.

In *Debesh Chandra v. Union of India*,<sup>2</sup> the appellant who was the Chief Secretary of Assam, was appointed a Secretary in the Central Government, on a tenure post which was to expire in July, 1969. In September, 1966, he was asked to choose between reversion to the service of his parent State or compulsory retirement. He contended that the order was a stigma and amounted to reduction in rank which therefore could not be passed without following the procedure laid down in Article 311 (2). The Court said that the cadre for the I. A. S. were to be found in the States only and not in the Central Government. Few of them, however, were intended to serve at the Centre and when they did so, they enjoyed better emoluments and status. Such an appointment meant promotion to a higher post. In the circumstances, the Court held that the order of reversion to the original post amounted to the appellant's reduction from a higher to a lesser rank, and not a reduction in the same time-scale post or deprivation of places in the same time-scale post, thereby adversely affecting his seniority therein or chances of promotion.

In *Moti Ram v. N. E. Frontier Railway*,<sup>3</sup> it was held that the termination of service of a permanent employee cannot be made (except to the rules of superannuation and compulsory retirement), without observing the procedural safeguards provided in Article 311. Thus a permanent employee cannot be dismissed even if under the rules termination was authorised for any other reason, and, therefore, the rules were held violative of Article 311 (2).

In *State of Mysore v. M. K. Godgoli*,<sup>4</sup> the respondent who was a Government servant holding a substantive post of a clerk. He was promoted as Awai Karkun in officiating capacity. But subsequently he was reverted to his substantive post on ground of unsatisfactory work. He challenged the validity of the order on the ground that he was reduced in rank without giving a reasonable opportunity in Art. 311 (2) of the Constitution. The Court, however, held

1. *State of Punjab v. Kishan Das*, AIR 1971 SC 766.

2. AIR 1970 SC 77.

3. AIR 1964 SC 600.

4. AIR 1977 SC 1617.

that the reversion in this case not amount to reduction in rank by way of punishment and hence Art. 311 (2) was not attracted. The Court said that a person officiating in a post has no right to hold it for all times. Such a person is given a higher officiating post to test his suitability to be made permanent later and holds it on implied term that he would have to be reverted if he was found unsuitable. The reversion in such a case on the ground of unsuitability is an action in accordance with the terms on which officiating post was being held and is not a reduction in rank by way of punishment.

But the suspension of a Government servant from service is neither dismissal or removal nor reduction in rank, therefore, if a Government servant, is suspended he cannot claim the constitutional guarantee of reasonable opportunity.<sup>1</sup>

**Article 311 applies to both temporary and permanent servants.**—The constitutional guarantee of reasonable opportunity is available to both permanent and temporary servants. In *Purshottam Lal Dhingra v. Union of India*,<sup>2</sup> the Supreme Court held that "Article 310, in terms, makes no distinction between permanent and temporary members of the service or between persons holding temporary or permanent post in the matter of their tenure being dependent upon the pleasure of President or the Governor, so does, Article 311, in our view, make no distinction between the two classes, both of which are, therefore, within its protection, and the decisions holding the contrary view cannot be supported as correct."

However, if a Government servant is holding a temporary post, termination after reasonable notice cannot entitle him to the protection of the safeguards provided in Article 311 (2) because he has no right to the post held by him.

In *Champaklal v. Union of India*,<sup>3</sup> the service of an officiating Assistant Director was terminated after giving him one month's notice without giving him any opportunity to show cause why his services should not be terminated because he was a temporary employee and as his work and conduct were found unsatisfactory. A memorandum was given to him in which he was asked to explain certain matters and he was asked to state why disciplinary action should not be taken against him. Although some enquiry was held against him but it was subsequently dropped because evidence against him was not considered conclusive. The appellant challenged the termination of his service on the ground that the memorandum really amounted to a charge-sheet against him and hence the provisions of Article 311 ought to have been complied with.

The Court relying in the case of *Shyam Lal v. State of U. P.*,<sup>4</sup> held that Article 311 (2) had no application to the facts of the present case. The mere fact that some preliminary enquiry was held against a temporary servant and following that enquiry the services were dispensed with in accordance with the contract of service or under the specific service rule would not mean that the termination of service amounted to infliction of punishment of dismissal or removal within the meaning of Article 311 (2).

In *State of Punjab v. Sukh Raj Bahadur*,<sup>5</sup> the Supreme Court summarized

1. *Sukh Bansh Singh v. State of Punjab*, AIR 1962 SC 1711
2. AIR 1958 SC 36 ; *Union of India v. P. K. More*, AIR 1962 SC 360 ; See also *State of Bihar v. S. B. Misra, A. I. R.* 1971 SC 1011.
3. AIR 1964 SC 1854.
4. AIR 1954 SC 369 ; *State of Orissa v. Ram Narayan Das*, AIR 1961 SC 177.
5. *State of Punjab v. Sukh Raj Bahadur*, AIR 1968 SC 1089.

the principles relating to the applicability of Article 311 to the temporary servants and probationers. The Court referred the whole previous case-law on the subject and laid down the following propositions :

(1) The services of a temporary servant or of a probationer can be terminated under the rules of his employment, and such termination without anything more will not attract the operation of Article 311.

(2) The circumstances preceding or attendant on the order of service have to be examined in each case, the motive behind it being immaterial.

(3) If the order visits the public servant with any evil consequences or casts an aspersions against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.<sup>1</sup>

(4) Any order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service does not attract Article 311.

(5) If there is a full scale departmental enquiry envisaged by Article 311, that is, an enquiry officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract Article 311.

In the instant case, the petitioner was a permanent official in the office of Chief Commissioner, Delhi. He was taken into the service of the Punjab Government and posted to the higher post, and he served his probation of 18 months. He was first served with a charge-sheet, to which he sent his explanation in which he applied for an oral enquiry. He was then served with an order passed by the Punjab Government reverting him to his original appointment in the Delhi Administration. He challenged the order of reversion on the ground that the order terminated his service without giving him an opportunity to show cause against it. The Court held that the order of termination could not be challenged as being in contravention of Article 311. The enquiry did not proceed beyond the stage of serving a charge-sheet, followed by an explanation of the petitioner. The enquiry was not proceeded with, there was no settings of any enquiry officer, no evidence recorded and no conclusions arrived on the enquiry.

**Reasonable opportunity.**—According to Art. 311 (2) a civil servant cannot be dismissed or reduced in rank until he has been given reasonable opportunity of showing cause against the action proposed to be taken in regard to him. What does the expression 'reasonable opportunity' mean? In *Khem Chand v. Union of India*,<sup>2</sup> the Supreme Court held that the "reasonable opportunity" envisaged by Article 311 includes :—

(1) an opportunity to deny his guilt and establishes his innocence which can be only done if he is told what the charges against him are and the allegations on which such charges are based;

(2) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and also

1. AIR 1960 SC 689.

2. AIR 1958 SC 300.

(3) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do so if the competent authority, after the enquiry is over and after applying his mind to the gravity of the charges, tentatively proposes to inflict one of the three major punishments and communicates the same to the Government servant.

In the instant case, the appellant who was in Government service had been served with a charge-sheet and an enquiry was held on the basis of the report of the enquiry officer, he was served with an order of dismissal the next day. The appellant challenged the validity of the order of dismissal on the ground that he had not been supplied with a copy of the Enquiry Officer's Report, and no opportunity was given to him against the action proposed to be taken in regard to him as required by Article 311. The Court held that even though an enquiry had been held on the basis of which the Enquiry Officer had reported that the charges were proved, and recommended the punishment of dismissal the authority competent to pass an order of punishment was bound to give a further opportunity to the Government servant to show cause why the particular punishment of dismissal should not be inflicted on him. It was at this stage where the punishing authority had accepted the report of the Enquiry Officer and proposed to inflict a particular punishment that the further opportunity became due. Since no further opportunity had been given to the appellant, the order of dismissal was unconstitutional being in violation of the requirements of Article 311 (2).

In *Divisional Superintendent, Eastern Railway v. Danapur*,<sup>1</sup> the Court held that any reduction of scale of a confirmed Government servant without giving him any opportunity to be heard was illegal. The Court said that when employee is confirmed he has right to the post and the scale of pay fixed, which cannot be varied without following the procedure laid down in Article 311 (2).

In *State of Punjab v. Bhagat Ram*,<sup>2</sup> the respondent was a Sub-Divisional Officer. The State ordered a departmental enquiry against him. As a result of the departmental inquiry the respondent was dismissed from his service. He challenged the order of dismissal on the ground that he was not given reasonable opportunity as contemplated by Art. 311 of the Constitution as he was not supplied with the copies of the statements recorded by the police in the course of investigation of the witnesses proposed to be examined at the departmental inquiry in spite of his request. The State contended that the respondent was given the opportunity to cross-examine the witnesses. It was argued that the synopsis was adequate to acquaint the respondent with the gist of evidence. The Supreme Court held that the respondent was not given reasonable opportunity to be heard and therefore his dismissal was illegal. The Court said, "It is unjust and unfair to deny the Government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the Government servant. A synopsis does not satisfy the requirements of giving the Government servant reasonable opportunity of showing cause against the action proposed to be taken. Though the Government servant is given an opportunity to cross-examine the witnesses unless the statements are given to him he will not be able to have an effective and useful cross-examination. The object of supplying statements is that the Government servant will be able to refer to the previous statement of the witness proposed to be examined against the Government servant.

1. AIR 1974 SC 1889.

2. AIR 1974 SC 2335,

In *U. P. Government v. Sabir Hussain*,<sup>2</sup> the Supreme Court held "the broad test of 'reasonable opportunity' is whether in the given case the show-cause notice issued to the delinquent servant contained or was accompanied by so much information as was necessary to enable him to clear himself of the guilt, if possible, even at that stage, or, in the alternative to show that the penalty imposed was much too harsh and disproportionate to the nature of the charge established against him. In this case, the impugned order of removal proceeded on the acceptance of the report of enquiry proceedings and comments of the Enquiry Officer. No copy of the report, finding and "comments" of the same in order to file an appeal to the higher authorities against the order of removal was given. It was, therefore, held that the delinquent servant was not given a reasonable opportunity to show cause against the action proposed to be taken against him, and the non-supply of the copies of the material documents had serious prejudice to him in making a proper representation. The order of removal was therefore unconstitutional and "illegal".

The Constitution (15th Amendment) Act, 1963, substituted a new provision in place of Art. 311 (2) which accepts the interpretation of the Supreme Court of the term "reasonable opportunity". But it has limited the scope of second opportunity which will now be available only on the basis of the evidence produced at the time of enquiry. No fresh evidence will be entertained at this stage.

**All-India Services.**—Article 312 empowers Parliament to create new All India Service common to the Union and the States. Parliament can create service if the Rajya Sabha by a resolution supported by not less than two-thirds of the members present and voting declares that it is necessary and expedient in the national interest to create such service.

The Constitution (42nd Amendment) Act, 1976, has amended Art. 312 of the Constitution which provides for the creation of an All-India Judicial Service by a parliamentary law. The new clause (3) says that such All-India Judicial Service shall not include any post inferior to that of a District Judge as defined in Article 236. The new clause (4) makes it clear that a law providing for the creation of the All-India Judicial Service shall not be deemed to be an amendment of this Constitution for the purpose of Article 368. The amendment accordingly has added the words "including an All-India Judicial Service in clause (1) of Article 311 and two new clauses (3) and (4) after clause (2) of Art. 311." The notes on clauses does not make it clear as to what is the object of this amendment. The object of the creation of the All-India Judicial Service is to ensure greater inter-State co-ordination and implementation of the policies of the Central Government through these officers. This also enables the Central Government to exercise a control over States in matters of execution of Union Laws. It is hoped that these services should be left under the complete control of the Judiciary and not under the Government. This would indeed be essential for maintaining independence and impartiality of the Judiciary.

the Constitution, as an All-India Service, or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

The Constitution (28th Amendment) Act, 1972, has abolished the privileges relating to salary, leave, pension, etc. of I.C.S. Officers which had been protected by Art. 314 of the Constitution.

**42nd Amendment Act, 1976 and Services.**—The 42nd Amendment provides for the establishment of Service Tribunals for the determination of disputes relating to recruitment and conditions of service of persons appointed to public services under Central, State or any local or other authority, or a Corporation owned or controlled by Government. The new Article 323A introduced by the Amendment empowers Parliament by law to establish service tribunals. Such a law may exclude the jurisdiction of all courts, except that of the Supreme Court under Article 136 with respect to disputes and complaints falling under Art. 323A.

No law has so far been passed by Parliament and therefore the existing jurisdiction of High Courts and the Supreme Court will continue.

### PUBLIC SERVICE COMMISSION

The Constitution provides for the establishment of a Public Service Commission for the Union and for each State.<sup>1</sup> Two or more States may agree to have Common Public Service Commission.<sup>2</sup> The Union Public Service Commission, if requested by the Governor of a State, may with the approval of the President, agree to act for a State.

**Appointment of Members of Public Service Commission.**—The Chairman and members of the Union Public Service Commission or a Joint Commission are appointed by the President and in the case of a State Commission by the Governor.<sup>3</sup> But one-half of the members of every Public Service Commission must be persons who at the dates of their appointments have held office for at least ten years under the Government of India or under the Government of a State.

A member of Public Service Commission shall hold office for a period of 6 years. Unless he attains the age of 65 in case of Union Commission or 60 years in case of State Commission, whichever is earlier. If he attains the age of retirement he has to retire even before the expiry of normal terms of 6 years.<sup>4</sup> A member may himself resign from his office.<sup>5</sup> He may also be removed from his office by order of the President on the ground of misbehaviour, if on reference made by the President the Supreme Court, after enquiry report to the President that he should be removed.<sup>6</sup> If the Chairman or any other member of a Public Service Commission is or becomes in any way concerned or interested in any contract agreement made by or on behalf of the Government of India or State Government or participates in any way in the profit or emolument resulting from such contract, or agreement he shall be deemed to be guilty of misbehaviour.<sup>7</sup> They may also be removed by the

1. Article 315 (1).
2. Article 315 (2).
3. Article 316 (1).
4. Article 316 (2).
5. Article 316 (2) (a).
6. Article 316 (2) (a), 317 (a).
7. Article 317 (1).

President without any reference to the Supreme Court if any such person (i) is adjudged an insolvent ; (2) accepts any other paid employment during the term of office ; (3) is in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body.

The members of the Union and the State Public Service Commission are debarred from re-appointment after the expiry of their term of office. They are also ineligible for any other employment under the Central or State Governments. This provision is necessary in order to ensure impartiality.<sup>1</sup>

**Functions of Public Service Commission.**—It shall be the duty of the Union and the State Public Service Commission to conduct examinations for appointments. If requested by two or more States it shall be obligatory on the Union Public Service Commission to assist them in devising of joint recruitment for services requiring special qualifications. The Union or State Commissions must be consulted—

- (1) in all matters relating to methods of recruitment to civil posts ;
- (2) on the principles to be followed in making appointments ; promotions and transfers and the suitability of candidates ;
- (3) on disciplinary matters affecting a person in service under the Central or State Government ;
- (4) on any claim by such a person for the costs incurred in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty ;
- (5) on any claim for compensation in respect of injuries sustained by a person while serving the Government.

In all above matters it shall be the duty of the Commission to advise. However, the President and the Governors may make regulations specifying the matters in which, either generally or in any particular circumstances the Commission may not be consulted.<sup>2</sup> The function of the Public Service Commissions are only advisory and the Constitution has no provision to make it obligatory upon the Government to act upon the advice of the Commission in any case.<sup>3</sup> Clause (4) says that the Commission need not be consulted as regards the reservation of posts for backward classes, Schedule Castes and Scheduled Tribes.<sup>4</sup>

Additional functions may be assigned to the Union and State Public Service Commission by an Act of Parliament and State Legislatures.<sup>5</sup> The expenses of the Union or a State Public Service Commission, and the salaries, allowances of its members are charged on the Consolidated Fund of India or State, as the case may be.<sup>6</sup>

The Commissions shall submit an annual report on the work done by them to the President or Governor, as the case may be. The reports are to be laid before the Parliament and the State Legislatures, respectively together with a memorandum as regards the cases where the advice of the Commission was not accepted and the reasons for such non-acceptance.<sup>7</sup>

1. Article 319.
2. Article 320 (3).
3. D'Silva v. Union of India, A. I.R. 1962 S. C. 1130.
4. Article 320 (4).
5. Article 321.
6. Article 322.
7. Article 323 (1) and (2).

## Tribunals (Arts. 323-A and 323-B)

The new Chapter has been added to the Constitution by the Constitution (42nd Amendment) Act, 1976. It consists of two articles—Articles 323-A and 323-B. Article 323-A provides for the establishment of Administrative Tribunals by a Parliamentary law for determining disputes relating to the recruitment and conditions of service of Government servants under the Union Government and the State Governments. Article 323-B provides for the creation of tribunals for the determination of disputes, complaints and offences relating to tax matters, export and imports, labour and industrial disputes, service matters, supply of essential commodities, elections to the Parliament and the State Legislatures.

**Tribunals for service matter—Art. 323-A**—Article 323-A provides for the establishment of Administrative Tribunals by a Parliamentary law for the adjudication or trial of disputes and complaints relating to the recruitment and conditions of service of Government servants under the Central Government and the State Governments including the employees of any local or other authority within the territory of India or under the control of the Government of India or of a corporation owned or controlled by the Government. Such a law may provide for the establishment of a tribunal for the Union and separate tribunals for each State or for two or more States. Such a law will also make provisions for :—

- (1) the jurisdiction, powers, (including the power to punish for contempt) and authority to be exercised by the above tribunals ;
- (2) the procedure to be followed by the above tribunals ;
- (3) the exclusion of the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136 ;
- (4) the transfer of all cases to the tribunals which were pending before any court or authority before the establishment of such tribunals ;
- (5) repeal or amend any order made by the President under clause (3) of Article 37I-D ;
- (6) supplementary or incidental or consequential provisions for the effective functioning of such tribunals.

The provisions of Article 323-A shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

**Tribunals for other matters—Art. 323-B**—Article 323-B empowers Parliament and the State Legislatures to establish tribunals for the adjudication of any disputes, complaints or offences with respect to all or any of the matters specified in clause (2) of this Article. The matters referred to in clause (2) are the following, namely—

- (a) levy, assessment, collection and enforcement of any tax ;
- (b) foreign exchange and import and export ;
- (c) industrial and labour disputes ;

- (d) land reform laws enacted under Article 31-A of the Constitution;
- (e) ceiling on urban property;
- (f) election disputes of members of Parliament or the State Legislatures, but excluding the matters referred to in Articles 329 and 329-A. These articles have taken away the jurisdiction of the Courts to decide election disputes of the Prime Minister and Speaker of the Lok Sabha;
- (g) production, procurement, supply and distribution of foodstuffs and essential goods and control of prices of such goods;
- (h) offences against laws with respect to any of the matters specified in sub-clauses (a) to (g) and fees in respect of any of those matters;
- (i) matters incidental to any of the matters specified in the above sub-clauses. Such a law will define the jurisdiction and powers of such tribunals and will lay down procedure to be followed by the said tribunals.

**Exclusion of Jurisdiction of Courts.**—Articles 323-A and 323-B provide for the exclusion of the matters mentioned in these articles from the jurisdiction of "all courts" except the jurisdiction of the Supreme Court under Article 136 of the Constitution. These articles thus deprive the Supreme Court and High Courts of their writ jurisdiction under Articles 32 and 226 in matters specified therein. The object of this new provision is to remove hurdles in the implementation of laws providing for socio-economic reforms. According to the Swaran Singh Committee on constitutional amendment, the amendment is intended to remove the defects of the existing judicial process which had led to dilatory proceeding and delays causing a great deal of inconvenience and expenditure of the State as well as affected parties.

**Appeal in Supreme Court by Special Leave—Art. 136.**—Though the writ jurisdiction of the Supreme Court under Art. 32 has now taken away, yet the Court's jurisdiction in the above matters are not totally shut out. An aggrieved party can still go to the Supreme Court under Article 136 of the Constitution. The Supreme Court has already laid down the guidelines for the grant of special leave to appeal from the decisions of the tribunals.

## Elections (Arts. 324 to 329-B)

**Election Commission.**—Article 324 provides for the appointment of an Election Commission to superintend, direct and control elections. The Election Commission is an independent autonomous body, and the Constitution ensures, as in the case of the Supreme Court and the High Courts, that it may be able to function freely without any Executive interference.

The Election Commission shall consist of the Chief Election Commissioner and such other Election Commissioners as the President may from time to time fix. The Chief Election Commissioner and other Election Commissioners are appointed by the President subject to the provisions of any law made by Parliament for that purpose.<sup>1</sup> The President may also appoint after consultation with Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in its functions.<sup>2</sup> The conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine. The Chief Election Commissioner can be removed from his office in the same manner and on the same grounds as a Judge of the Supreme Court. The conditions of service of the Chief Commissioner cannot be varied to his disadvantage after his appointment. The Election Commissioners and Regional Commissioners can only be removed on the recommendation of the Chief Election Commissioner. The Constitution thus secures the tenure of office of the Chief Election Commissioner and other Commissioners. They can therefore perform their duties without fear, favour or pressure from the Executive or party in power.

**Functions of Election Commission.**—According to Article 324 (1) the Election Commission performs the following functions :

- (1) The superintendence, direction and control of the preparation of the electoral roll for all elections to Parliament, State Legislatures and to the offices of President and Vice-President.
- (2) The conduct of elections.
- (3) Appointment of Election Tribunals for deciding doubts and disputes arising out of Election to Parliament or State Legislatures.
- (4) Advising the President and the Governors on the question of disqualification of any member of Parliament or a State Legislature, as the case may be.<sup>3</sup>

There shall be one general electoral roll for every territorial constituency.<sup>4</sup> No person shall be ineligible for inclusion in any such roll on grounds only of religion, race, caste, sex or any of them. The elections to the Parliament and State Legislatures are to be held on the basis of adult suffrage.

1. Article 324 (2).
2. Article 324 (4).
3. Article 103.
4. Article 325.

Every person who is a citizen of India and who is not less than 21 years of age, is not otherwise disqualified under this Constitution or any law (Representation of Peoples Act, 1950) made by the Legislature on the ground of non-residence, unsoundness of mind crime, or illegal practice, has a right to be registered as a voter.<sup>1</sup>

**Power of Parliament and State Legislatures with regard to Election Law.**—Article 327 empowers Parliament to make provisions with respect to all matters relating to or in connection with election to Parliament and State Legislature, the preparation of electoral rolls, the delimitation of constituencies and all other connected matters. In exercise of the power conferred by Article 327, Parliament has enacted the Representation of Peoples Acts, 1950 and 1951; the Presidential and Vice-Presidential Elections Act, 1952; and the Delimitation Commission Act, 1952. Article 328 confers a similar power on State Legislatures. The State Legislature can make laws relating to all the above matters referred to under Article 327, in so far as provision in that behalf is not made by Parliament.

**Courts not to interfere in election matters.**—Article 329 says that the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies shall not be called in question in any court. Clause (b) of Article 329 provides that elections can only be called in question by an election-petition presented to such authority and in such manner as may be laid down by law made by the appropriate legislation. In exercise of the power under clause (b) of this Article, Parliament enacted the Representation of Peoples Act, 1951. Under this Act, the decision of the Election Commission was final. In *Ponnu Swami v. Returning Officer, Namakkal*,<sup>2</sup> the appellant's nomination paper for the State Assembly was rejected by the Returning Officer. He then moved the High Court under Article 226 to quash the order of the Returning Officer and to direct the inclusion of his name in the list of valid nominations. The High Court dismissed the writ-petition on the ground that under Article 329 (b) the Court had no jurisdiction to interfere with the order of the Returning Officer. The appellant went in appeal to the Supreme Court. The Supreme Court held that the word "election" in Article 329 connotes the entire procedures to be gone through to return the candidate to the legislature, and bars the jurisdiction of the High Court under Article 226 as well. Acceptance or rejection of nomination paper is included in the term "election". The matter can only be challenged by an election-petition before the High Court after the election is over.<sup>3</sup>

But neither Article 329 (b) nor the Representation of the Peoples Act (before its amendment) which said that the decision or order of the Election Tribunal shall be "final" could restrict the power of High Courts under Article 226,<sup>4</sup> and the power of the Supreme Court under the Article.

