

CHAPTER 1

THE HISTORICAL BACKGROUND

Utility of a Historical Retrospect. THE very fact that the Constitution of the Indian Republic is the product not of a political revolution but of the research and deliberations of a body of eminent representatives of the people who sought to improve upon the existing system of administration, makes a retrospect of the constitutional development indispensable for a proper understanding of this Constitution.

Practically the only respect in which the Constitution of 1949¹ differs from the constitutional documents of the preceding two centuries is that while the latter had been imposed by an imperial power, the Republican Constitution was made by the people themselves, through representatives assembled in a sovereign Constituent Assembly. That explains the majesty and ethical value of this new instrument and also the significance of those of its provisions which have been engrafted upon the pre-existing system.

For our present purposes we need not go beyond the year 1858 when the British Crown assumed sovereignty over India from the East India Government of Company, and Parliament enacted the first statute for India Act, 1858. This Act serves as the starting point of our survey because it was dominated by the principle of absolute imperial control without any popular participation in the administration of the country, while the subsequent history up to the making of the Constitution is one of gradual relaxation of imperial control and the evolution of responsible government. By this Act, the powers of the Crown were to be exercised by the Secretary of State for India, assisted by a Council of fifteen members (known as the Council of India). The Council was composed exclusively of people from England, some of whom were nominees of the Crown while others were the representatives of the Directors of the East India Co. The Secretary of State, who was responsible to the British Parliament, governed India through the Governor-General, assisted by an Executive Council, which consisted of high officials of the Government.

The essential features of the system² introduced by the Act of 1858 were—

- (a) The administration of the country was not only unitary but rigidly centralised. Though the territory was divided into Provinces with a Governor or Lieutenant-Governor aided by his Executive Council at the

head of each of them, the Provincial Governments were mere agents of the Government of India and had to function under the superintendence, direction and control of the Governor-General in all matters relating to the government of the Province.²

(b) There was no separation of functions, and all the authority for the governance of India,—civil and military, executive and legislative,—was vested in the Governor-General in Council who was responsible to the Secretary of State.²

(c) The control of the Secretary of State over the Indian administration was absolute. The Act vested in him the ‘superintendence, direction and control of all acts, operations and concerns which in any way related to the Government or revenues of India’. Subject to his ultimate responsibility to the British Parliament, he wielded the Indian administration through the Governor-General as his agent and his was the last word, whether in matters of policy or of details.³

(d) The entire machinery of administration was bureaucratic, totally unconcerned about public opinion in India.

Indian Councils Act, 1861. The Indian Councils Act of 1861 introduced a grain of popular element insofar as it provided that the Governor-General’s Executive Council, which was so long composed exclusively of officials, should include certain additional *non-official* members, while transacting legislative business as a Legislative Council. But this Legislative Council was neither representative nor deliberative in any sense. The members were nominated and their functions were confined exclusively to a consideration of the legislative proposals placed before it by the Governor-General. It could not, in any manner, criticise the acts of the administration or the conduct of the authorities. Even in legislation, effective powers were reserved to the Governor-General, such as—(a) giving prior sanction to Bills relating to certain matters, without which they could not be introduced in the Legislative Council; (b) vetoing the Bills after they were passed or reserving them for consideration of the Crown; (c) legislating by Ordinances which were to have the same authority as Acts made by the Legislative Council.

Similar provisions were made by the Act of 1861 for Legislative Councils in the Provinces. But even for initiating legislation in these Provincial Councils with respect to many matters, the prior sanction of the Governor-General was necessary.

Indian Councils Act, 1892. Two improvements upon the preceding state of affairs as regards the Indian and Provincial Legislative Councils were introduced by the Indian Councils Act, 1892, namely that (a) though the majority of official members were retained, the non-official members of the Indian Legislative Council were henceforth to be nominated by the Bengal Chamber of Commerce and the Provincial Legislative Councils, while the non-official members of the Provincial Councils were to be nominated by certain local bodies such as universities, district boards, municipalities; (b) the Councils were to have the power of discussing the annual statement of revenue and expenditure, i.e., the Budget and of addressing questions to the Executive.

This Act is notable for its object, which was explained by the Under-Secretary of State for India thus:

"to widen the basis and expand the functions of the Government of India, and to give further opportunities to the *non-official and native elements* in Indian society to take part in the work of the Government."

The first attempt at introducing a representative and popular element was made by the Morley-Minto Reforms, known by the names of the then Secretary of State for India (Lord MORLEY) and the Viceroy (Lord MINTO), which were implemented by the Indian Councils Act, 1909.

The changes relating to the Provincial Legislative Councils were, of course, more advanced. The size of these Councils was enlarged by including elected non-official members so that the official majority was gone. An element of election was also introduced in the Legislative Council at the Centre but the official majority there was maintained.

The deliberative functions of the Legislative Councils were also increased by this Act by giving them the opportunity of influencing the policy of the administration by moving resolutions on the Budget, and on any matter of public interest, save certain specified subjects, such as the Armed Forces, Foreign Affairs and the Indian States.

On the other hand, the positive vice of the system of election introduced by the Act of 1909 was that it provided, for the first time, for separate representation of the Muslim community and thus sowed the seeds of separatism⁴ that eventually led to the lamentable partition of the country. It can hardly be overlooked that this idea of separate electorates for the Muslims was synchronous with the formation of the Muslim League as a political party (1906⁵).

Subsequent to this, the Government of India Act, 1915 (5 & 6 Geo. V., c. 61) was passed merely to consolidate all the preceding Government of India Acts so that the existing provisions relating to the government of India in its executive, legislative and judicial branches could be had from one enactment.

The next landmark in constitutional development of India is the Montagu-Chelmsford Report which led to the enactment of the Government of India Act, 1919. It was, in fact, an amending Act, but the amendments introduced substantive changes into the existing system.

The Morley-Minto Reforms failed to satisfy the aspirations of the nationalists in India inasmuch as, professedly, the Reforms did not aim at the establishment of a Parliamentary system of government in the country and provide for the retention of the final decision on all questions in the hands of the irresponsible Executive.

The Indian National Congress which, established in 1885, was so long under the control of Moderates, became more active during the First World War and started its campaign for self-government (known as the 'Home Rule' movement). In response to this popular demand, the British

Government made a declaration on August 20, 1917, that the policy of His Majesty's Government was that of—

"Increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to progressive realisation of responsible government in British India as an integral part of the British Empire."

The then Secretary of State for India (Mr. E.S. Montagu) and the Governor-General (Lord CHELMSFORD), entrusted with the task of formulating proposals for carrying out the above policy and the Government of India Act, 1919, gave a legal shape to their recommendations.

Main Features of the System introduced by the Act of 1919. The main features of the system introduced by the Government of India Act, 1919, were as follows⁶:

I. *Dyarchy in the Provinces.* Responsible government in the Provinces was sought to be introduced, without impairing the responsibility of the Governor (through the Governor-General), for the administration of the Province, by resorting to device known as 'Dyarchy' or dual government. The subjects of administration were to be divided (by Rules made under the Act) into two categories—Central and Provincial. The Central subjects were those which were exclusively kept under the control of the Central Government. The Provincial subjects were sub-divided into 'transferred' and 'reserved' subjects.

Of the matters assigned to the Provinces, the 'transferred subjects' were to be administered by the Governor with the aid of Ministers responsible to the Legislative Council in which the proportion of elected members was raised to 70 per cent. The foundation of responsible government was thus laid down in the narrow sphere of 'transferred' subjects.

The 'reserved subjects', on the other hand, were to be administered by the Governor and his Executive Council without any responsibility to the Legislature.

II. *Relaxation of Central control over the Provinces.* As stated already, the Rules made under the Government of India Act, 1919, known as the Devolution Rules, made a separation of the subjects of administration into two categories—Central and Provincial. Broadly speaking, subjects of all-India importance were brought under the category 'Central', while matters primarily relating to the administration of the provinces were classified as 'Provincial'. This meant a relaxation of the previous Central control over the provinces not only in administrative but also in legislative and financial matters. Even the sources of revenue were divided into two categories so that the Provinces could run the administration with the aid of revenue raised by the Provinces themselves and for this purpose, the provincial budgets were separated from the Government of India and the Provincial Legislature was empowered to present its own budget and levy its own taxes relating to the provincial sources of revenue.

At the same time, this devolution of power to the Provinces should not be mistaken for a *federal* distribution of powers. Under the Act of 1919, the

Provinces got power by way of delegation from the Centre. The Central Legislature, therefore, retained power to legislate for the whole of India, relating to any subject, and it was subject to such paramount power of the Central Legislature that the Provincial Legislature got the power "to make laws for the peace and good government of the territories for the time being constituting that province".

The control of the Governor-General over Provincial legislation was also retained by a laying down that a Provincial Bill, even though assented to by the Governor, would not become law unless assented to also by the Governor-General, and by empowering the Governor to reserve a Bill for the consideration of the Governor-General if it related to matters specified in this behalf by the Rules made under the Act.

III. The Indian Legislature made more representative. No responsibility was, however, introduced at the Centre and the Governor-General in Council continued to remain responsible only to the British Parliament through the Secretary of State for India. Nevertheless, the Indian Legislature was made more representative and, for the first time, *bi-cameral*. It was to consist of an Upper House, named the Council of State, composed of 60 members of whom 34 were elected, and a Lower House, named the Legislative Assembly, composed of about 144 members of whom 104 were elected. The powers of both the Houses were equal except that the power to vote supply was given exclusively to the Legislative Assembly. The electorates were, however, arranged on a communal and sectional basis, developing the Morley-Minto device further.

The Governor-General's overriding powers in respect of Central legislation were retained in the following forms—(i) his prior sanction was required to introduce Bills relating to certain matters; (ii) he had the power to veto or reserve for consideration of the Crown any Bill passed by the Indian Legislature; (iii) he had the converse power of certifying any Bill or any grant refused to be passed or made by the Legislature, in which case it would have the same effect as if it was passed or made by the Legislature; (iv) he could make Ordinances, having the force of law for a temporary period, in case of emergency.

The Reforms of 1919, however, failed to fulfil the aspiration of the **Shortcomings of the Act of 1919** people in India, and led to an agitation by the Congress (then under the leadership of Mahatma Gandhi) for 'Swaraj' or 'self-government', independent of the British Empire, to be attained through 'Non-cooperation'. The shortcomings of the 1919 system, mainly, were—

(i) Notwithstanding a substantial measure of devolution of power to the Provinces the structure still remained unitary and centralised "with the Governor-General in Council as the keystone of the whole constitutional edifice; and it is through the Governor-General in Council that the Secretary of State and, ultimately, Parliament discharged their responsibilities for the peace, order and good government of India".⁷ It was the Governor-General and not the Courts who had the authority to decide whether a particular subject was Central or Provincial. The Provincial Legislature could not,

without the previous sanction of the Governor-General, take up for consideration any bill relating to a number of subjects.

(ii) The greatest dissatisfaction came from the working of Dyarchy in the Provincial sphere. In a large measure, the Governor came to dominate ministerial policy by means of his overriding financial powers and control over the official block in the Legislature. In practice, scarcely any question of importance could arise without affecting one or more of the reserved departments. The impracticability of a division of the administration into two water-tight compartments was manifested beyond doubt. The main defect of the system from the Indian standpoint was the control of the purse. Finance being a reserved subject, was placed in charge of a member of the Executive Council and not a Minister. It was impossible for any Minister to implement any progressive measure for want of funds and together with this was the further fact that the members of the Indian Civil Service, through whom the Ministers were to implement their policies, were recruited by the Secretary of State and were responsible to him and not to the Ministers. Above all was the overriding power of the Governor who did not act as a constitutional head even with respect to the transferred subjects. There was no provision for collective responsibility of the Ministers to the Provincial Legislature. The Ministers were appointed individually, acted as advisers of the Governor, and differed from members of the Executive Council only in the fact that they were non-officials. The Governor had the discretion to act otherwise than in accordance with the advice of his Ministers; he could certify a grant refused by the Legislature or a Bill rejected by it if it was regarded by him as essential for the due discharge of his responsibilities relating to a reserved subject.

It is no wonder, therefore, that the introduction of ministerial government over a part of the Provincial sphere proved ineffective and failed to satisfy Indian aspirations.

The persistent demand for further reforms, attended with the dislocation caused by the Non-cooperation movement, led the British Government in 1927 to appoint a Statutory Commission, as envisaged by the Government of India Act, 1919 itself (s. 84A), to inquire into and report on the working of the Act and in 1929 to announce that Dominion Status was the goal of Indian political developments. The Commission, headed by Sir John Simon, reported in 1930.

The Report was considered by a Round Table Conference consisting of the delegates of the British Government and of British India as well as of the Rulers of the Indian States (inasmuch as the scheme was to unite the Indian States with the rest of India under a federal scheme). A White Paper, prepared on the results of this Conference, was examined by a Joint Select Committee of the British Parliament and the Government of India Bill was drafted in accordance with the recommendations of that Select Committee, and passed, with certain amendments, as the Government of India Act, 1935.

Before analysing the main features of the system introduced by this Act, it should be pointed out that this Act went another step forward in perpetuating the communal cleavage between the Muslim and the non-Muslim

"Communal Award."

communities, by prescribing separate electorates on the basis of the 'Communal Award' which was issued by Mr. Ramsay MacDonald, the British Prime Minister, on August 4, 1932, on the ground that the two major communities had failed to come to an agreement. From now onwards, the agreement between the two *religious* communities was continuously hoisted as a condition precedent for any further *political* advance. The Act of 1935, it should be noted, provided separate representation not only for the Muslims, but also for the Sikhs, the Europeans, Indian Christians and Anglo-Indians and thus created a serious hurdle in the way of the building up of national unity, which the makers of the future Constitution found it almost insurmountable to overcome even after the Muslims had partitioned for a separate State.

The main features of the governmental system prescribed by the Act of 1935 were as follows—

(a) *Federation and Provincial Autonomy.* While under all the previous

Main features of the system introduced by the Government of India Act, 1935. Government of India Acts, the government of India was unitary, the Act of 1935 prescribed a federation, taking the Provinces and the Indian States as units. But it was optional for the Indian States to join the Federation; and since the Rulers of the Indian States never gave their consent, the Federation envisaged by the Act of 1935 never came into being.

But though the Part relating to the Federation never took effect, the Part relating to Provincial Autonomy was given effect to since April, 1937. The Act divided legislative powers between the Provincial and Central Legislatures, and within its defined sphere, the Provinces were no longer delegates of the Central Government, but were autonomous units of administration. To this extent, the Government of India assumed the role of a federal government *vis-a-vis* the Provincial Government, though the Indian States did not come into the fold to complete the scheme of federation.

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

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

(b) *Dyarchy at the Centre.* The executive authority of the Centre was vested in the Governor-General (on behalf of the Crown), whose functions were divided into two groups—

(i) The administration of defence, external affairs, ecclesiastical affairs, and of tribal areas, was to be made by the Governor-General in his discretion with the help of 'counsellors', appointed by him, who were not

responsible to the Legislature, (ii) With regard to matters other than the above reserved subjects, the Governor-General was to act on the advice of a 'Council of Ministers' who were responsible to the Legislature. But even in regard to this latter sphere, the Governor-General might act contrary to the advice so tendered by the ministers if any of his 'special responsibilities' was involved. As regards the special responsibilities, the Governor-General was to act under the control and directions of the Secretary of State.

But, in fact, neither any 'Counsellors' nor any Council of Ministers responsible to the Legislature came to be appointed under the Act of 1935; *the old Executive Council provided by the Act of 1919 continued to advise the Governor-General until the Indian Independence Act, 1947.*

(c) *The Legislature.* The Central Legislature was bi-cameral, consisting of the Federal Assembly and the Council of State.

In six of the Provinces, the Legislature was bi-cameral, comprising a Legislative Assembly and a Legislative Council. In the rest of the Provinces, the Legislature was uni-cameral.

The legislative powers of both the Central and Provincial Legislatures were subject to various limitations and neither could be said to have possessed the features of a sovereign Legislature. Thus, the Central Legislature was subject to the following limitations:

(i) Apart from the Governor-General's power of veto, a Bill passed by the Central Legislature was also subject to veto by the Crown.

(ii) The Governor-General might prevent discussion in the Legislature and suspend the proceedings in regard to any Bill if he was satisfied that it would affect the discharge of his special responsibilities.

(iii) Apart from the power to promulgate Ordinances during the recess of the Legislature, the Governor-General had independent powers of legislation, concurrently with those of the Legislature. Thus, he had the power to make temporary Ordinances as well as permanent Acts at any time for the discharge of his special responsibilities.

(iv) No bill or amendment could be introduced in the Legislature without the Governor-General's previous sanction, with respect to certain matters, e.g., if the Bill or amendment sought to repeal or amend or was repugnant to any law of the British Parliament extending to India or any Governor-General's or Governor's Act, or if it sought to affect matters as respects which the Governor-General was required to act in his discretion.

There were similar fetters on the Provincial Legislature.

The Instruments of Instructions issued under the Act further required that Bills relating to a number of subjects, such as those derogating from the powers of a High Court or affecting the Permanent Settlement, when presented to the Governor-General or a Governor for his assent, were to be reserved for the consideration of the Crown or the Governor-General, as the case might be.

(d) *Distribution of legislative powers between the Centre and the Provinces.* Though the Indian States did not join the Federation, the federal provisions

of the Government of India Act, 1935, were in fact applied as *between the Central Government and the Provinces*.

The division of legislative powers, between the Centre and the Provinces is of special interest to the reader in view of the fact that the division made in the Constitution between the Union and the States proceeds largely on the same lines. It was not a mere delegation of power by the Centre to the Provinces as by Rules made under the Government of India Act, 1919. As already pointed out, the Government of India Act of 1935 itself divided the legislative powers between the Central and Provincial Legislatures and, subject to the provisions mentioned below, neither Legislature could transgress the powers assigned to the other.

A three-fold division was made in the Act—

- (i) There was a Federal List over which the Federal Legislature had exclusive powers of legislation. This List included matters such as External affairs; Currency and coinage; Naval, military and air forces; census,
- (ii) There was a Provincial List of matters over which the Provincial Legislature had exclusive jurisdiction, e.g., Police, Provincial Public Service, Education.
- (iii) There was a Concurrent List of matters over which both the Federal and Provincial Legislature had competence, e.g., Criminal law and procedure, Civil procedure, Marriage and divorce, Arbitration.

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

In case of repugnancy in the Concurrent field, a Federal law prevailed over a Provincial law to the extent of the repugnancy, but if the Provincial law having been reserved for the consideration of the Governor-General received his assent, the Provincial law prevailed, notwithstanding such repugnancy.

The allocation of residuary power of legislation in the Act was unique. It was not vested in either the Central or the Provincial Legislature but the Governor-General was empowered to authorise either the Federal or the Provincial Legislature to enact a law with respect to any matter which was not enumerated in the Legislative Lists.

It is to be noted that 'Dominion Status', which was promised by the Simon Commission in 1929, was not conferred by the Government of India Act, 1935.

The circumstances leading to the enactment of the Indian Independence Act, 1947,⁸ will be explained in the next Chapter. But the changes introduced by this Act into the structure of government pending the drawing up of a Constitution for independent India by Constituent Assembly, should be pointed out in the present context, so as to offer a correct and comprehensive picture of the background against which the Constitution was made.

In pursuance of the Indian Independence Act, the Government of India Act, 1935, was amended by the Adaptation Orders, both in India and Pakistan, in order to provide an interim Constitution to each of the two Dominions until the Constituent Assembly could draw up the future Constitution.

The following were the main results of such adaptations:—

(a) *Abolition of the Sovereignty and Responsibility of the British Parliament.* As has been already explained, by the Government of India Act, 1858, the Government of India was transferred from the East India Company to the Crown. By this Act, the British Parliament became the direct guardian of India, and the office of the Secretary of State for India was created for the administration of Indian affairs,—for which the Secretary of State was to be responsible to Parliament. Notwithstanding gradual relaxation of the control, the Governor-General of India and the Provincial Governors remained substantially under the direct control of the Secretary of State until the Indian Independence Act, 1947, so that—

“in constitutional theory, the Government of India is a subordinate official Government under His Majesty’s Government.”

The Indian Independence Act altered this constitutional position, root and branch. It declared that with effect from the 15th August, 1947 (referred to as the ‘appointed day’), India ceased to be a Dependency and the suzerainty of the British Crown over the Indian States and the treaty relations with Tribal Areas also lapsed from the date.

The responsibility of the British Government and Parliament for administration of India having ceased, the office of the Secretary of State for India was abolished.

(b) *The Crown no longer the source of authority.* So long as India remained a Dependency of the British Crown, the Government of India was carried on in the name of His Majesty. Under the Act of 1935, the Crown came into further prominence owing to the scheme of the Act being federal, and all the units of the federation, including the Provinces, drew their authority direct from the Crown. But under the Independence Act, 1947, neither of the two Dominions of India and Pakistan derived its authority from the British Isles.

(c) *The Governor-General and Provincial Governors to act as constitutional heads.* The Governors-General of the two Dominions became the constitutional heads of the two new Dominions as in the case of the other Dominions. This was, in fact, a necessary corollary from ‘Dominion Status’ which had been denied to India by the Government of India Act, 1935, but conceded by the Indian Independence Act, 1947.

According to the adaptations under the Independence Act, there was no longer any Executive Council as under the Act of 1919 or ‘councillors’ as envisaged by the Act of 1935. The Governor-General or the Provincial Governor was to act on the advice of a Council of Ministers having the confidence of the Dominion Legislature or the Provincial Legislature, as the case might be. The words “in his discretion”, “acting in his discretion” and “individual judgment” were effaced from the Government of India Act,

1935, wherever they occurred, with the result that there was now no sphere in which these constitutional heads could act without or against the wishes of the Ministers. Similarly, the powers of the Governor-General to require Governors to discharge certain functions as his agents were deleted from the Act.

The Governor-General and the Governors lost extraordinary powers of legislation so as to compete with the Legislature, by passing Acts, Proclamations and Ordinances for ordinary legislative purposes, and also the power of certification. The Governor's power to suspend the Provincial Constitution was taken away. The Crown also lost its right of veto and so the Governor-General could not reserve any bill for the signification of His Majesty's pleasure.

(d) *Sovereignty of the Dominion Legislature.* The Central Legislature of India, composed of the Legislative Assembly and the Council of States, ceased to exist on August 14, 1947. From the 'appointed day' and until the Constituent Assemblies of the two Dominions were able to frame their new Constitutions and new Legislatures were constituted thereunder,—it was the Constituent Assembly itself, which was to function also as the Central Legislature of the Dominion to which it belonged. In other words, the Constituent Assembly of either Dominion (until it itself desired otherwise), was to have a dual function, *constituent* as well as *legislative*.

The sovereignty of the Dominion Legislature was complete and no sanction of the Governor-General would henceforth be required to legislate on any matter, and there was to be no repugnancy by reason of contravention of any Imperial law.

REFERENCES

1. The Constitution of India was adopted on 26-11-1949 and some of its provisions were given immediate effect. The bulk of the Constitution, however, became operative on 26-1-1950, which date is referred to in the Constitution as its 'Date of Commencement', and is celebrated in India as the "*Republic Day*".
2. Report of the Indian Statutory Commission (Simon Report), Vol. I, pp. 112 *et seq.*
3. SETON, *India Office*, p. 81.
4. PANIKKAR, *Asia and Western Dominance*, 1953, p. 155.
5. NEHRU, *Discovery of India*, 1956, p. 385.
6. Simon Report, Vol. I, pp. 122-26, 148-56.
7. Report of the Joint Parliamentary Committee; Simon Report, Vol. I, pp. 232-38.
8. For the text of the Government of India Acts, 1800-1935, the Indian Councils Acts, 1861-1909, the Indian Independence Act, 1947 and Orders thereunder, see BASU, *Constitutional Documents*, Vol. I (1969).

CHAPTER 2

THE MAKING OF THE CONSTITUTION

Demand for a Constitution framed by a Constituent Assembly

THE demand that India's political destiny should be determined by the Indians themselves had been put forward by Mahatma Gandhi as early as in 1922.

"Swaraj will not be a free gift of the British Parliament; it will be a declaration of India's full self-expression. That it will be expressed through an Act of Parliament is true but it will be merely a courteous ratification of the declared wish of the people of India even as it was in the case of the Union of South Africa."

The failure of the Statutory Commission and the Round Table Conference which led to the enactment of the Government of India Act, 1935, to satisfy Indian aspirations ^{to strengthen/empowerize} accentuated the demand for a Constitution made by the people of India without outside interference, which was officially asserted by the National Congress in 1935. In 1938, Pandit Nehru definitely formulated his demand for a Constituent Assembly thus:

"The National Congress stands for independence and democratic state. It has proposed that the constitution of free India must be framed, without outside interference, by a Constituent Assembly elected on the basis of adult franchise."

This was reiterated by the Working Committee of the Congress in 1939. *Ludhiana Session, Nehru presided.*

This demand was, however, resisted by the British Government until the outbreak of World War II when external circumstances forced them to realise the urgency of solving the Indian constitutional problem. In 1940, the Coalition Government in England recognised the principle that Indians should themselves frame a new Constitution for autonomous India, and in March 1942, when the Japanese were at the doors of India, they sent Sir Stafford Cripps, a member of the Cabinet, with a draft declaration on the proposals of the British Government which were to be adopted (at the end of the War) provided the two major political parties (Congress and the Muslim League)¹ could come to an agreement to accept them, *viz.*²—

- (a) that the Constitution of India was to be framed by an elected Constituent Assembly of the Indian people;
- (b) that the Constitution should give India Dominion Status,—equal partnership of the British Commonwealth of Nations;
- (c) that there should be one Indian Union comprising all the Provinces and Indian States; but

(d) that any province (or Indian State) which was not prepared to accept the Constitution would be free to retain its constitutional position existing at that time and with such non-acceding Provinces the British Government could enter into separate constitutional arrangements.

But the two parties failed to come to an agreement to accept the proposals, and the Muslim League urged—

(a) that India should be divided into two autonomous States on communal lines, and that some of the Provinces, earmarked by Mr. Jinnah, should form an independent Muslim State, to be known as Pakistan;

(b) that instead of one Constituent Assembly, there should be two Constituent Assemblies, i.e., a separate Constituent Assembly for building Pakistan.

After the rejection of the Cripps proposals (followed by the dynamic 'Quit India' campaign launched by the Congress), various attempts to

Cabinet Delegation. reconcile the two parties were made including the Simla Conference held at the instance of the Governor-General, Lord WAVELL. These having failed, the British Cabinet sent three of its own members² including Cripps himself, to make another serious attempt. But the Cabinet Delegation, too, failed in making the two major parties come to any agreement and were, accordingly, obliged to put forward their own proposals, which were announced simultaneously in India and in England on the 16th May, 1946.

The proposals of the Cabinet Delegation sought to effect a compromise between a Union of India and its division. While the Cabinet Delegation definitely rejected the claim for a separate Constituent Assembly and a separate State for the Muslims, the scheme which they recommended involved a virtual acceptance of the principle underlying the claim of the Muslim League.

The broad features of the scheme were—

(a) There would be a Union of India, comprising both British India and the States, and having jurisdiction over the subjects of Foreign Affairs, Defence and Communications. All residuary powers would belong to the Provinces and the States.

(b) The Union would have an Executive and a Legislature consisting of representatives of the Provinces and States. But any question raising a major communal issue in the Legislature would require for its decision a majority of the representatives of the two major communities present and voting as well as a majority of all the members present and voting.

The Provinces would be free to form Groups with executives and legislatures, and each Group would be competent to determine the provincial subjects which would be taken up by the Group organisation.

The scheme laid down by the Cabinet Mission was, however, ^{to observe thoroughly} ~~recommendatory~~, and it was contemplated by the Mission that it would be adopted by agreement between the two major parties. H.M.G.'s statement of December 6, 1946, A curious situation, however, arose after an election for forming the Constituent Assembly was held. The Muslim League joined the election and its candidates were returned. But a difference of opinion had in the meantime arisen between the Congress and the League regarding the interpretation of the

'Grouping clauses' of the proposals of the Cabinet Mission. The British Government intervened at this stage, and explained to the leaders in London that they upheld the contention of the League as correct, and on December 6, 1946, the British Government published the following statement—

"Should a constitution come to be framed by the Constituent Assembly in which a large section of the Indian population had not been represented. His Majesty's Government would not contemplate forcing such a constitution upon any unwilling part of the country."

For the first time, thus, the British Government acknowledged the possibility of two Constituent Assemblies and two States. The result was that on December 9, 1946, when the Constituent Assembly first met, the Muslim League members did not attend, and the Constituent Assembly began to function with the non-Muslim League members.

The Muslim League next urged for the dissolution of the Constituent Assembly of India on the ground that it was not full representative of all sections of the people of India. On the other hand, the British Government, by their Statement of the 20th February, 1947, declared,—

- (a) that British rule in India would in any case end by June, 1948, after which the British would certainly transfer authority to Indian hands;
- (b) that if by that time a fully representative Constituent Assembly failed to work out a constitution in accordance with the proposals made by the Cabinet Delegation,—

"H.M.G. will have to consider to whom the powers of the Central Government in British India should be handed over, on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Government, or in such other way as seems most reasonable and in the best interests of the Indian people."

The result was inevitable and the League did not consider it necessary to join this Assembly, and went on pressing for another Constituent Assembly for 'Muslim India'. *to speed up.*

The British Government next sent Lord MOUNTBATTEN to India as the Governor-General, in place of Lord WAVELL, in order to expedite the preparations for the transfer of power, for which they had fixed a rigid time limit. Lord MOUNTBATTEN brought the Congress and the League into a definite agreement that the two 'problem' provinces of the Punjab and Bengal would be partitioned so as to form absolute Hindu and Muslim majority blocks within these Provinces. The League would then get its Pakistan—which the Cabinet Mission had so ruthlessly denied it,—minus Assam, East Punjab and West Bengal, while the Congress which was taken as the representative of the people of India other than the Muslims would get the rest of India where the Muslims were in minority.

The actual decisions as to whether the two Provinces of the Punjab and Bengal were to be partitioned was, however, left to the vote of the members of the Legislative Assemblies of these two Provinces, meeting in two parts, according to a plan known as the 'Mountbatten Plan'. It was given a formal shape by a Statement made by the British Government of June 3, 1947, which provided, *inter alia*, that:

The Mountbatten Plan.

"The Provincial Legislative Assemblies of Bengal and the Punjab (excluding European members) will, therefore, each be asked to meet in two parts, one representing the Muslim majority districts and the other the rest of the Province.... The members of the two parts of each Legislative Assembly sitting separately will be empowered to vote whether or not the Province should be partitioned. If a simple majority of either Part decides in favour of Partition, division will take place and arrangements will be made accordingly. If partition were decided upon, each part of the Legislative Assembly would decide, on behalf of the areas it represented, whether it would join the existing or a new and separate Constituent Assembly."

It was also proposed that there would be a referendum in the North Western Frontier Province and in the Muslim majority district of Sylhet as to whether they would join India or Pakistan. The Statement further declared H.M.G.'s intention "to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according to decisions taken as a result of the announcement."

The result of the vote according to the above Plan was a foregone conclusion as the representatives of the Muslim majority areas of the two Provinces (*i.e.*, West Punjab and East Bengal) voted for partition and for joining a new Constituent Assembly. The referendum in the North Western Frontier and Sylhet was in favour of Pakistan.

