

C. 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 [Art. 163(2)], it would be possible for a Governor to act without ministerial advice in certain other matters, according to the circumstances, even though they are not specifically mentioned in the Constitution as discretionary functions.¹³

(i) As an instance to the point may be mentioned the making of a report to the President under Art. 356, that a situation has arisen in which the Government of State cannot be carried on in accordance with the provisions of the Constitution. Such a report may possibly be made against a Ministry in power,—for instance, if it attempts to misuse its powers to subvert the Constitution. It is obvious that in such a case the report cannot be made according to ministerial advice. No such advice, again, will be available where one Ministry has resigned and another alternative Ministry cannot be formed. The making of a report under Art. 356, thus, must be regarded as a function to be exercised by the Governor in the exercise of his discretion.

Obviously, the Governor is also the medium through whom the Union keeps itself informed as to whether the State is complying with the Directives issued by the Union from time to time.

(ii) Further, after such a Proclamation as to failure of the Constitution machinery in the State is made by the President, the Governor acts as the agent of the President as regards those functions of the State Government which have been assumed by the President under the Proclamation [Art. 356(1)(a)].

(iii) In some other matters, such as the reservation of a Bill for consideration of the President [Art. 200], the Governor may not always be in agreement with his Council of Ministers, particularly when the Governor happens to belong to a party other than that of the Ministry. In such cases, the Governor may, in particular situations, be justified in acting without ministerial advice, if he considers that the Bill in question would affect the powers of the Union or contravene any of the provisions of the Constitution even though his Ministry may be of a different opinion.¹⁴⁻¹⁵

It is obvious that as regards matters on which the Governor is empowered to act in his discretion or on his 'special responsibility', the Governor will be under the complete control of the President.

As regards other matters, however, though the President will have a personal control over the Governor through his power of appointment and removal,¹⁶ it does not seem that the President will be entitled to exercise any effective control over the State Government against the wishes of a Chief Minister who enjoys the confidence of the State Legislature, though, of course, the President may keep himself informed of the affairs in the State through the reports of the Governor, which may even lead to the removal of the Ministry, under Art. 356, as stated above.

Whether Governor competent to dismiss a Chief Minister.

A sharp controversy has of late arisen upon the question whether a Governor has the power to dismiss a Council of Ministers, headed by the Chief Minister, on the *assumption* that the Chief Minister and his

Cabinet have lost their majority in the popular House of the Legislature. The controversy has been particularly intriguing inasmuch as two Governors acted in contrary directions under similar circumstances. In West Bengal, in 1967, Governor Dharma Vira, being of the view that the United Front Ministry, led by Ajoy Mukherjee, had lost majority in the Legislative Assembly, owing to defections from that Party, asked the Chief Minister to call a meeting of Assembly at a short notice, and, on the latter's refusal to do so, dismissed the Chief Minister with his Ministry. On the other hand, in Uttar Pradesh in 1970, Governor Gopala Reddy dismissed Chief Minister Charan Singh, on a similar assumption, without even waiting for the verdict of the Assembly which was scheduled to meet only a few days later. Quite a novel thing happened in Uttar Pradesh in 1998 when the Governor Romesh Bhandari, being of the view that the Chief Minister Kalyan Singh Ministry had lost majority in the Assembly, dismissed him without affording him opportunity to prove his majority on the floor of the House and appointed Shri Jagdambika Pal as the Chief Minister which was challenged by Shri Kalyan Singh before the High Court which by an interim order put Shri Kalyan Singh again in position as the Chief Minister. This order was challenged by Shri Jagdambika Pal before the Supreme Court which directed a "composite floor test" to be held between the contending parties which resulted in Shri Kalyan Singh securing majority. Accordingly, the impugned interim order of the High Court was made absolute.¹⁷

Before answering the question with reference to the preceding instances, it should be noted that the Cabinet system of Government has been adopted in *our* Constitution from the United Kingdom and some of the salient conventions underlying the British system have been codified in our Constitution. In the absence of anything to the contrary in the context, therefore, it must be concluded that the position under our Constitution is the same as in the United Kingdom.

In *England*, the Ministers being legally the servants of the Crown, at law the Crown has the power to dismiss each Minister, individually or collectively. But upon the growth of the Parliamentary system, it has been established that the Ministers, *collectively*, hold their office so long as they command a majority in the House of Commons. This is known as the 'collective responsibility' of Ministers. The legal responsibility of the Ministers, as a collective body, to the Crown has thus been replaced by the *political* responsibility of the Ministry to Parliament, and the Crown's power to dismiss a Prime Minister of his Cabinet has become obsolete,—the last instance being 1783.¹⁸ The Crown retains, however, his power to dismiss a Minister individually and, in practice, this power is exercised by the Crown on the advice of the Prime Minister himself, when he seeks to weed out an undesirable colleague.

Be that as it may, the above two propositions as they exist today in England have been codified in Cls. (1) and (2) of Art. 164 of our Constitution as follows :

"(1) ... and the Ministers shall hold office at the pleasure of the Governor;

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State."

In the above context, the legitimate conclusion that can be drawn is that—

(a) The Governor has the power to dismiss an individual Minister at any time.

(b) He can dismiss a Council of Ministers or the Chief Minister (whose **Testing majority support.** dismissal means a fall of the Council of Ministers), *only* when the Legislative Assembly has *expressed* its want of confidence in the Council of Ministers, either by a direct vote of no-confidence or censure or by defeating an important measure or the like, and the Governor does not think fit to dissolve the Assembly. The Governor cannot do so at his pleasure on his *subjective estimate* of the strength of the Chief Minister in the Assembly at any point of time, because it is for the Legislative Assembly to enforce the collective responsibility of the Council of Ministers to itself, under Art. 164(2).

The above view of the Author has been upheld by the Supreme Court in *S.R. Bommai v. Union of India*,¹⁹ (a 9-Judge Bench) by observing that wherever a doubt arises whether a Ministry has lost the confidence of the House, the only way of testing is on the floor of the House.²⁰ The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President.²¹

4. The Advocate-General

Each State shall have an Advocate-General for the State, an official **Advocate-General.** corresponding to the Attorney-General of India, and having similar functions for the State. He shall be appointed by the Governor of the State and shall hold office during the pleasure of the Governor. Only a person who is qualified to be a Judge of a High Court can be appointed Advocate-General. He receives such remuneration as the Governor may determine.

He shall have the right to speak and to take part in the proceedings of, but no right to vote in, the Houses of the Legislature of the State [Art. 177].

REFERENCES

1. A glaring exception to this sound principle took place when the President, on the advice of the National Front Prime Minister Sri V.P. Singh, in December 1989, asked all the Governors to resign, simply because another Party had come to power at the Union. Of course, eventually, some of them were not required to resign.
2. Thus, Sri V.V. Giri, who was appointed Governor of U.P. in 1958, was appointed Governor of Kerala in 1960 for the unexpired portion of his term and in June 1962 he was reappointed Governor of Kerala for a second term, limited up to June 1964 (*Statesman*, 10-6-1962), Srimati Padmaja Naidu, Governor of West Bengal, also got a second term.
3. C.A.D., Vol. VII, p. 455.
4. Indeed there did occur some friction between the Governor and the Chief Minister during 1987-89 in Andhra Pradesh and Kerala where they belonged to different political parties. But, strikingly, there was disagreement between the Governor Govind Narain Singh and the Chief Minister of Bihar (1985); and Governor Smt. Sarla Grewal and the Chief Minister of Madhya Pradesh (1989) even though hailing from the same party.
5. Emoluments of Governor as enhanced *vide* Act No. 27 of 1998, s. 2 (w.e.f. 1.1.1996).
6. Of course, as has been pointed out in other contexts, the Upper House of the Union Legislature, i.e., the Council of States or of the State Legislature, i.e., the Legislative Council, is not subject to dissolution but is subject to a system of periodical retirement.

- Hence, the President or the Governor's power of dissolution must be understood to refer to the dissolution of the House of the People and the Legislative Assembly, respectively.
- In those States where the State Legislature consists of one House only [Art. 168(1)(b)] (p. 233, *post*), a dissolution of the Legislative Assembly results in the dissolution of the State Legislature (because there is no Legislative Council to survive.)
7. Only the Governor of Jammu & Kashmir is vested with the power to impose Governor's Rule under s. 92 of Constitution of J. & K.
 8. The Governor may appoint a person to be the Chief Minister on his own estimation that such person is likely to command a majority in the State Assembly and he can exercise this power even before the Assembly is fully constituted. Such act, itself, would not establish *mala fides* on the part of the Governor [*Rajnarain v. Bhajanlal*, (1982) P&H., dated 20-10-1982; *Statesman* (D)/21-10-1982].
 9. *Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain*, (1997) 1 S.C.C. 35 (para 10).
 10. It is striking that no member of the 1975 Abdullah Ministry of Jammu & Kashmir was initially a member of the State Legislature.
 11. The Naga Hills-Tuensang Area has been taken out of this discretionary sphere, by making it a separate State, named Nagaland. Hence, Para 18 of the 6th Sch. has been omitted in 1971.
 12. That is, as amended by the Constitution (7th Amendment) Act, 1956, and the Bombay Reorganisation Act, 1960. By the Constitution (32nd Amendment) Act, 1973, Andhra Pradesh has been taken out of Art. 371 and provided for separately, in new Art. 371D.
 13. *Samsher v. State of Punjab*, AIR 1974 S.C. 2192 (paras 47, 88, 153).
 14. This happened in the case of the Kerala Education Bill [*vide In re Kerala Education Bill* AIR 1958 S.C. 956]. In *Hoechst Pharmaceuticals v. State of Bihar*, AIR 1953 S.C. 1019 (para 89), the function under Art. 200 has been held to be discretionary.
 15. In some cases, the Supreme Court has observed that unless a particular provision of the Constitution expressly requires the Governor to act in his discretion, his power to act without the advice of Ministers cannot be drawn by implication [*Sanjeevi v. State of Madras*, (1970) 2 S.C.C. 672 (677)]. But this observation is now to be read subject to the exceptional contingencies mentioned in the 7-Judge decision in [*Samsher v. State of Punjab*, AIR 1974 S.C. 2192, *above*].
 16. The dismissal of the Tamil Nadu Governor, Prabhudas Patwari in October, 1980 [*Statesman*, 31-10-1980] demonstrates that the President's 'pleasure' under Art. 156(1) can be used by the Prime Minister to dismiss any Governor for political reasons, and without assigning any cause.
 17. *Jagdambika Pal v. Union of India*, (1999) 9 S.C.C. 95.
 18. *Vide HALSBURY, LAWS OF ENGLAND* (4th Ed. 1974), Vol. 8. Pp. 696-97.
 19. *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.
 20. *Ibid.*, para 395.
 21. *Ibid.*, para 119.

CHAPTER 14

THE STATE LEGISLATURE

THOUGH a uniform pattern of government is prescribed for the States, in the matter of the composition of the Legislature, the Constitution makes a distinction between the bigger and the smaller States. While the Legislature of every State shall include the Governor and,

The Bi-cameral and Uni-cameral Legislatures. in some of the States, it shall consist of two Houses, namely, the Legislative Assembly and the Legislative Council, while in the rest, there shall be only one House, i.e., the Legislative Assembly [Art. 168].

Owing to changes introduced since the inauguration of the Constitution, in accordance with the procedure laid down in Art. 169, the States having two Houses,¹ in 2008, are Andhra Pradesh;² Bihar; Maharashtra;³ Karnataka and Uttar Pradesh⁴ [Art. 168]. To these must be added Jammu & Kashmir, which has adopted a bi-cameral Legislature, by her own State Constitution.

Creation and abolition of Second Chambers in States. It follows that in the remaining States,^{1, 4} the Legislature is uni-cameral, that is, consisting of the Legislative Assembly only [Art. 168]. But the above list is not permanent in the sense that the Constitution provides for the *abolition* of the Second Chamber (that is, the Legislative Council) in a State where it exists as well as for the *creation* of such a Chamber in a State where there is none at present, by a simple procedure which does not involve an amendment of the Constitution. The procedure prescribed is a resolution of the Legislative Assembly of the State concerned passed by a special majority (that is, a majority of the total membership of the Assembly not being less than two-thirds of the members actually present and voting), followed by an Act of Parliament [Art. 169].

This apparently extraordinary provision was made for the States (while there was none corresponding to it for the Union Legislature) in order to meet the criticism, at the time of the making of the Constitution, that some of our States being of poorer resources, could ill afford to have the extravagance of two Chambers. This device was, accordingly, prescribed to enable each State to have a Second Chamber or not according to its own wishes. It is interesting to note that, taking advantage of this provision, the State of Andhra Pradesh, in 1957, *created* a Legislative Council, leading to the enactment of the Legislative Council Act, 1957, by Parliament. Through the same process, it has been abolished in 1985.¹

On the other hand, West Bengal and Punjab have abolished their Second Chambers, pursuing the same procedure.⁴

The size⁵ of the Legislative Council shall vary with that of the **Composition of the Legislative Assembly**,—the membership of the Legislative Council being not more than one-third of the membership of the Legislative Assembly but not less than 40. This provision has been adopted so that the Upper House (the Council) may not get a predominance in the Legislature [Art. 171(1)].

The system of composition of the Council as laid down in the Constitution is not final. The final power of providing the composition of this Chamber of the State Legislature is given to the Union Parliament [Art. 171(2)]. But until Parliament legislates on the matter, the composition shall be as given in the Constitution, which is as follows: It will be a partly nominated and partly elected body,—the election being an indirect one and in accordance with the principle of proportional representation by the single transferable vote. The members being drawn from various sources, the Council shall have a variegated composition.

Broadly speaking, 5/6 of the total number of members of the Council shall be indirectly elected and 1/6 will be nominated by the Governor. Thus,—

(a) 1/3 of the total number of members of the Council shall be elected by electorates consisting of members of *local bodies*, such as municipalities, district boards.

(b) 1/12 shall be elected by electorates consisting of *graduates* of three years' standing residing in that State.

(c) 1/12 shall be elected by electorates consisting of persons engaged for at least three years in *teaching* in educational institutions within the State, not lower in standard than secondary schools.

(d) 1/3 shall be elected by members of the Legislative Assembly from amongst persons who are *not members* of the Assembly.

(e) The remainder shall be nominated by the Governor from persons having knowledge or practical experience in respect of such matters as literature, science, art, co-operative movement and social service (The courts cannot question the *bona fides* or propriety of the Governor's nomination in any case).

Composition of the Legislative Assembly. The Legislative Assembly of each State shall be composed of members chosen by *direct* election on the basis of adult suffrage from territorial constituencies. The number of members of the Assembly shall be not more than 500 nor less than 60. The Assembly in Mizoram and Goa shall have only 40 members each.

There shall be a proportionately equal representation according to population in respect of each territorial constituency within a State. There will be a readjustment by Parliament by law, upon the completion of each census [Art. 170].

As stated already, the Governor has the power to nominate⁶ one member of the Anglo-Indian community as he deems fit, if he is of opinion that they are not adequately represented in the Assembly [Art. 333]. Such reservation will cease on the expiration of sixty⁷ years from the commencement of the Constitution [Art. 334].

The duration of the Legislative Assembly is five years, but—

Duration of the Legislative Assembly. (i) It may be dissolved sooner than five years, by the Governor.⁸

(ii) The term of five years may be extended in case of a Proclamation of Emergency by the President. In such a case, the Union Parliament shall have the power to extend the life of the Legislative Assembly up to a period not exceeding six months after the Proclamation ceases to have effect, subject to the condition that such extension shall not exceed one year at a time [Art. 172(1)].

Duration of the Legislative Council. The Legislative Council shall not be subject to dissolution. But one-third of its members shall retire on the expiry of every second year [Art. 172(2)]. It will thus be a permanent body like the Council of States, only a fraction of its membership being changed every third year.

A Legislative Assembly shall have its Speaker and Deputy Speaker, and a Legislative Council shall have its Chairman and Deputy Chairman, and the provisions relating to them are analogous to those relating to the corresponding officers of the Union Parliament.

A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he—

Qualifications for membership of the State Legislature. (a) is a citizen of India;

(b) is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament [Art. 173].

Thus, the Representation of the People Act, 1951, has provided that a person shall not be elected either to the Legislative Assembly or the Council, unless he is himself an elector for any Legislative Assembly constituency in that State.

Disqualifications for membership. The disqualifications for membership of a State Legislature as laid down in Art. 191 of the Constitution are analogous to the disqualifications laid down in Art. 102 relating to membership of either House of Parliament. Thus,—

A person shall be disqualified for being chosen as, and for being a member of the Legislative Assembly or Legislative Council of a State if he—

(a) holds any office of profit under the Government of India or the Government of any State, other than that of a Minister for the Indian Union or for a State or an office declared by a law of the State not to disqualify its

holder (many States have passed such laws declaring certain offices to be offices the holding of which will not disqualify its holder for being a member of the Legislature of that State);

- (b) is of unsound mind as declared by a competent court;
- (c) is an undischarged insolvent;
- (d) is not a citizen of India or has voluntarily acquired the citizenship of a foreign State or is under any acknowledgment of allegiance or adherence to a foreign State;
- (e) is so disqualified by or under any law made by Parliament (in other words, the law of Parliament may disqualify a person for membership even of a State Legislature, on such grounds as may be laid down in such law). Thus, the Representation of the People Act, 1951, has laid down some grounds of disqualification, e.g., conviction by a court, having been found guilty of a corrupt or illegal practice in relation to election, being a director or managing agent of a corporation in which Government has a financial interest (under conditions laid down in that Act).

Article 192 lays down 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 above, the question shall be referred to the Governor of that State for decision who will act according to the opinion

Legislative procedure in a State having Bi-cameral Legislature, as compared with that in Parliament. of the Election Commission. His decision shall be final and not liable to be questioned in any court of law.

The legislative procedure in a State Legislature having two Chambers is broadly similar to that in Parliament, save for differences on certain points to be explained presently.

I. *As regards Money Bills*, the position is the same. The Legislative Council shall have no power save to make recommendations to the Assembly for amendments or to withhold the Bill for a period of 14 days from the date of receipt of the Bill. In any case, the will of the Assembly shall prevail, and the Assembly is not bound to accept any such recommendations.

It follows that there cannot be any deadlock between the two Houses at all as regards Money Bills.

II. *As regards Bills other than Money Bills*, too, the only power of the Council is to interpose some *delay* in the passage of the Bill for a period of

Legislative Council compared with Council of States. time (3 months) [Art. 197(1)(b)] which is, of course, larger than in the case of Money Bills. The Legislative Council of a State, thus, shall not be a revising but mere *advisory* or *dilatory* Chamber. If it disagrees to such a Bill, the Bill must have *second journey* from the Assembly to the Council, but ultimately the view of the Assembly shall prevail and in the second journey, the Council shall have no power to withhold the Bill for more than a month [Art. 197(2)(b)].

Herein the procedure in a State Legislature differs from that in the Parliament, and it renders the position of the Legislative Council even weaker than that of the Council of the States. The difference is as follows:

Provisions for resolving deadlock between two Houses. While disagreement between the two Houses of Parliament is to be resolved by a *joint sitting*, there is *no such provision* for solving differences between the two Houses of the State Legislature,—in this latter case, the will of the lower House, *viz.*, the Assembly, shall ultimately prevail and the Council shall have no more power than to interpose some delay in the passage of the Bill to which it disagrees.

This difference of treatment in the two cases is due to the adoption of two different principles as regards the Union and the State Legislatures. (a) As to Parliament,—it has been said that since the Upper House represents the federal character of the Constitution, it should have a status better than that of a mere dilatory body. Hence, the Constitution provides for a joint sitting of both Houses in case of disagreement between the House of the People and the Council of States, though of course, the House will ultimately have an upper hand, owing to its numerical majority at the joint sitting. (b) As regards the two Houses of the State Legislature, however, the Constitution of India adopts the English system founded on the Parliament Act, 1911, *viz.*, that the Upper House must eventually give way to the Lower House which represents the will of the people. Under this system, the Upper House has no power to obstruct the popular House other than to effect some delay. This democratic provision has been adopted in *our* Constitution in the case of the State Legislature inasmuch as in this case, no question of federal importance of the Upper House arises.

The provisions as regards Bills *other than Money Bills* may now be summarised:

(a) *Parliament.* If a Bill (other than a Money Bill) is passed by one House and (i) the other House rejects it or does not return it within six months, or (ii) the two Houses disagree as to amendment, the President may convene a joint sitting of the Houses, for the purpose of finally deliberating and voting on the Bill. At such joint sitting, the vote of the *majority of both Houses present and voting shall prevail* and the Bill shall be deemed to have been passed by both Houses with such amendments as are agreed to by such majority; and the Bill shall then be presented for his assent [Art. 108].

(b) *State Legislature.* (i) If a Bill (other than a Money Bill) is passed by the Legislative Assembly and the Council (a) rejects the Bill, or (b) passes it with such amendments as are not agreeable to the Assembly, or (c) does not pass the Bill within *3 months* from the time when it is laid before the Council,—the Legislative Assembly may again pass the Bill with or without further amendments, and transmit the Bill to the Council again [Art. 197(1)].

If on this second occasion, the Council—(a) again rejects the Bill, or (b) proposes amendments, or (c) does not pass it *within one month* of the date

on which it is laid before the Council, the Bill shall be deemed to have been passed by both Houses, and then presented to the Governor for his assent [Art. 197(2)].

In short, in the State Legislature, a Bill as regards which the Council does not agree with the Assembly, shall have two journeys from the Assembly to the Council. In the first journey, the Council shall not have the power to withhold the Bill for more than three months and in the second journey, not more than one month, and at the end of this period, the Bill shall be deemed to have been passed by both the Houses, even though the Council remains altogether inert [Art. 197].

(ii) The foregoing provision of the Constitution is applicable only as regards Bills *originating in the Assembly*. There is no corresponding provision for Bills originating in the Council. If, therefore, a Bill passed by the Council is transmitted to the Assembly and rejected by the latter, there is an end to the Bill.

The relative positions of the two Houses of the Union Parliament and of a State Legislature may be graphically shown as follows:

I. As regards *Money Bills*, the position is similar at the Union and the States:

- (a) A Money Bill cannot originate in the Second Chamber or Upper House (*i.e.*, the Council of States or the Legislative Council).
- (b) The Upper House (*i.e.*, the Council of States or the Legislative Council) has no power to amend or reject such Bills. In either case, the Council can only make recommendations when a Bill passed by the lower House (*i.e.*, the House of the People or the Legislative Assembly, as the case may be) is transmitted to it. It finally rests with the lower House to accept or reject the recommendations made by the Upper House. If the House of the People or the Legislative Assembly (as the case may be) does not accept any of the recommendations, the Bill is deemed to have been passed by the Legislature in the form in which it was passed by the lower House and then presented to the President or the Governor (as the case may be), for his assent. If the lower House, on the other hand, accepts any of the recommendations of the Upper House, then the Bill shall be deemed to have been passed by the Legislature in the form in which it stands after acceptance of such recommendations.

On the other hand, if the Upper House does not return the Money Bill transmitted to it by the Lower House, within a period of 14 days from the date of its receipt in the Upper House, the Bill shall be deemed to have been passed by the Legislature, at the expiry of the period of 14 days, and then presented to the President or the Governor, as the case may be, even though the Upper House has not either given its assent or made any recommendations.

- (c) There is no provision for resolving any deadlock as between the two Houses, as regards Money Bills, because no deadlock can possibly arise. Whether in Parliament or in a State Legislature, the

will of the lower House (House of the People or the Legislative Assembly) shall prevail, in case the Upper House does not agree to the Bill as passed by the lower House.

II. As regards Bills other than Money Bills:

Parliament

(a) Such Bills may be introduced in either House of Parliament.

(b) A Bill is deemed to have been passed by Parliament only if both Houses have agreed to the Bill in its original form or with amendments agreed to by both Houses. In case of disagreement between the two Houses in any of the following manner, the deadlock may be solved only by a joint sitting of the two Houses, if summoned by the President.

(c) The disagreement may take place if a House, on receipt of a Bill passed by the other House—

(i) rejects the Bill; or (ii) proposes amendments as are not agreeable to the other House; or (iii) does not pass the Bill within six months of its receipt of the Bill.

(d) In a case of disagreement, a passing of the Bill by the House of the People, a second time, cannot over-ride the Council of States. The only means of resolving the deadlock is a Joint sitting of the two Houses. But if the President, in his discretion, does not summon a joint sitting, there is an end of the Bill and, thus, the Council of States has effective power, subject to a joint sitting, of preventing the passing of a Bill.

State Legislature

(a) Such Bills may be introduced in either House of a State Legislature.

(b) The Legislative Council has no co-ordinate power, and in a case of disagreement between the two Houses, the will of the Legislative Assembly shall ultimately prevail. Hence, there is no provision for a joint sitting for resolving a deadlock between the two Houses.

(c) A disagreement between the two Houses may take place if the Legislative Council, *on receipt of a Bill passed by the Assembly*—

(i) rejects the Bill; or (ii) makes amendments to the Bill, which are not agreed to by the originating House; or (iii) does not pass the Bill within three months from the date of its receipt from the originating House.

While the period for passing a Bill received from the lower House is six months in the case of the Council of States, it is three months only in the case of the Legislative Council.

(d) In case of such disagreement, a passing of the Bill by the Assembly for a second time is sufficient for the passing of the Bill by the Legislature, and if the Bill is so passed and transmitted to the Legislative Council again, the only thing that the Council may do is to withhold it for a period of one month from the date of its receipt of the Bill on its second journey. If the Council either rejects the Bill again, or proposes amendments not

*Parliament**State Legislature*

agreeable to the Assembly or allows one month to elapse without passing the Bill, the Bill shall be deemed to have been passed by the State Legislature in the form in which it is passed by the Assembly for the second time, with such amendments, if any, as have been made by the Council and as are agreed to by the Assembly.

(e) The foregoing procedure applies *only* in the case of disagreement relating to a Bill *originating in the Legislative Assembly*.

In the case of a Bill originating in the Legislative Council and transmitted to the Assembly, after its passage in the Council, if the Legislative Assembly either rejects the Bill or makes amendments which are not agreed to by the Council, there is an immediate end of the Bill, and no question of its passage by the Assembly would arise.

Utility of the Second Chamber in a State.

It has been clear that the position of Legislative Council is inferior to that of the Legislative Assembly so much so that it may well be considered as a surplusage.

- (a) The very composition of the Legislative Council, renders its position weak, being partly elected and partly nominated, and representing various interests.
- (b) Its very existence depends upon the will of the Legislative Assembly, because the latter has the power to pass a resolution for the abolition of the second Chamber by an Act of Parliament.
- (c) The Council of Ministers is responsible only to the Assembly.
- (d) The Council cannot reject or amend a Money Bill. It can only withhold the Bill for a period not exceeding 14 days or make recommendations for amendments.
- (e) As regards ordinary legislation (*i.e.*, with respect to Bills other than Money Bills), too, the position of the Council is nothing but subordinate to the Assembly, for it can at most interpose a delay of four months (in two

journeys) in the passage of a Bill originating in the Assembly and, in case of disagreement, the Assembly will have its way without the concurrence of the Council.

In the case of a Bill originating in the Council, on the other hand, the Assembly has the power of rejecting and putting an end to the Bill forthwith.

It will thus be seen that the second Chamber in a State is not even a revising body like the second Chamber in the Union Parliament which can, by its dissent, bring about a deadlock, necessitating a joint sitting of both Houses to effect the passage of the Bill (other than a Money Bill). Nevertheless, by reason of its composition by indirect election and nomination of persons having special knowledge, the Legislative Council commands a better calibre and even by its dilatory power, it serves to check hasty legislation by bringing to light the shortcomings or defects of any ill-considered measure.

When a Bill is presented before the Governor after its passage by the Houses of the Legislature, it will be open to the Governor to take any of the following steps:

Governor's power of veto. (a) He may declare his *assent* to the Bill, in which case, it would become law at once; or,

(b) He may declare that he withdraws his assent to the Bill, in which case the Bill fails to become a law; or,

(c) He may, in the case of a Bill other than a Money Bill, return the Bill with a message.

(d) The Governor may reserve⁹ a Bill for the consideration of the President. In one case reservation is compulsory, *viz.*, where the law in question would derogate from the powers of the High Court under the Constitution.

In the case of a Money Bill, so reserved, the President may either declare his assent or withhold his assent. But in the case of a Bill other than a Money Bill, the President may, instead of declaring his assent or refusing it, direct the Governor to *return* the Bill to the Legislature for reconsideration. In the latter case, the Legislature must reconsider the Bill within six months and if it is passed again, the Bill shall be presented to the President again. But it shall not be obligatory upon the President to give his assent in this case too [Art. 201].

It is clear that a Bill which is reserved for the consideration of the President shall have no legal effect until the President declares his assent to it. But no time limit is imposed by the Constitution upon the President either to declare that he assents or that he withdraws his assent. As a result, it would be open to the President to keep a Bill of the State Legislature pending at his hands for an indefinite period of time, without expressing his mind.

It should also be noted that there is a third alternative for the President which was demonstrated in the case of the Kerala Education Bill, *viz.*, that when a reserved Bill is presented to the President he may, for the purpose of deciding whether he should assent to, or return the Bill, refer to the Supreme Court, under

Art. 143, for its advisory opinion where any doubts as to the constitutionality of the Bill arise in the President's mind.

Veto Powers of President and Governor, compared. The veto powers of the President and Governor may be presented graphically, as follows:

President

- (A) 1. May assent to the Bill passed by the Houses of Parliament.
- 2. May declare that he withdraws his assent, in which case, the Union Bill fails to become law.
- 3. In case of a Bill other than a Money Bill, may return it for reconsideration by Parliament, with a message to both Houses. If the Bill is again passed by Parliament, with or without amendments, and again presented to the President, the President shall have no other alternative than to declare his assent to it.

Governor

- 1. May assent to the Bill passed by the State Legislature.
- 2. May declare that he withdraws his assent, in which case, it fails to become law.
- 3. In case of a Bill other than a Money Bill, may return it for reconsideration by the State Legislature, with a message. If the Legislature again passes the Bill with or without amendments, and it is again presented to the Governor, the Governor shall have no other alternative than to declare his assent to it.
- 4. Instead of either assenting to, withholding assent from, or returning the Bill for reconsideration by the State Legislature, Governor may *reserve* a Bill for consideration of the President, in any case he thinks fit.

Such reservation is, however, obligatory if the Bill is so much derogatory to the powers of the High Court that it would endanger the constitutional position of the High Court, if the Bill became law.

(B) In the case of a State Bill reserved by the Governor for the President's consideration (as stated in para 4 of col. 2):

(a) If it is a Money Bill, the President may either declare that he assents to it or withdraws his assent to it.

(b) If it is a Bill other than a Money Bill, the President may—

(i) declare that he assents to it or that he withdraws his assent from it, or

President

(ii) return the Bill to the State Legislature with a message for reconsideration, in which case, the State Legislature must reconsider the Bill within six months, and if it is passed again, with or without amendments, it must be again presented, *direct*, to the President for his assent, but the President is *not* bound to give his assent, even though the Bill has been passed by the State Legislature, for a second time.

Governor

Once the Governor reserves a Bill for the President's consideration, the subsequent enactment of the Bill is in the hands of the President and the Governor shall have no further part in its career.