The Constitution (19th Amendment) Act, 1966, abolished the jurisdiction of Election Tribunals to decide election disputes. The Amendment vested this power in the High Courts. The effect of vesting the power in the High Courts was to expedite decision in election disputes.

1. Article 326.

2 AIR 1962 SC 64.

3 *Hari Krishna v. Ahmad Ishaque*, AIR 1955 SC 233; *Waryam Singh v. Amar Nath*, AIR 1954 SC 215.

4 *Durga Shanker v. Raghuraj*, AIR 1954 SC 520; *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425.

The system was changed by the Constitution (39th Amendment) Act, 1975, which took away the jurisdiction of the Supreme Court and the High Courts to decide election disputes of the President, Vice-President and the Prime Minister and the Speaker of the Lok Sabha. Originally, Article 71 gave jurisdiction to the Supreme Court to decide election disputes of the President and the Vice-President of India. This amendment had amended Art. 71 and the Representation of Peoples Act, 1951, and inserted Art. 329-A into the Constitution which provided that the election disputes of the above mentioned dignitaries shall be determined by a special forum, that is, a body to be set up by law made by Parliament. No such law has yet been passed by the Parliament.

The 44th Amendment Act, 1978, has omitted Article 329-A which made special provisions as to the elections to Parliament in case of Prime Minister and the Speaker. However, the commentary and the case-law on the omitted article is being retained "for, it has great Constitutional importance."

In *Smt. Indira Nehru Gandhi v. Raj Narain*,<sup>1</sup> the validity of the Constitution (9th Amendment) Act, 1975, was challenged on the ground that it affects the basic features of the Constitution, i.e. equality before the law, free and fair election and hence it is unconstitutional. The facts of case were as follows: The appellant filed an appeal in the Supreme Court against the judgment of the Allahabad High Court declaring the election of the appellant to the Lok Sabha from the Rai Bareli Parliamentary Constituency void on the ground that the appellant was guilty of having committed corrupt practices under section 123 (7) of the Representation of the Peoples Act, 1951 and therefore was disqualified for a period of six years in accordance with section 8-A of the same Act. During the pendency of the election-petition in the High Court section 77 of the Representation of Peoples Act was amended which added two explanations to section 77 of the Act.

The explanation declares that expenditure incurred as authorised by a political party shall not be deemed to be expenditure by the candidate. It removes the effect of the decision of the Supreme Court in *Amar Nath Chawala's case*. The High Court held that the appellant held herself out as a candidate from the Rai Bareli Parliamentary Constituency on December 29, 1970. It found that Yashpal Kapur continued to be in service of the Government of India till January 25, 1971, e.g. date of Notification of the acceptance of his resignation and appellant obtained and procured the assistance of Yashpal Kapur during the period from January 7 to 24, 1971, when he was still a Gazetted Officer.

During the pendency of the appeal in the Supreme Court, Parliament passed the Election Laws (Amendment) Act, 1975. It substituted a new section 8 A which empowers the President to decide whether a person found guilty of corrupt practice shall be disqualified, and, if so, for what period. He may submit a petition to him for the removal of such disqualification. Section 6 which amends section 77 makes pre-nomination expenses a matter of irrelevant consideration. It declares that the expenditure by a Government servant in the discharge of his official duty in connection with any arrangements of facilities shall not be deemed to be expenditure or assistance incurred or tendered for the furtherance of the election prospects of the candidate concerned. Section 7 redefines the word 'candidate' to mean a person who has been or claims to have been duly nominated as a candidate at any election. Section 8

1. AIR 1975 SC 2299.

provides that no symbol allotted to a candidate shall be deemed to be a religious or a national symbol. It also says that the publication in the Official Gazette of the resignation of a Government servant shall be conclusive proof of the fact of resignation. If the effective date of resignation is stated in the publication, it shall also be conclusive proof of the fact that the Government servant ceased to be in service with effect from the particular date. Section 10 gives retrospective effect to amendment made by sections 5, 6, 7, and 8. It applies to any election before and after the commencement of this Act or any election petition pending before any High Court, or decided by any High Court or to an election-appeal pending in the Supreme Court.

This Act virtually seals the controversy in the appeal. Again, on August 10, 1975, the Constitution (39th Amendment) Act was passed by Parliament. It made a number of changes in the Constitution. It inserted two new Articles in the Constitution, and puts in the Ninth Schedule three Acts (i) R. P. Act, 1951, (ii) R. P. (Amendment) Act, 1975, (iii) Election Laws (Amendment) Act, 1975. The new Article 71 puts the election disputes relating to the President and Vice-President beyond the judicial scrutiny. The New Art. 329-A makes special provisions as to elections to Parliament in the case of Prime Minister and Speaker of the Lok Sabha. Article 229-A has six clauses out of which clauses (1), (2) and (3) deal with the future election cases of the Prime Minister and the Speaker. Clause (1) takes out the election disputes of these persons from the jurisdiction of High Courts and vests in a body to be created by a law made by Parliament. Clause (2) declares that the validity of such a law cannot be called in question in any Court. Clause (3) provided that if a person after his election is appointed as Prime Minister or chosen to the office of the Speaker of the Lok Sabha, any election-petition pending against him under the existing law shall abate. These clauses thus take the jurisdiction of courts to try election disputes of the Prime Minister and the Speaker of the Lok Sabha.

Clause (4) provided that : "No law made by Parliament before the commencement of 39th Amendment Act, 1975, relating to election-petitions and matters connected therewith shall apply or shall be deemed ever to have applied to the election of the Prime Minister and the Speaker. It provides that the election of the aforesaid persons shall not be void or ever to have become void on any ground on which such election could be declared to be void or has before such commencement, been declared to be void under any such law. It declares that notwithstanding any judgment of any court such election shall continue to be valid and such judgment shall be deemed always to have been void and of no effect." Clause (5) ordains that any appeal or cross-appeal before the Supreme Court shall be disposed of in conformity with the provisions of clause (4). Clause (6) provided that the provisions of Art. 329-A shall take effect notwithstanding anything contained in the Constitution.

The respondent challenged the validity of the Constitution (39th Amendment) Act, 1975 and also the Election Laws Amendment Act, 1975 on the following grounds :—

1. the amendment affects the basic structure or framework of the Constitution and is therefore beyond the amendment power under Art. 368 ;
2. these amendments were passed in a session of Parliament which was not a legal session because some members were illegally prevented from attending it.

The Supreme Court by a majority of 3-2 (Khanna, Mathew and ~~Gandhi~~

chud, J.J.,) specifically struck down clause (4) of Art. 329-A as unconstitutional on the ground that it was beyond the amending power of Parliament as it effected the basic features of the Constitution. However, they gave varied reasons for their separate judgments. Khanna, J., struck down clause (4) on the ground that it violates the principle of free and fair elections which is an essential postulate of democracy and which in its turn is a part of the basic structure. Democracy can indeed function only upon the faith that elections are free and fair. Free and fair election requires that the candidates should not resort to unfair means or malpractices, disputes are bound to arise regarding the validity of elections. For resolving such disputes there must be a forum. The vice of clause (4) is that it abolishes the forum without providing for another forum for deciding election disputes of the appellant. Mathew, J., said that our Constitution [Art. 329 (b)] visualizes that election disputes must be decided by a judicial process, namely, by ascertaining facts and applying the pre-existing law. Clause (4) validates the election by a legislative process. The amending body, though possessed of judicial power, had no competence to exercise it unless it passed a constitutional law enabling it to do so. If the amending body really exercised judicial power, that power was exercised in violation of the principles of natural justice of *audi alteram partem*. There was nothing in the face of the amendment to show that amending body ascertained the facts of the case or applied any norms for determining the validity of the election. The amendment damages or destroys an essential feature of democracy as established by the Constitution, namely, decision of election dispute by court in the exercise of judicial power by ascertaining facts and applying the existing law. He criticised it as a legislation *ad hominem* directed against the course of the bearing of the appeals on merits as the appeal was to be disposed of in accordance with that clause and not by applying the law to the facts as ascertained by the Court. This was a direct interference with the decision of these appeals by Supreme Court on their merits by a legislative judgment. It was difficult to understand when the amending body expressly excluded the operation of all laws relating to election-petition and matters connected therewith by clause (4), and what ideal norms of free and fair election it had in view in adjudging the validity of the appellant. According to Mr. Justice Chandrachud, clauses (4) and (5) of the amended Article were an outright negation of the right of equality conferred by Art. 14, which more than any other is a basic postulate of our Constitution. The provisions are arbitrary and are calculated to damage or destroy the Rule of law. He said, generality and equality are two indelible characteristics of justice administered according to law. Clause (4) makes the existing laws retrospectively inapplicable without providing a law. It creates a legal vacuum. This clause puts the election of Prime Minister and the Speaker beyond the reach of any law, past or present. It is the common man's sense of justice which sustains democracies and there is a fear that the 39th Amendment may outrage that sense of justice. Different rules may apply to different conditions and classes of men and even a single individual may, by his uniqueness, form a class by himself. But in the absence of a difference reasonably related to the object of the law, justice must be administered with an even-handed to all. He rejected the contention of the Attorney-General that the amending body is an amalgam of all powers, legislative, executive and judicial. He said, "whatever pleases the emperor has the force of law" is not an Article of democratic faith. In deciding this case the Court proceeded on the basis of the majority judgment in the *Kesavanand Bharati's* case namely, that Parliament cannot alter the basic structure and framework of the Constitution while enacting a constitutional amendment under Art. 368.

The two other Judges, Chief Justice A. N. Ray and Justice Beg delivered

dissenting judgment. The Chief Justice held that clause (4) is a "declaratory judgment" which has been passed by the Legislature in exercise of judicial power and "not a law". The Constituent power can exercise judicial power. All powers, legislative, executive and judicial flow from the constituent power, though he accepted that it offends the Rule of Law as it did not apply any law but yet he did not declare it unconstitutional. Justice Beg held that clause (4) does not bar the jurisdiction of the Court to hear and decide the appeal.

All the Judges upheld the validity of the amendments made in the Election Laws in 1974 and 1975. They held that in view of the amendments Mrs. Indira Gandhi had committed no corrupt practice. The Court did not accept the contention of the respondents that even ordinary laws would be subject to the test of basic structure of the Constitution. Such a limitation operates upon an amending law under Art. 368 and upon a law under Art. 245.

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## Special Provisions Relating to Certain Classes (Arts. 330 to 342)

**Introduction.**—Our Constitution is consecrated by the ideals of equality and justice both in the social and political field. Accordingly, it abolishes any discrimination to any class of persons on the ground of religion, race or place of birth. It is in pursuance of this ideal that the Constitution has abolished communal representation or reservation of seats in the Legislatures or in any public office on the basis of religion.

"It would have been a blunder on the part of the makers of our Constitution if, on a logical application of the above principle 'they had omitted to make any special provisions for the advancement of those who are socially and economically backward, for' the democratic march of nation would be impossible if those who are handicapped are not aided at the start. The principle of democratic equality, indeed, can work only if the nation as a whole is brought on the same level, as far as that is practicable. Our Constitution, therefore, provides certain temporary measures to help the backward sections to come up to the same level with the rest of the nation, as well as certain permanent safeguards for the protection of the cultural linguistic and similar rights of any section of the community who might be said to constitute 'minority' from the numerical, not communal point of view, in order to prevent the democratic machine from being used as an engine of oppression by the numerical majority."<sup>1</sup>

(1) Article 46 of the Directive Principles enjoins the State to take special care in promoting the educational and economic interests of the weaker sections of the people and in particular the Scheduled Castes and Scheduled Tribes and to protect them from social injustice. Any such provision made by the State cannot be challenged on the ground of being discriminatory.<sup>2</sup>

(2) Part III of the Constitution guaranteeing fundamental rights contains many provisions protecting minority rights.

Article 14 guarantees to every person the right not to be denied equality before the law or the equal protection of laws. Article 15 prohibits discrimination by State on grounds only of religion, race, caste, etc. with regard to access to public places. Nothing in this article shall prevent from making any special provisions for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Article 16 guarantees equality of opportunity in matters of public employment. It prohibits discrimination in respect of public employment on grounds only of religion, race, caste, etc. But the State can make reservations of appointments or posts in favour of any backward class of citizens not adequately represented in the service under the State. Article 17 abolishes untouchability. Article 19 (5) authorizes the State to impose reasonable restrictions on the fundamental rights guaranteed by Clauses (d), (e) and (f) of Article 19 for the protection of interests of any scheduled tribes.

Articles 25 to 30 make provisions for protecting the religion and culture of minorities. Any section of the citizens of India having a distinct language,

1. Basu, D. D.: Introduction to the Constitution of India, 6th Edition, p. 327.  
2. The Constitution (First Amendment) Act, 1951

script, or culture shall have right to conserve the same. All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. In granting aid to educational institutions the State cannot discriminate on grounds that it is under the management of majority.

Article 275 provides for grants-in-aid to the States for promoting the welfare of Scheduled Tribes. According to Article 325 there shall be one general electoral roll, and no person is ineligible for inclusion in it on grounds only of religion, race caste, etc. Article 164 provides for Special Minister for Tribal Welfare in Bihar, Madhya Pradesh and Orissa.

Articles 330 to 342 make special provisions for safeguarding the interest of Scheduled Castes, Scheduled Tribes, Anglo Indians and Backward Classes. Articles 347, 350, 350-A, 350B make provisions for protecting the interests of linguistic minorities.

**A. Scheduled Castes and Scheduled Tribes.**—The Constitution does not define as to who are the persons who belong to Scheduled Castes and Scheduled Tribes. Articles 341 and 342 however empower the President to draw up a list of these castes and tribes. Scheduled Castes and Scheduled Tribes are those castes or tribes as the President may by public notification specify. If such notification is in respect of a State it can be done after consultation with the Governor of the State concerned. Any inclusion or exclusion from the Presidential notification of any caste, race, or tribe can be done by Parliament by law.

If any question arises whether or not a particular tribe is a tribe within the meaning of this Article, one has to look at the public notification issued by the President under Article 341 (1).<sup>1</sup>

The Constitution provides the following special provisions for the protection of the interests of the Scheduled Castes and Scheduled Tribes.

**Reservation of seats in Lok Sabha and State Assemblies [Arts. 330 & 332].**—Article 330 provides for the reservation of seats in the Lok Sabha for Scheduled Castes and Scheduled Tribes. The number of seats reserved in any State or Union Territory for such castes and tribes will be made on the population basis. The expression population for the purposes of this Article means the population as ascertained on the basis of 1971 census. The allocation of the seats in the Lok Sabha shall be frozen till the year 2000. This means that there will be no increase in the number of seats in the Lok Sabha till the year 2000. Similarly, Art. 332 provides for the reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of every State, (except in the Tribal areas of Assam, Nagaland and Meghalaya).

Originally under Art. 334 the reservation was made for ten years from the commencement of the Constitution. Since then, this duration was extended by ten years each time. The word 'twenty' was substituted by the Constitution (8th Amendment) Act, 1959, for the words 'ten years'. Again, the word 'thirty' was substituted by the Constitution (23rd Amendment) Act, 1969 for the word 'twenty'. Now, the word 'forty' has been substituted by the 45th Amendment Act, 1980 for the words 'thirty' in Art. 334 of the Constitution.

Though seats are reserved for them, they are elected by all the voters in

1. *Bhaiya Lal v. Harikishan Singh*, AIR 1965 SC 1557 ; *Basavalingappa v. Munichinappa*, AIR 1965 SC 1269.

the Constituency. There is no separate electorate for Scheduled Castes and Scheduled Tribes. Article 325 expressly provides that there shall be one general electoral roll. This means that a member of Scheduled Castes and Tribes may contest any seats other than reserved, i. e., a general seat.<sup>1</sup>

Article 335 however, makes it clear that the claims of the members of the Scheduled Castes and Tribes shall be taken into consideration, consistently with the maintenance of administration, in the making of appointments to services and posts under the Union or State. For this purpose, Article 16 (4) permits reservation of posts for backward classes which may include the Scheduled Castes and Tribes.

In order that the safeguards given to the minorities should be observed : Article 338 provides for the appointment by the President of a special officer for the Scheduled Castes and Scheduled Tribes. It shall be the duty of the Special Officer to investigate all matters, relating to the safeguards provided for these classes and to report to the President upon the working of those safeguards at such intervals as the President may direct. The President is to cause all such reports to be laid down before each House of Parliament.

The President may at any time and shall at the expiration of ten years from the commencement of the Constitution, appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the State.<sup>2</sup> The Central Government is also authorised to give directions to a State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State.<sup>3</sup>

#### B. Anglo-Indians.

According to Article 366 (2) an Anglo-Indian means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India or born within such territory whose parents habitually were resident in India and not established for temporary purposes only.

The President may, if he is of opinion that the Anglo-Indian Community is not adequately represented in the Lok Sabha, nominate not more than two members of that Community to it.<sup>4</sup> Similarly, the Governor of a State may, if he is of opinion that the Anglo-Indian Community is not adequately represented in the Legislative Assembly of the State, nominate such number of members of the Community to the Assembly as he considers appropriate.<sup>5</sup> This concession to the Anglo-Indian Community was only for 10 years from the commencement of the Constitution.<sup>6</sup> But the duration was extended by ten years each time and now the 45th Amendment 1980 has extended it from thirty to 'forty' years. Article 335 preserves certain special rights and privileges enjoyed by the Anglo-Indian Community before the Constitution came into force. It says that two years after commencement of the Constitution, appointments of members of the Anglo-Indian Community to the posts in the railway, customs, postal and telegraph services of the Union were to be made on the same basis as immedi-

1. V. V. Giri v. D. S. Dora, AIR 1959 SC 1318.
2. Article 339 (1).
3. Article 339 (2).
4. Article 331.
5. Article 333.
6. Article 334 (b).

ately before August 15, 1947.<sup>1</sup> Thereafter, the number of posts reserved for the said Community were to be reduced by 10% after every two years, and at the end of ten years from the commencement of the Constitution all such reservation came to an end. The members of the Anglo-Indian Community may also be appointed to posts other than or in addition to those reserved for the community under Article 336 (1) if such members are found *mala fide*, for appointment on merit as compared with the members of other Community.<sup>2</sup>

For the first three years after the Constitution came into operation, the same grants would be made by the Central and the State Governments for the benefit of the Anglo-Indian Community in respect of education as were made ever before March 1, 1948. Such educational grants to be reduced after three years and come to an end after 10 years from the commencement of the Constitution. But no educational institutions run by the Anglo-Indian Community were entitled to receive any grant unless at least 40% of the annual admission therein are made available to members of communities other than Anglo-Indian Community.<sup>3</sup> In *State of Bombay v. Bombay Education Society*,<sup>4</sup> an order of State Government which prevented the Anglo-Indian school to admit students of other communities was held unconstitutional on ground that it prevented the Anglo-Indian Schools from performing this constitutional obligation of admitting at least 40% students of other communities. Under Article 337 the State could not impose any other obligation on the Anglo-Indian schools as a condition to receive grants,<sup>5</sup> or so as to deprive them from such grant, except the condition of admitting at least 40% of non-Anglo-Indian students.<sup>6</sup>

### C. Backward Classes.

The Constitution does not define as to who are the persons who belong to the Backward Classes. It is for the Central and the State Governments to specify such classes of persons for the purposes of the Constitution.

But under Article 330 (1) the President is empowered to appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made by the Union or any State for that purpose and conditions subject to which such grants should be made.

The Commission so appointed shall investigate the matters referred to it and present to the President a report setting out the facts as found by them and making such recommendations as it thinks proper.<sup>7</sup> The President is required to lay down the report of the Commission together with a memorandum explaining the action taken thereon before each House of Parliament.

After the receipt of the report of the Commission, the President may, by

1. Article 335.
2. Article 335 (2).
3. Article 337.
4. A. I. R. 1954 S. C. 561.
5. *In re Kerala Education Bill*, A. I. R. 1958 S. C. 956.
6. *State of Bombay v. Bombay Education Society*, A.I.R. 1954 S.C. 561.
7. Article 334 (2).

order, specify backward classes. The Special Officer for Scheduled Castes and Scheduled Tribes then be asked to deal with Backward classes also.<sup>1</sup>

Under Article 15 (4) the State is empowered to make special provisions for the advancement of socially and educationally backward classes of citizen. Under Article 16 (4) the State is authorised to make provisions for the reservation of posts for backward classes, if in the opinion of the State, they are not adequately represented in the service.

The Constitution does not define the expression "backward class". It is for the Government to list the backward classes for purpose of Articles 15 (4) and 16 (4). There is no uniformity in the matter and each State lists the backwards classes in its own way. The Backward Classes Commission appointed in 1953, was asked to determine the criteria on the basis of which a class may be considered as a backward class. The Commission could not find a criteria for such classification.

In *Ram Krishna Singh v. State of Mysore*,<sup>2</sup> an order of the Government classified 95% of the total population of the State as backward classes. The classification was not based on social and economic backwardness but on caste and religion. The Mysore High Court held the order invalid. The court said that the determination by the Government with regard to backward classes is not final and court could examine the question as to whether the determination was based on an intelligible principle. The question whether a particular class of citizens is a backward or not is a justiciable issue.<sup>3</sup>

The Court can also examine whether the percentage of reservation provided for backward classes in any particular service is reasonable. If the reservation is found to be excessive, unreasonable or extravagant, it would be challenged as fraud on the Constitution.<sup>4</sup>

In *Devdasan v. Union of India*,<sup>5</sup> the 'Carry-forward Rule' framed by Central Government was held invalid on the ground that the power vested in the State Government under Article 16 (4) cannot be so exercised as to deny reasonable equality of opportunity in matters of public employment to members of classes other than backwards. In this case the number of vacancies which came to be reserved by virtue of 'Carry-forward Rule' was nearly 68% of the total vacancies which was unreasonable and hence the rule was declared invalid.

#### D. Linguistic Minorities.

A linguistic minority as a class of people whose mother tongue is different from that of the majority in the State or part of a State. The Constitution provides for the protection of the interests of linguistic minorities.

Article 350-A imposes a duty on the States to endeavour to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority. The President is

1. Article 338 (3).
2. A. I. R. 1963 Mys 338.
3. *Triloki Nath v. State of J. & K.*, A. I. R. 1967 S. C. 1283.
4. *Balaji v. State of Mysore*, A. I. R. 1963 S. C. 649—In this case a reservation of 68 per cent of seats in educational institutions by the State was held invalid.
5. A. I. R. 1964 S. C. 179, followed in *B. N. Tewari v. Union of India*, A. I. R. 1965 S. C. 1430,

authorized to issue such directions to any State, as he considers necessary or proper for securing the provisions of such facilities.

Article 347 provides for the use of majority language in the administration. If a demand is made in this behalf and the President is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognized by the State, the President may direct that such language, shall also be officially recognized throughout the State or any part of the State for such purposes as he may specify.

Article 350 gives right to every person to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or a State, as the case may be.

Article 350-B empowers the President to appoint a Special Officer for Linguistic Minorities. It is the duty of the Special Officer to investigate all matter relating to the safeguards provided for Linguistic Minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct. The President shall cause reports to be laid before each House of Parliament and send to the Government of the State concerned.