On the 26th July, 1947, the Governor-General announced the setting up of a separate Constituent Assembly for Pakistan. The Plan of June 3, 1947, having been carried out, nothing stood in the way of effecting the transfer of power by enacting a statute of the British Parliament in accordance with the declaration.

It must be said to the credit of the British Parliament that it lost no time to draft the Indian Independence Bill upon the basis of the above Plan, and The Indian Independence Act, 1947. this Bill was passed and placed on the Statute Book, with amazing speed, as the Indian Independence Act, 1947 (10 & 11 Geo. VI, c. 30). The Bill, which was introduced in Parliament on July 4, received the Royal Assent on July 18, 1947, and came into force from that date.

The most outstanding characteristics of the Indian Independence Act was that while other Acts of Parliament relating to the Government of India (such as the Government of India Acts from 1858 to 1935) sought to lay down a Constitution for the governance of India by the legislative will of the British Parliament,—this Act of 1947 did not lay down any such constitution. The Act provided that as from the 15th August, 1947 (which date is referred to in the Act as the 'appointed date'), in place of 'India' as defined in the Government of India Act, 1935, there would be set up two independent Dominions, to be known as *India* and *Pakistan*, and the Constituent Assembly of each Dominion was to have unlimited power to frame and adopt any constitution and to repeal any Act of the British Parliament, including the Indian Independence Act.

Under the Act, the Dominion of India got the residuary territory of India excluding the Provinces of Sind, Baluchistan, West Punjab, East Bengal, and the North Western Frontier Province and the district of Sylhet in Assam (which had voted in favour of Pakistan at a referendum, before the Act came into force).

Constituent Assembly of India.

The Constituent Assembly, which had been elected for undivided India and held its first sitting on the 9th December, 1946, reassembled on the 14th August, 1947, as the sovereign Constituent Assembly for the Dominion of India.

As to its composition, it should be remembered, that it had been elected by indirect election by the members of the Provincial Legislative Assemblies (Lower House only), according to the scheme recommended by the Cabinet Delegation [see Table II, in the Appendix]. The essentials of this scheme were as follows:—

- (1) Each province and each Indian State or group of States were allotted the total number of seats proportional to their respective populations roughly in the ratio of one to a million. As a result, the Provinces were to elect 292 members while the Indian States were allotted a minimum of 93 seats.
- (2) The seats in each province were distributed among the three main communities, Muslim, Sikh and General, in proportion to their respective populations.
- (3) Members of each community in the Provincial Legislative Assembly elected their own representatives by the method of proportional representation with single transferable vote.
- (4) The method of selection in the case of representatives of Indian States was to be determined by consultation.

As a result of the Partition under the Plan of June 3, 1947, a separate Constituent Assembly was set up for Pakistan, as stated earlier. The representatives of Bengal, Punjab, Sind, North Western Frontier Province, Baluchistan and the Sylhet district of Assam (which had joined Pakistan by a referendum) ceased to be members of the Constituent Assembly of India, and there was a fresh election in the new Provinces of West Bengal and East Punjab. In the result, when the Constituent Assembly reassembled on the 31st October, 1947, the membership of the House was reduced to 299, as in Table II, post. Of these, 284 were actually present on the 26th November, 1949, and appended their signatures to the Constitution as finally passed.

The salient principles of the proposed Constitution had been outlined by various committees of the Assembly³ such as the Union Constitution Committee, the Union Powers Committee, Committee on Fundamental Rights, and, after a general discussion of the reports of these Committees, the Assembly appointed a Drafting Committee on the 29th August, 1947. The Drafting Committee, under the Chairmanship of Dr. Ambedkar, embodied the decision of the Assembly with alternative and additional proposals in the form of a 'Draft Constitution of India' which was published in February, 1948. The Constituent Assembly next met in November, 1948, to consider the provisions of the Draft, clause by clause. After several sessions the consideration of the clauses or second reading was completed by the 17th October, 1949.

The Constituent Assembly again sat on the 14th November, 1949, for passing of the the third reading and finished it on the 26th November, 1949, on which date the Constitution received the signature of the President of the Assembly and was declared as passed.

Date of Commencement of the Constitution. The provisions relating to citizenship, elections, provisional Parliament, temporary and transitional provisions, were given immediate effect, i.e., from November 26, 1949. The rest of the Constitution came into force on the 26th January, 1950, and this date is referred to in the Constitution as the *Date of its Commencement*.⁴

REFERENCES

- As stated earlier, the Muslim League, professedly a communal party, was formed in 1906. While its earlier objective was to secure separate representation of the Muslims in the political system, in its Lahore Resolution of 1940, it asserted its demand for the creation of a separate Muslim State in the Muslim majority areas. This idea was developed into the claim for dividing India into two independent States, when the Cripps offer was announced.
- The Cabinet Mission consisted of Lord PETHICK-LAWRENCE, Sir Stafford Cripps and Mr. A.V. Alexander.
- The important committees of the Constituent Assembly were,—
 - Union Powers Committee. It had 9 members. Shri Jawaharlal Nehru was its chairman.
 - Committee on Fundamental Rights and Minorities. It had 54 members. Sardar Vallabhbhai Patel was its chairman,
 - Steering Committee. It had 3 members. Dr. K.M. Munshi (chairman), Shri Gopalswamy Ayyangar and Shri Bishwanath Das.
 - Provincial Constitution Committee. 25 members. Sardar Patel as chairman.
 - Committee on Union Constitution. 15 members. Pt. Nehru as chairman.
- The draft was prepared by Sir B.N. Rau, Adviser to the Constituent Assembly. A 7-member committee chaired by Sir Alladi Krishnaswamy Iyer was set up to examine the draft. Dr. B.R. Ambedkar who was minister for law from 15-8-1947 to 26-1-1950 piloted the draft constitution in the Assembly.
- Since that date, the Constitution has been freely amended, according to the procedure laid down in Art. 368,—no less than 94 times, by 2006 (see Table IV, *post*). For a text of the original Constitution, with its subsequent amendments, see Author's *Constitution Amendment Acts; Constitutional Law of India*, 6th Ed. (Prentice-Hall of India).

CHAPTER 3

THE PHILOSOPHY OF THE CONSTITUTION

EVERY Constitution has a philosophy of its own.

For the philosophy underlying *our* Constitution we must look back into **The Objectives Resolution.** which was adopted by the Constituent Assembly on January 22, 1947,¹ and which inspired the shaping of the Constitution through all its subsequent stages. It reads thus—

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

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

(3) WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

(4) WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of Governments are derived from the people; and

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

(6) WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) WHEREIN shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilised nations; and

(8) The ancient land attain its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind."

In the words of Pandit Nehru, the aforesaid Resolution was "something more than a resolution. It is a declaration, a firm resolve, a pledge, an undertaking and for all of us a dedication".

It will be seen that the ideal embodied in the above Resolution is faithfully reflected in the Preamble to the Constitution, **The Preamble.** which, as amended in 1976,² summarises the aims and objects of the Constitution :

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR² DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

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

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

FRATERNITY assuring the dignity of the individual and the unity and integrity² of the Nation:

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

The importance and utility of the Preamble has been pointed out in several decisions of our Supreme Court. Though, by itself, it is not enforceable in a Court of law,³ the Preamble to a written Constitution states the *objects* which the Constitution seeks to establish and promote and also aids the legal interpretation of the Constitution where the language is found to be *ambiguous*.⁴ For a proper appreciation of the aims and aspirations embodied in our Constitution, therefore, we must turn to the various expressions contained in the Preamble, as reproduced above.

The Preamble to our Constitution serves, two purposes:

- (a) it indicates the *source* from which the Constitution derives its authority;
- (b) it also states the *objects* which the Constitution seeks to establish and promote.

As has been already explained, the Constitution of India, unlike the **Independent and Sovereign** preceding Government of India Acts, is not a gift of the British Parliament. It is ordained by the people of India through their representatives assembled in a sovereign Constituent Assembly which was competent to determine the political future of the country in any manner it liked. The words—"We, the people of India.... adopt, enact and give to ourselves this Constitution", thus, declare the ultimate sovereignty of the people of India and that the Constitution rests on their authority.³

Sovereignty means the independent authority of a State. It means that it has the power to legislate on any subject; and that it is not subject to the control of any other State or external power.

The Preamble declares, therefore, in unequivocal terms that the source of all authority under the Constitution is the people of India and that there is no subordination to any external authority. While Pakistan remained a British Dominion until 1956, India ceased to be a Dominion and declared herself a 'Republic' since the making of the Constitution in 1949. It means a government by the people and for the people.

We have an elected President at the head of our State, and all office including that of the President will be open to all citizens.

Sovereignty not inconsistent with membership of the Commonwealth. On and from the 26th Jan., 1950, when the Constitution came into force, the Crown of England ceased to have any legal or constitutional authority over India and no citizen of India was to have any allegiance to the British Crown. But though India declared herself a Republic, she did not sever all ties with the British Commonwealth as did *Eire*, by enacting the Republic of Ireland Act, 1948. In fact, the conception of the Commonwealth itself has undergone a change owing to India's decision to adhere to the Commonwealth, *without acknowledging allegiance to the Crown* which was the symbol of unity of the Old British Empire and also of its successor, the 'British Commonwealth of Nations'.⁵ It is this decision of India which has converted the 'British Commonwealth',—a relic of imperialism,—into a free association of independent nations under the honourable name of the 'Commonwealth of Nations'. This historic decision took place at the Prime Ministers' Conference at London on April 27, 1949, where, our Prime Minister, Pandit Nehru, declared that notwithstanding her becoming a sovereign independent Republic, India will continue—"her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the *free* association of the independent nations and as such the Head of the Commonwealth."

It is to be noted that this declaration is *extra-legal* and there is no mention of it in the Constitution of India. It is a voluntary declaration and indicates a free association and no obligation. It only expresses the desire of India not to sever her friendly relations with the English people even though the tie of political subjugation was severed. The new association was an honourable association between independent States. It accepts the Crown of England only as a *symbolic* head of the Commonwealth (having no functions to discharge in relation to India as belonged to him prior to the Constitution), and having no claim to the allegiance of the citizens of India. Even if the King or Queen of England visits India, he or she will *not* be entitled to any precedence over the President of India. Again though as a member of the Commonwealth, India has a right to be represented on Commonwealth conferences, decisions at Commonwealth conferences will not be binding on her and no treaty with a foreign power or declaration of war by any member of the Commonwealth will be binding on her, without her express consent. Hence, this voluntary association of India with the Commonwealth does not affect her sovereignty to any extent and it would be open to India to cut off that association at any time she finds it not to be honourable or useful. As Pandit Nehru explained—

"It is an agreement by free will, to be terminated by free will."⁶

Promotion of International Peace. The great magnanimity with which India took this decision in the face of a powerful opposition at home which was the natural reaction of the manifold grievances under the imperialistic rule, and the great fortitude with which the association has still been maintained, under the pressure of repeated disappointments, the strain of baffling international alignments and the 1976 upsurge of racism in England, speak volumes about the sincerity of India's

pledge to contribute 'to the promotion of world peace' which is reiterated in Art. 51 of the Constitution:

"The State shall endeavour to—

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

The fraternity which is professed in the Preamble is thus not confined within the bounds of the national territory; it is ready to overflow them to reach the loftier ideal of universal brotherhood; which can hardly be better expressed than in the memorable words of Pandit Nehru:

"The only possible, real object that we, in common with other nations, can have is the object of co-operating in building up some kind of a world structure, call it one world, call it what you like."⁷

Thus, though India declares her sovereignty to manage her own affairs, in no unmistakable terms, the Constitution does not support isolationism or 'Jingoism'. Indian sovereignty is consistent with the concept of 'one world' international peace and amity.

The picture of a 'democratic republic' which the Preamble envisages is democratic not only from the *political* but also from **Democracy.** the *social* standpoint; in other words, it envisages not only a democratic form of government but also a democratic society, infused with the spirit of 'justice, liberty, equality and fraternity'.

A Representative Democracy. (a) As a form of government, the democracy which is envisaged is, of course, a representative democracy and there are in *our* Constitution no agencies of direct control by the people, such as 'referendum, or 'initiative'. The people of India are to exercise their sovereignty through a Parliament at the Centre and a Legislature in each State, which is to be elected on adult franchise⁸ and to which the real Executive, namely, the Council of Ministers, shall be responsible. Though there shall be an elected President at the head of the Union and a Governor nominated by the President at the head of each State, neither of them can exercise any political function without the advice of the Council of Ministers⁹ which is collectively responsible to the people's representatives in the respective Legislatures (excepting functions which the Governor is authorised by the Constitution itself to discharge in his discretion or on his individual responsibility). The Constitution holds out equality to all the citizens in the matters of choice of their representatives, who are to run the governmental machinery.

Also known as parliamentary democracy, it envisages (i) representation of the people, (ii) responsible government, and (iii) accountability of the Council of Ministers to the legislature. The essence of this is to draw a direct line of authority from the people through the legislature. The character and content of parliamentary democracy in the ultimate analysis depends upon the quality of persons who man the legislature as representatives of the people. The members of the legislature, thus, must owe their power directly or indirectly to the people.¹⁰

The ideal of a democratic republic enshrined in the Preamble of the Constitution can be best explained with reference to the adoption of **Government of the People, by the People and for the People.** universal suffrage (which has already been explained) and the complete equality between the sexes not only before the law but also in the political sphere. Political Justice means the absence of any arbitrary distinction between man and man in the political sphere.

In order to ensure the 'political' justice held out by the Preamble, it was essential that every person in the territory of India, irrespective of his proprietary or educational qualifications, should be allowed to participate in **Political Justice.** the political system like any other person. Universal adult suffrage was adopted with this object in view.

This means that every five years, the members of the Legislatures of the Union and of each State shall be elected by the vote of the entire adult population, according to the principle—'one man, one vote'.

(b) The offering of equal opportunity to men and women, irrespective of their caste and creed, in the matter of public employment also implements this democratic ideal. The treatment of the minority, even apart from the constitutional safeguards, clearly brings out that the philosophy underlying the Constitution has not been overlooked by those in power. The fact that members of the Muslim and Christian communities are as a rule being included in the Council of Ministers of the Union as well as the States, in the Supreme Court, and even in Diplomatic Missions, without any constitutional reservation in that behalf, amply demonstrates that those who are working the Constitution have not missed its true spirit, namely, that every citizen must feel that this country is his own.

That this democratic Republic stands for the good of *all* the people is embodied in the concept of a 'Welfare State' which inspires the Directive Principles of State Policy. The 'economic justice' assured by the Preamble can hardly be achieved if the democracy envisaged by the Constitution were confined to a 'political democracy'. In the words of Pandit Nehru:¹¹

"Democracy has been spoken of chiefly in the past, as political democracy, roughly represented by every person having a vote. But a vote by itself does not represent very much to a person who is down and out, to a person, let us say, who is starving or hungry. Political democracy, by itself, is not enough except that it may be used to obtain a gradually increasing measure of economic democracy, equality and the spread of good things of life to others and removal of gross inequalities."¹¹

Or, as Dr. Radhakrishnan has put it—

"Poor people who wander about, find no work, no wages and starve, whose lives are a continual round of sore affliction and pinching poverty, cannot be proud of the Constitution or its law."¹²

In short, the Indian Constitution promises not only *political* but also *social* democracy, as explained by Dr. Ambedkar in his concluding speech in the Constituent Assembly:

"Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity which are not to be treated as separate items in a trinity.

They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. *Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.*¹³

The State in a democratic society derives its strength from the cooperative and dispassionate will of all its free and equal citizens.¹³ Social and economic democracy is the foundation on which political democracy would be a way of life in the Indian polity¹⁴.

(c) The banishment of poverty, not by expropriation of those who *have*, **Economic Justice.** but by the multiplication of the national wealth and resources and an equitable distribution thereof amongst all who contribute towards its production, is the aim of the State envisaged by the Directive Principles. Economic democracy will be installed in our sub-continent to the extent that this goal is reached. In short, economic justice aims at establishing economic democracy and a 'Welfare State'.

The ideal of economic justice is to make equality of status meaningful and life worth living at its best removing inequality of opportunity and of status—social, economic and political.¹⁵

Social justice is a fundamental right.¹⁶ Social justice is the comprehensive form to remove social imbalance by law harmonising the rival claims or the interests of different groups and/or sections in the social structure or individuals by means of which alone it would be possible to build up a welfare State.¹⁷

Liberty, equality and fraternity. The three have to be secured and protected with social justice and economic empowerment and political justice to all the citizens under the rule of law.¹⁸

Democracy, in any sense, cannot be established unless certain minimal rights, which are essential for a free and civilised existence, are assured to every member of the community. The Preamble mentions these essential individual rights as 'freedom of thought, expression, belief, faith and worship' and these are guaranteed against all the authorities of the State by Part III of the Constitution [*vide Arts. 19, 25-28*], subject, of course, to the implementation of the Directive Principles, for the common good [Art. 31C] and the 'fundamental duties', introduced [Art. 51A], by the 42nd Amendment, 1976.

'Liberty' should be coupled with social restraint and subordinated to the liberty of the greatest number for common happiness.¹⁹

Equality. Guaranteeing of certain rights to each individual would be meaningless unless all inequality is banished from the social structure and each individual is assured of equality of status and opportunity for the development of the best in him and the means for the enforcement of the rights guaranteed to him. This object is secured in the body of the Constitution, by making illegal all discriminations by the State between citizen and citizen, simply on the ground of religion, race, caste, sex or place of birth [Art. 15]; by throwing open 'public places' to all citizens

[Art. 15(2)]; by abolishing untouchability [Art. 17]; by abolishing titles of honour [Art. 18]; by offering equality of opportunity in matters relating to employment under the State [Art. 16]; by guaranteeing equality before the law and equal protection of the laws, as justiciable rights [Art. 14].

In addition to the above provisions to ensure *civic* equality the Constitution seeks to achieve *political* equality by providing for universal adult franchise [Art. 326] and by reiterating that no person shall be either excluded from the general electoral roll or allowed to be included in any general or special electoral roll, only on the ground of his religion, race, caste or sex [Art. 325].

Apart from these general provisions, there are special provisions in the Directive Principles [Part IV] which enjoin the State to place the two sexes on an equal footing in the economic sphere, by securing to men and women equal right to work and equal pay for equal work [Art. 39, Cls. (a), (d)].

The realisation of so many objectives would certainly mean an expansion of the functions of the State. The goal envisaged by the Constitution, therefore, is that of a 'Welfare State'²⁰ and the establishment of a 'socialist state'²¹. At the Avadi session in 1955, Congress explained this objective as establishing a 'socialistic pattern of society' by a resolution—

"In order to realise the object of Congress. . . . and to further the objectives stated in the Preamble and Directive Principles of State Policy of the Constitution of India, planning should take place with a view to the establishment of a socialistic pattern of society, where the principal means of production are under social ownership or control, production is progressively speeded up and there is equitable distribution of the national wealth."

How far this end has been already achieved will be explained in Chap. 9, where it will also be pointed out how, till 1992, the trend had been from a 'socialistic pattern' towards a 'socialistic state', bringing industries and private enterprises under State ownership and management and carrying on trade and business as a State function.

That the goal of the Indian polity is *socialism* was ensured by inserting the word 'socialist' in the Preamble, by the Constitution (42nd Amendment) Act, 1976. It has been inserted "to spell out expressly the high ideals of socialism". It is to be noted, however, that the 'socialism' envisaged by the Indian Constitution is not the usual scheme of State socialism which involves 'nationalisation' of *all* means of production, and the abolition of private property. As the then Prime Minister Indira Gandhi explained²¹—

"We have always said that we have our *own brand* of socialism. We will nationalise the sectors where we feel the necessity. Just nationalisation is not our type of socialism."²¹

Though the word 'Socialism' is vague, our Supreme Court has observed that its principal aim is to eliminate inequality of income and status and standards of life, and to provide a decent standard of life to the working people. The Indian Constitution, therefore, does not seek to abolish private property altogether but seeks to put it under restraints so that it may be used in the interests of the nation, which includes the upliftment of the poor.

Instead of a total nationalisation of all property and industry, it envisages a 'mixed economy', but aims at offering 'equal opportunity' to all, and the abolition of 'vested interests'.²²⁻²³ From 1992 onwards the trend is now away from socialism to privatisation. Investment in many public enterprises has been divested in favour of private persons and many industries and services which were reserved for the government sector have been thrown open for private enterprise. This is in keeping with the worldwide trend after the collapse of socialism in the U.S.S.R., and East European countries. But the constitutional obligation to pay compensation to the private owner for State acquisition has been taken away by repealing Art. 31, by the Constitution (44th Amendment) Act, 1978, as will be further explained under Chap. 8, *past.*

Unity amongst the inhabitants of this vast sub-continent, torn asunder by a multitude of problems and fissiparous forces, was the first requisite for maintaining the independence of the country as well as to make the experiment of democracy successful. The ideal of unity has been buttressed by adding the words 'and integrity' of the Nation, in the Preamble, by the Constitution (42nd Amendment) Act, 1976. But neither the integration of the people nor a democratic political system could be ensured without infusing a spirit of brotherhood amongst the heterogeneous population, belonging to different races, religions and cultures.²⁴

The 'Fraternity' cherished by the framers of the Constitution will be achieved not only by abolishing untouchability amongst the different sects of the same community, but by abolishing all communal or sectional or even local or provincial anti-social feelings which stand in the way of the unity of India.

Democracy would indeed be hollow if it fails to generate this spirit of brotherhood amongst all sections of the people,—a feeling that they are all children of the same soil, the same Motherland. It becomes all the more essential in a country like India, composed of so many races, religions, languages and cultures.

Article 1 of the Declaration of Human Rights (1948), adopted by the United Nations, says:

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

It is this spirit of brotherhood that the Preamble of *our* Constitution reflects.²⁵

The unity and fraternity of the people of India, professing numerous Faiths, has been sought to be achieved by enshrining the ideal of a 'secular State', which means that the State protects all religions equally and does not itself uphold any religion as the State religion. The question of Secularism is not one of sentiments, but one of law. The secular objective of the State has been specifically expressed by inserting the word 'secular' in the Preamble by the Constitution (42nd Amendment) Act, 1976. Secula-

**A Secular State,
guaranteeing Free-
dom of Religion to
all.**

**42nd Amendment,
1976.**

rism is a part of the basic structure of the Constitution.²⁵ There is no provision in the Constitution making any religion the 'established Church' as some other Constitutions do. On the other hand, the liberty of 'belief, faith and worship' promised in the Preamble is implemented by incorporating the fundamental rights of all citizens relating to 'freedom of religion' in Arts. 25-28, which guarantee to each individual freedom to profess, practise and propagate religion, assure strict impartiality on the part of the State and its institutions towards all religions (see Chap. 8, *post*).

This itself is one of the glowing achievements of Indian democracy when her neighbours, such as Pakistan,²⁶ Bangladesh, Sri Lanka (Ceylon) and Burma, uphold particular religions as State religions.

[For further discussion on 'Secularism', see under Chap. 8, *Art. 25, post.*]

A fraternity cannot, however, be installed unless the dignity of each of **Dignity of the Individual.** its members is maintained. The Preamble, therefore, says that the State, in India, will assure the dignity of

the Individual. The Constitution seeks to achieve this object by guaranteeing equal fundamental rights to each individual, so that he can enforce his minimal rights, if invaded by anybody, in a court of law. Seeing that these justiciable rights may not be enough to maintain the dignity of an individual if he is not free from wants and misery, a number of Directives have been included in Part IV of the Constitution, exhorting the State so to shape its social and economic policies that, *inter alia*, "all citizens, men and women equally, have the right to an adequate means of livelihood" [Art. 39(a)], "just and humane conditions of work" [Art. 42], and "a decent standard of life and full enjoyment of leisure and social and cultural opportunities" [Art. 43]. Our Supreme Court has come to hold that the right to dignity is a fundamental right.²⁷

In order to remove poverty and to bring about a socio-economic revolution, the list of Directives was widened by the Constitution (42nd Amendment) Act, 1976, and it was provided that,—in order that such welfare measures for the benefit of the masses may not be defeated,—any measure for the implementation of *any* of the Directives shall be immune from any attack in the Courts on the ground that such measure contravenes any person's fundamental rights under Art. 14 or 19.²⁸

The philosophy contained in the Preamble, as explained in the **Fundamental Duties.** foregoing pages, has been further highlighted by emphasising that each individual shall not only have the fundamental rights in Part III of the Constitution to ensure his liberty of expression, faith and worship, equality of opportunity and the like, but also a corresponding fundamental duty, such as to uphold the sovereignty, unity and integrity of the nation, to maintain secularism and the common brotherhood amongst all the people of India. This has been done by inserting Art. 51A, laying down ten 'Fundamental Duties', by the Constitution (42nd Amendment) Act, 1976 (see, further, under Chap. 8, *post*).

A fitting commentary on the foregoing contents of the Preamble to our Constitution can be best offered by quoting a few lines from Prof. Ernest Barker, one of the modern thinkers on democratic government.²⁹

" . . . there must be a *capacity* and a *passion* for the enjoyment of liberty—there must be a sense of personality in each, and of respect for personality in all, generally spread through the whole community—before the democratic State can be *truly achieved* . . . Perhaps it can be fairly demanded only in a community which has achieved a *sufficient standard of material existence*, and a *sufficient degree of national homogeneity* to devote itself to an ideal of liberty which has to be *worked out in each by the common effort of all*. If the problems of material existence are still absorbing... the ideal of living a common life of freedom—in other words, of attaining a particular quality of life—will seem an ideal dream. If, again, the problems of national homogeneity are still insistent, and there is *no common feeling of fellowship*—if some sections of the community are regarded by others, whether on the ground of their inferior education, or on the ground of their inferior stock or any other ground, as essentially alien and heterogeneous—the ideal of the common life of freedom will seem equally illusory...."²⁹

Combining the ideals of political, social and economic democracy with that of equality and fraternity, the Preamble seeks to establish what Mahatma Gandhi described as "the India of My Dreams", namely,—

" . . . an India, in which the poorest shall feel that it is their country in whose making they have an effective voice; . . . an India in which all communities shall live in perfect harmony. There can be no room in such an India for the curse of untouchability or the curse of intoxicating drinks and drugs. Women will enjoy the same rights as men."³⁰

No wonder such a successful combination in the text of our Preamble would receive unstinted approbation from Ernest Barker, who has reproduced this Preamble at the opening of his book on Social and Political Theory, observing that the Preamble to the Constitution of India states,

"in a brief and pithy form the argument of much of the book, and it may accordingly serve as a key-note."³¹

REFERENCES

1. (1947) C.A.D. 304 (moved by Pandit Jawaharlal Nehru on December 13, 1946).
2. The words in italics were inserted by the Constitution (42nd Amendment) Act, 1976. See Author's *Constitutional Law of India*, Preamble.
3. *A.K. Gopalan v. State of Madras*, (1950) S.C.R. 88 (198); *Union of India v. Madan Gopal*, (1954) S.C.R. 541 (555).
4. *Re Berubari Union*, AIR 1960 S.C. 845 (846).
5. So called since the Imperial Conference 1926. Later it has come to be mentioned simply as "The Commonwealth" [Cf. BARKER, *Essays on Government* (1956), pp. 16-18].
The concept of Commonwealth as an association has considerably weakened when the United Kingdom virtually segregated itself by refusing to protest against the Racist atrocities committed by the Government of South Africa and later by imposing the visa system upon immigrants from India and some other states.
6. C.A.D., 16-5-1949.
7. C.A.D., 22-1-1947.
8. The survival of this representative democracy and Parliamentary Government in India for about six decades since Independence should silence her critics, since military regime prevailed in her neighbouring countries until recently. In 1981, the Constitution of Pakistan of 1972 was supplanted by the Provisional Constitution Order, 1981, under which Martial Law was imposed under Gen. Zia-ul-Haq as the Chief Martial Law Administrator, who assumed power in 1977. It is only after Zia's death that in December,

1988, elections were held. But the future is not so certain. Similarly, in Bangladesh, Martial Law was imposed since the assassination of Mujibar Rahaman and the assumption of military rule by Ziaur Rahaman, in 1975 and later on by Lt. General Ershad, until 1986 when an election was held and General Ershad elected President amidst a tumultuous situation. President Ershad handed over his power to a neutral Vice-President for conducting fresh elections. At the election Begum Khaleda Zia became the Prime Minister in March, 1991. In November, 1994, Parliament was dissolved, and, at the fresh election, Mrs. Hasina Wazed was elected the new Prime Minister.

9. This is now expressly ensured by amending Art. 74(1) by the Constitution (42nd Amendment) Act, 1976, and the 44th Amendment Act, 1978.
10. *S.R. Chaudhari v. State of Punjab*, (2001) 7 S.C.C. 126.
11. Inaugural address of Pandit Nehru at the Seminar on Parliamentary Democracy on 25-2-1956.
12. Speech of the Vice-President, *ibid*.
13. *State of Punjab v. G.S. Gill*, A.I.R. 1997 S.C. 2324.
14. *Samantha v. State of A.P.*, A.I.R. 1997 S.C. 3297.
15. *Dalmia Cement (Bharat) Ltd. v. Union of India*, (1996) 10 S.C.C. 104.
16. *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 S.C.C. 201.
17. *Dalmia Cement (Bharat) Ltd. v. Union of India*, (1996) 10 S.C.C. 104.
18. *S.S. Bola v. B.D. Sardana*, (1997) 8 S.C.C. 522.
19. *S.S. Bola v. B.D. Sardana*, (1997) 8 S.C.C. 522.
20. Cf. *Crown Aluminum Works v. Workmen*, (1958) S.C.R. 651.
21. *Statesman*, 25-10-1976, p. 1; 28-10-1976, p. 1.
22. See, further, Author's *Constitutional Law of India*, Preamble.
23. It must be pointed out, in this context, that both 'socialism' and 'secularism' are vague words and, in the absence of any explanation of these words in the Constitution, such vagueness is liable to be capitalised by interested political groups and to create confusion in the minds of the masses of the Republic to instruct whom is one of the objects of the Preamble. The Janata Party sought to offer such explanation, by amending Art. 366 of the Constitution by the 45th Amendment Bill, 1976, which, however, was thwarted by the Congress opposition in the Rajya Sabha.

In the absence of such explanation, it would remain a matter of controversy whether the object of 'socialism' under the Indian Constitution simply means 'freedom from exploitation' or State Socialism or even Marxism. Similarly, 'secularism' might be used as an instrument of unrestrained communalism or bigotry or even anti-religionism, as distinguished from 'equal respect for all religions'. Instead of these words serving to elucidate the articles of the Constitution, the meaning of these words shall have to be gathered from the operative provisions, which, in legal interpretation, cannot be controlled by the Preamble. Thus, from Art. 43A, which has been introduced by the same 42nd Amendment Act, 1976, it is clear that 'socialism', as envisaged by the Preamble, will include 'participation of workers' in the management of an industry, and consequently, profit-sharing. This is, obviously, a step forward from Capitalism to collectivism.

The Supreme Court is also facilitating the advent of socialism by interpreting other provisions of the Constitution in the light of the word 'socialism' in the Preamble [*Excel Wear v. Union of India*, AIR 1979 S.C. 25 (para 24); *Randhir v. Union of India*, AIR 1982 S.C. 879 (para 8); *Nakara v. Union of India*, AIR 1983 S.C. 130 (paras 33-34); *Minerva Mills v. Union of India*, AIR 1980 S.C. 1789].