The Governor's power to make Ordinances [Art. 213], having the force of an Act of the State Legislature, is similar to the Ordinance-making power of the President in the following respects :

Ordinance-making power of Governor. (a) The Governor shall have this power only when the Legislature, or both Houses thereof, are not in session;

(b) It is not a discretionary power, but must be exercised with the aid and advice of ministers;

(c) The Ordinance must be laid before the State Legislature when it re-assembles, and shall automatically cease to have effect at the expiration of six weeks from the date of re-assembly, unless disapproved earlier by that Legislature.

(d) The Governor himself shall be competent to withdraw the Ordinance at any time.

(e) The scope of the Ordinance-making power of the Governor is co-extensive with the legislative powers of the State Legislature, and shall be confined to the subjects in Lists II and III of Sch. VII.

But as regards repugnancy with a Union law relating to a *concurrent* subject the Governor's Ordinance will prevail notwithstanding repugnancy, if the Ordinance had been made in pursuance of 'instructions' of the President.

The peculiarity of the Ordinance-making power of the Governor is that he cannot make Ordinances without 'instructions' from the President if—

(a) A Bill containing the same provisions would under the Constitution have required the previous sanction of the President for the introduction thereof into the Legislature;¹⁰ or (b) the Governor would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President;¹¹ or (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President¹² [Art. 213].

Ordinance-making power of President and Governor, compared.

The Ordinance-making powers of the President and a Governor may be graphically presented as follows:

President

1. Can make Ordinance only when either of the two Houses of Parliament is not in session.

Governor

1. Can make Ordinance only when the State Legislature or either of the two Houses (where the State Legislature is bi-cameral) is not in session.

The President or Governor must be satisfied that circumstances exist which render it necessary for him to take immediate action.

But Governor cannot make an Ordinance relating to three specified matters, without instructions from President (see *above*).

2. Ordinance has the same force and is subject to the same limitations as an Act of Parliament.

2. Ordinance has the same force and is subject to the same limitations as an Act of the State Legislature.

But as regards repugnancy with a Union law relating to a Concurrent subject, if the Governor's Ordinance has been made in pursuance of 'instructions of the President', the Governor's Ordinance shall prevail as if it were an Act of the State Legislature which had been reserved for the consideration of the President and assented to by him.

3. (a) Must be laid before both Houses of Parliament when it re-assembles.

3. (a) Must be laid before the Legislative Assembly or before both Houses of the State Legislature (where it is bi-cameral), when the Legislature re-assembles.

- (b) Shall cease to operate on the expiry of six weeks from the re-assembley of Parliament or, if, before that period, resolutions disapproving the Ordinance are passed by both Houses, from the date of the second of such resolutions.

- (b) Shall cease to operate on the expiry of six weeks from the re-assembley of the State Legislature or, if before the expiry of that period, resolutions disapproving the Ordinance are passed by the Assembly or, where there are two Houses the resolution passed by

*President**Governor*

the Assembly is agreed to by the Council, from the date of the passing of the resolution by the Assembly in the first case, and of the agreement of the Council in the second case.

The privileges of the Legislature of a State are similar to those of the Union Parliament inasmuch as the constitutional provisions [Arts. 105 and

Privileges of a State Legislature. 194] are identical. The question of the privileges of a State Legislature has been brought to the notice of the

public, particularly in relation to the power of the Legislature to punish for contempt and the jurisdiction of the Courts in respect thereof. Though all aspects of this question have not yet been settled, the following propositions may be formulated from the decisions of the Supreme Court:

(a) Each House of the State Legislature has the power to punish for breach of its privileges or for contempt.

(b) Each House is the sole judge of the question whether any of its privileges has, in particular case, been infringed, and the Courts have no jurisdiction to interfere with the decision of the House on this point.

The Court cannot interfere with any action taken for contempt unless the Legislature or its duly authorised officer is seeking to assert a privilege not known to the law of Parliament; or the notice issued or the action taken was without jurisdiction.

(c) No House of the Legislature has, however, the power to create for itself any new privilege not known to the law and the Courts possess the power to determine whether the House in fact possesses a particular privilege.

(d) It is also competent for a High Court to entertain a petition for *habeas corpus* under Art. 226 or for the Supreme Court, under Art. 32, challenging the legality of a sentence imposed by a Legislature for contempt on the ground that it has violated a fundamental right of the petitioner and to release the prisoner on bail, pending disposal of that petition.

(e) But once a privilege is held to exist, it is for the House to judge the occasion and its manner of exercise. The Court cannot interfere with an erroneous decision by the House or its Speaker in respect of a breach of its privilege.

New States added since 1950.

Apart from those States which have merely changed their names (e.g., Madras has changed its name to *Tamil Nadu*; Mysore to *Karnataka*; United Provinces was renamed Uttar Pradesh immediately after the adoption of the Constitution), there has been an addition of various items in the list of States in the First Schedule to the Constitution, by reason of which a brief note should be given as to the new items to make the reader familiar as to their identity.

The State of 'Andhra' was created by the Andhra State Act, 1953, **Andhra Pradesh.** comprising certain areas taken out of the State of Madras, and it was renamed 'Andhra Pradesh' by the States Reorganisation Act, 1956.

The Bombay Reorganisation Act, 1960 split up the State of Bombay **Gujarat.** into two States, Gujarat and Maharashtra.

The State of Kerala was created by the States Reorganisation Act, 1956, **Kerala.** in place of the Part B State of Travancore-Cochin of the original Constitution.

Maharashtra. See under Gujarat, *above*.

Nagaland was created a separate State by the State of Nagaland Act, **Nagaland.** 1962, by taking out the Naga Hills-Tuensang area out of the State of Assam.

By the Punjab Reorganisation Act, 1966, the 17th State of the Union of **Haryana.** India was constituted by the name of Haryana, by carving out a part of the territory of the State of Punjab.

The State of Mysore was formed by the States Reorganisation Act, **Karnataka.** 1956, out of the original Part B State of Mysore. It has been renamed, in 1973, as Karnataka.

Some of the Union Territories had, of late, been demanding promotion **Himachal Pradesh.** to the status of a State. Of these, Himachal Pradesh became the fore-runner on the enactment of the State of Himachal Pradesh Act, 1970, by which Himachal Pradesh was added as the 18th State in the list of States, and omitted from the list of Union Territories, in the First Schedule of the Constitution.

In the same manner, Manipur and Tripura were lifted up from the **Manipur and Tripura.** status of Union Territories (original Part C States), by the North-Eastern Areas (Reorganisation) Act, 1971.

Meghalaya was initially created a 'sub-State' or **Meghalaya.** 'autonomous State' within the State of Assam, by the Constitution (22nd Amendment) Act, 1969, by the insertion of Arts. 241 and 371A. Subsequently, it was given the full status of a State and admitted in the 1st Schedule as the 21st State, by the North-Eastern Area (Reorganisation) Act, 1971.

As has been explained earlier, Sikkim (a Protectorate of India) was **Sikkim.** given the status of an 'associate State' by the Constitution (35th Amendment) Act, 1974, and thereafter added to the 1st Schedule as the 22nd State, by the Constitution (36th Amendment) Act, 1975.

By the State of Mizoram Act, 1986, Mizoram was elevated from the **Mizoram.** status of a Union Territory to be the 23rd State in the 1st Schedule of the Constitution.

By a similar process, statehood was conferred on the Union Territory **Arunachal Pradesh.** of Arunachal Pradesh, by enacting the State of Arunachal Pradesh Act, 1986.

Goa. Goa was separated from Daman and Diu and made a State, by the Goa, Daman and Diu Reorganisation Act, 1987.

Chhattisgarh Chhattisgarh was carved out of the territories of the Madhya Pradesh by the Madhya Pradesh Reorganisation Act, 2000.

Uttarakhand Initially, Uttarakhand was created out of the territories of the Uttar Pradesh by the Uttar Pradesh Reorganisation Act, 2000. It was renamed as Uttarakhand by the Uttarakhand (Alteration of Name) Act, 2006.

Jharkhand Jharkhand was created by carving out a part of the territories of the Bihar by the Bihar Reorganisation Act, 2000.

REFERENCES

1. (a) The Legislative Council in Andhra Pradesh has been abolished by the Andhra Pradesh Legislative Council (Abolition) Act, 1985. (b) By reason of s. 8(2) of the Constitution (7th Amendment) Act, 1956, Madhya Pradesh shall have a second House (Legislative Council) only after a notification to this effect has been made by President. No such notification having been made so far, Madhya Pradesh is still having one Chamber. (c) The Legislative Council of Tamil Nadu has been abolished in August, 1986, by passing the Tamil Nadu Legislative Council (Abolition) Act, 1986.
2. Revived by the Andhra Pradesh Legislative Council Act, 2005 (1 of 2006).
3. Maharashtra has been created out of Bombay, by the Bombay Reorganisation Act, 1960.
4. West Bengal has abolished its Legislative Council w.e.f. 1-8-1969 by a notification under the West Bengal Legislative Council (Abolition) Act, 1969, and Punjab has abolished its Legislative Council, under the Punjab Legislative Council (Abolition) Act, 1969.
5. See Table XV for membership of the State Legislatures.
6. The number of Anglo-Indian members so nominated by the Governor of the several States as in September, 1990, was as follows : Andhra 1; Bihar 1; Karnataka 1; Kerala 1; Madhya Pradesh 1; Tamil Nadu 1; Maharashtra 1; Uttar Pradesh 1; West Bengal 1. The present position is not available.
7. The original period of ten years has been extended to sixty years, gradually by the Constitution (8th Amendment) Act, 1959, the 23rd Amendment Act, 1969, the 45th Amendment Act, 1980, the 62nd Amendment Act, 1989 and the 79th Amendment Act, 1999.
8. In this context, we should refer to the much-debated question as to whether the Governor has any discretion to dissolve the Assembly without or against the advice of the Chief Minister, or through the device of suspending the State Legislature under Art. 356. In the general election to the *Lok Sabha*, held in March, 1977, the Congress Party was routed by the Janata Party. It was urged by the Janata Government at the Centre that in view of this verdict, the Congress Party had no moral right to continue in power in 9 States, viz., Bihar, Haryana, Himachal Pradesh, M.P., Orissa, Punjab, Rajasthan, U.P., West Bengal. In pursuance of this view, the Union Home Minister (Mr. Charan Singh) issued on, 18-4-1977, an 'appeal' to the Chief Ministers of these 9 States to advise their respective Governors to dissolve the Assemblies and hold an election in June, 1977 (while their extended term would have expired in March, 1978). But the Congress Party advised the Chief Ministers not to yield to this appeal or pressure, and contended that the proposition that the English Sovereign can dissolve Parliament without the advice of the Prime Minister was wrong and obsolete and that the Crown's prerogative in this behalf had been turned into a privilege of the Prime Minister. In short, under the British Parliamentary system which had been adopted under the Indian Constitution, a Governor could not dissolve the Assembly contrary to the advice of the Chief Minister of the State. It was also urged that Art. 356 was not intended to be used for such purposes.

The question was eventually taken to the Supreme Court by some of the affected States by way of a suit (under Art. 131) against the Union of India. The suit was dismissed by a Bench of 7 Judges, at the hearing on the prayer for temporary injunction, though the Judges gave separate reasons in 6 concurring judgments [*State of Rajasthan v. Union of India*, AIR 1977 S.C. 1361]. The Judges agreed on the following points: (i) The reasons behind an Executive decision to dissolve the Legislature are *political* and not justiciable in a court of law. (ii) So also is the question of the President's satisfaction for the purpose of using the power under Art. 356,—unless it was shown that there was no satisfaction at all or the satisfaction was based on extraneous grounds [paras 59, 83 (BEG. C.J.); 124 (CHANDRACHUD, J.); 144 (BHAGWATI & GUPTA J.J.); 170 (GOSWAMI, J.); 179 (UNTWALIA, J.); 206 (FAZAL ALI, J.)]. All the Judges held that on the facts on the record, it was not possible to hold that the order of the President under Art. 356, suspending the constitutional system in the relevant States was actuated by *mala fides* or extraneous considerations.

Exercise of power under Art. 356 was received again by a 9-Judge Bench of the Supreme Court in *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. I. Explaining the *Rajasthan* case it has laid down the following points: (i) Proclamation under Art. 356 is subject to judicial review but to a limited extent, e.g. whether there was any material, whether it was relevant, whether *mala fide* etc. (ii) Till the proclamation is approved by Parliament it is not permissible for the President to take any irreversible action (such as dissolution of the House) under Art. 356(1)(a), (b), or (c). (iii) Even if approved by the Parliament the Court may order *status quo ante* to be restored. (iv) If the ruling party in the State suffers a defeat in election to the Lok Sabha it will not be a ground for exercise of power under Art. 356.

9. The entire function of reservation and veto is discretionary and non-justiciable [*Hoechst Pharmaceuticals v. State of Bihar*, AIR 1953 S.C. 1019 (para 89)].
10. E.g., An Ordinance imposing reasonable restrictions upon inter-State trade or commerce [Art. 304, Proviso].
11. E.g., An Ordinance which might affect the powers of the Union [Art. 220].
12. E.g., An Ordinance affecting powers of the High Court [2nd Prov. on to Art. 200].

CHAPTER 15

THE STATE OF JAMMU & KASHMIR

**Peculiar position
of the State.**

THE State of Jammu & Kashmir holds a peculiar position under the Constitution of India.

It forms a part of the 'territory of India' as defined in Art. 1 of the Constitution, being the fifteenth State included in the First Schedule of the Constitution, as it stands amended. In the original Constitution, Jammu & Kashmir was specified as a 'Part B' State. The States Reorganisation Act, 1956, abolished the category of Part B States and the Constitution (7th Amendment) Act, 1956, which implemented the changes introduced by the former Act, included Jammu & Kashmir in the list of the 'States' of the Union of India, all of which were now included in one category.

Nevertheless, the special constitutional position which Jammu & Kashmir enjoyed under the original Constitution [Art. 370] has been maintained, so that all the provisions of the Constitution of India relating to the States in the First Schedule are *not* applicable to Jammu & Kashmir even though it is one of the States specified in that Schedule.

To understand why Jammu & Kashmir, being a State included in the First Schedule of the Constitution of India, should yet be accorded a separate treatment, a retrospect of the development of the constitutional relationship of the State with India becomes necessary. Under the British

History of the integration of Jammu and Kashmir with India. regime, Jammu & Kashmir was an Indian State ruled by a hereditary Maharaja. On the 26th of October, 1947, when the State was attacked by Azad Kashmir Forces with the support of Pakistan, the Maharaja (Sir Hari Singh) was obliged to seek the help of India,

after executing an Instrument of Accession similar to that executed by the Rulers of other Indian States. By the Accession the Dominion of India acquired jurisdiction over the State with respect to the subjects of Defence, External Affairs and Communications, and like other Indian States which survived as political units at the time of the making of the Constitution of India, the State of Jammu & Kashmir was included as a Part B State in the First Schedule of the Constitution of India, as it was promulgated in 1950.

Position of the State under the original Constitution of India. But though the State was included as a Part B State, all the provisions of the Constitution applicable to Part B States were not extended to Jammu & Kashmir. This peculiar position was due to the fact that having regard to the circumstances in which the State acceded to India, the

Government of India had declared that it was the people of the State of Jammu & Kashmir, acting through their Constituent Assembly, who were to finally determine the Constitution of the State and the jurisdiction of the Union of India. The applicability of the provisions of the Constitution regarding this State were, accordingly, to be in the nature of an interim arrangement. (This was the substance of the provision embodied in Art. 370 of the Constitution of India.)

Implications of the Accession. Since the liberality of the Government of India has been misunderstood and misinterpreted in interested quarters, overlooking the *legal* implications of the

Accession of the State to India, we should pause for a moment to explain these legal implications lest they be lost sight of in the turmoil of political events which have clouded the patent fact of the Accession. The first thing to be noted is that the Instrument of Accession signed by Maharaja Hari Singh on the 26th October, 1947, was in the *same form*¹ as was executed by the Rulers of the numerous other States which had acceded to India following the enactment of the Indian Independence Act, 1947. The legal consequences of the execution of the Instrument of Accession by the Ruler of Jammu & Kashmir cannot, accordingly, be in any way different from those arising from the same fact in the case of the other Indian States. It may be recalled² that owing to the lapse of paramountcy under s. 7(1)(b) of the Indian Independence Act, 1947, the Indian States regained the position of absolute sovereignty which they had enjoyed prior to the assumption of suzerainty by the British Crown. The Rulers of the Indian States thus became unquestionably competent to accede to either of the newly created Dominions of India and Pakistan, in exercise of their sovereignty. The legal basis³ as well as the form of Accession were the same in the case of those States which acceded to Pakistan and those which acceded to India. There is, therefore, no doubt that by the act of Accession the State of Jammu & Kashmir became *legally and irrevocably* a part of the territory of India and that the Government of India was entitled to exercise jurisdiction over the State with respect to those matters to which the Instrument of Accession extended. If, in spite of this, the Government of India had given an assurance to the effect that the Accession or the constitutional relationship between India and the State would be subject to confirmation by the people of the State, under no circumstances can any *third party* take advantage of such extra-legal assurances and claim that the legal act had not been completed.

When India made her Constitution in 1949, it is natural that this dual attitude of the Government of India should be reflected in the position

Articles of the Constitution which apply of their own force to the State. offered to the State of Jammu & Kashmir within the framework of that Constitution. The act of Accession was unequivocally given legal effect by declaring Jammu & Kashmir a part of the territory of India [Art. 1]. But the application of the other provisions of

the Constitution of India to Jammu & Kashmir was placed on a tentative basis, subject to the eventual approval of the Constituent Assembly of the State. The Constitution thus provided that the only Articles of the Constitution which would apply of their own force to Jammu & Kashmir were—Arts. 1 and 370. The application of the other

Articles was to be determined by the President in consultation with the Government of the State [Art. 370]. The legislative authority of Parliament over the State, again, would be confined to those items of the Union and Concurrent Lists as correspond to matters specified in the Instrument of Accession. The above interim arrangement would continue until the Constituent Assembly for Jammu & Kashmir made its decision. It would then communicate its recommendations to the President, who would either abrogate Art. 370 or make such modification as might be recommended by that Constituent Assembly.

In pursuance of the above provisions of the Constitution, the President made the Constitution (Application to Jammu & Kashmir) Order, 1950, in consultation with the Government of the State of Jammu & Kashmir, specifying the matters with respect to which the Union Parliament would be competent to make laws for Jammu & Kashmir, relating to the three subjects of Defence, Foreign Affairs and Communications with respect to which Jammu & Kashmir had acceded to India.

Subsequent Orders. Next, there was an Agreement between the Government of India and of the State at Delhi in June, 1952, as to the subjects over which the Union should have jurisdiction over the State, pending the decision of the Constituent Assembly of Jammu & Kashmir. The Constituent Assembly of Jammu & Kashmir ratified the Accession to India and also the decision arrived at by the Delhi Agreement as regards the future relationship of the State with India, early in 1954. In pursuance of this, the President, in consultation with the State Government, made the *Constitution (Application to Jammu & Kashmir), Order, 1954*, which came into force on the 14th of May, 1954. This Order implemented the Delhi Agreement as ratified by the Constituent Assembly and also superseded the Order of 1950. According to this Order, in short, the jurisdiction of the Union extended to *all* Union subjects under the Constitution of India (subject to certain slight alterations) instead of only the three subjects of Defence, Foreign Affairs and Communications with respect to which the State had acceded to India in 1947. This Order, as amended in 1963, 1964, 1965, 1966, 1972, 1974 and 1986, deals with the entire constitutional position of the State within the framework of the Constitution of India, excepting only the internal constitution of the State Government, which was to be framed by the Constituent Assembly of the State.⁴

Making of the State Constitution. It has already been explained how from the beginning it was declared by the Government of India that, notwithstanding the Accession of the State of Jammu & Kashmir to India by the then Ruler, the future Constitution of the State as well as its relationship with India were to be finally determined by an elected Constituent Assembly of the State. With these objects in view, the people of the State elected a sovereign Constituent Assembly which met for the first time on October 31, 1951.

The Constitution (Application to Jammu & Kashmir) Order, 1954, which settled the constitutional relationship of the State of Jammu & Kashmir, did not disturb the previous assurances as regards the framing of the *internal* Constitution of the State by its own people. While the

Constitution of the other Part B States was laid down in Part VII of the Constitution of India (as promulgated in 1950), the State Constitution of Jammu & Kashmir was to be framed by the Constituent Assembly of that State. In other words, the provisions governing the Executive, Legislature and Judiciary of the State of Jammu & Kashmir were to be found in the Constitution drawn up by the people of the State and the corresponding provisions of the Constitution of India were not applicable to that State.

The first official act of the Constituent Assembly of the State was to put an end to the hereditary princely rule of the Maharaja. It was one of the conditions of the acceptance of the accession by the Government of India that the Maharaja would introduce popular Government in the State. In pursuance of this understanding, immediately after the Accession, the Maharaja invited Sheikh Mohammad Abdullah, President of the All Jammu & Kashmir National Conference, to form an interim Government, and to carry on the administration of the State. The interim Government later changed into a full-fledged Cabinet, with Sheikh Abdullah as the first Prime Minister. The Abdullah Cabinet, however, would not rest content with anything short of the abdication of the ruling Maharaja Sir Hari Singh. In June 1949, thus, Maharaja Hari Singh was obliged to abdicate in favour of his son Yuvaraj Karan Singh. The Yuvaraj was later *elected* by the Constituent Assembly of the State (which came into existence on October 31, 1951) as the '*Sadar-i-Riyasat*'. Thus, came to an end the princely rule in the State of Jammu & Kashmir and the head of the State was henceforth to be an elected person. The Government of India accepted this position by making a Declaration of the President under Art. 370(3) of the Constitution (15th November, 1952) to the effect that for the purposes of the Constitution, 'Government' of the State of Jammu & Kashmir shall mean the *Sadar-i-Riyasat* of Jammu & Kashmir, acting on the advice of the Council of Ministers of the State. Subsequently, however, the name of *Sadar-i-Riyasat* has been changed to that of Governor.

We have already seen that in February, 1954, the Constituent Assembly of Jammu & Kashmir ratified the State's Accession to India, thus fulfilling the moral assurance given in this behalf by the Government of India, and also that this act of the Constituent Assembly was followed up by the promulgation by the President of India of the Constitution (Application to Jammu & Kashmir) Order, 1954, placing on a final footing the applicability of the provisions of the Constitution of India governing the relationship between the Union and this State.

The making of the State Constitution for the internal governance of the State was now the only task left to the Constituent Assembly. As early as November, 1951, the Constituent Assembly had made the Jammu & Kashmir Constitution (Amendment) Act, which gave legal recognition to the transfer of power from the hereditary Maharaja to the popular Government headed by an elected *Sadar-i-Riyasat*. For the making of the permanent Constitution of the State, the Constituent Assembly set up several Committees and in October, 1956, the Drafting Committee presented the Draft Constitution, which after discussion, was finally adopted on November 17, 1957, and given effect to from January 26, 1957. The State of Jammu & Kashmir thus acquired the distinction of having a *separate Constitution for the*

administration of the State, in place of the provisions of Part VI of the Constitution of India which govern all the other States of the Union.⁵

Important provisions of the State Constitution. The more important provisions of the State Constitution of Jammu & Kashmir (as amended up to 1984) are as follows:

The Constitution declares the State of Jammu and Kashmir to be "an integral part of Union of India".

The territory of the State will comprise all the territories, which, on August 15, 1947, were under the sovereignty or suzerainty of the Ruler of the State (*i.e.*, including the Pakistan-occupied area of Jammu & Kashmir). This provision is immune from amendment.

The executive and legislative power of the State will extend to all matters except those with respect to which Parliament has powers to make laws for the State under the provisions of the Constitution of India.

Every person who is, or is deemed to be, a citizen of India shall be a permanent resident of the State, if on the 14th of May, 1954, he was a State subject of Class I or Class II, or, having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than 10 years prior to that date. Any person who, before the fourteenth day of May, 1954, was a State subject of Class I or of Class II and who, having migrated after the first day of March, 1947, to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature will on such return be a permanent resident of the State.⁶ The permanent residents will have all rights guaranteed to them under the Constitution of India [s. 10].

Under the original Constitution of Jammu & Kashmir, there was a difference between this State and other States of India as regards the Head of the State Government. While in the rest of India, the head of the State Executive was called 'Governor' and he is appointed by the President [Arts. 152, 155], the Executive head of the State of Jammu & Kashmir was called *Sadar-i-Riyasat* and he was to be elected by the State Legislative Assembly. This anomaly has, however, been removed by the Constitution of Jammu & Kashmir (6th Amendment) Act, 1965, as a result of which the nomenclature has been changed from *Sadar-i-Riyasat* to 'Governor' and he is to be 'appointed by the President under his hand and seal' [ss. 26-27] as in other States [Art. 155]. In the result, there is now no *differences on this point*, between Jammu & Kashmir and other States. As in other States, the executive power of the State will be vested in the Governor and shall be exercised by him with the advice of the Council of Ministers (except in the matter of appointment of the Chief Minister [s. 36] and of issuing a Proclamation for introducing 'Governor's Rule' in case of breakdown of constitutional machinery [s. 92]). The Governor will hold office for a term of five years. The Council of Ministers, headed by the Chief Minister, will be collectively responsible to the Legislative Assembly.

The Legislature of the State will consist of the Governor and two Houses, to be known respectively as the Legislative Assembly and the

Legislative Council. The Legislative Assembly will consist of one hundred members chosen by direct election from territorial constituencies in the State; and two women members nominated by the Governor. Twenty-four seats in the Legislative Assembly will remain vacant to be filled by representatives of people living in Pakistan-occupied areas of the State. The Legislative Council will consist of 36 members. Eleven members will be elected by the members of the Legislative Assembly from amongst persons who are residents of the Province of Kashmir, provided that of the members so elected at least one shall be a resident of Tehsil Ladakh and at least one a resident of Tehsil Kargil, the two outlying areas of the State. Eleven members will be elected by the members of the Legislative Assembly from amongst persons who are residents of the Jammu Province. The remaining 14 members will be elected by various electorates, such as municipal councils, and such other local bodies.

The High Court of the State will consist of a Chief Justice and two or more other Judges. Every Judge of the High Court will be appointed by the President after consultation with the Chief Justice of India and the Governor, and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.

There will be a Public Service Commission for the State. The Commission along with its Chairman will be appointed by the Governor.

Every member of the civil service or one holding a civil post will hold office under the pleasure of the Governor.

The official language of the State will be Urdu, but English will, unless the Legislature by law otherwise provides, continue to be used for all official purposes of the State [s. 145.]

The State Constitution may be amended by introducing a Bill in the Legislative Assembly and getting it passed in each House by a majority of not less than two-thirds of the total membership of that House. But no Bill or amendment seeking to make any change in the provisions relating to the relationship of the State with the Union of India, the extent of executive and legislative powers of the State or the provisions of the Constitution of India as applicable in relation to the State shall be introduced or moved in either House of the Legislature [s. 147].

Notwithstanding the liberal measures introduced in the State by the adoption of a separate State Constitution, the pro-Pakistani elements in Jammu & Kashmir continued their agitation for the holding of a plebiscite to

Indira-Abdullah Agreement of 1975. finally determine whether the State should accede to India or Pakistan and there were violent incidents initiated by the 'Plebiscite Front',—a pro-Pakistani party which had been formed with the avowed object of secession from India. Sheikh Abdullah got involved in these anti-Indian movements and went on criticising the Indian policy towards the State, as a result of which he had to be placed under preventive detention in 1955. After a short release in 1964 on the profession of a changed attitude, he again went wrong, so that he was again detained in 1965 under the D.I.R., and eventually extorted from the State in 1971. This was followed by a period of blowing hot and cold, leading to a series of negotiations between

the representatives of India and the Plebiscite Front, and an agreement was eventually reached and announced, on February 24, 1975.⁷

The net political result of this Agreement was that the demand for plebiscite was abandoned by Abdullah and his followers and, on the other hand, it was agreed that the special status of the State of Jammu & Kashmir would continue to remain under the provisions of Art. 370 of the Constitution of India, which was described as a 'temporary' measure, in the original Constitution. A halt was, thus, cried to the progress of integration of this State with the Union of India, which had started in 1954, by giving larger autonomy to the State Assembly in certain matters.

It should, however, be mentioned that owing to differences over matters arising out of the Agreement, it has *not* been implemented by issuing a fresh Presidential Order under Art. 370.⁴

The salient features of the constitutional position of the State of Jammu & Kashmir in relation to the Union, as modified up-to-date, may now be summarised.

(a) *Jurisdiction of Parliament.* The jurisdiction of Parliament in relation to Jammu & Kashmir shall be confined to the matters enumerated in the Union List, and the Concurrent List,⁸ subject to certain modifications, while it shall have no jurisdiction as regards most of the matters enumerated in the Concurrent List. While in relation to the other States, the residuary power of legislation belongs to Parliament, in the case of Jammu & Kashmir, the residuary power shall belong to the Legislature of that State, excepting certain matters, specified in 1969, for which Parliament shall have exclusive power, e.g., prevention of activities relating to cession or secession, or disrupting the sovereignty or integrity of India. The power to legislate with respect to preventive detention in Jammu & Kashmir, under Art. 22(7), shall belong to the Legislature of the State instead of Parliament, so that no law of preventive detention made by Parliament will extend to that State.

By the Constitution (Application to Jammu & Kashmir) Order, 1986, however, Art. 249 has been extended to the State of Jammu & Kashmir, so that it would now be competent to extend the jurisdiction of Parliament to that State, in the national interest (e.g., for the protection of the borders of the State from aggression from Pakistan or China), by passing a resolution in the Council of States [Constitution Order, 129].

(b) *Autonomy of the State in certain matters.* The plenary power of the Indian Parliament is also curbed in certain other matters, with respect to which Parliament cannot make any law without the consent of the Legislature of the State of Jammu & Kashmir, where that State is to be affected by such legislation, e.g., (i) alteration of the name or territories of the State [Art. 3], (ii) international treaty or agreement affecting the disposition of any part of the territory of the State [Art. 253].

Similar fetters have been imposed upon the executive power of the Union to safeguard the autonomy of the State of Jammu & Kashmir, a privilege which is not enjoyed by the other States of the Union. Thus,

Recapitulation of the Constitutional position of Jammu & Kashmir vis-a-vis the Union.

(i) Similarly, no decision affecting the disposition of the State can be made by the Government of India, without the consent of the Government of the State.

(ii) The Union shall have *no* power to suspend the Constitution of the State on the ground of failure to comply with the directions given by the Union under Art. 365.

(iii) Arts. 356-357 relating to suspension of constitutional machinery have been extended to Jammu & Kashmir by the Amendment Order of 1964. But "failure" would mean failure of the constitutional machinery as set up by the Constitution of Jammu & Kashmir and not Part VI of the Constitution of India.

In Jammu & Kashmir two types of Proclamations are made: (a) the "Governor's Rule" under s. 92 of the Constitution of Jammu & Kashmir, and (b) the "Presidents Rule" under Art. 356 as in the case of other States.

(a) The first occasion when President's Rule was imposed in Jammu & Kashmir was on 7-9-1986. It followed Governor's Rule which expired on 6-9-1986. The Proclamation was revoked on 6-11-1986 when Farooq Abdullah formed a ministry.