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## Official Language (Arts. 343 to 351)

The Official Language of the Union shall be Hindi in Devnagri Script but the form of numericals to be used for the official purposes of Union shall be the International form of Indian numericals.<sup>1</sup> However, for a period of fifteen years from the commencement of the Constitution the English Language shall continue to be used for all the official purposes of the Union. Even after fifteen years, the Parliament may by law provide for the use of English Language for specified purposes.<sup>2</sup> Even during this period of fifteen years, the President may authorise the use of the Hindi Language, in addition to the English Language, and of the Devnagri forms of numericals for any official purposes of the Union.

The Official Language of the Union shall be the official language for communication between one State and other and between a State and the Union,<sup>3</sup> but two or more States may agree to have Hindi as the Official Language for communication amongst them.

Article 345 provides that 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.

**Directive for the Development of the Hindi Language.**—Article 351 imposes a duty on the Union to promote the spread of the Hindi Language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating, without interfering with its genius, the forms, style and expression used in Hindustani and in other languages of India and by drawing for its vocabulary primarily from Sanskrit and secondarily from other Languages.

The Parliament may also provide the use of the Hindi Language in the proceedings of Supreme Court and High Courts. Until Parliament by law otherwise provides all proceedings in the Supreme Court and the High Courts and the authoritative Texts of Bills, Act, Orders, etc. shall be in English language.<sup>4</sup> The Governor of a State may, however, with the previous consent of the President, authorise the use of the Hindi Language or any other language for any official purposes of the State, in proceedings in the High Court except to any judgment, decree or order passed by the High Court.<sup>5</sup> For fifteen years from the commencement of the Constitution no bill or amendment making provision for the language to be used for any of those purposes shall be introduced in either House of Parliament without the previous sanction of the President. The President will give his sanction after taking into consideration the recommendation of the Language Commission and the report of the Committee thereof.<sup>6</sup>

The Constitution imposes a duty on every State to provide adequate facilities for instructions in the mother tongue at the primary stage of education to children belonging to linguistic minority groups.<sup>7</sup> The President shall also

1. Article 343 (1).
2. Article 343 (3).
3. Article 346.
4. Article 148.
5. Article 348 (2).
6. Article 349.
7. Article 350-A.

appoint a special officer for linguistic minorities who will investigate all matters relating to the safeguards provided for linguistic minorities under the Constitution and report to the President upon those matters as the President may direct.<sup>1</sup>

If a demand is made and the President 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, he may direct that such language shall also be officially recognised in that State for such purpose as he may specify.<sup>2</sup>

The Constitution also gives right to every person to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State as the case may be.<sup>3</sup>

Article 344 provides for the appointment of a Commission on Official Language. At the expiration of five years from the commencement of the Constitution and after ten years, the President shall appoint a Commission. The Commission shall consist of a Chairman and other members representing the different languages.<sup>4</sup>

The Commission is to make recommendation to the President regarding following matters—

(1) progressive use of the Hindi language for the official purposes of the Union ;

(2) restrictions on the use of the English language for all or any of the official purposes of the Union ;

(3) the language to be used for the proceedings in the Supreme Court and the High Courts ;

(4) the form of numericals to be used for any one or more specified purposes of the Union ;

(5) any other matter referred to the Commission by the President as regards the Official Language of the Union and the language for communication between the Union and a State or between one State and another and their use.

In making recommendation, under clause (2) the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the just claims and the interests of persons belonging to the non-Hindi speaking areas in regard to the public services. There shall be constituted a Committee consisting of thirty members of whom twenty will be elected by the House of the People and ten by the Council of States, to examine the recommendations of the Commissioner and to report to the President their opinion thereon. After considering the report of the Committee the President may issue directions in accordance with the whole or any part of the report.

The languages which are constitutionally recognised are—Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Malayalam, Marathi, Oriya, Punjabi, Saoskrit, Sindhi, Tamil, Telgu and Urdu. (Total 15)

The Parliament has passed the Official Language Act, 1963, which provides for continued use of English for official purposes of the Union indefinitely, notwithstanding the expiration of the period mentioned in Article 345. The change over to Hindi has thus been postponed indefinitely by permitting

1. Article 350-B.

2. Article 347.

3. Article 350.

4. Article 344 (4), (5), (6).

the use of English as an additional official language for all purposes for which it has been so far used. The position will be reviewed only after January 26, 1975.

In *Union of India v. Murasoli*,<sup>1</sup> the respondents filed writ-petitions in the High Court for a declaration that the Presidential Order which requires training of administrative personnel in Hindi while in service, is void. The Presidential Order made trainings in Hindi while in service compulsory for all Central Government employees below the age of 45 years. It was contended that the Presidential Order ceased to have any effect because the Second Language Commission was not appointed as required by Art. 344 of the Constitution. It was also contended that the Presidential Order was inconsistent with section 3 of the Official Language Act, 1963 insasmuch as they placed the respondent in a disadvantageous position on account of their having no proficiency in Hindi language. The Supreme Court held that the Presidential Order was valid. It is erroneous to say that the Presidential Order of 1960 became invalid after the passing of Official Language Act. The Presidential Order keeps in view the ultimate object to make Hindi Language as official language but takes into note the circumstances prevailing in our country and considered it desirable that the change should be gradual one and due regard should be given to the just claims and the interests of persons belonging to the non-Hindi speaking areas. The power to appoint Commissions under Art. 344 cannot be said to be exhausted on the expiry of 15 years. The President can use it on more than one occasions. The Presidential Order continues itself at the end of 15 years. It would be strange that the steps necessary for the change should be given up at the expiry of 15 years because a switch over from English to Hindi has not been possible and Parliament provided by law for the continued use of the English language.

The Court also held that there is no inconsistency between the Presidential Order and the Official Language Act. Arts. 343 and 344 deal with the process of transition. The ultimate aim is provided in Art. 345 which fulfils the object of the spread and development of the Hindi language. Art. 344 (6) takes into account this objective and is intended to determine the pace of progress and to achieve the same. The Act merely continues the use of the English language in addition to Hindi. The Act does put the limitation on the power of the President to issue directions under Art. 344 (6). The non-obscure clause in Art. 344 (6) empowers the President to issue such direction. Parliament is legislating in different field. The field is the permissive use of English language in addition to Hindi during the period following 15 years because the change to Hindi could not be complete. The transitional period has exceeded 15 years. The Presidential Order keeps in view the steps to replace the use of English language. The operation of the Act and the Presidential Order is, therefore, in different fields and has different purposes. The Act is to continue the use of English language after the expiry of 15 years. The Presidential Order on the other hand is to provide for the progressive use of the Hindi language. It confers an additional qualifications in those who learn Hindi and does not take away anything from the Government employees. Prizes are offered and there may be increase on pay. These are incentives. The contention that the Presidential Order conflicts with Sec. 3 (4) of the Act is unsound. The "In-service training" of the employees is during hours of duty and free of cost. Even if they fail there is no penalty. There is no treatment of unequal alike.

The States are left free to adopt any language to be used for official purposes.<sup>2</sup>

## The Emergency Provisions (Arts. 352 to 360)

One of the chief characteristics of the Indian Constitution is the way in which the normal Federal Constitution can be adapted to emergency situation. It is the merit of the Indian Constitution that it visualises the contingencies when the strict application of the federal principle might destroy the basic assumptions on which our Constitution is built.

The Constitution of India provides for three types of emergencies :

- A. National Emergency—due to war, external aggression or armed rebellion. (Art. 352).
- B. State Emergency—due to the failure of constitutional machinery in State. (Art. 356).
- C. Financial Emergency—(Art. 360).

A. National Emergency.—Caused by war, external aggression and armed rebellion. (Art. 352)—Art. 352 as it exists after the 44th Amendment Act, 1978, provides that if the President is satisfied that a grave emergency exists whereby the security of India or any part of India is threatened, either by war or external aggression or armed rebellion, he may make a Proclamation of Emergency in respect of the whole of India or any part of India as may be specified in the Proclamation. The proclamation of Emergency made under clause (1) may be revoked or varied by the President by a subsequent Proclamation [Cl. (2)].

Clause (3) provides that the President shall not issue a Proclamation of emergency unless the decision of the Cabinet (that is to say, the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under Article 75, that such a proclamation may be issued has been communicated to him in writing. This means that the emergency can be declared only on the concurrence of the Cabinet, and not merely on the advice of the Prime Minister as was done by Smt. Indira Gandhi's Government in June, 1975. She had advised the President to proclaim emergency without consulting her Cabinet.

The Proclamation of emergency must be laid before each Houses of Parliament and it shall cease to be in operation at the expiration of one month (prior to the 44th Amendment Act, 1978 two months) unless before the expiry of one month it has been approved by resolutions of both Houses of Parliament. If the proclamation of emergency is issued at a time when the Lok Sabha has been dissolved or the dissolution of the Lok Sabha takes place during the period of one month referred to above, without approving the proclamation, but the proclamation has been approved by the Rajya Sabha, the Proclamation shall cease to operate at the expiration of 30 days from the date on which the Lok Sabha sits after fresh election, unless before the expiry of the above period of 30 days a resolution approving the Proclamation has been passed by the Lok Sabha. [Clause (4)] A resolution approving the Proclamation must be passed by a *special majority*, that is by a majority of the total members of each House and also by a majority of not less than 2/3 of the

members present and voting in each House. Prior to the 44th Amendment, 1978, such a resolution could be passed by Parliament by a simple majority.

Clause (5) provides that once, the Proclamation of Emergency is approved by Parliament, it shall remain in force for a period of *six months* from the date of the passing of the second resolution approving it under clause (4), unless revoked earlier. For the further continuance of the emergency beyond the period of six months, approval by Parliament would be required every six months. If the dissolution of the Lok Sabha takes place during the period of six months without approving the further continuance of emergency, but it has been approved by the Rajya Sabha, the proclamation shall cease to operate at the expiry of 30 days after the Lok Sabha sits after fresh election unless before the expiry of the above period, it is approved by the Lok Sabha. Here also the resolution is required to be passed by the *special majority* referred to above.

Clause (7) provides that President shall revoke a proclamation if the Lok Sabha passes a resolution disapproving it or disapproving its continuance. Clause (8) provides that where a notice in writing signed by not less than  $\frac{1}{10}$ th of the total number of members of the Lok Sabha have been given their intention to move a resolution for disapproving the continuance of a proclamation of emergency—

- (a) to the Speaker, if the House is in session ; or
- (b) to the President, if the House is not in session ;

a special sitting of the Lok Sabha shall be held within 14 days from the date on which such a notice is received by the Speaker or the President for the purpose of considering the resolution. In such a case the session must be convened for considering the resolution. Now, it is not left to the discretion of the Government to convene or not a session of the Lok Sabha.

The power conferred on the President by this Article shall include the power to issue different Proclamations on different grounds, either war or external aggression or armed rebellion or imminent danger thereof, whether or not there is a proclamation already issued by the President under clause (1) and such proclamation is in operation. (Clause 9).

**Grounds.**—The President can proclaim emergency if he is satisfied that the security of India or any part thereof is threatened by either by *war* or *external aggression* or *armed rebellion*. Prior to the 44th Amendment Act, 1978, one of the ground on which emergency could be declared under clause (1) was "internal disturbance". The words "internal disturbance" were vague and gave wide discretion to the Executive to declare emergency even on flimsy grounds. In fact, Smt. Indira Gandhi, the then Prime Minister, had declared emergency on the ground that the security of India was threatened due to internal disturbance. The 44th Amendment has now substituted the words "armed rebellion" for the words "internal disturbance", which will exclude the possibility of a situation which arose in 1975.

The Proclamation of Emergency can be made even before the actual concurrence of events contemplated in Art. 352 have taken place if the President is satisfied that there is imminent danger of war or armed rebellion. Thus the actual occurrence of the events mentioned in Art. 352 are not essential. An imminent danger of war or external aggression or armed rebellion is enough for the declaration of emergency. [Explanation to Art. 352 (1)].

1. *Gulam Sarwar v. Union of India*, A. I. R. 1967 S. C 1335.

The "satisfaction" that the security of India is threatened or there is an imminent danger of its being threatened by war or external aggression or armed rebellion is the "subjective satisfaction" of the President and cannot be challenged in a court of law and even on ground that the opinion of the President had been actuated by *mala fides*. The President is the sole judge to decide whether circumstances exist justifying the proclamation of emergency.

It is to be however noted that the word 'satisfaction' used in Art. 352 does not mean the personal satisfaction of the President, but, it is the satisfaction of the Cabinet. Thus, the power to declare emergency can be exercised by the President only on the advice of the Council of Ministers. This provision has further been strengthened by the addition of the new clause (3) to Art. 352 by the 44th Amendment Act, 1978. It makes it clear that the President shall declare emergency only on the written advice of the Cabinet, and not merely on the advice of the Prime Minister, as was done by Smt. Indira Gandhi in June, 1975. She had advised the President to proclaim emergency without consulting her Cabinet. The members of the Council of Ministers were simply informed subsequently about the proclamation of emergency which was a *fait accompli*. The object of clause (3) is to prevent the recurrence of such a situation in future.

Emergency provisions vest a very great power in the Executive. In the Constituent Assembly, certain members had expressed the view that this power might be misused by the Executive. Dr. Ambedkar however said that the possibility that the emergency powers may be abused furnishes no ground for denial of emergency powers to the Executive. The power of Executive, however, is not unbridled. He pointed out that the Constitution itself provides certain safeguards against the abuse of emergency powers by the Executive. Firstly, it is to be exercised on the Council of Ministers who are representatives of the people. Secondly, it must be laid before the Parliament and cannot remain in force beyond two months without its approval. A review of the past events, however, have amply made it clear that inspite of the several safeguards incorporated in the Constitution, the emergency provisions were misused. In 1975 emergency provisions were used to perpetuate the rule of one party which was in power.<sup>1</sup> It is submitted that the effective safeguards against the abuse of emergency powers by the Executive are not constitutional provisions (even after the 44th Amendment, 1978) but the existence of an enlightened and vigilant public opinion. As promised to the electorate the Janata Government has enacted the 44th Amendment and incorporated certain safeguards in the Constitution against any misuse of emergency powers by Government in future.<sup>2</sup>

The 44th Amendment has amended article 352 and provided for various safeguards against abuse of emergency powers by the Government. The object of this amendment is to make it impossible the repetition of the 1975 situation when Smt. Indira Gandhi's Government declared emergency without any sufficient cause on the ground of "internal disturbance" and thousands and lakhs of innocent citizens were sent to jails only on the suspicion that their activities were likely in the opinion of the Government to threaten the internal peace within the country. The members of the Janata Government were the worst sufferers and they had promised to the electorate to amend the Constitution and incorporate adequate provisions for preventing the recurrence of the events

1. D. K. Singh, Emergency and the Constitution of India, Indian Constitution Trends and Issues, p. 288.

2. Inserted by the 44th Amendment Act, 1978.

during emergency. A brief summary of the 44th Amendment, as discussed above, is as follows :

1. The ground of "internal disturbance" has been substituted by the ground of "armed rebellion" these words will exclude the possibility of Emergency being proclaimed on the ground of "internal disturbance" only not involving armed rebellion. The words "internal disturbance" were vague and gave wide discretion to the Executive to declare emergency. After this amendment, a proclamation of emergency under Art. 352 will be possible only when the security of India is threatened by war or external aggression or armed rebellion.

2. Clause (3) provides that the President shall not issue a proclamation of emergency unless the decision of the Cabinet that such a proclamation may be issued has been communicated to him in writing. This means that the emergency can only be declared on the concurrence of the Cabinet, and not merely on the advice of the Prime Minister as was done by Smt. Indira Gandhi Government in June, 1975. She advised the President to proclaim emergency without consulting the Cabinet.

3. Clause (4) provides that the proclamation of emergency will have to be approved within a period of one month (instead of two months as provided at present) by a resolution of both the Houses of Parliament. This means that the proclamation will automatically cease to operate at the expiry of one month unless before the expiry of that period it has been approved by Parliament. Such a resolution should be passed by a majority of the total membership of each House and not less than  $\frac{2}{3}$  of the total membership of the members present and voting in each House. Prior to this, such a resolution could be passed by Parliament by a simple majority.

4. Clause (5) says that once approved by Parliament, the proclamation shall remain in force for a period of six months. For that further the continuance of the emergency beyond the period of six months, approval by Parliament would be required every six months. Prior to this amendment once approved by Parliament emergency could remain in operation for indefinite period, i. e., as long as the Executive wanted it to continue.

5. It provides that a proclamation of emergency shall cease to be operative whenever a resolution to that effect is adopted by the Lok Sabha by a simple majority of the members of the House present and voting.

6. Clause (8) provides that where a notice in writing signed by not less than  $\frac{1}{10}$  of the total number of members of the Lok Sabha has been given of their intention to move a resolution for approving or disapproving the continuance in force of a proclamation of emergency—

- (a) to the Speaker, if the House is in session ; or
- (b) to the President, if the House is not in session ;

a special sitting of the House shall be held within 14 days from the date on which such notice is received by the Speaker or the President for the purpose of considering such resolution. In such cases the session must be convened for considering the resolution. It is no longer left to the discretion of the Government to convene or not a session of the House.

7. Clause (5) of Article 352 added by the 42nd Amendment has been omitted. This clause made the 'satisfaction' of the President final.

8. Clause (9) provides that the power conferred on the President by this Article shall include the power to issue different proclamations on different grounds, war, or external aggression or armed rebellion or imminent danger thereof whether or not there is a proclamation already issued by the President under clause (1) and such proclamation is in operation.

**Territorial Extent of Proclamation.**—Art. 352 enables the President to make a proclamation of emergency either 'in respect of the whole of India or of such part of the territory thereof as may be specified'. These words were added by the 42nd Amendment Act, 1976, which now enables the President to confine the declaration of emergency to any part of the territory of India.

Prior to this Amendment, it could be made to apply to the whole of India. If the situation becomes normal in any part of the country emergency could be revoked from that part of the country, but it may continue to operate in other parts of the country.

**Duration of Proclamation.**—Prior to the 44th Amendment, 1978 a proclamation of emergency could remain in force in the first instance for "two" months. But once approved by Parliament emergency could remain in force indefinitely i. e. as long as the Executive wanted to continue. The 44th Amendment has curtailed the power of the Executive to prolong the operation of emergency unnecessarily.

After the 44th Amendment Act, a proclamation of emergency may remain in force in the first instance for "one" month. Such a proclamation, if approved by Parliament, shall remain in force for the period of "six months" unless revoked earlier. Clause (6) requires that the resolution approving the proclamation of emergency must be passed by either House of Parliament by a special majority, that is, by a majority of the total membership of that House present and voting. For the further continuance of emergency beyond the period of six months, approval by Parliament would be required every six months. Thus after this Amendment the continuance of emergency does not depend upon the discretion of the Executive. It can now be done only with the approval of Parliament and that too by a special majority of the House.

**Effects of Proclamation of Emergency.**—The following are the consequences of the Proclamation of Emergency :

(1) **Extension of Centre's Executive power (Art. 353).**—During the operation of a Proclamation of Emergency the executive power of the Union extends to giving of directions to any State as to the manner in which the executive power of the State is to be exercised.

The Constitution (42nd Amendment) Act, 1976 made a consequential change in Art. 353 following the amendment made in Article 352. It provides that the executive power of the Union to give directions under clause (a) and the power to make laws under clause (b) shall also extend to any State other than the State where emergency is in force, if the security of India or any part of the territory is threatened by activities in or in relation to that part of the territory of India in which the Proclamation of Emergency is in operation. This clause has also been added to Articles 358 and 359 of the Constitution.

In normal times, the executive power does not extend to giving such directions, subject to certain exceptions.

(2) Parliament empowered to legislate on State Subjects—(Art. 250).—While the Proclamation of Emergency is in operation, the Union Parliament is empowered to make laws with respect to any of the matters in the State List. The distribution of legislative power is thus fundamentally changed during emergency. The law-making power of the State is only suspended during the emergency. The State can make law but it is subject to the overriding power of the Union Parliament.

(3) Centre empowered to alter distribution of revenues between the Union and the States—(Art. 354).—The President may, while a Proclamation of Emergency is in operation by the order alter the financial arrangement between the State and the Union as provided in Articles 268 to 279. Every such order is to be laid before each House of Parliament and will come to an end by the end of the financial year in which the Proclamation of Emergency ceases to operate.

(4) Extension of life of Lok Sabha—[Art. 83 (2)].—While the Proclamation of Emergency is in operation, the President may extend the normal life of the Lok Sabha by a year each time upto a period not exceeding beyond six months after Proclamation ceases to operate.

(5) Suspension of fundamental rights guaranteed by Art. 19.—Article 358 provides for the suspension of the seven freedoms guaranteed to the citizens by Article 19 of the Constitution. It says that while a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State to make any law or to take any executive action abridging or taking away the rights guaranteed by Article 19 of the Constitution. It means that as soon as the Proclamation of Emergency is made the freedom guaranteed by Art. 19 are automatically suspended.

Normally, the rights guaranteed by Article 19 cannot be taken away or abridged by any law of Parliament or State Legislature. But Article 19 ceases to restrict the legislative or the executive power of the Centre or the States for the period of emergency and any law made by the Legislature or any action taken by the Executive cannot be challenged on the ground that they are inconsistent with the rights guaranteed by Article 19. As soon as the Proclamation of Emergency ceases to operate, Article 19 which remains suspended during emergency, automatically comes into life and begins to operate and any law inconsistent with Article 19 made during emergency ceases to have effect to the extent of the inconsistency except as respects *things done or omitted to be done before the law so ceases to have effect*. But no action will lie for anything done during the emergency even after the emergency is over.

The 44th Amendment Act, 1978.—has made two important changes in Article 358 : (l) Firstly, in Clause (l) of Article 358, for the words—"While a Proclamation of Emergency is in operation" the Amendment substitutes the following words—"While a Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression is in operation."

This means that under Article 358, Article 19 will be suspended only when a Proclamation of Emergency is declared on the ground of war or external aggression and not when emergency is declared on the ground of armed rebellion which has been added to this Article by the 44th Amendment.

(2) Secondly, it inserts a new clause (2) in Article 358 which says that—Nothing in clause (l) shall apply to—

(a) to any law which does not contain a recital to the effect that such law in relation to the Proclamation of Emergency when it is made, or

(b) to any executive action taken otherwise than under a law containing such recital. This clause makes it clear that Article 358 will only protect emergency laws from being challenged in a court of law and not other laws which are not related to the emergency. Prior to this, the validity of even other laws not related to emergency could not be challenged under Article 358.

The proclamation of emergency however, does not validate a law which was invalid before the proclamation of emergency.<sup>1</sup>

In *M. M. Phatak v. Union of India*,<sup>2</sup> the Supreme Court had an occasion to consider the effect of the expression "the things done or omitted to be done" in Article 358 after the Proclamation of Emergency ceases. In that case a settlement was arrived at between the Life Insurance Corporation of India and its employees in 1971 under which the LIC agreed to pay a case bonus to its employees. In 1976, however, by the LIC (Modification of Settlement) Act passed by Parliament during emergency the settlement was made ineffective and the employees could not demand their bonus while the emergency was in force. The employees of the LIC challenged the constitutional validity of the LIC (Modification of Settlement) Act, 1976.

The Supreme Court held that the effect of Proclamation of Emergency on fundamental rights is that the rights guaranteed by Articles 14 and 19 are not suspended during emergency but their operation is only suspended. This means that only the validity of an attack based on Articles 14 and 19 is suspended during the emergency. But once this embargo is lifted Articles 14 and 19 of the Constitution whose use was suspended, would strike down any legislation which would have been had. In other words, the declaration of validity is stayed during the emergency.