According to the Supreme Court, the goal of Indian Socialism is "a blend of Marxism and Gandhism, leaning heavily towards Gandhian socialism" [*Nakara v. Union of India*, *ibid*.].

The budget for 1992-93 showed and subsequent budgets confirm that the trend of the Government is now away from collective ownership of means of production. Power, steel, airways and many other fields have been opened for free enterprise. The demise of U.S.S.R. has hastened this change of approach. Public sector undertakings are being privatised, the Industrial Finance Corporation Act has been repealed and the corporation has been converted into a company. Same has been the fate of many government corporations. It will not be far away from the truth to assert that the pendulum has now

- swung from Socialism to the other direction of *laissez faire*, under which Indian industry will not have to face open competition from formidable foreign rivals.
24. The Supreme Court has pointed out that in promoting the unity of India, the common culture and heritage of India, of which the foundation is the Sanskrit language, must play a leading part [*Santosh v. Secretary, Ministry of H.R.D.*, AIR 1995 S.C. 293 (para 18)].
 25. *Bommai v. Union of India*, A.I.R. 1994 S.C. 1918. Also see *Sri Adi Visheshwar of Kashi Vishwanath Temple, Varanasi v. State of U.P.*, (1997) 4 S.C.C. 606 (para 26).
 26. Islam is the State religion of Pakistan under the Constitution of 1972. This position had been maintained by the Provisional Constitution Order, 1981, issued by General Zia-ul-Haq, who assumed power in 1977 as the Chief Martial Law Administrator. In Bangladesh, Lieut. General Ershad, the President and Chief Martial Law Administrator declared that Islam would be the State religion [*Statesman*, 30-12-1982].
 27. *L.I.C. v. Consumer Centre*, A.I.R. 1995 S.C. 1811.
 28. This amendment of Art. 31C, by the 42nd Amendment, has not been touched by the 44th Amendment Act, 1978, because the Congress Opposition in the Rajya Sabha thwarted the Janata attempt, through the 45th Amendment Bill, to revert to the pre-1976 position.
 29. BARKER, *Reflections on Government* (Paperback), pp. 192-93.
 30. M.K. GANDHI, *India of My Dreams*, pp. 9-10.
 31. BARKER, *Principles of Social and Political Theory* (1951, Paperback), Preface, pp. vi, ix.

In recent cases (*vide* author's *Shorter Constitution of India*, Preamble), the Supreme Court is relying more and more on the Preamble in interpreting the enacting provisions and implementing the Directive Principles (Part IV) of the Constitution.

CHAPTER 4

OUTSTANDING FEATURES OF OUR CONSTITUTION

I. THE Constitution of India is remarkable for many outstanding features which will distinguish it from other Constitutions even though it has been prepared after "ransacking all the known Constitutions of the world" and most of its provisions are substantially borrowed from others. As Dr. Ambedkar observed,¹—

"One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled when the first written Constitution was drafted. It has been followed by many other countries reducing their Constitutions to writing . . . Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there be any, in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country."¹

So, though our Constitution may be said to be a 'borrowed' Constitution, the credit of its framers lies in gathering the best features of each of the existing Constitutions and in modifying them with a view to avoiding the faults that have been disclosed in their working and to adapting them to the existing conditions and needs of this country. So, if it is a 'patchwork', it is a 'beautiful patchwork'.²

There were members in the Constituent Assembly² who criticised the Constitution which was going to be adopted as a 'slavish imitation of the West' or 'not suited to the genius' of the people. Many apprehended that it would be unworkable. But the fact that it has survived for about sixty years, while Constitutions have sprung up only to wither away in countries around us, such as Burma and Pakistan, belies the apprehension of the critics of the Indian Constitution.

II. It must, however, be pointed out at the outset that many of the original features of the 1949-Constitution have been substantially modified by the 78 Amendments which have been made up to 1996,—of which the 42nd Amendment Act, 1976 (as modified by the 43rd and 44th Amendment Acts, 1977-78), has practically recast the Constitution in vital respects.

Supplemented by multiple amendments, and practically recast by the 42nd, 43rd and 44th Amendments, 1976-78.

The 73rd Amendment Act which was brought into force in April 1993 has added 16 articles which provide for establishment of and elections to Panchayats. They comprise a new part, Part IX. By the same Amendment a

new schedule (Sch. 11) has been added which enumerates the functions to be delegated to the Panchayats.

The 74th Amendment Act was passed to establish Municipalities and provides for elections to them. It has inserted Part 9A consisting of 18 articles. Schedule 12 inserted by the Amendment mentions the functions to be assigned to the Municipalities. This Amendment came into force on 1st June 1993.

III. The Constitution of India has the distinction of being the most lengthy and detailed constitutional document the world has so far produced. The original Constitution contained as many as 395 Articles and 8 Schedules (to which additions were made by subsequent amendments). Even after the repeal of several provisions it still (in 2008) contains 444 Articles and 12 Schedules.³

During the period 1950-2000, while a number of Articles have been omitted,—64 Articles and 4 Schedules have been *added* to the Constitution, viz., Arts. 21A, 31A-31C, 35A, 39A, 43A, 48A, 51A, 131A, 134A, 139A, 144A, 224A, 233A, 239A, 239AA, 239AB, 239B, 243, 243A to 243ZG, 244A, 257A, 258A, 290A, 300A, 312A, 323A, 323B, 338A, 350A, 350B, 361A, 363A, 371A-371-I, 372A, 378A, 394A.

This extraordinary bulk of the Constitution is due to several reasons :

Incorporates the accumulated experience of different Constitutions. (i) The framers sought to incorporate the accumulated experience gathered from the working of all the known Constitutions and to avoid all defects and loopholes that might be anticipated in the light of those Constitutions. Thus, while they framed the Chapter on the Fundamental Rights upon the model of the

American Constitution, and adopted the Parliamentary system of Government from the United Kingdom, they took the idea of the Directive Principles of State Policy from the Constitution of Eire, and added elaborate provisions relating to Emergencies in the light of the Constitution of the German Reich and the Government of India Act, 1935. On the other hand, our Constitution is more full of words than other Constitutions because it has embodied the modified results of judicial decisions made elsewhere interpreting comparable provisions, in order to minimise uncertainty and litigation.

Detailed administrative provisions included. (ii) Not contented with merely laying down the fundamental principles of governance (as the American Constitution does), the authors of the Indian Constitution followed and reproduced the Government of India Act, 1935, in providing matters of administrative detail,—not only

because the people were accustomed to the detailed provisions of that Act, but also because the authors had the apprehension that in the present conditions of the country, the Constitution might be perverted unless the form of administration was also included in it. In the words of Dr. Ambedkar,¹

“... It is perfectly possible to pervert the Constitution without changing the form of administration.”

Any such surreptitious subversion of the Constitution was sought to be prevented by putting detailed provisions in the Constitution itself, so that they might not be encroached upon without amending the Constitution.

The very adoption of the bulk of the provisions from the Government of India Act, 1935, contributed to the volume of the new Constitution inasmuch as the Act of 1935 itself was a lengthy and detailed organic law. So much was borrowed from that Act because the people were familiar with the existing system.

It was also felt that the smooth working of an infant democracy might be jeopardised⁴ unless the Constitution mentioned in detail things which were left in other Constitutions to ordinary legislation. This explains why we have in our Constitution detailed provisions about the organisation of the Judiciary, the Services, the Public Service Commissions, Elections and the like. It is the same ideal of 'exhaustiveness' which explains why the provisions of the Indian Constitution as to the division of powers between the Union and the States are more numerous than perhaps the aggregate of the provisions relating to that subject in the Constitution of the U.S.A., Australia and Canada.

Peculiarity of the Problems to be solved. (iii) The vastness of the country (see Table I), and the peculiar problems to be solved have also contributed towards the bulk of the Constitution. Thus, there is one entire Part [Part XVI] relating to the Scheduled Castes and Tribes and other backward classes; one Part [Part XVIII] relating to Official Language and another [Part XVII] relating to Emergency Provisions.

Constitution of the Units also included. (iv) While the Constitution of the United States deals only with the Federal Government and leaves the States to draw up their own Constitutions, the Indian Constitution provides the Constitutions of both the Union and the Units (*i.e.*, the States), with the same fullness and precision. Since the Units of the federation differed in their historical origins and their political development, special provisions for different classes of the Units⁵ had to be made, such as the Part B States (representing the *former Indian States*), the Part C States (representing the Centrally Administered areas) and some smaller Territories in Part D. This also contributed to the bulk of the 1949-Constitution (see Table III).

Special provisions for Jammu & Kashmir. Though, as has just been said, the Constitution of the State was provided by the Constitution of India, the State of Jammu and Kashmir was accorded a special status and was allowed to make its own State Constitution.

Even all the other provisions of the Constitution of India did not directly apply to Jammu and Kashmir but depended upon an Order made for the President in Constitution with the Government of State,—for which provision had to be made in Art. 370 [see Chap. 15].

Nagaland, Sikkim, etc. Even after the inauguration of the Constitution, special provisions have been inserted [*e.g.*, Arts. 371-371I], to meet the regional problems and demands in

certain States, such as Nagaland, Assam, Manipur, Andhra Pradesh, Maharashtra, Gujarat, Sikkim, Mizorma, etc.

(v) Not only are the provisions relating to the Units elaborately given,

Federal Relations elaborately dealt with. the relations between the Federation and the Units and the Units *inter se*, whether legislative or administrative, are also exhaustively codified, so as to eliminate conflicts as far as possible. The lessons

drawn from the political history of India which induced the framers of the Constitution to give it a unitary bias, also prompted them to make detailed provisions "regarding the distribution of powers and functions between the Union and the States in all aspects of their administrative and other activities",⁶ and also as regards inter-State relations, co-ordination and adjudication of disputes amongst the States.

(vi) There is not only a Bill of Rights containing justiciable fundamental

Both Justiciable and Non-justiciable Rights included: Fundamental Rights, Directive Principles, and Fundamental Duties. rights of the individual [Part III] on the model of the Amendments to the American Constitution but also a Part [Part IV] containing Directive Principles, which confer no justiciable rights upon the individual but are nevertheless to be regarded as 'fundamental in the governance of the country',—being in the nature of 'principles of social policy' as contained in the Constitution of *Eire* (*i.e.*, the Republic of Ireland).

It was considered by the makers of *our* Constitution that though they could not, owing to their very nature, be made legally enforceable, it was well worth to incorporate in the Constitution some basic non-justiciable rights which would serve as moral restraints upon future governments and thus prevent the policy from being torn away from the idea which inspired the makers of the organic law.

Even the Bill of Rights (*i.e.*, the list of Fundamental Rights) became bulkier than elsewhere because the framers of the Constitution had to include novel matters owing to the peculiar problems of *our* country, *e.g.*, untouchability, preventive detention.

To the foregoing list, a notable addition has been made by the 42nd Amendment inserting one new Chapter of Fundamental Duties of Citizens [Part IVA, Art. 51A], which though not attended with any legal sanction, have now to be read along with the Fundamental Rights [see, further, under Chap. 8, *post*].

More Flexible than Rigid.

IV. Another distinctive feature of the Indian Constitution is that it seeks to impart flexibility to a written federal Constitution.

It is only the amendment of a few of the provisions of the Constitution that requires ratification by the State Legislatures and even then ratification by only 1/2 of them would suffice (while the American Constitution requires ratification by 3/4 of the States).

The rest of the Constitution may be amended by a special majority of the Union Parliament, *i.e.*, a majority of not less than 2/3 of the members of

each House present and voting, which, again, must be majority of the total membership of the House [see Chap. 10].

On the other hand, Parliament has been given the power to alter or modify many of the provisions of the Constitution by a simple majority as is required for general legislation, by laying down in the Constitution that such changes "*shall not be deemed to be 'amendments' of the Constitution*". Instances to the point are—(a) Changes in the names, boundaries, areas of, and amalgamation and separation of States [Art. 4]. (b) Abolition or creation of the Second Chamber of a State Legislature [Art. 169]. (c) Administration of Scheduled Areas and Scheduled Tribes [*Para 7 of the 5th Schedule and Para 21 of the 6th Schedule*]; (d) Creation of Legislatures and Council of Ministers for certain Union Territories [Art. 239A(2)].

Legislation as supplementing the Constitution. Yet another evidence of this flexibility is the power given by the Constitution itself to Parliament to supplement the provisions of the Constitution by legislation. Though the makers of the Constitution aimed at exhaustiveness, they realised that it was not possible to anticipate all exigencies and to lay down detailed provisions in the Constitution to meet all situations and for all times.

(a) In various Articles, therefore, the Constitution lays down certain basic principles and empowers Parliament to supplement these principles by legislation. Thus, (i) as to citizenship, Arts. 5-8 only lay down the conditions for acquisition of citizenship at the commencement of the Constitution and Art. 11 vests plenary powers in Parliament to legislate on this subject. In pursuance of this power, Parliament has enacted the Citizenship Act, 1955, so that in order to have a full view of the law of citizenship in India, study of the Constitution has to be supplemented by that of the Citizenship Act. (ii) Similarly, while laying down certain fundamental safeguards against preventive detention, Art. 22(7) empowers Parliament to legislate on some subsidiary matters relating to the subject. The laws made under this power, have, therefore, to be read along with the provisions of Art. 22. (iii) Again, while banning 'untouchability', Art. 17 provides that it shall be an offence 'punishable in accordance with law', and in exercise of this power, Parliament has enacted the Protection of Civil Rights Act, 1955⁷ which must be referred to as supplementing the constitutional prohibition against untouchability. (iv) While the Constitution lays down the basic provisions relating to the election of the President and Vice-President, Art. 71(3) empowers Parliament to supplement these constitutional provisions by legislation, and by virtue of this power Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952.

The obvious advantage of this scheme is that the law made by Parliament may be modified according to the exigencies for the time being, without having to resort to a constitutional amendment.

(b) There are, again, a number of articles in the Constitution which are of a tentative or transitional nature and they are to remain in force only so long as Parliament does not legislate on the subject, e.g., exemption of Union property from State taxation [Art. 285]; suability of the State [Art. 300(1)].

The Constitution, thus, ensures adaptability by prescribing a variety of modes in which its original text may be changed or supplemented, a fact which has evoked approbation from Prof. Wheare—

"This variety in the amending process is wise but is *rarely found*."⁸

This wisdom has been manifested in the ease with which Sikkim, a Protectorate since British days, could be brought under the Constitution—first, as an 'associate State' (35th Amendment Act), and then as a full-fledged State of the Union (36th Amendment Act, 1975).

Reconciliation of a written Constitution with Parliamentary sovereignty.

V. This combination of the theory of 'fundamental law' which underlies the written Constitution of the United States with the theory of 'Parliamentary sovereignty' which underlies the unwritten Constitution of *England* is the result of the liberal philosophy of the framers of the Indian

Constitution which has been so nicely expressed by Pandit Nehru:

"While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital, organic people. . . In any event, we could not make this Constitution as rigid that it cannot be *adapted* to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what we may do to-day may not be wholly capable tomorrow."⁹

The flexibility of *our* Constitution is illustrated by the fact that during the first 59 years of its working, it has been amended 94 times. Vital changes have thus been effected by the First, Fourth, Twenty-fourth, Twenty-fifth, Thirty-ninth, Forty-second, Forty-fourth, Seventy-third and Seventy-fourth Amendments to the Constitution, including amendments to the fundamental rights, powers of the Supreme Court and the High Courts.

Dr. Jennings¹⁰ characterised *our* Constitution as rigid for two reasons: (a) that the process of amendment was complicated and difficult, (b) that matters which should have been left to ordinary legislation having been incorporated into the Constitution, no change in these matters is possible without undergoing the process of amendment. We have seen that the working of the Constitution during six decades has *not* justified the apprehension that the process of amendment is very difficult [see also Chap. 10, *post*]. But the other part of his reasoning is obviously sound. In fact, his comments on this point have proved to be prophetic. He cited Art. 224 as an illustration of a provision which had been unnecessarily embodied in the Constitution:

"An example taken at random is article 224, which empowers a retired judge to sit in a High Court. Is that a provision of such constitutional importance that it needs to be constitutionally protected, and be incapable of amendment except with the approval of two-thirds of the members of each House sitting and voting in the Union Parliament?"¹¹

As Table IV will show it has required an amendment of the Constitution, namely, the Seventh Amendment of 1956, to amend this article to provide for the appointment of Additional Judges instead of recalling retired Judges. Similar amendments have been required, once to provide that a Judge of a High Court who is transferred to another High Court shall

not be entitled to compensation [Art. 222] and, again, to provide for compensation. It is needless to multiply such instances since they are numerous.

The greatest evidence of flexibility, however, has been offered by the amendments since 1976. The 42nd Amendment Act, 1976, after the Constitution had worked for over quarter of a century, introduced vital changes and upset the balance between the different organs of the State.¹¹ Of course, behind this flexibility lies the assumption that the Party in power wields more than a two-thirds majority in both Houses of Parliament.¹¹

VI. It is also remarkable that though the framers of the Constitution

Role of Conventions under the Constitution.

attempted to make an exhaustive code of organic law,

room has been left for the growth of conventions to supplement the Constitution in matters where it is

silent. Thus, while the Constitution embodied the

doctrine of Cabinet responsibility in Art. 75, it was not possible to codify the numerous conventions which answer the problems as they may arise in England, from time to time, in the working of the Cabinet system. Take, for instance, the question whether the Ministry should resign whenever there is an adverse vote against it in the House of the People, or whether it is at liberty to regard an accidental defeat on a particular measure as a 'snap vote'.¹² Again, the Constitution cannot possibly give any indication as to which issue should be regarded as a 'vital issue' by a Ministry, so that on a defeat on such an issue the Ministry should be morally bound to resign. Similarly, in what circumstances a Ministry would be justified in advising the President to dissolve Parliament instead of resigning upon an adverse vote, can only be established by convention.

Sir Ivor Jennings¹⁰ is, therefore, justified in observing that—

"The machinery of government is essentially British and the whole collection of British constitutional conventions has apparently been incorporated as conventions."

VII. While the Directive Principles are not enforceable in the Courts, the Fundamental Rights, included in Part III, are so enforceable at the

Fundamental Rights, and Constitutional Remedies.

instance of any person whose fundamental right has been infringed by any action of the State,—executive or legislative—and the remedies for enforcing these rights, namely, the writs of *habeas corpus*, *mandamus*,

prohibition, *quo warranto* and *certiorari*, are also guaranteed by the Constitution. Any law or executive order which offends against a fundamental right is liable to be declared void by the Supreme Court or the High Court.

It is through a misapprehension of these provisions that the Indian Constitution has been described by some critics as a 'lawyer's paradise'.¹² According to Sir Ivor Jennings,¹⁰ this is due to the fact that the Constituent Assembly was dominated by 'the lawyer-politicians'. It is they who thought of codifying the individual rights and the prerogative writs though none in England would ever cherish such an idea. In the words of Sir Ivor—

"Though no English lawyer would have thought of putting the prerogative writs into a Constitution, the Constituent Assembly did so... These various factors have given India a most complicated Constitution. Those of us who claim to be

constitutional lawyers can look with equanimity on this exaltation of our profession. But constitutions are intended to enable the process of Government to work smoothly, and not to provide fees for constitutional lawyers. The more numerous the briefs the more difficult the process of government becomes. India has perhaps placed too much faith in us."¹⁰

With due respect to the great constitutional expert,¹⁰ these observations disclose a failure to appreciate the very foundation of the Indian **Judicial review** Constitution. Sir Ivor omits to point out that the **makes the Constitution legalistic.** fathers of the Indian Constitution preferred the American doctrine of 'limited government' to the English doctrine of Parliamentary sovereignty.

In *England*, the birth of modern democracy was due to a protest against the absolutism of an autocratic executive and the English people discovered in Parliamentary sovereignty an adequate solution of the problem that faced them. The English political system is founded on the unlimited faith of the people in the good sense of their elected representatives. Though, of late, detractions from its omnipotent authority have taken place because the ancient institution at Westminster has grown incapable of managing myriads of modern problems with the same ease as in Victorian age, nonetheless, never has anybody in England thought of placing limitations on the authority of Parliament so that it might properly behave.

The Founding Fathers of the *American* Constitution, on the other hand, had the painful experience that even a representative body might be tyrannical, particularly when they were concerned with a colonial Empire. Thus it is that the Declaration of Independence recounts the attempts of the British "Legislature to extend an unwarrantable jurisdiction over us" and how the British people had been "deaf of the voice of justice". At heavy cost had the colonists learnt about the frailty and weakness of human nature when the same Parliament which had forced Charles I to sign the Petition of Right (1628) to acknowledge that no tax could be levied without the consent of Parliament, did, in 1765, and the years that followed, insist on taxing the colonies, regardless of their right of representation, and attempt to enforce such undemocratic laws through military rule.

Hence, while the English people, in their fight for freedom against autocracy, stopped with the establishment of the supremacy of the law and Parliament as the sole source of that law, Americans had to go further and to assert that there is to be a law superior to the Legislature itself and that it was the restraints of this paramount written law that could only save them from the fears of absolutism and autocracy which are ingrained in human nature itself.

As will be more fully explained in the Chapter on Fundamental Rights, the Indian experience of the application of the British Rule of Law in India was not altogether happy and there was a strong feeling that it was not administered with even hands by the foreign rulers in India as in their own land. The "Sons of Liberty" in India had known to what use the flowers of the English democratic system, *viz.*, the Sovereignty of Parliament and the Rule of Law, could be put in trampling down the rights of man under an

Imperial rule. So, in 1928, long before the dawn of independence in India, the Motilal Nehru Committee asserted that

"Our first care could be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances."

Now, judicial review is a necessary concomitant of 'fundamental rights', for, it is meaningless to enshrine individual rights in a written Constitution as 'fundamental rights' if they are not enforceable, in Courts of law, against any organ of the State, legislative or executive. Once this choice is made, one cannot help to be sorry for the litigation that ensues. Whatever apprehensions might have been entertained in some quarters in India at the time of the making of the Indian Constitution, there is hardly anybody in India to-day who is aggrieved because the Supreme Court, each year, invalidates a dozen of statutes and a like number of administrative acts on the ground of violation of the fundamental rights.

At the same time, it must be pointed out that since the inauguration of the Constitution, various provisions have been inserted into the Constitution by amendments, which have taken out considerable areas from the pale of judicial review, e.g., by inserting Arts. 31A-31C; and by 1995 as many as 284 Acts,—Central and State,—have been shielded from judicial review on the ground of contravention of the Fundamental Rights, by enumerating them under the 9th Schedule, which relates to Art. 31B.¹¹

VIII. An independent Judiciary, having the power of 'Judicial review', is another prominent feature of *our* Constitution.

On the other hand, we have avoided the other-extreme, namely, that of 'judicial supremacy', which may be a logical outcome of an over-emphasis on judicial review, as the American experience demonstrates.

Judicial power of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution.¹²

Indeed, the harmonisation which our Constitution has effected between Parliamentary Sovereignty and a written Constitution with a provision for Judicial Review, is a unique achievement of the framers of *our* Constitution. An absolute balance of powers between the different organs of government is an impracticable thing and, in practice, the final say must belong to some one of them. This is why the rigid scheme of Separation of Powers and the checks and balances between the organs in the Constitution of the *United States* has failed in its actual working, and the Judiciary has assumed supremacy under its powers of interpretation of the Constitution to such an extent as to deserve the epithet of the 'safety valve' or the 'balance-wheel' of the Constitution. As one of her own Judges has said (Chief Justice HUGHES), "The Constitution (of the U.S.A.) is what the Supreme Court says it is". It has the power to invalidate a law duly passed by the Legislature not only on the ground that it transgresses the legislative powers vested in it by the Constitution or by the prohibitions contained in the Bill of Rights but also on the ground that it is opposed to some general principles said to underlie vague expressions, such as due process, the contents of which not being

Compromise between Judicial Review and Parliamentary Supremacy.

explicitly laid down in the Constitution, are definable only by the Supreme Court. The American Judiciary thus sits over the *wisdom* of any legislative policy as if it were a third Chamber or super-Chamber of the Legislature.

Under the *English* Constitution, on the other hand, Parliament is supreme and "can do everything that is not naturally impossible" (*Blackstone*) and the Courts cannot nullify any Act of Parliament on any ground whatsoever. As MAY puts it—

"The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be *unjust* and contrary to the principles of sound government. But Parliament is not controlled in its discretion and when it errs, its errors can be corrected only by itself."

So, English Judges have denied themselves any power "to sit as a court of appeal against Parliament".

The *Indian* Constitution wonderfully adopts the *via media* between the American system of Judicial Supremacy and the English principle of Parliamentary Supremacy, by endowing the Judiciary with the power of declaring a law as unconstitutional if it is beyond the competence of the Legislature according to the distribution of powers provided by the Constitution, or if it is in contravention of the fundamental rights guaranteed by the Constitution or of any other mandatory provision of the Constitution, e.g., Arts. 286, 299, 301, 304; but, at the same time, depriving the Judiciary of any power of 'judicial review' of the wisdom of legislative policy. Thus, it avoided expressions like 'due process', and made fundamental rights such as that of liberty and property subject to regulation by the Legislature.¹¹ But the Supreme Court has discovered 'due process' in Art. 21 in *Maneka Gandhi*.¹⁴ Further the major portion of the Constitution is liable to be amended by the Union Parliament by a special majority, if in any case the Judiciary proves too obtrusive. The theory underlying the Indian Constitution in this respect can hardly be better expressed than in the words of Pandit Nehru:

"No Supreme Court, no Judiciary, can stand in judgment over the sovereign will of Parliament, representing the will of the entire community. It can pull up that sovereign will if it goes wrong, but, in the ultimate analysis, where the future of the community is concerned, no Judiciary can come in the way... Ultimately, the fact remains that the Legislature must be supreme and must not be interfered with by the Courts of Law in such measures as *social reform*."

Our Constitution thus places the supremacy at the hands of the Legislature as much as that is possible within the bounds of a written Constitution. But, as has been mentioned earlier, the balance between Parliamentary Sovereignty and Judicial Review was seriously disturbed, and a drift towards the former was made, by the Constitution (42nd Amendment) Act, 1976, by inserting some new provisions, e.g., Arts. 31D, 32A, 131A, 144A, 226A, 228A, 323A-B, 329A.

The Janata Government, coming to power in 1977, restored the pre-1976 position, to a substantial extent, through the 43rd and 44th Amendments, 1977-78, by repealing the following Articles which had been inserted by the 42nd Amendment—31D, 32A, 131A, 144A, 226A, 228A, 329A; and by restoring Art. 226 to its original form (substantially).

On the other hand, the Judiciary has gained ground by itself declaring that 'judicial review' is a 'basic feature' of *our* Constitution, so that so long as the Supreme Court itself does not revise its opinion in this behalf, any amendment of the Constitution to take away judicial review of legislation on the ground of contravention of any provision of the Constitution shall itself be liable to be invalidated by the Court (see at the end of this Chapter).

Fundamental Rights subject to reasonable regulation by Legislature.

IX. The balancing between supremacy of the Constitution and sovereignty of the Legislature is illustrated by the novel declaration of Fundamental Rights which our Constitution embodies.

The idea of incorporating in the Constitution a 'Bill of Rights' has been taken from the Constitution of the United States. But the guarantee of individual rights in *our* Constitution has been very carefully balanced with the need for the *security of the State itself*.

American experience demonstrates that a written guarantee of fundamental rights has a tendency to engender an atomistic view towards society and the State which may at times prove to be dangerous to the common welfare. Of course, America has been saved from the dangers of such a situation by reason of her Judiciary propounding the doctrine of 'Police Powers' under which the Legislature is supposed to be competent to interfere with individual rights wherever they constitute a 'clear danger' to the safety of the State and other collective interests.

Instead of leaving the matter to the off-chance of judicial protection in particular cases, the Indian Constitution makes each of the fundamental rights subject to legislative control under the terms of the Constitution itself, apart from those exceptional cases where the interests of national security, integrity or welfare should exclude the application of fundamental rights altogether [Arts. 31A-31C].¹¹

X. Another peculiarity of the Chapter on Fundamental Rights in the Social Equality also guaranteed by the Constitution. Indian Constitution is that it aims at securing not merely political or legal equality, but *social* equality as well. Thus, apart from the usual guarantees that the

State will not discriminate between one citizen and another merely on the ground of religion, race, caste, sex or place of birth,—in the matter of appointment, or other employment, offered by the State,—the Constitution includes a prohibition of 'untouchability', in any form and lays down that no citizen may be deprived of access to any public place, of the enjoyment of any public amenity or privilege, only on the ground of religion, race, caste, sex or place of birth.

We can hardly overlook in this context that under the Constitution of the U.S.A., racial discrimination persists even to-day, notwithstanding recent judicial pronouncements to the contrary. The position in the United Kingdom is no better as demonstrated by current events.

Fundamental Rights checkmated by Fundamental Duties.

XI. Another feature, which was not in the original Constitution has been introduced by the 42nd Amendment, 1976, by introducing Art. 51A as Part IVA of the Constitution.

Though the Directives in Part IV of the Constitution were not enforceable in any manner and had to give way before the **42nd Amendment** 1976. Fundamental Rights, under the original Constitution, the situation was reversed, through the backdoor, by the 42nd Amendment, 1976, by amending Art. 31C¹¹—shielding *all* the Directives in Part IV of the Constitution from the Fundamental Rights in Part III. But this object has been frustrated by the majority decision in the case of *Minerva Mills v. Union of India*,¹⁵ as a result of which Art. 31C will shield from unconstitutionality on the ground of violation of Art. 13 those laws which implement only the Directives specified in Art. 39(b)-(c) and not any other Directive included in Part IV of the Constitution.

In the same direction, the 42nd Amendment Act introduced 'Fundamental Duties', to circumscribe the Fundamental Rights, even though the Duties, as such, cannot be judicially enforced (see, further, under Chap. 8, *post*).

Universal Franchise without Communal Representation. XII. The adoption of universal adult suffrage [Art. 326], *without any qualification* either of sex, property, taxation or the like, is a 'bold experiment' in India, having regard to the vast extent of the country and its population, with an over-whelming illiteracy (see Table I, *post*). The

suffrage in India, it should be noted, is wider than that in England or the United States. The concept of popular sovereignty, which underlies the declaration in the Preamble that the Constitution is adopted and given by the 'people of India' unto themselves, would indeed have been hollow unless the franchise—the only effective medium of popular sovereignty in a modern democracy—were extended to the entire adult population which was capable of exercising the right and an independent electoral machinery (under the control of the Election Commission) was set up to ensure the free exercise of its. The electorate has further been widened by lowering the voting age from 21 to 18, by the 61st Constitution Amendment Act, 1988.

That, notwithstanding the outstanding difficulties, this bold experiment has been crowned with success will be evident from some of the figures¹⁶ relating to the first General Election held under the Constitution in 1952. Out of a total population of 356 million and an adult population of 180 million, the number of voters enrolled was 173 million and of these no less than 88 million, *i.e.*, over 50 per cent of the enrolled voters, actually exercised their franchise. The orderliness with which eleven General Elections have been conducted speaks eloquently of the political attainment of the masses, though illiterate, of this vast sub-continent. In the eleventh General Election held in 1996, the number of persons on the electoral roll had come up to 550 million and the same came up to 67,14,87,930 in the 14th General Election in 2004.