(b) Governor's Rule was imposed on 27-3-1977 for the first time and later on 19-1-1990.

Since 19-7-1990 the State had continuously been under President's Rule until 9-10-1996 when a popular Government, under the leadership of Farooq Abdullah, was formed on the basis of an election held in September, 1996 [Statesman, 10-10-1996].

Governor's Rule is provided by the State Constitution. In exercise of this power the Governor has the power, with the concurrence of the President, to assume to himself all or any of the functions of the Government of the State, except those of the High Court.

(iv) The Union shall have no power to make a Proclamation of Financial Emergency with respect to the State of Jammu & Kashmir under Art. 360.

In other words, the federal relationship between the Union and the State of Jammu & Kashmir respects 'State rights' more than in the case of the other States of the Union.

(c) *Fundamental Rights and the Directive Principles.* The provisions of Part IV of the Constitution of India relating to the Directive Principles of State Policy do *not* apply to the State of Jammu & Kashmir. The provisions of Art. 19 are subject to special restrictions for a period of 25 years. Special rights as regards employment, acquisition of property and settlement have been conferred on 'permanent residents' of the State, by inserting a *new* Art. 35A. Articles 19(1)(f) and 31(2) have *not* been omitted, so that the fundamental right to property is still guaranteed in this State.

(d) *Separate Constitution for the State.* While the Constitution for any of the other States of the Union of India is laid down in Part VI of the Constitution of India, the State of Jammu & Kashmir has its own

Constitution (made by a separate Constituent Assembly and promulgated in 1957).

(e) *Procedure for Amendment of State Constitution.* As already stated, the provisions of Art. 368 of the Constitution of India are not applicable for the amendment of the State Constitution of Jammu & Kashmir. While an Act of Parliament is required for the amendment of any of the provisions of the Constitution of India, the provisions of the State Constitution of Jammu & Kashmir (excepting those relating to the relationship of the State with the Union of India) may be amended by an Act of the Legislative Assembly of the State, passed by a majority of not less than two-thirds of its membership; but if such amendment seeks to affects the Governor or the Election Commission, it shall have no effects unelss the law is reserved for the consideration of the President and receives his assent.

It is also to be noted that no amendment of the Constitution of India shall extend to Jammu & Kashmir unless it is extended by an Order of the President under Art. 370(1).

(f) No alteration of the area or boundaries of this State can be made by Parliament without the consent of the Legislature of the State of Jammu & Kashmir.

(g) *Other Jurisdictions.* By amendments of the Constitution Order, the jurisdictions of the Comptroller and Auditor-General, of the Election Commission, and the Special Leave Jurisdiction of the Supreme Court have been extended to the State of Jammu & Kashmir.

Power to put an end to Art. 370. Clause (3) of Art. 370 provides—

"Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification."

Recently, a plea has been raised by the Bharatiya Janata Party that the President should declare that Art. 370 shall cease to operate, so that the special status of J & K would be abolished and that State would be brought to the same level as that of the other States, to be governed by all the provisions of Part VI of the Constitution.

Since the Constituent Assembly, referred to in the Proviso to Cl. (3) [above] no longer exists, the President's power appears to be unfettered now. The arguments of the B.J.P. to abolish the special status are—

(a) The makers of the Constitution of India intended that the special status was granted to J. & K. only as a temporary measure, and that is why Art. 370 was included in Part XXI under the label—"Temporary, Transitional and Special Provisions", and Cl. (3) was appended to Art. 370.

(b) The people of J. & K. have abused the special status and entered into a conspiracy with the Government of Pakistan and the leaders of 'Pakistan-occupied Kashmir' to invite a veiled invasion from Pakistan.

The Congress Government has so far resisted the demand of the B.J.P. on political grounds. History only can say what would happen if and when the B.J.P. ever gains a position of predominance.

REFERENCES

1. *Vide White Paper on Indian States* (MS. 6) rule pp. 111, 165.
2. *Vide Author's Commentary on the Constitution of India*, 5th Ed., Vol. 4, p. 38.
3. Sections 5-6 of the Government of India Act, 1935, read with s. 7(1)(b) of the Indian Independence Act, 1947.
4. As to the Constitution of Jammu & Kashmir see pp. 27ff. of Author's *Commentary on The Constitution of India*, 6th Ed., Vol. P. Numerous other changes were proposed to be introduced after the agreement arrived at between the Government of India and Sheikh Abdullah, in February, 1975. But this agreement could not be implemented owing to difference in matter of detail (see also f.n. 8, below).
5. The very definition of 'State' (in Art. 152) for the purpose of Part VI excludes the State of Jammu & Kashmir.
6. Their position is sought to be drastically changed by a Resettlement Bill passed by the Jammu & Kashmir Legislature, which has been referred by the President to the Supreme Court of India for its opinion as to its constitutional validity.
7. *Vide Statesman*, Calcutta, 25-2-1975, pp. 1, 7. He was released shortly after this Agreement and made the Chief Minister in February, 1975, on the resignation of the Mir Qasim ministry. At the election held in July, 1975, Sheikh Abdullah was elected to the Jammu & Kashmir Assembly and his Chief Ministership was thus upheld by election. He was retaining that office till his death in 1982.
8. Until the amendment of the Order in 1963, the Concurrent List was altogether inapplicable to Jammu & Kashmir. Its application has been extended by the Amendment Order of 1964, subject to exceptions introduced in 1972.

CHAPTER 16

ADMINISTRATION OF UNION TERRITORIES AND ACQUIRED TERRITORIES

AS stated earlier, in the original Constitution of 1949, States were **Genesis of Union Territories.** divided into three categories and included in Parts A, B and C of the First Schedule of the Constitution.

Part C States were 10 in number, namely,—Ajmer, Bhopal, Bilaspur, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur, Tripura and Vindhya Pradesh. Of these, Himachal Pradesh, Bhopal, Bilaspur, Kutch, Manipur, Tripura and Vindhya Pradesh had been formed by the integration of some of the smaller Indian States. The remaining States of Ajmer, Coorg and Delhi were Chief Commissioner's Provinces under the Government of India Acts, 1919 and 1935, and were thus administered by the Centre even before the Constitution.

The special feature of these Part C States was that they were administered by the President through a Chief Commissioner or a Lieutenant-Governor, acting as his agent. Parliament had legislative power relating to *any* subject as regards the Part C States, but the Constitution empowered Parliament to create a Legislature as well as a Council of Advisers or Ministers for a Part C State. In exercise of this power, Parliament enacted the Government of Part C States Act, 1951, by which a Council of Advisers or Ministers was set up in each Part C State, to advise the Chief Commissioner, under the overall control of the President, and also a Legislative Assembly to function as the Legislature of the State, without derogation to the plenary powers of Parliament.

In place of these Part C States, the Constitution (7th Amendment) Act, 1956 substituted the category of 'Union Territories' which are also similarly administered by the Union. As a result of the reorganisation of the States by the States Reorganisation Act, 1956, the Part C States of Ajmer, Bhopal, Coorg, Kutch, and Vindhya Pradesh were merged into other adjoining States.

The list of Union Territories, accordingly, included the remaining Part C States of Delhi; Himachal Pradesh¹ (which included Bilaspur); Manipur; **Union Territories.** and Tripura.¹ To these were added the Andaman and Nicobar Islands; and the Laccadive and Amindivi Islands. Under the original Constitution, the Andaman and Nicobar Islands were included in Part D of the First Schedule. The Laccadive, Minicoy and

Amindivi Islands (renamed '*Lakshadweep*' in 1973), on the other hand, were included in the territory of the State of Madras. The States Reorganisation Act and the Constitution (7th Amendment) Act, 1956 abolished Part D of the 1st Schedule and constituted it a separate Union Territory.

By the Constitution (Tenth, Twelfth, Fourteenth and Twenty-seventh) Amendment Acts, some others were added to the list of Union Territories.

Since some of the erstwhile Union Territories (Himachal Pradesh, Manipur, Tripura, Mizoram, Arunachal Pradesh¹ and Goa) have been lifted up into the category of 'States', the number of Union Territories is, at the end of 2000, *seven*¹ [see Table III, *post*].

Though all these Union Territories belong to one category, there are some differences in the actual system of administration as between the several Union Territories owing to the provisions of the Constitution as well as of Acts of Parliament which have been made in pursuance of the Constitutional provisions.

Article 239(1) provides that save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify.² Instead of appointing an Administrator from outside, the President may appoint the Governor of a State as the Administrator of an adjoining Union Territory; and where a Governor is so appointed, he shall exercise his functions as such Administrator independently of his Council of Ministers [Art. 239(2)].

All the Union Territories are thus administered by an Administrator as the agent of the President and not by a Governor acting as the head of a State.

In 1962, however, Art. 239A (amended by the 37th Amendment, 1974) was introduced in the Constitution, to empower Parliament to create a Legislature or Council of Ministers or both for some of the Union Territories. By virtue of this power, Parliament enacted the Government of Union Territories Act, 1963, providing for a Legislative Assembly as well as a Council of Ministers to advise the Administrator, in these Union Territories. Pondicherry alone is now left in this category, all other Union Territories have become States.

On 1-2-1992, Arts. 239AA and 239AB (inserted by Constitution 69th Amendment) came into force. To supplement these provisions the Government of National Capital Territory of Delhi Act, 1991 was enacted. Delhi has from 1993 a Legislative Assembly and a Council of Ministers. The Government of Delhi has all the legislative powers in the State List excepting entries 1 (Public Order), 2 (Police) and 18 (Land).

Parliament has exclusive legislative power over a Union Territory, including matters which are enumerated in the State Legislative Power. List [Art. 246(4)]. But so far as the two groups of Island Territories; Dadra and Nagar Haveli; Daman and Diu; Pondicherry; are

concerned, the President has got a legislative power, namely, to make regulations for the peace, progress and good government of these Territories. This power of the President overrides the legislative power of Parliament inasmuch as a regulation made by the President as regards these

**President's Power
to make Regula-
tions as regards
the Andaman &
Nicobar Islands;
Lakshadweep and
other Islands.**

Territories may repeal or amend any Act of Parliament which is for the time being applicable to the Union Territory [Art. 240(2)]. But the President's power to make regulations shall remain suspended while the Legislature is functioning in any of these States,—to be revived as soon as such Legislature is dissolved or suspended.

Parliament may by law constitute a High Court for a Union Territory or declare any court in any such Territory to be a High Court for all or any of the purposes of this Constitution [Art. 241]. Until such legislation is made High Courts for Union Territories.

the existing High Courts relating to such territories shall continue to exercise their jurisdiction. In the result, the Punjab and Haryana High Court acts as the High Court of Chandigarh; the *Lakshadweep* is under the jurisdiction of the Kerala High Court; the Calcutta High Court has got jurisdiction over the Andaman and Nicobar Islands [*vide* Table XVI], the Madras High Court has jurisdiction over Pondicherry; the Bombay High court over Dadra and Nagar Haveli; and the Gauhati High Court (Assam) over Mizoram and Arunachal Pradesh. The Territory of Goa, Daman and Diu had a Judicial Commissioner but recently the jurisdiction of the Bombay High Court has been extended to this Territory. Delhi has a separate High Court of its own since 1966.

There are no separate provisions in the Constitution relating to the administration of Acquired Territories but the provisions relating to Union

**Acquired
Territories.** Territories will extend by virtue of their definition of 'Union Territory' [Art. 366(30)], as including "any other territory comprised within the territory of India

but not specified in that Schedule". Thus, the Territory of Pondicherry, Karaikal, Yanam and Mahe, was being administered by the President of India through a Chief Commissioner until it was made a Union Territory, in 1962. Parliament has plenary power of legislation regarding such territory as in the case of the Union Territories [Art. 246(4)].

REFERENCES

1. Himachal Pradesh has since been transferred to the category of States, by the State of Himachal Pradesh Act, 1970, and Manipur and Tripura, by the N.E. Areas (Reorganisation) Act, 1971. Similarly, by the State of Mizoram Act, 1986, the State of Arunachal Pradesh Act, 1986 and the Goa, Daman and Diu Reorganisation Act, 1987, the Union Territories of Mizoram, Arunachal Pradesh and Goa have been elevated to Statehood.
2. Heterogeneous designations have been specified by the President in the case of the different Union Territories:
 - (a) Administrator—Chandigarh, Dadra & Nagar Haveli, Daman & Diu, Lakshadweep.
 - (b) Lieutenant Governor—Delhi; Pondicherry; Andaman and Nicobar Islands.

CHAPTER 17

THE NEW SYSTEM OF PANCHAYATS AND MUNICIPALITIES

THE village *Panchayat* was a unit of local administration since the early **History.** British days, but they had to work under Government control. When Indian leaders pressed for local autonomy at the national level, the British Government sought to meet this demand by offering concession at the lowest level, at the initial stage, by giving powers of self-government to Panchayats in rural area and municipalities in urban areas, under various local names under different enactments, e.g. the Bengal Local Self-Government Act, 1885; the Bengal Village Self-Government Act, 1919; the Bengal Municipal Act, 1884.

In the Government of India Act, 1935, the power to enact legislation was specifically given to the Provincial Legislature by Entry 12 in the Provincial Legislative List. By virtue of this power, new Acts were enacted by many other States vesting powers of administration, including criminal justice, in the hands of the Panchayats.

Notwithstanding such existing legislation, the makers of the Constitution of Independent India were not much satisfied with the working of these local bodies as institutions of popular government and, therefore, a Directive was included in the Constitution of 1949 in Art. 40 as follows:

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

But notwithstanding this Directive in Art. 40, not much attention was given to hold elections in these local units as a unit of representative democracy in the country as a whole. During the time of Mr. Rajeev Gandhi it was considered necessary to further the organisation of these local units by inserting specific provisions in the Constitution itself on the basis of which the Legislatures of the various States might enact detailed laws according to the guidelines provided by the Constitutional provisions.

The ideas so evolved, culminated in the passing of Constitution 73rd and 74th Amendment Acts, 1992 which inserted Parts IX and IX-A in the Constitution. While Part IX relates to the Panchayats, containing Arts. 243 to 243-O, Part IXA relates to the Municipalities, containing Arts. 243P to 243ZG. The provisions in Parts IX and IXA are more or less parallel or analogous.

Special features of the new system. Before entering into details, it may be pointed out that new system contained certain novel provisions, for example, direct election by the people in the same manner as at the Union and State levels; reservation of seats for women; an Election Commission to conduct election, a Finance Commission to ensure financial viability of these institutions.

Another striking feature is that the provisions inserted in the Constitution by Arts. 243-243ZG are in the nature of basic provisions which are to be supplemented by laws made by the respective State Legislatures, which will define the details as to the powers and functions of the various organs, just mentioned.

It is to be recalled that 'local Government' including self-Government institutions in both urban and rural areas is an exclusive State subject under Entry 5 of List II of the 7th Sch., so that the Union cannot enact any law to create rights and liabilities relating to these subjects. What the Union has, therefore, done is to outline the scheme which would be implemented by the several States by making laws, or amending their own existing laws to bring them in conformity with the provisions of the 73rd and 74th Constitution Amendment Acts.

After implementing legislation was enacted by the States, elections have taken place in most of the States and the Panchayats and Municipalities have started functioning under the new law. These amendments do not apply to Jammu & Kashmir, Meghalaya, Mizoram, Nagaland and National Capital Territory of Delhi.

[See, further, under Chap. 34—How the Constitution has worked, *post*.]

The new system of local government has been designed to meet the needs of the rural areas and to give them a larger share of power and autonomy than they had earlier. It aims at giving the people a greater say in the administration of their local areas. It also aims at ensuring that the local government should be accountable to the people and that its actions should be transparent. It also aims at ensuring that the local government should be able to take care of the welfare of the people and that it should be able to provide them with basic services like education, health, sanitation, etc. The new system of local government is based on the principles of decentralization, participation, accountability, and transparency. It is intended to bring about a change in the way local government is run and to make it more responsive to the needs of the people. It is also intended to make the local government more efficient and effective in providing services to the people. The new system of local government is a significant step towards achieving the goal of a truly decentralized and participatory democracy.

CHAPTER 18

PANCHAYATS

PART IX of the Constitution envisages a three-tier system of Panchayats,¹ namely, (a) The village level; (b) The District Panchayat at the district level; (c) The Intermediate Panchayat which stands between the village and district Panchayats in the States where the population is above 20 lakhs.

All the seats in a Panchayat shall be filled by persons chosen by direct election from territorial constituencies in the Panchayat area. The electorate has been named 'Gram Sabha' consisting of persons registered in the electoral rolls relating to a village comprised within the area of a Panchayat. In this way representative democracy will be introduced at the grass roots.

The Chairperson of each Panchayat shall be elected according to the law passed by a State and such State Law shall also provide for the representation of Chairpersons of Village and Intermediate Panchayats in the District Panchayat, as well as members of the Union and State Legislature in the Panchayats above the village level.

Article 243D provides that seats are to be reserved for (a) Scheduled Castes, and (b) Scheduled Tribes. The reservation shall be in proportion to their population. If, for example, the Scheduled Castes constitute 30% of the population and the Scheduled Tribes 21%, then 30% and 21% seats shall be reserved for them respectively.

Out of the seats so reserved not less than 1/3rd of the seats shall be reserved for women belonging to Scheduled Castes and Scheduled Tribes, respectively.

Reservation for women. Not less 1/3rd of the total number of seats to be filled by direct elections in every Panchayat shall be reserved for women.

Reservation of offices of Chairpersons. A State may by law make provision for similar reservation of the offices of Chairpersons in the Panchayats at the village and other levels.

These reservations favouring the Scheduled Castes and Tribes shall cease to be operative when the period specified in Art. 334 (at present 60 years i.e., upto 24-1-2010).

A State may by law also reserve seats or offices of Chairpersons in the Panchayat at any level in favour of backward classes of citizens.

Duration of Panchayat. Every Panchayat shall continue for five years from the date of its first meeting. But it can be dissolved earlier in accordance with the procedure prescribed by State law. Elections must take place before the expiry of the above period. In case it is dissolved earlier, then the elections must take place within six months of its dissolution. A Panchayat reconstituted after premature dissolution (*i.e.* before the expiry of the full period of five years) shall continue only for the remainder of the period. But if the remainder of the period is less than six months it shall not be necessary to hold elections.

Qualification for membership. Article 243F provides that all persons who are qualified to be chosen as a member of a Panchayat. The only difference is that a person who has attained the age of 21 years will be eligible to be a member (in case of State Legislature the prescribed age is 25 years—Art. 173). If a question arises as to whether a member has become subject to any disqualification, the question shall be referred to such authority as the State Legislature may provide by law.

Powers, authority and responsibilities of Panchayats. State Legislatures have the legislative power, to confer on the Panchayats such powers and authority as may be necessary to enable them to function as institutions of self-government [*Arts. 243G-243H*]. They may be entrusted with the responsibility of (a) preparing plans for economic development and social justice, (b) implementation of schemes for economic development and social justice, and (c) in regard to matters listed in the Eleventh Schedule (inserted by the 73rd Amendment). The list contains 29 items, *e.g.*, land improvement, minor irrigation, animal husbandry, fisheries, education, women and child development etc. The 11th Sch. thus distributes powers between the State Legislature and the Panchayat just as the 7th Sch. distributes powers between the Union and the State Legislature.

Powers to impose taxes and financial resources. A State may by law authorise a Panchayat to levy, collect and appropriate taxes, duties, tolls etc. The law may lay down the procedure to be followed as well as the limits of these exactions. It can also assign to a Panchayat various taxes, duties etc. collected by the State Government. Grants-in-aid may be given to the Panchayats from the Consolidated Fund of the State.

Panchayat Finance Commissions. Within one year from 25th April 1993, *i.e.* the date on which the Constitution 73rd Amendment came into force and afterwards every five years the State Government shall appoint a Finance Commission to review the financial position of the Panchayats and to make recommendations as to—

(a) the distribution between the State and the Panchayats of the net proceeds of taxes, duties, tolls and fees leviable by the State which may be divided between them and how allocation would be made among various levels of Panchayats;

(b) what taxes, duties, tolls and fees may be assigned to the Panchayats;

(c) grant-in-aid to the Panchayats.

The report of the Commission, together with a memorandum of action taken on it, shall be laid before the State Legislature. These provisions are modelled on Art. 280 which contains provisions regarding appointment of a Finance Commission for distribution of finances between the Union and the States.

State Election Commission. Article 243K is designed to ensure free and fair elections to the Panchayats.

Article 243K provides for the Constitution of a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor. Powers of superintendence, direction and control of elections to the Panchayats, including preparation of electoral rolls for it shall vest in the State Election Commission. To ensure the independence of the Commission it is laid down that State Election Commissioner can be removed only in the same manner and on the same grounds as a Judge of a High Court. The State Legislatures have the power to legislate on all matters relating to elections to Panchayats.

As under Art. 329, courts shall have no jurisdiction to examine the validity of a law, relating to delimitation of constituencies or the allotments of seats, made under Art. 243K. An election to a Panchayat can be called in question only by an election petition which should be presented to such authority and in such manner as may be prescribed by or under any law made by the State Legislature.

REFERENCES

- For the text of the 73rd Amendment Act relating to Panchayats [Arts. 243-243-O], see Author's *Constitution Amendment Acts*, 7th Ed. pp. 170-77; *Shorter constitution of India*, 14th Ed., 2008.

CHAPTER 19

MUNICIPALITIES AND PLANNING COMMITTEES

PART IXA which has come into force on 1-6-1993 gives a constitutional foundation to the local self-government units in urban areas. In fact such institutions are in existence all over the country.

Some of the provisions are similar to those contained in Part IX, e.g. Reservation of Seats, Finance Commission, Election Commission etc.

This part gives birth to two types of bodies:

- (i) Institutions of self-government [Art. 243Q], and
- (ii) Institutions for planning [Arts. 243ZX and 243 ZE].

Institutions of self-government, called by a general name "municipalities" are of three types:

- (a) Nagar Panchayat, for a transitional area, i.e. an area which is being transformed from a rural area to an urban area.
- (b) Municipal Council for a smaller urban area.
- (c) Municipal Corporation for a larger urban area.

Article 243Q makes it obligatory for every State to constitute such units. But if there is an urban area or part of it where municipal services are being provided or proposed to be provided by an industrial establishment in that area then considering also the size of the area and other factors the Governor may specify it to be an industrial township. For such an area it is not mandatory to constitute a Municipality.

The members of a municipality would generally be elected by direct election. The Legislature of a State may by law provide for representation in a municipality of (i) persons having special knowledge or experience in municipal administration, (ii) Members of Lok Sabha, State Assembly, Rajya Sabha and Legislative Council, and (iii) the Chairpersons of Committees constituted under Cl. (5) of Art. 243S. The Chairperson shall be elected in the manner provided by the Legislature.

For one or more wards comprised within the territorial area of a **Wards Committee.** municipality having a population of three lacs or more it would be obligatory to constitute Ward Committees. The State Legislature shall make provision with respect to its composition, territorial area and the manner in which the seats in a ward committee shall be filled.

Other Committees. It is open for the State Legislature to constitute Committees in addition to the wards committees.

Reservations of seats for Scheduled Castes and Scheduled Tribes. As in Part IX reservations of seats are to be made in favour of the Scheduled Castes and Scheduled Tribes in every Municipality.

Reservation for women. Out of the total number of seats to be filled by direct elections at least 1/3rd would be reserved for women. This includes the quota for women belonging to Scheduled Castes and Tribes.

Reservation of offices of Chairpersons. It has been left to the State legislature to prescribe by law the manner of reservation of the offices of the Chairpersons of Municipalities.

All reservations in favour of Scheduled Castes and Tribes shall come to an end with the expiry of the period specified in Art. 334.

It is permissible for a State Legislature to make provisions for reservation of seats or offices of Chairpersons in favour of backward classes.

Duration of Municipalities. Every Municipality shall continue for five years from the date of its first meeting. But it may be dissolved earlier according to law. Article 243Q further prescribes that before dissolution a reasonable opportunity of being heard must be given to the municipality. Elections to constitute a Municipality shall be completed before the expiry of the period of five years. If the Municipality has been superseded before the expiry of its term, the elections must be completed within six months of its dissolution. A Municipality constituted after its dissolution shall continue only for the remainder of the term. But if the remainder of the period is less than six months it shall not be necessary to hold elections.

It has been provided that no amendment of the law in force shall cause dissolution of a Municipality before the expiry of the five years term.

Qualification for membership. Article 243V lays down that all persons who are qualified to be chosen to the State legislature shall be qualified for being a member of a Municipality. There is an important difference. Persons who have attained the age of 21 years will be eligible to be a member. While the constitutional requirement is that for election to the State legislature of a State a person must have attained the age of 25 years [Art. 173].

Powers, authority and responsibilities of Municipalities. Legislatures of States have been conferred the power [Art. 243W] to confer on the Municipalities all such powers and authority as may be necessary to enable them to function as institutions of self-government. It has specifically been mentioned that they may be given the responsibility of (a) preparation of plans for economic development and social justice, (b) implementation of schemes as may be entrusted to them, and (c) in regard to matters listed in the 12th schedule. This schedule contains 18 items, e.g. Urban Planning, Regulation of Land Use, Roads and

Bridges, Water Supply, Public Health, Fire Services, Urban Forestry, Slums, etc.

A State Legislature may by law authorise a Municipality to levy, collect and appropriate taxes, duties, tolls etc. The law may lay down the limits and **Power to impose taxes and financial resources.** prescribe the procedure to be followed. It can also assign to a Municipality various taxes, duties etc. collected by the State Government. Grants-in-aid may be given to the Municipalities, from the Consolidated Fund of the State.

The Finance Commission appointed under Art. 243-I (see Chap. 18 **Panchayat Finance Commission.** under Panchayat Finance Commission) shall also review the financial position of the Municipalities and make recommendations as to—

- (a) the distribution between the State and the Municipalities of the net proceeds of taxes, duties, tolls and fees leviable by the State which may be divided between them and allocation of shares amongst different levels of Municipalities.
- (b) the taxes, duties, tolls and fees that may be assigned to the Municipalities.
- (c) grants-in-aid to the Municipalities.
- (d) the measures needed to improve the financial position of the Municipalities.
- (e) any other matter that may be referred to it by the Governor.

The State Election Commission appointed under Art. 243K shall have **Elections to Municipalities.** the power of superintendence, direction and control of (i) the preparation of electoral rolls for, and (ii) the conduct of all elections to the Municipalities. State Legislatures have been vested with necessary power to regulate by law all matters relating to elections to Municipalities.

The courts shall have no jurisdiction to examine the validity of a law, **Bar to interference by courts in electoral matters.** relating to delimitation of constituencies or the allotment of seats made under Art. 243ZA. An election to a Municipality can be called in question only by an election petition which should be presented to such authority and in such manner as may be prescribed by or under any law made by the State Legislature.

Apart from giving constitutional recognition to Municipalities the 74th **Committees for (a) District Planning and (b) Metropolitan Planning.** Amendment¹ lays down that in every State two committees shall be constituted.

- (1) At the district level a District Planning Committee [Art. 243ZD].
- (2) In every metropolitan area a Metropolitan Planning Committee [Art. 243ZB].

The composition of the committees and the manner in which the seats are to be filled are to be provided by a law to be made by the State legislature. But it has been laid down that,—

(a) in case of the District Planning Committee at least 4/5th of the members shall be elected by the elected members of the district level Panchayat and of the Municipalities in the district from amongst themselves. Their proportion would be in accordance with the ratio of urban and rural population of the district.

(b) in case of Metropolitan Planning Committee at least 2/3rd of the members of the committee shall be elected by the Members of the Municipalities and Chairpersons of the Panchayats in the Metropolitan area from amongst themselves. The proportion of seats to be shared by them would be based on the ratio of the population of the Municipalities and of the Panchayats in the area.

The State legislature would by law make provision with respect to (i) the functions relating to district planning that may be assigned to the district committees, and (ii) the manner in which the Chairperson of a district committee may be chosen.

The Committee shall prepare and forward the development plan to the State Government. In regard to the Metropolitan Planning Committee which is to prepare a development plan for the whole Metropolitan area the State Legislature may by law make provision for

(1) the representation of the Central and State Governments and of such organisations and institutions as may be deemed necessary,

(2) the functions relating to planning and co-ordination for the Metropolitan area,

(3) the manner in which the Chairpersons of such committees shall be chosen.

The development plan shall be forwarded to the State Government.

This part adds one more function to the duties cast on the Finance Commission appointed by the President under Art. 280. The Commission will make recommendations in regard to the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State on the basis of the recommendations made by the State Finance Commission.

REFERENCES

- For the text of the 74th Amendment Act relating to Municipalities [Arts. 243P-243ZG], see Author's *Constitution Amendment Acts*, 7th Ed., pp. 177-84; *Shorter Constitution of India*, 14th Ed., 2008.

CHAPTER 20

ADMINISTRATION OF SCHEDULED AND TRIBAL AREAS

THE Constitution makes special provisions for the Administration of certain areas called 'Scheduled Areas' in States other than Assam, Meghalaya, Tripura and Mizoram even though such areas are situated within a State or Union Territory [Art. 244(1)], presumably because of the backwardness of the people of these Areas. Subject to legislation by Parliament, the power to declare any area as a 'Scheduled Area' is given to the President [5th Schedule, paras 6-7] and the President has made the **Scheduled Areas**. Scheduled Areas Order, 1950, in pursuance of this power. These are Areas inhabited by Tribes specified as 'Scheduled Tribes', in States *other than* Assam, Meghalaya, Tripura and Mizoram.¹ Special provisions for the administration of such Areas are given in the 5th Schedule.

The Tribal Areas in the States of Assam, Meghalaya, Tripura² and **Tribal Areas**, Mizoram are separately dealt with [Art. 244(2)], and provisions for their administration are to be found in the Sixth Schedule to the Constitution.

The systems of administration under the Fifth and Sixth Schedules may be summarised as follows:

I. The 5th Schedule of the Constitution deals with the administration and control of Scheduled Areas as well as of Scheduled Tribes in States *other than* Assam, Meghalaya, Tripura and Mizoram. The main features of the administration provided in this Schedule are as follows:

The executive power of the Union shall extend to giving directions to the respective States regarding the administration of the Scheduled Areas [Sch. V, para 3]. The Governors of the States in which there are 'Scheduled Areas'¹ have to submit reports to the President regarding the administration of such Areas, annually or whenever so required by the President [Sch. V, para 3]. Tribes Advisory Councils are to be constituted to give advice on such matters as welfare and advancement of the Scheduled Tribes in the States as may be referred to them by the Governor [Sch. V, para 4].

The Governor is authorised to direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or shall apply, only subject to exceptions or modifications. The Governor is also authorised to make regulations to prohibit or restrict the transfer of land by, or among members of, the Scheduled Tribes, regulate the allotment of land,

and regulate the business of money-lending. All such regulations made by the Governor must have the assent of the President [Sch. V, para 5].

The foregoing provisions of the Constitution relating to the administration of the Scheduled Areas and Tribes may be altered by Parliament by ordinary legislation, without being required to go through the formalities relating to the amendment of the Constitution [Sch. V, para 7(2)].