The expression "the things done or omitted to be done" occurring in Article 358 does not mean that the right conferred under the settlement is washed off completely. The expression is to be interpreted very narrowly. Therefore, as soon as the emergency is over, the settlement would revive and what could not be demanded during the period of emergency would become payable even for the period of emergency for which payment was suspended, otherwise the enactment will have effect even after the emergency had ceased. This would, the court said, clearly be contrary to the express provision of Articles 358 and 359 (1). In other words, valid claims cannot be washed off by the emergency *per se*. They can only be suspended by a law passed during the operation of Articles 358 and 359 (1).

6. Suspension of right of enforcement of fundamental rights (Art. 359).—Article 359 empowers the President to suspend the right to enforce fundamental rights guaranteed by Part III of the Constitution. It says that while the 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 fundamental rights as may be mentioned in the order (except Articles 20 and 21)<sup>3</sup> and all proceedings pending in any court for the enforcement of such rights shall remain suspended for the period of Proclamation is in force or for such shorter

1. *Bennet Coleman & Co. v. Union of India*, A. I. R. 1973 S. C. 106.

2. A. I. R. 1978 S. C. 803.

3. Added by the 44th Amendment Act, 1978.

period as may be specified in the order. An order suspending the enforcement of fundamental rights may extend to the whole or any part of the territory of India [Clause (2)]. An order made under clause (1) shall, as soon as possible, be laid before each House of Parliament.

The Constitution (38th Amendment) Act, 1975, has added a new clause (1A) in Art. 359 which provides that while an order under clause (1) is in operation, nothing in Part III shall restrict the power of the State to make any law or to take any executive action. Any such law shall cease to have effect to the extent of incompetency, as soon as the order ceases to operate except as respects things done or omitted to be done before the law so ceased to have effect.

**The 44th Amendment Act, 1978.**—The Amendment substitutes the following words in clauses (1) and (1A) the rights conferred by Part III (except Articles 20 and 21) for the words "the rights conferred by Part III". After Clause (1A) a new Clause (1B) has been inserted which provides that Article 359 shall not apply (a) to any law which does not contain a declaration that such a law is in relation to the Proclamation of Emergency in operation when made, or (b) to any executive action taken otherwise than under a law containing such a recital. The Amendment thus makes two significant changes :

Firstly, it provides that under Article 359 the President does not have the power to suspend the enforcement of the right to life and personal liberty under Article 21 of the Constitution. In future, Article 21 cannot be suspended during emergency. Secondly, it provides that suspension of any fundamental rights under Article 359 will not apply in relation to any law which does not contain a declaration that such a law is in relation to the Proclamation of Emergency in operation when it is made or to any executive action taken otherwise than under a law containing such a recital. Thus laws not related to the emergency can be challenged in a court of law.

This Amendment is a sequel to the decision of the Supreme Court in the *Habeas Corpus* case. The amendment is intended to remove the reoccurrence of such a situation in future.

It is to be noted that unlike Art. 358 under Art. 359 the suspension of right to move any court for the enforcement of fundamental rights is not automatic. It can only be brought about by a Presidential order.

In September 1962, China attacked India. On 26th October, 1962, the President of India issued a Proclamation of Emergency under Article 352(1) declaring that a grave emergency exists whereby the security of India is threatened by 'external aggression'.

On 3rd November, 1962, the President issued an order under Article 359 (1) which ran thus :

"In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution shall remain suspended for the period during which the emergency issued under Article 352(1) on 26th October, 1962 is in force, if such person has been deprived of any such rights under the Defence of India Act, 1962, or any rule or order made thereunder."

In *Makhan Singh v. State of Punjab*,<sup>1</sup> Makhan Singh and others were detained under the Defence of India Act, 1962. They applied to the High Court under section 491 (1) (b) of the Criminal Procedure Code and alleged that they had been improperly and illegally detained because the Defence of India Act and the Rules made thereunder contravene their Fundamental Rights under Articles 14, 21 and 22. Their petitions were dismissed by the High Court, on the ground that the Presidential Order issued under Article 359 created a bar, which precluded them from moving the High Court under section 491 (1) (b), Criminal Procedure Code. They went in appeal to the Supreme Court. The two important questions for decision by the Supreme Court were :

(1) What is the true scope and effect of the Presidential Order issued under Article 359 (1) ?

(2) Does the bar created by the Presidential Order operate in respect of the applications made by the detainees under section 491 (1) (b) of the Criminal Procedure Code ?

In construing Article 359 the Court considered it relevant and useful to compare and contract the provisions of Article 358 and Article 359.

(1) Under Article 358 as soon as the Proclamation of Emergency is issued under Article 352 and so long as it lasts. Article 19 is suspended, and the power of the Legislatures as well as the Executive to that extent is made wider. Although Article 19 will revive and become operative as soon as the proclamation ceased to operate, but Article 358 expressly provides that 'things done or omitted to be done during the emergency' cannot be challenged even after the emergency is over. Thus suspension of Article 19 is complete during the period of emergency and Legislative and Executive action which contravenes Article 19 cannot be questioned even after the emergency is over. Article 359, on the other hand, does not suspend any Fundamental Right, but merely authorises the President to issue an order declaring that the right to move any court for the enforcement of such Fundamental Rights as may be mentioned in the order, 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. The rights are not suspended, but the citizen is deprived of his right to move any court for their enforcement. The said rights are theoretically alive.

(2) While the suspension of Article 19 under Article 358 applies to the whole country and so covers all Legislatures and States, the order under Article 352 (1) may extend to the whole of India or may be confined to any part of the territory of India.

(3) While the suspension of Article 19 under Article 359 continues for the entire period of emergency, the suspension of the right to move any court will ensue for the period of the emergency, or for a shorter period, if so specified by the Presidential Order.

(4) While Article 358 provides that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over, the position under Article 359 is different. As soon as the order issued under Article 352 ceases to be operative, any infringement made by the Legislative or Executive action is liable to challenge on the basis that those rights were in operation even during the pendency of the Presidential Order, unless an appropriate Act of Indemnity is passed by Parliament.

1. A. I. R. 1964 S. C. 381.

Coming to the true scope and effect of Article 359, the Court said that it is impossible to accept the contention that only right that can be suspended by an Order made under Article 359 (1) is the right guaranteed by Article 32(1), to move the Supreme Court for the enforcement of any of the Fundamental Rights, and a citizen would be free to seek relief from a High Court under Article 226. Article 359 uses the word "any court", which does not mean only the Supreme Court but must include all courts of competent jurisdiction. The use of the expression "any court" cannot be justified by a reference to Article 32 (3) which enables Parliament to empower any other court to exercise all or any of the powers exercisable by the Supreme Court under Article 32 (2). Article 32 (3) clearly shows that the other courts empowered by the Parliament cannot have the same status as the Supreme Court to which alone Article 32 (1) is applicable. Hence the words "any court" in Article 359 (1) would include the Supreme Court as well as the High Courts before whom the specified rights can be enforced by citizens.

The Supreme Court, however, took the precaution of pointing out that a citizen would not be deprived of his right to move the appropriate court for a writ of *habeas corpus* if his detention has been ordered *mala fide*. The detention can also be challenged on the grounds of infringement of those rights conferred by Part III which have not been mentioned in the Presidential Order. Similarly, if the detenu contends that the provisions of Defence of India Act and the Ordinance under which he is detained suffer from excessive delegation his plea raised cannot be barred by the Presidential Order because it is a plea which does not relate to the fundamental rights mentioned in the Order.

In *Maharashtra State v. Prabhakar*,<sup>1</sup> the Supreme Court held that if a person was deprived of his personal liberty not under the Defence of India Act or any rule made thereunder but in contravention thereof his right to move the said courts in that regard would not be suspended.

Similarly, in *Ram Manohar Lohia v. State of Bihar*,<sup>2</sup> the Supreme Court held the order of detention under the Defence of India Rules illegal on the ground that the order of detention was inconsistent with the conditions laid down in the Defence of India Rules. In this case Dr. Ram Manohar Lohia was detained by an order of District Magistrate to whom the power was delegated by the Government under section 40 (2) of the Defence of India Act, 1962. The order stated that the D. M. was satisfied that with a view to prevent the petitioner from acting in any manner prejudicial to the "public safety and the maintenance of law and order" it was necessary to detain him. The expression used 'for this purpose' under the Defence of India Rules was "public safety and maintenance of public order".

The Court held that the order of the President does not form a bar to all applications for release from detention under the Act or the Rules. Where a person was detained in violation of the mandatory provisions of the Defence of India Act his right to move the court was not suspended. The petitioner contended that the order of detention was not justified under the Act or Rules and was, therefore, against the provisions of the Act. The petitioner was therefore entitled to be heard.

The order detaining the petitioner would not be in terms of the Rule unless it could be said that the expression "law and order" means the same

1. A.I.R. 1966 S.C. 724.

2. Ibid.

thing as "public order". What was meant by maintenance of public order was the prevention of disorder of a grave nature, a disorder which the authorities thought was necessary to prevent in view of the emergent situation created by external aggression ; whereas the expression "maintenance of law and order" may mean prevention of disorder of comparatively lesser gravity and of local significance only.

In *Mohd. Yaqub v. State of Jammu and Kashmir*,<sup>1</sup> the Supreme Court held that an order made by the President under Article 359 (1) is not 'law' within the meaning of Article 13 (2) and, therefore, its validity cannot be challenged with reference to the provisions of Part III. Thus if the order suspends the enforcement of Article 14, it cannot be challenged on the ground that it is discriminatory under Article 14. The validity of the order cannot be tested under the very fundamental rights, i. e., Article 14 which it suspended. The Supreme Court thus overruled its own decision in *Ghulam Sarwar v. Union of India*,<sup>2</sup> wherein it had held that the Presidential Order issued under Article 359 (1) could be challenged as being discriminatory order.

The emergency proclaimed in 1962 continued up to January 10, 1968. The emergency was again proclaimed in 1971 when Pakistan attacked India, and continued in operation up to March 1977. On 26th June, 1975, the President declared emergency on the ground that the security of India was threatened due to 'internal disturbances'.

This Proclamation of Emergency was in addition to the emergency declared in 1971 relating to external aggression which continued up to March 1977. The Constitution (38th Amendment) Act, 1975, added a new clause (4) to Art. 352 which declared that the power under clause (1) included the power to issue different proclamations on different grounds whether or not a proclamation has already been issued and is in operation.

On June 27, 1975 the President issued an order under Article 359 (1) as follows :

"In exercise of powers conferred by clause (1) of Article 359 the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 and all proceedings pending in any court for the enforcement of the above-mentioned rights shall remain suspended for the period during which the Proclamation of Emergency made under clause (1) of Article 352 on the 3rd December and 25th June are both in force."

In *A. D. M., Jabalpur v. S. Shukla*,<sup>3</sup> popularly known as the *habeas corpus* case the respondents challenged the validity of the Proclamation of Emergency by the President under Article 352 made on 25th June, 1975, and the order of detention made against them thereunder. The respondents were detained under section 3 of the MISA. They filed applications in different High Courts for the issue of writ of *habeas corpus*. A preliminary objection was raised on behalf of the State that the President's Order was a bar to invoke the writ jurisdiction of the High Courts. The High Courts held that notwithstanding the continuance of emergency and the Presidential Order suspending the

1. A. I. R. 1968 S. C. 765 (overruling *Ghulam Sarwar v. Union of India*, A. I. R. 1968 S. C. 1335).

2. A. I. R. 1968 S. C. 1335.

3. A. I. R. 1976 S. C. 1207.

enforcement of rights conferred by Articles 19, 21 and 22 the High Court can examine whether an order of detention is in accordance with the provisions of the MISA or whether the order was *mala fide* or was made on the basis of relevant materials by which the detaining authority could have satisfied that the order was necessary. The State appealed to the Supreme Court.

The main questions for the consideration of the Supreme Court were two : *Firstly*, whether in view of the Presidential Order, dated 27th June, 1975 and 8th January, 1976 under clause (1) of Article 359 any writ-petition under Article 226 before a High Court for *habeas corpus* to enforce the right to personal liberty of a person detained under the Act on the ground that the order of detention is not in compliance with the Act. *Secondly*, if such a petition is maintainable what is the scope of judicial security particularly in view of the Presidential Order mentioning Art. 22 and section 16A of the MISA. Section 16A of MISA prohibits the detaining authority to communicate grounds of detention to the detenu.

The Supreme Court by a 4 : 1 majority (A. N. Ray, C. J., Beg, Chandrachud and Bhagwati, JJ.)—Khanna, J. dissenting) held that in view of the Presidential Order, dated 27th June, 1975 no person has any *locus standi* (legal right) to move any writ-petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by *mala fides* factual or legal or is based on extraneous considerations.

The respondents had argued that the present appeal should be decided in the light of the Court's rulings in the *Makhan Singh* case. In *Makhan Singh*'s case the Court had held that if a detenu challenged his detention on the ground that it violated statutory provisions or the detention is vitiated by *mala fides* the challenge could not be barred because of the Presidential Order, under Article 359 (1).

The Court however, held that the Supreme Court decision in *Makhan Singh*'s case does not apply in the present case. The 1962 Presidential Order was a conditional order as it related to only those persons who had been detained under Defence of India Act. The Presidential Order issued on June 27, 1975 was a "blanket" order and was not confined to persons detained under a particular law. Mr. Justice Khanna in his dissenting judgment however, observed, "the difference in phraseology of the Presidential Order dated June 27, 1975 and that of the 1952 Presidential Order would not justify the conclusion that because of the new Presidential Order a detention order need not comply with the requirements of the law providing for preventive detention".

It was also argued that the object of Article 359 (1) is to bar moving the Supreme Court under Art. 32 for the enforcement of, without effecting in any manner the enforcement of common law and statutory rights to personal liberty under Article 226 before the High Court. In brief, the contention was that Article 21 is not the embodiment of rights to personal liberty. The Court, however, rejected this argument and held that Art. 21 is the sole repository of the right to life and personal liberty. The moment the right to move any Court for enforcement of the Article is suspended, no one can move any court for any redress.

The Court has also made important observations on the question whether the state of emergency resulting from the Presidential Order can be equated

with Martial Law. It was argued that if the jurisdiction of courts to enforce the right to personal freedom is affected, the resulting position would be no different from that, which prevails when Martial Law is declared. The Court however did not agree with the contention of the petitioner. Beg., J.<sup>1</sup> observed, "There is no provision" in our Constitution for a declaration of Martial Law. Nevertheless Article 34 of the Constitution recognises the possibility of Martial Law in this country. Martial Law cannot be equated with conditions under emergency particularly after the Presidential Order under Article 359 (1). Firstly, a Presidential Order under Article 359 (1) has a wider range and effect (prior to the 42nd Amendment Act, 1976) throughout the country than the existence of Martial Law in a particular part of the country. Martial Law is generally of a locally restricted application. Secondly, the conditions in which Martial Law may prevail result in taking over by Military Courts of powers even to try offences; and the ordinary or civil courts will not interfere with the special jurisdiction under extraordinary conditions. Such a takingover by Military Courts is certainly outside the provisions of Article 359 (1) of the Constitution. It would perhaps fall under Presidential powers under Articles 53 and 73 read with Article 355 of the Constitution.

#### **Distinction between Arts. 358 and 359.**

While Art. 358 *proprio vigore* (automatically) suspends the fundamental rights guaranteed by Art. 19 thus enabling the State to make laws in violation of Art. 19 and to take executive action under those laws despite the fact that those laws constitute an infringement of the rights conferred by Art. 19. Article 359 (1) does not suspend any fundamental rights of its own force but authorises the President to deprive an individual of his right to approach any court for enforcement of any or all of the rights conferred by Part III of the Constitution.

Thus Article 359 (1) which makes no distinction between the threat to the security of India by war or external aggression or armed rebellion is wider in scope than Art. 358 and it is not open to any one either to challenge the validity of any law or any executive action on the ground of violation of a fundamental right specified in the Presidential Order promulgated under Article 359 (1).<sup>2</sup>

A. A Duty of the Union to protect States—Article 355 imposes a duty on 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.

Article 355 thus imposes the following two obligations on the Central Government :

- (1) The duty to protect States from internal disturbance and external aggression. Such provisions are also found in other federal Constitutions, i. e. America, Australia. But in America and Australia the Centre acts only when the request is made by States, while there is no such pre-condition under Article 355. The Centre can thus interfere even without the State's request.
- (2) The duty to see that the Government of every State is carried on in accordance with the provisions of the Constitution. The Cons-

1. A. D. M., Jabalpur v. S. Shukla, A. I. R. 1976 S. C. 1207 at p. 1318.

2. Union of Indis v. Bhanudas, A. I. R. 1977 S. C. 1207.

titions of U. S. A. and Australia also contain such provisions. It is this duty in performance of which the Centre takes over the Government of State under Art. 356 in case of failure of the constitutional machinery in the State. In other federations, however, the Centre cannot do so.

**B. Failure of constitutional machinery in State.**—Article 356 says that if the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, he may issue a proclamation. By that proclamation :

- (1) The President may assume to himself all or any of the powers vested in or exercisable by the Governor to any body or authority in the State.
- (2) The President may declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament.
- (3) The President may make such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of proclamation.

The President cannot, however, assume to himself, any of the powers vested in a High Court or suspend the operation of any provisions of the Constitution relating to the High Court.

Where by the proclamation under Article 356 (1) the powers of the State Legislature are to be exercised by Parliament. Parliament can confer on the President the power to make laws for the States. Parliament may also authorise the President to delegate such power to any other authority as specified by himself.<sup>1</sup> If the Lok Sabha is not in session the President may authorise expenditure from the Consolidated Fund of State, pending sanction of such expenditure by Parliament.

The Constitution (42nd Amendment) Act, 1976 has substituted a new clause in place of clause (2) of Article 357. This is a saving clause which says that any law made by Parliament or the President or any authority in exercise of the powers of the State Legislature under Article 356 shall continue in force until altered, repealed or amended by the competent Legislature or other authority.

It is to be noted that under Article 356 the President acts on a report of the Governor or otherwise. This means that the President can act even without the Governor's report. This is justified in view of the obligation of the Centre imposed by Art. 355 to ensure that the Government of the State is carried on in accordance with the provisions of the Constitution. In view of it the Centre's ultimate responsibility to protect the constitutional machinery of the States, the framers thought it proper not to restrict and confine the action of the Centre merely on the Governor's report. The Governor might not sometimes make a report. The President can, therefore, act even without the Governor's report, if he is satisfied that such events have occurred in a State, which involve the special responsibility placed upon the Centre to maintain the State under the Constitution.

1. Article 357 (1)(a)

A proclamation issued under Article 356 shall be laid before each House of Parliament and shall remain in operation for 2 months. Unless before the expiry of that period it has been approved by both Houses of Parliament. Any such proclamation may be revoked or varied by a subsequent proclamation. If any such proclamation is issued at a time when the Lok Sabha is dissolved or the dissolution takes place during the period of 2 months and the proclamation is passed by the Rajya Sabha but not passed by the Lok Sabha, the proclamation shall cease to operate at the expiry of 30 days from the date on which the new Lok Sabha meets after the reconstruction unless before the expiry of 30 days it has been also passed by the Lok Sabha. If the proclamation is approved by the Parliament it will remain in operation for "six months". Parliament may extend the duration of proclamation for "six months" at a time but no such proclamation shall in any case remain in force for more than three years. After the expiry of the maximum period of three years, neither the Parliament nor the President shall have power to continue a proclamation and the constitutional machinery must be restored to the State.

The Constitution (44th Amendment) Act, 1978 has amended Article 356 and restricted its scope. It substitutes the words 'six months' for the words "one year" as it existed originally. Thus it restores the position as it stood before the 42 Amendment. A proclamation of emergency will, if approved by Parliament, continue for six months from the date of the issue. For the further continuance of emergency, it must be approved by Parliament each time for a period of six months. It has added a new clause (5) to Art. 356 in place of the existing clause (5) which is now omitted. This clause (5) provided that a resolution for the continuance of the emergency beyond one year shall not be passed by either House of Parliament unless—(a) a proclamation of emergency is in operation at the time of the passing of such resolution; and (b) the Election Commission certifies that the continuance in force of the proclamation under Art. 356 during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned. This means that the extension of the emergency beyond the period of one year only be possible if the conditions mentioned in clause (5) are present. Prior to this Amendment there was no such condition imposed and the Government could extend the period upto the maximum of 3 years without sufficient cause.

Since the commencement of the Constitution the President's rule had been imposed under Article 356, on several occasions. In most of the cases, it has been imposed in the circumstances in which stable ministry could not be formed, e. g., in 1951 in Punjab, in 1953 in Pepsu, in 1954 in Andhra Pradesh, in 1956 in Travancore-Cochin, in 1961 in Orissa, in 1964 in Kerala, in 1967 in Rajasthan, in 1968 in Uttar Pradesh, West Bengal, Bihar and Punjab, in 1969 in Bihar. In West Bengal for the second time, in 1970 on the resignation of Sri Ajoy Mukherji, Chief Minister of the United Front Ministry. In U. P., second time in 1970 when Chief Minister, Mr. Charan Singh refused to resign when he had lost the majority. He had advised the Governor to dismiss 14 Ministers of his cabinet in the BKD—Congress Coalition Ministry. In Orissa second time in 1971, when the Chief Minister resigned and his advice for dissolution of Assembly was not accepted by the Governor. In Mysore in 1971, in Gujarat in 1971, in Punjab fourth time in 1971, in Tripura in 1971, in Bihar in 1971, in Andhra Pradesh in 1973. In Orissa for the third time on March 3, 1973 when the Chief Minister Nandini Satpathi had to resign due to defection. In 1973 it was imposed in Manipur owing to defection. In 1973 President rule was imposed in U. P. when the Chief Minister Mr. Kamla Pati

Tripathi had to resign due to the moral responsibility of the ministry for the Police revolt. In 1974, the President rule was imposed in Gujarat due to student's agitation demanding dissolution of Assembly. In 1975 it was imposed in Uttar Pradesh to solve party disputes. In 1976 it was imposed in Tamil Nadu on the ground that according to the Governor's report, the Tamil Nadu Government had disregarded the directions of the Central Government in relation to the emergency and has misused the emergency powers. The report also said that D. M. K. Ministry had by a series of acts of mal-administration, corruption and misuse of power for achieving partisan ends set at naught all canons of justice and equity which are hallmark of democratic administration. The action of the Centre cannot be held as democratic one because the ministry enjoyed the full confidence of the Legislature as well as the confidence of the people.

In 1959 the President rule was imposed in Kerala in a peculiar circumstance. The Communist Ministry was dismissed on the ground that it had lost the confidence of the people, although it enjoyed the confidence of the Legislature. There was a widespread agitation against the Government and the law and order situation was beyond the control of the State Government justifying the imposition of the President rule. The action of the Central Government has been subject to criticism.

In 1967 in Haryana, and in 1975 in Nagaland President rule was imposed due to defections. In 1966 President rule was imposed in Punjab as a result of the bifurcation of the State into Punjab and Haryana and in Goa for holding an opinion poll.

In 1976, President rule was imposed in two States, Gujarat and Orissa. In Gujarat it was imposed because of the failure of the coalition ministry due to defections. In 1976, in Orissa, like Uttar Pradesh, this article was invoked to solve party disputes. The Chief Minister Mr. Satpathy was asked to resign by the Congress High Command because she had defied certain direction of the High Command. The State Assembly was not dissolved but was kept under suspended animation. This was the fourth time that the State of Orissa came under President's rule, the last three occasions being the years, 1961, 1971 and 1973.

The President rule was imposed in Assam on December 12, 1979 on the ground that no government was possible due to defection. The Janata Ministry led by Mr. G. Borbora which assumed office after elections in 1978 resigned in September following defection from the party. It was succeeded by a newly formed regional party—Asom Janata Dal—consisting mostly of dissident Janata members. The Assam Dal headed by Mr. Hazarika came to power with the support of the Congress, C. P. I. and Progressive Democratic front. The Hazarika Ministry was reduced to minority when Congress and C. P. I. withdrew their support. Thereupon, on the report of the Governor, the Ministry was dismissed and the President rule was imposed in the State.