No less creditable for the framers of the Constitution is the abolition of communal representation, which in its trail had brought in the bloody and lamentable partition of India. In the new Constitution there was no reservation of seats except for the Scheduled Castes and Scheduled Tribes and for the Anglo-Indians,—and that only for a temporary period (this

period was 10 years in the original Constitution, which has been extended to 60 years, i.e., up to 2010 A.D., by subsequent amendments of Art. 334).¹⁷

XIII. It has been stated at the outset, that the form of government introduced by *our* Constitution both at the Union and the States is the Parliamentary Government of the British type.¹⁸ A primary reason for the choice of this system of government was that the people had a long experience of this system under the Government of India Acts,¹⁹ though the British were very slow in importing its features to the fullest length.

The makers of *our* Constitution rejected the Presidential system of government, as it obtains in *America*, on the ground that under that system the Executive and the Legislatures are separate from and independent of each other,²⁰ which is likely to cause conflicts between them, which *our* infant democracy could ill afford to risk.

But though the British model of Parliamentary or Cabinet form of government was adopted, a hereditary monarch or ruler at the head could not be installed, because India had declared herself a 'Republic'. Instead of a monarch, therefore, an elected President was to be at the head of the Parliamentary system. In introducing this amalgam, the makers of *our* Constitution followed the *Irish* precedent.

As in the Constitution of *Eire*, the Indian Constitution superimposes an elected President upon the Parliamentary system of responsible government.

**Parliamentary
Government
combined with an
elected President
at the Head.**

But though an elected President is the executive head of the Union, he is to act on the advice of his ministers, although whether he so acts according to the advice of his ministers is not questionable in the courts and there is no mode, short of impeachment, to remove the President if he acts contrary to the

Constitution.

On the other hand, principle of ministerial responsibility to the Legislature, which under the English system rests on convention, is embodied in the express provisions of *our* Constitution [Art. 75(3)].

In the words of *our* Supreme Court,²¹

"Our Constitution though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of government policy and its transmission into law, though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. . . In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England. . ."²¹

But *our* Constitution is not an exact replica of the Irish model either. The Constitution of *Eire* lays down that the constitutional powers of the President can only be exercised by him on the advice of Ministers, *except* those which are left to his discretion by the Constitution itself. Thus, the Irish President has an absolute discretion to refuse dissolution of the Legislature to a defeated Prime Minister, contrary to the English practice and convention.

**42nd Amendment,
1976.**

But in the Indian Constitution there is no provision authorising the President to act 'in his discretion' on any matter. On the other hand, by amending

Art. 74(1), the 42nd Amendment Act has explicitly codified the proposition which the Supreme Court had already laid down in several decisions,²¹ that the President "shall, in the exercise of his functions, act *in accordance with* such advice," i.e., the advice tendered by the Council of Ministers.

The Janata Government has preferred not to disturb this contribution of the 42nd Amendment, except to empower the President by the 44th Amendment, 1978, to refer a matter back to the Council of Ministers, for reconsideration.

XIV. Perhaps the most remarkable achievement of the Indian Constitution is to confer upon a federal system the strength of a unitary government. **A Federal System with Unitary Bias.** Though normally the system of government is federal, the Constitution enables the federation to transform itself into a unitary State (by the assumption of the powers of States by the Union),—in *emergencies* [Part XVIII].

Such a combination of federal and unitary systems in the same constitution is unique in the world. For a correct appreciation of this unique system it is necessary to examine the background upon which federalism has been introduced into India, in the light of the experience in other federal countries. This deserves a separate treatment [see Chap. 5, *post*].

XV. No less an outstanding feature of the new Constitution is the union of some 552 Indian States with the rest of India under the Constitution. **Integration of Indian States.** Thus, the problem that baffled the framers of the Government of India Act, 1935, and ultimately led to the failure of its federal scheme, was solved by the framers of the Constitution with unique success. The entire sub-continent of India has been unified and consolidated into a compact State in a manner which is unprecedented in the history of this country.

The process by which this formidable task has been formed makes a story in itself.

At the time of the constitutional reforms leading to the Government of India Act, 1935, the geographical entity known as India was divided into two parts—British India and the Indian States. While British India comprised the nine Governors' Provinces and some other areas administered by the Government of India itself, the Indian States comprised some 600 States which were mostly under the personal rule of the Rulers or proprietors. All the Indian States were not of the same order. Some of them were States under the rule of hereditary Chiefs, which had a political status even from before the Mahomedan invasion; others (about 300 in number) were Estates or Jagirs granted by the Rulers as rewards for services or otherwise, to particular individuals or families. But the common feature that distinguished these States from British India was that the Indian States, had not been annexed by the British Crown. So, while British India was under the direct rule of the Crown through its representatives and according to the statutes of Parliament and enactments of the Indian Legislatures,—the Indian

States were allowed to remain under the personal rule of their Chiefs and Princes, under the 'suzerainty' of the Crown, which was assumed over the entire territory of India when the Crown took over authority from the East India Company in 1858.

The relationship between the Crown and the Indian States since the **Incidents of Paramountcy.** assumption of suzerainty by the Crown came to be described by the term '*Paramountcy*'. The Crown was bound by engagements of a great variety with the

Indian States. A common feature of these engagements was that while the States were responsible for their own internal administration, the Crown accepted responsibility for their external relations and defence. The Indian States had no international life, and for *external* purposes, they were practically in the same position as British India. As regards *internal* affairs, the policy of the British Crown was normally one of non-interference with the monarchical rule of the Rulers, but the Crown interfered in cases of misrule and mal-administration, as well as for giving effect to its international commitments. So, even in the internal sphere, the Indian States had *no legal* right against non-interference.

Nevertheless, the Rulers of the Indian States enjoyed certain personal rights and privileges, and normally carried on their personal administration, unaffected by all political and constitutional vicissitudes within the neighbouring territories of British India.

The Government of India Act, 1935 envisaged a federal structure for the whole of India, in which the Indian States could figure as units, together

Place of Indian States in the Federal Scheme proposed by the Government of India Act, 1935. with the Governors' Provinces. Nevertheless, the framers of the Act differentiated the Indian States from the Provinces in two material respects, and this differentiation ultimately proved fatal for the scheme itself. The two points of difference were—(a) While in the case of the Provinces accession to the Federation

was compulsory or automatic,—in the case of an Indian State it was voluntary and depended upon the option of the Ruler of the State. (b) While in the case of the Provinces, the authority of the Federation over the Provinces (executive as well as legislative) extended over the whole of the federal sphere chalked out by the Act,—in the case of the Indian States, the authority of the Federation could be limited by the Instrument of Accession and all residuary powers belonged to the State. It is needless to elaborate the details of the plan of 1935, for, as has been stated earlier, the accession of the Indian States to the proposed Federation never came true, and this Part of that Act was finally abandoned in 1939, when World War II broke out.

When Sir Stafford Cripps came to India with his Plan, it was definitely understood that the Plan proposed by him would be confined to settling the political destinies of British India and that the Indian States would be left free to retain their separate status.

Proposal of the Cabinet Mission.

But the Cabinet Mission supposed that the Indian States would be ready to co-operate with the new development in India. So, they recommended

that there should be a Union of India, embracing both British India and the States, which would deal only with Foreign Affairs, Defence and Communications, while the State would retain all powers other than these.

Lapse of Paramountcy under the Indian Independence Act.

When the Indian Independence Act, 1947, was passed, it declared the lapse of suzerainty (paramountcy) of the Crown, in s. 7(1)(b) of the Act, which is worth reproduction:

'7. (1) As from the appointed day—

(b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at the date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority, or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise; and

Provided that notwithstanding anything in paragraph (b). . . of this sub-section, effect shall, as nearly as may be, continue to be given to the provision of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the Rulers of the Indian States. . . on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.'

But though paramountcy lapsed and the Indian States regained their position which they had prior to the assumption of suzerainty by the Crown, most of the States soon realised that it was no longer possible for them to maintain their existence independent of and separate from the rest of the country, and that it was in their own interests necessary to accede to either of the two Dominions of India and Pakistan. Of the States situated within the geographical boundaries of the Dominion of India, all (numbering 552) save Hyderabad, Kashmir, Bahawalpur, Junagadh and the N.W.F. States (Chitral, Phulra, Dir, Swat and Amb) had acceded to the Dominion of India by the 15th August, 1947, i.e., before the 'appointed day' itself. The problem of the Government of India as regards the States after the accession was two-fold:

(a) Shaping the Indian States into sizeable or viable administrative units, and (b) fitting them into the constitutional structure of India.

(A) The first objective was sought to be achieved by a three-fold process of integration (known as the 'Patel scheme' after Sardar Vallabhbhai Patel, Minister in-charge of Home Affairs)—

(i) 216 States were merged into the respective Provinces, geographically contiguous to them. These merged States were included in the territories of the States in Part B in the First Schedule of the Constitution. The process of merger started with the merger of Orissa and Chhattisgarh States with the then Province of Orissa on January 1, 1948, and the last instance was the merger of Cooch-Behar with the State of West Bengal in January, 1950.

(ii) 61 States were converted into Centrally administered areas and included in Part C of the First Schedule of the Constitution. This form of integration was resorted to in those cases in which, for administrative, strategic or other special reasons, Central control was considered necessary.

(iii) The third form of integration was the consolidation of groups of States into new viable units, known as Union of States. The first Union formed was the Saurashtra Union consolidating the Kathiawar States and many other States (February 15, 1948), and the last one was the Union of Travancore-Cochin, formed on July 1, 1949. As many as 275 States were thus integrated into 5 Unions—Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin. *These were included in the States in Part B of the First Schedule.* The other 3 States included in Part B were—Hyderabad, Jammu and Kashmir and Mysore. The cases of Hyderabad and Jammu and Kashmir were peculiar. Jammu and Kahsmir acceded to India on October 26, 1947, and so it was included as a State in Part B, but the Government of India agreed to take the accession subject to confirmation by the people of the State, and a Constituent Assembly subsequently confirmed it, in November, 1956. Hyderabad did not formally accede to India, but the Nizam issued a Proclamation recognising the necessity of entering into a constitutional relationship with the Union of India and accepting the Constitution of India subject to ratification by the Constituent Assembly of that State, and the Constituent Assembly of that State ratified this. As a result, Hyderabad was included as a State in Part B of the First Schedule of the Constitution.

(B) We have so far seen how the States in Part B were formed as viable units of administration,—being the residue of the bigger Indian States, left after the smaller States had been merged in the Provinces or converted into Centrally Administered Areas. So far as the latter two groups were concerned, there was no problem in fitting them into the body of the Constitution framed for the rest of India. There was an agreement between the Government of India and the Ruler of each of the States so merged, by which the Rulers voluntarily agreed to the merger and ceded all powers for the governance of the States to the Dominion Government, reserving certain personal rights and privileges for themselves.

But the story relating to the States in Part B is not yet complete. At the time of their accession to the Dominion of India in 1947, the States had acceded only on three subjects, *niz.*, Defence, Foreign Affairs and Communications. With the formation of the Unions and under the influence of political events, the Rulers found it beneficial to have a closer connection with the Union of India and all the Rajpramukhs of the Unions as well as the Maharaja of Mysore, signed revised Instruments of Accession by which all these States acceded to the Dominion of India in respect of *all* matters included in the Union and Concurrent Legislative Lists, except only those relating to taxation. Thus, the States in Part B were brought at par with the States in Part A, subject only to the differences embodied in Art. 238 and the supervisory powers of the Centre for the transitional period of 10 years [Art. 371]. Special provisions were made only for Kashmir [Art. 370] in view of its special position and problems. That article makes special provisions for the partial application of the Constitution of India to that State, with the concurrence of the Government of that State.

It is to be noted that the Rajpramukhs of the five Unions as well as the Rulers of Hyderabad, Mysore, Jammu and Kashmir all adopted the Constitution of India, by Proclamations.

Reorganisation of States. The process of integration culminated in the Constitution (7th Amendment) Act, 1956, which abolished Part B States as a class and included *all the States in Part A and B in one list.*²²

The special provisions in the Constitution relating to Part B States were, consequently, omitted. The Indian States thus lost their identity and became part of one uniform political organisation embodied in the Constitution of India.²³

The process of reorganisation is continuing still and the recent trend is towards conceding the demands of smaller units which were previously Part B States, Union Territories or autonomous parts of States, by conferring upon them the status of a 'State', e.g., Nagaland, Meghalaya, Himachal Pradesh, Manipur, Tripura, Mizoram, Goa. Delhi has been made the National Capital Territory. This process will be further elaborated in Chap. 6 (Territory of India), *post.*

Outstanding and 'basic' features of the Constitution. Before closing this Chapter, however, it should be pointed out that since the observations in the case of *Golak Nath*,²⁴ culminating with *Keshavananda*,²⁵ the Supreme Court had been urging that there are certain 'basic' features of the Constitution, which were immune from the power of amendment conferred by Art. 368, which, according to the Court, was subject to 'implied' limitations. On the other hand, the Indira Government had been attempting to thwart this doctrine by successive amendments of Art. 368, starting with the 24th Amendment, 1971, and ending with 42nd Amendment Act, 1976, so as to obviate any such conclusion by the Supreme Court.²⁶ The Court has, however, adhered to its view notwithstanding any of these amendments.²⁷ The present Chapter does not enter into that controversy, which will be dealt with in Chap. 10 (Procedure for Amendment), *post.* [See that Chapter as to the list of basic feature].

The comparative study of any Constitution will reveal that it has certain prominent features which distinguish it from other Constitutions. It is those prominent features which have been summarised in this Chapter by way of introducing the reader to the various provisions of the Indian Constitution.

REFERENCES

1. VII C.A.D., pp. 35-38.
2. VII C.A.D., 2, 242; XI C.A.D., 613, 616.
3. The Constitution of the United States, with all its amendments up to date, consists of not more than 7,000 words.
4. C.A.D., Vol. XI, pp. 839-40.
5. Of course, some of these provisions have been eliminated by the Constitution (7th Amendment) Act, 1956, which abolished the distinction between different classes of States.
6. DR. RAJENDRA PRASAD, C.A.D., Vol. X, p. 891.
7. The original title of this Act was the 'Untouchability (Offences) Act, 1955'. It has been extensively widened and made more rigorous, and renamed as the 'Protection of Civil Rights Act, 1955', by Act 106 of 1976.
8. WHEARE, *Modern Constitutions*, p. 143.
9. C.A.D. dated 8-11-1948, pp. 322-23.
10. JENNINGS, *Some Characteristics of the Indian Constitution*, 1953, pp. 2, 6, 25-26.

11. The major changes made by the 42nd Amendment Act have been elaborately and critically surveyed in the Author's *Constitution Amendment Acts*, pp. 117-34, which should be read along with this book.
12. C.A.D., Vol. VII, p. 293.
13. *G.C. Kanungo v. State of Orissa*, (1995) 5 S.C.C. 96 (paras 17 and 18) : A.I.R. 1995 S.C. 1655; *L. Chandra Kumar v. Union of India*, (1997) 3 S.C.C. 261 (paras 62 and 76) : A.I.R. 1997 S.C. 1125 and *State of A.P. v. K. Mohanlal*, (1998) 5 S.C.C. 468 (para 9).
14. *Maneka Gandhi v. Union of India*, AIR 1978 S.C. 597.
15. *Minerva Mills v. Union of India*, AIR 1980 S.C. 1789 (paras 21-26).
16. Report of the First General Elections in India (1951-52), Vol. I.
17. *Vide* the Constitution (79th Amendment) Act, 1999.
18. Prime Minister Nehru in the Lok Sabha, on 28-3-1957.
19. IV C.A.D., 578 (Sardar Patel).
20. VII C.A.D., 984 (Munshi).
21. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225; *Shamser Singh v. State of Punjab*, AIR 1974 S.C. 2192.
22. As will be more fully explained in a later Chapter, the number of the States,—all of one category,—is 28 at the end of 2000. Besides, there are 7 Union Territories.
23. It should be mentioned, in this context, that the last vestiges of the princely order in India have been done away with by the repeal of Arts. 291 and 362, and the insertion of Art. 363A, by the Constitution (26th Amendment) Act, 1971 (w.e.f. 28-12-1971), which abolished the Privy Purse granted to the Rulers of the erstwhile Indian States and certain other personal privileges accorded to them under the Constitution—as a result of which the heads of these pre-Independence Indian States have now been brought down to a level of equality with other citizens of India.
24. *Golak Nath v. State of Punjab*, AIR 1967 S.C. 1643.
25. *Keshavananda v. State of Kerala*, AIR 1973 S.C. 1461.
26. The Janata Government's efforts to enshrine the 'basic features theory' in the Constitution itself, by requiring a *referendum* to amend four 'basic features', failed owing to Congress opposition to the relevant amendments of Art. 368 of the Constitution, as proposed by the 45th Amendment Bill, 1978. The four basic features mentioned in that Bill were—(i) Secular and democratic character of the Constitution; (ii) Fundamental Rights under Part III; (iii) Free and fair elections to the Legislatures; (iv) Independence of the Judiciary.
27. *Minerva Mills v. Union of India*, AIR 1980 S.C. 1789 (paras 21-26, 28, 91, 93-94); *Sampat v. Union of India*, AIR 1987 S.C. 386; *Union of India v. Raghbir*, AIR 1989 S.C. 1933 (para 7).

CHAPTER 5

NATURE OF THE FEDERAL SYSTEM

India, a Union of States.

ARTICLE 1(1) of *our* Constitution says—"India, that is Bharat, shall be a Union of States."

While submitting the Draft Constitution, Dr. Ambedkar, the Chairman of the Drafting Committee, stated that "although its Constitution may be federal in structure", the Committee had used the term "Union" because of certain advantages.¹ These advantages, he explained in the Constituent Assembly,² were to indicate two things, *viz.*, (a) that the Indian federation is not the result of an agreement by the units, and (b) that the component units have no freedom to secede from it.

The word 'Union', of course, does not indicate any particular type of federation, inasmuch as it is used also in the Preamble of the Constitution of the United States—the model of federation; in the Preamble of the British North America Act (which, according to Lord HALDANE, did not create a true federation at all); in the Preamble to the Union of South Africa Act, 1909, which patently set up a unitary Constitution; and even in the Constitution of the U.S.S.R. (1977), which formally acknowledges a right of secession [Art. 72] to each Republic, *i.e.*, unit of the Union.³

We have, therefore, to examine the provisions of the Constitution itself, apart from the label given to it by its draftsman, to determine whether it provides a federal system as claimed by Dr. Ambedkar, particularly in view of the criticisms (as will be presently seen) levelled against its federal claim by some foreign scholars.

The difficulty of any treatment of federalism is that there is no agreed definition of a federal State. The other difficulty is that it is habitual with scholars on the subject to start with the model of the *United States*, the oldest (1787) of all federal Constitutions in the world, and to exclude any system that does not conform to that model from the

Different types of Federal Constitutions in the modern World. nomenclature of 'federation'. But numerous countries in the world have, since 1787, adopted Constitutions having federal features and, if the strict historical standard of the United States be applied to all these later Constitutions, few will stand the test of federalism save perhaps Switzerland and Australia. Nothing is, however, gained by excluding so many recent Constitutions from the federal class, for, according to the traditional classification followed by political scientists, Constitutions are either unitary or federal. If, therefore, a Constitution partakes of some features of both types, the only alternative is to analyse those features and to ascertain

whether it is *basically* unitary or federal, although it may have subsidiary variations. A liberal attitude towards the question of federalism is, therefore, inevitable particularly in view of the fact that recent experiments in the world of Constitution-making are departing more and more from the 'pure' type of either unitary or a federal system. The Author's views on this subject, expressed in the previous Editions of this book as well as in the *Commentary on the Constitution of India*,⁴ now find support from the categorical assertion of a research worker⁵ on the subject of federalism (who happens to be an American himself), that the question whether a State is federal or unitary is one of degrees and the answer will depend upon "how many federal features it possesses". Another American scholar⁶ has, in the same strain, observed that federation is more a 'functional' than an 'institutional' concept and that any theory which asserts that there are certain inflexible characteristics without which a political system cannot be federal ignores the fact "that institutions are not the same things in different social and cultural environments".

To anticipate the Author's conclusion, the constitutional system of **Indian Constitution basically Federal, with unitary features.** India is *basically* federal, but, of course, with striking unitary features.⁷ In order to come to this conclusion, we have to formulate the essential minimal features of a federal system as to which there is common agreement amongst political scientists.

Essential features of a Federal polity.

Though there may be difference amongst scholars in matters of detail, the consensus of opinion is that a federal system involves the following essential features:

(i) *Dual Government.* While in a unitary State, there is only one Government, namely the national Government, in a federal State, there are two Governments,—the national or federal Government and the Government of each component State.

Though a unitary State may create local sub-divisions, such local authorities enjoy an autonomy of their own but exercise only such powers as are from time to time delegated to them by the national government and it is competent for the national Government to revoke the delegated powers or any of them at its will.

A federal State, on the other hand, is the fusion of several States into a single State in regard to matters affecting common interests, while each component State enjoys autonomy in regard to other matters. The component States are not mere delegates or agents of the federal Government but both the Federal and State Governments draw their authority from the same source, *viz.*, the Constitution of the land. On the other hand, a component State has no right to secede from the federation at its will. This distinguishes a federation from a confederation.

(ii) *Distribution of Powers.* It follows that the very object for which a federal State is formed involves a division of authority between the Federal Government and the States, though the method of distribution may not be alike in the federal Constitutions.

(iii) *Supremacy of the Constitution.* A federal State derives its existence from the Constitution, just as a corporation derives its existence from the grant of a statute by which it is created. Every power—executive, legislative, or judicial—whether it belongs to the federation or to the component States, is subordinate to and controlled by the Constitution.

(iv) *Authority of Courts.* In a federal State the legal supremacy of the Constitution is essential to the existence of the federal system. It is essential to maintain the division of powers not only between the coordinate branches of the government, but also between the Federal Government and the States themselves. This is secured by vesting in the Courts a final power to interpret the Constitution and nullify an action on the part of the Federal and State Governments or their different organs which violates the provisions of the Constitution.

The Supreme Court has observed that Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely, supremacy of the Constitution, division of power between the Union and the States and existence of an independent judiciary.⁸

Not much pains need to be taken to demonstrate that the political system introduced by *our* Constitution possesses all the aforesaid essentials of a federal polity. Thus, the Constitution is the supreme organic law of *our* land, and both the Union and the State Governments as well as their respective organs derive their authority from the Constitution, and it is not competent for the States to secede from the Union. There is a division of legislative and administrative powers between the Union and the State Governments and the Supreme Court stands at the head of *our* Judiciary to jealously guard this distribution of powers and to invalidate any action which violates the limitations imposed by the Constitution. This jurisdiction of the Supreme Court may be resorted to not only by a person⁹ who has been affected by a Union or State law which, according to him, has violated the constitutional distribution of powers but also by the Union and the States themselves by bringing a direct action against each other, before the Original Jurisdiction of the Supreme Court under Art. 131.¹⁰ It is because of these basic federal features that our Supreme Court has described the Constitution as 'federal'.¹¹

Peculiar features of Indian Federalism. But though *our* Constitution provides these essential features of a federation, it differs from the typical federal systems of the world in certain fundamental respects:

(A) *The Mode of formation.* A federal union of the American type is formed by a voluntary agreement between a number of sovereign and independent States, for the administration of certain affairs of general concern.

But there is an alternative mode of the *Canadian* type (if Canada is admitted into the family of federations), namely, that the provinces of a unitary State may be transformed into a federal union to make themselves autonomous. The provinces of Canada had no separate or independent existence apart from the colonial Government of Canada, and the Union was not formed by any agreement between them, but was imposed by a British statute, which withdrew from the Provinces all their former rights and then re-divided them between the Dominion and the Provinces. Though the Indian federation resembles the Canadian federation in its centralising

tendency, it even goes further than the Canadian precedent. The federalism in India is not a matter of administrative convenience, but one of principle.¹²

India had a thoroughly centralised unitary constitution until the Government of India Act, 1935. The Provincial Governments were virtually the agents of the Central Government, deriving powers by delegation from the latter (see pp. 1-8, *ante*).

To appreciate the mode of formation of federation in India, we must go back to the Government of India Act, 1935, which for the first time introduced the federal concept, and used the expression 'Federation of India' (s. 5) in a Constitution Act relating to India, since the Constitution has simply continued the federal system so introduced by the Act of 1935, so far as the Provinces of British India are concerned. The foundation for a federal set-up for the nation was laid in the Govt. of India Act, 1935. Though in every respect the distribution of legislative power between the Union and the States as envisaged in the 1935 Act has not been adopted in the Constitution, but the basic framework is the same.¹³ The Supreme Court observed that India has adopted for itself a loose federal structure as it is an indestructible Union of destructible units.¹⁴

By the Act of 1935, the British Parliament set up a federal system in the same manner as it had done in the case of *Canada*, viz., "by creating autonomous units and combining them into a federation by one and the same Act". All powers hitherto exercised in India were resumed by

the Crown and redistributed between the Federation and the Provinces by a direct grant. Under this system, the Provinces derived their authority directly from the Crown and exercised legislative and executive powers, broadly free from Central control, within a defined sphere. Nevertheless, the Centre retained control through 'the Governor's special responsibilities' and his obligation to exercise his individual judgment and discretion in certain matters, and the power of the Centre to give direction to the Provinces.¹⁵

The peculiarity of thus converting a unitary system into a federal one can be best explained in the words of the Joint Parliamentary Committee on Indian Reforms:

"Of course in thus converting a unitary State into a federation we should be taking a step for which there is no exact historical precedent. Federations have commonly resulted from an agreement between independent or, at least, autonomous Governments, surrendering a defined part of their sovereignty or autonomy to a new central organism. At the present moment the British Indian Provinces are not even autonomous for they are subject to both administrative and legislative control of the Government and such authority as they exercise has been in the main devolved upon them under a statutory rule-making power by the Governor-General in Council. We are faced with the necessity of *creating autonomous units and combining them into a federation by one and the same Act*."

It is well worth remembering this peculiarity of the origin of the federal system in India. Neither before nor under the Act of 1935, the Provinces were in any sense 'sovereign'

States like the States of the American Union. The Constitution, too, has been framed by the 'people of India' assembled in the Constituent Assembly, and the Union of India cannot be said to be the result of any *compact* or agreement between autonomous States.² So far as

the Provinces are concerned, the progress had been from a unitary to a federal organisation, but even then, this has happened not because the Provinces desired to become autonomous units under a federal union, as in Canada. The Provinces, as just seen, had been artificially made autonomous, within a defined sphere, by the Government of India Act, 1935. What the makers of the Constitution did was to associate the Indian States with these autonomous Provinces into a federal union, which the Indian States had refused to accede to, in 1935.

Some amount of homogeneity of the federating units is a condition for their desire to form a federal union. But in India, the position has been different. From the earliest times, the Indian States had a separate political entity, and there was little that was common between them and the Provinces which constituted the rest of India. Even under the federal scheme of 1935 the Provinces and the Indian States were treated differently; the accession of the Indian States to the system was voluntary while it was compulsory for the Provinces, and the powers exercisable by the Federation over the Indian States were also to be defined by the Instruments of Accession. It is because it was optional with the Rulers of the Indian States that they refused to join the federal system of 1935. They lacked the 'federal sentiment' (*Dicey*), that is, the desire to form a federal union with the rest of India. But, as already pointed out, the political situation changed with the lapse of paramountcy of the British Crown as a result of which most of the Indian States acceded to the Dominion of India on the eve of the Independence of India.

The credit of the makers of the Constitution, therefore, lies not so much in bringing the Indian States under the federal system but in placing them, as much as possible, on the same footing as the other units of the federation, under the same Constitution. In short, the survivors of the old Indian States (States in Part B¹⁶ of the First Schedule) were, with minor exceptions, placed under the same political system as the old Provinces (States in Part A¹⁶). The integration of the units of the two categories has eventually been completed by eliminating the separate entities of States in Part A and States in Part B and replacing them by one category of States, by the Constitution (7th Amendment) Act, 1956.¹⁶

(B) *Position of the States in the Federation.* In the *United States*, since the States had a sovereign and independent existence prior to the formation of the federation, they were reluctant to give up that sovereignty any further than what was necessary for forming a national government for the purpose of conducting their common purposes. As a result, the Constitution of the federation contains a number of safeguards for the protection of 'State rights', for which there was no need in *India*, as the States were not 'sovereign' entities before. These points of difference deserve particular attention:

(i) While the *residuary* powers are reserved to the States by the American Constitution, these are assigned to the Union by *our* Constitution [Art. 248].

This alone, of course, is not sufficient to put an end to the federal character of our political system, because it only relates to the *mode* of distribution of powers. *Our* Constitution has simply followed the *Canadian* system in vesting the residuary power in the Union.

No State excepting Kashmir, can draw its own Constitution.

(ii) While the Constitution of the *United States of America* merely drew up the constitution of the national government, leaving it "in the main (to the State) to continue to preserve their original Constitution", the Constitution of *India* lays down the constitution for the States as well, and, no State, save Jammu and Kashmir, has a right to determine its own (State) constitution.

(iii) In the matter of amendment of the Constitution, again, the part assigned to the State is minor, as compared with that of the Union. The doctrine underlying a federation of the *American* type is that the union is the result of an agreement between the component units, so that no part of the Constitution which embodies the compact can be altered without the consent of the covenanting parties. This doctrine is adopted, with variations, by most of the federal systems.

But in *India*, except in a few specified matters affecting the federal structure (see Chap. 10, *post*), the States need not even be consulted in the matter of amendment of the bulk of the Constitution, which may be effected by a Bill in the Union Parliament, passed by a special majority.

(iv) Though there is a division of powers between the Union and the States, there is provision in *our* Constitution for the exercise of control by the Union both over the administration and legislation of the States. Legislation by a State shall be subject to disallowance by the President, when reserved by the Governor for his consideration [Art. 201]. Again, the Governor of a State shall be appointed by the President of the Union and shall hold office 'during the pleasure' of the President [Arts. 155-156]. These ideas are repugnant to the Constitution of the United States or of Australia, but are to be found in the *Canadian* Constitution.

(v) The *American* federation has been described by its Supreme Court as "an indestructible Union composed of indestructible States".¹⁷

It comprises two propositions—

(a) The Union cannot be destroyed by any State seceding from the Union at its will.¹⁸

(b) Conversely, it is not possible for the federal Government to redraw the map of the United States by forming new States or by altering the boundaries of the States as they existed at the time of the compact without the *consent* of the Legislatures of the States concerned. The same principle is adopted in the *Australian* Constitution to make the Commonwealth "indissoluble", with the further safeguard superadded that a popular referendum is required in the affected State to alter its boundaries.

(a) It has been already seen that the first proposition has been accepted by the makers of *our* Constitution, and it is not possible for the States of the Union of India, to exercise any right of secession. It should be noted in this context that by the 16th Amendment of the Constitution in 1963, it has been made clear that even advocacy of secession will not have the protection of the freedom of expression.¹⁹

No right to secede.

(b) But just the contrary of the second proposition has been embodied

But consent of a State is not required for altering its boundaries by Parliament. in *our Constitution*. Under *our Constitution*, it is possible for the Union Parliament to reorganise the States or to alter their boundaries, by a simple majority in the ordinary process of legislation [Art. 4(2)]. The Constitution does not require that the

consent of the Legislature of the States is necessary for

enabling Parliament to make such laws; only the President has to 'ascertain' the views of the Legislature of the affected States to recommend a Bill for this purpose to Parliament. Even this obligation is not mandatory insofar as the President is competent to fix a time-limit within which a State must express its views, if at all [Proviso to Art. 3, as amended]. In the Indian federation, thus, the States are not "indestructible" units as in the *U.S.A.* The ease with which the federal organisation may be reshaped by an ordinary legislation by the Union Parliament has been demonstrated by the enactment of the States Reorganisation Act, 1956, which reduced the number of States from 27 to 14 within a period of six years from the commencement of the Constitution. The same process of disintegration of existing States, effected by unilateral legislation by Parliament, has led to the formation, subsequently, of several new States—Gujarat, Nagaland, Haryana, Karnataka, Meghalaya, Himachal Pradesh, Manipur, Sikkim, Tripura, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh, Uttarakhand, Jharkhand.