The Constitution provides for the appointment of a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States. The President may appoint such Commission at any time, but the appointment of such Commission at the end of ten years from the commencement of the Constitution is obligatory [Art. 339(1)]. A Commission was accordingly appointed (with Sri U.N. Dhebar as Chairman) in 1960 and it submitted its report to the President towards the end of 1961.

II. The Tribal Areas in Assam, Meghalaya, Tripura and Mizoram

specified in the Table appended to the 6th Schedule (para 20) in the Constitution, which has undergone several amendments. Originally, it consisted of two Parts, A and B. But since the creation of the States of Nagaland, the Table (as amended in 1972, 1984 and 1988) includes 9 areas, in four Parts:

Part I—1. The North Kachar Hills District; 2. The Karbi Anglong District; 3. The Bodoland Territorial Areas District.

Part II—1. The Khasi Hills District; 2. The Jaintia Hills District; 3. The Garo Hills District (in Meghalaya).

Part IIA—Tripura Tribal Areas District.

Part III—1. The Chakma District; 2. The Mara District; 3. The Lai District.

While the administration of Scheduled Areas in States *other than* Assam, Meghalaya, Tripura and Mizoram² is dealt with in Sch. V, the 6th Schedule deals with the tribal areas in Assam, Meghalaya, Tripura and Mizoram.²

These Tribal Areas are to be administered as autonomous districts. These autonomous districts are not outside the executive authority of the State concerned but provision is made for the creation of District Councils and Regional Councils for the exercise of certain legislative and judicial functions. These Councils are primarily representative bodies and they have got the power of law-making³ in certain specified fields such as management of a forest other than a reserved forest, inheritance of property, marriage and social customs, and the Governor may also confer upon these Councils the power to try certain suits or offences.⁴ These Councils have also the power to assess and collect land revenue and to impose certain specified taxes. The laws made by the Councils shall have, however, no effect unless assented to by the Governor.

With respect to the matters over which the District and Regional Councils are thus empowered to make laws, Acts of the State Legislature shall not extend to such Areas unless the relevant District Council so directs by public notification.⁵ As regards other matters, the President with respect to a

Central Act and the Governor with respect to a State Act, may direct that an Act of Parliament or of the State Legislature shall *not* apply to an autonomous district or shall apply only subject to exceptions or modifications as he may specify in his notification.

These Councils shall also possess judicial power, civil and criminal, subject to the jurisdiction of the High Court as the Governor may from time to time specify.

REFERENCES

1. These States, in 1984, are—Andhra Pradesh, Bihar, Gujarat, Himachal Pradesh, Madhya Pradesh, Maharashtra, Orissa and Rajasthan (*India 1984*, p. 152).
2. Meghalaya was added by the North-Eastern Areas (Reorganisation) Act, 1971. Tripura by the Constitution (49th Amendment) Act, 1984 and Mizoram by State of Mizoram Act, 1986.
3. Para 3, Sixth Schedule.
4. Para 4, Sixth Schedule.
5. Paras 12, 12A, 12AA and 12B, Sixth Schedule.

CHAPTER 21

ORGANISATION OF THE JUDICIARY IN GENERAL

IT has already been pointed out, that notwithstanding the adoption of a

No Federal Distribution of Judicial Powers. federal system, the Constitution of India has not provided for a double system of Courts as in the

United States. Under our Constitution there is a single

integrated system of Courts for the Union as well as

the States which administer both Union and State laws, and at the head of the entire system stands the Supreme Court of India. Below the Supreme Court stand the High Courts of the different States¹ and under each High Court there is a hierarchy of other Courts which are referred to in the Constitution as 'subordinate courts' i.e., courts subordinate to and under the control of the High Court [Arts. 233-237].

The organisation of the subordinate judiciary varies slightly from State to State, but the essential features may be explained with reference to Table XVI, *post*, which has been drawn with reference to the system obtaining in the majority of the States.

The Supreme Court has issued a direction² to the Union and the States to constitute an All India Judicial Service and to bring about uniformity in designation of officers both in criminal and civil side. Concrete steps in this directions are yet to be taken by the Government.

At the lowest stage, the two branches of justice,—civil and criminal,—are bifurcated. The Union Courts and the **The hierarchy of Courts.** Bench Courts, constituted under the Village Self-Government Acts, which constituted the lowest civil

and criminal Courts respectively, have been substituted by Panchayat Courts set up under post-Constitution State legislation. The Panchayat Courts also function on two sides, civil and criminal, under various regional names, such as the *Nyaya Panchayat*, *Panchayat Adalat*, *Gram Kutchery*, and the like. In some States, the Panchayat Courts, are the Criminal Courts of the lowest jurisdiction,³ in respect of petty cases.

The Munsiffs Courts are the next higher Civil Courts, having jurisdiction as determined by High Courts. Above the Munsiffs are Subordinate Judges who have got unlimited pecuniary jurisdiction over civil suits and hear first appeals from the judgments of Munsiffs. The District Judge hears first appeals from the decisions of Subordinate Judges and also from the Munsiffs (unless they are transferred to a Subordinate Judge) and himself possesses unlimited original

jurisdiction, both civil and criminal. Suits of a small value are tried by the Provincial Small Causes Courts.

The District Judge is the highest judicial authority (civil and criminal) in the district. He hears appeals from the decisions of the superior Magistrates and also tries the more serious criminal cases, known as the Sessions cases. A Subordinate Judge is sometimes vested also with the powers of an Assistant Sessions Judge, in which case he combines in his hands both civil and criminal powers like a District Judge.³

Since the enactment of the Criminal Procedure Code, 1973, the trial of criminal cases is done exclusively by 'Judicial Magistrates', except in Jammu & Kashmir and Nagaland, to which that Code does not apply. The Chief Judicial Magistrate is the head of the Criminal Courts within the district. In Calcutta and other 'metropolitan areas', there are Metropolitan Magistrates.³ The Judicial and Metropolitan Magistrates, discharging judicial functions, under the administrative control of the State High Court, are to be distinguished from Executive Magistrates who discharge the executive function of maintaining law and order, under the control of the State Government.

There are special arrangements for civil judicial administration in the 'Presidency towns', which are now called 'metropolitan areas'. The Original Side of the High Court at Calcutta tries the bigger *civil* suits arising within the area of the Presidency town. Suits of lower value within the City are tried by the City Civil Court and the Presidency Small Causes Court. But the Original *Criminal* jurisdiction of all High Courts, including Calcutta, has been taken away by the Criminal Procedure Code, 1973.³

The High Court is the supreme judicial tribunal of the State,—having both Original and Appellate jurisdiction. It exercises appellate jurisdiction over the District and Sessions Judge, the Presidency Magistrates and the Original Side of the High Court itself (where the Original Side still continues). There is a High Court for each of the States, except Manipur, Meghalaya, Tripura and Nagaland which have the High Court of Assam (at Gauhati) as their common High Court; and Haryana, which has a common High Court (at Chandigarh) with Punjab. The Bombay High Court is common to Maharashtra and Goa.

As regards the Judiciary in Union Territories, see under 'Union Territories'.

The Supreme Court has appellate jurisdiction over the High Courts and is the highest tribunal of the land. The Supreme Court also possesses original and advisory jurisdictions which will be fully explained hereafter (in Chap. 22).

REFERENCES

1. For a list of High Courts, their seat and territorial jurisdiction, see Table XVII.
2. *All India Judges Assn. v. Union of India*, AIR 1992 S.C. 165.
3. See Author's *Criminal Procedure Code, 1973* (Prentice-Hall of India, 2nd Ed., 1992), pp. 33 *et seq.*

CHAPTER 22

THE SUPREME COURT

PARLIAMENT has the power to make laws regulating the constitution, organisation, jurisdiction and powers of the Supreme Court. Subject to such legislation, the Supreme Court consists of the Chief Justice of India and not more than twenty-five¹ other Judges [Art. 124].

Besides, the Chief Justice of India has the power, with the previous consent of the President, to request a retired Supreme Court Judge to act as a Judge of the Supreme Court for a temporary period. Similarly, a High Court Judge may be appointed *ad hoc* Judge of the Supreme Court for a temporary period if there is a lack of quorum of the permanent Judges [Arts. 127-128].

Every Judge of the Supreme Court shall be appointed by the President **Appointment of Judges.** of India. The President shall, in this matter, consult other persons besides taking the advice of his Ministers. In the matter of appointment of the Chief Justice of India, he shall consult such Judges of the Supreme Court and of the High Courts as he may deem necessary. A nine-Judge Bench of the Supreme Court has laid down that the seniormost Judge of the Supreme Court considered fit to hold the office should be appointed to the office of Chief Justice of India.² And in the case of appointment of other Judges of the Supreme Court, consultation with the Chief Justice of India, in addition to the above, is obligatory [Art. 124(1)]. Consultation would generally mean concurrence.² The above provision, thus, modifies the mode of appointment of Judges by the Executive—by providing that the Executive should consult members of the Judiciary itself, who are well-qualified to give their opinion in this matter.³

In a reference⁴ (not as a review or reconsideration of the *Second Judges case*) made by the President under Art. 143 relating to the consultation between the Chief Justice of India and his brother Judges in matters of appointment of the Supreme Court Judges and the relevance of seniority in making such appointments, the nine-Judge Bench opined:

1. The opinion of the CJI, having primacy in the consultative process and reflecting the opinion of the judiciary, has to be formed on the basis of consultation with the *collegium*, comprising of the CJI and the four senior most Judges of the Supreme Court. The Judge, who is to succeed the CJI should also be included, if he is not one of the four senior most Judges. Their views should be obtained in writing.

2. Views of the senior most Judges of the Supreme Court, who hail from the High Courts where the persons to be recommended are functioning as Judges, if not the part of the *collegium*, must be obtained in writing.

3. The recommendation of the *collegium* alongwith the views of its members and that of the senior most Judges of the Supreme Court who hail from the High Courts where the persons to be recommended are functioning as Judges should be conveyed by the Chief Justice of India to the Govt. of India.

4. The substance of the views of the others consulted by the Chief Justice of India or on his behalf, particularly those of non-Judges (Members of the Bar) should be stated in the memorandum and be conveyed to the Govt. of India.

5. Normally, the *collegium* should make its recommendation on the basis of consensus but in case of difference of opinion no one would be appointed, if the CJI dissents.

6. If two or more members of the *collegium* dissent, CJI should not persist with the recommendation.

7. In case of non-appointment of the person recommended, the materials and information conveyed by the Govt. of India, must be placed before the original *collegium* or the reconstituted one, if so, to consider whether the recommendation should be withdrawn or reiterated. It is only if it unanimously reiterated that the appointment must be made.

8. The CJI may, in his discretion, bring to the knowledge of the person recommended the reasons disclosed by the Govt. of India for his non-appointment and ask for his response thereto, which, if made, be considered by the *collegium* before withdrawing or reiterating the recommendation.

9. Merit should be predominant consideration though inter-seniority among the Judges in their High Courts and their combined seniority on all India basis should be given weight.

10. Cogent and good reasons should be recorded for recommending a person of outstanding merit regardless of his lower seniority.

11. For recommending one of several persons of more or less equal degree of merit, the factor of the High Courts not represented on the Supreme Court, may be considered.

12. The Judge passed over can be reconsidered unless for strong reasons, it is recorded that he be never appointed.

13. The recommendations made by the CJI without complying with the norms and requirements, are not binding on the Govt. of India.

A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is (a) a citizen of India; and
Qualifications for appointment as Judge. (b) either,—(i) a distinguished jurist; or (ii) has been a High Court Judge for at least 5 years; or (iii) has been an Advocate of a High Court (or two or more such

Courts in succession) for at least 10 years [Art. 124(3)].

Tenure of Judges. No minimum age is prescribed for appointment as a Judge of the Supreme Court, nor any fixed period of office. Once appointed, a Judge of the Supreme Court may cease to be so, on the happening of any one of the following contingencies (other than death):

(a) On attaining the age of 65 years; (b) On resigning his office by writing addressed to the President; (c) On being removed by the President upon an address to that effect being passed by a special majority of each House of Parliament (*viz.*, a majority of the total membership of that House and by majority of not less than two-thirds of the members of that House present and voting).

The only grounds upon which such removal may take place are (1) 'proved misbehaviour' and (2) 'incapacity' [Art. 124(4)].

Impeachment of a Judge. The combined effect of Art. 124(4) and the Judges (Inquiry) Act, 1968 is that the following procedure is to be observed for removal of a Judge. This is commonly known as impeachment—

(1) A motion addressed to the President signed by at least 100 members of the Lok Sabha or 50 members of the Rajya Sabha is delivered to the Speaker or the Chairman.

(2) The motion is to be investigated by a Committee of three (2 Judges of the Supreme Court and a distinguished jurist).

(3) If the Committee finds the Judge guilty of misbehaviour or that he suffers from incapacity the motion (*para 1, above*) together with the report of the Committee is taken up for consideration in the House where the motion is pending.

(4) If the motion is passed in each House by majority of the total membership of that House and by a majority of not less than two-thirds of that House present and voting the address is presented to the President.

(5) The Judge will be removed after the President gives his order for removal on the said address.

The procedure for impeachment is the same for Judges of the Supreme Court and the High Courts. After the Constitution this procedure was started against SHRI R. RAMASWAMY in 1991-93. The Committee found the Judge guilty. In the Lok Sabha the Congress Party abstained from voting and so the motion could not be passed with requisite majority.

Salaries, etc. A Judge of the Supreme Court gets a salary of Rs. 30,000 *per mensem*⁵ and the use of an official residence free of rent. The salary of the Chief Justice is Rs. 33,000.⁵

Independence of Supreme Court Judges, how secured. The independence of the Judges of the Supreme Court is sought to be secured by the Constitution in a number of ways:

(a) Though the appointing authority is the President, acting with the advice of his Council of Ministers, the

appointment of Supreme Court Judge has been lifted from the realm of pure politics by requiring the President to consult the Chief Justice of India in the matter.³

(b) By laying down that a Judge of the Supreme Court shall not be removed by the President, except on a joint address by both Houses of Parliament (supported by a majority of the total membership and a majority of not less than two-thirds of the members present and voting, in each House), on ground of proved misbehaviour or incapacity of the Judge in question [Art. 124(4)].

This provision is similar to the rule prevailing in England since the Act of Settlement, 1701, to the effect that though Judges of the Superior Courts are appointed by the Crown, they do not hold office during his pleasure, but hold their office 'on good behaviour' and the Crown may remove them only upon a joint address from both Houses of Parliament.

(c) By fixing the salaries of the Judges by the Constitution and providing that though the allowances, leave and pension may be determined by law made by Parliament, these shall not be varied to the disadvantage of a Judge during his term of office. In other words, he will not be affected adversely by any changes made by law since his appointment [Art. 125(2)].

But it will be competent for the President to override this guarantee, under a Proclamation of 'Financial Emergency' [Art. 360(4)(b)].

(d) By providing that the administrative expenses of the Supreme Court, the salaries and allowances, etc., of the Judges as well as of the staff of the Supreme Court shall be 'charged upon the Consolidated Fund of India'; i.e., shall not be subject to vote in Parliament [Art. 146(3)].

(e) By forbidding the discussion of the conduct of a Judge of the Supreme Court (or of a High Court) in Parliament, except upon a motion for an address to the President for the removal of the Judge [Art. 121].

(f) By laying down that after retirement, a Judge of the Supreme Court shall not plead or act in any Court or before any authority within the territory of India⁶ [Art. 124(7)].

[It is to be noted that there are analogous provisions in the case of High Court Judges; see Chap. 23, *post.*]

It has been rightly said that the jurisdiction and powers of our Supreme Court are in their nature and extent wider than those exercised by the highest Court of any other country.⁷ It is at once a federal Court, a Court of appeal and a guardian of the Constitution, and the law declared by it, in the exercise of any its jurisdictions under the Constitution, is binding on all other Courts within the territory of India [Art. 141].

**Compared with
the American
Supreme Court.**

Our Supreme Court possesses larger powers⁸ than the American Supreme Court in several respects—

Firstly, the American Supreme Court's appellate jurisdiction is confined to cases arising out of the federal relationship or those relating to the constitutional validity of laws and treaties. But *our* Supreme Court is not only a federal court and a guardian of the Constitution, but also the highest court of appeal in the land, relating to civil and criminal cases [Arts. 133-134], apart from cases relating to the interpretation of the Constitution.

Secondly, *our* Supreme Court has an extraordinary power to entertain appeal, without any limitation upon its discretion, from the decision not only of any court but also of any tribunal within the territory of India [Art. 136]. No such power belongs to the American Supreme Court.

Thirdly, while the American Supreme Court has denied to itself any power to advise the Government and confined itself only to the determination of actual controversies between parties to a litigation, *our* Supreme Court is vested by the Constitution itself with the power to deliver advisory opinion on any question of fact or law that may be referred to it by the President [Art. 143].

Every federal Constitution, whatever the degree of cohesion it aims at, involves a distribution of powers between the Union and the units

(i) **As a Federal Court.** composing the Union, and both Union and State Governments derive their authority from, and are limited by the same Constitution. In a unitary Constitution, like that of England, the local administrative or legislative bodies are mere subordinate bodies under the central authority. Hence, there is no need of judicially determining disputes between the central and local authorities. But in a federal Constitution, the powers are divided between the national and State Governments, and there must be some authority to determine disputes between the Union and the States or the States *inter se* and to maintain the distribution of powers as made by the Constitution.

Though *our* federation is not in the nature of a treaty or compact between the component units, there is, nevertheless, a division of legislative as well as administrative powers between the Union and the States. Article 131 of *our* Constitution, therefore, vests the Supreme Court with original and exclusive jurisdiction to determine justiciable disputes between the Union and the States or between the States *inter se*.⁸

Like the House of Lords in England, the Supreme Court of India is the final appellate tribunal of the land, and in some respects, the jurisdiction of the Supreme Court is even wider than that of the House of Lords. As

(ii) **As a Court of Appeal.** regards criminal appeals, an appeal lies to the House of Lords only if the Attorney-General certifies that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought. But in cases specified in Cls. (a) and (b) of Art. 134(1) of *our* Constitution (death sentences), an appeal will lie to the Supreme Court as of right.

As to appeals from High Courts in *civil* cases, however, the position has been altered by an amendment of Art. 133(1) by the Constitution (30th

Amendment) Act, 1972, which has likened the law to that in England. Civil appeals from the decisions of the Court of Appeal lie to the House of Lords only if the Court of Appeal or the House of Lords grants leave to appeal. Under Art. 133(1) of *our* Constitution as it originally stood, an appeal to the Supreme Court lay as of right in cases of higher value (as certified by the High Court). But this value test and the category of appeal as of right has been abolished by the amendment of 1972, under which appeal from the decision of a High Court in a civil matter will lie to the Supreme Court only if the High Court certifies that the case involves 'a substantial question of law of general importance' and that 'the said question needs to be decided by the Supreme Court'.⁸

But the right of the Supreme Court to entertain appeal, *by special leave*, in any cause or matter determined by any Court or tribunal in India, save military tribunals, is unlimited [Art. 136].

As against unconstitutional acts of the Executive the jurisdiction of the Courts is nearly the same under all constitutional systems. But not so is the control of the Judiciary over the Legislature.

(iii) As a Guardian of the Constitution. It is true that there is no express provision in *our* Constitution empowering the *Courts* to invalidate laws; but the Constitution has imposed definite limitations upon each of the organs of the state, and any transgression of those limitations would make the law *void*. It is for the Courts to decide whether any of the constitutional limitations has been transgressed or not,⁹ because the Constitution is the organic law subject to which ordinary laws are made by the Legislature which itself is set up by the Constitution.

Thus, Art. 13 declares that any law which contravenes any of the provisions of the Part on Fundamental Rights, shall be *void*. But, as *our* Supreme Court has observed,⁹ even without the specific provision in Art. 13 (which has been inserted only by way of abundant caution), the Court would have the powers to declare any enactment which transgresses a fundamental right as invalid.

Similarly, Art. 254 says that in case of inconsistency between Union and state laws in certain cases, the State law shall be *void*.

The limitations imposed by *our* Constitution upon the powers of Legislatures are—(a) Fundamental rights conferred by Part III. (b) Legislative competence. (c) Specific provisions of the Constitution imposing limitations relating to particular matters.¹⁰

It is clear from the above that (apart from the jurisdiction to issue the writs to enforce the fundamental rights, which has been explained earlier) the jurisdiction of the Supreme Court is three-fold: (a) Original; (b) Appellate; and (c) Advisory.

The Original jurisdiction of the Supreme Court is dealt with in Art. 131 of the Constitution. The functions of the Supreme Court under Art. 131 are purely of a federal character and are confined to disputes between the Government of India and any of the States of the Union, the

A. Original Jurisdiction of Supreme Court.

Government of India and any State or States on one side and any other State or States on the other side, or between two or more States *inter se*. In short, these are disputes between different units of the federation which will be within the exclusive original jurisdiction of the Supreme Court. The Original jurisdiction of the Supreme Court will be *exclusive*, which means that no other court in India shall have the power to entertain any such suit. On the other hand, the Supreme Court in its original jurisdiction will not be entitled to entertain any suit where *both* the parties are not units of the federation. If any suit is brought either against the State or the Government of India by a private citizen, that will *not lie* within the original jurisdiction of the Supreme Court but will be brought in the ordinary courts under the ordinary law.

Again, one class of disputes, though a federal nature, is excluded from this original jurisdiction of the Supreme Court, namely, a dispute arising out of any treaty, agreement, covenant, engagement; 'sanad' or other similar instrument which, having been entered into or executed before the commencement of this Constitution continues in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute.¹¹ But these disputes may be referred by the President to the Supreme Court for its *advisory* opinion.

It may be noted that until 1962, no suit in the original jurisdiction had been decided by the Supreme Court. It seems that the disputes, if any, between the Union and the units or between the units *inter se* had so far been settled by negotiation or agreement rather than by adjudication. The first suit, brought by the State of West Bengal against the Union of India in 1961, to declare the unconstitutionality of the Coal Bearing Areas (Acquisition and Development) Act, 1957, was dismissed by the Supreme Court.¹²

In this context, it should be further noted that there are certain provisions in the Constitution which exclude from the original jurisdiction of the Supreme Court certain disputes, the determination of which is vested in other tribunals:

(i) Disputes specified in the Proviso to Arts. 131 and 363(1).

(ii) Complaints as to interference with inter-State water supplies, referred to the statutory tribunal mentioned in Art. 262, if Parliament so legislates.

Since Parliament has enacted the Inter-State Water Disputes Act (33 of 1956), Art. 262 has now to be read with s. 11 of that Act.

(iii) Matters referred to the Finance Commission [Art. 280].

(iv) Adjustment of certain expenses as between the Union and the States under Arts. 257(4), 258(3).

(v) Adjustment of certain expenses as between the Union and the States [Art. 290].

The jurisdiction of the Supreme Court to entertain an application under Art. 32 for the issue of a constitutional writ for the enforcement of Fundamental Rights, is sometimes treated as an 'original' jurisdiction of the Supreme

Court. It is no doubt original in the sense that the party aggrieved has the right to directly move the Supreme Court by presenting a petition, instead of coming through a High Court by way of appeal. Nevertheless, it should be treated as a separate jurisdiction since the dispute in such cases is not between the units of the Union but an aggrieved individual and the Government or any of its agencies. Hence, the jurisdiction under Art. 32 has no analogy to the jurisdiction under Art. 131.

The Supreme Court is the highest court of appeal from all courts in the territory of India, the jurisdiction of the Judicial Committee of the Privy

C. Appellate Jurisdiction of Supreme Court. Council to hear appeals from India having been abolished on the eve of the Constitution. The *Appellate jurisdiction* of the Supreme Court may be divided under three heads:

- (i) Cases involving interpretation of the Constitution,—civil, criminal or otherwise.
- (ii) Civil cases, irrespective of any constitutional question.
- (iii) Criminal cases, irrespective of any constitutional question.

Apart from appeals to the Supreme Court by special leave of that Court under Art. 136, an appeal lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in two classes of cases—

(A) Where the case involves a substantial question of law as to the *interpretation of the Constitution*, an appeal shall lie to the Supreme Court on the certificate of the High Court that such a question is involved or on the leave of the Supreme Court where the High Court has refused to grant such a certificate but the Supreme Court is satisfied that a substantial question of law as to the interpretation of the Constitution is involved in the case [Art. 132].

(B) In cases where no *constitutional* question is involved, appeal shall lie to the Supreme Court if the High Court certifies that the following conditions are satisfied [Art. 133(1)]—

- (i) that the case involves a substantial question of law;
- (ii) that in the opinion of the High Court the said question should be decided by the Supreme Court.

Prior to the Constitution, there was no court of criminal appeal over the High Courts. It was only in a limited sphere that the Privy Council entertained appeals in criminal cases from the High Courts by *special leave* but there was no appeal *as of right*. Article 134 of the Constitution for the

(i) Criminal. first time provides for an appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court, *as of right*, in two specified classes of cases—

- (a) where the High Court has on an appeal reversed an order of acquittal of an accused person and sentenced him to death;

(b) where the High Court has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused and sentenced him to death.

In these two classes of cases relating to a sentence of death by the High Court, appeal lies to the Supreme Court as of right.

Besides the above two classes of cases, an appeal may lie to the Supreme Court in any criminal case if the High Court certifies that the case is a fit one for appeal to the Supreme Court. The certificate of the High Court would, of course, be granted only where some substantial question of law or some matter of great public importance or the infringement of some essential principles of justice are involved. Appeal may also lie to the Supreme Court (under Art. 132) from a criminal proceeding if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

Except in the above cases, no appeal lies from a criminal proceeding of the High Court to the Supreme Court under the Constitution but Parliament has been empowered to make any law conferring on the Supreme Court further powers to hear appeals from criminal matters.

While the Constitution provides for regular appeals to the Supreme Court from decisions of the High Courts in Arts. 132 (ii) **Appeal by Special Leave.** to 134, there may still remain some cases where justice might require the interference of the Supreme Court with decisions not only of the High Courts outside the purview of Arts. 132-134 but also of any other court or tribunal within the territory of India. Such residuary power outside the ordinary law relating to appeal is conferred upon the Supreme Court by Art. 136. This Article is worded in the widest terms possible—

"136. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting special leave, against any kind of judgment or order made by any court or tribunal (except a military tribunal) in any proceeding and the exercise of the power is left entirely to the *discretion* of the Supreme Court unfettered by any restrictions and this power cannot be curtailed by any legislation short of amending the Article itself. This wide power is not, however, to be exercised by the Supreme Court so as to entertain an appeal in *any* case where no appeal is otherwise provided by the law or the Constitution. It is a special power which is to be exercised only under *exceptional circumstances* and the Supreme Court has already laid down the principles according to which this extraordinary power shall be used, e.g., where there has been a violation of the principles of natural justice. In *civil cases* the special leave to appeal under this Article would not be granted unless there is some substantial question of law or general public interest involved in the case. Similarly, in *criminal cases* the

Supreme Court will not interfere under Art. 136 unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.¹³ Similarly, it will not substitute its own decision for the determination of a *tribunal* but it would interfere to quash the decision of a quasi-judicial tribunal under its extraordinary powers conferred by Art. 136 when the tribunal has either exceeded its jurisdiction or has approached the question referred to in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the established rules of natural justice.¹⁴

Besides the above regular jurisdiction of the Supreme Court, it shall have an *advisory jurisdiction*, to give its *opinion*, on any question of law or fact of public importance as may be referred to it for consideration by the President.

Article 143 of the Constitution lays down that the Supreme Court may be required to express its opinion in two classes of matters, in an advisory capacity as distinguished from its judicial capacity :

(a) In the first class, any question of law may be referred to the Supreme Court for its opinion if the President considers that the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court. It differs from a regular adjudication before the Supreme Court in this sense that there is no litigation between two parties in such a case and that the opinion given by the Supreme Court on such a reference is not binding upon the Government itself and further that the opinion is not executable as a judgment of the Supreme Court. The opinion is only advisory and the Government may take it into consideration in taking any action in the matter but it is not bound to act in conformity with the opinion so received. The chief utility of such an advisory judicial opinion is to enable the Government to secure an authoritative opinion either as to the validity of a legislative measure before it is enacted or as to some other matter which may not go to the courts in the ordinary course and yet the Government is anxious to have authoritative legal opinion before taking any action.

Up to 2007 there were *fourteen* cases of reference of this class made by the President.¹⁵⁻²⁸ It may be mentioned that though the opinion of the Supreme Court on such a reference may not be binding on the Government, the propositions of law declared by the Supreme Court even on such a reference are binding on the subordinate courts. In fact, the propositions laid down in the *Delhi Laws* case¹⁵ have been frequently referred to and followed since then by the subordinate courts. The Supreme Court is entitled to decline to answer a question posed to it under Art. 143 if it is superfluous or unnecessary.²²

(b) The second class of cases belong to the disputes arising out of pre-Constitution treaties and agreements which are excluded by Art. 131, Proviso, from the Original Jurisdiction of the Supreme Court, as we have already seen. In other words, though such disputes cannot come to the Supreme Court as a litigation under its C. original jurisdiction, the subject-

matter of such disputes may be referred to by the President for the opinion of the Supreme Court in its advisory capacity.

There are provisions for reference to this Court under Art. 317(1) of **E. Miscellaneous Jurisdiction.** the Constitution, s. 257 of the Income-tax Act, 1961, s. 7(2) of the Monopolies and Restrictive Trade Practices Act, 1969, s. 130A of the Customs Act, 1962 and s. 35H of the Central Excise and Salt Act, 1944.

Appeals also lie to Supreme Court under the Representation of the People Act, 1951; Monopolies and Restrictive Trade Practices Act, 1969; Advocates Act, 1961; Contempt of Courts Act, 1971; Customs Act, 1962; Central Excise and Salt Act, 1944; Terrorist Affected Areas (Special Courts) Act, 1984; Terrorist and Disruptive Activities (Prevention) Act, 1985; Trial of Offences relating to Transactions in Securities Act, 1992 and Consumer Protection Act, 1986.

Election Petitions under Part III of the Presidential and Vice-Presidential Elections Act, 1952 are also filed directly in the Supreme Court.

The jurisdiction of the Supreme Court, as outlined in the foregoing pages, was curtailed by the 42nd Amendment of the **The 42nd, 43rd and 44th Amendments.** Constitution (1976), in several ways. But some of these changes have been recoiled by the Janata Government, by repealing them by the 43rd Amendment Act, 1977, so that the reader need not bother about them. The provisions so repealed are Arts. 32A, 144A.

But there are several other provisions which were introduced by the 42nd Amendment Act, 1976, but the Janata Government failed to dislodge them, owing to the opposition of the Congress Party in the *Rajya Sabha*. These are—

(i) *Art. 323A—323B.* The intent of these two new Articles was to take away the jurisdiction of the Supreme Court under Art. 32 over orders and decisions of Administrative Tribunals. These Articles could, however, be implemented only by legislation which Mrs. Gandhi's first Government had no time to undertake.

Article 323A has been implemented by the Administrative Tribunals Act, 1985 [see, further, under Chap. 30, *post*].