#### Nine Assemblies Dissolution in 1977.

In 1977, Article 356 was invoked in very peculiar circumstances. The Assemblies of 9 States of Rajasthan, Uttar Pradesh, Madhya Pradesh, Punjab, Bihar, Himachal Pradesh, Orissa, West Bengal and Haryana, were dissolved and President rule was imposed on the ground that the Assemblies in these States no longer represent the wishes of the electorate. The facts which led to the dissolution of the nine Assemblies were as follows: The Lok Sabha in which Congress had an overwhelming majority was dissolved on Jan. 18, 1977

and fresh elections were held in March 1977 in which the ruling Congress Party was completely routed and the Janata Party secured a landslide victory and formed the Government at the Centre. The Congress Party could not secure even a single Lok Sabha seat in several States. On the date on which the Janata Party took office, the Congress was in power in various States. On April 1977 Shri Charan Singh, the Union Home Minister, addressed a letter to the Chief Ministers of these States earnestly recommending for their consideration that they should advise the Governors of their respective States "to dissolve the State Assembly in exercise of the power under Art. 174 (2) (b) and seek a fresh mandate from the electorate." It was contended that since their party was virtually rejected in the recent Lok Sabha elections a serious doubt had been cast on their enjoying the peoples confidence. When a legislature no longer reflects the wishes of the electorate he said, it should obtain a fresh mandate.

Thereupon, six out of nine States filed suits under Art. 131 in the Supreme Court out of which arose the most important case of *State of Rajasthan v. Union of India*, A. I. R. 1977 S. C. 1361. The plaintiffs contended that the directive contained in the Home Minister's letter to the Chief Minister is unconstitutional. The letter discloses the sole ground for the proclamation under Art. 356 and that such a proclamation and the dissolution of their legislative Assemblies upon the grounds given in the letter is outside the scope of Art. 356 of the Constitution. It was also contended that the condition precedent to the dissolution of the Assemblies is a ratification by both Houses of Parliament and so that no dissolution can take place without ascertaining the wishes of both the Houses of Parliament. The petitioners prayed for a permanent injunction restraining the Union of India from giving effect to the Home Minister's directive. On behalf of the Union of India, it was contended that the suit under Art. 131 was not maintainable because the dispute was of a political character regarding the continuance of a Council of Ministers. It was argued that the questions which arose for gauging the existence of a "situation" calling for action under Article 356 are non-justifiable. Mere intimation of some facts does not justify a prohibition to act in future on other facts. It could not be predicted now what other facts may arise in future.

A seven member constitution Bench of the Supreme Court by an unanimous judgment rejected the petitioner's petition and upheld the Centre's action of dissolving their Assemblies under Art. 356 as constitutionally valid. The Court held that the 'satisfaction' of President under Art. 356 cannot be questioned. [Clause (5) added by the 42nd Amendment] to Art. 356 made it impossible for Courts to question the President's satisfaction "on any ground". The President does not act only on the report of the Governor but on otherwise. This means that the satisfaction can be based on material other than Governor's report. The choice between a dissolution and re-election or a retention of the same membership of the legislature or the Government for a certain period are matters of political expediency and strategy under a democratic system. Under the Indian system, the gist of political power through formation of several political parties is legal. Hence, a mere attempt to get more political power for a party is not constitutionally prohibited or *per se* illegal.

However, the Court did not give a blank cheque to the Government to dissolve Assemblies. The Court observed that if the satisfaction is *mala fide* or is based on wholly extraneous and irrelevant grounds the Court would have jurisdiction to examine it, because in that case there would be no satisfaction of

the President. (Bhagwati and Gupta, JJ.). The Chief Justice suggested that a healthy convention should be developed so that the power under Art. 356 is neither exercised capriciously by or arbitrarily nor it to be exercised when a political situation really calls for. It is not for Courts to formulate and, much less, to enforce a convention to regulate the exercise of such an executive power. This is a matter which entirely rests with the Executive.

After the judgment of the Supreme Court the Assemblies in the aforesaid States were dissolved and elections were held. In the elections, the Janata Party secured a thumping majority in these States and formed the Government.

#### Nine Assemblies Dissolution in 1980.

In 1980, Article 356 was invoked by the Congress (I) Government more or less in similar circumstances in which it was invoked in 1977 by the Janata Government at the Centre. The Assemblies of 9 States of Uttar Pradesh, Bihar, Rajasthan, Madhya Pradesh, Punjab, Orissa, Gujarat, Maharashtra and Tamil Nadu were dismissed and the President rule was imposed in them on the ground that they no longer represent the wishes and aspirations of the electorate. The facts leading to the dissolution of the nine Assemblies were as follows—As stated earlier, in 1977 Lok Sabha elections the Janata Party had secured a landslide victory and formed the Government at the Centre. But due to internal dissensions and defections from the party it was reduced to minority and the Prime Minister Mr. Morarji tendered the resignation of his Government. The President invited Mr. Charan Singh, the leader of the alliance to form the Government, but before he could face the Parliament he tendered his resignation and advised the President to dissolve the Lok Sabha and order fresh elections. The President dissolved the Lok Sabha and ordered fresh elections. In the elections the Congress (I) secured a massive majority by capturing 351 seats in the House and the Janata Party could secure only 31 seats. On the date on which the Congress (I) took office at the Centre, the Janata Party was in power in various States. On February 18, 1980 the Centre dissolved the Assemblies of the aforesaid nine States and imposed President rule in them. The grounds on which the Assemblies were dissolved were the same as those advanced by the Janata Government in 1977. The Congress (I) contended that after the Lok Sabha elections in December 1979, as in 1977, the State Governments and Assemblies concerned no longer represent the wishes and aspirations of the electorate. The dissolution order, however, did not mention any reasons for dissolution presumably due to the fear that if reasons were given it might be challenged in the court of law.

Although attempts to distinguish between the two sets of dissolutions may not appear to be all convincing because of the political overtures involved in it but this does not mean that the two sets of dismissals are exactly similar. First, the Assemblies dissolved by the Janata Government were living their extended life. Their tenure was extended from 5 years to 6 years by the 42nd Amendment which was passed when Emergency was in operation. In its election manifesto the Janata Party had promised to undo this Amendment. The political sovereign (electorate) gave the Janata Party the sanction to undo the 42nd Amendment which was enacted by the Legal Sovereign (Parliament). Initially, it could not be done because of majority enjoyed by the Congress Party in the Upper House. The Janata had therefore to take the political decision under Art. 356 to get rid of the Congress ruled ministries. Secondly, the Janata's case for dismissal was more strongly founded in the sense that the party's victory in the 1977 Lok Sabha election in the concerned nine States was much more spectacular than Congress (I)'s election victory in

rule is concerned, but it has not touched this aspect of the Article which was much more serious matter than limiting the period of the President's rule.

**Difference between Articles 352 and 356.**—Under Article 352 the State constitution cannot be suspended. The State Legislature and the State Executive continue to function. The only effect is that Centre gets concurrent powers of legislation and administration in State matters. Under Article 356, on the other hand, the State Legislature is suspended and dissolved. The Executive and Legislative power of the State is exercised by the Centre. Under Article 352 the relationship of all the States with the Centre undergoes a change, while under Article 356 the relationship of only the State with the Centre is affected.

**C. Financial Emergency.**—Article 360 provides that if the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of part of the territory thereof is threatened, he may by a proclamation make a declaration to that effect. The Constitution (38th Amendment) Act, 1975, added a new clause (5) which declared that the satisfaction of the President shall be final and conclusive and shall not be questioned in any court on any ground.

**The 44th Amendment Act, 1978.**—The Amendment makes two changes in Art. 360 of the Constitution. At present clause (2) of Art. 360 incorporates by reference the provisions of Cl. (2) of Art. 352. Since Cl. (2) of Art. 352 has been amended, it has become necessary to make Cl. (2) of Art. 360 self-contained. Therefore, the Amendment substitutes a new clause for Cl. (2) of Art. 360 which provides that a proclamation issued under Art. 360 (1) (a) may be revoked or varied by a subsequent proclamation, (b) shall be laid before each House of Parliament, and (c) shall cease to operate at the expiry of two months unless before the expiration of that period unless it has been approved by resolutions of two Houses of Parliament. But if the Lok Sabha is dissolved during this period of two months and resolution is approved by the Rajya Sabha, but not by the Lok Sabha, the proclamation shall cease to operate at the expiry of 30 days from the date on which the new Lok Sabha sits unless before the expiry of 30 days a resolution approving the proclamation is passed by the Lok Sabha.

Clause (5) of Art. 360 which was added by the 42nd Amendment has now been omitted.

During the period when such a proclamation is in operation, the executive authority of the Union shall extend to the giving direction to any State to observe such canons of financial propriety as may be specified in the direction. The President is also to give other directions as he may deem necessary and adequate for the purpose.

Any such direction may include a provision for the reduction of salaries and allowances of all or any class of persons serving in a State, including the Judges of the Supreme Court and High Courts. It may also require that all Money or Financial Bills are to be reserved for the consideration of the President after they are passed by the Legislature of the State.

The duration of a proclamation of financial emergency will be in operation for two months and unless approved by the President it shall cease to operate at the expiry of two months' period.

"The Constitution of India is unique in respect that it contains a complete scheme for speedy re-adjustment of the peace-time govern-

## The Amendment of the Constitution (Art. 368)

**Necessity of Amending Provision in the Constitution.**—Provision for amendment of the Constitution is made with a view to overcome the difficulties which may encounter in future in the working of the Constitution. No generation has a monopoly of wisdom nor has it a right to place letters on future generations to mould the machinery of Government according to their requirements. If no provision were made for the amendment of the Constitution, the people would have recourse to extra-constitutional method like revolution to change the Constitution.<sup>1</sup>

"It has been the nature of the amending process itself in federations which has led political scientists to classify federal Constitution as rigid. A federal Constitution is generally rigid in character as the procedure of amendment is unduly complicated. The procedure of amendment in American Constitution is very difficult. So is the case with Australia, Canada and Switzerland. It is a common criticism of federal Constitution that it is too conservative, too difficult to alter and that it is consequently behind the times."<sup>2</sup>

The framers of the Indian Constitution were keen to avoid excessive rigidity. They were anxious to have a document which could grow with a growing nation, adapt itself to the changing need and circumstances of a growing people. The nature of the 'amending process' envisaged by the framers of our Constitution can best be understood by referring the following observation of the late Prime Minister Pt. Nehru, "While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in the Constitutions. There should be a certain flexibility. If you make anything rigid and permanent you stop the nation's growth, of a living, vital, organic people ..... In any event, we could not make this Constitution so rigid that it cannot be adopted to changing conditions. When the world is in a period of transition, what we may do today may not be wholly applicable tomorrow."

But the framers of Indian Constitution were also aware of the fact that if the Constitution was so flexible it would be a plaything of the whims and caprices of the ruling party. They, were therefore, anxious to avoid flexibility of the extreme type. Hence, they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes. Willis in his book on the Constitutional Law of the United States says, "If no provision for amendment were provided, there would be constant danger of revolution. If the method of amendment were too easy, there would be the danger of too hasty action all the time. In either case there would be a danger of the overthrow of our political institutions. Hence the purpose for

social condition make it necessary to change the fundamental law to correspond with such social change."<sup>1</sup>

The machinery of amendment should be like a safety valve, so devised as neither to operate the machine with too great facility nor to require, in order to set in motion, an accumulation of force sufficient to explode it. The Constitution-makers have, therefore, kept the balance between the danger of having a non-amendable Constitution and a Constitution which is too easily amendable.<sup>2</sup>

"One can, therefore, safely say that the Indian Federation will not suffer from the faults of rigidity of legalism. Its distinguishing feature is that it is a flexible federation.<sup>3</sup>

For the purpose of amendment the various Articles of the Constitution are divided into three categories :

(1) *Amendment by Simple Majority.*—Articles that can be amended by Parliament by simple majority as that required for passing of any ordinary law. The amendments contemplated in Articles 4, 6 and 239 A, can be made by simple majority. These articles are specifically excluded from the purview of the procedure prescribed in Article 368.

(2) *Amendment by Special Majority.*—Articles of the Constitution which can be amended by a special majority, as laid down in Article 368. All constitutional amendments other than those referred to above come within this category, and must be effected by a majority of the total membership of each House of Parliament as well as by a majority of not less than 2/3 of the members of that House present and voting.

(3) *By Special Majority and Ratification by States.*—Articles which require in addition to the special majority mentioned above, ratification by not less than 1/2 of the State Legislatures. The States are given an important voice in the amendments of these matters. These are fundamental matters where States have important power under the Constitution and any unilateral amendment by Parliament may vitally affect the fundamental basis of the system built up by the Constitution. This class of Articles consists of amendments which seek to make any change in the provisions mentioned in Article 368. The following provisions require such ratification by the States :

- (1) Election of the President—Articles 54 and 55.
- (2) Extent of the Executive powers of the Union and the States—Articles 73 and 162.
- (3) Articles dealing with Judiciary, Supreme Court, High Courts in the States and Union territories—Articles 124 to 147, 214 to 231, 241.
- (4) Distribution of Legislative powers between the Centre and the States—Articles 245—255.
- (5) Any of the Lists of the VII Schedule.
- (6) Representation of States in Parliament—IV Schedule.
- (7) Article 368 itself.

1. Quoted in *Kesavanand v. State of Kerala*, A. I. R. 1973 S. C. 1461.

2. Ibid

3. Dr Ambedkar—CAD, Vol. IX, p. 1569.

## The Amendment of the Constitution (Art. 368)

**Necessity of Amending Provision in the Constitution.**—Provision for amendment of the Constitution is made with a view to overcome the difficulties which may encounter in future in the working of the Constitution. No generation has a monopoly of wisdom nor has it a right to place letters on future generations to mould the machinery of Government according to their requirements. If no provision were made for the amendment of the Constitution, the people would have recourse to extra-constitutional method like revolution to change the Constitution.<sup>1</sup>

"It has been the nature of the amending process itself in federations which has led political scientists to classify federal Constitution as rigid. A federal Constitution is generally rigid in character as the procedure of amendment is unduly complicated. The procedure of amendment in American Constitution is very difficult. So is the case with Australia, Canada and Switzerland. It is a common criticism of federal Constitution that it is too conservative, too difficult to alter and that it is consequently behind the times."<sup>2</sup>

The framers of the Indian Constitution were keen to avoid excessive rigidity. They were anxious to have a document which could grow with a growing nation, adapt itself to the changing need and circumstances of a growing people. The nature of the 'amending process' envisaged by the framers of our Constitution can best be understood by referring the following observation of the late Prime Minister Pt. Nehru, "While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in the Constitutions. There should be a certain flexibility. If you make anything rigid and permanent you stop the nation's growth, of a living, vital, organic people ..... In any event, we could not make this Constitution so rigid that it cannot be adopted to changing conditions. When the world is in a period of transition, what we may do today may not be wholly applicable tomorrow."

But the framers of Indian Constitution were also aware of the fact that if the Constitution was so flexible it would be a plaything of the whims and caprices of the ruling party. They, were therefore, anxious to avoid flexibility of the extreme type. Hence, they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes. Willis in his book on the Constitutional Law of the United States says, "If no provision for amendment were provided, there would be constant danger of revolution. If the method of amendment were too easy, there would be the danger of too hasty action all the time. In either case there would be a danger of the overthrow of our political institutions. Hence the purpose for providing for the amendment of the Constitution is to make it possible gradually to change the Constitution in an orderly fashion as the changes in

1. Kesavanand v. State of Kerala, A. I. R. 1973 S. C. 1461.
2. Prof. Wheare : Federal Government, 1963 ed., p. 209.

**Amendment of fundamental rights**—The question whether fundamental rights can be amended under Article 368 came for consideration of the Supreme Court in *Shankarl Prasad v. Union of India*.<sup>1</sup> In that case the validity of the Constitution (First Amendment) Act, 1951, which inserted *inter alia* Articles 31-A and 31-B of the Constitution was challenged. The amendment was challenged on the ground that it purported to take away or abridge the rights conferred by Part III which fell within the prohibition of Article 13 (2) and hence was void. It was argued that the "State" in Article 12 includes Parliament and the word "law" in Article 13 (2), therefore, must include a constitutional amendment.

The Supreme Court, however, rejected the above argument and held that the power to amend the Constitution including the fundamental rights was contained in Article 368, and that the word 'law' in Article 13 (2) includes only an ordinary law made in exercise of the Legislative power and does not include a constitutional amendment which is made in exercise of constituent power. Therefore, a constitutional amendment will be valid even if it abridges or takes away any of the fundamental rights.

In *Sajjan Singh v. State of Rajasthan*,<sup>2</sup> the validity of the Seventeenth Amendment of the Constitution was in question. This amendment amended Article 31-A by inserting one more proviso to it. A new sub-clause (a) was substituted for the old sub-clause (a) of clause (2) of Article 31 retrospectively. By this amendment 44 Acts were added in the Ninth Schedule. The petitioners contended that the power vested in the High Court, under Article 226 was likely to be affected by the 17th Amendment, therefore it was necessary that the special procedure laid down in proviso to Article 368 should have been followed. The impugned Act was said to be unconstitutional because it was not enacted according to the procedure laid down in Article 368. In this case the Supreme Court approved the majority judgment given in *Shankarl Prasad's* case. The majority in *Sajjan Singh's* case held that the expression "amendment of the Constitution" means amendment of all the provisions of the Constitution. Gajendragadkar, C. J. said that if the Constitution-makers intended to exclude the Fundamental Rights from the scope of the amending power, they would have made a clear provision in that behalf.

In *Golak Nath v. State of Punjab*,<sup>3</sup> the validity of the Constitution (17th Amendment) Act, 1964, which included in the Ninth Schedule, among other Acts, the Punjab Security of Land Tenures Act, 1953, and the Mysore Land Reforms Act, 1962, as amended by Act of 1965. The Supreme Court by a majority of 6 to 5 prospectively overruled its earlier decision in *Shankarl Prasad's* and *Sajjan Singh's* cases and held that Parliament had no power, from the date of this decision, to amend Part III of the Constitution so as to take away or abridge the fundamental rights ensured thereby. This means that though Parliament has the right to amend the provisions of the Constitution it cannot be amended so as to take away or abridge the fundamental rights. Chief Justice Subba Rao supported his judgment on the following reasonings :

(1) The Chief Justice rejected the argument that the power to amend the Constitution is a sovereign power and the said power is supreme to the legis-

1. A. I. R. 1951 S. C. 455 at p. 458.

2. A. I. R. 1965 S. C. 845.

3. A. I. R. 1967 S. C. 1643.

**Procedure for Amendment**—A Bill to amend the Constitution may be introduced in either House of Parliament. It must be passed by each House by a majority of the total membership to that House and by a majority of not less than 2/3 of the members of that House present and voting. When a Bill is passed by both Houses it shall be presented to the President for his assent, who shall give his assent to the Bill and thereupon the Constitution shall stand amended.<sup>1</sup> But a Bill which seeks to amend the provisions mentioned in Article 368 requires in addition to the special majority mentioned above the ratification by the 1/2 of the States.

Article 368, however, does not constitute the complete Code of unconstitutional amendment and that the process of amending the Constitution is the legislative process governed by the rules of that process.

Thus it is clear that most of the provisions of the Constitution can be amended by an ordinary legislative process. Only a few provisions which deal with the '*federal principle*' require a special majority *plus* ratification by the States. The procedure to amend these provisions is in conformity with the federal principle. The procedure to amend the Constitution is, however, not so difficult as in America or Australia. The difficult procedure of referendum followed in Australia and Switzerland or constitutional conventions followed in America, have not been adopted in Indian Constitution. Most of the provisions of the Indian Constitution can be amended by the special majority. Though different from the ordinary Legislative process, the special majority rule does not result in a very rigid method of amendment as is clear from the fact that the Constitution has been amended as many as 45 times within the period of 20 years. Even the procedure to amend the Constitution with the consent of States, though more rigid than the special majority rule, is not so difficult as the American or Australian procedure to amend the Constitution.

In Australia the Constitution can be amended in the following manner :

1. Amendment must be proposed by an absolute majority of both Houses.
2. Within 6 months this must be submitted to the electors.
3. Must be approved by a majority of the electors in a majority of the States.

In America, the constitutional amendments can be proposed in either of two ways—(1) by 2/3 of the votes of both Houses of Congress, or (2) by a Convention called on the application of the Legislatures of 2/3 of the States. An Amendment proposed in either of the above two ways can be ratified in either of two ways :—

1. by the Legislatures of 3/4 of the States, or
2. by Conventions in 3/4 of the States.

From the above, it is clear that the procedure in Australia and the United States is much more difficult than that of the Indian Constitution.

Thus, it may be said that the Indian Constitution-makers have sought to find a *via media*, between the two extremes—extreme flexibility and extreme rigidity, as this, it is hoped, will duly meet the needs of a growing society.

1. The Constitution (24th Amendment) Act, 1971.

lative power and that it does not permit any implied limitations and that amendments made in exercise of that power involve political questions and that therefore they are outside of judicial review.

(2) The power of Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368, which only deals with procedure. Amendment is a legislative process.

(3) An amendment is a 'law' within the meaning of Article 13 (2) and, therefore, if it takes or abridges the fundamental rights it is void. The word 'law' in Article 13 (2) includes every kind of law, statutory as well as constitutional law and, hence a constitutional amendment which contravenes Article 13 (2) will be void.

The Chief Justice said the fundamental rights are assigned transcendental place under our Constitution and therefore they are kept beyond the reach of Parliament.

The majority accordingly held that the Constitution (17th Amendment) Act, 1964, is void inasmuch as it takes away or abridges the fundamental rights under Article 13 (2) of the Constitution. The Chief Justice applied the doctrine of *Prospective Overruling* and held that this decision will have only prospective operation and therefore, the 1st, 4th and 17th Amendments will continue to be valid.

The majority, however, did not express any final opinion on the question whether the word 'amendment' in Article 368 includes the power to *destroy the basic structure of the Constitution or abrogation of the Constitution or its complete rewriting*.

The minority view of five out of eleven Judges was that the word 'law' in Article 13 (2) refers to only ordinary law and not a constitutional amendment and hence *Shankari Prasad's* and *Sajjan Singh's* cases were rightly decided. According to them, Article 368 dealt with not only the procedure of amending the Constitution but also contained the power to amend the Constitution.

*Hidayatullah and Mudholkar, JJ.*, however, by a separate judgment doubted the correctness of the majority view, as to whether fundamental rights were not really fundamental and should be amended under Article 368. Mudholkar, J., posed a further question, whether making a change in a basic feature of the Constitution can be regarded merely an amendment or would it, in effect, be rewriting a part of the Constitution; and if the latter would, it be within the purview of Article 368.

**24th Amendment Act, 1971.**—In order to remove difficulties created by the decision of Supreme Court in *Golak Nath's* case Parliament enacted the Constitution (24th Amendment) Act, 1971.

Section 2 of the Amendment Act added clause (4) to Article 13 of the Constitution providing that "nothing in this Article shall apply to any amendment of this Constitution made under Article 368". Section 3 (a) of the Amending Act substitutes a new marginal heading to Article 368 in place of the old. The old heading was "Procedure for amendment of the Constitution". The new heading is "Power of Parliament to amend the Constitution and procedure therefor". Section 3 (b) of the Amendment Act inserts a new sub-section (1) in Article 368 which provides that "Notwithstanding anything in this Constitution, Parliament may, in exercise of its constituent power amend by

way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this Article". Section 3 (c) of the Amending Act substitutes the words "it shall be presented to the President who shall give his assent to the Bill and thereupon" for the words "it shall be presented to the President for his assent and upon such assent being given to the Bill." Thus section 3 (c) makes it obligatory for the President to give his assent to the Amendment Bill. Section 3 (d) adds a new clause (3) to Article 368 which provides that "nothing in Article 13 shall apply to any amendment made under this Article".