It is natural, therefore, that questions might arise in foreign minds as to the nature of federalism introduced by the Indian Constitution.

(vi) Not only does the Constitution offer no guarantee to the States against affecting their territorial integrity without their consent,—there is no theory of 'equality of State rights' underlying the federal scheme in *our Constitution*, since it is not the result of any agreement between the States.

One of the essential principles of *American federalism* is the equality of the component States under the Constitution, irrespective of their size or population. This principle is reflected in the equality of representation of the States in the upper House of the Federal Legislature (*i.e.*, in the Senate),²⁰ which is supposed to safeguard the status and interests of the States in the federal organisation. To this is superadded the guarantee that no State may, without its consent, be deprived of its equal representation in the Senate [Art. V].

No equality of State representation. Under *our Constitution*, there is no equality of representation of the States in the Council of States. As given in the Fourth Schedule, the number of members for the several States varies from 1 to 31. In view of such composition of the Upper Chamber, the federal safeguard against the interests of the lesser States being overridden by the interests of the larger or more populated States is absent under *our Constitution*. Nor can *our Council of States* be correctly described as a federal Chamber insofar as it contains a nominated element of twelve members as against 238 representatives of the States and Union Territories.

Status of Sikkim.

(vii) Another novel feature introduced into the Indian federalism was the admission of Sikkim as an

'associate State', without being a *member* of the Union of India, as defined in Art. 1, which was made possible by the insertion of Art. 2A into the Constitution, by the Constitution (35th Amendment) Act, 1974.

This innovation was, however, shortlived and its legitimacy has lost all practical interest since all that was done by the 35th Amendment Act, 1974, has been undone by the 36th Amendment Act, 1975, by which Sikkim has been admitted into the Union of India, *as a full-fledged State* under the First Schedule with effect from 26th April, 1975 (see under Chap. 6, *post*). The original federal scheme of the Indian Constitution, comprising States and the Union Territories, has thus been left unimpaired.

Of course, certain special provisions have been laid down in the new Art. 371F, as regards Sikkim, to meet the special circumstances of that State. Article 371G makes certain special provisions relating to the State of Mizoram, while Arts. 371H and 371I insert special provisions for Arunachal Pradesh and Goa.

(C) *Nature of the Polity.* As a radical solution of the problem of reconciling national unity with 'State rights', the framers of the *American* Constitution made a logical division of everything essential to sovereignty and created a dual polity, with a dual citizenship, a double set of officials and a double system of Courts.

(i) An *American* is a citizen not only of the State in which he resides but also of the United States, *i.e.*, of the federation, under different conditions; and both the federal and State Governments, each independent of the other, operate directly upon the citizen who is thus *subject to two Governments, and owes allegiance to both*. But the *Indian* Constitution, like the Canadian, does not introduce any double citizenship, but one citizenship, *viz.*—the citizenship of India [Art. 5], and birth or residence in a particular State does not confer any separate status as a citizen of that State.

(ii) As regards officials similarly, the federal and State Governments in the *United States*, have their own officials to administer their respective laws and functions. But there is no such division amongst the public officials in India. The majority of the public servants are employed by the States, but they administer both the Union and the State laws as are applicable to their respective States by which they are employed. Our Constitution provides for the creation of All-India Services, but they are to be common to the Union and the States [Art. 312]. Members of the Indian Administrative Service, appointed by the Union, may be employed either under some Union Department (say, Home or Defence) or under a State Government, and their services are transferable, and even when they are employed under a Union Department, they have to administer both the Union and State laws as are applicable to the matter in question. But even while serving under a State, for the time being, a member of an all-India Service can be dismissed or removed only by the Union Government, even though the State Government is competent to initiate disciplinary proceedings for that purpose.

No dual system of Courts. (iii) In the *U.S.A.*, there is a bifurcation of the Judiciary as between the Federal and State Governments. Cases arising out of the federal Constitution and federal laws are tried by the federal Courts, while State Courts deal with cases arising out of the State Constitution and State laws. But in *India*, the same system of Courts, headed by the Supreme Court, will administer both the Union and State laws as they are applicable to the cases coming up for adjudication.

(iv) The machinery for election, accounts and audit is also similarly integrated.

(v) The Constitution of India empowers the Union to entrust its executive functions to a State, by its consent [Art. 258], and a State to entrust its executive functions to the Union, similarly [Art. 258A]. No question of 'surrender of sovereignty' by one Government to the other stands in the way of this smooth co-operative arrangement.

(vi) While the federal system is prescribed for normal times, the Indian Constitution enables the federal government to acquire the strength of a unitary system in *emergencies*. While in normal times the Union Executive is entitled to give directions to the State Governments in respect of specified matters, when a Proclamation of Emergency is made, the power to give directions extends to *all* matters and the legislative power of the Union extends to State subjects [Arts. 353, 354, 357]. The wisdom of these emergency provisions (relating to *external aggression*, as distinguished from '*internal disturbance*') has been demonstrated by the fact that during the Chinese aggression of 1962 or the Pakistan aggression of 1965, India could stand as one man, pooling all the resources of the States, notwithstanding the federal organisation.

(vii) Even in its normal working, the federal system is given the strength of a unitary system—

Union control in normal times. (a) By endowing the Union with as much exclusive powers of legislation as has been found necessary in other countries to meet the ever-growing national exigencies, and, over and above that, by enabling the Union

Legislature to take up some subject of State competence, if required in the national interest'. Thus, even apart from emergencies, the Union Parliament may assume legislative power (though temporarily) over any subject included in the State List,²¹ if the Council of States (Second Chamber of Parliament) resolves, by a two-thirds vote, that such legislation is necessary in the 'national interest' [Art. 249]. There is, of course, a federal element in this provision inasmuch as such expansion of the power of the Union into the State sphere is possible only with the consent of the Council of States where the States are represented. But, in actual practice, it will mean an additional weapon in the hands of the Union *vis-a-vis* the States so long as the same party has a solid majority in both the Houses of the Union Parliament.

Strong bias.

central

Even though there is a distribution of powers between the Union and the States as under a federal system, the distribution has a strong Central bias and

the powers of the States are hedged in with various restrictions which impede their sovereignty even within the sphere limited to them by the distribution of powers basically provided by the Constitution.

(b) By empowering the Union Government to issue directions upon the State Governments to ensure due compliance with the legislative and administrative action of the Union [Arts. 256-257], and to supersede a State Government which refuses to comply with such directions [Art. 365].

(c) By empowering the President to withdraw to the Union the executive and legislative powers of a State under the Constitution if he is, *at any time*, satisfied that the administration of the State cannot be carried on in the normal manner in accordance with the provisions of Constitution, owing to political or other reasons [Art. 356]. From the federal standpoint, this seems to be anomalous inasmuch as the Constitution-makers did not consider it necessary to provide for any remedy whatever for a similar breakdown of the constitutional machinery at the Centre. Hence, Panikkar is justified in observing—"The Constitution itself has created a kind of paramountcy for the Centre by providing for the suspension of State Governments and the imposition of President's rule under certain conditions such as the breakdown of the administration". *Secondly*, the power to suspend the constitutional machinery may be exercised by the President, not only on the report of the Governor of the State concerned but also *suo motu*, whenever he is satisfied that a situation calling for the exercise of this power has arisen. It is thus a *coercive* power available to the Union against the units of the federation.

But though the above scheme seeks to avoid the demerits of the federal **A critique of the Federal System.** system, there is perhaps such an emphasis on the strength of the Union government as affects the federal principle as it is commonly understood. Thus, a foreign critic (Prof. Wheare)²² was led to observe that the Indian Constitution provides—

"a system of Government which is quasi-federal . . . a *Unitary State with subsidiary federal features rather than a Federal State with subsidiary unitary features.*"

In his later work in *Modern Constitutions*²³ he puts it, generically, thus—

"In the class of quasi-federal Constitution it is *probably proper* to include the Indian Constitution of 1950. . . ."

Prof. Alexandrowicz²⁴ has taken great pains to combat the view that the Indian federation is 'quasi-federation'. He seems to agree with this Author,²⁵ when he says that "India is a case *sui generis*". This is in accord with the Author's observation that—

"the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type. It enshrines the principle that in spite of federalism the national interest ought to be paramount."²⁵

In fact, anybody who impartially studies the Indian Constitution from close quarters and acknowledges that Political Science today admits of different variations of the federal system cannot but observe that the Indian

system is 'extremely federal',²⁶ or that it is a 'federation with strong centralising tendency'.²⁷

Strictly speaking, any deviation from the American model of pure federation would make a system quasi-federal, and, if so, the Canadian system, too, can hardly escape being branded as quasi-federal. The difference between the *Canadian* and the *Indian* system lies in the degree and extent of the unitary emphasis. The real test of the federal character of a political structure is, as Prof. Wheare has himself observed²²—

"That, however, is what appears on paper only. It remains to be seen whether *in actual practice* the federal features entrench or strengthen themselves as they have in Canada, or whether the strong trend towards centralisation which is a feature of most Western Governments in a world of crises, will compel these federal aspects of the Constitution to wither away."

A survey of the actual working of *our* Constitution for the last 59 years **The working of federalism in India.** would hardly justify the conclusion that, even though the unitary bonds have in some respects been further tightened, the federal features have altogether 'withered away'.

Some scholars in India²⁸ have urged that the unitary bias of *our* Constitution has been accentuated, in its actual working, by two factors so much so that very little is left of federalism. These two factors are—(a) the overwhelming financial power of the Union and the utter dependence of the States upon Union grants for discharging their functions; (b) the comprehensive sweep of the Union Planning Commission, set up under the concurrent power over planning. The criticism may be justified in point of degree, but not in principle, for two reasons—

(i) Both these controls are aimed at securing a uniform development of the country as a whole. It is true that the bigger States are not allowed to appropriate all their resources and the system of assignment and distribution of tax resources by the Union [Arts. 269, 270, 272] means the dependence of the States upon the Union to a large extent. But, left alone, the stronger and bigger States might have left the smaller ones lagging behind, to the detriment of our national strength.

(ii) Even in a country like the United States, such factors have, in practice, strengthened the national Government to a degree which could not have been dreamt of by the fathers of the Constitution. Curiously enough, the same complaint, as in India, has been raised in the United States. Thus, of the centralising power of federal grants, an American writer²⁹ has observed—

"Here is an attack on federalism, so subtle that it is scarcely realised . . . Control of economic life and of these social services (*viz.*, unemployment, old-age, maternity and child welfare) were the two major functions of a State and local governments. The first has largely passed into national hands; the second seems to be passing. If these both go, what we shall have left of State autonomy will be a hollow shell, a symbol."

In fact, the traditional theory of mutual independence of the two governments,—federal and States, has given way to "co-operative federalism" in most of the federal countries today.³⁰

An American scholar explains the concept of 'co-operative federalism' in these words³⁰—

" . . . the practice of administrative co-operation between general and regional governments, the partial *dependence* of the regional governments *upon payments* from the general governments, and the fact that the general governments, by the use of *conditional* grants, frequently promote developments in matters which are *constitutionally assigned* to the regions."

Hence, the system of federal co-operation existing under the Indian Constitution, through allocation by the Union of the taxes collected, or direct grants or allocation of plan funds do not necessarily militate against the concept of federalism and that is why Granville Austin³¹ prefers to call Indian federalism as 'co-operative federalism' which "produces a strong central . . . government, yet it does not necessarily result in weak provincial governments that are largely administrative agencies for central policies."

In fact, the federal system in the Indian Constitution is a compromise between two apparently conflicting considerations:

- (i) There is a normal division of powers under which the States enjoy autonomy within their own spheres, with the power to raise revenue;
- (ii) The need for national integrity and a strong Union government, which the saner section of the people still consider necessary after 59 years of working of the Constitution.

The interplay of the foregoing two forces has been acknowledged even **Indian federalism** as **judicially interpreted** by the Supreme Court in interpreting various provisions of the Constitution, e.g., in explaining the significance of Art. 301³² thus—

"The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the conditions then prevailing, a distribution of powers and a basic part of our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Art. 1 that India is a Union of States and in interpreting the Constitution one must keep in the view the essential structure of a federal or quasi-federal Constitution, namely, that the units of the Union have also certain powers as has the Union itself . . .

In evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations. . . first, in the larger interest of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, the regional interests must not be ignored altogether, and third, there must be a power of intervention by the Union in case of crisis to deal with particular problems that may arise in any part of India . . . Therefore, in interpreting the relevant articles in Part XIII we must have regard to the general scheme of the Constitution of India with special reference to Part III, Part XII . . . and their inter-relation to Part XIII in the context of a federal or quasi-federal Constitution in which the States have certain powers including the power to raise revenues for their purposes by taxation."

At the same time, there is no denying the fact that the States have occasionally smarted³³ against 'Central dominion' over the States in their exclusive sphere, even in normal times, through the Planning Commission (which itself was not recognised by the Constitution like the Finance Commission, the Public Service Commission or the like). But this is not because the Constitution is not federal in structure³⁴ or that its provisions envisage unitary control; the defect is political, namely, that it is the same Party which dominates both the Union and State Governments and that,

naturally, complaints of discrimination or interference with State autonomy are more common in those States which happen to be, for the time being, under the rule of a Party different from that of the Union Government. The remedy, however, lies through the ballot box. It is through political forces, again, that the Union Government may be prevented from so exercising its constitutional powers as to assume an 'unhealthy paternalism'³⁵; but that is beyond the ken of the present work. The remedy for a too frequent use of the power to impose President's rule in a State, under Art. 356, is also political.³⁶

The strong Central bias has, however, been a boon to keep India together when we find the separatist forces of communalism, linguism and **Survival of Federalism in India.** scramble for power, playing havoc notwithstanding all the devices of Central control, even after five decades of the working of the Constitution. It also shows that the States are not really functioning as agents of the Union Government⁷ or under the directions of the latter, for then, events like those in Assam (over the language problem) or territorial dispute between Karnataka and Maharashtra could not have taken place at all.

That the federal system has not withered away owing to the increasing impact of Central bias would be evidenced by a number of circumstances which cannot be overlooked [see, further, Chap. 33, *post*]:

(a) The most conclusive evidence of the survival of the federal system in India is the co-existence of the Governments of the parties in the States different from that of the Centre. Of course, the reference of the Kerala Education Bill by the President for the advisory opinion of the Supreme Court instead of giving his assent to the Bill in the usual course, has been criticised in Kerala as an undue interference with the constitutional rights of the State, but thanks to the wisdom and impartiality of the Supreme Court, the opinion delivered by the Court³⁵ was prompted by a purely legalistic outlook free from any political consideration so that the federal system may reasonably be expected to remain unimpaired notwithstanding changes in the party situation so long as the Supreme Court discharges its duties as a guardian of the Constitution.

(b) That federalism is not dead in India is also evidenced by the fact that new regions are constantly demanding Statehood and that already the Union had to yield to such demand in the cases of Meghalaya, Nagaland, Manipur, Tripura, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh,³⁷ Uttarakhand³⁸ and Jharkhand.³⁹

(c) Another evidence is the strong agitation for greater financial power for the States. The case for greater autonomy for the States in *all* respects was first launched by Tamil Nadu, as a lone crusader, but in October, 1983, it was joined by the States ruled by non-Congress Parties, forming an 'Opposition Conclave', though all the Parties were not prepared to go to the same extent. The enlargement of State powers at the cost of the Union, in the *political* sphere is not, however, shared by other States, on the ground that a weaker Union will be a danger to external security and even internal cohesion, in present-day circumstances. But there is consensus amongst the States, in general, that they should have larger financial powers than those

conferred by the existing Constitution, if they are to efficiently discharge their development programmes within the State sphere under List II of the 7th Schedule. The Morarji Desai Government (1977) sought to pacify the States by conceding substantial grants by way of 'Plan assistance', by what has been called the 'Desai award'.⁴⁰

Sarkaria Commi-ssion. It is doubtful, however, whether the agitation for larger constitutional powers in respect of finance will be set at rest by such *ad hoc* palliatives. It is interesting to note that the suggestion, in a previous edition of this book, that the

remedy perhaps lay in setting up a Commission for the revision of the Constitution, so that the question of finance may be taken up along with the responsibilities of the Union and the States, on a more comprehensive perspective, has borne fruit in the appointment, in March, 1983, of a one-man Commission, headed by an ex-Supreme Court Judge, SARKARIA, J., empowered to recommend changes⁴¹ in the Centre-State relations' in view of the various developments which have taken place since the commencement of the Constitution. The Commission submitted its Report in 1988. The Supreme Court referred to the report in *S.R. Bommai*⁴² (see also under 'Inter-State Council', *post*).

The proper assessment of the federal scheme introduced by our Constitution is that it introduces a system which is to *normally* work as a federal system but there are provisions for converting it into a unitary or quasi-federal system under specified exceptional circumstances.⁴³ But the exceptions cannot be held to have overshadowed the basic and normal structure.⁴⁴ The exceptions are, no doubt, unique and numerous; but in cases where the exceptions are not attracted, federal provisions are to be applied without being influenced by the existence of the exceptions. Thus, it will not be possible either for the Union or a State to assume powers which are assigned by the Constitution to the other Government, unless such assumption is sanctioned by some provisions of the Constitution itself. Nor would such usurpation or encroachment be valid by consent of the other party, for the Constitution itself provides the cases in which this is permissible by consent [e.g., Arts. 252, 258(1), 258A]; hence, apart from these exceptional cases, the Constitution would not permit any of the units of the federation to subvert the federal structure set up by the Constitution, even by consent. Nor would this be possible by delegation of powers by one Legislature in favour of another.

Conclusion. In fine, it may be reiterated that the Constitution of India is *neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type*.⁴⁵ It enshrines the principle that "in spite of federalism, the national interest ought to be paramount".⁴⁶

REFERENCES

1. Draft Constitution, 21-2-1948, p. iv. [The word 'Union', in fact, had been used both in the Cripps proposals and the Cabinet Mission Plan (see under Chap. 2, *ante*), and in the Objectives Resolution of Pandit Nehru in 1947 (Chap. 3, *ante*), according to which residuary powers were to be reserved to the units].
2. C.A.D. Vol. VII, p. 43.
3. See Author's *Select Constitutions of the World*, 1984 Ed., p. 188.

4. Author's *Commentary on the Constitution of India*, 7th (Silver Jubilee) Ed., Vol. A, pp. 33 *et seq.*
5. Prof. W.T. WAGNER, *Federal States and their Judiciary* (Moulton and Co., 1969), p. 25.
6. LIVINGSTONE, *Federation and Constitutional Change*, 1956, pp. 6-7.
7. This view of the Author has been affirmed by the 9-Judge Bench Supreme Court decision in *S.R. Bommai v. Union of India*, AIR 1994 S.C. 1918 (para 211).
8. *Ganga Ram Moolchandani v. State of Rajasthan*, AIR 2001 SC 2616.
9. Cf. *Gujarat University v. Sri Krishna*, AIR 1963 S.C. 703 (715-16); *Waverly Mills v. Rayman & Co.*, AIR 1963 S.C. 90 (95).
10. Cf. *State of West Bengal v. Union of India*, AIR 1963 S.C. 1241.
11. Cf. *Atiabari Tea Co. v. State of Assam*, (1961) 1 S.C.R. 809 (860); *Automobile Transport v. State of Rajasthan*, AIR 1962 S.C. 1406 (1416); Ref. under Art. 143, AIR 1965 S.C. 745 (para 39).
12. *S.R. Bommai v. Union of India*, AIR 1994 S.C. 1918; **affirming** by and large, the views of the author at pp. 35-55 of C7, Vol. A.
13. *Prof. Yashpal v. State of Chhattisgarh*, AIR 2005 SC 2026.
14. *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*, (2007) 3 SCC 184.
15. Though the federal system as envisaged by the Government of India Act, 1935, could not fully come into being owing to the failure of the Indian States to join it, the provisions relating to the Central Government and the Provinces were given effect to as stated earlier [see under 'Federation and Provincial Autonomy', *ante*].
16. *Vide Table III, col. (A)*.
17. *Texas v. White*, (1869) 7 Wall. 700.
18. A contrary instance is to be found in the Constitution of the U.S.S.R. which expressly provides that "each Union Republic shall retain the right freely to secede from the U.S.S.R." [Art. 72 of the Constitution of 1977; see Author's *Select Constitutions of the World*, 1984 Ed., p. 188].
19. Author's *Constitutional Law of India* (6th Ed., 1991, Prentice-Hall of India, p. 46).
20. Each of the 50 States of U.S.A. has two representatives in the Senate.
21. There are three legislative lists in the Seventh Schedule; 99 items in the Union List, 61 items in the State List and 52 items in the Concurrent List [see Table XIX, *post*].
22. K.C. WHEARE, *Federal Government*, 1951, p. 28. He relaxes this view in the 4th Ed. (1963), pp. 26, 77.
23. WHEARE, *Modern Constitutions*, 2nd Ed. (1966), p. 21.
24. C.H. ALEXANDROWICZ, *Constitutional Developments in India*, 1957, pp. 157-70.
25. *Vide Author's Commentary on the Constitution of India*, 7th Ed., Vol. A, p. 55.
26. APPLEY, *Public Administration in India* (1953), p. 51.
27. JENNINGS, *Some Characteristics of the Indian Constitution*, p. 1.
28. E.g. SANTHANAM, *Union-State Relations in India*, 1960, pp. vii; 51, 59, 63. At p. 70, the learned Author observes—
"India has practically functioned as a Unitary State though the Union and the States have tried to function formally and legally as a Federation."
29. GRIFFITH, *The Impasse of Democracy* 1939, p. 196, quoted in GODSHALL, *Government in the United States*, p. 114.
30. Cf. BIRCH, *Federalism*, pp. 305-06.
31. GRANVILLE AUSTIN, *The Indian Constitution* (1966), pp. 187 *et seq.*
32. *Automobile Transport v. State of Rajasthan*, AIR 1962 S.C. 1406 (1415-16). In *Keshavananda v. Union of India*, AIR 1973 S.C. 1461, some of the judges (paras 302, 599, 1681) considered federalism to be one of the 'basic features' of our Constitution. A nine-Judge Supreme Court Bench has in *S.R. Bommai v. Union of India*, AIR 1994 S.C. 1918 laid down that the Constitution is federal and some of the Judges characterised federalism as its basic feature.
33. *Vide Report of the Centre-State Relations Committee (Rajamannar Committee)* (Madras, 1971, pp. 7-9).
34. It is interesting to note that even the Rajamannar Committee characterises the system under the Constitution of India as 'federal' (para 5, p. 16, *ibid.*), but suggests amendment of some of its features which have a unitary trend (para 6, p. 16).

35. Re. Kerala Education Bill, AIR 1958 S.C. 956.
36. It is unfortunate that even the Janata Government formed in 1977 which was determined to undo all mischief alleged to have been caused by the long Congress rule, was not convinced of the need to effectively control the frequent use of the drastic power conferred by Art. 356, and that the amendments effected by the 44th Amendment, 1978, in respect of this Article, are not good enough from this standpoint.
37. *Vide* The Madhya Pradesh Reorganisation Act, 2000.
38. *Vide* The Uttar Pradesh Reorganisation Act, 2000.
39. *Vide* The Bihar Reorganisation Act, 2000.
40. *Statesman*, Calcutta, dated 26-2-1979, p. 1.
41. Rao Government, which was in office till 1995, did not implement any of the recommendations made in the report of the Sarkaria Commission.
42. As Dr. Ambedkar explained in the Constituent Assembly (VII C.A.D. 33-34), the political system adopted in the Constitution could be "both unitary as well as federal according to the requirements of time and circumstances".
43. How far the 9-Judge Bench of the Supreme Court in *Bommai's case* (AIR 1994 S.C. 1918) has adopted the Author's views as expressed in the foregoing discussion will be evident from its following observation:

"The fact that under the scheme of our Constitution, greater power is conferred upon the Centre *vis-a-vis* the States does not mean that states are mere appendages of the Centre. Within the sphere allotted to them, *States are supreme* . . . More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. . . let it be said that federalism in the Indian Constitution is not a *matter of administrative convenience, but one of principle*—the outcome of our own historical process and a recognition of the ground realities (para 276).

This view, expressed by Jeevan Reddy and Agrawal, JJ. is joined by Pandian, J. (para 2). The view is supported by Sawant and Kuldip Singh, JJ. in these words (para 99);

". . . the States have an independent constitutional existence. . . they are not satellites nor agents of the Centre. The fact that during emergency and in certain other eventualities their powers are overridden or invaded by the Centre is not *destructive* of the *essential* federal feature of our Constitution. . . they are exceptions and have to be resorted to only to meet the exigencies of the *special situations*. The *exceptions are not a rule* (para 99).

44. GRANVILLE AUSTIN [*The Indian Constitution* (1966), p. 186] agrees with this view when he describes the Indian federation as 'a new kind of federalism to meet India's peculiar needs'.
45. JENNINGS, *Some Characteristics of the Indian Constitution*, p. 55.

CHAPTER 11

THE UNION EXECUTIVE

1. The President and the Vice-President.

At the head of the Union Executive stands the President of India.

The President of India is elected¹ by indirect election, that is, by an **Election of President** electoral college, in accordance with the system of proportional representation by means of the single transferable vote.²

The electoral college³ shall consist of—

- (a) The elected members of both Houses of Parliament; (b) the elected members of the Legislative Assemblies of the States; and (c) the elected members of the Legislative Assemblies of Union Territories of Delhi and Pondicherry [Art. 54].

As far as practicable, there shall be uniformity of representation of the different States at the election, according to the population and the total number of elected members of the Legislative Assembly of each State, and parity shall also be maintained between the States as a whole and the Union [Art. 55]. This second condition seeks to ensure that the votes of the States, in the aggregate, in the electoral college for the election of the President, shall be equal to that of the people of the country as a whole. In this way, the President shall be a representative of the nation as well as a representative of the people in the different States. It also gives recognition to the status of the States in the federal system.

The system of indirect election was criticised by some as falling short of the democratic ideal underlying universal franchise, but indirect election was supported by the framers of the Constitution, on the following grounds—

(i) Direct election by an electorate of some 510 millions of people would mean a tremendous loss of time, energy and money. (ii) Under the system of responsible Government introduced by the Constitution, real power would vest in the ministry; so, it would be anomalous to elect the President directly by the people without giving him real powers.⁴

In order to be qualified for election as President, a person must—

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|---|---|
| Qualifications for election as President | <ul style="list-style-type: none"> (a) be a citizen of India; (b) have completed the age of thirty-five years; (c) be qualified for election as a member of the House of the People; and |
|---|---|

- (d) must *not* hold any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Government [Art. 58].

But a sitting President or Vice-President of the Union or the Governor of any State or a Minister either for the Union or for any State is not disqualified for election as President [Art. 58].

Term of Office of President. The President's term of office is five years from the date on which he enters upon his office; but he is eligible for re-election⁵ [Arts. 56-57].

The President's office may terminate within the term of five years in either of two ways—

(i) By resignation in writing under his hand addressed to the Vice-President of India,

(ii) By removal for violation of the Constitution, by the process of impeachment [Art. 56]. The only ground for impeachment specified in Art. 61(1) is 'violation of the Constitution'.

An impeachment is a quasi-judicial procedure in Parliament. *Either House* may prefer the charge of violation of the Constitution before the other House which shall then either investigate the charge itself or cause the charge to be investigated.

But the charge cannot be preferred by a House unless—

(a) a resolution containing the proposal is moved after a 14 days' notice in writing signed by not less than 1/4 of the total number of members of that House; and

(b) the resolution is then passed by a majority of not less than 2/3 of the total membership of the House.

The President shall have a right to appear and to be represented at such investigation. If, as a result of the investigation, a resolution is passed by not less than 2/3 of the total membership of the House before which the charge has been preferred declaring that the charge has been sustained, such resolution shall have the effect of removing the President from his office with effect from the date on which such resolution is passed [Art. 61].

Since the Constitution provides the mode and ground for removing the President, he cannot be *removed* otherwise than by impeachment, in accordance with the terms of Arts. 56 and 61.

Conditions of President's Office. The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President. The president shall not hold any other office of profit [Art. 59(1)].

Emoluments and allowances of President. The President shall be entitled without payment of rent to the use of his official residence and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law (and until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule of the Constitution).⁶ By passing the President's Emoluments and Pension (Amendment) Act, 1998, Parliament has raised the emoluments to Rs. 50,000/- per mensem. The emoluments and allowances of the President shall not be diminished during his term of office [Art. 59(3)].

The Amendment Act, 1998 referred to above also provides for the payment of an annual pension of Rs. 3,00,000 to a person who held office as President, on the expiration of his term or on resignation, provided he is not re-elected to the office.

Vacancy in the Office of President. A vacancy in the office of the President may be caused in any of the following ways—

(i) On the expiry of his term of five years.

(ii) By his death.

(iii) By his resignation.

(iv) On his removal by impeachment.

(v) Otherwise, e.g., on the setting aside of his election as President [Art. 65(1)].

(a) When the vacancy is going to be caused by the *expiration of the term* of the sitting President, an election to fill the vacancy must be *completed* before the expiration of the term [Art. 62(1)]. But in order to prevent an 'interregnum', owing to any possible delay in such completion, it is provided that the outgoing President must continue to hold office, notwithstanding that his term has expired, until his successor enters upon his office [Art. 56(1)(c)]. (There is no scope for the Vice-President getting a chance to act as President in this case.)

(b) In case of a vacancy arising by reason of any cause *other than* the expiry of the term of the incumbent in office, an election to fill the vacancy must be held as soon as possible after, and in no case later than, six months from the date of occurrence of the vacancy.

Immediately after such vacancy arises, say, by the death of the President, and until a new President is elected, as above, it is the Vice-President who shall act as President [Art. 65(1)]. It is needless to point out that the new President who is elected shall be entitled to the full term of five years from the date he enters upon his office.

(c) Apart from a permanent *vacancy*, the President may be temporarily *unable* to discharge his functions, owing to his absence from India, illness or any other cause, in which case the Vice-President shall *discharge his functions* until the date on which the President resumes his duties [Art. 65(2)].

Election of Vice-President The election¹ of the Vice-President, like that of the President, shall be indirect and in accordance with the system of proportional representation by means of the single transferable vote. But his election shall be different from that of the President inasmuch as the State Legislatures shall have no part in it. The Vice-President shall be elected by an electoral college consisting of the members of both Houses Parliament [Art. 66(1)].

Qualifications for election as Vice-President. As in the case of the President, in order to be qualified to be elected as Vice-President, a person must be (a) a citizen of India; (b) has completed 35 years of age; and (c) must not hold an office of profit save that of President, Vice-President, Governor or Minister for the Union or State [Art. 66].

But while in order to be a President, a person must be qualified for election as a member of the House of the People, in order to be Vice-President, he must be qualified for election as a member of the Council of States. The reason for this difference is obvious, namely, that the Vice-President is normally to act as the Chairman of the Council of States.