But subsequently, the position turned out to be otherwise as the Supreme Court declared the Articles 323-A, Cl. 2(d) and 323-B, Cl. 3(d) and also the "exclusion of jurisdiction" clauses in all the legislations enacted in pursuance of these Articles, unconstitutional to the extent they excluded the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32.²⁹

(ii) *Art. 368(4)—(5).* These two clauses were inserted in Art. 368 with a view to preventing the Supreme Court from invalidating any Constitution Amendment Act on the theory of 'basic features of Constitution' or anything of that nature.

Curiously, however, these Clauses have been emasculated by the Supreme Court itself, striking them down on the ground that they are violative of two 'basic features' of the Constitution—(a) the limited nature of

the amending power under Art. 368, and (b) judicial review,—in the *Minerva Mills case*.³⁰

REFERENCES

1. The Constitution provided for seven Judges besides the Chief Justice, subject to legislation by Parliament. Parliament has enacted the Supreme Court (Number of Judges) Acts, 1956 and 1986, raising this number to 25.
 2. *Supreme Court Advocates v. Union of India*, (1993) 4 S.C.C. 441 (9-Judge Bench).
 3. VIII C.A.D. 258. But there is no such safeguard in the case of appointment of a Chief Justice, and when A.N. RAY, J., was appointed Chief Justice, after superseding three senior Judges,— HEGDE, GROVER and SHELAT, there was an uproar in which the Supreme Court Bar Association joined, that the Senior Judges had been superseded solely because their judgment in *Keshavananda's case* (AIR 1973 S.C. 1461) had been unfavourable to the Government.
- Again in January 1977 instead of H.R. KHANNA, J., the seniormost Judge M.U. BEG, J. was made the Chief Justice of India. Justice KHANNA resigned just as the three Judges had done a few years back. It was said the supersession was because of his dissenting judgment in *A.D.M. v. Shukla*, AIR 1976 S.C. 1207.
- After the judgment referred to in f.n. 2 above viz. *Supreme Court Advocates v. Union of India*, it appears that discretion of the executive has been curtailed.
4. *Special Reference No. 1 of 1998*, Re :, (1998) 7 S.C.C. 739. The Bench expressed its optimistic view that the successive CJIs shall henceforth act in accordance with the *Second Judges case* and the opinion in the instant reference.
 5. The salaries of Judges of the Supreme Court and the High Courts has been enhanced *vide* Act 18 of 1998, s. 7 (w.e.f. 1.I.1996).
 6. But, curiously, there is no bar against a retired Judge from being appointed to any office under the Government [as there is in the case of the Comptroller and Auditor-General: Art. 148(4)]; and the expectation of such employment after retirement indirectly detracts from the independence of the Judges from executive influence. In fact, retired Judges have been appointed to hold offices such as that of Governor, Ambassador and the like, apart from membership of numerous Commissions or Boards.
 7. Attorney-General of India (1956) S.C.R. 8; A.K. AIYAR, *The Constitution and Fundamental Rights*, 1955, p. 15.
 8. *Vide* Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), pp. 168 *et seq.*
 9. *A.K. Gopalan v. State of Madras*, (1950) S.C.R. 88 (100); Ref. Under Art. 143, AIR 1965 S.C. 745 (762).
 10. *Vide* Author's *Constitutional Law of India*, *ibid.*, p. 270.
 11. Article 131, *Proviso*, as amended by the Constitution (7th Amendment) Act, 1956.
 12. *State of West Bengal v. Union of India*, AIR 1963 S.C. 1241.
 13. *Pritam Singh v. State*, AIR 1950 S.C. 169.
 14. *D.C. Mills v. Commr. of I.T.*, AIR 1955 S.C. 65.
 15. *In re Delhi Laws Act, 1912* (1951) S.C.R. 747 [regarding the validity of the Delhi Laws Act, 1912].
 16. *Re Kerala Education Bill*, AIR 1958 S.C. 956 [regarding the constitutionality of the Kerala Education Bill].
 17. *Re Berubari Union*, (1960) 3 S.C.R. 250 [regarding the procedure for implementation of the Indo-Pakistan Agreement relating to the Berubari Union].
 18. *In re Sea Customs*, AIR 1963 S.C. 1760 [regarding the constitutionality of the Sea Customs Amendment Bill, with reference to Art. 289 of the Constitution].
 19. Special Reference I of 1964 (re. U.P. Legislature), AIR 1965 S.C. 745.
 20. *In re Presidential Election, 1974*, AIR 1974 S.C. 1682.
 21. *In re Special Courts Bill, 1978*, AIR 1979 S.C. 478 (dated 1-12-1978).
 22. *In re Cauvery Waters Disputes Tribunal*, AIR 1992 S.C. 1183.
 23. *Special Reference No. 1 of 1993*. [regarding issue of an ordinance to acquire certain disputed land near Ram Janma Bhumi and whether a temple stood at that place]. *Ismail Faruqui v. Union of India*, (1994) 6 S.C.C. 360 (Rama Janma Bhumi case).

24. *Special Reference No. 1 of 1998*, (1998) 7 SCC 739. [Regarding consultation with the Chief Justice of India and method of communicating in regard to appointment of S.C. and H.C. Judges].
25. *Reference No. 1 of 1982*. [Regarding validity of Resettlement Act, passed by the State of J&K, decided or 8.11.2001 but unreported yet].
26. *Special Reference No. 1 of 2002*, (*In re, Gujarat Assembly Election Matter*, (2002) 8 SCC 237. [Gujarat Assembly was prematurely dissolved. Reference was regarding whether the new Assembly must meet within six months. It involved interpretation of Arts. 174, 324 and 356].
27. *Special Reference No. 1 of 2001*, (2004) 4 SCC 489. [Regarding whether States have legislative competence to legislate on the subject of natural gas and liquefied natural gas under Entry 25 of List II of Sch. VII or whether the Union has exclusive jurisdiction over natural gas in whatever physical form under Entry 53 List I of Sch. VII]. [Opinion delivered on 25-03-2004].
28. The Punjab Termination of Agreement Act, 2004, passed by Punjab State Legislature referred in July 2004 regarding legislative competence (not yet decided).
29. *L. Chandra Kumar v. Union of India*, (1997) 3 S.C.C. 261 : A.I.R. 1997 S.C. 1125.
30. *Minerva Mills v. Union of India*, AIR 1980 S.C. 1789 (paras 22-26, 28, 93-94).

CHAPTER 23

THE HIGH COURT

THERE shall be a High Court in each State [Art. 214] but Parliament **The High Court of a State.** has the power to establish a common High Court for two or more States¹ [Art. 231]. The High Court stands at the head of the Judiciary in the State [see Table XVII].

(a) Every High Court shall consist of a Chief Justice and such other **Constitution of High Courts.** Judges as the President of India may from time to time appoint.

(b) Besides, the President has the power to appoint (i) *additional* Judges for a temporary period not exceeding two years, for the clearance of arrears of work in a High Court; (ii) an acting Judge, when a permanent Judge of a High Court (other than a Chief Justice) is temporarily absent or unable to perform his duties or is appointed to act temporarily as Chief Justice. The acting Judge holds office until the permanent Judge resumes his office. But neither an additional nor an acting Judge can hold office beyond the age of 62 years.²

Appointment and Conditions of the Office of a Judge of a High Court. Every Judge of a High Court shall be appointed by the President. In making the appointment, the President shall consult the Chief Justice of India, the Governor of the State (and also the Chief Justice of that High Court in the matter of appointment of a Judge other than the Chief Justice).

Participatory Consultative Process.—A nine-Judge Bench of the Supreme Court³ has held that (1) the process of the appointment of the Judges of the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.

(2) Initiation of the proposal for appointment in the case of High Court must invariably be made by the Chief Justice of that High Court.

(3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' formed by him in consultation with two senior most Judges of the Supreme Court who come from that State, would have supremacy.

(4) No appointment of any Judge of a High Court can be made unless it is in conformity with the opinion of the Chief Justice of India.

(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that the appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the CJI and the other Judges of the Supreme Court, consulted by him in the matter, on reiteration of the recommendation by the CJI, the appointment should be made as a healthy convention.

Subsequently, the President of India in exercise of his powers under Art. 143 made a Reference⁴ to the Supreme Court relating to the consultation between the CJI and his brother Judges in matters of appointments of the High Court Judges, but not as a review or reconsideration of the *Supreme Court Advocates case (Second Judges case)* above. The S.C. opined that "consultation with the CJI" implies consultation with a plurality of Judges in the formation of opinion. His sole opinion does not constitute consultation. Only a *collegium* comprising the CJI and two senior most Judges of the S.C., as was in the *Second Judges case* above, should make the recommendation. The *collegium* in making its decision should take into account the opinion of the CJI of the High Court concerned which "would be entitled to the greatest weight," the views of the other Judges of the High Court who may be consulted and the views of the other Judges of the S.C. "who are conversant with the affairs of the High Court concerned." The views of the Judges of the S.C. who were puisne Judges of the High Court or C.J., thereof, will also be obtained irrespective of the fact that the H.C. is not their parent H.C. and they were transferred there. All these views should be expressed in writing and be conveyed to the Govt. of India alongwith the recommendation of the *collegium*. The recommendations made by the CJI without complying with the norms and requirements of the consultation process, as aforesaid, are not binding upon the Govt. of India.

Judicial review would be available if the aforesaid procedure is not followed or the appointee is found to lack eligibility.

A Judge of the High Court shall hold office until the age of 62 years.²

Every Judge,—permanent, additional or acting,—may vacate his office earlier in any of the following ways—

(i) By resignation in writing addressed to the President.

(ii) By being appointed a Judge of the Supreme Court or being transferred to any other High Court, by the President.

(iii) By removal by the President on an address of both Houses of Parliament (supported by a majority of the total membership of that house and by the vote of not less than $\frac{2}{3}$ of the members present), on the ground of proved misbehaviour or incapacity. The mode of removal of a Judge of the High Court shall thus be the same as that of a Judge of the Supreme Court, and both shall hold office during 'good behaviour' [Art. 217(1)]. This procedure is known as impeachment and is the same as that for a Judge of

the Supreme Court. [For details, see Chap. 22 under, "Impeachment of a Judge".]

A Judge of a High Court gets a salary of Rs. 26,000/- *per mensem* while the Chief Justice gets Rs. 30,000/- *per mensem*.⁵ He is also entitled to such allowances and rights in respect of leave and pension as Parliament may from time to time determine, but such allowances and rights cannot be varied by Parliament to the disadvantage of a Judge after his appointment [Art. 221].

The qualifications laid down in the Constitution for being eligible for appointment as a Judge of the High Court are that—

Qualifications for Appointment as High Court Judge.

(a) he must be a citizen of India, not being over 62 years; and must have

(b) (i) held for at least 10 years a judicial office in the territory of India; or

(ii) been for at least 10 years an advocate of a High Court or of two or more such Courts in succession [Art. 217(2)].

As in the case of the Judges of the Supreme Court, the Constitution **Independence of the Judges.** seeks to maintain the independence of the Judges of the High Courts by a number of provisions:

(a) By laying down that a Judge of the High Court shall not be removed, except in the manner provided for the removal of a Judge of the Supreme Court, that is, upon an address of each House of Parliament (passed by a special majority [Art. 218];

(b) By providing that the expenditure in respect of the salaries and allowances of the Judges shall be charged on the Consolidated Fund of the State [Art. 202(3)(d)];

(c) By specifying in the Constitution the salaries payable to the Judges and providing that the allowances of a Judge or his rights in respect of absence or pension shall not be varied by Parliament to his disadvantage after his appointment [Art. 221], except under a Proclamation of Financial Emergency [Art. 360(4)(b)];

(d) By laying down that after retirement a permanent Judge of High Court shall not plead or act in a Court or before any authority in India, except the Supreme Court and a High Court other than the High Court in which he had held his office [Art. 220].

As Sir Alladi Krishnaswami explained in the Constituent Assembly,⁶ while ensuring the independence of the Judiciary, the Constitution placed the High Courts under the control of the Union in certain important matters, in order to keep them outside the range of 'provincial politics'.

Control of the Union over High Courts.

Thus, even though the High Court stands at the head of the State Judiciary, it is not so sharply separated from the federal Government as the highest Court of an American State (called the State Supreme Court) is. The control of the Union over a High Court in India is exercised in the following matters:

(a) Appointment [Art. 217], transfer⁷ from one High Court to another [Art. 222] and removal [Art. 217(1), *Prov.* (b)], and determination of dispute as to age [Art. 217(3)], of Judges of High Courts.

Transfer.—Now the power to transfer of the High Court Judges remains no more a method of control over the High Court by the Union Government as the Supreme Court has prescribed a procedure for the purpose in a Reference⁸ made by the President of India in exercise of his powers under Art. 143. The Supreme Court opined that the Chief Justice of India should obtain the views of the Chief Justice of the High Court from which the proposed transfer is to be effected as also that of the Chief Justice of the High Court to which the transfer is to be effected (as was stated in the *Second Judges case* in 1993). The Chief Justice of India should also take into account the views of one or more Supreme Court Judges who are in position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place. These views should be expressed in writing and should be considered by CJI and the four senior most puisne Judges of the Supreme Court. These views and those of each of the four senior most Judges should be conveyed to the Govt. of India with the proposal of transfer.

What applies to the transfer of puisne Judges of a H.C. applies as well to the transfer of the Chief Justice of a High as a C.J. of another H.C. except that in this case, only the views of one or more knowledgeable Judges need be taken into account.

These factors, including the response of the High Court Chief Justice or the puisne Judge proposed to be transferred, to the proposal to transfer him, should be placed before the *collegium*—the CJI and his first four puisne Judges—to be taken into account by it before reaching a final conclusion on the proposal.

Unless the decision to transfer has been taken in the manner aforesaid, it is not decisive and does not bind the Govt. of India and shall be subject to judicial review.

(b) The constitution and organisation of High Courts and the power to establish a common High Court for two or more States and to extend the jurisdiction of a High Court to, or to exclude its jurisdiction from, a Union Territory, are all exclusive powers of the Union Parliament.

It should be pointed out in the present context that there are some provisions introduced into the original Constitution by subsequent amendments, which affect the independence of High Court Judges, as compared with Supreme Court Judges :

(a) Art. 224 was introduced by substitution, in 1956, to provide for the appointment of additional Judges to meet 'any temporary increase in the business of a High Court'. An additional Judge, so appointed, holds office for two years, but he may be made permanent at the end of that term. There is no such corresponding provision for the Supreme Court. It was introduced in the case of the High Courts because of the problem of arrears of work, which was expected to disappear in the near future. Now that the problem of arrears has become a standing problem which is being met by

the addition of more Judges, there is no particular reason why the make-shift device of additional appointment should continue. The inherent vice of this latter device is that it keeps an additional Judge on probation and under the tutelage of the Chief Justice as well as the Government⁷ as to whether he would get a permanent appointment at the end of two years. So far as the judicial power of a High Court Judge is concerned, he ranks as an equal to every other member of a Bench and is not expected, according to any principle relating to the administration of justice, to 'agree' with the Chief Justice or any other senior member of a Bench where his learning, conscience or wisdom dictates otherwise, or to stay his hands where the merits of a case require a judgment against the Government. The fear of losing his job on the expiry of two years obviously acts as an inarticulate obsession upon an additional Judge.

(b) Similarly, Cl.(3) was inserted in Art. 217 in 1963, giving the President, in consultation with the Chief Justice of India, the final power to determine the age of High Court Judge, if any question is raised by anybody in that behalf. By the same amendment of 1963 (15th Amendment), Cl.(2A) was inserted in Art.124, laying down that a similar question as to the age of a Supreme Court Judge shall be determined in such manner as Parliament may by law provide. A High Court Judge's position has thus become not only unnecessarily inferior to that of a Supreme Court Judge but even to that of a subordinate Judicial Officer, because any administrative determination of the latter's age is open to challenge in a Court of law, but in the case of a High Court Judge, it is made 'final' by the Constitution itself.⁹ There is, apparently, no impelling reason why a provision similar to Cl. (2A) to Art. 124 shall not be introduced in Art. 217, in place of Cl. (3), in question.

(c) Another agency of control over High Court Judges is the provision in Art. 221(l) for their transfer from one High Court to another, which has been given a momentum in 1994 by transferring as many as 50 Judges at a time.¹⁰ In order that the power of the President to order such transfer is not used as a punitive measure, the Supreme Court has laid down¹¹ that while no consent of the Judge concerned would be required, the President would not be competent to exercise the power except on the recommendation of the Chief Justice of India.

Territorial Jurisdiction of a High Court. Except where Parliament establishes a common High Court for two or more States [Art. 231] or extends the jurisdiction of a High Court to a Union Territory, the jurisdiction of the High Court of a State is co-terminous with the territorial limits of that State.¹²

As has already been stated, Parliament has extended the jurisdiction of some of the High Courts to their adjoining Union Territories, by enacting the States Reorganisation Act, 1956. Thus, the jurisdiction of the Calcutta High Court extends to the Andaman and Nicobar Islands; that of the Kerala High Court extends to the Lakshadweep [see Table XVIII].

Ordinary Jurisdiction of High Courts.

The Constitution does not make any provision relating to the general jurisdiction of the High Courts, but maintains their jurisdiction as it existed at the

commencement of the Constitution, with this improvement that any restrictions upon their jurisdiction as to revenue matters that existed prior to the Constitution shall no longer exist [Art. 225].

The existing jurisdictions of the High Courts are governed by the Letters Patent and Central and State Acts; in particular, their civil and criminal jurisdictions are primarily governed by the two Codes of Civil and Criminal Procedure.

(a) The High Courts at the three Presidency towns of Calcutta, Bombay and Madras had an original jurisdiction, both civil and

(a) **Original.** criminal, over cases arising within the respective Presidency towns. The original *criminal* jurisdiction of the High Courts has, however, been completely taken away by the Criminal Procedure Code, 1973.¹³

Though City Civil Courts have also been set up to try civil cases within the same area, the original civil jurisdiction of these High Courts has not altogether been abolished but retained in respect of actions of higher value.

(b) The appellate jurisdiction of the High Court, similarly, is both civil and criminal.

(b) **Appellate.** (I) On the civil side, an appeal to the High Court is either a First appeal or a Second appeal.

(i) Appeal from the decisions of District Judges and from those of Subordinate Judges in cases of a higher value (broadly speaking), lie direct to the High Court, on questions of fact as well as of law.

(ii) When any Court subordinate to the High Court (*i.e.*, the District Judge or Subordinate Judge) decides an appeal from the decision of an inferior Court, a second appeal lies to the High Court from the decision of the lower appellate Court, but only on question of law and procedure, as distinguished from questions of fact [s. 100, C.P. Code].

(iii) Besides, there is a provision for appeal under the Letters Patent of the Allahabad, Bombay, Calcutta, Madras and Patna High Courts. These appeals lie to the Appellate Side of the High Court from the decision of a single Judge of the High Court itself, whether made by such Judge in the exercise of the original or appellate jurisdiction of the High Court.

(II) The criminal appellate jurisdiction of the High Court is not less complicated. It consists of appeals from the decisions of—

(a) A Sessions Judge or an Additional Sessions Judge, where the sentence is of imprisonment exceeding seven years;

(b) An Assistant Sessions Judge, Metropolitan Magistrate or other Judicial Magistrates in certain specified cases other than 'petty' cases [ss. 374, 376, 376G, Cr.P.C., 1973]

Every High Court has a power of superintendence over all Courts and tribunals throughout the territory in relation to which

High Court's Power of superintendence. it exercises jurisdiction, excepting military tribunals [Art. 227]. This power of superintendence is a very wide power inasmuch as it extends to all Courts as

well as tribunals within the State, whether such Court or tribunal¹² is subject to the *appellate jurisdiction* of the High Court or not. Further, this power of superintendence would include a revisional jurisdiction to intervene in cases of gross injustice or non-exercise or abuse of jurisdiction or refusal to exercise jurisdiction, or in case of an error of law apparent on the face of the record, or violation of the principles of natural justice, or arbitrary or capricious exercise of authority, or discretion or arriving at a finding which is perverse or based on no material, or a flagrant or patent error in procedure, even though no appeal or revision against the orders of such tribunal was otherwise available.

Jurisdiction over Administrative Tribunals. By reason of the extension of Governmental activities and the complicated nature of issues to be dealt with by the administration, many modern statutes have entrusted administrative bodies with the function of deciding disputes and quasi-judicial issues that arise in connection with the administration of such laws, either because the ordinary courts are already overburdened to take up these new matters or the disputes are of such a technical nature that they can be decided only by persons who have an intimate knowledge of the working of the Act under which it arises. Thus, in India, quasi-judicial powers have been vested in administrative authorities such as the Transport Authorities under the Motor Vehicles Act; the Rent Controller under the State Rent Control Acts. Besides, there are special tribunals which are not a part of the judicial administration but have all the 'trappings' of a court. Nevertheless, they are not courts in the proper sense of the term, in view of the special procedure followed by them. All these tribunals have one feature in common, *viz.* that they determine questions affecting the rights of the citizens and their decisions are binding upon them.

Since the decisions of such tribunals have the force or effect of a judicial decision upon the parties, and yet the tribunals do not follow the exact procedure adopted by courts of justice, the need arises to place them under the control of superior courts to keep them within the proper limits of their jurisdiction and also to prevent them from committing any act of gross injustice.

In *England*, judicial review over the decisions of the quasi-judicial tribunals is done by the High Court in the exercise of its power to issue the prerogative writs.

In *India*, there are several provisions in the Constitution which place these tribunals under the control and supervision of the superior courts of the land, *viz.*, the Supreme Court and the High Courts :

(i) If the tribunal makes an order which infringes a fundamental right of a person, he can obtain relief by applying for a writ of *certiorari* to quash that decision, either by applying for it to the Supreme Court under Art. 32 or to the High Court under Art. 226. Even apart from the infringement of the fundamental right, a High Court is competent to grant a writ of *certiorari*, if the tribunal either acts without jurisdiction or in excess of its jurisdiction as conferred by the statutes by which it was created or it makes an order

contrary to the rules of natural justice or where there is some error of law apparent on the face of its record.

(ii) Besides the power of issuing the writs, every High Court has a general power of superintendence over all the tribunals functioning within its jurisdiction under Art. 227 and this superintendence has been interpreted as both administrative and judicial superintendence. Hence, even where the writ of *certiorari* is not available but a flagrant injustice has been committed or is going to be committed, the High Court may interfere and quash the order of a tribunal under Art. 227.¹⁴

(iii) Above all, the Supreme Court may grant special leave to appeal from any determination made by any tribunal in India, under Art. 136 wherever there exist extraordinary circumstances calling for interference of the Supreme Court. Broadly speaking, the Supreme Court can exercise this power under Art. 136 over a tribunal wherever a writ for *certiorari* would lie against the tribunal; for example, where the tribunal has either exceeded its jurisdiction or has approached the question referred to it in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the established rules of natural justice. The extraordinary power would, however, be exercised by the Supreme Court in rare and exceptional circumstances and not to interfere with the decisions of such tribunals as a court of appeal.

Besides the above, the Supreme Court as well as the High Courts possess what may be called an extraordinary jurisdiction, under Arts. 32 and 226 of the Constitution, respectively, which extends not only to inferior courts and tribunals but also to the State or any authority or person, endowed with State authority.

The Writ Jurisdiction of Supreme Court and High Court. The peculiarity of this jurisdiction is that being conferred by the Constitution, it cannot be taken away or abridged by anything short of an amendment of the Constitution itself. As has already been pointed out, the jurisdiction to issue writs under these Articles is larger in the case of High Court inasmuch as while the Supreme Court can issue them only where a fundamental right has been infringed, a High Court can issue them not only in such cases but also where an ordinary legal right has been infringed, provided a writ is a proper remedy in such cases, according to well-established principles.

Public interest litigation.—Following English and American decisions, our Supreme Court has admitted exceptions from the strict rules relating to affidavit *locus standi* and the like in the case of a class of litigations, classified as 'public interest litigation' (PIL) i.e., where the public in general are interested in the vindication of some right or the enforcement of some public duty.¹⁵ The High Courts also have started following this practice in their jurisdiction under Art. 226,¹⁶ and the Supreme Court has approved this practice, observing that where public interest is undermined by an arbitrary and perverse executive action, it would be the duty of the High Court to issue a writ.¹⁷

The Court must satisfy itself that the party bringing the PIL is litigating *bona fide* for public good. It should not be merely a cloak for attaining

private ends of a third party or of the party bringing the petition. The court can examine the previous records of public service rendered by the litigant.¹⁸ An advocate filed a writ petition against the State or its instrumentalities seeking not only compensation to a victim of rape committed by its employees (the railway employees) but also so many other reliefs including eradication of anti-social and criminal activities at the railway stations. The Supreme Court held that the petition was in the nature of a PIL and the advocate could bring in the same for which no personal injury or loss is an essential element.¹⁹

As the head of the Judiciary in the State, the High Court has got an administrative control over the subordinate judiciary in the State in respect of certain matters, besides its appellate and supervisory jurisdiction over them. The Subordinate Courts include District Judges, Judges of the City Civil Courts as well as the Metropolitan Magistrates and members of the judicial service of the State.

The control over the Judges of these Subordinate Courts is exercised by the High Courts in the following matters—

(a) The High Court is to be consulted by the Governor in the matter of appointing, posting and promoting District Judges [Art. 233].

(b) The High Court is consulted, along with the State Public Service Commission, by the Governor in appointing persons (other than District Judges) to the judicial service of the State [Art. 234].

(c) The control over district courts and courts subordinate thereto, including the posting and promotion of, and the grant of leave to, transfers of, disciplinary control over including inquiries, suspension and punishment, and compulsory retirement of, persons belonging to the judicial service and holding any post inferior to the post of a district judge is vested in High Court [Art. 235].

Control over the subordinate courts is the collective and individual responsibility of the High Court.²⁰

The foregoing survey of the jurisdiction of a High Court under the original Constitution was drastically curtailed in various ways, by the Constitution (42nd Amendment) Act, 1976, which has been referred to at the end of Chap. 22 *ante*, in the context of the Supreme Court, but the new provisions in Arts. 226A and 228A which had been inserted by the Constitution (42nd Amendment) Act, 1976, have all been omitted by the 43rd Amendment Act, 1977, and the original position has been restored.

In this context, we must mention Arts. 323A-323B, inserted by the 42nd Amendment Act.

Parliament has passed the Administrative Tribunals Act, 1985, implementing Art. 323A, under which the Central Government has set up Central Administrative Tribunals with respect to services under the Union.

As a result, all Courts of law including the High Court shall cease to have any jurisdiction to entertain any litigation relating to the recruitment

and other service matters relating to persons appointed to the public services of the Union, whether in its original or appellate jurisdiction. The Supreme Court has, however, been spared its special leave jurisdiction of appeals from these Tribunals, under Art. 136 of the Constitution. But subsequently, the position turned out to be otherwise as the Supreme Court declared the Articles 323-A, Cl. 2(d) and 323-B, Cl. 3(d) and also the "exclusion of jurisdiction" clauses in all the legislations enacted in pursuance of these Articles, unconstitutional to the extent they excluded the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32.²¹

REFERENCES

1. Under this provision, the High Court of Assam (at Gauhati) is the common High Court for Assam, Nagaland, Manipur, Meghalaya, Tripura, Arunachal Pradesh and Mizoram [Table XVIII]; and the Bombay High Court serves both Maharashtra and Goa.
2. By the Constitution (15th Amendment) Act, 1963, the age of retirement of High Court Judges has been raised from 60 to 62.
3. *Supreme Court Advocates v. Union of India*, (1993) 4 S.C.C. 441.
4. *Special Reference No. 1 of 1998*, Re : (1998) 7 S.C.C. 739 [9 Judge Bench].
5. This is the salary as enhanced *vide* Act 18 of 1998, s. 7 (w.e.f. 1.1.1996).
6. C.A.D., dated 22-11-1948.
7. Cf. *Gupta v. President of India*, AIR 1982 S.C. 149 (7-Judge Bench).
8. *Special Reference No. 1 of 1998*, Re : (1998) 7 S.C.C. 739.
9. In this context, see *Union of India v. Jyoti Prakash*, AIR 1971 S.C. 1093, and the comments of the author thereon, at pp. 246ff. of Vol. G of the Author's *Commentary on the Constitution of India* (6th Ed.).
10. *Statesman*, Calcutta, 14-4-1994, 16-4-1994 (p. 5).
11. *S.C. Advocates v. Union of India*, (1993) 4 S.C.C. 441 (para 472)—9-Judge Bench.
12. See Table XVII as to the territorial jurisdiction of the several High Courts. Delhi which was under the jurisdiction of the Punjab High Court has now its own High Court since 1996.
13. BASU'S *Criminal Procedure Code* (Prentice-Hall of India, 1979), p. 29.
14. The 42nd Amendment Act, 1976, also took away this jurisdiction of the High Courts over tribunals, under Art. 227(1), by omitting the word 'tribunals' therefrom; but the 44th Amendment Act, 1978, has restored the word, so that a High Court retains its power of superintendence over any tribunal within its territorial jurisdiction. This jurisdiction of the High Court was taken away in respect of Administrative Tribunals set up under Art. 323A, by the Administrative Tribunals Act, 1985 but the provisions in these Articles and in the legislations enacted in pursuance thereof excluding the jurisdiction of S.C. and H.C.s under Arts. 32 and 226/227 have been declared to be unconstitutional by the Supreme Court in *L. Chandra Kumar v. U.O.I.*, (1997) 3 S.C.C. 261 : A.I.R. 1997 S.C. 1125.
15. *People's Union v. Union of India*, A.I.R. 1982 S.C. 1473 (para 1).
16. *State of W.B. v. Sampat*, A.I.R. 1985 S.C. 195 (para 10).
17. *Chaitanya v. State of Karnataka*, A.I.R. 1986 S.C. 825 (para 10).
18. *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 S.C.C. 492 (para 12) : A.I.R. 1999 S.C. 393.
19. *Chairman, Railway Board v. Chandrima Das*, (2000) 2 S.C.C. 465.
20. *High Court of Judicature at Bombay v. Shirish Kumar Rangrao Patil*, (1997) 6 S.C.C. 339.
21. *L. Chandra Kumar v. Union of India*, (1997) 3 S.C.C. 261 : A.I.R. 1997 S.C. 1125.

CHAPTER 24

DISTRIBUTION OF LEGISLATIVE AND EXECUTIVE POWERS

Nature of the Union. THE nature of the federal system introduced by *our* Constitution has been fully explained earlier (Chap. 5).

To recapitulate its essential features: Though there is a strong admixture of unitary bias and the exceptions from the traditional federal scheme are many, the Constitution introduces a federal system as the basic structure of government of the country. The Union is composed of 28 States¹ and both the Union and the States derive their authority from the Constitution which divides all powers,—legislative, executive and financial, as between them. [The judicial powers, as already pointed out (Chap. 22), are, not divided and there is a common Judiciary for the Union and the States.] The result is that the States are not delegates of the Union and that, though there are agencies and devices for Union control over the States in many matters,—subject to such exceptions, the States are autonomous within their own spheres as allotted by the Constitution, and both the Union and the States are equally subject to the limitations imposed by the Constitution, say, for instance, the exercise of legislative powers being limited by Fundamental Rights.