Thus the 24th Amendment not only restored the amending power of the Parliament but also extended the scope of the amending power by adding the words "to amend by way of the addition or variation or repeal any provision of this Constitution in accordance with the procedure laid down in this Article".

#### *Kesavanand Bharti's Ruling and Theory of Basic Structure*

The validity of the Constitution (24th Amendment) Act, 1971 was, *inter alia* challenged in *Kesavanand v. State of Kerala*,<sup>1</sup> popularly known as the *Fundamental Rights case*:

The question involved was, *what is the extent of the amending power conferred by Article 368 of the Constitution?* On behalf of the Union of India, it was claimed that amending power is unlimited. Short of repeal of the Constitution, any change may be effected. The Counsel for the petitioner, on the other hand, contended that the amending power is wide but not unlimited. Under Article 368, Parliament cannot destroy the 'basic features' of the Constitution.

A Special Bench of 13 judges was constituted to hear the case. Out of the 13 judges 11 judges delivered separate judgments.

The Court by majority overruled the *Golak Nath's case*, which denied Parliament the power to amend fundamental rights of citizens. The majority held that Article 368, even before the 24th Amendment, contained the power as well as the procedure of amendment. The 24th Amendment merely made explicit what was implicit in the unamended Article 368-A. The 24th Amendment does not enlarge the amending power of the Parliament. The 24th Amendment is declaratory in nature. It only declares the true legal position as it was before that amendment. Hence it is valid.

As regards the scope of amending power contained in Article 368, six judges (Sikri, C. J., Shelat, Grover, Hegde, Reddy and Mukherjea, JJ.) held that there was inherent or implied limitations on the amending power of Parliament and Article 368 did not confer power to amend the Constitution so as to damage or destroy the essential elements or basic features of the Constitution. Khanna, J., held that though there was no implied limitation on the amending power but the power to amend did not include the power to abrogate the Constitution. The word "amendment", he said, postulates that the old Constitution must survive without loss of identity and it must be retained though in the amended form and, therefore, the power does not include the power to destroy or abrogate the basic structure or framework of the Constitution. The remaining six judges (A. N. Ray, Chandrachud, Mathew, Beg, Dwivedi and Palekar, JJ.) held that there were no limitations, express or implied on the amending power. Thus the Court by majority of 7 to 6 held

1. A. I. R. 1973 S. C. 1461.

that the Parliament has wide powers of amending the Constitution and extends to all the Articles, but the amending power is not unlimited and does not include the power to destroy or abrogate the 'basic features' or 'framework' of the Constitution. There are implied limitations on the power of amendment under Article 368. Within these limits, Parliament can amend every Article of the Constitution. Whether there are implied limitations on the amending power or not would depend upon the interpretation of the word 'amendment'.

Delivering the leading majority judgment the Chief Justice said, "In the Constitution the word 'amendment' or 'amend' has been used in various places to mean different things. In some articles, the word 'amendment' in the context, has a wide meaning and in another context it has a narrow meaning." In view of the great variation of the phrases used all through the Constitution it follows that the word "amendment" must derive its colour from Article 368 and the rest of the provisions of the Constitution. Reading the Preamble, the fundamental importance of the freedom of the individual, its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions, an irresistible conclusion emerges that it was not the intention to use the word "amendment" in the widest sense. It was the common understanding that the fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare State. In view of the above reasons, a necessary implication arises on the power of Parliament that the expression 'amendment of this Constitution' has consequently a limited meaning in our Constitution and not the meaning suggested by the Attorney-General. 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 and the Constitution to carry out the objectives in the Preamble and the Directive Principles applied to fundamental rights, it would mean that while fundamental rights, cannot be abrogated reasonable abridgements of fundamental rights can be effected in the public interest, "If this meaning is given", the Chief Justice said, "it would enable Parliament to adjust fundamental rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen. On behalf of the Union and the States, it was urged that the conceptions of basic elements and fundamental features are illusive conceptions and therefore it would be very unsatisfactory test for the Parliament to comprehend and follow. The Chief Justice said, that the concept of amendment within the contours of the Preamble and of Constitution cannot be said to be a vague and unsatisfactory idea which Parliamentarians and the public would not be able to understand. He said that the argument that because something cannot be cut and dried or nicely weighed or measured and therefore does not exist is fallacious. There are many concepts of law which are not capable of exact definition, but it does not mean that it does not exist. It was also argued that every provision of the Constitution is essential, otherwise it would not have been put in the Constitution. The Chief Justice further said, "But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result, the basic foundation and structure of the Constitution remains the same."

*What is basic structure.*

What then are the essentials of the basic structure of the Constitution ?

in *Ridge v. Baldwin* in *Kesavanand Bharti's<sup>1</sup>* case, Sikri, C. J. said, "In modern times opinions have sometimes been expressed that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the courts is much more defined than that."

If the historical background, the Preamble, the entire scheme of the Constitution and the relevant provisions thereof including Art. 368 are kept in mind then there can be no difficulty in determining what are the basic elements of the basic structure of the Constitution. These words apply with greater force to the doctrine of the basic structure, because, the federal and democratic structure of our Constitution, the separation of powers, the secular character of our State are very much more definite than either negligence or natural justice.<sup>2</sup>

In 1975 the Attorney-General moved an application in the Supreme Court for reconsideration of the theory of basic structure laid down in *Kesavananda's* case. During the course of hearing the review petition the judges asked the Attorney-General whether the doctrine of the basic structure had prevented the Government in enacting laws for implementing socio-economic measures? He answered that it has not done so. Since no case was made out by the Attorney-General for the reconsideration of the *Kesavananda's case* the Bench was dissolved.

Khanna, J., concurred with the majority decision but delivered a separate judgment. He said :

"The amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated. (Indeed, this much has been conceded by the Attorney-General). The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed, and done away with; it is retained though in the amended form. The words 'amendment of the Constitution' with all their wide sweep and amplitude cannot have the effect of destroying and abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of a amendment, for instance, to change the democratic Government into dictatorship of hereditary monarchy nor it would be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the State according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the Constitution does not furnish a pretence for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful *harakiri*. Such subversion

1. 1964 A. C. 401.

2. H. M. Seervai : Constitutional Law of India, 11th Ed., Vol. II, p. 1568.

theory of basic structure and struck down Cl. (4) of Article 329-A, which was inserted by the Constitution (39th Amendment) Act, 1975, as unconstitutional and violative of Parliament's power to amend Constitution as it destroys the basic features of the Constitution. The amendment was made to validate election of the Prime Minister which was declared void by the Allahabad High Court. Khanna, J., struck down other clause on the ground that it violated the free and fair elections which is an essential postulate of democracy which in turn is a part of the basic structure of the Constitution, Chandrachud, J., struck down Cls. (4) and (5) as unconstitutional on the ground that they are outright negation of the right of equality conferred by Art. 14 a right which is a basic postulate of our Constitution. He held that these provisions are arbitrary and are calculated to damage or destroy the Rule of law. Thus the Supreme Court has added the following features as basic features of the Constitution to the list of basic feature laid down in the *Kesavanand Bharti's case*:

1. Rule of law.
2. Equality before law.
3. Free and Fair Election, which is a basic postulate of Democracy.

#### 42nd Amendment and Article 368.

The Constitution (42nd Amendment) Act, 1976, has added two new clauses, Clauses (4) and (5) to Article 368 of the Constitution. The new clause (4) provides that 'no constitutional amendment (including the provision of Part III) or purporting to have been made under Art. 368 whether before or after the commencement of the Constitution (42nd Amendment) Act, 1976 shall be called in any court on any ground. Clause (5) removes any doubts about the scope of the amending power. It declares that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal of the provisions of the Constitution under this Article. Thus by inserting clause (5) it makes it clear that even the basic feature of the Constitution can be amended.

This amendment would, according to Mr. Swaran Singh, the Chairman Congress Committee on Constitutional Amendments put an end to any controversy as to which is supreme, Parliament or the Supreme Court. Clause (4) asserts the supremacy of Parliament. Parliament represents the will of the people and if people desire to amend the Constitution through Parliament there can be no limitation whatever on the exercise of this power.

This amendment removes the limitation, imposed on the amending power of Parliament by the ruling of the Supreme Court in *Kesavanand Bharti's case*. In that case, the Court has held that, while Parliament has power to amend any part of the Constitution, but power cannot be exercised so as to alter or destroy the 'basic structure' of the Constitution. It was said that the theory of 'basic structure' as invented by the Supreme Court is vague and will create difficulties. The amendment seeks to rectify this situation. It was however not pointed out clearly as to what were the difficulties faced by Parliament due to the basic structure theory.

A question may be asked here. *Can it be said that an amendment made by Parliament is an amendment made by the people?* The (42nd Amendment) was intended to achieve this object. It was argued that the amending body

1. See also H.M. Seervai : Emergency, Future Safeguard and the Habeas Corpus Case. A Criticism, 1978, p. 140

under Article 368 has the full constituent power. In other words, the Parliament acts in the same capacity as the Constituent Assembly when exercising the power of amendment under Art. 368.

It is, however, submitted that this proposition is totally wrong :

First, an amendment made by Parliament can not be said to be an amendment made by the people. There is a distinction between the power of the people to amend a Constitution and the power of the legislature to amend it. It is true that Parliament represents the will of the people. But it is not equally true that whatever Parliament does is usually approved by the people. The Lok Sabha election held in 1977 is a good example to show that the representative of the people in Parliament do not always reflect the people's will. Whatever was done during the emergency was done in the name of the people. But from the election result it was clear that they had rejected all what had been done in their name by their representatives. Therefore it is not possible to derive support for an unfettered amending power from the theory that the representatives of the people always reflect the people's will. The theory of basic structure propounded by the Supreme Court in the *Fundamental rights case* is correct and will act as a safety-valve against arbitrary use of the amending power. In Australia, out of 30 amendments proposed by the absolute majority of Australian Parliament only four were accepted and 26 were rejected by the people. This illustration makes it clear that Parliament does not always represent the will of the people.

Secondly, the assertion of Parliamentary supremacy is based on wrong notions. The supremacy of Parliament is the main characteristics of the British Constitution. The Parliamentary supremacy means that Parliament has unlimited law-making power. It includes both the constituent power and ordinary law-making powers. Parliament can change the Constitution by passing an ordinary law. It means that there is no distinction in England between Constitutional law and ordinary law. Secondly, no law passed by Parliament can be declared unconstitutional by the courts. In India, Parliament is not supreme but the Constitution is supreme. Parliament is a creature of the Constitution and derives its powers from the provisions of the Constitution including the power to amend the Constitution under Art. 368. Laws passed by Parliament can be declared *ultra vires* the Constitution. There is a distinction between the constituent power and the ordinary law-making power. The Amending power under Article 368, therefore, cannot be exercised in such a way so as to subvert or abrogate the Constitution.

#### Constitutional Amendments can still be challenged.

There is an anomaly in clause (1) of Art. 368 and the new clauses (4) and (5) added to Article 368 by the 42nd Amendment Act, 1976. Clause (1) requires the procedure to be complied with in passing an amendment of the Constitution. Where the new clauses (4) and (5) declare that the amendment cannot be challenged on "any ground whatever". This means that even if the amendment Act is not passed in accordance with the procedure laid down in Article 368, its validity cannot be challenged. This cannot be correct position and definitely the framers never intended that the constituent power can be exercised without following the procedure laid down in Article 368. The Courts are bound to give effect to clause (1) which has not been made ineffective expressly by clauses (4) and (5). Consequently 'the validity of the amending Act can be challenged on the ground that the procedure as laid down in Article 368 (1) cannot be followed ;

Secondly, the amendment can be challenged on substantive ground also. In *Kesavananda's case* the Supreme Court had held that Parliament cannot alter the "basic structure" of the Constitution in exercise of its amending power under Article 368 of the Constitution. The amendment is intended to bar judicial review of constitutional amendments. But so long as the rulings in *Kesavananda's case* stands constitutional amendments can still be challenged on the ground that they affect some of the 'basic features' of the Constitution.<sup>1</sup>

Recently, in *Minerva Mills v. Union of India*,<sup>2</sup> (unreported) the Supreme Court by 4 to 1 majority (Mr. Chandrachud, C. J. and Gupta, Untawalia, and Kailasam, JJ. for majority and Bhagwati, J. dissenting) held that section 55 of the 42nd Amendment 1976 which inserted sub-sections (4) and (5) in Art. 368 is beyond the amending power of the Parliament and is void since it removes all limitations on the power of Parliament to amend the Constitution and conferring unlimited amending power upon Parliament so as to damage or destroy its basic or essential features or its basic structure.

Applying the principles laid down in *Kesavananda Bharti's* decision the Supreme Court struck down sub-clauses (4) and (5) of Art. 368 of the Constitution which conferred on Parliament unlimited amending power and declared that the Parliament cannot have unlimited power to amend the Constitution.

The order of the Supreme Court, thus declares in categorical terms that the Constitution—not Parliament—is supreme in India. This is in accordance with the intention of the framers who adopted a written Constitution for the country. Under the written Constitution there is a clear distinction between the ordinary legislative power and the constituent power (amending power) of Parliament. Parliament cannot have unlimited amending power so as to damage or destroy the Constitution to which it owes its existence and also derives its power. The Parliament elected for a fixed period of five years is meant for certain specific purposes and can not be vested with unlimited amending power. The decision of the court is to be welcomed. It has put at rest the long drawn controversy between the Courts and the Executive. The Government should not take the order of the court as a challenge against it but in the spirit of the compromise and co-operation between the two organs of the Government.

1. See D. D. Basu : Constitutional Law of India, 1977 Edition, p. 438  
 2. Fuller reasons for decision will be given later on.

## Constitutional Amendments (1950-1978)

### First Amendment, 1951

This Amendment was made to remove difficulties created by several decisions of the Supreme Court, viz. *Ramesh Thappar v. State of Madras*,<sup>1</sup> *Brij Bhushan v. State of Delhi*,<sup>2</sup> and *Moti Lal v. State of Uttar Pradesh*.<sup>3</sup>

The Amendment added three more grounds of restrictions to Art. 19(2), viz. 'public order', 'friendly relation with foreign States' and incitement to an offence'. In *Ramesh Thappar* and *Brij Bhushan* cases the Supreme Court held that freedom of speech and expression could not be curtailed merely for maintaining 'public order' and 'public safety' unless the security of State is also threatened. It added the word 'reasonable' before the word 'restriction' and thus made restrictions a justiciable issue. The amendment added an explanatory clause to Art. 19 (6) which made it clear that State Trading and Nationalization of any trade or business by the State will not be invalid on the ground that it infringes right to trade and commerce guaranteed in Art. 19 (1) (g) [*Moti Lal's case*]. The Amendment added two new Art. 31-A and 31-B to validate certain Land Reforms Laws (Zamindari Abolition Law). The newly added Ninth Schedule made Acts named therein beyond the challenge of Courts for infringement of fundamental rights guaranteed in Arts. 14, 19 and 31.

A new clause (4) was added to Art. 15 which empowers the State to make special provisions for advancement of the socially and educationally backward classes of citizens. It was necessitated due to the decision of the Supreme Court in *Champakam Dorairajan v. State of Madras*.

The amendment also amended Arts. 85, 87, 174, 176, 341, 342 and 376.

### Second Amendment, 1952.

It amend Art. 81 (1) (b) which dealt with representation of States in Parliament. It provided that one member of the House could represent even more than 7,50,000 persons thus made it possible to maintain the total strength of Lok Sabha constant at 500 which would have become impossible under the original Article.

### Third Amendment, 1954.

This Amendment amended Entry 33 of the Concurrent List. Originally Entry 33 empowered the Centre to control the products of the controlled industry only. The control of essential commodities was not within the exclusive jurisdiction of the Centre. It fell under the State sphere under Entry 27, List II. This position was found to be unsatisfactory. The food situation in the country was difficult. Essential supplies were in short supply. To remove this difficulty this amendment widened, the scope of Entry 33, List III empowering Parliament to control the production, supply and distribution of all kinds of commodities.

1. A. I. R. 1950 S. C. 124.
2. A. I. R. 1950 S. C. 129.
3. A. I. R. 1951 S. C. 257.

### Fourth Amendment, 1955.

This Amendment was passed to remove the difficulties created by the Supreme Court's decision in *Bela Banerjee's case*.<sup>1</sup> The Court had insisted for payment of compensation in every case of compulsory deprivation of property by the State. It was held that clause (1) and clause (2) of Article 31 deal with the same subject, that is, deprivation of private property. In *Bela Banerjee's case* the Court had held that the word 'compensation' meant 'just compensation' i. e. a just equivalent of 'what the owner had been deprived of'. The Amendment modified Art. 31(2). It made clear that clauses (1) and (2) deal with different things, i. e. deprivation and compulsory acquisition. The new Art. 31 (2) (A) made it clear that the compensation was only payable in the case of compulsory acquisition, i. e. where the State acquires the ownership in property taken. The adequacy of compensation was also made non-justiciable. The amendment broadened the scope of Art. 31-A and included more statutes in the Ninth Schedule. The Amendment also amended Art. 305 and empowered the State to nationalise any trade.

### Fifth Amendment, 1955.

It has amended Art. 3 of the Constitution, Article 3 provided for a Bill for reorganisation of States to be referred to the States for expression of their views. Originally, it did not prescribe a time limit for expression of views by the States. It was, therefore, feared that the States could forestall the passage State Reorganisation Act by not expressing their views for any length of time. The amended Article now provides a time limit within which the States have to express their views. If they do not express their views within the specified time the Bill may be passed by Parliament.

### Sixth Amendment, 1956.

The amendment effected changes in Entry 92, List I and Entry 55, List II. Originally, the general power of State to impose sales-tax or purchase-tax under Entry 54 included also to impose sales-tax on inter-State sale or purchase. In *State of Bombay v. United Motors (India) Limited*,<sup>2</sup> the Supreme Court had held that the States have power to tax inter-State sales. The unrestricted power of States to tax inter-State sales resulted in double and multiple taxation of such sale altering trend, and economy of the Union. The Amendment made the subject-matter of taxation of inter-State sale a Union subject by introducing new Entry 92A in List I and making the Entry 54 of List II subject to Entry 92-A of List I. Parliament was empowered to define what is a sale 'outside' a State or in the course of import and export. [Art. 286(2)]. It added clause (3) to Art. 286 which restricts State's power to tax important goods or commodities in the inter-State trade.

### Seventh Amendment, 1956.

It was passed after the enactment of the State's Reorganisation Act, 1956. In order to implement the State's Reorganisation Plan it amended Arts. I, First Schedule, Fourth Schedule, Arts. 80, 81, 82, 153, 158, 170, 171 and Arts. 239 to 241. Amended Art. I, abolished the existing classification of States into three categories, e. g. Part A, Part B and Part C. Parts A and B were treated on equal footing and Part C were designated as Union territories. Consequential changes were brought about in Arts. 80, 81, 82, 170, 171 and Arts. 239 to 241. To adjust constituencies and allocation of seats in the Parliament First and Fourth Schedules were amended.

1. A. I. R. 1954 S. C. 170.  
2. A. I. R. 1953 S. C. 242,

Article 131 was amended so as to adjust the original jurisdiction of the Supreme Court because of the abolition of Part B States.

In case of High Courts the following changes were made : (1) Proviso to Art. 216 fixing the maximum strength of judges was omitted ; (2) Art. 220 (new Article) permitted a retired permanent judge of the High Court to practise in the Supreme Court ; (3) (Art. 224 provided for appointment of additional and acting judges in the High Courts and fixed age of their retirement at 60 years ; (4) Arts. 230 and 231 were substituted for Arts. 230, 231, 232, Article 230 expanded the jurisdiction of High Courts to Union territories. Article 231 provided for establishment of a common High Court for two or more States.

It added the following new Articles—Art. 258A which empowered States to entrust its functions to Centre. Article 298 extended the executive power of the Union and the States to carry on any trade or business and the acquisition of holding and disposal of property and making of contracts for any purpose—Article 290 authorised payment of money out of the Consolidated Fund of the States of Kerala and Madras to a religious fund or maintenance of Hindu temples and shrines.

The new Arts. 350A and 350B were added to safeguard interest of linguistic minorities.

Article 371 provided for Regional Committees for Andhra Pradesh.

In the Seventh Schedule, Entry 42 was substituted for Entry 33 of List I and Entry 36 of List II in order to remove power of Government for acquisition and requisition of property for Government purposes.

#### Eighth Amendment, 1960.

The Amendment extended the period of reservation of seats in the Legislatures for the Scheduled Castes, Scheduled Tribes and Anglo-Indians from 10 years to 20 years. For this purpose, it substituted the word "twenty years" for the words "ten years" in Art. 334 of the Constitution.

#### Ninth Amendment, 1960.

The Amendment was passed in the light of the opinion of the Supreme Court in *Berubari's case* (A. I. R. 1960 S. C. 845). It redefined the boundary of State of West Bengal, and made necessary changes in the First Schedule to cede the Indian territory of Berubari to Pakistan as provided in the Indo-Pakistan Agreement.

#### Tenth Amendment, 1961.

The Amendment added two new territories of Dadra and Nagar Haveli to the List of Union territories, in the First Schedule. It added a new Article 239-A to provide for the creation of the Legislatures, Council of Ministers in certain Union territories.

#### Eleventh Amendment, 1961.

It added a new clause 4 to Art. 71 of the Constitution which makes clear that the election of the President or Vice-President cannot be challenged on the ground that any vacancy existed in the electoral college as mentioned in Arts. 54 and 55. In *Khare's case*, A. I. R. 1957 S. C. 694, it was contended that the Presidential election should be postponed till the election in certain constituencies of Punjab and Himachal Pradesh were not held as without which the electoral college would be incomplete.

#### Twelfth Amendment, 1962.

By this Amendment the territories of Goa, Daman and Diu were included as a Union territory in the First Schedule.

### Thirteenth Amendment, 1962.

The Amendment was passed following to the agreement between the Government of India and the leaders of the Naga Peoples Convention for the establishment of the separate State of Nagaland. It added a new Art. 371-A, which made certain special provisions for the governance of the State of Nagaland. It was purely a temporary provision till the formal announcement of the separate State of Nagaland.

### Fourteenth Amendment, 1962.

The Amendment added the territory of Pondicherry, a French establishment as a Union territory in the First Schedule. It also added a new Art. 239-A which provided for the creation of the Legislatures and Council of Ministers in some of the Union territories.

### Fifteenth Amendment, 1963.

It raised the retirement age of the High Court Judges from 60 years to 62 years by amending Arts. 271 and 124 and laid down the procedure for determination of their age. The Amendment was necessitated due to a long standing litigation in *Mitter's case C. W. N. 211*. Article 222 modified so as to provide compensatory allowance, in addition to their salary, to the High Court Judges when they are transferred from one Court to the other Court. A new Article 224-A was added which provided for retired judges of the High Courts to act as judges of the same Court. It added a new clause (IA) to Art. 226 to enable High Courts to issue writs to any person or authority even outside its territorial jurisdiction. The Amendment was necessitated by the Supreme Court's decision in *Election Commission v. Venkata Rao, A. I. R. 1953 S. C. 210*. Before the Amendment, only the Punjab High Court could issue writs against any department of the Government of India located at New Delhi. Article 128 was amended to enable a retired judge of the High Courts to act as *ad hoc* judges of the Supreme Court. It added the words 'continental shelf' to Art. 297.

The Amendment modified Art. 311 (2) and limited the scope of second opportunity given to a civil servant in disciplinary matters after the Inquiry was over and the authority reached a conclusion to impose the punishment of dismissal and reduction in rank on him.