Whether Member of Legislature may become President or Vice-President. There is no bar to a member of the Union or State Legislature being elected President or Vice-President, but the two offices cannot be combined in one person. In case a member of the Legislature is elected President or Vice-President, he shall be deemed to have vacated his seat in that House of the Legislature to which he belongs on the date on which he enters upon his office as President or Vice-President [Arts. 59(1); 66(2)].

Term of Office of Vice-President. The term of office of the Vice-President is five years. His office may terminate earlier than the fixed term either by resignation or by removal. A formal impeachment is not required for his removal. He may be removed by a resolution of the Council of States passed by a majority of its members and agreed to by the House of People [Art. 67, Prov. (b)].

Though there is no specific provision (corresponding to Art. 57) making a Vice-President eligible for re-election, the *Explanation* to Art. 66 suggests that a sitting Vice-President is eligible for re-election and Dr. S. Radhakrishnan was, in fact, elected for a second term in 1957.

Functions of the Vice-President. The Vice-President is the highest dignitary of India, coming next after the President [see Table IX]. No functions are, however, attached to the office of the Vice-President as such. The normal function of the Vice-President is to act as the *ex-officio* Chairman of the Council of States. But if there occurs any vacancy in the office of the President by reason of his death, resignation, removal or otherwise, the Vice-President shall act as President until a new President is elected and enters upon his office [Art. 65(1)].

The Vice-President shall *discharge the functions* of the President during the temporary absence of the President, illness or any other cause by reason of which he is unable to discharge his functions [Art. 65(2)]. No machinery having been prescribed by the Constitution to determine when the President is unable to

discharge his duties owing to absence from India or a like cause, it becomes a somewhat delicate matter as to who should move in the matter on any particular occasion. It is to be noted that this provision of the Constitution has not been put into use prior to 20th June, 1960, though President, Dr. Rajendra Prasad had been absent from India for a considerable period during his foreign tour in the year 1958. It was during the 15-day visit of Dr. Rajendra Prasad to the Soviet Union in June 1960, that for the first time, the Vice-President, Dr. Radhakrishnan was given the opportunity of acting as the President owing to the 'inability' of the President to discharge his duties.

The second occasion took place in May, 1961, when President Rajendra Prasad became seriously ill and incapable of discharging his functions. After a few days of crisis, the President himself suggested that the Vice-President should discharge the functions of the President until he resumed his duties. It appears that the power to determine when the President is unable to discharge his duties or when he should resume his duties has been understood to belong to the President himself. In the event of occurrence of vacancy in the office of both the President and the Vice-President by reason of death, resignation, removal etc. the Chief Justice of India or in his absence the seniormost Judge of the Supreme Court available shall discharge the functions until a new President is elected. In 1969 when on the death of Dr. Zakir Hussain, the Vice-President Shri V. V. Giri resigned, the Chief Justice Shri HIDYATULLAH discharged the functions from 20-7-1969.

Emoluments. When the Vice-President acts as, or discharges the functions of the President, he gets the emolument of the President; otherwise, he gets the salary of the chairman of the Council of States.⁸

When the Vice-President thus acts as, or discharges the functions of the President he shall cease to perform the duties of the Chairman of the Council of States and then the Deputy Chairman of the Council of States shall act as its Chairman [Art. 91].

Doubts and disputes relating to or connected with the election of a President or Vice-President.

Determination of doubts and disputes relating to the election of a President or Vice-President is dealt with in Art. 71, as follows—

(a) Such disputes shall be decided by the Supreme Court whose jurisdiction shall be *exclusive* and *final*.

(b) No such dispute can be raised on the ground of any vacancy in the electoral college which elected the President or Vice-President.

(c) If the election of a President or Vice-President is declared void by the Supreme Court, acts done by him prior to the date of such decision of the Supreme Court shall not be invalidated.

(d) Barring the decision of such disputes, other matters relating to the election of President or Vice-President may be regulated by law made by Parliament.

2. Powers and duties of the President.

Nature of the powers of the President. The Constitution says that the "executive power of the Union shall be vested in the President" [Art. 53]. The President of India shall thus be the head of the 'executive power' of the Union.

The 'executive power' primarily means the execution of the laws enacted by the Legislature, but the business of the Executive in a modern State is not as simple as it was in the days of Aristotle. Owing to the manifold expansion of the functions of the State, all residuary functions have practically passed into the hands of the Executive. The executive power may, therefore, be shortly defined as 'the power of carrying on the business of government' or 'the administration of the affairs of the State', excepting functions which are vested by the Constitution in any other authority. The ambit of the executive power has been thus explained by our Supreme Court⁹—

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away, subject, of course, to the provisions of the Constitutions or of any law..."

The executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State."⁹

Before we take up an analysis of the different powers of the Indian President, we should note the *constitutional limitations* under which he is to exercise his executive powers.

Constitutional limitations on President's powers. Firstly, he must exercise these powers according to the Constitution [Art. 53(1)]. Thus, Art. 75(1) explicitly requires that Ministers (other than the Prime Minister) can be appointed by the President only on the advice of the Prime Minister. There will be a violation of this provision if the President appoints a person as Minister from outside the list submitted by the Prime Minister. If the President violates any of the mandatory provisions of the Constitution, he will be liable to be removed by the process of impeachment.

Secondly, the executive powers shall be exercised by the President of India *in accordance with the advice* of his Council of Ministers [Art. 74(1)].

I. Prior to 1976, there was no express provision in the Constitution that the President was bound to act in accordance with the advice tendered by the Council of Ministers, though it was *judicially established*¹⁰ that the President of India was not a real executive, but a constitutional head, who was bound to act according to the advice of Ministers, so long as they commanded the confidence of the majority in the House of the People [Art. 75(3)].¹⁰ The 42nd Amendment Act, 1976 amended Art. 74(1) to clarify this position.

Article 74(1), as so amended, reads:

"There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice."

The word 'shall' makes it obligatory for the President to act in accordance with ministerial advice.

II. The Janata Government retained the foregoing text of Art. 74(1), as The 44th Amendment amended by the 42nd Amendment Act. But by the 44th Amendment Act, a Proviso was added to Art. 74(1) as follows:

"Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration."

The net result after the 44th Amendment, therefore, is that except in certain marginal cases referred to by the Supreme Court¹⁰ (to be noticed presently), the President shall have no power to act in his discretion in any case. He *must* act according to the advice given to him by the Council of Ministers, headed by the Prime Minister, so that refusal to act according to such advice will render him liable to impeachment for violation of the Constitution. This is subject to the President's power to send the advice received from the Council of Ministers, in a particular case, back to them for their reconsideration; and if the Council of Ministers adhere to their previous advice, the President shall have no option but to act in accordance with such advice. The power to return for reconsideration can be exercised only once, on the same matter.

It may be said, accordingly, that the powers of the President will be the powers of his Ministers, in the same manner as the prerogatives of the English Crown have become the 'privileges of the people' (*Dicey*).¹¹ An inquiry into the powers of the Union Government, therefore, presupposes an inquiry into the provisions of the Constitution which vest powers and functions in the President.

The various powers that are included within the comprehensive expression 'executive power' in a modern State have been classified by political scientists under the following heads:

- (a) *Administrative power*, i.e., the execution of the laws and the administration of the departments of government.
- (b) *Military power*, i.e., the command of the armed forces and the conduct of war.
- (c) *Legislative power*, i.e., the summoning, prorogation, etc., of the legislature, initiation of and assent to legislation and the like.
- (d) *Judicial power*, i.e., granting of pardons, reprieves, etc., to persons convicted of crime.

The Indian Constitution, by its various provisions, vests power in the hands of the President under each of these heads, subject to the limitations just mentioned.

I. The Administrative Power. In the matter of administration, not being a real head of the Executive like the American President, the Indian President shall *not* have any administrative function to discharge nor shall he have that power of control and supervision over the Departments of the Government

as the American President possesses. But though the various Departments of Government of the Union will be carried on under the control and responsibility of the respective Ministers in charge, the President will remain the *formal* head of the administration, and as such, all executive action of the Union must be expressed to be taken in the *name* of the President. The only mode of ascertaining whether an order or instrument is made by the Government of India will be to see whether it is expressed in the name of the President and authenticated in such manner as may be prescribed by rules to be made by the President [Art. 77]. For the same reason, all contracts and assurances of property made on behalf of the Government of India must be expressed to be made by the President and executed in such manner as the President may direct or authorise [Art. 299].

Again, though he may not be the 'real' head of the administration, all officers of the Union shall be his 'subordinates' [Art. 53(1)] and he shall have a right to be informed of the affairs of the Union [Art. 78(b)].

The administrative power also includes the power to *appoint and remove* the high dignitaries of the State. Under *our* Constitution, the President shall have the power to appoint—(i) The Prime Minister of India. (ii) Other Ministers of the Union. (iii) The Attorney-General for India. (iv) The Comptroller and Auditor-General of India. (v) The Judges of the Supreme Court. (vi) The Judges of the High Courts of the States. (vii) The Governor of a State. (viii) A Commission to investigate interference with water-supplies. (ix) The Finance Commission. (x) The Union Public Service Commission and Joint Commissions for a group of States. (xi) The Chief Election Commissioner and other members of the Election Commission. (xii) A Special Officer for the Scheduled Castes and Tribes. (xiii) A Commission to report on the administration of Scheduled Areas. (xiv) A Commission to investigate into the condition of backward classes. (xv) A Commission on Official Language. (xvi) Special Officer for linguistic minorities.

In making some of the appointments, the President is required by the Constitution to consult persons other than his ministers as well. Thus, in appointing the Judges of the Supreme Court the President shall consult the Chief Justice of India and such other Judges of the Supreme Court and of the High Courts as he may deem necessary [Art. 124(2)]. These conditions will be referred to in the proper places, in connection with the different offices.

The President shall also have the power to remove (i) his Ministers, individually; (ii) the Attorney-General for India; (iii) the Governor of a State; (iv) the Chairman or a member of the Public Service Commission of the Union or of a State, on the report of the Supreme Court; (v) a Judge of the Supreme Court or of a High Court or the Election Commissioner, on an address of Parliament.

It is to be noted that besides the power of appointing the above specified functionaries, the Indian Constitution does not vest in the President any absolute power to appoint *inferior officers* of the Union as is to be found in the American Constitution. The Indian Constitution thus seeks to avoid the

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undesirable 'spoils system' of America, under which about 20 per cent of the federal civil offices are filled in by the President, without consulting the Civil Service Commission, and as a reward for party allegiance. The Indian Constitution avoids the vice of the above system by making the 'Union Public Services and the Union Public Service Commission—a legislative subject for the Union Parliament, and by making it obligatory on the part of the President to consult the Public Service Commission in matters relating to appointment [Art. 320(3)], except in certain specified cases. If in any case the President is unable to accept the advice of the Union Public Service Commission, the Government has to explain the reasons therefor in Parliament. In the matter of removal of the civil servants, on the other hand, while those serving under the Union hold office during the President's pleasure, the Constitution has hedged in the President's pleasure by laying down certain conditions and procedure subject to which only the pleasure may be exercised [Art. 311(2)].

II. The Military Power. The military powers of the Indian President shall be lesser than those of either the American President or of the English Crown.

The Supreme command of the Defence Forces is, of course, vested in the President of India, but the Constitution expressly lays down that the exercise of this power shall be regulated by law [Art. 53(2)]. This means that though the President may have the power to take action as to declaration of war or peace or the employment of the Defence Forces, it is competent for Parliament to regulate or control the exercise of such powers. The President's powers as Commander-in-Chief cannot be construed, as in the U.S.A., as a power independent of legislative control.

Secondly, since the Constitution enjoins that certain acts cannot be done without the authority of law, it must be held that such acts cannot be done by the President without approaching Parliament for sanction, e.g., acts which involve the expenditure of money [Art. 114(3)], such as the raising, training and maintenance of the Defence Forces.

III. The Diplomatic Power. The diplomatic power is a very wide subject and is sometimes spoken of as identical with the power over foreign or external affairs, which comprise "all matters which bring the Union into relation with any foreign country". The legislative power as regards these matters as well as the power of making treaties and implementing them, of course, belongs to Parliament. But though the *final* power as regards these things is vested in Parliament, the Legislature cannot take the initiative in such matters. The task of *negotiating* treaties and agreements with other countries, subject to ratification by Parliament, will thus belong to the President, acting on the advice of his Ministers.

Again, though diplomatic representation as a subject of legislation belongs to Parliament, like the heads of other States, the President of India will represent India in international affairs and will have the power of appointing Indian representatives to other countries and of receiving diplomatic representatives of other States, as shall be recognised by Parliament.

IV. Legislative Powers. Like the Crown of England, the President of India is a component part of the Union Parliament and here is one of the instances where the Indian Constitution departs from the principle of Separation of Powers underlying the Constitution of the United States. The legislative powers of the Indian President, of course according to ministerial advice, [Art. 74(1)] are various and may be discussed under the following heads:

(a) *Summoning, Prorogation, Dissolution.*

Like the English Crown our President shall have the power to summon or prorogue the Houses of Parliament and to dissolve the lower House.¹² He shall also have the power to summon a joint sitting of both Houses of Parliament in case of a deadlock between them [Arts. 85, 108].

(b) *The Opening Address.*

The President shall address both Houses of Parliament assembled together, at the first session after each general election to the House of the People and at the commencement of the first session of each year, and "inform Parliament of the causes of its summons" [Art. 87].

The practice during the last five decades shows that the President's Opening Address is being used for purposes similar to those for which the 'Speech from the Throne' is used in England, *viz.*, to announce the programme of the Cabinet for the session and to raise a debate as to the political outlook and matters of general policy or administration. Each House is empowered by the Constitution to make rules for allotting time "for discussion of the matters referred to in such address and for the precedence of such discussion over other business of the House."

(c) *The Right to Address and to send Messages.*

Besides the right to address a joint sitting of both Houses at the commencement of the first session, the President shall also have the right to address either House or their joint sitting, at any time, and to require the attendance of members for this purpose [Art. 86(1)]. This right is no doubt borrowed from the English Constitution, but there it is not exercised by the Crown except on ceremonial occasions.

Apart from the right to address, the Indian President shall have the right to send messages to either House of Parliament either in regard to any pending Bill or to other matter, and the House must then consider the message "with all convenient despatch" [Art. 86(2)]. Since the time of George III, the English Crown has ceased to take any part in legislative or to influence it and messages are now sent only on formal matters. The American President, on the other hand, possesses the right to recommend legislative measures to Congress by messages though Congress is not bound to accept them.

The Indian President shall have the power to send messages not only on legislative matters but also 'otherwise'. Since the head of the Indian Executive is represented in Parliament by his Ministers, the power given to the President to send messages regarding legislation may appear to be

superfluous, unless the President has the freedom to send message differing from the Ministerial policy, in which case again it will open a door for friction between the President and the Cabinet.

It is to be noted that during the fifty nine years of the working of *our* Constitution, the President has not sent any message to Parliament nor addressed it on any occasion other than after each general election and at the opening of the first session each year.

(d) *Nominating Members to the Houses.*

Though the main composition of the two Houses of Parliament is elective, either direct or indirect, the President has been given the power to nominate certain members to both the Houses upon the supposition that adequate representation of certain interests will not be possible through the competitive system of election. Thus,

(i) In the Council of States, 12 members are to be nominated by the President from persons having special knowledge or practical experience of literature, science, art and social service [Art. 80(1)]. (ii) The President is also empowered to nominate not more than two members to the House of the People from the Anglo-Indian community, if he is of opinion that the Anglo-Indian community is not adequately represented in that House [Art. 331].

(e) *Laying Reports, etc., before Parliament.*

The President is brought into contact with Parliament also through his power and duty to cause certain reports and statements to be laid before Parliament, so that Parliament may have the opportunity of taking action upon them. Thus, it is the duty of the President to cause to be laid before Parliament—(a) the Annual Financial Statement (Budget) and the Supplementary Statement, if any; (b) the report of the Auditor-General relating to the accounts of the Government of India; (c) the recommendations made by the Finance Commission, together with an explanatory memorandum of the action taken thereon; (d) the report of the Union Public Service Commission, explaining the reasons where any advice of the Commission has not been accepted; (e) the report of the Special Officer for Scheduled Castes and Tribes; (f) the report of the Commission on backward classes; (g) the report of the Special Officer for linguistic minorities.

(f) *Previous sanction to legislation.*

The Constitution requires the previous sanction or recommendation of the President for introducing legislation on some matters, though, of course, the Courts are debarred from invalidating any legislation on the ground that the previous sanction was not obtained, where the President has eventually assented to the legislation [Art. 255]. These matters are:

(i) *A Bill for the formation of new States or the alteration of boundaries, etc., of existing States [Art. 3].* The exclusive power of recommending such legislation is given to the President in order to enable him to obtain the views of the affected States before initiating such legislation.

(ii) A Bill providing for any of the matters specified in Art. 31A(1) [Prov. I to Art. 31A(1)].

(iii) A Money Bill [Art. 117(1)].

(iv) A Bill which would involve expenditure from the Consolidated Fund of India even though it may not, strictly speaking, be a Money Bill [Art. 117(3)].

(v) A Bill affecting taxation in which States are interested, or affecting the principles laid down for distributing moneys to the States, or varying the meaning of the expression of 'agricultural income' for the purpose of taxation of income, or imposing a surcharge for the purposes of the Union under Chap. I of Part XII [Art. 274(1)].

(vi) State Bills imposing restrictions upon the freedom of trade [Art. 304, *Proviso*].

(g) *Assent to legislation and Veto.*

(A) Veto over Union Legislation. A Bill will not be an Act of the Indian Parliament unless and until it receives the assent of the President. When a Bill is presented to the President, after its passage in both Houses of Parliament, the President shall be entitled to take any of the following three steps:

(i) He may declare his assent to the Bill; or

(ii) He may declare that he withholds his assent to the Bill; or

(iii) He may, *in the case of Bills other than Money Bills*, return the Bill for reconsideration of the Houses, with or without a message suggesting amendments. A Money Bill cannot be returned for reconsideration.

In case of (iii), if the Bill is passed again by both House of Parliament with or without amendment and again presented to the President, it would be obligatory upon him to declare his assent to it [Art. 111].

Generally speaking, the object of arming the Executive with this power is to prevent hasty and ill-considered action by the Legislature. But the necessity for such power is removed or at least lessened when the Executive itself initiates and conducts legislation or is responsible for legislation, as under the Parliamentary or Cabinet system of Government. As a matter of fact, though a theoretical power of veto is possessed by the Crown in *England*, it has never been used since the time of Queen Anne.

Where, however, the Executive and the Legislature are separate and independent from each other, the Executive, not being itself responsible for the legislation, should properly have some control to prevent undesirable legislation. Thus, in the *United States*, the President's power of veto has been supported on various grounds, such as (a) to enable the President to protect his own office from aggressive legislation; (b) to prevent a particular legislation from being placed on the statute book which the President considers to be unconstitutional (for though the Supreme Court possesses the power to nullify a statute on the ground of unconstitutionality, it can exercise that power only in the case of clear violation of the Constitution,

regardless of any question of policy, and only if a proper proceeding is brought before it *after* the statute comes into effect); (c) to check legislation which he deems to be practically inexpedient or, which he thinks does not represent the will of the American people.

From the standpoint of effect on the legislation, executive vetos have been classified as absolute, qualified, suspensive and pocket vetos.

(B) *Absolute Veto.* The English Crown possesses the prerogative of absolute veto, and if it refuses assent to any bill, it cannot become law, notwithstanding any vote of Parliament. But this veto power of the Crown has become *obsolete* since 1700, owing to the development of the Cabinet system, under which all public legislation is initiated and conducted in the Legislature by the Cabinet. Judged by practice and usage, thus there is at present no executive power of veto in England.

(C) *Qualified Veto.* A veto is 'qualified' when it can be overridden by an extraordinary majority of the Legislature and the Bill can be enacted as law with such majority vote, overriding the executive veto. The veto of the *American* President is of this class. When a Bill is presented to the President, he may, if he does not assent to it, return the Bill within 10 days, with a statement of his objections, to that branch of Congress in which it originated. Each House of Congress then reconsiders the Bill and if it is adopted again in each House, by a two-thirds vote of the members present,—the Bill becomes a law, notwithstanding the absence of the President's signature. The qualified veto is then overridden. But if it fails to obtain that two-thirds majority, the veto stands and the Bill fails to become law. In the result, the qualified veto serves as a means to the Executive to point out the defects of the legislation and to obtain a reconsideration by the Legislature, but ultimately the extraordinary majority of the Legislature prevails. The qualified veto is thus a useful device in the United States where the Executive has no power of control over the Legislature, by prorogation, dissolution or otherwise.

(D) *Suspensive Veto.* A veto is suspensive when the executive veto can be overridden by the Legislature by an *ordinary* majority. To this type belongs the veto power of the *French* President. If, upon a reconsideration, Parliament passes the Bill again by a simple majority, the President has no option but to promulgate it.

(E) *Pocket Veto.* There is a fourth type of veto called the 'pocket veto' which is possessed by the *American* President. When a Bill is presented to him, he may neither sign the Bill nor return the Bill for reconsideration within 10 days. He may simply let the Bill lie on his desk until the ten-day limit has expired. But, if in the meantime, Congress has adjourned (*i.e.*, before expiry of the period of ten-days from presentation of the Bill to the President), the Bill fails to become a law. This method is known as the 'pocket veto', for, by simply withholding a Bill presented to the President during the last few days of the session of Congress the President can prevent the Bill to become law.

In India.

The veto power of the Indian President is a combination of the absolute, suspensive and pocket vetos. Thus,—

(i) As in *England*, there would be an end to a Bill if the President declares that he withholds his assent from it. Though such refusal has become obsolete in England since the growth of the Cabinet system under which it is the Cabinet itself which is to initiate the legislation as well as to advise a veto, such a provision was made in the Government of India Act, 1935. Even with the introduction of full Ministerial responsibility, the same provision has been incorporated in the Constitution of India. Normally, this power will be exercised only in the case of 'private' members' Bills. In the case of a Government Bill, a situation may, however, be imagined, where after the passage of a Bill and before it is assented to by the President, the Ministry resigns and the next Council of Ministers, commanding a majority in Parliament, advises the President to use his veto power against the Bill. In such a contingency, it would be constitutional on the part of the President to use his veto power even though the Bill had been duly passed by Parliament.¹³

(ii) If, however, instead of refusing his assent outright, the President remits the Bill or any portion of it for reconsideration, a re-passage of the Bill by an *ordinary* majority would compel the President to give his assent. This power of the Indian President, thus, differs from the qualified veto in the United States insofar as no extraordinary majority is required to effect the enactment of a returned Bill. The effect of a return by the Indian President is thus merely 'suspensive'. [As has been stated earlier, this power is not available in the case of Money Bills.]

(iii) Another point to be noted is that the Constitution does not prescribe any time-limit within which the President is to declare his assent or refusal, or to return the Bill. Article 111 simply says that if the President wants to return the Bill, he shall do it 'as soon as possible' after the Bill is presented to him. By reason of this absence of a time-limit, it seems that the Indian President would be able to exercise something like a 'pocket veto', by simply keeping the Bill on his desk for an indefinite time,¹⁴ particularly, if he finds that the Ministry is shaky and is likely to collapse shortly.

(F) *Disallowance of State legislation.* Besides the power to veto Union legislation, the President of India shall also have the power of disallowance or return for reconsideration of a Bill of the State Legislature, which may have been reserved for his consideration by the Governor of the State [Art. 201].

Reservation of a State Bill for the assent of the President is a discretionary power¹⁵ of the Governor of a State. In the case of any Bill presented to the Governor for his assent after it has been passed by both Houses of the Legislature of the State, the Governor may, instead of giving his assent or withholding his assent, reserve the 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 [Art. 200, 2nd Proviso].

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 this 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 his assent or that he withholds 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.

In a strictly Federal Constitution like that of the *United States*, the States are autonomous within their sphere and so there is no scope for the Federal Disallowance of Executive to veto measures passed by the State **State legislation.** Legislatures. Thus, in the Constitution of *Australia*, too, there is no provision for reservation of a State Bill for the assent of the Governor-General and the latter has no power to disallow State Legislation.

But *India* has adopted a federation of the Canadian type. Under the *Canadian* Constitution the Governor-General has the power not only of refusing his assent to a Provincial legislation, which has been reserved by the Governor for the signification of the Governor-General's assent, but also of directly disallowing a Provincial Act, even where it has not been reserved by the Governor for his assent. These powers thus give the Canadian Governor-General a control over Provincial legislation, which is unknown in the United States of America or Australia. This power has, in fact, been exercised by the Canadian Governor-General not only on the ground of encroachment upon Dominion powers, but also on grounds of policy, such as injustice, interference with the freedom of criticism and the like. The Provincial Legislature is to this extent subordinate to the Dominion Executive.

There is no provision in the Constitution of India for a direct disallowance of State legislation by the Union President, but there is provision for disallowance of such bills as are *reserved* by the State Governor for assent of the President. The President may also direct the Governor to return the Bill to the State Legislature for reconsideration; if the Legislature again passes the Bill by an ordinary majority, the Bill shall be presented again to the President for his reconsideration. But if he refuses his assent again, the Bill fails. In short, there is no means of overriding the President's veto, in the case of State legislation. So, the Union's control over State legislation shall be absolute, and no grounds are limited by the Constitution upon which the President shall be entitled to refuse his assent. As to reservation by the Governor, it is to be remembered that the Governor is a nominee of the President. So, the power of direct disallowance will be virtually available to the President through the Governor.

These powers of the President in relation to State legislation will thus serve as one of the bonds of Central control, in a federation tending towards the unitary type.

(h) *The Ordinance-making Power.*

The President shall have the power to legislate by Ordinances at a time when it is not possible to have a Parliamentary enactment on the subject, immediately [Art. 123].

The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of Parliament, that is to say, it may relate to any subject in respect of which Parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament. Thus, an Ordinance cannot contravene the Fundamental Rights any more than an Act of Parliament. In fact, Art.13(3)(a) doubly ensures this position by laying down that "law" includes an 'Ordinance'."

Subject to this limitation, the Ordinance may be of any nature as Parliamentary legislation may take, e.g., it may be retrospective or may amend or repeal any law or Act of Parliament itself. Of course, an Ordinance shall be of temporary duration.

This independent power of the Executive to legislate by Ordinance is a relic of the Government of India Act, 1935, but the provisions of the Constitution differ from that of the Act of 1935 in several material respects as follows:

Firstly, this power is to be exercised by the President on the advice of his Council of Ministers (and not in the exercise of his 'individual judgment' as the Governor-General was empowered to act, under the Government of India Act, 1935).

Secondly, the Ordinance must be laid before Parliament when it reassembles, and shall automatically cease to have effect at the expiration of six weeks from the date of re-assembly unless disapproved earlier by Parliament. In other words an Ordinance can exist at the most only for six weeks from the date of re-assembly. If the Houses are summoned to reassemble on different dates the period of six weeks is to be counted from the later of those dates.

Thirdly, the Ordinance-making power will be available to the President only when either of the two Houses of Parliament has been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. He shall have no such power while both Houses of Parliament are in session. The President's Ordinance-making power under the Constitution is, thus, not a co-ordinate or parallel power of legislation available while the Legislature is capable of legislating.

Any legislative power of the executive (independent of the legislature) is unimaginable in the U.S.A., owing to the doctrine of Separation of Powers underlying the American Constitution and even in England, since the *Case of Proclamations* [(1610) 2 St. Tr. 723]. But the power to make Ordinances during recesses of Parliament has been justified in India, on the ground that

the President should have the power to meet with a pressing need for legislation when either House is not in session.

"It is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be difficult to deal with a situation which may suddenly and immediately arise. The Executive must have the power to issue an Ordinance as the Executive cannot deal with the situation by resorting to the ordinary process of law because the Legislature is not in session."

Even though the legislature is not in session, the President cannot promulgate an Ordinance unless he is satisfied that there are circumstances which render it necessary for him to take 'immediate action'. Clause (1) of Art. 123 says—

"If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require."

But 'immediate action' has no necessary connection with an 'emergency' such as is referred to in Art. 352. Hence, **Possibility of abuse of the Ordinance making power.** the promulgation of an Ordinance is not dependent upon the existence of an armed rebellion or external aggression. The only test is whether the circumstances which call for the legislation are so serious and imminent that the delay involved in summoning the Legislature and getting the measure passed in the ordinary course of legislation cannot be tolerated. But the sole judge of the question whether such a situation has arisen is the President himself and it was held in some earlier cases a Court cannot enquire into the propriety of his satisfaction even where it is alleged that the power was not exercised in good faith.¹⁶

But if on the expiry of an Ordinance it is repromulgated and this is done repeatedly then it is an abuse of the power and a fraud on the Constitution.¹⁷

In *Cooper's case*,¹⁸ however, the Supreme Court expressed the view that the genuineness of the President's satisfaction could possibly be challenged in a court of law on the ground that it was *mala fide*, e.g., where the President has prorogued a House of Parliament in order to make an Ordinance relating to a controversial matter, so as to by-pass the verdict of the Legislature.

(I) The Indira Government wanted to silence any such judicial interference in the matter of making an Ordinance by inserting Cl. (4) in Art. 123, laying down that the President's satisfaction shall be *final* and could not be questioned in any Court on any ground.

(II) The Janata Government overturned the foregoing change. The net result is that the observation in *Cooper's case*¹⁸ re-enters the field and the door for judicial interference in a case of *mala fides* is reopened.¹⁶ To establish *mala fides* may not be an easy affair; but the revival of *Cooper's* observation¹⁸ may serve as a potential check on any arbitrary power to prorogue the House of Parliament in order to legislate by Ordinance.

It is true that when the Ordinance-making power is to be exercised on the advice of a Ministry which commands a majority in Parliament, it makes little difference that the Government seeks to legislate by an Ordinance instead of by an Act of Parliament, because the majority would have ensured a safe passage of the measure through Parliament even if a Bill had been brought instead of promulgating the Ordinance. But the argument would not hold good where the Government of the day did *not* carry an overwhelming majority. Article 123 would, in such a situation, enable the Government to enact a measure for a temporary period by an Ordinance, not being sure of support in Parliament if a Bill had been brought. Even where the Government has a clear majority in Parliament, a debate in Parliament which takes place where a Bill is introduced not only gives a nation-wide publicity to the 'pros and cons' of the measure but also gives to the two Houses a chance of making amendments to rectify unwelcome features or defects as may be revealed by the debate. All this would be absent where the Government elects to legislate by Ordinance. It is evident, therefore, that there is a likelihood of the power being abused even though it is exercisable on the advice of the Council of Ministers,¹⁹ because the Ministers themselves might be tempted to resort to an Ordinance simply to avoid a debate in Parliament¹⁶ and may advise the President to prorogue Parliament at any time, having this specific object in mind.

Parliamentary safeguard. It is clear that there should be some safeguard against such abuse. So far as the merits of the Ordinance are concerned, Parliament, of course, gets a chance to review the measure when Government seeks to introduce a Bill to replace it. It may also pass resolutions disapproving of the Ordinance, if and when the Government is obliged to summon the Parliament for other purposes [Art. 123(2)(a)]. But the real question is how to enable Parliament to tell the Government, short of passing a vote of censure or of no-confidence, that it does not approve of the conduct of the Government in making the Ordinance instead of bringing a Bill for the purpose? The House of the people has made a Rule requiring that whenever the Government seeks to replace an Ordinance by a Bill, a statement "explaining the circumstances which necessitated immediate legislation by Ordinance" must accompany such Bill. The statement merely informs the House of the grounds advanced by the Government. A general discussion takes place on the resolution approving the Ordinance and generally a resolution is moved by the opposition disapproving the Ordinance.