Thus, neither the Union Legislature (Parliament) nor a State Legislature can be said to be 'sovereign' in the legalistic sense,—each being limited by the provisions of the Constitution effecting the distribution of legislative powers as between them, apart from the Fundamental Rights and other specific provisions restraining their powers in certain matters, e.g., Art. 276(2) [limiting the power of a State Legislature to impose a tax on professions]; Art. 303 [limiting the powers of both Parliament and a State Legislature with regard to legislation relating to trade and commerce]. If any of these constitutional limitations is violated, the law of the Legislature concerned is liable to be declared invalid by the Courts.

The Scheme of Distribution of Legislative Powers. As has been pointed out at the outset, a federal system postulates a distribution of powers between the federation and the units. Though the nature of distribution varies according to the local and political background in each country, the division, obviously, proceeds on two lines—

(a) The *territory* over which the Federation and the Units shall, respectively, have their jurisdiction.

(b) The *subjects* to which their respective jurisdiction shall extend.

The distribution of legislative powers in *our* Constitution under both heads is as follows:

I. As regards the territory with respect to which the Legislature may legislate, the State Legislature naturally suffers from a limitation to which **Territorial Extent of Union and State Legislation.** Parliament is not subject, namely, that the territory of the Union being divided amongst the States, the jurisdiction of each State must be confined to its own territory. When, therefore, a State Legislature makes a law relating to a subject within its competence, it must be read as referring to persons or objects situated within the territory of the State concerned. A State Legislature can make laws for the whole or any part of the State to which it belongs [Art. 245(1)]. It is not possible for a State Legislature to enlarge its territorial jurisdiction under any circumstances except when the boundaries of the State itself are widened by an Act of Parliament.

Parliament has, on the other hand, the power to legislate for 'the whole or any part of the territory of India', which includes not only the States but also the Union Territories or any other area, for the time being, included in the territory of India [Art. 246(4)]. It also possesses the power of 'extra-territorial legislation' [Art. 245(2)], which no State Legislature possesses. This means that laws made by Parliament will govern not only persons and property within the territory of India but also Indian subjects resident and their property situated *anywhere* in the world. No such power to affect persons or property outside the borders of its own State can be claimed by a State Legislature in India.

Limitations to the Territorial Jurisdiction of Parliament. The plenary territorial jurisdiction of Parliament is, however, subject to some special provisions of the Constitution—

(i) As regards some of the Union Territories, such as the Andaman and Lakshadweep group of Islands, Regulations may be made by the President to have the same force as Acts of Parliament and such Regulations may repeal or amend a law made by Parliament in relation to such Territory [Art. 240(2)].²

(ii) The application of Acts of Parliament to any Scheduled Area may be barred or modified by notifications made by the Governor [Para 5 of the 5th Schedule].²

(iii) Besides, the Governor of Assam may, by public notification, direct that any other Act of Parliament shall not apply to an autonomous district or an autonomous region in the State of Assam or shall apply to such district or region or part thereof subject to such exceptions or modifications as he may specify in the notification [Para 12(1)(b) of the 6th Sch.].³ Similar power has been vested in the President as regards the autonomous district or region in Meghalaya, Tripura and Mizoram by Paras 12A, 12AA and 12B of the 6th Schedule.

It is obvious that the foregoing special provisions have been inserted in view of the backwardness of the specified areas to which the indiscriminate application of the general laws might cause hardship or other injurious consequences.

Distribution of Legislative Subjects. II. As regards the *subjects* of legislation, the Constitution adopts from the Government of India Act, 1935, a *threefold distribution* of *legislative powers* between the Union and the States [Art. 246]. While in the *United States* and *Australia*, there is only a single enumeration of powers,—only the powers of the Federal Legislature being enumerated,—in *Canada* there is a double enumeration, and the Government of India Act, 1935, introduced a scheme of threefold enumeration, namely, Federal, Provincial and Concurrent. The Constitution adopts this scheme from the Act of 1935 by enumerating possible subjects of legislation under three Legislative Lists in Sch. VII of the Constitution (see Table XIX).⁴

List I or the *Union List* includes (in 2008) 100 subjects over which the Union shall have exclusive power of legislation. These include defence, foreign affairs, banking, insurance, currency and coinage, Union duties and taxes.

List II or the *State List* comprises 61 items or entries over which the State Legislature shall have exclusive power of legislation, such as public order and police, local government, public health and sanitation, agriculture, forests, fisheries, State taxes and duties.

List III gives *concurrent powers* to the Union and the State Legislatures over 52 items, such as Criminal law and procedure, Civil procedure, marriage, contracts, torts, trusts, welfare of labour, economic and social planning and education.

In case of *overlapping* of a matter as between the three Lists, predominance has been given to the Union Legislature, as under the Government of India Act, 1935. Thus, the power of the State Legislature to legislate with respect to matters enumerated in the State List has been made subject to the power of Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists, and the entries in the State List have to be interpreted accordingly.

In the *concurrent sphere*, in case of repugnancy between a Union and a State law relating to the *same* subject, the former prevails. If, however, the State law was reserved for the assent of the President and has received such assent, the State law may prevail notwithstanding such repugnancy, but it would still be competent for Parliament to override such State law by subsequent legislation [Art. 254(2)].⁵

Residuary Powers. The vesting of residual power under the Constitution follows the precedent of *Canada*, for, it is given to the Union instead of the States (as in the *U.S.A.* and *Australia*). In this respect, the Constitution differs from the Government of India Act, 1935, for, under that Act, the residual powers were vested neither in the Federal nor in the State Legislature, but were placed in the hands of the Governor-General; the Constitution vests the residuary power, *i.e.*, the power to legislate with respect to any matter *not* enumerated in any one of the three Lists,—in the Union legislature [Art. 248],⁶ and the final determination as to whether a particular matter falls under the residuary power or not is that of the Courts.

It should be noted, however, that since the three Lists attempt at an exhaustive enumeration of all possible subjects of legislation, and the Courts interpret the ambit of the enumerated powers liberally, the scope for the application of the residuary power will be very narrow.⁷

Expansion of the Legislative Powers of the Union under different circumstances. While the foregoing may be said to be an account of the normal distribution of the legislative powers, there are certain exceptional circumstances under which the above system of distribution is either suspended or the powers of the Union Parliament are extended over State subjects. These exceptional or extraordinary circumstances are—

(a) In the *National Interest*. Parliament shall have the power to make laws with respect to any matter included in the State List, for a temporary period, if the Council of States declares by a resolution of 2/3 of its members present and voting, that it is necessary in the *national* interest that Parliament shall have power to legislate over such matters. Each such resolution will give a lease of one year to the law in question.

A law made by Parliament, which Parliament would not but for the passing of such resolution have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period [Art. 249]. The resolution of the Council of States may be renewed for a period of one year at a time.

(b) Under a *Proclamation of Emergency*. While a Proclamation of 'Emergency' made by the President is in operation, Parliament shall have similar power to legislate with respect to State subjects.

A law made by Parliament, which Parliament would not but for the issue of such Proclamation have been competent to make, shall, to the extent of incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period [Art. 250].

(c) *By agreement between States*. If the Legislatures of two or more States resolve that it shall be lawful for Parliament to make laws with respect to any matters included in the State List relating to those States, Parliament shall have such power as regards such States. It shall also be open to any other State to adopt such Union legislation in relation to itself by a resolution passed in that behalf in the Legislature of the State. In short, this is an extension of the jurisdiction of Parliament by consent of the State Legislatures [Art. 252].⁸

Thus, though Parliament has no competence to impose an estate duty with respect to *agricultural* lands, Parliament, in the Estate Duty Act, 1953, included the agricultural lands situated in certain States, by virtue of resolutions passed by the Legislatures of such States, under Art. 252, to confer such power upon Parliament. That Act has since been repealed.

Other examples of such legislation are: Prize Competition Act, 1955; Urban Land (Ceiling and Regulation) Act, 1976; Water (Prevention and Control of Pollution) Act, 1974.

(d) *To implement Treaties.* Parliament shall have the power to legislate with respect to any subject for the purpose of implementing treaties or international agreements and conventions. In other words, the normal distribution of powers will not stand in the way of Parliament to enact legislation for carrying out its international obligations, even though such legislation may be necessary in relation to a State subject [Art. 253].

Examples of such legislation are: Geneva Convention Act, 1960; Anti-Hijacking Act, 1982; United Nations (Privileges and Immunities) Act, 1947.

(e) *Under a Proclamation of Failure of Constitutional Machinery in the States.* When such a Proclamation is made by the President, the President may declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament [Art. 356(1)(b)].

The interpretation of over 200 Entries in the three Legislative Lists is no easy task for the Courts and the Courts have to apply various judicial principles to reconcile the different Entries, a discussion of which would be beyond the scope of the present work.⁹ Suffice it to say that—

(a) Each Entry is given the widest import that its words are capable of, without rendering another Entry nugatory.¹⁰

(b) In order to determine whether a particular enactment falls under one Entry or the other, it is the 'pith and substance' of such enactment and not its legislative label that is taken account of.¹¹ If the enactment substantially falls under an Entry over which the Legislature has jurisdiction, an incidental encroachment upon another Entry over which it had no competence will not invalidate the law.¹⁰

(c) On the other hand, where a Legislature has no power to legislate with respect to a matter, the Courts will not permit such Legislature to transgress its own powers or to encroach upon those of another Legislature by resorting to any device or 'colourable legislation'.¹²

(d) The motives of the Legislature are, otherwise, irrelevant for determining whether it has transgressed the constitutional limits of its legislative power.¹²

The distribution of *executive* powers between the Union and the States Distribution of is somewhat more complicated than that of the Executive Powers.

I. In general, it follows the scheme of distribution of the legislative powers. In the result, the executive power of a State is, in the main, co-extensive with its legislative powers,—which means that the executive power of State shall extend only to its own territory and with respect to those subjects over which it has legislative competence [Art. 162]. Conversely, the Union shall have exclusive executive power over (a) the matters with respect to which Parliament has exclusive power to make laws (*i.e.*, matters in List I

of Sch. VII), and (b) the exercise of its powers conferred by any treaty or agreement [Art. 73]. On the other hand, a State shall have exclusive executive power over matters included in List II [Art. 162].

II. It is in the *concurrent* sphere that some novelty has been introduced. As regards matters included in the Concurrent Legislative List (*i.e.*, List III), the executive function shall *ordinarily* remain with the States, but subject to the provisions of the Constitution or of any law of Parliament conferring such function expressly upon the Union. Under the Government of India Act, 1935, the Centre had only a power to give directions to Provincial Executive to execute a Central law relating to a Concurrent subject. But this power of giving directions proved ineffective; so, the Constitution provides that the Union may, whenever it thinks fit, itself take up the administration of Union laws relating to any Concurrent subject.

In the result, the executive power relating to concurrent subjects remains with the States, except in two cases—

(a) Where a law of Parliament relating to such subjects vests some executive function specifically in the Union, *e.g.*, the Land Acquisition Act, 1894; the Industrial Disputes Act, 1947 [Proviso to Art. 73(1)]. So far as these functions specified in such Union law are concerned, it is the Union and not the States which shall have the executive power while the rest of the executive power relating to the subjects shall remain with the States.

(b) Where the provisions of the Constitution itself vest some executive functions upon the Union. Thus,

(i) The executive power to implement any treaty or international agreement belongs exclusively to the Union, whether the subject appertains to the Union, State or Concurrent List [Art. 73(1)(b)].

(ii) The Union has the power to give directions to the State Governments as regards the exercise of their executive power, in certain matters—

(I) *In Normal times:*

(a) To ensure due compliance with Union laws and existing laws which apply in that State [Art. 256].

(b) To ensure that the exercise of the executive power of the State does not interfere with the exercise of the executive power of the Union [Art. 257(1)].

(c) To ensure the construction and maintenance of the means of communication of national or military importance by the State [Art. 257(2)].

(d) To ensure protection of railways within the State [Art. 257(3)].

(e) To ensure drawing and execution of schemes specified in the directions to be essential for the welfare of the Scheduled Tribes in the States [Art. 339(2)].

(f) To secure the provision of adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups [Art. 350A].

(g) To ensure the development of the Hindi language [Art. 351].

(h) To ensure that the government of a State is carried on in accordance with the provisions of the Constitution [Art. 355].

(II) In Emergencies:

(a) During a Proclamation of Emergency, the power of the Union to give directions extends to the giving of directions as to the *manner* in which the executive power of the State is to be exercised, relating to any matter [Art. 353(a)]. (so as to bring the State Government under the complete control of the Union, without suspending it).

(b) Upon a Proclamation of failure of constitutional machinery in a State, the President shall be entitled to assume to himself all or any of the executive powers of the State [Art. 356(1)].

(III) During a Proclamation of Financial Emergency:

(a) To observe canons of financial propriety, as may be specified in the directions [Art. 360(3)].

(b) To reduce the salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and High Courts [Art. 360(4)(b)].

(c) To require all Money Bills or other Financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State [Art. 360(4)].

III. While as regards the legislative powers,*it is not competent for the Union [apart from Art. 252, see *ante*] and a State to encroach upon each other's exclusive jurisdiction by mutual consent, this is possible as regards executive powers. Thus, with the consent of the Government of a State, the Union may entrust its own executive functions relating to any matter to such State Government or its officers [Art. 258(1)]. Conversely, with the consent of the Union Government, it is competent for a State Government to entrust any of its executive functions to the former [Art. 258A].

IV. On the other hand, under Art. 258(2), a law made by Parliament relating to a Union subject may *authorise* the Central Government to delegate its functions or duties to the State Government or its officers (irrespective of the consent of such State Government).

REFERENCES

1. The creation of Chhattisgarh, Uttaranchal (now Uttarakhand) and Jharkhand States by carving out their territories from the territories of the Madhya Pradesh, the Utz. Pradesh and the Bihar States respectively in 2000 has raised the number of States from 25 to 28.
2. See Author's *Constitutional Law of India* (Prentice-Hall of India, 6th Ed., 1991) pp. 265, 458.
3. *Ibid.*, p. 467.
4. As stated earlier, the distribution does not apply to the Union Territories, in regard to which Parliament is competent to legislate with respect to any subject, including those which are enumerated in the 'State List'.
5. See Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), pp. 281-84.
6. *Ibid.*, p. 279.

7. See *Second Gift Tax Officer v. Hazareth*, AIR 1970 S.C. 999; *Union of India v. Dhillon*, (1971) 2 S.C.C. 779; *Azam v. Expenditure Tax Officer*, (1971) 3 S.C.C. 621; *Shorter Constitution of India*, 14th Ed., 2008, Sch. VII, under 'General Rules for interpretation of the Entries' etc.
8. See Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), p. 280.
9. Vide Author's *Commentary on the Constitution of India*, 5th Ed., Vol. IV, pp. 95 *et seq.* and *Shorter Constitution of India*, 14th Ed., 2008, Sch. VII, under 'General Rules for interpretation of the Entries' etc.; *Constitutional Law of India* 6th Ed., pp. 473-500.
10. *State of Bombay v. Balsara*, (1951) S.C.R. 682; *Ramakrishna v. Municipal Committee*, (1950) S.C.R. 15 (25).
11. *Amar Singh v. State of Rajasthan*, (1955) 2 S.C.R. 303 (325).
12. *K.C.G. Narayana Deo v. State of Orissa*, (1954) S.C.R. 1.

CHAPTER 25

DISTRIBUTION OF FINANCIAL POWERS

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.

Need for Distribution of Financial Resources. To achieve this object, *our* Constitution has made elaborate provisions, mainly following the lines of the Government of India Act, 1935, relating to the distribution of the taxes as well as non-tax revenues and the power of borrowing, supplemented by provisions for grants-in-aid by the Union to the States.

Before entering into these elaborate provisions which set up a complicated arrangement for the distribution of the financial resources of the country, it has to be noted that the object of this complicated machinery is an equitable distribution of the financial resources between the two units of the federation, instead of dividing the resources into two watertight compartments, as under the usual federal system. A fitting introduction to this arrangement has been given by our Supreme Court,¹ in these words:

"Sources of revenue which have been allocated to the Union are not meant entirely for the purposes of the Union but have to be distributed according to the principles laid down by Parliamentary legislation as contemplated by the Articles aforesaid. Thus all the taxes and duties levied by the Union ... do not form part of the Consolidated Fund of India but many of these taxes and duties are distributed amongst the States and form part of the Consolidated Fund of the States. Even those taxes and duties which constitute the Consolidated Fund of India may be used for the purposes of supplementing the revenues of the States in accordance with their needs. The question of distribution of the aforesaid taxes and duties amongst the States and the principles governing them, as also the principles governing grants-in-aid ... are matters which have to be decided by a high-powered Finance Commission, which is a responsible body designated to determine those matters in an objective way... The Constitution-makers realised the fact that those sources of revenue allocated to the States may not be sufficient for their purposes and that the Government of India would have to subsidise their welfare activities.. Realising the limitations on the financial resources of the States and the growing needs of the community in a welfare State, the Constitution has made... specific provisions empowering Parliament to set aside a portion of its revenues... for the benefit of the States, not in stated proportions but according to their needs ... The resources of the Union Government are not meant exclusively for the benefit of the Union activities ... In other words, the Union and the States together form one

organic whole for the purposes of utilisation of the resources of territories of India as a whole."

Principles underlying distribution of Tax Revenues..

not identical.

The Constitution makes a distinction between the legislative power to levy a tax and the power to appropriate the proceeds of a tax so levied. In India, the powers of a Legislature in these two respects are

Distribution of Legislative Powers to levy Taxes.

(A) The legislative power to make a law for imposing a tax is divided as between the Union and the States by means of specific Entries in the Union and State Legislative Lists in Sch. VII (see Table XIX). Thus, while the State Legislature has the power to levy an estate duty in respect of agricultural lands [Entry 48 of List II], the power to levy an estate duty in respect of non-agricultural land belongs to Parliament [Entry 87 of List I]. Similarly, it is the State Legislature which is competent to levy a tax on agricultural income [Entry 46 of List II], while Parliament has the power to levy income-tax on all incomes other than agricultural [Entry 82 of List I].

The residuary power as regards taxation (as in general legislation) belongs to Parliament [Entry 97 of List I] and the Gift tax and Expenditure tax have been held to derive their authority from this residuary power. There is no concurrent sphere in the matter of tax legislation.

Before leaving this topic, it should be pointed out that though a State Legislature has the power to levy any of the taxes enumerated in the State Legislative List, in the case of certain taxes, this power is subject to certain limitations imposed by the substantive provisions of the Constitution. Thus—

(a) While Entry 60 of List II of Sch. VII authorises a State Legislature to levy a tax on profession, trade, calling or employment, the total amount payable in respect of any one person to the State or any other authority in the State by way of such tax shall not exceed Rs. 2,500² per annum [Art. 276(2)].

(b) The power to impose taxes on 'sale or purchase of goods other than newspapers' belongs to the State [Entry 54, List II]. But 'taxes on imports and exports' [Entry 83, List I] and 'taxes on sales in the course of inter-State trade and commerce' [Entry 92A, List I] are exclusive Union subjects. Article 286 is intended to ensure that sales taxes imposed by States do not interfere with imports and exports or inter-State trade and commerce, which are matters of national concern, and should, therefore, be beyond the competence of the States. Hence, certain limitations have been laid down by Art. 286 upon the power of the States to enact sales tax legislation:

1. (a) No tax shall be imposed on sale or purchase which takes place outside the State.

(b) No tax shall be imposed on sale or purchase which takes place in the course of import into or export out of India.³

2. In connection with inter-State trade and commerce there are two limitations—

(i) The power to tax sales taking place 'in the course of inter-State trade and commerce'⁴ is within the exclusive competence of Parliament [Entry 92A, List I].

(ii) Even though a sale does not take place 'in the course of inter-State trade or commerce, State taxation would be subject to restrictions and conditions imposed by Parliament if the sale relates to 'goods declared by Parliament to be of *special importance* in inter-State trade and commerce'. In pursuance of this power, Parliament has declared sugar, tobacco, cotton, silk and woollen fabrics to be goods of special importance in inter-State trade and commerce, by enacting the Additional Duties of Excise (Goods of Special Importance) Act, 1957 [s. 7], and imposed special restrictions upon the States to levy tax on the sales of these goods.

(c) Save insofar as Parliament may by law otherwise provide, no law of

(c) Tax on Consumption or Sale of Electricity. a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—

(i) consumed by the Government of India, or sold to the Government of India for consumption by that Government; or

(ii) consumed in the construction, maintenance or operation of any railway by the Government of India, or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway [Art. 287].

(d) Exemption of Union and State properties from mutual taxation. (d) The property of the Union shall, save insofar as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State [Art. 285(1)].

Conversely, the property and income of a State shall be exempt from Union taxation [Art. 289(1)]. There is, however, one exception in this case. If a State enters into a trade or business, other than a trade or business which is declared by Parliament to be incidental to the ordinary business of government, it shall not be exempt from Union taxation [Art. 289(2)]. The immunity, again, relates to a tax on property. Hence, the property of a State is not immune from customs duty.¹

(B) Even though a Legislature may have been given the power to levy a tax because of its affinity to the subject-matter of Distribution of taxation, the yield of different taxes coming within the proceeds of Taxes. State legislative sphere may not be large enough to serve the purposes of a State. To meet this situation, the Constitution makes special provisions:

(i) Some duties are leviable by the Union; but they are to be collected and entirely appropriated by the States after collection.

(ii) There are some taxes which are both levied and collected by the Union, but the proceeds are then assigned by the Union to those States within which they have been levied.

(iii) Again, there are taxes which are levied and collected by the Union but the proceeds are distributed between the Union and the State.

The distribution of the tax-revenue between the Union and the States, according to the foregoing principles, stands as follows:

(A) Taxes belonging to the Union exclusively:

1. Customs. 2. Corporation tax. 3. Taxes on capital value of assets of individuals and Companies. 4. Surcharge on income tax, etc. 5. Fees in respect of matters in the Union List (List I).

(B) Taxes belonging to the States exclusively:

1. Land Revenue. 2. Stamp duty except in documents included in the Union List. 3. Succession duty, Estate duty, and Income tax on agricultural land. 4. Taxes on passengers and goods carried on inland waterways. 5. Taxes on lands and buildings, mineral rights. 6. Taxes on animals and boats, on road vehicles, on advertisements, on consumption of electricity, on luxuries and amusements, etc. 7. Taxes on entry of goods into local areas. 8. Sales Tax. 9. Tolls. 10. Fees in respect of matters in the State List. 11. Taxes on professions, trades, etc., not exceeding Rs. 2,500 per annum (List II).

(C) Duties Levied by the Union but Collected and Appropriated by the States:

Stamp duties on bills of Exchange, etc., and Excise duties on medicinal and toilet preparations containing alcohol, though they are included in the Union List and *levied* by the Union, shall be collected by the States insofar as leviable within their respective territories, and shall form part of the States by whom they are collected [Art. 268].

(D) Taxes Levied as well as Collected by the Union, but Assigned to the States within which they are Leviable:

(a) Duties on succession to property other than agricultural land. (b) Estate duty in respect of property other than agricultural land. (c) Terminal taxes on goods or passengers carried by railway, air or sea. (d) Taxes on railway fares and freights. (e) Taxes on stock exchange other than stamp duties. (f) Taxes on sales of and advertisements in newspapers. (g) Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce. (h) Taxes on inter-State consignment of goods [Art. 269].

(E) Taxes Levied and Collected by the Union and Distributed between Union and the States:

Certain taxes shall be levied as well as collected by the Union, but their proceeds shall be divided between the Union and the States in a certain proportion, in order to effect an equitable division of the financial resources. These are—

(a) Taxes on income other than on agricultural income [Art. 270].

(b) Duties of excise as are included in the Union List, excepting medicinal and toilet preparations may also be distributed, if Parliament by law so provides [Art. 272].

(F) *The principal sources of non-tax revenues of the Union are the receipts from—*

Railways; Posts and Telegraphs; Broadcasting; Opium; Currency and Mint; Industrial and Commercial Undertakings of the Central Government relating to the subjects over which the Union has jurisdiction.

Distribution of Non-tax Revenues. Of the Industrial and Commercial Undertakings relating to Central subjects may be mentioned—

The Industrial Finance Corporation; Air India; Indian Airlines; Industries in which the Government of India have made investments, such as the Steel Authority of India; the Hindustan Shipyard Ltd; the Indian Telephone Industries Ltd.

(G) *The States, similarly, have their receipts from—*

Forests, Irrigation and Commercial Enterprises (like Electricity, Road Transport) and Industrial Undertakings (such as Soap, Sandalwood, Iron and Steel in Karnataka, Paper in Madhya Pradesh, Milk Supply in Mumbai, Deep-sea Fishing and Silk in West Bengal).

Grants-in-Aid. Even after the assignment to the States of a share of the Central taxes, the resources of all the States may not be adequate enough. The Constitution, therefore, provides that grants-in-aid shall be made in each year by the Union to such States as Parliament may determine to be in need of assistance; particularly, for the promotion of welfare of tribal areas, including special grants to Assam in this respect [Art. 275].

Constitution and Functions of the Finance Commission. Articles 270, 273, 275 and 280 provide for the constitution of a Finance Commission (at five year intervals) to recommend to the President certain measures relating to the distribution of financial resources between the Union and the States,—for instance, the percentage of the net proceeds of income-tax which should be assigned by the Union to the States and the manner in which the share to be assigned shall be distributed among the States [Art. 280].

The constitution of the Finance Commission is laid down in Art. 280, which has to be read with the Finance Commission (Miscellaneous Provisions) Act of 1951, which has supplemented the provisions of the Constitution. Briefly speaking, the Commission has to be constituted by the President, every five years. The Chairman must be a person having 'experience in public affairs'; and the other four members must be appointed from amongst the following—

(a) A High Court Judge or one qualified to be appointed as such; (b) a person having special knowledge of the finances and accounts of the Government; (c) a person having wide experience in financial matters and administration ; (d) a person having special knowledge of economics.

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) the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Panchayats in the State;⁵
- (d) the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State;⁶
- (e) any other matter referred to the Commission by the President in the interests of sound finance.

The First Finance Commission was constituted in 1951, with Sri Neogy as the Chairman, and it submitted its report in 1953. **The First Finance Commission.** Government accepted its recommendations which, *inter alia*, were that—

(a) 55 per cent of the net proceeds of income-tax shall be assigned by the Union to the States and that it shall be distributed among the States in the shares prescribed by the Commission.

(b) The Commission laid down the principles for guidance of the Government of India in the matter of making general grants-in-aid to States which require financial assistance and also recommended specific sums to be given to certain States such as West Bengal, Punjab, Assam, during the five years from 1952 to 1957.

A Second Finance Commission, with Sri Santhanam as the Chairman, was constituted in 1956. Its report was submitted to **The Second Finance Commission.** Government in September, 1957 and its recommendations were given effect to for the quinquennium commencing from April, 1957.

The Third Finance Commission. A Third Finance Commission, with Sri A.K. Chanda as its Chairman, was appointed in December, 1960. It submitted its report in 1962.

The Fourth Finance Commission. The Fourth Finance Commission with Dr. RAJAMANNAR, retired Chief Justice of the Madras High Court, as its Chairman, was constituted in May, 1964.

The Fifth Finance Commission. A Fifth Finance Commission, headed by Sri Mahavir Tyagi, was constituted in March, 1968, with respect to the quinquennium commencing from 1-4-1969. It submitted its final report in July 1969, and recommended that the States' share of income-tax should be raised to 75 per cent and of Union Excise duties should be raised to 20 per cent.

The Sixth Finance Commission. The Sixth Finance Commission, headed by Sri Brahmananda Reddy, submitted its Report in October, 1973. This Commission was, for the first time, required to go into the question of the debt position of the States and their non-plan capital gap.

The Seventh Finance Commission. A Seventh Finance Commission was appointed in June, 1977 in relation to the next quinquennium from 1979, with Sri Shelat, a retired Judge of the Supreme Court as its Chairman. It submitted its report in October, 1978.

The Eighth Finance Commission. The Eighth Finance Commission was set up in 1982, with ex-Minister, Shri Y.B. Chavan as its head.

The Eighth Finance Commission submitted its report in 1984, but its recommendations, granting moneys to the States, were not implemented by the Government of India, on the ground of financial difficulties and late receipt of the Commission's Report. Obviously, this placed some of the States in financial difficulty and the State of West Bengal raised vehement protest against this unforeseen situation. Responsible authorities in West Bengal threatened litigation but eventually nothing was done presumably because the matter was non-justiciable. Article 280(3) enjoins the Finance Commission to make 'recommendations' to the President and the only duty imposed on the President, by Art. 281, is to lay the recommendations of the Commission before each House of Parliament. It is nowhere laid down in the Constitution that the recommendations of the Commission shall be binding upon the Government of India or that it would give rise to a legal right in favour of the beneficiary States to receive the moneys recommended to be offered to them by the Commission. Of course, non-implementation would cause grave dislocation in States which might have acted upon their anticipation founded on the Commission's Report. The remedy for such dislocation or injustice lies only in the ballot box.

The Ninth Finance Commission. The Ninth Finance Commission, headed by Shri N.K.P. Salve, submitted its reports in 1988 and 1989; all its recommendations have been accepted by the Government.⁷

The Tenth Finance Commission. The Tenth Finance Commission was constituted on 16-6-1992, with Shri K.C. Pant as its Chairman. It submitted its report on 26-11-1994.

The Eleventh Finance Commission. The Eleventh Finance Commission was constituted on 3-7-1998. It submitted its report on 7-7-2000.

The Twelfth Finance Commission. The Twelfth Finance Commission was constituted on 1.11.2002 with Dr. C. Rangarajan as its Chairman. It submitted its report on 17.12.2004.

The Thirteenth Finance Commission. The Thirteenth Finance Commission was constituted on 1.11.2007 with Shri Vijay Kelkar as its Chairman and is expected to submit its report by October, 2009.

Safeguarding the interests of the States in the shared Taxes. By way of safeguarding the interests of the States in the Union taxes which are divisible according to the foregoing provisions, it is provided by the Constitution [Art. 274] that no Bill or amendment which—

- (a) varies the rate of any tax or duty in which the States are interested; or
- (b) affects the principles on which moneys are distributable according to the foregoing provisions of the Constitution; or

- (c) imposes any surcharge on any such tax or duty for the purposes of the Union,

shall be introduced or moved in Parliament except on the recommendation of the President.

Subject to the above condition, however, it is competent for Parliament to increase the rate of any such tax or duty (by imposing a surcharge) for purposes of the Union [Art. 271].

Financial control by the Union in Emergencies.

As in the legislative and administrative spheres, so in financial matters, the normal relation between the Union and the States (under Arts. 268-279) is liable to be modified in different kinds of emergencies. Thus,

(a) While a Proclamation of Emergency [Art. 352(1)] is in operation, the President may by order direct that, for a period not extending beyond the expiration of the financial year in which the Proclamation ceases to operate, all or any of the provisions relating to the division of the taxes between the Union and the States and grants-in-aid shall be suspended [Art. 354]. In the result, if any such order is made by the President, the States will be left to their narrow resources from the revenues under the State List, without any augmentation by contributions from the Union.