### Sixteenth Amendment, 1963.

It amended clauses (2), (3) and (4) of Article 19 to enable the State to impose reasonable restrictions on the freedom of speech and expression, assembly and association in the interests of the sovereignty and integrity of India. This new ground was added in order to prevent citizens from making seditious speeches. It also amended Arts. 84 and 173 and the form of oath contained in the Third Schedule. The members of the Parliament and State Legislatures, Judges of the Supreme Court and High Courts and Comptroller and Auditor-General of India have now to take oath to uphold the sovereignty and integrity of India.

### Seventeenth Amendment, 1964.

The Amendment extended the scope of Art. 31-A and Ninth Schedule to protect certain agrarian reform enacted by the Kerala and the Madras States. The word "estates" in Art. 31A now includes any jagir or inam, muafqi or any other grant and *janman* right in the State of Kerala and Madras, and also *ryotwari* lands. It added the Kerala Agrarian Reforms Act, 1961 and Madras Land Reforms Act, which were declared unconstitutional by the Supreme Court to the Ninth Schedule to immune them from being challenged in a court of law.

### **Eighteenth Amendment, 1966.**

This Amendment extended the scope of Art. 3 by adding explanations. It made clear that the word 'State' in that Art. includes Union Territory. This was done for the purpose of empowering Parliament to re-organise State of Punjab and the Union territory of Himachal Pradesh.

### **Nineteenth Amendment, 1966.**

It amended Art. 324 and took away the power of the Election Commission to appoint election tribunals for deciding election disputes of the members of Parliament and the State legislatures.

### **Twentieth Amendment, 1966.**

The Amendment added a new provision in Art. 233-A to the Constitution, which was enacted for validating certain appointments and judgments of district courts in the Uttar Pradesh. It was passed to remove difficulties created by the decision of the Supreme Court in *Chandra Mohan v. Uttar Pradesh*, A. I. R. 1966 S. C. 1987. In this case the Court had declared the U. P. Higher Judiciary Rules unconstitutional on the ground that these rules provide for appointment of District Judges not in consultation with High Court as stipulated in the Constitution but on the recommendation of a Selection Committee appointed by the Governor.

### **Twenty-First Amendment, 1966.**

The Amendment amended Schedule VIII to the Constitution and added 'Sindhi' as constitutionally recognised language in India.

### **Twenty-Second Amendment, 1969.**

It was passed to empower the Parliament to form an autonomous State within the State of Assam and provide for the creation of legislature or Council of Ministers for these States. The new Art. 244-A empowered Parliament to form the autonomous State of Meghalaya within the State of Assam. Article 371-A, a new Article, was added to provide for the constitution of a Committee of the Legislative Assembly of the State consisting of members of the Assembly elected from the tribal areas specified in Part A.

### **Twenty-Third Amendment, 1969.**

This Amendment was enacted to extend the safeguards granted by the Constitution to the Scheduled Castes and Scheduled Tribes for a further period of 10 years by substituting the words "thirty years" for the words "twenty years" in Art. 334.

### **Twenty-Fourth Amendment, 1971.**

This Amendment was passed to remove difficulties created by the decision of the Supreme Court in *Golaknath v. State of Punjab*. The Court had held that an amendment under Art. 368 was a 'law' within the meaning of Art. 1 of the Constitution. Secondly, that Art. 368 lays down only procedure for amendment and the power to amend is vested in Art. 245. It amended Art. 368 and Art. 13 of the Constitution. Amended Art. 368 makes it clear that Art. 368 lays down power as well as procedure thereof. It has not only removed the restrictions placed by the *Golak Nath's* case but has extended the power of amendment by adding the words, 'Parliament may amend by way of addition, variation or repeal any provision of the Constitution'. The amended Art. 13 makes it clear that a constitutional amendment shall not be considered as a 'law' within the meaning of Art. 13.

In *Kesavanand Bharti's* case, the Supreme Court has upheld the validity of the Constitution (24th Amendment) Act, 1972.

### Twenty-Fifth Amendment, 1971.

It was passed to remove the difficulties created by the decision of the Supreme Court in the *Bank Nationalisation case* (*R. C. Cooper v. Union of India*, A. I. R. 1970 S. C. 564). It amended clause (2) of Art. 31 and substituted the word 'amount' for the word 'compensation' and added the words 'that the whole or any part of such amount is to be given otherwise than in cash.' Before the amendment the word 'compensation' was interpreted by the Supreme Court in *R. C. Cooper v. Union of India*, A. I. R. 1970 S. C. 564, 'just equivalent' of what the owner has been deprived of. It added a new clause, clause (2-A) which makes it clear that a deprivation law passed under Art. 31 cannot be challenged on the ground that it infringes rights guaranteed in Art. 19 of the Constitution.

It inserted a new Article, i. e. Art. 31-C which provides that a law passed for giving effect to the directive principles specified in clause (b) or clause (c) of Art. 39 cannot be challenged on the ground that it is inconsistent with or takes away or abridges any of the rights guaranteed in Arts. 14, 19 and 31.

The validity of this Amendment has been upheld in the *Kesavanand Bhari's case*.

### Twenty-Sixth Amendment; 1971.

This Amendment was necessitated by the decision of the Supreme Court in *Privy Purse case* (*Madhav Rao Schindia v. Union of India*, A. I. R. 1971 S. C. 530) in which the Presidential Order de-recognising the privileges of the Ex-Rulers of Indian States was declared to be unconstitutional. The privy purse was held to be property and therefore it could not be taken away merely by an executive order. The Amendment omitted Arts. 291 and 362 and inserted a new provision. Art. 363-A which provided for non-recognition of any person who at any time was recognised as ruler of an Indian State and declared that privy purse is abolished and all rights, liabilities and obligations in respect of privy purse are extinguished.

### Twenty-Seventh Amendment, 1971.

This Amendment was passed consequent to the North Eastern Areas Re-organisation Plan. It amended Articles 239-A and 240 and added two new articles, i. e. Arts. 239-B and 371-C. The amended Art. 240 made certain special provisions for the new Union territories of Mizoram and Arunachal Pradesh. Article 371-C, a new provision, provided for the Constitution and function of a Committee of the Legislative Assembly of the new State of Manipur and for the special responsibility of the Governor.

### Twenty-Eighth Amendment, 1972.

The Amendment abolished the special privileges enjoyed by the Members of the Indian Civil Services. Consequently it inserted a new Article, i. e., Art. 312-A which empowers Parliament to vary service conditions, etc. of the members of the Indian Civil Services. Article 314 which conferred these privileges on the members of I. C. S. has therefore been omitted.

However, Art. 312-A will not affect the condition of service of the Judges of the Supreme Court and High Courts, the Comptroller and Auditor-General of India, Members of Union and the States Public Service Commissions.

### Twenty-Ninth Amendment, 1972.

The Amendment added two more Acts, namely, the Kerala Land Reforms Act, 1969, and the Kerala Land Reforms (Amendment) Act, 1971 to the Ninth Schedule of the Constitution.

### Thirtyith Amendment, 1972.

It amended Art. 133 of the Constitution and thereby abolished the valuation basis of civil appeals against the High Court judgments. The amended Art. 133 now provides that an appeal can be filed in the Supreme Court only if the High Court certifies that the case involves a substantial question of general importance.

### Thirty-First Amendment, 1974.

The Amendment Act has amended Art. 81 of the Constitution. It has raised the limit for representation in the Lok Sabha from 325 to 545.

### Thirty-Second Amendment, 1974.

It amends Art. 371 and inserts a new Article, namely, Art. 371D. The new Article 371-D provides certain special provisions with respect to the State of Andhra Pradesh.

### Thirty-Third Amendment, 1974.

The Amendment was an outcome of Gujarat movement where coercive methods were used to compel members of a Legislative Assembly to resign their seats. It amended Arts. 101 and 190 of the Constitution. The amended Article provides that the resignation of the members of Parliament and the State Legislatures may be accepted by the Speaker only if he is satisfied that the resignation is voluntary or genuine. If he is satisfied that a member has resigned under threat or coercion he shall not accept his resignation.

### Thirty-Fourth Amendment, 1974.

It amended the Ninth Schedule to the Constitution for the fourth time and added seventeen Land Reforms Acts relating particularly to ceiling on land holdings enacted by the various States. With the addition of those Acts the number of Acts which are immune from being challenged in a court of law has risen to 86.

### Thirty-Fifth Amendment, 1974.

The Amendment was passed with a view to give effect to the unanimous resolution adopted by the Sikkim Assembly requesting the Government of India to take necessary step for the participation of the people of Sikkim in India's Parliamentary system. The Amendment inserted a new Article, i.e., Art. 2-A and the Tenth Schedule to the Constitution. Article 2-A conferred on Sikkim the status of an 'Associate State'. The amendment enabled it to send one representative in each of the two Houses of the Parliament. The newly added 10th Schedule provided the terms and conditions of Sikkimese association with India and India's responsibilities. Under the Tenth Schedule, the responsibilities of the Government of India will relate to defence, communications, external relations, economic and social development, provision of facilities for the Sikkimese students for higher learning in India and for participation in all India Services and for participation in the political institutions of India. These provisions, however, were not enforceable in a court of law.

elections to Parliament from Sikkim shall be with the Election Commission of India.

#### Thirty-Sixth Amendment, 1975.

This amendment has made Sikkim a full-fledged State of the Indian Union. It has amended the First Schedule to the Constitution and included Sikkim as the 22nd State of the Indian Union. Fourth Schedule of the Constitution was also amended to enable Sikkim to send one representative in the Rajya Sabha. A new Article, 371 F, was added to the Constitution which provides for special provisions with respect to the State of Sikkim. Under the new Article the Governor of Sikkim shall have special responsibility for peace and for an equitable arrangement for ensuring the special and economic advancement of different sections of the population of Sikkim and in discharge of his special responsibility under this clause, the Governor of Sikkim shall subject to the directions of the President, act in his discretion. In reply to the criticism of this provision the External Affairs Minister assured the members that the Governor would use these powers under the direction of the President, The President being a constitutional head, acts on the advice of the Council of Ministers which in turn is responsible to the Parliament. He said 'it was essential to give certain discretionary powers of the Governor keeping in view the national security.'

Under this Article the State of Sikkim has been allotted one seat in the Lok Sabha.

The Amendment omits the provisions added by the Constitution (35th Amendment) Act. Article 2-A is omitted and consequential changes in Arts. 80 (1) and 81 (1) are also made. Tenth Schedule is also omitted.

#### Thirty-Seventh Amendment, 1975.

It provides for the creation of Legislative Assembly and Council of Minister for the newly established State of Arunachal. For this purpose it amends Arts. 239A and 240 of the Constitution. In the above Articles word 'Arunachal' is added after the Pondicherry and Mizoram.

#### Thirty-Eighth Amendment, 1975.

The Amendment puts beyond judicial scrutiny the "satisfaction" of the President in declaring the Emergency as also the Ordinance-making powers of the President, Governors and Administrators of Union Territories. As for the declaration of Emergency the Law Minister accepted that the courts had held consistently that it was outside their jurisdiction to assess whether an emergency existed or not. Thus the legal position is clear. However, the amendment was being brought to make this well-known legal position clear "without a shadow of doubt".

The Act amends Arts. 123, 213, 239-B, 352, 359 and 360 of the Constitution.

In Articles 123, 213 and 239-B a new clause has been inserted which provides that notwithstanding anything in the Constitution the satisfaction of the President, the Governor and the Administrator of Union territory shall be final and conclusive and shall not be questioned in any Court on any ground.

Similarly, in Arts. 352, 356, 360 a new clause has been added to make it clear that the 'satisfaction' of the President in declaring emergency shall be final.

A new clause (4) to Art. 352 also provides that the power conferred on the President by this Article shall include the power to issue different

proclamations on different grounds whether or not there is a proclamation already issued by the President under clause (1) and such proclamation is in operation.

### Thirty-ninth Amendment, 1975.

This Amendment Act amended Art. 71 of the Constitution and took away the jurisdiction of the Courts to decide the election disputes of the President, Vice-President, the Prime Minister or the Speaker. The dispute relating to election of the holder of these offices were taken out of the jurisdiction of the Courts. According to this amendment all disputes relating to elections of the President, Vice President, Prime Minister and the Speaker were to be decided by a forum to be established by a law made by Parliament. As regards the composition and the function of the forum envisaged in the amendment, it was said that it would not be a judicial body having paraphernalia of a Court.

Prior to this amendment, Art. 71 provided that disputes arising out of the election of the President or Vice-President should be decided by the Supreme Court. The matters relating to the election of the Prime Minister and the Speaker were regulated by the provisions of the Representation of the Peoples Act, 1951, under which the High Court had the jurisdiction to decide such disputes.

The Amendment extended the same protection to the Prime Minister and the Speaker. The Amendment also provided that the pending proceedings in respect of the election of the holder of the above-mentioned offices under the existing law would be null and void. In extending the protection of this provision to the Prime Minister and the Speaker, the law Minister pointed out how the Prime Minister was not only elected by a vast majority of the people but was "recognised throughout the length and breadth of the country as the undisputed leader" she should not be subjected to a process where the election could be set aside even on the flimsiest grounds.

The new Art. 329A provided that no election (a) to either House of Parliament of a person who holds the office of a Prime Minister at the time of such election or is appointed as Prime Minister after such election (b) to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election, shall be called in question except before such authority or body and in such manner as may be provided for by or under any law made by Parliament. The validity of any such law creating a forum and the decision of any authority or body under such law shall not be called in question in any Court.

Clause (3) of Art. 329A provided that where any person is appointed a Prime Minister or chosen to the office of the Speaker of the House of the People, while an election-petition referred to in clause (b) of Art. 329 in respect of his election to either House of Parliament or to the House of the People is pending, such election-petition shall abate upon such person being appointed as Prime Minister or being chosen to the office of the Speaker of the House of the People. However, such election may be called in question under any such law as referred to in clause (1).

The provisions of this Article (Art. 329A) shall have effect notwithstanding anything contained in the Constitution.

In the Ninth Schedule to the Constitution, the Amendment added 37 Central and State Laws. The validity of these enactments cannot be challenged in a court of law. The important Central Acts included in the Ninth Schedule

are the Representation of the Peoples Act, 1951, the Representation of the People (Amendment) Act, 1974, the Election Laws (Amendment) Act, 1975, and the Maintenance of the Internal Security Act, 1971.

#### **Fortieth Amendment, 1976.**

This Amendment has amended the Ninth Schedule to the Constitution and inserted 64 new Central and State Land Reform Laws in the Schedule. With the addition of 64 new laws the total number of laws so far included in the Ninth Schedule to the Constitution stood at 188.

The Amendment has also substituted a new Article for the existing Art. 297. The substituted Art. 297 empowers Parliament to specify by law the limits of the country's territorial waters, the continental shelf, the exclusive economic zone and other maritime zones. The Amendment has thus widened the scope of Art. 297 which provides that all lands, minerals and other things of valuables under the ocean within the exclusive economic zone of India shall rest in the Union. Before the Amendment, the limits of territorial waters and its continental shelf were determined by proclamation issued by the President. The amended Articles now make it clear that the country's sovereignty extends not only to the sea-bed but also the living creatures in the waters above within prescribed maritime limit.

#### **Forty-first Amendment, 1976.**

This Amendment has amended the Fifth Schedule to the Constitution to rationalise scheduled areas for the purpose of tribal development. Secondly, it has raised the age of retirement of the members of the State Public Service Commissions from 60 to 62 years. The Fifth Schedule to the Constitution makes special provision for the administration of tribal areas and provides a broad and flexible framework for effective legal and administrative action.

#### **Forty-second Amendment, 1976.**

The Constitution (42nd Amendment) Act, 1976 has inserted two new Parts—IV A and XIVA and nine Articles—39A, 43A, 48A, 131A, 139A, 144A, 226A, 228A and 257A in the Constitution and also amended 50 articles of the Constitution.

**Preamble.**—The Amendment had inserted three new words 'Socialist' 'Secular' and 'integral' in the Preamble. These concepts have been clearly spelt out in the amendments to the Preamble.

**Fundamental Rights.**—It has inserted a new Article 31D which empowers Parliament to make law for prohibiting and preventing 'anti-national activities' and 'anti-national associations'. It declares that no such law shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31. The above expressions have been defined in detail in the Amendment. Laws made under this article will be an exception to Article 13 of the Constitution.

**Directive Principles**—It has amended Article 31C and widened its scope so as to cover all directive principles. It gives supremacy to the directive principles over the fundamental rights.

**Articles 39A, 43A, 48A** have added three new directives to the Constitution :

1. Equal justice and free legal aid.
2. Participation of workers in the management of industries.
3. Protection and improvement of environment and safeguarding of forests and wild life.

It has also amended Art. 39 (f) with a view to emphasize the constructive role of the State with regard to children.

**Fundamental Duties.** The Amendment added a new Part IVA to the Constitution which lays down ten fundamental duties for all the citizens of India. The fundamental duties are intended to serve a constant reminder to every citizen that while the Constitution specially conferred on him certain fundamental rights, equally the citizens are also required to observe certain basic norms of democratic conduct and democratic behaviour. 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."

**Parliament, Executive and State Legislatures.** Article 55 was amended to make it clear that the "population" of the country for the purposes of allocation of seats, in Parliament and the State Assemblies will be determined on the basis of the 1971 census and will remain the same till the year 2000. This has been done in accordance with the new population policy of the Government of India. The re-delimitation of constituencies undertaken after each census will take effect hereafter on dates to be specified by the President. Accordingly, it makes consequential changes in the relevant articles, namely articles 81 and 82 relating to Lok Sabha, Article 170 relating to the Legislative Assemblies of States, Article 55 relating to the election of the President and Articles 330 and 332 relating to reservation of seats for Scheduled castes and Scheduled tribes in Lok Sabha and the Legislative Assemblies.

The Amendment amends article 74 and makes it clear that the President who acts on the advice of the Council of Ministers "shall be bound by such advice". It has also amended Art. 77 which now prohibits courts or any other authority to order production of the rules made by Government for the more convenient transaction of the business of the Government of India. This Amendment is intended to remove the difficulties created by the order of the Allahabad High Court in the Prime Minister's Election case. In that case, the court had ordered the Government of Uttar Pradesh to produce such rules for its scrutiny.

The amendment extended the duration of the Lok Sabha and the State Assemblies from the present "five years" to "six years". Accordingly it

are the Representation of the Peoples Act, 1951, the Representation of the People (Amendment) Act, 1974, the Election Laws (Amendment) Act, 1975, and the Maintenance of the Internal Security Act, 1971.

#### **Fortieth Amendment, 1976.**

This Amendment has amended the Ninth Schedule to the Constitution and inserted 64 new Central and State Land Reform Laws in the Schedule. With the addition of 64 new laws the total number of laws so far included in the Ninth Schedule to the Constitution stood at 188.

The Amendment has also substituted a new Article for the existing Art. 297. The substituted Art. 297 empowers Parliament to specify by law the limits of the country's territorial waters, the continental shelf, the exclusive economic zone and other maritime zones. The Amendment has thus widened the scope of Art. 297 which provides that all lands, minerals and other things of value under the ocean within the exclusive economic zone of India shall rest in the Union. Before the Amendment, the limits of territorial waters and its continental shelf were determined by proclamation issued by the President. The amended Articles now make it clear that the country's sovereignty extends not only to the sea-bed but also the living creatures in the waters above within prescribed maritime limit.

#### **Forty-first Amendment, 1976.**

This Amendment has amended the Fifth Schedule to the Constitution to rationalise scheduled areas for the purpose of tribal development. Secondly, it has raised the age of retirement of the members of the State Public Service Commissions from 60 to 62 years. The Fifth Schedule to the Constitution makes special provision for the administration of tribal areas and provides a broad and flexible framework for effective legal and administrative action.

#### **Forty-second Amendment, 1976.**

The Constitution (42nd Amendment) Act, 1976 has inserted two new Parts—IV A and XIVA and nine Articles—39A, 43A, 48A, 131A, 139A, 144A, 226A, 228A and 257A in the Constitution and also amended 50 articles of the Constitution.

**Preamble.**—The Amendment had inserted three new words 'Socialist' 'Secular' and 'integral' in the Preamble. These concepts have been clearly spelt out in the amendments to the Preamble.

**Fundamental Rights.**—It has inserted a new Article 31D which empowers Parliament to make law for prohibiting and preventing 'anti-national activities' and 'anti-national associations'. It declares that no such law shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 and 31. The above expressions have been defined in detail in the Amendment. Laws made under this article will be an exception to Article 13 of the Constitution.

**Directive Principles**—It has amended Article 31C and widened its scope so as to cover all directive principles. It gives supremacy to the directive principles over the fundamental rights.

Articles 39A, 43A, 48A have added three new directives to the Constitution :

1. Equal justice and free legal aid.
2. Participation of workers in the management of industries.
3. Protection and improvement of environment and safeguarding of forests and wild life.

composed of a minimum of seven judges. The Amendment makes consequential changes in Art. 145 as result of the insertion of Articles 131A, 139A and 144A in the Constitution.

**High Courts.**—As regards the High Courts, the Amendment has made the following changes : It amends Art. 217 and adds a new qualification to the existing qualifications to be fulfilled by a person for appointment as a High Court judge. It provides that a "distinguished jurist" is also qualified to be appointed as a High Court judge. The Amendment has omitted the proviso to Art. 225 which gave jurisdiction to the High Courts on revenue matters. The High Courts shall have now no jurisdiction on revenue matters. Dispute relating to revenue matters will now be decided by the Tribunals to be established by a Parliamentary Law under the new Art. 323B, added by the 42nd Amendment Act, 1976. The Amendment has made significant changes in Art. 226. The new Article 226 redefines the writ-jurisdiction of the High Court. It has deleted the words "for any other purpose" which gave jurisdiction over other legal rights to the High Courts. The jurisdiction of the High Courts is now restricted to (a) for the enforcement of fundamental rights ; (b) cases involving substantial injury to citizens because of the contravention of any provision of the Constitution or any other enactments ; and (c) cases of substantial failure of justice due to any illegality in any proceedings under sub-clause (b).

Even in such extreme cases, clause (3) of Art. 226 requires a person to satisfy the Court that he has no other remedy. If some alternative remedy is available (whether it is adequate or not) the High Court shall not entertain any petition for the redress of injury referred to under sub-clause (b) or (c) of clause (1). The new clause (4) prohibits High Courts to "issue any interim, stay or injunction" unless the respondent (the Government) has been given opportunity to be heard. However, the High Court may grant interim order if it is satisfied that the citizen is likely to suffer loss or damage that cannot be compensated in money. Such interim order shall cease to have effect on the expiry of the period of 14 days unless the requirement of clause (4) have been complied with before the expiry of that period.

But even this exception to clause (4) cannot be invoked if it results in delaying either (1) any inquiry into a matter of public importance or (2) any action or work or project of public utility or (3) acquisition of any property for such purpose by the Government—*Clause 6.*

Article 226A excludes from the jurisdiction of High Courts the question of the validity of Central laws. The Amendment deletes the word "tribunal" from Art. 227 and makes it clear that the High Court shall have no jurisdiction over tribunals. A hierarchy of tribunals will be set up to decide tax matters, import and export disputes, labour and industrial disputes, land reform and urban ceiling disputes, election disputes, services matters and matters relating to supply of food and essential commodities. Article 228 has been amended and the power of the High Courts to withdraw cases from subordinate courts involving substantial question of law as to the interpretation of the Constitution has been made subject to the new Article 131A which gives exclusive jurisdiction to the Supreme Court to decide the validity of Central laws to the exclusion of the High Courts. Article 228A provides that for determining the validity of a State Law the High Court Bench shall consist of not less than five judges, and no State law can be declared invalid except by the majority of two-thirds of the number of judges constituting the Bench. But where a High Court consists of less than five Judges, a law will not be declared invalid unless all the judges concur. It means where the number is less than five absolute

- (i) election disputes of the members of the House of Parliament or the House of the Legislature of a State, except matters referred to in Articles 323 and 323-A,
- (g) production, procurement, supply and distribution of foodstuffs, and other essential goods,
- (h) offences against laws with respect to above matters,
- (i) any matter incidental to any of the matters specified in sub-clauses (a) to (h).