(V) *The Pardoning Power.* Almost all Constitutions confer upon the head of the Executive the power of granting pardons to persons who have been tried and convicted of some offence. The object of conferring this 'judicial' power upon the Executive is to correct possible judicial errors, for, no human system of judicial administration can be free from imperfections.

In *Kehar Singh's case*²⁰ the following principles were laid down (a) The convict seeking relief has no right to insist on oral hearing, (b) No guideline need be laid down by the Supreme Court for the exercise of the power, (c) The power is to be exercised by the President on the advice of the Central Government, (d) The President can go into the merits of the case and take a different view, (e) Exercise of the power by the President is not open to

judicial review, except to the limited extent as indicated in *Maru Ram's* case.²¹ The Court can interfere only where the Presidential decision is wholly irrelevant to the object of Art. 72 or is irrational, arbitrary, discriminatory or *mala fide*.

It should be noted that what has been referred to above as the 'pardoning power' comprises a group of analogous powers each of which has a distinct significance and distinct legal consequences, *viz.*, pardon, reprieve, respite, remission, suspension, commutation. Thus, while a *pardon* rescinds both the sentence and the conviction and absolves the offender from all punishment and disqualifications, *commutation* merely substitutes one form of punishment for another of a lighter character, *e.g.*, each of the following sentences may be commuted for the sentence next following it: death; rigorous imprisonment; simple imprisonment; fine. *Remission*, on the other hand, reduces the amount of sentence without changing its character, *e.g.*, a sentence of imprisonment for one year may be remitted to six months. *Respite* means awarding a lesser sentence instead of the penalty prescribed, in view of some special fact, *e.g.*, the pregnancy of a woman offender. *Reprieve* means a stay of execution of a sentence, *e.g.*, pending a proceeding for *pardon* or *commutation*.

**Pardoning power
of President and
Governor
compared.**

Under the Indian Constitution, the pardoning power shall be possessed by the President as well as the State Governors, under Arts. 72 and 161, respectively as follows—

<i>President</i>	<i>Governor</i>
1. Has the power to grant pardon, reprieve, respite, suspension, remission or commutation in respect of punishment or sentence by court-martial.	1. No such power.
2. Do., where the punishment or sentence is for an offence against a law relating to a matter to which the <i>executive power of the union</i> extends.	2. Powers similar to those of President in respect of an offence against a law relating to a matter to which the <i>executive power of the State</i> extends (except as to death sentence for which see <i>below</i>).
3. Do., in <i>all cases</i> where the sentence is one of death.	3. No power to pardon in case of sentence of death. But the power to suspend, remit or commute a sentence of death, if conferred by law, remains, unaffected.

In the result, the President shall have the pardoning power in respect of—

(i) All cases of punishment by a Court Martial. (The Governor shall have no such power.)

(ii) Offences against laws made under the Union and Concurrent Lists. (As regards laws in the Concurrent sphere, the jurisdiction of the President shall be concurrent with that of the Governor.) Separate provision has been made as regards sentences of death.

(iii) The *only* authority for pardoning a sentence of death is the President.

But though the Governor has no power to pardon a sentence of death, he has, under s. 54 of the Indian Penal Code and ss. 432-433 of the Criminal Procedure Code, 1973, the power to suspend, remit or commute a sentence of death in certain circumstances. This power is left intact by the Constitution, so that as regards suspension, remission or commutation, the Governor shall have a concurrent jurisdiction with the President.

(VI) *Miscellaneous Powers.* As the head of the executive power, the President has been vested by the Constitution with certain powers which may be said to be residuary in nature, and are to be found scattered amongst numerous provisions of the Constitution. Thus,

(a) The President has the constitutional authority to make *rules* and **Rule-making Power.** regulations relating to various matters, such as, how his orders and instruments shall be authenticated; the paying into custody of and withdrawal of money from, the public accounts of India; the number of members of the Union Public Service Commission, their tenure and conditions of service; recruitment and conditions of service of persons serving the Union and the secretarial staff of Parliament; the prohibition of simultaneous membership of Parliament and of the Legislature of a State; the procedure relating to the joint sittings of the Houses of Parliament in consultation with the Chairman and the Speaker of the two Houses; the manner of enforcing the orders of the Supreme Court; the allocation among States of emoluments payable to a Governor appointed for two or more States; the discharge of the functions of a Governor in any contingency not provided for in the Constitution; specifying Scheduled Castes and Tribes; specifying matters on which it shall not be necessary for the Government of India to consult the Union Public Service Commission.

(b) He has the power to give instructions to a Governor to promulgate an Ordinance if a Bill containing the same provisions requires the previous sanction of the President under the Constitution [Art. 213(1), Proviso].

(c) He has the power to refer any question of public importance for the opinion of the Supreme Court and already 14 such references have been made since 1950 till 2007. The last one has not yet been decided. [Art. 143; see Chap. 22 under 'Advisory Jurisdiction'].

(d) He has the power to appoint certain Commissions for the purpose of reporting on specific matters, such as, Commissions to report on the administration of Schedules Areas and welfare of Scheduled Tribes and Backward Classes; the Finance Commission; Commission on Official Language; an Inter-State Council.

(e) He has some special powers relating to 'Union Territories', or territories which are directly administered by the Union. Not only is the

administration of such Territories to be carried on by the President through an Administrator, responsible to the President alone, but the President has the final legislative power (to make regulations) relating to the Andaman and Nicobar Islands; the Lakshadweep; Dadra and Nagar Haveli;²² and may even repeal or amend any law made by Parliament as may be applicable to such Territories [Art. 240].

(f) The President shall have certain special powers in respect of the administration of Scheduled Area and Tribes, and Tribal Area in Assam:

(i) Subject to amendment by Parliament, the president shall have the power, by order, to declare an area to be a Scheduled Area or declare that an area shall cease to be a Scheduled Area, alter the boundaries of Scheduled Areas, and the like [Fifth Sch., Para 6.]

(ii) A Tribes Council may be established by the direction of the President in any State having Scheduled Areas and also in States having Scheduled Tribes therein *but not Scheduled Areas* [Fifth Sch., Para 4].

(iii) All regulations made by the Governor of a State for the peace and good government of the Scheduled Areas of the State must be submitted forthwith to the President and until assented to by him, such regulations shall have no effect [Fifth Sch., Para 5(4)].

(iv) The President may, at any time, require the Governor of a State to make a report regarding the administration of the Scheduled Areas in that State and give directions as to the administration of such Areas [Sch. V, Para 3].

(g) The President has certain special powers and responsibilities as regards Scheduled Castes and Tribes:

(i) Subject to modification by Parliament, the President has the power to draw up and notify the lists of Scheduled Castes and Tribes in each State and Union Territory. Consultation with the Governor is required in the case of the list relating to a State [Arts. 341-342].

(ii) The President shall appoint a Special Officer to investigate and report on the working of the safeguards provided in the Constitution for the Scheduled Castes and Tribes [Art. 338].

(iii) The President may at any time and shall at the expiration of ten years from the commencement of the Constitution, appoint a Commission for the welfare of the Scheduled Tribes in the States [Art. 339].

(VII) *Emergency Powers.* The foregoing may be said to be an account of the President's normal powers. Besides these, he shall have certain extraordinary powers to deal with emergencies, which deserve a separate treatment [Chap. 28, *post*]. For the present, it may be mentioned that the situations that would give rise to these extraordinary powers of the President are of three kinds :

(a) *Firstly*, the President is given the power to make a "Proclamation of Emergency" on the ground of threat to the security of India or any part thereof, by war, external aggression or *armed rebellion*.²³ The object of this Proclamation is to maintain the security of India and its effect is, *inter alia*, assumption of wider control by the Union over the affairs of the States or any of them as may be affected by armed rebellion or external aggression.

(b) *Secondly*, the President is empowered to make a Proclamation that the Government of a State cannot be carried on in accordance with the provisions of the Constitution. The break-down of the constitutional machinery may take place either as a result of a political deadlock or the failure by a State to carry out the directions of the Union [Arts. 356, 365]. By means of a Proclamation of this kind, the President may assume to himself any of the governmental powers of the State and to Parliament the powers of the Legislature of the State.

(c) *Thirdly*, the President is empowered to declare that a situation has arisen whereby "the financial stability or credit of India or of any part thereof is threatened" [Art. 360]. The object of such Proclamation is to maintain the financial stability of India by controlling the expenditure of the States and by reducing the salaries of the public servants, and by giving directions to the States to observe canons of financial propriety, as may be necessary.

3. The Council of Ministers

The framers of *our* Constitution intended that though formally all executive powers were vested in the President, he should act as the constitutional head of the Executive like the English Crown, acting on the advice of Ministers responsible to the popular House of the Legislature.

But while the *English* Constitution leaves the entire system of Cabinet Government to convention, the Crown being legally vested with absolute powers and the Ministers being in theory nothing more than the servants of the Crown, the framers of *our* Constitution enshrined the foundation of the Cabinet system in the body of the written Constitution itself, though, of course, the details of its working had necessarily to be left to be filled up by convention and usage.²⁴

Appointment of Ministers. While the Prime Minister is selected by the President, the other Ministers are appointed by the President on the advice of the Prime Minister [Art. 75(1)] and the allocation of portfolios amongst them is also made by him. Further, the President's power of dismissing an individual Minister is virtually a power in the hands of the Prime Minister. In selecting the Prime Minister, the President must obviously be restricted to the leader of the party in majority in the House of the People, or, a person who is in a position to win the confidence of the majority in that House.

Council of Ministers and Cabinet. The number of members of the Council of Ministers is not specified in the Constitution. It is determined according to the exigencies of the time. At the end of 1961, the strength of the Council of Ministers of the Union was 47, at the end of 1975, it was raised to 60, and in 1977, it was reduced to 24, while in July 1989, it was again raised to 58. The National Front Government (headed by Sri V.P. Singh) started with only 22 Ministers. All the Ministers, however, do not belong to the same rank.²⁵ The National Democratic Alliance Government (headed by Mr. A.B. Bajpai) had 29 Cabinet Ministers and 44 State Ministers (no Deputy Ministers). However, sub-clause (1A) has been inserted to Art. 75 by the Constitution (Ninety-first Amendment) Act, 2003 which provides that the total number of Ministers, including the Prime Minister, shall not exceed 15% of the total number of the members of the

House of People (w.e.f. 1.1.2004). The Constitution does not classify the members of the Council of Ministers into different ranks. All this has been done informally, following the English practice. It has now got legislative sanction, so far as the Union is concerned, in s. 2 of the Salaries and Allowances of Ministers Act, 1952, which defines "Minister" as a "Member of the Council of Ministers, by whatever name called, and includes a Deputy Minister."²⁵

Salaries of Ministers. The Council of Ministers is thus a composite body, consisting of different categories. At the Centre, these categories are three, as stated above. The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine. Each Minister gets a sumptuary allowance at a varying scale, according to his rank, and a residence, free of rent.

The rank of the different Ministers is determined by the Prime Minister according to whose advice the President appoints the Ministers [Art.75(1)], and also allocates business amongst them [Art.77]. While the Council of Ministers is collectively responsible to the House of the People [Art. 75(3)], Art. 78(c) enjoins the Prime Minister, when required by the President, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council,—in practice, the Council of Ministers seldom meets as a body. It is the Cabinet, an inner body *within the Council*, which shapes the policy of the Government.

While Cabinet Ministers attend meetings of the Cabinet of their own right, Ministers of State are not members of the Cabinet and they can attend only if invited to attend any particular meeting. A Deputy Minister assists the Minister in charge of a Department of Ministry and takes no part in Cabinet deliberations.

Ministers may be chosen from members of either House and a Minister who is a member of one House has a right to speak in and to take part in the proceedings of the other House though he has no right to vote in the House of which he is not a member [Art. 88].

Under our Constitution, there is no bar to the *appointment* of a person from outside the Legislature as Minister. But he cannot continue as Minister for more than 6 months unless he secures a seat in either House of Parliament (by election or nomination, as the case may be), in the meantime. Article 75(5) says—

"A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister."

Ministerial Responsibility to Parliament.

President.

Collective Responsibility.

As to Ministerial responsibility, it may be stated that the Constitution follows in the main the English principle except as to the *legal* responsibility of individual Ministers for acts done by or on behalf of the

(A) The principle of collective responsibility is codified in Art. 75(3) of the Constitution—

"The Council of Ministers shall be collectively responsible to the House of the People."

So, the Ministry, as a body, shall be under a constitutional obligation to resign as soon as it loses the confidence of the popular House of the Legislature. The collective responsibility is to the House of the People even though some of the Ministers may be members of the Council of States.

The 'collective responsibility' has two meanings : the first that all the members of a government are unanimous in support of its policies and exhibit that unanimity on public occasions although while formulating the policies, they might have differed in the cabinet meeting; the second that the Ministers, who had an opportunity to speak for or against the policies in the Cabinet are thereby personally and morally responsible for their success and failure.²⁶

Of course, instead of resigning, the Ministry shall be competent to advise the President or the Governor to exercise his power of dissolving the Legislature, on the ground that the House does not represent the views of the electorate faithfully.

Individual Responsibility to the President. (B) The principle of individual responsibility to the head of the State is embodied in Art. 75(2)—

"The Ministers shall hold office during the pleasure of the President."

The result, is that though the Ministers are collectively responsible to the Legislature, they shall be individually responsible to the Executive head and shall be liable to dismissal even when they may have the confidence of the Legislature. But since the Prime Minister's advice will be available in the matter of dismissing other Ministers individually, it may be expected that this power of the President will virtually be, as in England, a power of the Prime Minister against his colleagues,—to get rid of an undesirable colleague even where that Minister may still possess the confidence of the majority in the House of the People. Usually, the Prime Minister exercises this power by asking an undesirable colleague to resign, which the latter readily complies with, in order to avoid the odium of a dismissal.

(C) But, as stated earlier, the English principle of legal responsibility has not been adopted in *our* Constitution. In *England*, the Crown cannot do any public act without the counter-signature of a Minister who is liable in a

Legal Responsibility. Court of law if the act done violates the law of the land and gives rise to a cause of action in favour of an individual. But *our* Constitution does not expressly say that the President can act only *through* Ministers and leaves it to the President to make rules as to how his orders, etc., are to be authenticated; and on the other hand, provides that the Courts will not be entitled to enquire what advice was tendered by the Ministers to the executive head. Hence, if an act of the President is, according to the rules made by him, authenticated by a Secretary to the Government of India, there is no scope for a Minister being legally responsible for the act even though it may have been done on the advice of the Minister.

As in England, the Prime Minister is the "keystone of the Cabinet arch". Article 74(1) of *our* Constitution expressly states that the Prime Minister shall be "at the head" of the Council of Ministers. Hence, the other Ministers cannot function when the Prime Minister dies or resigns.

In *England*, the position of the Prime Minister has been described by Lord MORLEY as '*primus inter pares*', i.e., 'first among equals'. In theory, all Ministers or members of the Cabinet have an equal position, all being advisers of the Crown, and all being responsible to Parliament in the same manner. Nevertheless, the Prime Minister has a pre-eminence, by convention and usage. Thus,—

- (a) The Prime Minister is the leader of the party in majority in the popular House of the legislature.
- (b) He has the power of selecting the other Ministers and also advising the Crown to dismiss any of them individually, or require any of them to resign. Virtually, thus, the other Ministers hold office at the pleasure of the Prime Minister.
- (c) The allocation of business amongst the Ministers is a function of the Prime Minister. He can also transfer a Minister from one Department to another.
- (d) He is the chairman of the Cabinet, summons its meetings and presides over them.
- (e) While the resignation of other Ministers merely creates a vacancy, the resignation or death of the Prime Minister dissolves the Cabinet.
- (f) The Prime Minister stands between the Crown and the Cabinet. Though individual Ministers have the right of access to the Crown on matters concerning their own departments, any important communication, particularly relating to policy, can be made only through the Prime Minister.
- (g) He is in charge of co-ordinating the policy of the Government and has, accordingly, a right of supervision over all the departments.

In *India*, all these special powers will belong to the Prime Minister inasmuch as the conventions relating to Cabinet Government are, in general, applicable. But some of these have been codified in the Constitution itself. The power of advising the President as regards the appointment of other Ministers is, thus, embodied in Art. 75(1). As to the function of acting as the channel of communication between the President and the Council of Ministers, Art. 78 provides—

"It shall be the duty of the Prime Minister—

- (a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;
- (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and
- (c) if the President so requires to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

Thus, even though any particular Minister has tendered any advice to the President without placing it before the Council of Ministers, the President has (through the Prime Minister) the power to refer the matter to be considered by the Council of Ministers. The unity of the Cabinet system will thus be enforced in India through the provisions of the written Constitution.

4. The President in relation to his Council of Ministers.

It is no wonder that the position of the President under *our* Constitution has evoked much interest amongst political scientists in view of the plenitude of powers vested in an elected President holding for a fixed term, saddled with limitations of Cabinet responsibility.

In a Parliamentary form of government, the tenure of office of the virtual executive is *dependent* on the will of the Legislature; in a Presidential Government the tenure of office of the executive is *independent* of the will of the Legislature (*Leacock*). Thus, in the Presidential form of which the model is the *United States*,—the President is the *real* head of the Executive who is elected by the people for a fixed term. He is independent of the Legislature as regards his tenure and is not responsible to the Legislature for his acts. He may, of course, act with the advice of ministers, but they are appointed by him as his *counsellors* and are responsible to him and not to the Legislature. Under the Parliamentary system represented by *England*, on the other hand, the head of the Executive (the Crown) is a mere titular head, and the virtual executive power is wielded by the Cabinet, a body formed of the members of the Legislature and responsible to the popular House of the Legislature for their office and actions.

Being a Republic, *India* could not have a hereditary monarch. So, an elected President is at the head of the executive power in India. The tenure of his office is for a fixed term of years as of the American President. He also

Indian President compared with American President and English Crown. resembles the American President inasmuch as he is removable by the Legislature under the special quasi-judicial procedure of impeachment. But, on the other hand, he is more akin to the English King than the American President insofar as he has no 'functions' to discharge, on his own authority. All the powers and 'functions' [Art. 74(1)] that are vested by the Constitution in the President are to be exercised on the advice of the Ministers responsible to the Legislature as in England. While the so-called Cabinet of the American President is responsible to himself and not to Congress, the Council of Ministers of *our* President shall be responsible to Parliament.

The reason why the framers of the Constitution discarded the *American* model after providing for the election of the President of the Republic by an electoral college formed of members of the Legislatures not only of the Union but also of the States, has thus been explained²⁷: In combining stability with responsibility, they gave more importance to the latter and preferred the system of 'daily assessment of responsibility' to the theory of 'periodic assessment' upon which the American system is founded. Under the American system, conflicts are bound to occur between the Executive, Legislature and Judiciary; and on the other hand, according to many modern American writers the absence of co-ordination between the Legislature and the Executive is a source of weakness of the American political system. What is wanted in India on her attaining freedom from one and a half century of bondage is a *smooth* form of Government which would be conducive to the manifold development of the country without the least friction,—and to this end, the Cabinet or Parliamentary system of Govern-

ment of which India has already had some experience, is better suited than the Presidential.

A more debatable question that has been raised is whether the Constitution *obliges* the President to act only on the advice of the Council of Ministers, on every matter. The controversy, on this question, was highlighted by a speech delivered by the President Dr. Rajendra Prasad at a ceremony of the Indian Law Institute (November 28, 1960)²⁸ where he urged for a study of the relationship between the President and the Council of Ministers, observing that—

“There is no provision in the Constitution which in so many words lays down that the President shall be bound to act in accordance with the advice of his Council of Ministers.”

The above observation came in contrast with the words of Dr. Rajendra Prasad himself with which he, as the President of the Constituent Assembly, summed up the relevant provisions of the Draft Constitution:²⁸

“Although there is no specific provision in the Constitution itself making it binding on the President to accept the advice of his ministers, it is hoped that the convention under which in England the King always acted on the advised of his ministers would be established in this country also and the President would become a constitutional President in all matters.”

Politicians and scholars, naturally, took sides on this issue, advancing different provisions of the Constitution to demonstrate that the “President under our Constitution is not a figure-head” (*Munshi*)²⁹ or that he was a mere constitutional head similar to the English Crown.

When the question went up to the Supreme Court, the Court took the latter view, relying on the interpretation of the words ‘aid and advise’ in the Dominion Constitution Acts, in these words, in *Ram Jawaya’s case*³⁰:

“Under article 53(1) of our Constitution the executive power of the Union is vested in the President. But under article 74 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. *The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.* The same provisions obtain in regard to the Government of States; the Governor, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is like the British Cabinet, ‘a hyphen which joins, a buckle which fastens’, the legislative part of the State to the executive part.”³¹

The foregoing interpretation³² was reiterated by the Supreme court in several later decisions,³³ so that, so far as judicial interpretation was concerned, it was settled that the Indian President is a constitutional head of the Executive like the British Crown. In *Rao v. Indira*³⁴ a unanimous Court observed—

“The Constituent Assembly did not choose the Presidential system of Government.”

The 42nd Amendment. The Indira Government sought to put the question beyond political controversy, by amending the Constitution itself. Article 74(1) was thus substituted, by the Constitution (42nd Amendment) Act, 1976:

"(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice."

Though the Janata Government sought to wipe off the radical changes infused into the Constitution by Mrs. Gandhi's Government, it has *not* disturbed the foregoing amendment made in Art. 74(1). The only change made by the 44th Amendment

The 43rd and 44th Amendments.

Act over the 1976-provision is to add a Proviso which gives the President one chance to refer the advice given to the Council of Ministers back for a reconsideration; but if the Council of Ministers reaffirm their previous advice, the President shall be *bound* to act according to that advice. Article 74(1), as it stands after the 44th Amendment, 1978, stands thus:

"(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration."

The position to-day, therefore, is that the debate whether the President of India has any power to act contrary to the advice given by the Council of Ministers has become *meaningless*. By amending the Constitution in 1976 and 1978, a seal has been put to the controversy which had been mooted by President Rajendra Prasad at the Indian Law Institute²⁸ that there was no provision in the Indian Constitution to make it obligatory upon the President to act only in accordance with the advice tendered by the Council of Ministers, on each occasion and under all circumstances.

But, at the same time, the amendment so made has erred on the other side, by making it an *absolute* proposition, without keeping any reserve for situations when the advice of a Prime Minister is not available (*e.g.*, in the case of death);¹⁹ or the advice tendered by the Prime Minister is improper, according to British conventions, *e.g.*, when Prime Minister defeated in Parliament successively asks for its dissolution.³¹

(a) So far as the contingency arising from the death of the Prime Minister is concerned, it instantly operates to dissolve the existing Council of Ministers. Hence, it would appear that notwithstanding the 1976-78 amendments of Art. 74(1), the President shall have the power of acting without ministerial advice, during the time taken in the matter of choosing a new Prime Minister, who, of course, must command majority in the House of the People. In this contingency, no Council of Ministers exists, on the death of the erstwhile Prime Minister.

(b) But as regards the contingency arising out of a demand for dissolution by a Prime Minister who is defeated in the House of the People, it cannot be said that no Council of Ministers is in existence. On the amended Art. 74(1), the President of India, must act upon the request of the defeated Council of Ministers even if such request is improper, *e.g.*, on a second occasion of defeat. If so, the position in India would differ from the principles of Cabinet Government as they prevail in the U.K.²⁴

5. The Attorney-General for India.

The office of the Attorney-General is one of the offices placed on a special footing by the Constitution. He is the first Law Officer of the Government of India, and as such, his duty shall be—

(i) to give advice on such legal matters and to perform such other duties of a legal character as may, from time to time, be referred or assigned to him by the President; and (ii) to discharge the functions conferred on him by the Constitution or any other law for the time being in force [Art. 76].

Though the Attorney-General of India is not (as in England) a member of the Cabinet, he shall also have the right to speak in the Houses of Parliament or in any Committee thereof, but shall have no right to vote [Art. 88]. By virtue of his office, he is entitled to the privileges of a member of Parliament [Art. 105(4)]. In the performance of his official duties, the Attorney-General shall have a right of audience in all Courts in the territory of India.

The Attorney-General for India shall be appointed by the President and shall hold office during the pleasure of the President. He must have the same qualifications as are required to be a Judge of the Supreme Court. He shall receive such remuneration as the President may determine. He is not a whole-time counsel for the Government nor a Government servant.

6. The Comptroller and Auditor-General of India.

Another pivotal office in the Government of India is that of Comptroller and Auditor-General who controls the entire financial system of the country [Art. 148]—at the Union as well as State levels.

As observed by Ambedkar, the Comptroller and Auditor-General of India shall be the most important officer under the Constitution of India. For, he is to be the guardian of the public purse and it is his duty to see that not a farthing is spent out of the Consolidated Fund of India or of a State without the authority of the appropriate Legislature. In short, he shall be the impartial head of the audit and accounts system of India. In order to discharge this duty properly, it is highly essential that this office should be independent of any control of the Executive.

The foundation of parliamentary system of Government, as has been already seen, is the responsibility of the Executive to the Legislature and the essence of such control lies in the system of financial control by the Legislature. In order to enable the Legislature to discharge this function properly, it is essential that this Legislature should be aided by an agency, fully independent of the Executive, who would scrutinise the financial transactions of the Government and bring the results of such scrutiny before the Legislature. There was an Auditor-General of India even under the Government of India Act, 1935, and that Act secured the independence of the Auditor-General by making him irremovable except "in like manner and on the like grounds as a Judge of the Federal Court". The office of the Comptroller and Auditor-General, in the Constitution, is substantially

modelled upon that of the Auditor-General under the Government of India Act, 1935.

The *independence* of the Comptroller and Auditor-General has been **Conditions of service.** sought to be secured by the following provisions of the Constitution—

a. Though appointed by the President, the Comptroller and Auditor-General may be *removed* only on an address from both Houses of Parliament, on the grounds of (i) 'proved misbehaviour', or (ii) 'incapacity'.

He is thus excepted from the general rule that all civil servants of the Union hold their office at the pleasure of the President [Ch. Art. 310(1)].

b. His salary and conditions of service shall be statutory (*i.e.*, as laid down by Parliament by law) and shall not be liable to variation to his disadvantages during his term of office. Under this power, Parliament has enacted the Comptroller and Auditor-General's (Conditions of Service) Act, 1971 which, as amended, provides as follows:

(i) The term of office of the Comptroller and Auditor-General shall be six years from the date on which he assumes office. But—

(a) He shall vacate office on attaining the age of 65 years, if earlier than the expiry of the 6-year term;

(b) He may, at any time, resign his office, by writing under his hand, addressed to the President of India;

(c) He may be removed by impeachment [Arts. 148(1); 124(4)].

(ii) His salary shall be equal to that of a Judge of the Supreme Court (which is now Rs. 30,000, w.e.f. 1-1-1996).

(iii) On retirement, he shall be eligible to an annual pension of Rs. 15,000.

(iv) In other matters his conditions of service shall be determined by the Rules applicable to a member of the I.A.S., holding the rank of a Secretary to the Government of India.

(v) He shall be disqualified for any further Government 'office' after retirement³² so that he shall have no inducement to please the Executive of the Union or of any State.

(vi) The salaries, etc., of the Comptroller and Auditor-General and his staff and the administrative expenses of his office shall be charged upon the Consolidated Fund of India and shall thus be non-votable [Art. 148].

On the above points, thus, the position of the Comptroller and Auditor-General shall be similar to that of a Judge of the Supreme Court.³³

The Comptroller and Auditor-General shall perform such *duties* and **Duties and powers.** exercise such *powers* in relation to the accounts of the Union and of the States as may be prescribed by Parliament. In exercise of this power, Parliament has enacted the Comptroller and Auditor-General's (Duties, Powers and Conditions of

Service) Act, 1971, which, as amended in 1976, relieves him of his pre-Constitution duty to *compile* the accounts of the Union; and the States may enact similar legislation with the prior approval of the President,—to separate accounts from audit also at the State level, and to relieve the Comptroller and Auditor-General of his responsibility in the matter of preparation of accounts, either of the States or of the Union.

The material provisions of this Act relating to the duties of the Comptroller and Auditor-General are—

(a) to audit and report on all expenditure from the Consolidated Fund of India and of each State and each Union Territory having a Legislative Assembly as to whether such expenditure has been in accordance with the law;

(b) similarly, to audit and report on all expenditure from the Contingency Funds and Public Accounts of the Union and of the States;

(c) to audit and report on all trading, manufacturing, profit and loss accounts, etc., kept by any Department of the Union or a State;

(d) to audit the receipts and expenditure of the Union and of each State to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue;

(e) to audit and report on the receipts and expenditure of (i) all bodies and authorities 'substantially financed' from the Union or State revenues; (ii) Government companies; (iii) other corporations or bodies, when so required by the laws relating to such corporations or bodies.

As has been just stated, the duty of preparing the accounts was a relic **Compared with his British counterpart.** of the Government of India Act, 1935, which has no precedent in the British system, under which the accounts are prepared, not by the Comptroller and Auditor-General, but by the respective Departments. The legislation to separate the function of preparation of accounts from the Comptroller and Auditor-General of India, thus, brings this office at par with that of his British counterpart in one respect.

But there still remains another fundamental point of difference. Though the designation of his office indicates that he is to function both as Comptroller and Auditor, our Comptroller and Auditor-General is so far exercising the functions only of an Auditor. In the exercise of his functions as Comptroller, the English Comptroller and Auditor-General controls the receipt and issue of public money and his duty is to see that the whole of the public revenue is lodged in the account of Exchequer at the Bank of England and that nothing is paid out of that account without legal authority. The Treasury cannot, accordingly, obtain any money from the public Exchequer without a specific authority from the Comptroller, and, this he issues on being satisfied that there is proper legal authority for the expenditure. This system of control over issues of the public money not only prevents withdrawal for an unauthorised purpose but also prevents expenditure in excess of the grants made by Parliament.

In India, the Comptroller and Auditor-General has no such control over the *issue* of money from the Consolidated Fund and many Departments are authorised to draw money by issuing cheques without specific authority from the Comptroller and Auditor-General, who is concerned only *at the audit stage* when the expenditure has already taken place. This system is a relic of the past, for, under the Government of India Acts, even the designation 'Comptroller' was not there and the functions of the Auditor-General were ostensibly confined to audit. After the commencement of the Constitution, it was thought desirable that *our* Comptroller and Auditor-General should also have the control over issues as in England, particularly for ensuring that "the grants voted and appropriations made by Parliament are not exceeded". But no action has as yet been taken to introduce the system of Exchequer Control over issues as it has been found that the entire system of accounts and financial control shall have to be overhauled before the control can be centralised at the hands of the Comptroller and Auditor-General.