(b) While a Proclamation of Financial Emergency [Art. 360(1)] is made by the President, it shall be competent for the Union to give directions to the States—

- (i) to observe such canons of financial propriety and other safeguards as may be specified in the directions;
- (ii) to reduce the salaries and allowances of all persons serving in connection with the affairs of the State, including High Court Judges;
- (iii) to reserve for the consideration of the President all money and financial Bills, after they are passed by the Legislature of the State [Art. 360]

The Union shall have unlimited power of borrowing, upon the security

Borrowing Powers of the Union and the States. of the revenues of India either within India or outside. The Union Executive shall exercise the power subject only to such limits as may be fixed by Parliament from time to time [Art. 292].

The borrowing power of a State is, however, subject to a number of constitutional limitations:

(i) It cannot borrow outside India. Under the *Government of India Act, 1935*, the States had the power to borrow outside India with the consent of the Centre. But this power is totally denied to the States by the Constitution; the Union shall have the sole right to enter into the international money market in the matter of borrowing.

(ii) The State Executive shall have the power to borrow, within the territory of India upon the security of the revenues of the State; subject to the following conditions:

- (a) Limitations as may be imposed by the State Legislature.

(b) If the Union has guaranteed an outstanding loan of the State, no fresh loan can be raised by the State without consent of the Union Government.

(c) The Government of India may itself offer a loan to a State, under a law made 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 Government of India. The Government of India may impose terms in giving its consent as above [Art. 293].

Demand for more Financial power by States. Before closing this Chapter, it should be pointed out that there is a growing demand from some of the States for greater financial powers, by amending the Constitution, if necessary, which was stoutly resisted by Prime Minister Desai.⁸ There are two relevant considerations on this issue:

(i) The steps taken by Pakistan to make nuclear bombs together with the equivocal conduct of China leave no room for complacency in the matter of defence. Hence, the Union cannot yield to any weakening of its resources that would prejudice the defence potential of the country.⁹

(ii) On the other hand, the welfare activities of the States involving huge expenditure, natural calamities, etc., which could not be fully envisaged in 1950, call for a revision of the financial provisions of the Constitution.

The entire subject of 'Centre-State Relations' has been reviewed by the Sarkaria Commission. Its Report is under consideration by the Government.¹⁰

REFERENCES

1. *Coffee Board v. C.T.O.*, AIR 1971 S.C. 870.
2. The maximum limit of the professions tax has been raised from Rs. 250 to Rs. 2500, by the Constitution (60th Amendment) Act, 1988.
3. *State of J. & K. v. Caltex*, AIR 1966 S.C. 1350.
4. In re *Sea Customs Act*, AIR 1963 S.C. 1760 (1777).
5. Inserted by the Constitution (73rd Amendment) Act, 1992, w.e.f. 24-4-1993.
6. Inserted by the Constitution (74th Amendment) Act, 1992, w.e.f. 1-6-1993.
7. *Vide* India, 1990, p. 349.
8. Mrs. Gandhi's Second Government has also adhered to the recommendations of the Administrative Reforms Commission that no amendment of the Constitution is necessary to alter the relation between the Centre and the States, on the ground, *inter alia*, that the financial deficiencies of particular States are being periodically examined and provided for by the Finance Commission, by making larger grants to those States from the Union revenues, according to the provisions of the Constitution.
9. For India's Annual Budget and defence expenditure for 2008-2009, see Table I.
10. *Vide* Author's *Comparative Federalism* (Prentice-Hall of India, 1987).

CHAPTER 26

ADMINISTRATIVE RELATIONS BETWEEN THE UNION AND THE STATES

ANY federal scheme involves the setting up of dual governments and division of powers. But the success and strength of the federal polity depends upon the maximum of co-operation and co-ordination between the governments. The topic may be discussed under two heads:

Need for co-ordination between the Units of the Federation.

- (a) Relation between the Union and States;
- (b) Relation between the States *inter se*.

In the present Chapter the former aspect will be discussed and the inter-State relations will be dealt with in the next Chapter.

(A) TECHNIQUES OF UNION CONTROL OVER STATES

It would be convenient to discuss this matter under two heads—(i) in emergencies; (ii) in normal times.

I. *In Emergencies.* It has already been pointed out that in 'emergencies' the government under the Indian Constitution will work as if it were a unitary government. This aspect will be more fully discussed in Chap. 28.

II. *In Normal Times.* Even in normal times, the Constitution has devised techniques of control over the States by the Union to ensure that the State governments do not interfere with the legislative and executive policies of the Union and also to ensure the efficiency and strength of each individual unit which is essential for the strength of the Union.

Some of these avenues of control arise out of the executive and legislative powers vested in the President, in relation to the States, e.g. :

(i) The power to appoint and dismiss the Governor [Arts. 155-156]; the power to appoint other dignitaries in the State, e.g., Judges of the High Court; Members of the State Public Service Commission [Arts. 217, 317].

(ii) Legislative powers, e.g., previous sanction to introduce legislation in the State Legislature [Art. 304, Proviso]; assent to specified legislation which must be reserved for his consideration [Art. 31A(1), Prov. 1; 31C, Prov. 288(2)]; instruction of President required for the Governor to make

Ordinance relating to specified matters [Art. 213(1), Prov.]; veto power in respect of other State Bills reserved by the Governor [Art. 200, Prov. 1].

These having been explained in the preceding Chapters, in the present chapter we shall discuss other specific agencies for Union control, namely:

- (i) Directions to the State Government.
- (ii) Delegation of Union functions.
- (iii) All-India Services.
- (iv) Grant-in-aid.
- (v) Inter-State Councils.
- (vi) Inter-State Commerce Commission [Art. 307].

The idea of the Union giving directions to the States is foreign and repugnant to a truly 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, the circumstances out of which the federation emerged.

The circumstances under which and the matters relating to which it shall be competent for the Union to give directions to a State have already been stated. The sanction prescribed by the Constitution to secure compliance with such directions remains to be discussed.

It is to be noted that the Constitution prescribes a coercive sanction for the enforcement of the directions issued under any of the foregoing powers, namely, the power of the President to make a Proclamation under Art. 356. This is provided in Art. 365 as follows :

Sanction for enforcement of Directions. "Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution."

And as soon as a Proclamation under Art. 356 is made by the President he will be entitled to assume to himself any of the functions of the State Government as are specified in that Article.

Delegation of Functions. It has already been stated that with the consent of the Government of a State, President may entrust to that Government executive functions of the Union relating to any matter [Art. 258(1)]. While legislating on a Union subject, Parliament may delegate powers to the State Governments and their officers insofar as the statute is applicable in the respective States [Art. 258(2)].

Conversely, a State Government may, with the consent of the Government of India, confer administrative functions upon the latter, relating to State subjects [Art. 258A].

Thus, where it is inconvenient for either Government to directly carry out its administrative functions, it may have those functions executed through the other Government.

It has been pointed out earlier that besides persons serving under the **All-India Services**. Union and the States, there will be certain services 'common to the Union and the States'. These are called 'All-India Services', of which the Indian Administrative Service and the Indian Police Service are the existing examples [Art. 312(2)]. But the Constitution gives the power to create additional All-India Services.¹ If the Council of States declares by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interests so to do, Parliament may by law provide for the creation of one or more all-India services common to the Union and the States and regulate the recruitment, and the conditions of service of persons appointed, to any such service [Art. 312(1)].¹

As explained by Dr. Ambedkar in the Constituent Assembly, the object behind this provision for All-India Services is to impart a greater cohesion to the federal system and greater efficiency to the administration in both the Union and the States:

"The dual policy which is inherent in a federal system is followed in all federations by a dual service. In all Federations, there is a Federal Civil Service and a State Civil Service. The Indian Federation, though a dual polity, will have a dual service, but with one exception. It is recognised that in every country there are certain parts in its administrative set-up which might be called strategic from the point of view of maintaining the standard of administration... There can be no doubt that the standard of administration depends upon the calibre of the civil servants who are appointed to these strategic posts... The Constitution provides that without depriving the States of their right to form their own civil services there shall be an all-India Service, recruited on an all-India basis with common qualifications, with uniform scale of pay and members of which alone could be appointed to these strategic posts throughout the Union."

As stated earlier, Parliament is given power to make such grants as it may deem necessary to give financial assistance to any **Grant-in-Aid.** State which is in need of such assistance [Art. 275]

By means of the grants, the Union would be in a position to correct inter-State disparities in financial resources which are not conducive to an all-round development of the country and also to exercise control and co-ordination over the welfare schemes of the States on a national scale.

Besides this general power to make grants to the States for financial assistance, the Constitution provides for specific grants on two matters: (a) For schemes of development, for welfare of Scheduled Tribes and for raising the level of administration of Scheduled Areas, as may have been undertaken by a State with the approval of the Government of India. (b) To the State of Assam, for the development of the tribal Areas in that State [Proviso. 1-2, Art. 275(1)].

The President is empowered to establish an inter-State Council **Inter-State Council.** [Art. 263] if at any time it appears to him that the public interests would be served thereby. Though the President is given the power to define the nature of the duties to be performed by the Council, the Constitution outlines the three-fold duties that may be assigned to this body. One of these is—

"the duty of *inquiring* into and *advising* upon disputes which may have arisen between States."

The other functions of such Council would be to investigate and discuss subjects of common interest between the Union and the States or between two or more States *inter se*, e.g. research in such matters as agriculture, forestry, public health and to make recommendation for co-ordination of policy and action relating to such subject.

In exercise of this power, the President has so far established a Central Council of Health,² a Central Council of Local Self-Government,³ and a Transport Development Council,⁴ for the purpose of co-ordinating the policy of the States relating to these matters. In fact, the primary object of an Inter-State Council being co-ordination and federal cohesion, this object has been lost sight of, while creating fragmentary bodies to deal with specified matters relying on the statutory interpretation that the singular 'a' before the word 'Council' includes the plural.

The Sarkaria Commission has recommended the constitution of a permanent inter-State Council, which should be charged with the duties set out in (b) and (c) of Art. 263. Such a Council, consisting of six Union Cabinet Ministers and the Chief Ministers of all the States, has been created in April, 1990.⁵

For the purpose of enforcing the provisions of the Constitution relating to the freedom of trade, commerce and intercourse throughout the territory of India [Arts. 301—305], Parliament is empowered to constitute an authority similar to the Inter-State Commerce Commission in the U.S.A. and to confer on such authority such powers and duties as it may deem fit [Art. 307]. No such Commission has, however, been set up.

Apart from the above constitutional agencies for Union control over the States, to ensure a co-ordinated development of India notwithstanding a federal system of government, there are some advisory bodies and conferences held at the Union level, which further the co-ordination of State policy and eliminate differences as between the States. The foremost of such bodies is the Planning Commission.

Though the Constitution specifically mentions several Commissions to achieve various purposes, the Planning Commission, as such, is not to be found in the Constitution. 'Economic and social planning' is a concurrent legislative power [Entry 20, List III]. Taking advantage of this Union power, the Union set up a Planning Commission in 1950, but without resorting to legislation. This extra-constitutional and non-statutory body was set up by a resolution (1950) of the Union Cabinet by Prime Minister Nehru with himself as its first Chairman, to formulate an integrated Five Year⁶ Plan for economic and social development and to act as an advisory body to the Union Government, in this behalf.

Set up with this definite object, the Commission's activities have gradually been extended over the entire sphere of the administration

Extra-constitutional Agencies for setting all-India Problems.

excluding only defence and foreign affairs, so much so, that a critic has described it as "the economic Cabinet of the country as a whole", consisting of the Prime Minister and encroaching upon the functions of constitutional bodies, such as the Finance Commission⁷ and, yet, not being accountable to Parliament. It has built up a heavy bureaucratic organisation⁸ which led Pandit Nehru himself to observe⁷—

"The Commission which was a small body of serious thinkers had turned into a government department complete with a crowd of secretaries, directors and of course a big building."

According to these critics, the Planning Commission is one of the agencies of encroachment upon the autonomy of the States under the federal system. The extent of the influence of this Commission should, however, be precisely examined before arriving at any conclusion. The function of the Commission is to prepare a plan for the "most effective and balanced utilisation of the country's resources", which would initiate "a process of development which will raise living standards and open out to the people new opportunities for a richer and more varied life". It is obvious that the business of the Commission is only to prepare the plans; the implementation of the plans rests with the States because the development relates to mostly State subjects. There is no doubt that at the Union, the Planning Commission has great weight, having the Prime Minister himself as its Chairman. But so far as the States are concerned, the role of the Commission is only advisory. Whatever influence it exerts is only *indirect*, insofar as the States vie with each other in having their requirements included in the national plan. After that is done, the Planning Commission can have no *direct* means of securing the implementation of the plan. If, at that stage, the States are obliged to follow the uniform policy laid down by the Planning Commission, that is because the States cannot do without obtaining financial assistance from the Union.⁹ But, strictly speaking, taking advantage of financial assistance involves voluntary element, not coercion, and even in the *United States* the receipt of federal grants-in-aid is not considered to be a subversion of the federal system, even though it operates as an encroachment upon State autonomy, according to many critics.¹⁰

But there is justification behind the criticism that there is overlapping of work and responsibility owing to the setting up of two high-powered bodies, *viz.*, the Finance Commission and the Planning Commission and the Administrative Reforms Commission has commented upon it.¹¹ There is, in fact, no natural division between 'plan expenditure' and 'non-plan expenditure'. The anomaly has been due to the fact that the makers of the Constitution could not, at that time, envisage the creation of a body like the Planning Commission which has subsequently been set up by executive order. Be that as it may be, the need for co-ordination between the two Commissions is patent, and, ultimately, this must be taken over by the Cabinet or a body such as the National Development Council of which we shall speak just now, unless the two Commissions are unified,—which would require an amendment of the Constitution because the Finance Commission is mentioned in the Constitution.

The working of the Planning Commission, again, has led to the setting up of another extra-constitutional and extra-legal body, namely, the National Development Council.

This Council was formed in 1952, as an adjunct to the Planning Commission, to associate the States in the formulation of the Plans. The functions of the Council are "to strengthen and mobilise the efforts and resources of the nation in support of the plans; to promote common economic policies in all vital spheres and to ensure the balanced and rapid development of all parts of the country", and in particular, are—

- (a) to review the working of the National Plan from time to time;
- (b) to recommend measures for the achievement of the aims and targets set out in the National Plan.

Since the middle of 1967, all members of the Union Cabinet, Chief Ministers of States, the Administrators of the Union Territories and members of the Planning Commission have been members of this Council.¹²

Besides the Planning Commission, the annual conferences, whose number is legion, held under the auspices of the Union, serve to evolve co-ordination and integration even in the State sphere. Apart from conferences held on specific problems, there are annual conferences at the highest level, such as the Governors' Conference, the Chief Ministers' Conference, the Law Ministers' Conference, the Chief Justices' Conference, which are of no mean importance from the standpoint of the Union-State as well as inter-State relations. As Appleby⁸ has observed, it is by means of such contacts rather than by the use of constitutional coercion, that the Union is maintaining a hold over this sub-continent, having 25 autonomous States (now 28):

"No other large and important national government... is so dependent as India on theoretically subordinate but actually rather *distinct units responsible to a different political control*, for so much of the administration of what are recognised as national programmes of great importance to the nation.

The power that is exercised organically in New Delhi is the uncertain and discontinuous power of prestige. It is influence rather than power. Its method is making plans, issuing pronouncements, holding conferences... Any real power in most of the development field is the personal power of particular leaders and the informal, extra-constitutional, extra-administrative power of a dominant party, coherent and strongly led by the same leaders. Dependence of achievement, therefore, is in some crucial ways, apart from the formal organs of governance, in forces which in the future may take quite different forms."⁸

Another non-constitutional body, the National Integration Council, was created in 1986, to deal with welfare measures for the minorities on an all-India basis. The National Front Government revived it in 1990, with a broad-based composition, including not only Union Ministers and Chief Ministers of States, but also representatives of national and regional political parties, labour, women, public figures as well as media representatives. The issues before its first meeting were—

Communal harmony, increased violence by secessionists, the problems in respect of Punjab, Kashmir, Ram Janambhoomi-Babri Masjid.

(B) CO-OPERATION BETWEEN THE UNION AND THE STATES

Apart from the agencies of federal control, there are certain provisions which tend towards a smooth working of both the Union and State Governments, without any unnecessary conflict jurisdiction. These are—

(i) Mutual delegation of functions.

(ii) Immunity from mutual taxation.

(a) As explained already *our* Constitution distributes between the

Mutual Delegation of Functions. Union and the States not only the legislative power but also the executive power, more or less on the same lines [Arts. 73, 162].

The result is that it is not competent for a State to exercise administrative power with respect to Union subjects, or for the Union to take up the administration of any State function, unless authorised in that behalf by any provision in the Constitution. In administrative matters, a rigid division like this may lead to occasional deadlocks. To avoid such a situation, the Constitution has engrafted provisions enabling the Union as well as a State to make a mutual delegation of their respective administrative functions:

(b) As to the delegation of Union functions, there are two methods:

(i) With the *consent* of the State Government, the *President* may, without any legislative sanction, entrust any executive function to that State [Art. 258(1)].

(ii) Irrespective of any consent of the State concerned, *Parliament* may, while legislating with respect to Union subject, confer powers upon a State or its officers, relating to such subject [Art. 258(2)]. Such delegation has, in short, a statutory basis.

(c) Conversely, with the *consent* of the Government of India, the *Governor* of a State may entrust on the Union Government or its officers, functions relating to a State subject, so far as that State is concerned [Art. 258A].

(C) IMMUNITY FROM MUTUAL TAXATION

The system of double government set up by a federal Constitution requires, for its smooth working, the immunity of the property of one Government from taxation by another. Though there is some difference between federal Constitutions as to the extent to which this immunity should go, there is an agreement on the principle that mutual immunity from taxation would save a good deal of fruitless labour in assessment and calculation and cross-accounting of taxes between the two governments (Union and State).

This matter is dealt with in Arts. 285 and 289 of *our* Constitution, relating to the immunity of the Union and a State, respectively.

Immunity of Union Property from State Taxation.

Exemption of Property and Income of a State from Union Taxation.

The property of the Union shall, save insofar as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a state [Art. 285(1)].

Similarly the property of a State is immune from Union taxation [Art. 289(1)]. The immunity, however, does not extend to all Union taxes, as held by *our* Supreme Court,¹³ but is confined only to such taxes as

are levied *on* property. A State is, therefore, not immune from customs duty, which is imposed, not on property, but on the act of import or export of goods.

Not only the 'property' but also the 'income' of a State is exempted from Union taxation. The exemption is, however, confined to the State Government and does not extend to any local authority situated within a State. The above immunity of the income of a State is, again, subject to an overriding power of Parliament as regards any income derived from a commercial activity. Thus—

(a) Ordinarily, the income derived by a State from commercial activities shall be immune from income-tax levied by the Union.

(b) Parliament is, however, competent to tax the income of a State derived from a commercial activity.

(c) If, however, Parliament declares any apparently trading functions as functions 'incidental to the ordinary functions of government', the income from such functions shall be no longer taxable, so long as such declaration stands.¹⁴

REFERENCES

1. Until 1961, no additional All-India Services were created, but later on several new All-India Services were created [*vide* footnote no. 45 under Chap. 30, *Post*].
2. S.R.O. 1418, dated 9-8-1952; *India*, 1959, p. 146
3. *India*, 1957, p. 398
4. *India*, 1979, p. 352. Also Central Council of Indian Medicine, Central Family Welfare Council [*India*, 1982, pp. 101, 108].
5. *Rep. of the Administrative Reforms Commission* (1969), Vol. I, pp. 32-34; *the Report of the Sarkaria Commission on Inter-State Relations*, Part I, paras. 9.3.05-06.
6. The current Plan is the 10th Five Year Plan (2002-07)
7. CHANDRA, *Federation in India*, pp. 213 *et seq.*
8. APPLEBY, *Public Administration in India*, p. 22
9. Under the Second Five Year Plan, 70 per cent of the 'revenue expenditure' and nearly the whole of the 'capital expenditure' on the State Plans were financed by grants from the Union (under Art. 275 of the Constitution), known as 'matching grants'.
10. *Vide* BASU'S *Commentary on the Constitution of India*, 5th Ed., Vol. IV, p. 304; *Steward Machine Co. v. Davis*, (1937) 301 U.S. 548.
11. *Rep. of the Administrative Reforms Commission*, Vol. I, pp. 16-19, 26-39.
12. *Statesman*, 18-7-1976, p. 1
13. *In re, Sea Customs Act*, AIR 1963 S.C. 1760.
14. *A.P.S.R.T.C. v. I.T.O.*, AIR 1964 S.C. 1486 (1491, 1493).

CHAPTER 27

INTER-STATE RELATIONS

I. INTER-STATE COMITY

Though a federal Constitution involves the sovereignty of the Units **Inter-State Comity.** 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 a Unit would require its recognition by, and co-operation of, the other Units of the federation. All federal Constitutions, therefore, lay down certain rules of comity which the Units are required to observe, in their treatment of each other. These rules and agencies relate to such matters as—

- (a) Recognition of the public acts, records and judicial proceedings of each other.
- (b) Extra-judicial settlement of disputes.
- (c) Co-ordination between States.
- (d) Freedom of inter-State trade, commerce and intercourse.

(A) Recognition of Public Acts, etc. Since the jurisdiction of each State is **Full Faith and Credit.** confined to its own territory [Arts. 162, 245(1)], the acts and records of one State might have been refused to be recognised in another State, without a provision to compel such recognition. The Constitution, therefore, provides 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” [Art. 261(1)].

This means that duly authenticated copies of statutes or statutory instruments, judgments or orders of one State shall be given recognition in another State in the same manner as the statutes, etc., of the latter State itself. Parliament has the power to legislate as to the mode of proof of such acts and records or the effects thereof [Art. 261(2)].

(B) Extra-judicial Settlement of Disputes. Since the States, in every **Prevention and Settlement of Disputes.** federation, normally act as independent units in the exercise of their internal sovereignty, conflicts of interest between the units are sure to arise. Hence, in order to maintain the strength of the Union, it is essential that there should be adequate provision for judicial determination of disputes between the units and for settlement of disputes by extra-judicial bodies as well as their prevention by consultation and joint action. While Art. 131 provides for the judicial determination of disputes between States

by vesting the Supreme Court with exclusive jurisdiction in the matter, Art. 262 provides for the adjudication of *one class* of such disputes by an extra-judicial tribunal, while Art. 263 provides for the prevention of inter-State disputes by investigation and recommendation by an administrative body. Thus—

(i) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley and also provide for the exclusion of the jurisdiction of all Courts, including the Supreme Court, to entertain such disputes [Art. 262].

In exercise of this power, Parliament has enacted the Inter-State Water Disputes Act, 1956, providing for the constitution of an *ad hoc* Tribunal for the adjudication of any dispute arising between two or more States with regard to the waters of any inter-State river or river valley.

(ii) The President can establish an inter-State Council for enquiring into and advising upon inter-State disputes, if at any time it appears to him that the public interests would be served by the establishment of such Council [Art. 263(a)].

(C) Co-ordination between States. The power of the President to set up inter-State Councils may be exercised not only for advising upon disputes, but also for the purpose of investigating and discussing subjects in which some or all of the States or the Union and one or more of the States have a common interest. In exercise of this power, the President has already constituted the Central Council of Health, the Central Council of Local Self-Government, the Central Council of Indian Medicine,¹ Central Council of Homeopathy.

In this connection, it should be mentioned that advisory bodies to advise on inter-State matters have also been established under statutory authority:

(a) Zonal Councils. Zonal Councils have been established by the States Reorganisation Act, 1956 to advise on matters of common interest to each of the five zones into which the territory of India has been divided,—Northern, Southern, Eastern, Western and Central.

It should be remembered that these Zonal Councils do not owe their origin to the Constitution but to an Act of Parliament, having been introduced by the States Reorganisation Act, as a part of the scheme of reorganisation of the States with a view to securing co-operation and co-ordination as between the States, the Union Territories and the Union, particularly in respect of economic and social development. The creation of the Zonal Councils was a logical outcome of the reorganisation of the States on a linguistic basis. For, if the cultural and economic affinity of linguistic States with their contiguous States was to be maintained and their common interests were to be served by co-operative action, a common meeting ground of some sort was indispensable. The object of these Councils, as Pandit Nehru envisaged it, is to "develop the habit of co-operative working". The presence of a Union Minister, nominated by the Union Government, in

each of these Councils (and the Chief Ministers of the States concerned) also furthers co-ordination and national integration through an extra-constitutional advisory organisation, without undermining the autonomy of the States. If properly worked, these Councils would thus foster the 'federal sentiment' by resisting the separatist tendencies of linguism and provincialism.

(i) The *Central Zone*, comprising the States of Uttar Pradesh, Madhya Pradesh, Chhattisgarh and Uttarakhand.

(ii) The *Northern Zone*, comprising the States of Haryana, Himachal Pradesh, Punjab, Rajasthan, Jammu & Kashmir, and the Union Territories of Delhi & Chandigarh.

(iii) The *Eastern Zone*, comprising the States of Bihar, West Bengal, Orissa, Sikkim and Jharkhand.

(iv) The *Western Zone*, comprising the States of Gujarat, Maharashtra and Goa and the Union Territories of Dadra & Nagar Haveli; Daman & Diu.

(v) The *Southern Zone*, comprising the States of Andhra Pradesh, Karnataka, Tamil Nadu, Kerala, and the Union Territory of Pondicherry.

(vi) The *North Eastern Zone*, comprising the States of Assam, Meghalaya, Nagaland, Manipur, Tripura, Mizoram, Arunachal Pradesh.

Each Zonal Council consists of the Chief Minister and two other Ministers of each of the States in the Zone and the Administrator in the case of a Union Territory. There is also provision for holding joint meetings of two or more Zonal Councils. The Union Home Minister has been nominated to be the common chairman of all the Zonal Councils.

The Zonal Councils, as already stated, discuss matters of common concern to the States and Territories comprised in each Zone, such as, economic and social planning, border disputes, inter-State transport, matters arising out of the reorganisation of States and the like, and give advice to the Governments of the States concerned as well as the Government of India.²

Besides the Zonal Councils, there is a North-Eastern Council, set up under the North-Eastern Council Act, 1971, to deal with the common problems of Assam, Meghalaya, Manipur, Nagaland, Tripura, Arunachal Pradesh and Mizoram.

(b) The River Boards Act, 1956, provides for the establishment of a **River Board** for the purpose of advising the Governments interested in relation to the regulation or development of an inter-State river or river valley.

(c) The inter-State Water Disputes Act, 1956, provides for the reference of an *inter-State* river dispute for arbitration by a **Water Disputes Tribunal**, whose award would be final according to Art. 262(2).

II. FREEDOM OF INTER-STATE TRADE AND COMMERCE

The great problem of any federal structure is to minimise inter-State barriers as much as possible, so that the people may feel that they are members of one nation, though they may, individually, be residents of any

of the Units of the Union. One of the means to achieve this object is to guarantee to every citizen the freedom of movement and residence throughout the country. Our Constitution guarantees this right by Art. 19(1)(d) & (e).

No less important is the freedom of movement or passage of commodities and of commercial transactions between one part of the country and another. The progress of the country as a whole also requires free flow of commerce and intercourse as between different parts, without any barrier. This is particularly essential in a federal system. This freedom

Need for the Freedom of Trade and Commerce. is sought to be secured by the provisions [Arts. 301—307] contained in Part XIII of our Constitution. These provisions, however, are not confined to *inter-State* freedom but include *intra-State* freedom as well. In other words, subject to the exceptions laid down in this Part, no restrictions can be imposed upon the flow of trade, commerce and intercourse, not only as between one State and another but as between any two points within the territory of India whether any State border has to be crossed or not.

Article 301 thus declares—

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

Art. 303(1) declares that neither the Parliament nor the State Legislature shall have power to make any law giving, or authorising the giving of, any preference to one State over another; or making or authorising the making of, any discrimination between one State and another, in the field of trade, commerce or intercourse. Hence, if a State prohibits the sale of lottery tickets of others and promotes that of its own, it would be discriminatory and violative of Art. 303.³

The limitations imposed upon the above freedom by the other provisions of Part XIII are—

(a) Non-discriminatory restrictions may be imposed by Parliament, in the public interest [Art. 302].

By virtue of this power, Parliament has enacted the Essential Commodities Act, 1955, which empowers, 'in the interest of the general public', the Central Government to control the production, supply and distribution of certain 'essential commodities', such as coal, cotton, iron and steel, petroleum.

(b) Even discriminatory or preferential provisions may be made by Parliament, for the purpose of dealing with a scarcity of goods arising in any part of India [Art. 303(2)].

(c) Reasonable restrictions may be imposed by a State "in the public interest" [Art. 304(b)].

(d) Non-discriminatory taxes may be imposed by a State on goods imported from other States or Union Territories, similarly as on *intra-State* goods [Art. 304(a)].

(e) The appropriate Legislature may make a law [under Art. 19(6)(ii)] for the carrying on by the State, or by a corporation owned or controlled by

the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Before leaving this topic, we should notice the difference in the scope **Freedoms under** of the provisions of Arts. 19(1)(g) and 301 both of **Arts. 19(1)(g) and** which guarantee the freedom of trade and commerce. 301.

Though this question has not been finally settled, it may be stated broadly that Art. 19(1)(g) looks at the freedom from the standpoint of the *individual* who seeks to carry on a trade or profession and guarantees such freedom throughout the territory of India subject to reasonable restrictions, as indicated in Art. 19(5). Article 301, on the other hand, looks at the freedom from the standpoint of the movement or passage of commodities or the carrying on of commercial transactions between *one place and another*, irrespective of the individuals who may be engaged in such trade or commerce. The only restrictions that can be imposed on the freedom declared by Art. 301 are to be found in Arts. 302—305. But if either of these freedoms be restricted, the aggrieved individual⁴ or even a State⁵ may challenge the constitutionality of the restriction, whether imposed by an executive order or by legislation.⁴ When there is a violation of Art. 301 or 304, there would ordinarily be an infringement of an individual's fundamental right guaranteed by Art. 19(1)(g), in which case, he can bring an application under Art. 32, even though Art. 301 or 304 is not included in Part III as a fundamental right.⁶

REFERENCES

1. *India*, 1982, p. 101.
2. After a lapse of some three years, sittings of Zonal Councils have been revived from 1978 [STATESMAN, 8-9-1978, p. 9]. Yet, it must be said that this scheme has *not* been fully utilised [see Author's *Comparative Federalism*, 1987, pp. 574ff.].
3. *B.R. Enterprises v. State of U.P.*, (1999) 9 S.C.C. 700.
4. *Atiabari Tea Co. v. State of Assam*, AIR 1961 S.C. 232; *Automobile Transport v. State of Rajasthan*, AIR 1962 S.C. 1406.
5. *State of Rajasthan v. Mangilal*, (1969) 2 S.C.C. 710 (713); *State of Assam v. Labanya Prabha*, AIR 1967 S.C. 1574 (1578).
6. *Syed Ahmed v. State of Mysore*, AIR 1975 S.C. 1443.

CHAPTER 28

EMERGENCY PROVISIONS

FEDERAL government, according to *Bryce*, means weak government because it involves a division of power. Every modern federation, however, has sought to avoid this weakness by providing for the assumption of larger powers by the federal government whenever unified action is necessary by reason of emergent circumstances, internal or external. But while in countries like the *United States* this expansion of federal power takes place through the wisdom of judicial interpretation, in *India*, the Constitution itself provides for conferring extraordinary powers upon the Union in case of different kinds of emergencies. As has been stated earlier, the Emergency provisions of our Constitution enable the federal government to acquire the strength of a unitary system whenever the exigencies of the situation so demand.