Such a law will define jurisdiction and powers of tribunals and will lay down its procedure. It may also provide for the exclusion of the jurisdiction of all courts except the jurisdiction of the Supreme Court under Article 136.

**Emergency**—The Amendment has amended Arts. 352, 353, 356, 357, 358 and 359. In Article 352 it has inserted the following words “in respect of the whole of India or of such parts of territory of India thereof as may be specified in the proclamation”. This will enable the President to make a proclamation of emergency either in respect of any part of the country or to the whole of India. At present, the proclamation of emergency applies to the whole of India. As a consequence of this change in clause (1) the amendment has added the words “or varied” after the word “revoked” in clause (2) of this Article. The emergency proclamation may be lifted from such part of the territory of India where the conditions are normal in the opinion of the President.

The Amendment made a consequential change in Arts. 353, 358, 359. The new proviso in Art. 353 provides that where a proclamation of emergency is in operation in any part of the country the executive power of the Union shall extend also to any other State other than a State where emergency is in operation if the security of India or any part of the country is threatened by activities in the part of the territory of India in which proclamation of emergency is in operation.

The Amendment substituted the words “one year” for the words “six months” in clause (4) of Article 356. An emergency proclamation made under Article 356, if approved by Parliament will continue in operation for a year, instead of six months as it stands now. The Amendment has substituted a new clause for clause (2) of Article 357. This is a saving clause. It saves the proclamation of emergency under Article 356 and all laws passed by Parliament and actions taken by the President in exercise of the powers of the State legislature under Art. 356. All laws passed and actions taken under it shall continue to be in force until altered, repealed or amended by the competent legislature.

**Amendment.**—The Amendment added two new clauses (4) and (5) to the Art. 368 of the Constitution. Clause (4) provides that “no constitutional amendment made under Art. 368 shall be called in question in any Court on any ground.” Clause (5) provides that for the removal of doubts, it is declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article. This amendment, it has been claimed, would establish the supremacy of Parliament which represents the will of the people. This amendment removes the limitations imposed on the amending power of Parliament by the ruling of the Supreme Court in *Kesavananda Bharati's case*. In that case, the Court held that while Parliament has power to amend any part of the Constitution, the power cannot be exercised so as to alter or destroy the ‘basic structure’ of the Constitution.

There appears to be a conflict between clause (1) and newly added clause  
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majority of Judges will be required to declare a law unconstitutional. In computing the number of judges of a High Court for this purpose, a Judge who is disqualified by reason of personal or pecuniary bias shall be excluded. This provision may affect the independence and impartiality of the Judiciary.

**Relation between the Union and the States.**—The Amendment had added a new Article 257-A to the Constitution. This article empowered the Central Government to send any armed or police force to any State to deal with "grave" law and order situation. Such force will act in accordance with the Central Government's directives. Parliament may, by law, define the powers, functions and liabilities of members of such force. This is intended to remove any doubts about the power to the Central Government to send armed force or police force to any State for the maintenance of grave law and order situation.

The Amendment Act amended the Seventh Schedule to the Constitution and transferred certain entries from one List to another. The subjects which have been transferred from List II (State List) to List III (Concurrent List) are—

- (1) administration of justice, constitution and organisation of all courts except the Supreme Court and the High Courts,
- (2) education,
- (3) weight and measures,
- (4) forests,
- (5) protection of wild animals and birds.

In List I the amendment had inserted a new Entry 2A (deployment of any armed force or other force of the Union in any State for maintaining grave law and order situation). There is a consequential amendment following the insertion of new Article 257-A in the Constitution. Entry I of List II has consequently been redefined to make it clear that any armed or police force deployed in the State under Art. 257-A shall not be under the control of the State Government but under the Central Government.

**Services.**—The Amendment amends Art. 311 of the Constitution and takes away the right of a Government servant to make representation at the second stage of the enquiry. The amended Art. 312 provides for the creation of an 'all-India judicial service'. The all-India judicial service shall not include any post inferior to that of [a district judge]. The law providing for a creation of the all-India judicial service shall not be deemed to be an amendment of this Constitution for the purposes of Article 368.

**Tribunals.**—The Constitution (42nd Amendment) Act added a new Chapter to the Constitution, entitled as "Tribunals". It consists of two Articles —Arts. 323-A and 323-B. Article 323-A provides for the establishment of Administrative Tribunals by a Parliamentary law for determining disputes relating to the recruitment and conditions of service of Central Government servants and servants of the States. Article 323-B provides for the creation of various tribunals for the determination of disputes, complaints with respect of all or any of the matters specified in clause (2). They are as follows :—

- (a) tax matters,
- (b) foreign exchange, import and export,
- (c) industrial and labour disputes,
- (d) land reform laws,
- (e) ceilings on urban property.

and the High Courts to deal with pending cases in the same manner as if the abovementioned articles had never been added to the Constitution. Necessary consequential amendments to Articles 145, 228 and 366 have also been made.

Article 31D which conferred special power on Parliament to enact laws to prohibit anti-national activities has also been omitted. It was thought that the powers of Parliament to make laws under Article 316 were of a sweeping nature and were capable of abuse. Hence, it has been omitted.

#### **Forty-fourth Amendment Act, 1978.**

This Amendment seeks to remove the distortions that the 42nd Amendment had brought about in the Constitution during the Emergency. Not only this, the Amendment has considerably modified the emergency provisions of the Constitution so as to ensure that it is not misused in future. As passed by the Lok Sabha the bill consisted of 49 clauses but the Rajya Sabha, which is dominated by the Congress Party, has rejected five clauses of the Amendment.

*Parliament, Executive and State Legislature—Parliament.*—The 44th Amendment Act, 1978 has amended Articles 83, 172 and 371F, respectively of the Constitution and has restored the term of the Lok Sabha and the State Legislative Assemblies to 'five years' which was extended to 'six years' by the 42nd Amendment Act, 1976. Accordingly, it has substituted the words 'five years' for the words 'six years' in Articles 83, 172 and 371F of the Constitution.

The Amendment has again amended Articles 103 and 192 (relating to decisions on questions as to disqualification of a member of Parliament and State Legislatures) and has restored the position as it obtained prior to the 42nd Amendment Act. Now the questions of disqualifications of the members of Parliament and State Legislatures will now be, as originally provided in the Constitution, decided by the President and the Governor, as the case may be, in accordance with the opinion of the Election Commission.

Article 118 has been amended and original Articles 100 (3) and (4) and 189 (3) have been restored. This restores the position as regards the quorum in the Houses of Parliament and the State Legislatures.

The Amendment made in Article 102 (1) (a) regarding 'office of profits' has been cancelled and original clause has been restored. The 42nd Amendment took away the powers of the Court to decide whether an office is an 'office of profit'. The 44th Amendment restores this power to the courts.

A similar change has also been made in Article 191 (1) (a). The original Article 191 (1) (a) has been restored. Now, the courts will decide whether an office is an 'office of profit'.

The Amendment Act has again amended Articles 105 (3) and 194 (3) relating to the Privileges of Parliament and the State Legislatures. The 42nd Amendment had partially omitted the reference in the House of Commons by providing that (1) the existing privileges shall be those which existed before the 42nd Amendment Act, 1976; (2) but others shall be those which may be evolved by the Houses of Parliament.

The 44th Amendment restores the original article subject to the modification that it completely omits the reference to the privileges of the House of Commons in future. For this purpose, it substitutes the following words: "shall be those of that House and of its members and Committees immediately before the 44th Amendment of 1978" for the words "shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees at the commencement of this Constitution" in Articles 105 (3) and 194 (3) of the Constitution.

(5). Clause (1) provides that an amendment can be challenged on the ground that it has not been passed in accordance with the procedure laid down in Art. 368. Clause (5), on the other hand, says that there is no limitation 'whatever' on the amending power, whether substantive or procedural.

The Amendment substituted a new sub clause (a) for the old sub-clause (a) of clause (1) of Art. 102, which gives Parliament power to declare by law which office under the Central or State Government is an "office of profit" and whether the holder thereof is disqualified or not. This amendment overrules a long series of rulings given by the Courts. A similar change has been made in Article 19 (a) which relates to States Legislatures. However, the power to specify the office will vest in Parliament and not in the State Legislature.

The Amendment substituted a new article for Art. 103 of the Constitution. The new article takes away the question of disqualifications of members of the Central and State Legislatures from the jurisdiction of the Courts. It now provides that if a question arises—(1) whether a person has become subject to the disqualifications mentioned in Art. 102, or (2) whether he has been found guilty of corrupt practice at an election and thereby disqualified to be a member of Parliament, the question shall be referred to the President for his decision and the decision shall be final. The President must consult the Election Commission before giving his decision.

A similar change has been made in Article 192 which relates to the State Legislatures.

**Power of the President to remove difficulties.**—This new clause popularly known as the removal of difficulty clause conferred on the President power to remove any difficulty which may arise in giving effect to the provisions of the Constitution as amended by the Constitution (42nd Amendment) Act, 1976. For this purpose, the President may issue such orders which appears to him necessary for removing the difficulties in giving effect to the provisions of the Constitution.

This is a transitory provision and will cease to be in force after the expiry of two years from the date on which the President gives assent to it. The orders made by the President under this clause must be laid before the Parliament.

This provision has been criticised from many quarters as delegating "naked and wide" power to the President. Replying to this criticism, the Union Minister of State for law, Dr. V. A. Sayid Mohammad said that there is nothing extraordinary or undemocratic in clause 59 of the Amendment. Such powers existed in the Constitutions of many other countries. He said "the justification for giving such a power to the President is that whenever a new Constitution replaces an old one or when amendments are introduced in the existing Constitution many difficulties foreseen and unforeseen are bound to arise and such difficulties should be authorised to be removed by some agency. Since Parliament will not be permanently or constantly in session, the Head of the State is the most suitable, convenient and competent authority to be invested with necessary powers. Mr. Gokhale, the Union Law Minister said, "This does not mean that the President can provide for something which is not introduced in the Constitution. He can only remove if certain difficulties or lacunae arise in giving effect to the constitutional provisions."

#### Forty-third Amendment, 1977.

The Constitution (43rd Amendment) Act, 1977, has amended the 42nd Amendment Act with a view to restore the jurisdiction of the Supreme Court and the High Courts. Consequently, it has omitted Articles 32A, 131A, 144A, 226A and 228A. It also makes a special provision to enable the Supreme Court

ment, decree, final order or sentence. It also omits clause (3) of Article 132 relating to grant of special leave by Supreme Court in cases where the High Court refuses to give a certificate. Cases of special leave to appeal by Supreme Court will thus be left to be regulated exclusively by Article 136 of the Constitution. This is intended to avoid delay in matters of appeal to the Supreme Court from High Courts.

Article 139A, which has been added by the 42nd Amendment gives power to the Supreme Court in certain circumstances, to withdraw cases from the High Courts and decide them itself. This Article is retained subject to some modification. Prior to 44th Amendment, the court could take action under this article only if an application is made by the Attorney-General. The 44th Amendment enables the court to do so also on the application of a party to any such case. Thus the court may do so either *suo motu* or on the application of the party to any such case.

The Amendment omits sub-clause (c) of clause (2) of Article 217 which was inserted by the 42nd Amendment. This clause made provision for appointing distinguished jurists as judges of the High Courts.

The proviso to Article 225, as originally existed, gave original jurisdiction to the High Courts in revenue matters. The 42nd Amendment omitted this proviso and took away jurisdiction of the High Court in revenue matters. The 44th Amendment now restores the said proviso to Article 225 and again gives original jurisdiction to the High Courts on revenue matters.

Subject to a modification, this amendment restores Article 226 as it obtained prior to the 42nd Amendment Act, 1976. The provisions relating to the issue of an interim order as introduced by the 42nd Amendment was very cumbersome and detrimental to litigants. Instead of this, 44th Amendment introduces a simple provision in new clauses (3) and (4). Clause (3) provides that when an interim order is passed against a party *ex parte* (without giving him opportunity of being heard) that party may make an application to the High Court for the vacation of such order and the High Court must dispose of such an application within two weeks. If the High Court fails to dispose of the application within two weeks, the interim order shall stand vacated after the expiry of two weeks.

This Amendment restores article to the form in which it was prior to the 42nd Amendment Act, and this gives their power of superintendence over the tribunals. The 42nd Amendment had taken away this power of the High Courts.

#### **Relation between the Union and the States.**

The 42nd Amendment Act, 1976 had added a new Article 257A to the Constitution which empowered the Central Government to send any armed or police force to any State to deal with 'grave' law and order situation. The 44th Amendment Act, 1978 has omitted this article.

**Emergency.**—The 44th Amendment makes a number of changes in Article 352 with a view to prevent recurrence of the 1975 situation when emergency was declared by the Congress Government headed by Srimati Indira Gandhi without any adequate reason and also without consulting her Cabinet. The Amendment substitutes the following clauses for Cls. (2), (2-A) and (3) of Article 352 :

1. In clause (1) the words "internal disturbance" has been substituted by the words "armed rebellion". This will exclude the scope for the proclamation of emergency on ground of internal disturbance not involving armed rebellion. This means that, in future a proclamation of emergency under Article 352 can

The Amendment has added a new Article 361A after Article 361. It provides constitutional protection in respect of publication of proceedings of Parliament and the State Legislatures and further provides that no person shall be liable to any civil or criminal proceedings in any Court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or of a State Legislature, unless the publication is proved to have been made with malice. This immunity will also apply to broadcast by means of wireless. This immunity will however, not apply to the publication of any report of the proceedings of a secret proceedings of a House. Until now, this immunity is regulated by a Parliamentary Law—Parliamentary Proceedings (Protection of Publication) Act, 1966—which was repealed during the emergency of 1975 but has now been re-enacted. By incorporating into the Constitution, the Amendment puts this immunity on a very solid footing. The immunity is extended to publication of proceedings of a State Legislature. The above law applies only to parliamentary proceedings.

*Executive.*—Article 71 "as originally enacted" gave jurisdiction to the Supreme Court to decide election disputes of the President and the Vice-President. The 42nd Amendment took away the jurisdiction of the Courts to decide such dispute. The 44th Amendment now restores the position as it was before the 42nd Amendment and gives the Supreme Court jurisdiction in this respect.

Article 74 as amended by the 42nd Amendment made the advice of the Cabinet binding on the President. The 44th Amendment retains this amendment but adds a new proviso which provides that 'the President may require the Council of Ministers to reconsider its advice tendered by them and that the President shall act in accordance with the advice tendered after such reconsideration'. Thus, while the advice shall be binding on the President this amendment gives him a limited right to refer the matter back to the Council of Ministers for reconsideration of its advice given to him. This is intended to prevent recurrence of the situation which happened during 1975 emergency when the President had to sign the emergency proclamation though it had not been discussed by the Council of Ministers.

The 42nd Amendment Act added a new clause (4) to Articles 77 and 166 which took away the power of court to compel production of rules for the production of the business of the Central Government and the State Governments. The 44th Amendment Act of 1978 now omits clause (4) of Articles 77 and 166 and thus restores the power of the courts in this respect.

The 42nd Amendment Act added a new clause (4) in Articles 123, 213 and 239B, and made the satisfaction of the President, Governor or Administrator final and conclusive in issuing Ordinances. The 44th Amendment has now omitted clause (4) from these articles and restored the position as it obtained in this respect prior to the 42nd Amendment.

*Supreme Court and High Courts.*—The 44th Amendment Act amends Articles 132, 133 and 134 relating to appeals in the Supreme Court from the decisions of the High Court. Under Article 132 an appeal lies in certain cases to the Supreme Court if the High Court grants a certificate under that article. If the High Court refuses the certificate, the Supreme Court may grant special leave. Under Article 133 an appeal lies to the Supreme Court in civil cases if the High Court grants a certificate under that Article. Under Article 134 (1) (c) an appeal lies to the Supreme Court in criminal cases if the High Court grants a certificate under that article. The 44th Amendment inserts a new Article 134A under which the High Court can now grant a certificate for appeal to the Supreme Court under Articles 132, 133 and 134 (1) (c) either *suo motu* or on an oral application by the aggrieved party immediately after the delivery of the judg-

(b) the Election Commission certifies that the continuance in force of the proclamation is necessary on account of the difficulties in holding general elections to the Legislative Assembly of the State concerned.

Thus a proclamation under Article 356 can only be extended beyond the six months only if the above two conditions are fulfilled.

*Amendment of Article 358.*—The Amendment makes two changes in Article 358. Firstly, it provides that Article 19 will now only be suspended in the case of proclamation of emergency on the ground of war or external aggression, and not in the case of a proclamation of emergency issued on the ground of armed rebellion. Secondly, it has added a new clause (2) to Article 358 which provides that Art. 358 will not apply to any law which does not contain a recital to the effect that such law is in relation to the proclamation of emergency in operation when it is made or to any executive action taken. This means that only a law relating to emergency will be immune from being challenged in a court of law during emergency and not a law which is not in any way connected with the emergency.

*Amendment of Art. 359.*—This amendment makes two changes in Art. 359. Firstly, it provides that the enforcement of the right to life and personal liberty cannot be suspended by the Presidential Order. Consequently, in clauses (1) and (1-A) of Art. 359 for the words "the rights conferred by Part III", the words "the rights conferred by Part III (except Articles 20 and 21)" have been substituted. This is intended to prevent the repetition of the situation in future which arose in the *Habeas Corpus* case.

Secondly, it has added a new clause (1-B) to Art. 359 which says that the suspension of the enforcement of any right under Art. 359 will not apply in relation to any law which does not contain a recital to the effect that such a law is in relation to the proclamation of emergency in operation when it is made or to any executive action taken otherwise than under a law containing such a recital. Thus laws unconnected with emergency can be challenged in a court of law even during emergency.

*Amendment of Art. 360.*—The 44th Amendment makes two changes in Art. 360. At present clause (2) incorporates by reference the provisions of clause (2) of Art. 352. Since clause (2) of Art. 352 has been amended it has become necessary to make clause (2) of Art. 360 self-contained. Therefore Cl. (2) has been replaced by a new clause which says that a proclamation issued under clause (1) of Art. 360—(a) may be revoked or varied by a subsequent proclamation, (b) must be laid before the Houses of Parliament; and (c) shall cease to operate at the expiry of two months, unless before the expiry of two months it has been approved by resolutions of both Houses of Parliament. If the Lok Sabha is dissolved during the period of two months and the resolution is passed by the Rajya Sabha but not by the Parliament the proclamation shall cease to operate at the expiry of 30 days from the date on which new Lok Sabha sits after its reconstitution. Unless before that period a resolution approving the proclamation is passed by Lok Sabha.

Secondly, it omits clause (5) of Art. 360 which was inserted by the 42nd Amendment Act and which made the satisfaction of the President about the existence of financial emergency final and conclusive. The Amendment thus restores the position in this respect as it stood prior to the 42nd Amendment Act, 1976.

*Preventive detention.*—The 44th Amendment has amended Art. 22 which deals with preventive detention and has incorporated a few safeguards against preventive detention :

only be made when security of India or any part thereof is threatened by war or external aggression or armed rebellion.

2. It provides that the President shall not issue a proclamation of emergency unless the decision of the Cabinet that such a proclamation may be issued has been communicated to him in writing. This makes it clear that the President must act on the advice of the Cabinet and not only on the advice of the Prime Minister. This provides a safeguard against the declaration of emergency merely on the advice of the Prime Minister without consulting his cabinet as was done by the Ex-Prime Minister Smt. Indira Gandhi in 1975—*Clause(3)*.

3. It provides that a proclamation of emergency must be approved within a period of one month instead of two months as it exists at present, by resolution of both the Houses of Parliament. Also, such a resolution should be passed by a majority of the total membership of each House and not less than 2/3 majority of the members present and voting in each House, instead of a simple majority as it exists at present. This means that if a Proclamation is not approved within one month it will automatically cease to be in operation. Secondly, a proclamation is required to be approved by a special majority of Parliament.—*Clause (4)*.

4. A proclamation if approved by Parliament will remain in force for a period of six months. For the continuance of emergency beyond the period of six months, approval of Parliament will be required. At present, once approved by Parliament, the proclamation may remain in force for an indefinite period at the sweetwill of the Executive. This Amendment requires periodical review (six months) of proclamation by Parliament.—*Clause (5)*.

5. A proclamation of emergency will cease to be operative whenever a resolution to that effect is adopted by the Lok Sabha by a simple majority of the members of the House present and voting.—*Clause (6)*. Clause (8) provides that where a notice in writing signed by not less than 1/10 of the total members of Lok Sabha has been given of their intention to move a resolution disapproving the continuance of a proclamation of emergency—

(a) to the Speaker, if the House is in session ; or

(b) to the President, if the House is not in session, a special sitting of the House shall be held within 14 days from the date on which such notice is received by the Speaker or the President, for the purpose of considering such resolution. Thus 1/10 of the members may by notice, requisition meeting of the Lok Sabha for the purpose of considering the continuance or discontinuance of a proclamation of emergency.

*Clause (4)* is renumbered and for the words 'internal disturbance,' the words "armed rebellion" has been substituted.

*Clause (5)* which made the satisfaction of the President 'final' has been omitted. *Clause (5)* was added to Article 352 by the 38th Amendment.

*Amendment of Art. 356.*—In clause (4) for the words 'one year' the words "six months from the date of proclamation" has been substituted. This amendment thus restores the original position in this respect (that is, six months). This was extended to one year by the 42nd Amendment Act. Secondly, it omits clause (5) which made the 'satisfaction' of the President 'final'. In place of clause (5) a new clause has been added which provides that a resolution for the continuance in force of a proclamation beyond the period of six months cannot be passed by the House, unless—

(a) a proclamation of emergency is in operation at the time of the passing of such resolution ; and

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1. It restricts the maximum period for which a person may be detained without obtaining the opinion of the Advisory Board from (3 months as at present) to 2 months.
2. The Advisory Board shall now consist of a Chairman and not less than two other members. The Chairman of the Board shall be a sitting Judge of High Court and other two members may be sitting or retired judges of the High Court. The composition of the Board shall be in accordance with the recommendations of the Chief Justice of the appropriate High Court. The Advisory Board will not be free from executive control and will be under the control of Judiciary and would thus be an independent body.
3. Nothing in clause (a) will authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament.
4. In every case of preventive detention beyond the period of two months the consultation with the Advisory Board is necessary.

*Property right.*—The 44th Amendment takes away the right to property from the category of fundamental rights and makes it a right which can be regulated by ordinary law. Consequently, it makes the following changes :

- (1) It omits sub-clause (f) of Art. 19 (1).
- (2) It omits Article 31.
- (3) It has inserted a new Article 300-A under the Heading 'Right to Property' in Part XII of the Constitution which provides that—"no person shall be deprived of his property save by authority of law".
- (4) The safeguards contained in Art. 31 relating to acquisition of property of an educational institution established and administered by a minority has now been incorporated in Art. 30 by adding a new clause (1-A) after clause (1).

*Elections.*—The Amendment omits Art. 329-A which was inserted by the 42nd Amendment Act and which took away the power of the courts to decide election disputes of the Prime Minister and the Speaker of the Lok Sabha.

#### Forty-fifth Amendment Act, 1980.

This Amendment has substituted the word "forty" for the word "thirty" in Art. 334 of the Constitution. It has thus extended the period of reservation of seats for Scheduled Castes and Scheduled Tribes in the Lok Sabha and the State Assemblies from 'thirty' to 'forty years' from the commencement of the Constitution originally this reservation was only for 'ten' years.

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