The Constitution provides for *three different kinds* of abnormal situations which call for a departure from the normal governmental machinery set up by the Constitution:—
Different kinds of Emergencies. viz., (i) An emergency due to war, external aggression or *armed rebellion*¹ [Art. 352]. This may be referred to as 'national emergency', to distinguish it from the next category. (ii) Failure of constitutional machinery in the States [Art. 356]. (iii) Financial emergency [Art. 360].

An 'armed rebellion' poses a threat to the security of the State as distinguished from 'internal disturbance' contemplated under Art. 355.²

Where the Constitution simply uses the expression 'Proclamation of Emergency', the reference is [Art. 366(18)] to a Proclamation of the first category, i.e., under Art. 352.

The Emergency provisions in Part XVIII of the Constitution [Arts. 352-360] have been extensively amended by the 42nd **42nd and 44th Amendments.** Amendment (1976) and the 44th Amendment (1978) Acts, so that the *resultant* position may be stated for the convenience of the reader, as follows:

I. A 'Proclamation of Emergency' may be made by the President at any time he is satisfied that the security of India or any part thereof has been threatened by war, external aggression or *armed rebellion*¹ [Art. 352]. It may be made even before the *actual occurrence* of any such disturbance, e.g., when external aggression is apprehended.

An 'Emergency' means the existence of a condition whereby the security of India or any part thereof is threatened by war or external aggression or *armed rebellion*.¹ A state of emergency exists under the Constitution when the President makes a 'Proclamation of Emergency'. The actual occurrence of war or any armed rebellion, is not necessary to justify a Proclamation of Emergency of the President. The President may make such a Proclamation if he is satisfied that there is an imminent danger of such external aggression or *armed rebellion*. But no such Proclamation can be made by the President unless the Union Ministers of Cabinet rank, headed by the Prime Minister, recommend to him, *in writing*, that such a Proclamation should be issued [Art. 352(3)].

While the 42nd Amendment made the declaration immune from judicial review, that fetter has been removed by the 44th Amendment, so that the constitutionality of the Proclamation can be questioned in a Court on the ground of *mala fides*².

Every such Proclamation must be laid before both Houses of Parliament and shall cease to be in operation unless it is approved by resolutions of both Houses of Parliament within *one month* from the date of its issue.

Until the 44th Amendment of 1978, there was no Parliamentary control over the revocation of a Proclamation, once the issue of the Proclamation had been approved by resolutions of the Houses of Parliament.

After the 44th Amendment, a Proclamation under Art. 352 may come to an end in the following ways:

(a) On the expiry of *one month* from its issue, unless it is approved by resolutions of both Houses of Parliament before the expiry of that period. If the House of the People is dissolved at the date of issue of the Proclamation or within one month thereof, the Proclamation may survive until 30 days from the date of the first sitting of the House after its reconstitution, provided the Council of States has in the meantime approved of it by a resolution [*Cl. (4)*].

(b) It will get a fresh lease of six months from the date it is approved by resolutions of both Houses of Parliament [*Cl. 5*], so that it will terminate at the end of six months from the date of last such resolution.

(c) Every such resolution under Cls. (4)-(5), must be passed by either House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting [*Cl. (6)*].

(d) The President must issue a Proclamation of revocation any time that the House of the People passes a resolution *disapproving* of the issue or continuance of the Proclamation [*Cl. (7)*]. For the purpose of convening a special sitting of the House of the People for passing such a resolution of disapproval, not less than 1/10 of the Members of the House may give a notice in writing to the Speaker or to the President (when the House is not in session) to convene a special sitting of the House for this purpose. A special

sitting of the House shall be held within 14 days from the date on which the notice is received by the Speaker or as the case may be by the President [Cl. (8)].

It may be that an armed rebellion or external aggression has affected only a *part* of the territory of India which is needed to be brought under greater control. Hence, it has been provided, by the 44th Amendment, that a Proclamation under Art. 352 may be made in respect of the whole of India or only a part thereof.

The Executive and the Legislature of the Union shall have extraordinary powers during an emergency.

The effects of a Proclamation of Emergency may be discussed under four heads—(i) Executive; (ii) Legislative.; (iii) Financial; and (iv) As to Fundamental Rights.

(i) *Executive.* When a Proclamation of Emergency has been made, the executive power of the Union shall, during the operation of the Proclamation, extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised [Art. 353(a)].

In normal times, the Union Executive has the power to give directions to a State, which includes only the matters specified in Arts. 256-257.

But under a Proclamation of Emergency, the Government of India shall acquire the power to give directions to a State on ~~any~~ matter, so that though the State Government will not be suspended, it will be under the complete control of the Union Executive, and the administration of the country insofar as the Proclamation goes, will function as under a unitary system with local sub-divisions.

(ii) *Legislative.* (a) While a Proclamation of Emergency is in operation, Parliament may, by law, extend the normal life of the House of the People (5 years) for a period not exceeding one year at a time and not extending in any case beyond a period of 6 months after the Proclamation has ceased to operate [Proviso to Art. 83(2), ante]. (This power also was used by Mrs. Gandhi in 1976—Act 109 of 1976).

(b) As soon as a Proclamation of Emergency is made, the legislative competence of the Union Parliament shall be automatically widened and the limitation imposed as regards List II, by Art. 246(3), shall be removed. In other words, during the operation of the Proclamation of Emergency, Parliament shall have the power to legislate as regards List II (State List) as well [Art. 250(1)]. Though the Proclamation *will not suspend the State Legislature*, it will suspend the distribution of legislative powers between the Union and the State, so far as the Union is concerned,—so that the Union Parliament may meet the emergency by legislation over any subject as may be necessary as if the Constitution were unitary.

(c) In order to carry out the laws made by the Union Parliament under its extended jurisdiction as outlined above, Parliament shall also have the power to make laws conferring powers, or imposing duties (as may be necessary for the purpose), upon the Executive of the Union in respect of

any matter, even though such matter normally belonged to State jurisdiction [Art. 353(b)].

(iii) *Financial.* During the operation of the Proclamation of Emergency the President shall have the constitutional power to modify the provisions of the Constitution relating to the allocation of financial resources [Arts. 268-279] between the Union and the States, by his own Order. But no such Order shall have effect beyond the financial year in which the Proclamation itself ceases to operate, and, further, such Order of the President shall be subject to approval by Parliament [Art. 354].

(iv) *As regards Fundamental Rights.* Articles 358-359 lay down the effects of a Proclamation of Emergency upon fundamental rights. As amended up to 1978, by the 44th Amendment Act, the following results emerge—

I. While Art. 358 provides that the State would be free from the limitations imposed by Art. 19, so that these rights would be non-existent against the State during the operation of a Proclamation of Emergency, under Art. 359, the right to *move the Courts* for the enforcement of the rights or any of them, may be suspended, by Order of the President.

II. While Art. 359 would apply to an Emergency declared on any of the grounds specified in Art. 352, i.e., war, external aggression or armed rebellion, the application of Art. 358 is confined to the case of Emergency on grounds of war or external aggression only.

III. While Art. 358 comes into operation automatically to suspend Art. 19 as soon as a Proclamation of Emergency on the ground of war or external aggression is issued, to apply Art. 359 a further Order is to be made by the President, specifying those Fundamental Rights against which the suspension of enforcement shall be operative.

IV. Art. 358 suspends Art. 19; the suspension of enforcement under Art. 359 shall relate only to those Fundamental Rights which are specified in the President's Order, *excepting Arts. 20 and 21*. In the result, notwithstanding an Emergency, access to the Courts cannot be barred to enforce a prisoner's or detenu's right under Art. 20 or 21.⁴

V. Neither Art. 358 nor 359 shall have the effect of suspending the operation of the relevant fundamental right unless the law which affects the aggrieved individual contains a recital to the effect that "such law is in relation to the Proclamation of Emergency". In the absence of such recital in the law itself, neither such law nor any executive action taken under it shall have any immunity from challenge for violation of a fundamental right during operation of the Emergency [Cl. (2) of Art. 358 and Cl. (1B) of Art. 359].

A. The *first* Proclamation of Emergency under Art. 352 was made by **Uses of the Emergency Powers.** the President on October 26, 1962, in view of the Chinese aggression in the NEFA. It was also provided by a Presidential Order, issued under Art. 359, that a person arrested or imprisoned under the Defence of India Act would not be entitled to move any Court for the enforcement of any of his Fundamental

Rights under Art. 14, 19 or 21. This Proclamation of Emergency was revoked by an order made by the President on January 10, 1968.

B. The *second* Proclamation of Emergency under Art. 352 was made by the President on December 3, 1971 when Pakistan launched an undeclared war against India.

A Presidential Order under Art. 359 was promulgated on December 25, 1974, in view of certain High Court decisions releasing some detenus under the Maintenance of Internal Security Act, 1971 for smuggling operations. This Presidential Order suspended the right of any such detenu to move *any* Court for the enforcement of his fundamental rights under Arts. 14, 21 and 22, for a period of six months or during the continuance of the Proclamation of Emergency of 1971, whichever expired earlier.

Though there was a ceasefire on the capitulation of Pakistan in Bangladesh in December, 1971, followed by the Shimla Agreement between India and Pakistan, the Proclamation of 1971 was continued, owing to the persistence of hostile attitude of Pakistan. It was thus in operation when the third Proclamation of June 25, 1975 was made.

C. While the two preceding Proclamations under Art. 352 were made on the ground of *external* aggression, the *third* Proclamation of Emergency under Art. 352 was made on June 25, 1975, on the ground of "*internal disturbance*".⁵

The "internal disturbance", which was cited in the Press Note relating to the Proclamation, was that 'certain persons have been inciting the Police and the Armed Forces against the discharge of their duties and their normal functioning'.⁵ Both the second and third proclamations were revoked on 21st March, 1977.

It should be noted that after 1978, it is not possible to issue a Proclamation of Emergency on the ground of 'internal disturbance', short of an armed rebellion, for, the words 'internal disturbance' have been substituted by the words 'armed rebellion', by the Constitution (44th Amendment) Act, 1978.¹

II. The Constitution provides for carrying on the administration of a State in case of a failure of the constitutional machinery.

(a) It is a duty of the Union to ensure that the government of every State is carried on in accordance with the provisions of the Constitution [Art. 355]. So, the President is empowered to make a

B. Proclamation of Failure of Constitutional Machinery in a State. Proclamation, when he is satisfied that the Government of a State cannot be carried on in accordance with the provisions of the Constitution, either on the report of the Governor of the State or otherwise [Art. 356(1)]. (For uses of this power, see *below*.)

(b) Such Proclamation may also be made by the President where any State has failed to comply with, or to give effect to, any directions given by the Union, in the exercise of its executive power to the State [Art. 365].⁶

By such Proclamation, the President may—

- (a) assume to himself all or any of the functions of the Executive of the State or of any other authority save the High Court; and
- (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament. In short, by such Proclamation, the Union would assume control over all functions in the State administration, except judicial.

When the State Legislature is thus suspended by the Proclamation, it shall by competent—

- (a) for Parliament to delegate the power to make laws for the State to the President or any other authority specified by him; (b) for the President to authorise, when the House of the People is not in session, expenditure from the Consolidated Fund of the State pending the sanction of such expenditure from Parliament; and (c) for the President to promulgate Ordinances for the administration of the State when Parliament is not in session [Art. 357].

The duration of such Proclamation shall ordinarily be for *two* months. If, however, the Proclamation was issued when the House of the People was dissolved or dissolution took place during the period of the two months above-mentioned, the Proclamation would cease to operate on the expiry of 30 days from the date on which the reconstituted House of the People first met, unless the Proclamation is approved by Parliament. The two months' duration of such Proclamation can be extended by resolutions passed by both Houses of Parliament for a period of six months at a time, subject to a maximum duration of three years [Art. 356(3)-(4)]; but if the duration is sought to be extended beyond *one* year, two other conditions, as inserted by the 44th Amendment Act, 1978, have to be satisfied, namely, that—

Conditions for extension of duration beyond one year. (a) a Proclamation of Emergency is in operation, in the whole of India or as the case may be, in the whole or any part of the State, at the time of the passing of such resolution, and

(b) the Election Commission certifies that the continuance in force of the Proclamation approved under Cl. (3) 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.

By the 42nd Amendment, 1976, the President's satisfaction for the making of a Proclamation under Art. 356 had been made immune from judicial review; but the 44th Amendment of 1978 has removed that fetter, so that the Courts may now interfere if the Proclamation is *mala fide*³ or the reasons disclosed for making the Proclamation have no reasonable nexus with the satisfaction of the President.³

The Author's views expressed above have been upheld by the **Judicial Review.** Supreme Court in *S.R. Bommai's case*⁷ where a nine-Judge Bench held that the validity of a Proclamation under Art. 356 can be judicially reviewed to examine (i) whether it was

issued on the basis of any material, (ii) whether the material was relevant, (iii) whether it was issued *mala fide*.

The Proclamation in case of failure of the constitutional machinery differs from a Proclamation of 'Emergency' on the following points:

(i) A Proclamation of Emergency may be made by the President only when the *security* of India or any part thereof is threatened by war, external aggression or armed rebellion. A Proclamation in respect of failure of the constitutional machinery may be made by the President when the constitutional government of State cannot be carried on for any reasons, not necessarily connected with *war or armed rebellion*.

(ii) When a Proclamation of Emergency is made, the Centre shall get no power to *suspend* the State Government or any part thereof. The State Executive and Legislature would continue in operation and retain their powers. All that the Centre would get are *concurrent* powers of legislation and administration of the State.

But under a Proclamation in case of failure of the constitutional machinery, the State Legislature would be suspended and the executive authority of the State would be assumed by the President in whole or in part. [This is why it is popularly referred to as the imposition of the *'President's rule'*.]

(iii) Under a Proclamation of Emergency, Parliament can legislate in respect of State subjects only by itself; by under a Proclamation of the other kind, it can delegate its powers to legislate for the State,—to the President or any other authority specified by him.

(iv) In the case of a Proclamation of failure of constitutional machinery, there is a maximum limitation to the power of Parliament to extend the operation of the Proclamation, namely, three years [*Art. 356(4), Proviso 1*], but in the case of a Proclamation of Emergency, it may be continued for a period of six months by each resolution of the Houses of Parliament approving its continuance, so that if Parliament so approves, the Proclamation may be continued indefinitely as long as the Proclamation is not revoked or the Parliament does not cease to make resolutions approving its continuance [*new Cl. (5) to Art. 352*, inserted by the 44th Amendment Act, 1978].

Use of the Power. It is clear that the power to declare a Proclamation of failure of constitutional machinery in a State has nothing to do with any external aggression or armed rebellion; it is an extraordinary power of the Union to meet a *political* breakdown in any of the units of the federation [or the failure by such Unit to comply with the federal directives (*Art. 365*)], which might affect the national strength. It is one of the coercive powers at the hands of the Union to maintain the democratic form of government, and to prevent factional strifes from paralysing the governmental machinery, in the States. The importance of this power in the political system of India can hardly be overlooked in view of the fact that it has been used not less than 108 times during the first 50 years of the working of the Constitution (till March 2001).

For details see Table XXI.

**Frequent and
improper use of
the power under
Art. 356, depre-
cated.**

From the foregoing history of the use of the power conferred upon the Union under Art. 356, it is evident that it is a drastic coercive power which takes nearly the substance away from the normal federal polity prescribed by the Constitution. It is, therefore, to be always remembered that the provision for such drastic power was defended by Dr. Ambedkar in the Constituent Assembly⁸ on the plea that the use of this drastic power would be a *matter of the last resort*:

... the proper thing we ought to expect is that such articles will never be called into operation and *that they would remain a dead-letter*. If at all they are brought into operation, I hope the President who is endowed with this power *will take proper precautions* before actually suspending the administration of the Province.

It is natural, therefore, that the propriety of the use of this provision (which was envisaged by Dr. B.R. Ambedkar⁸ to 'remain a dead-letter'), on numerous occasions (more than any other provision of the Constitution), has evoked criticism from different quarters. The judgment of the Supreme Court in the *Rajasthan case*⁶ also did not lay down the law correctly. The views of the Author were expressed in detail in the 16th Edition of this book (at pp. 336-37). In view of *S.R. Bommai's case*⁷ (nine-Judge Bench) the comments have been replaced by the law as declared by the Supreme Court, which affirm the Author's view.

In *S.R. Bommai's case*⁷ the Court has clearly subscribed to the view

**Power under Art.
356 must be used
rarely.**

that the power under Art. 356 is an exceptional power and has to be resorted to only occasionally to meet the exigencies of special situations. The Court quoted the Sarkaria Commission Report to give examples of situations when such power should *not* be used. It made it clear that Art. 356 cannot be invoked for superseding a duly constituted ministry and dissolving the Assembly on the sole ground that in the elections to the Lok Sabha, the ruling party in the State suffered a massive defeat.

After *Bommai's case*⁷ it is settled that the Courts possess the power to review the Proclamation on the grounds mentioned above [see under "JUDICIAL REVIEW", ante]. This will surely have a restraining effect on the tendency to use the power on flimsy grounds.

**President not to
take irreversible
steps under Art.
356(1) (a), (b) & (c).**

In *S.R. Bommai's case*⁷ it has been pronounced that till the Proclamation is approved by both Houses of Parliament, it is not permissible for the President to take any irreversible action under Cls. (a), (b) and (c) of Art. 356(1). Hence the Legislative Assembly of a State cannot be dissolved before the Proclamation is approved by both Houses of Parliament.

**Court's Power to
restore status quo
ante.**

If the Court holds the Proclamation to be invalid then in spite of the fact that it has been approved by the Parliament, the Court has the power to restore, in its discretion, *status quo ante*, i.e. the Court may order that the dissolved Ministry and Assembly will be revived.⁷

Illustration of cases where resort to Art. 356 would not be proper

Some of the situations which do *not* amount to failure of constitutional machinery are given below. They are based on the report of the Sarkaria Commission and have the approval of the Court in *S.R. Bommai's case*.⁹

(1) a situation of maladministration in a State, where a duly constituted ministry enjoys support of the Assembly.

(2) where a Ministry resigns or is dismissed on losing majority support and the Governor recommends imposition of President's Rule without exploring the possibility of installing an alternative government.

(3) where a Ministry has not been defeated on the floor of the House, the Governor on his subjective assessment recommends supersession and imposition of President's Rule.

(4) where in general elections to the Lok Sabha the ruling party in the State has suffered a massive defeat.

(5) where there is situation of internal disturbance but all possible measures to contain the situation by the Union in discharge of its duty, under Art. 355, have not been exhausted.

(6) where no prior warning or opportunity is given to the State Government to correct itself in cases where directives were issued under Arts. 256, 257 etc.

(7) where the power is used to sort out intra-party problems of the ruling party.

(8) the power cannot be legitimately exercised on the sole ground of stringent financial exigencies of the State.

(9) the power cannot be invoked merely on the ground that there are serious allegations of corruption against the Ministry.

(10) exercise of the power for a purpose extraneous or irrelevant to those which are permitted by the Constitution would be vitiated by legal *mala fides*.

A proper occasion for use of this power would, of course, be when a Ministry *resigns* after defeat in the Legislature and no other Ministry

Proper occasions for use suggested. commanding a majority in the Assembly can at once be formed. Dissolution of the Assembly may be a radical solution, but, that being expensive, a resort to

Art. 356 may be made to allow the state of flux in the Assembly to subside so as to obviate the need for a dissolution, if possible. A similar situation would arise where the party having a majority *declines* to form a Ministry and the Governor fails in his attempt to find a coalition Ministry. Another obviously proper use is mentioned in Art. 365 of the Constitution itself; but curiously, none of the numerous past occasions *specifically* refers to this contingency. The provision in Art. 365 relates to the failure of a State Government to carry out the directives of the Union Government which the latter has the authority under the Constitution to issue (*e.g.*, under Arts. 256,

257). The Union may also issue such a directive under the implied power conferred by the latter part of Art. 355, "to ensure that the government of every State is carried on in accordance with the provisions of this Constitution".⁶

Effect of 44th Amendment on Art. 356. The only change that the 44th Amendment Act, 1978 (sponsored by the Janata Government), has made in this Article, is to substitute Cl. (5) to limit the duration of a Proclamation made under Art. 356 to a period of *one year* unless a Proclamation of Emergency under Art. 352 is in operation and the Election Commission certifies that it is not possible to hold elections to the Legislative Assembly of the State concerned immediately, in which case, it may be extended up to three years, by successive resolutions for continuance being passed by both Houses of Parliament.

It is to be noted that the foregoing amendment has not specified any conditions or circumstances under which the power under Art. 356 can be used. Hence, in the light of the *Rajasthan decision*,⁶ no legal challenge could be offered when Mrs. Gandhi repeated the Janata experiment in February, 1980, in the same nine States, on the same ground, *viz.*, that the Janata Party, which was in power in those States, was routed in the *Lok Sabha* election.

III. If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect [Art. 360(1)].

The consequences of such a declaration are :

(a) During the period any such Proclamation is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions.

(b) Any such direction may also include—

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

(ii) a provision requiring all Money Bills or other financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State.

(c) It shall be competent for the President during the period that any such Proclamation is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts [Art. 360(3)-(4)].

The duration of such Proclamation will be similar to that of a Proclamation of Emergency, that is to say, it shall ordinarily remain in force for a period of *two months*, unless before the expiry of that period, it is approved by resolutions of both Houses of Parliament. If the House of the

People is dissolved within the aforesaid period of two months, the Proclamation shall cease to operate on the expiry of thirty days from the date on which the House of the People first sits after its reconstitution, unless before the expiry of that period of thirty days it has been approved by both Houses of Parliament. It may be revoked by the President at any time, by making another Proclamation.

No use of Art. 360 has ever been made.

REFERENCES

1. Since the amendment of Art. 352 in 1978, it is no longer possible to make a Proclamation of Emergency, on the ground of mere 'internal disturbance' which does not constitute an 'armed rebellion'.
2. *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 S.C.C. 109 (paras 31 and 32); A.I.R. 1998 S.C. 431.
3. Cf. *State of Rajasthan v. Union of India*, AIR 1977 S.C. 1361 (paras 124, 144); *Minerva Mills v. Union of India*, AIR 1980 S.C. 1789 (paras 103-04); *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.
4. This amendment, saving Arts. 20 and 21 from the mischief of Art. 359, has been made by the 44th Amendment Act, 1978 in order to *supersede* the view taken in the case of *A.D.M. v. Shukla*, AIR 1976 S.C. 1207, that when Art. 21 is suspended by an Order under Art. 359, the person imprisoned or detained "loses his *locus standi* to regain his liberty on *any* ground".
5. An official version of the reasons which impelled Mrs. Gandhi to assume that 'the security of India was threatened by internal disturbances' may be had from *India, 1976*, pp. i-ii. This Proclamation was revoked on March 21, 1977.
6. *State of Rajasthan v. Union of India*, AIR 1977 S.C. 1361 (paras 58-59).
7. *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.
8. C.A. Debates IX, p. 177.
9. *Ibid.*, f.n. 7, para 82.

PART III

Government of the States

1. The Central Government.

As already seen, Central Govt. is responsible primarily to the Central Government, having supreme supremacy of administration for the Union and all India outside the States. The Constitution contains provisions for the autonomy of State. It has drawn a compromise between the two. Article 163 of the Constitution, in Part VI of the Constitution, which is applicable to all the States save the State of Jammu & Kashmir, specifies the composition of Council of Ministers of the Government for a State which will be explained in Chap. 17.

Generally speaking the position of Governor in the States is the same as that of the Lieutenant-Governor, namely, a position which entitles the Governor to be a member of the Executive Council of the State Government and also to act according to the advice of the Governor of the State Government in its general affairs. Some States will have this power except in respect of financial Government which will be exercised by the Governor himself "in his discretion".¹ In other States,

2. The Governor.

As the head of the executive power of a State, the Governor has no legislative power. He is the civilian chief of the head of the executive government, and is the representative of the President of the Union. The executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. Normally, there will be a Governor for each State. There may be a group of three or more governors in case of the union territories or for certain parts of the country.

The Governor of a State is not elected but is appointed by the Government and President and holds the office at the pleasure of the Government and is removed by the order of India who has completed 30 years of age.² He has no right to be the chairman of any committee of the Government of the Union or of any State govt. and so. This is the law as the position of a Governor does not stand mentioned in a Legislative Law.³ A Member of Parliament is appointed Governor, he ceases to be a Member immediately upon such appointment.

The original term of a Governor's office shall be five years, but it may be renounced earlier before:

(a) Removal by the President at whose pleasure he holds the office [Art. 163(1); in derogation of Art. 163(2)].

CHAPTER IV

PART V

Local Government

This chapter deals with a unit of local administration which may be called a Panchayat. It is an administrative body which has been created under the Constitution of India. While India became independent in 1947, it did not have any form of local government at the national level. The British Government had established only a few small units of local government in the areas under the Raj. There were no forms of village organisations. However, it was also found that people in certain areas used various forms of self-government. Therefore, in the Constitutional Conference of 1947, the Indian Delegates were asked to include the term "Panchayat" in the Constitution.

In the Conference of 1947, Mr. Gokhale, the leader of the Delegation of the Congress, proposed to include the Panchayat in the Constitution by giving it the status of a local government. By means of this proposal, new laws were enacted by the State governments giving powers of administration, taxation, and other related rights to the Panchayats.

Understanding such Indian legislation, the leaders of the Constituent Assembly of Independent India were also given sufficient time to work on this topic. After the discussion of various government bodies, therefore, a decision was taken to include the Panchayat in the Constitution as follows:

"The Government shall, in regard to village communities, make such arrangements for securing to such bodies as may be in accordance with their wishes"

After understanding the Directive in Art. 40, one small question was to decide whether these bodies shall be units of representative democracy or only a unit of self-government. As per Directive, these bodies were to be representative bodies—the formation of them from units of existing specific panchayats in the Constitution, on the basis of which the boundaries of the various states might exist, would have according to the guidelines provided by the Constitutional provisions.

The term as given in Article 40 in the form of Constitution Text: "The Panchayat shall be representative bodies which receive State Government". It was later in the Constitution, Article 243X which was inserted after Art. 40 in the Preamble, giving Article 40 an effect. The 243X relates to the Panchayat, grampanchayat Act, Act on 2002, Art. 243T to 243ZB. The 243X makes the Panchayat, grampanchayat, etc., popular or representative.

PART VIII

The Federal System

DISTRIBUTIVE, EXECUTIVE AND LEGISLATIVE

AND EXECUTIVE POWERS

"Distribution of the Federal system incorporated in the Constitution has been fully explained in Part V Chap. 11.

United States is a federal system of government. Through the act of creating administrative, executive and legislative functions the constituent members are granted such extensive independence as federal government of the body members of confederacy of the country. The Union is composed of 50 states with their own distinct and the states derive some autonomy from the Government which exercises all powers. Legislative, executive and judicial as between them. The original powers as already mentioned above. Hence, those distributed and the way it is made exclusive for the Union and the States. The powers of the States are not derived from the Union and that should therefore provide each State full control over the affairs in their states—subject to certain conditions, the States are autonomous within their own spheres as defined by the Constitution, and both the Union and the States are equally subject to the limitations imposed by the Constitution only, for nothing else of legislative, judicial or executive by Constitution, there.

Thus, within the Federal Government, the legislative, judicial, executive and the control by Government of the legislature as well as the executive and by the application of the Constitution enables the distribution of legislative powers as between them, apart from the Fundamental Rights and other similar provision that enables their power to certain extent. As far as the limiting the power of a state legislature, there are two types of powers, one is state power, the power of state legislature and a state legislature can expand its legislative authority to make any amendment if any of these constitutional provisions is violated the act of the legislature concerned can be declared unconstitutional.

As has been pointed out in the article, a federal system provides a distribution of power between the Federation and the various units of state. Though there exists no constitutional vesting of power, according to the legal and political arrangement in Constitutional Powers, the power constitutive and executive, primarily lie with the states.

(a) The section over which the Federation and the individual governments have jurisdiction.

(b) The areas of which a few states may have different.

PART II

Government of the Union

The President and Vice President.

At the head of the Union Government stands the President of India.

The President of India is elected by indirect election, that is, by an election of elected colleges in accordance with the system of proportional representation by means of the single transferable vote.

The duration of his term of office is:

- (a) The elected members of both Houses of Parliament or, in the event of the dissolution of the Legislative Assembly of the State, and for the elected members of the Legislative Assemblies under the States of Delhi and Hyderabad [Art. 64].

As far as possible, there shall be universality of representation of the different States in the election, according to the population and the total number of elected members of the legislative Assembly of each State, and thereby that shall be transacted between the States in which and the Union. Art. 64. This system will facilitate to make that in case of the States of the Aborigines, the scheduled Castes and the members of the President, that becomes to that of the people of the country as a whole, in this way, the President shall be a representative of the entire as well as a representative of the people in the different States. It also gives recognition of the status of the States in the federal scheme.

The system of indirect election was dictated by certain following aims of the dominion, that is, that the President, who is the head of state, was supposed to be the master of the Constitution of the Dominion.

(i) Direct election by an electorate of some 300 millions of people would result in a person from less than one percent constituency, i.e. under the system of proportional representation introduced by the Constitution, even if it were not so, the constituency would be represented on that basis, because directly by the person holding voting member power.

In order to be entitled to election as President, popularity among the public, education, the right to be a citizen of India, etc., are the qualifications. He must be a citizen of India, he must have completed the age of thirty-five years, he must be a person who has been nominated for election as a member of the Lok Sabha or the Rajya Sabha.

PART VII

The Judicature

The judiciary has always been considered as the backbone of a strong and stable political system. In Constitution of India too, the role of judiciary is very important. It is the duty of Courts to see that the laws made by the Parliament of India or the States are carried out. The Supreme Court which is the apex court of India and also it is the head of the entire system. The Supreme Court can pass orders, the High Courts deal with the disputes of the different states and minor civil suits. Every month it receives a lot of cases which come from all over the country and it tries its best to settle the纠纷 (disputes) as soon as possible.

The composition of the subordinate judiciary varies from state to state and the several factors may be geographical convenience of the state, the size of the state, the nature of the judiciary of the state.

The Supreme Court has been given the power to make rules and regulations for All India Judicial Service and making rules relating to formation of other such or similar services, making maps for distribution among the States by the Government.

At the present stage, the law department is not concerned with the formation of criminal and civil service. The main clients are the Ministry of Home Affairs, Government of India, the State Government, the Parliament Act, which controls the law and order and criminal code. The other body which is associated with the law and order part is the Central Police Commission. The Department of Law and Education has also got a role in the formation of law and order services. The other two major clients are the High Courts, State Legal Services Authority, State Judiciary and the other three bodies, i.e. Panchayati Raj, the Central Council of the Panchayati Raj and the State Legislative Assembly.

The Minister's clients are the various High Civil Courts, whose jurisdiction is determined by the State. Some of the State Government clients who have got a reduced pecuniary jurisdiction over civil cases and also the appropriate administrative Ministers. The State Public Works Department, the departments of Education, Justice and other areas like the Ministers taking their advice to a Subordinate judge for consent process are termed as judicial