The functions of the Comptroller and Auditor-General have recently been the subject of controversy, in regard to two questions:

(a) The first is, whether in exercising his function of audit, the Comptroller and Auditor-General has the jurisdiction to comment on extravagance and suggest economy, apart from the legal authority for a particular expenditure. The orthodox view is that when a statute confers power or discretion upon an authority to sanction expenditure, the function of audit comprehends a scrutiny of the *propriety* of the exercise of such power in particular cases, having regard to the interests of economy, besides its legality. But the Government Departments resent on the ground that such interference is incompatible with their responsibility for the administration. In this view, the Departments are supported by academicians such as Appleby,³⁴ according to whom the question of economy is inseparably connected with the efficiency of the administration and that, having no responsibility for the administration, the Comptroller and Auditor-General or his staff has no competence on the question of economy:

"Auditors do not know and cannot be expected to know very much about good administration; their prestige is highest with others who do not know much about administration... Auditing is a necessary but highly pedestrian function with a narrow perspective and very limited usefulness."³⁴

(b) Another question is whether the audit of the Comptroller and Auditor-General should be extended to industrial and commercial undertakings carried on by the Government through private limited companies, who are governed by the Articles of their Association, or to statutory public corporations or undertakings which are governed by statute. It was rightly contended by a former Comptroller and Auditor-General³⁵ that inasmuch as money is issued out of the Consolidated Fund of India to invest in these companies and corporations on behalf of the Government, the audit of such companies must necessarily be a right and responsibility of the Comptroller and Auditor-General, while, at present, the Comptroller and Auditor-General can have no such power unless the Articles of Association of such companies or the governing statutes provide for audit by the Comptroller and Auditor-General. The result is that the report of the Comptroller and

Auditor-General does not include the results of the scrutiny of the accounts of these corporations and the Public-Accounts Committee or Parliament have little material for controlling these important bodies, spending public money. On behalf of the Government, however, this extension of the function of the Comptroller and Auditor-General has been resisted on the ground that the Comptroller and Auditor-General lacks the business or industrial experience which is essential for examining the accounts of these enterprises and that the application of the conventional machinery of the Comptroller and Auditor-General is likely to paralyse these enterprises which are indispensable for national development.

As has just been stated, this defect has been partially remedied by the Act of 1971 which enjoins the Comptroller and Auditor-General to audit and report on the receipts and expenditure of 'Government companies' and other bodies which are 'substantially financed' from the Union or State revenues, irrespective of any specific legislation in this behalf.

REFERENCES

1. For the results of the elections so far held, see Table X.
2. As to how the system of Proportional Representation would work, see Author's *Commentary on the Constitution of India*, 7th Ed., Vol. E/1, pp. 84-90.
3. At the Presidential election held in 2007, the electoral college consisted of 4896 members of which the break-up was 543 Lok Sabha + 233 Rajya Sabha + 4120 State Assembly members.
4. C.A.D. , Vol. IV, pp. 734, 846.
5. In his speech in Parliament in 1961, Prime Minister Nehru observed that we should adopt a *convention* that no person shall be a President for more than two terms, and that no amendment of the Constitution was necessary to enjoin this.
6. Rs. 10,000 originally, raised to Rs. 20,000 in 1990 and to Rs. 50,000 in 1998 (w.e.f. 1-1-1996).
7. The original Constitution provided that the Vice-President would be elected by the two Houses of Parliament, assembled at a *joint meeting*. This cumbersome procedure of a joint meeting of the two Houses for this purpose has been done away with, by amending Art. 66(1) by the Constitution (11th Amendment) Act, 1961. As amended, the members of both Houses remain the voters, but they may vote by secret ballot, without assembling at a joint meeting.
8. Article 65(3) is to be read with para 4 of Part A of the 2nd Schedule,—the result of which is that until Parliament legislates on this subject (no such law has so far been passed by Parliament till 1987), a Vice-President, while acting as or discharging the functions of the President, shall receive the same emoluments and privileges and allowances as the President gets under Art. 59(3). Since 1996, that emolument is a sum of Rs. 50,000/- per mensem.
9. When the Vice-President does not act as President, his only function is that of the Chairman, Council of States, under Art. 97. By passing the Salaries and Allowances of Officers of Parliament (Amendment) Act, 1998, the salary of the Chairman of the Council of States has been raised to Rs. 40,000/- per mensem, *vide* Act 26 of 1998 (w.e.f. 1-1-1996). He is entitled to daily allowance as admissible to Members of Parliament.
10. *Ram Jawaya v. State of Punjab*, (1955) 2 S.C.R. 225 (238-39).
11. *Shamser Singh v. State of Punjab*, AIR 1974 S.C. 2192; *Rao v. Indira*, AIR 1971 S.C. 1002 (1005); *Sanjeevi v. State of Madras*, AIR 1970 S.C. 1102 (1106).
12. DICEY, *Law of the Constitution*, 10th Ed., p. 468.
13. The Council of States, also called the upper House, is *not* subject to dissolution, but is a permanent body. One-third of its members retire every two years [Art. 83(1)].
14. The only instance of the exercise of the President's veto power over a Bill passed by Parliament, so far, has been in regard to the PEPSU Appropriation Bill. It was passed by Parliament under Art. 357, by virtue of the Proclamation under Art. 356. The

Proclamation was, however revoked on 7-3-1954, and the Bill was presented for assent of the President on 8-3-1954. The President withheld his assent to the Bill on the ground that on 8-3-1954, Parliament had no power to exercise the legislative powers of the PEPSU State and that, accordingly, the President could not give his assent to the Bill to enact a law which was beyond the competence of Parliament to enact on that date.

The Salary, Allowances and Pension of Members of Parliament (Amendment) Bill, 1991 was passed by the Houses of Parliament on the last day of its sitting, without obtaining the President's recommendation as required by Art. 117(1). It was presented to the President for his assent on 18th March, 1991. The President withheld his assent to it. (*Rajya Sabha, Parliamentary Bulletin Part I*, dated March 9, 1992).

This shows that the veto power is necessary to prevent the enactment of Bills which appear to be *ultra vires* or unconstitutional at the time when the Bill is ready for the President's assent. It also shows that there may be occasions when Government may have to advise the President to veto a Bill which had been introduced by the Government itself.

14. In 1986 both the Houses passed the Indian Post Office (Amendment) Bill, 1986. It was widely criticised as curtailing the Freedom of the Press. President Zail Singh did not declare his assent or that he withheld his assent. It was all the time in the 'pocket' of the President.

After the formation of the National Front Government in December, 1989, the President R. Venkataraman referred it back for reconsideration and the Prime Minister declared that it would be brought again before the Houses of Parliament, with suitable changes. It appears certain that it has been given up.

15. *Hoechst Pharmaceuticals v. State of Bihar*, AIR 1953 S.C. 1019 (para 89).
16. *Lakhinarayan v. Prov. of Bihar*, AIR 1950 F.C. 59; *State of Punjab v. Satya Pal*, AIR 1969 S.C. 903 (912).

The proposition arrived at in these cases now stand modified in a case from Bihar, decided by the Supreme Court in December, 1986—*Wadhwa v. State of Bihar*, AIR 1987 S.C. 579. In this case, it was established that the Government of Bihar, instead of laying before the State Legislature an Ordinance as required by Art. 213(2)(a) of the Constitution [corresponding to Art. 123(2)(a)] or having an Ordinance replaced by an Act of the Legislature, before the expiry of the Ordinance on the lapse of the time specified in the Constitution, would prolong its duration by re-promulgating it, i.e., by issuing another new Ordinance to replace the Ordinance which would have otherwise expired. In this manner, some 256 Ordinances were kept alive (up to a length of 14 years in some cases) without getting an Act passed by the State Legislature in place of the expiring Ordinance. The Supreme Court held that the power of the Governor to promulgate an Ordinance was in the nature of an emergency power. Hence, though in some rare cases when an Act to replace an Ordinance could not be passed by the Legislature in time as it was loaded with other business; but if it was made a usual practice so as to establish legislation by the Executive (or an 'Ordinance Raj') instead of by the Legislature, as envisaged by the Constitution, that would amount to a *fraud* on the Constitution, on which ground, the Court would strike down the repromulgated Ordinance. The substance of this decision is, therefore, that in extreme cases, a Court may invalidate an Ordinance on the ground of *fraud* and it affirms the trend since Cooper's case (f.n. 18, below).

17. *Wadhwa v. State of Bihar*, AIR 1987 S.C. 579.
18. *Cooper v. Union of India*, AIR 1970 S.C. 564 (588, 644); *A.K. Roy v. Union of India*, AIR 1982 S.C. 710.
19. *Samsher v. State of Punjab*, AIR 1974 S.C. 2192 (para 30).
20. *Kehar Singh v. Union of India*, AIR 1989 S.C. 653.
21. *Maru Ram v. Union of India*, AIR 1980 S.C. 2147, paras 62, 72(a) [Const. Bench] followed in *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1 (para 73)—9-Judge Bench.
22. As regards the Union Territories of (a) Goa, Daman & Diu, (b) Pondicherry, (c) Mizoram and (d) Arunachal Pradesh, the President's power to make regulations has ceased, since the setting up of a Legislature in each of these Territories, after the amendments of Art. 240(1), in 1962, 1971 and 1975. So far as Mizoram, Arunachal Pradesh and Goa are concerned, they have been promoted to the category of States, in 1986-87.

23. The words 'armed rebellion' have been substituted for 'internal disturbance', by the 44th Amendment Act, 1978.
24. For further study of the Cabinet system in India, see Author's *Commentary on the Constitution of India* (7th Ed.), Vol. E/I, pp. 195-293.
25. In July, 1989, their number was (a) Members of the Cabinet—18; (b) Ministers of State—40 (total 58). In July 1990 (a) the Members of the Cabinet—18; (b) Ministers of State—18; and (c) Deputy Ministers—5. In March 1992 the total was 57. In September, 1995—(a) Members of the Cabinet—20, and (b) Ministers of State—50. In December 1996 there were 20 cabinet ministers and 19 ministers of State. In November 2000 there were 29 Cabinet Ministers, 44 State Ministers and no Deputy Ministers. On 22.5.2008, there were 32 Cabinet Ministers, 8 Ministers of State (independent charge) and 40 other Ministers of State.
26. *Common Cause, A Registered Society v. Union of India*, (1999) 6 S.C.C. 667 (para 3) : A.I.R. 1999 S.C. 2979.
27. C.A.D., Vol. IV, pp. 580, 734; Vol. VII, pp. 32, 974, 984.
28. The suggestion of President Dr. Rajendra Prasad, in his speech at the Indian Law Institute, that the position of the Indian President was not identical with that of the British Crown, must be read with his quoted observation in the Constituent Assembly [X C.A.D. 988] which, as a contemporaneous statement, has a great value in assessing the intent of the makers of the Constitution, and the meaning behind Art. 74(1), as it stood up to 1976.
29. K.M. Munshi, the President under the Indian Constitution (1963), p. viii.
30. *Sanjeevi v. State of Madras*, AIR 1970 S.C. 1102 (1106); *Rao v. Indira*, AIR 1971 S.C. 1002 (1005); *Shamser Singh v. State of Punjab*, AIR 1974 S.C. 2192.
31. BASU, *Commentary on the Constitution of India*, 5th Ed., Vol. II, p. 593, where it is stated—
"Constitutional writers agree that a dismissal of the Cabinet by the Crown, would now be an unconstitutional act, except in the abnormal case of a Cabinet refusing to resign or to appeal to the electorate upon a vote of no confidence in the Commons." See the instances given in *Shamser Singh's* case [AIR 1974 S.C. 2192 (para 153)].
32. There was a vehement public criticism that this prohibition in Art. 148(4) was violated by the appointment of a retired Comptroller and Auditor-General as the Chairman of the Finance Commission. According to judicial decisions, an 'office' is an employment, which embraces the ideas of tenure, duration, emolument and duties. Now, the Finance Commission is an office created by Art. 280 of the Constitution itself, with a definite tenure, emoluments and duties as defined by the Finance Commission (Miscellaneous Provisions) Act, 1951, read with Art. 280 of the Constitution. Apparently, therefore, the membership of the Finance Commission is an office under the Government of India, which comes within the purview of Art. 148(4).
33. But, as Dr. Ambedkar pointed out in the Constituent Assembly (C.A.D., VIII, p. 407), in one respect the independence of the Comptroller and Auditor-General falls short of that of the Chief Justice of India. While the power of appointment of the staff of the Supreme Court has been given to the Chief Justice of India [Art. 146(1)], the Comptroller and Auditor-General has no power of appointment, and, consequently, no power of disciplinary control with respect to his subordinates. In the case of the Comptroller and Auditor-General, these powers have been retained by the Government of India though it is obviously derogatory to the administrative efficiency of this highly responsible functionary.
34. APPLEBY, A., *Re-examination of India's Administrative System*, p. 28.
35. Narhari Rao's statement before the Public Accounts Committee, 1952.

CHAPTER 12

THE UNION LEGISLATURE

AS has been explained at the outset, *our* Constitution has adopted the **Functions of Parliament.** Parliamentary system of Government which effects a harmonious blending of the legislative and executive organs of the State inasmuch as the executive power is wielded by a group of members of the Legislature who command a majority in the popular Chamber of the Legislature and remain in power so long as they retain that majority. The functions of Parliament as the legislative organ follow from the above feature of the Parliamentary system:

I. Providing the Cabinet. It follows from the above that the first function of Parliament is that of providing the Cabinet and holding them responsible. Though the responsibility of the Cabinet is to the popular Chamber the membership of the Cabinet is not necessarily restricted to that Chamber and some of the members are usually taken from the upper Chamber.

II. Control of the Cabinet. It is a necessary corollary from the theory of ministerial responsibility that it is a business of the popular Chamber to see that the Cabinet remains in power so long as it retains the confidence of the majority in that House. This is expressly secured by Art. 75(3) of *our* Constitution.

III. Criticism of the Cabinet and of individual Ministers. In modern times both the executive and the legislative policies are initiated by the Cabinet, and the importance of the legislative function of Parliament has, to that extent, diminished from the historical point of view. But the critical function of Parliament has increased in importance and is bound to increase if Cabinet Government is to remain a 'responsible' form of Government instead of being an autocratic one. In this function, both the Houses participate and are capable of participating, though the power of bringing about a downfall of the Ministry belongs only to the popular Chamber (*i.e.*, the House of the People) [Art. 75(3)].

While the Cabinet is left to formulate the policy, the function of Parliament is to bring about a discussion and criticism of that policy on the floor of the House, so that not only the Cabinet can get the advice of the deliberative body and learn about its own errors and deficiencies, but the nation as a whole can be appraised of an alternative point of view, on the evaluation of which representative democracy rests in theory.

IV. An organ of information. As an organ of information, Parliament is more powerful than the Press or any other private agency, for Parliament secures the information *authoritatively*, from those in the know of things. The

CHAP. 12]

THE UNION LEGISLATURE

211

Spread/disperse (information) through certain organ

information is collected and disseminated not only through the debates but through the specific medium of 'Questions' to Ministers.

V. Legislation. The next function of the Legislature is that of making laws [Arts. 107-108, 245] which belongs to the Legislature equally under the Presidential and Parliamentary forms of government. In India, since the inauguration of the Constitution the volume of legislation is steadily rising in order to carry out the manifold development and other measures necessary to establish a welfare State.

VI. Financial control. Parliament has the sole power not only to authorise expenditure for the public services and to specify the purposes to which that money shall be appropriated, but also to provide the ways and means to raise the revenue required, by means of taxes and other impositions and also to ensure that the money that was granted has been spent for the authorised purposes. As under the English system, the lower House possesses the dominant power in this respect, under our Constitution [Art. 109].

Constitution Parliament. The Parliament of India consists of the President and two Houses. The lower House is called the House of the People while the upper House is known as the Council of States¹ [Art. 79].

(The Hindi names 'Lok Sabha' and 'Rajya Sabha' have been adopted by the House of the People and the Council of States respectively.)

The President is a part of the Legislature, like the English Crown, for, even though he does not sit in Parliament, except for the purpose of delivering his opening address [Art. 87], a Bill passed by the Houses of Parliament cannot become law without the President's assent. The other legislative functions of the President, such as the making of Ordinances while both Houses are not in sitting, have already been explained.

Composition of the Council of States. The Council of States shall be composed of not more than 250 members, of whom (a) 12 shall be nominated by the President; and (b) the remainder (i.e., 238) shall be representatives of the States and the Union Territories elected by the method of indirect election² [Art. 80].

(a) *Nomination.* The 12 nominated members shall be chosen by the President from amongst persons having 'special knowledge or practical experience in literature, science, art, and social service'. The Constitution thus adopts the principle of nomination for giving distinguished persons a place in the upper Chamber.

(b) *Representation of States.* The representatives of each State shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(c) *Representation of Union Territories.* The representatives of the Union Territories shall be chosen in such manner as Parliament may prescribe [Art. 80(5)]. Under this power Parliament has prescribed² that the repre-

sentatives of Union Territories to the Council of States shall be indirectly elected by members of an electoral college for that Territory, in accordance with the system of proportional representation by means of the single transferable vote.

The Council of States thus reflects a federal character by representing the Units of the federation. But it does not follow the American principle of equality of State representation in the Second Chamber. In India, the number of representatives of the States to the Council of States varies from 1 (Nagaland) to 31 (Uttar Pradesh).

The House of the People has a variegated composition. The Constitution prescribes a maximum number as follows:

People.

(a) Not more³ than 530⁴ [Art. 81(1)(a)] representatives of the States;

(b) Not more than 20 representatives of Union Territories [Art. 81(1)(b)].

(c) Not more than 2 members of the Anglo-Indian community, nominated by the President, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People [Art. 331].

(i) The representatives of the States shall be directly elected by the people of the State on the basis of adult suffrage. Every citizen who is not less than 18⁵ years of age and is not otherwise disqualified, e.g., by reason of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to vote at such election [Art. 326].

There will be no reservation of seats for any minority community other than the Scheduled Castes and the Scheduled Tribes [Arts. 330, 341, 342].

The bulk of the members of the House are thus directly elected by the people.

(ii) The members from the Union Territories are to be chosen in such manner as Parliament may by law provide.

Under this power, Parliament has enacted⁶ that representatives of all the Union Territories shall be chosen by direct election.

(iii) Two members may be nominated from the Anglo-Indian community by the President to the House of the People if he is of opinion that the Anglo-Indian community has not been adequately represented in the House of the People [Art. 331]. (see Table VIII, post.)

The election to the House of the People being direct, requires that the territory of India should be divided into suitable territorial constituencies, for the purpose of holding such elections. Article 81(2), as it stands after the Constitution (7th Amendment) Act, 1956, has provided for uniformity of representation in two respects—(a) as between the different States, and (b) as between the different constituencies in the same State, thus:

Territorial constituencies for election to the House of the People.

(a) there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and

(b) each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the State.

While the system of separate electorates was abandoned by the Constitution, the system of proportional representation was partially adopted for the second Chamber in the Union and State Legislatures.

(a) As regards the Council of States, proportional representation by single transferable vote has been adopted for the indirect election by the elected members of the Legislative Assembly of each State, in order to give some representation to minority communities and parties [Art. 80(4)].

(b) Similarly, proportional representation is prescribed for election to the Legislative Council of a State by electorates consisting of municipalities, district boards and other local authorities and of graduates and teachers of three years standing resident in the State [Art. 171(4)].

As regards the House of the People [Art. 81] and the Legislative Assembly of a State, however, the system of proportional representation has been abandoned and, instead, the Constitution has adopted the single member constituency with reservation of seats (at the general election) for some backward communities, namely, the Scheduled Castes and Tribes [Arts. 330, 332].

The reasons for not adopting proportional representation for the House of the People were thus explained in the Constituent Assembly—

(i) Proportional representation presupposes literacy on a large scale. It presupposes that every voter should be a literate, at least to the extent of being in a position to know the numerals and mark them on the ballot paper. Having regard to the position of literacy in this country at present, such a presumption would be extravagant.

(ii) Proportional representation is ill-suited to the Parliamentary system of government laid down by the Constitution. One of the disadvantages of the system of proportional representation is the fragmentation of the Legislature into a number of small groups. Although the British Parliament appointed a Royal Commission in 1910 to consider the advisability of introducing proportional representation and the Commission recommended it, Parliament did not eventually accept the recommendations of the Commission on the ground that the proportional representation would not permit a stable Government. Parliament would be so divided into small groups that every time anything happened which displeased certain groups in Parliament, they would on those occasions withdraw support to the Government with the result that the Government, losing the support of certain groups, would fall to pieces.

Why proportional representation not adopted for House of the People and Legislative Assembly.

What India needed, at least in view of the existing circumstances, was a stable Government, and, therefore, proportional representation in the lower House to which the Government would be responsible could not be accepted. In this connection, Dr. Ambedkar said in the Constituent Assembly,—

"I have not the least doubt in my mind, whether the future Government provides relief to the people or not, our future Government must do one thing—they must maintain a stable Government and maintain law and order."⁷

(a) The Council of States is not subject to dissolution. It is a permanent body, but (as nearly as possible) 1/3 of its members retire on the expiration of every second year, in accordance with provisions made by Parliament in this behalf. It follows that there will be an election of 1/3 of the membership of the Council of States at the beginning of every third year [Art. 83(1)]. The order of retirement of the members is governed by the Council of States (Term of Office of Members) Order, 1952, made by the President in exercise of powers conferred upon him by the Representation of the People Act, 1951.

(b) The normal life of the House of the People is 5 years,⁸ but it may be dissolved earlier by the President.

On the other hand, the normal term may be extended by an Act passed by Parliament itself⁹ during the period when a 'Proclamation of Emergency' (made by the President under Art. 352) remains in operation. The Constitution, however, sets a limit to the power of Parliament thus to extend its own life during a period of Emergency: the extension cannot be made for a period exceeding one year at a time (*i.e.*, by the same Act of Parliament), and, in any case, such extension cannot continue beyond a period of six months after the Proclamation of Emergency ceases to operate [Proviso to Art. 83].

The President's power—(a) to summon either House, (b) to prorogue either House, and (c) to dissolve the House of the People has already been noted (in the Chapter—"The Union Executive", *ante*).

As regards summoning, the Constitution imposes a duty upon the President, namely, that he must summon each House at such intervals that six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session [Art. 85(1)]. The net result of this provision is that Parliament must meet at least twice a year and not more than six months shall elapse between the date on which a House is prorogued and the commencement of its next session.

It would, in this context, be useful to distinguish prorogation and dissolution from adjournment. A 'session' is the period of time between the first meeting of a Parliament, and its prorogation or dissolution. The period between the prorogation of Parliament and its re-assembly in a new session is termed 'recess'. 

Within a session, there are a number of daily 'sittings' separated by adjournments, which postpone the further consideration of business for a specified time—hours, days or weeks.

The sitting of a House may be terminated by (a) dissolution, (b) prorogation, or (c) adjournment:

(i) As stated already, only the House of the People is subject to dissolution. Dissolution may take place in either of two ways—(a) By efflux of time, i.e., on the expiry of its term of five years, or the terms as extended during a Proclamation of Emergency. (b) By an exercise of the President's power under Art. 85(2).

(ii) While the powers of dissolution and prorogation are exercised by the President on the advice of his Council of Ministers, the power to adjourn the daily sittings of the House of the People and the Council of States belongs to the Speaker and the Chairman, respectively.

A dissolution brings the House of the People to an end (so that there must be a fresh election), while prorogation merely terminates a session. Adjournment does not put an end to the existence of a session of Parliament but merely postpones the further transaction of business for a specified time, hours, days or weeks.

(iii) A dissolution ends the very life of the existing House of the People so that all matters pending before the House lapse with the dissolution. If these matters have to be pursued, they must be re-introduced in the next House after fresh election. Such pending business includes not only notices, motions, etc., but Bills, including Bills which originated in the Council and were sent to the House, as well as Bills originating in the House and transmitted to the Council which were pending in the Council on the date of dissolution. But a Bill pending in the Council which has not yet been passed by the House shall not lapse on dissolution. A dissolution would not, however, affect a joint sitting of the two Houses summoned by the President to resolve a disagreement between the Houses if the President has notified his intention to hold a joint sitting before the dissolution [Art. 108(5)].

Though in England prorogation also wipes all business pending at the date of prorogation, in India, all Bills pending in Parliament are expressly saved by Art. 107(3). In the result, the only effect of a prorogation is that pending notices, motions and resolutions lapse, but Bills remain unaffected.

Adjournment has no such effect on pending business.

In order to be chosen a member of Parliament, a person (a) must be a citizen of India; (b) must be not less than 30 years of age in the case of the Council of States and not less than 25 years of age in the case of the House of the People.

Disqualifications for membership. Additional qualifications may be prescribed by Parliament by law [Art. 84]. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

- (a) if he holds any office of profit under the Government of India or the Government of any State (other than an office exempted by Parliament by law) but not a Minister for the Union or for a State; or
- (b) if he is of unsound mind and stands so declared by a competent Court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India or has voluntarily acquired citizenship of a foreign State or is under acknowledgment of allegiance or adherence to a foreign power;
- (e) if he is so disqualified by or under any law made by Parliament [Art. 102].

It may be noted that sex is no disqualification for membership of Parliament and that in the Thirteenth General Election, as many as 32 women secured election to the House of the People.

If any question arises as to whether a member of either House of Parliament has become subject to any of the above disqualifications, the President's decision, in accordance with the opinion of the Election Commission, shall be final [Art. 103].

A penalty of Rs. 500 per day may be imposed upon a person who sits or votes in either House of Parliament knowing that he is not qualified or that he is disqualified for membership thereof [Art. 104].

Vacation of seats by members. A member of Parliament shall vacate his seat in the following cases [Art. 101]:

(i) *Dual membership.* (a) If a person be chosen to membership of both Houses of Parliament he must vacate his seat in one of the two Houses, as may be prescribed by Parliament by law. (b) Similarly, if a person is elected to the Union Parliament and a State Legislature then he must resign his seat in the State Legislature; otherwise his seat in Parliament shall fall vacant at the expiration of the period specified in the rules made by the President.

(ii) *Disqualification.* If a person incurs any of the disqualifications mentioned in Art. 102 (e.g., becoming of unsound mind), his seat will thereupon become vacant immediately.

(iii) *Resignation.* A member may resign his seat by writing addressed to the Chairman of the Council of States or the Speaker of the House of the People, as the case may be, and thereupon his seat shall be vacant.

(iv) *Absence without permission.* The House may declare a seat vacant if the member in question absents himself from all meetings of the House for a period of 60 days without permission of the House.

Under the Salaries, Allowances and Pension of Members of Parliament Act, 1954, as amended by Act 40 of 2006, a member of Parliament is

Salaries and Allowances of Members of Parliament. entitled to a salary at the rate of Rs. 16,000 per mensem during the whole term of his office plus an allowance at the rate of Rs. 1000 for each day during any period of residence on duty at the place where

Parliament or any Committee thereof is sitting or where any other business connected with his duties as Member of Parliament is transacted. Together with this, he is entitled to travelling allowance, free transit by railways, steamer and other facilities as prescribed by rules framed under the Act. He shall also be entitled to a pension, since a 1976 amendment, on a graduated scale for each 5 year term as member of either House.

Officers of Parliament. Each House of Parliament has its own presiding officer and secretarial staff.

Speaker. There shall be a *Speaker* to preside over the House of the People. In general, his position is similar to that of the Speaker of the English House of Commons.

The House of the People will, as soon as may be after its first sitting, choose two members of the House to be, respectively, Speaker and Deputy Speaker [Art. 93]. The Speaker or the Deputy Speaker will normally hold office during the life of the House, but his office may terminate earlier in any of the following ways (i) By his ceasing to be a member of the House. (ii) By resignation in writing, addressed to the Deputy Speaker, and *vice versa*. (iii) By *removal* from office by a resolution, passed by a majority of all the then members of the House [Art. 94]. Such a resolution shall not be moved unless at least 14 days' notice has been given of the intention to move the resolution. While a resolution for his removal is under consideration, the Speaker shall not preside but he shall have the right to speak in, and to take part in the proceedings of, the House, and shall have a right of vote except in the case of equality of votes [Art. 96].

Powers of the Speaker. At other meetings of the House the Speaker shall preside. The Speaker will not vote in the first instance, but shall have and exercise a casting vote in the case of equality of votes.

The absence of vote in the first instance will make the position of the Speaker as impartial as in England, and the casting vote is given to him only to resolve a deadlock.

The Speaker will have the final power to maintain order within the House of the People and to interpret its Rules of Procedure. In the absence of a quorum, it will be the duty of the Speaker to adjourn the House or to suspend the meeting until there is a quorum.

The Speaker's conduct in regulating the procedure or maintaining order in the House will not be subject to the jurisdiction of any Court [Art. 122].

Besides presiding over his own House, the Speaker possesses certain powers not belonging to the Chairman of the Council of States.

(a) The Speaker shall preside over a joint sitting of the two Houses of Parliament [Art. 118(4)].

(b) When a Money Bill is transmitted from the Lower House to the Upper House, the Speaker shall endorse on the Bill his certificate that it is a Money Bill [Art. 110(4)]. The decision of the Speaker as to whether a Bill is Money Bill is final and once the certificate is endorsed by the Speaker on a

Bill, the subsequent procedure in the passage of the Bill must be governed by the provisions relating to Money Bills.

While the office of Speaker is vacant or the Speaker is absent from a **Deputy Speaker**, sitting of the House, the Deputy Speaker presides, except when a resolution for his own removal is under consideration.

While the House of the People has a Speaker elected by its members from among themselves, the Chairman of the Council of States (who presides over that House) performs that function *ex-officio*. It is the Vice-President of India who shall *ex-officio* be the Chairman of the Council of States and shall preside over that House and shall function as the Presiding Officer of that House so long as he does not officiate as the President of **Chairman**.

India during a casual vacancy in that office. When the Chairman acts as the President of India, the Office of the Chairman of the Council of States falls vacant and the duties of the office of the Chairman shall be performed by the Deputy Chairman. The Chairman may be removed from his office only if he is removed from the office of the Vice-President, the procedure for which has already been stated. Under the Salaries and Allowances of Officers of Parliament Act, 1953, as amended, the salary of the Chairman is the same as that of the Speaker, *viz.*, Rs. 40,000 plus a sumptuary allowance of Rs. 1,000 per mensem, but when the Vice-President acts as the President he shall be entitled to the emoluments and allowances of the President [Art. 65(3)] and during that period he shall cease to earn the salary of the Chairman of the Council of States. The functions of the Chairman in the Council of States are similar to those of the Speaker in the House of the People except that the Speaker has certain special powers according to the Constitution, for instance, of certifying a Money Bill, or presiding over a joint sitting of the two Houses, which have been already mentioned.

Privileges are certain rights belonging to each House of Parliament collectively and some others belonging to the members individually, without which it would be impossible for either House to maintain its independence of action or the dignity of its position.

Powers, Privileges and Immunities of Parliament and its Members. Both the Houses of Parliament as well as of a State Legislature have similar *privileges* under our Constitution.

Clauses (1)-(2) of Arts. 105 and 194 of our Constitution deal only with two matters, *viz.*, freedom of speech and right of publication.

As regard privileges relating to other matters, the position, as it stands after the 44th Amendment, 1978, is as follows—The privileges of members of our Parliament were to be the same as those of members of the House of Commons (as they existed at the commencement of the Constitution), until our Parliament itself takes up legislation relating to privileges in whole or in part. In other words, if Parliament enacts any provision relating to any particular privilege at any time, the English precedents will to that extent be superseded in its application to our Parliament. No such legislation having been made by our Parliament, the privileges were the same as in the House

of the Commons, subject to such exceptions as necessarily follow from the difference in the constitutional set-up in India. Reference to House of Commons was omitted in 1978.

In an earlier case,¹⁰ the Supreme Court held that if there was any conflict between the existing privileges of Parliament and the fundamental rights of a citizen, the former shall prevail, for, the provisions in Arts. 105(3) and 194(3) of the Constitution, which confer upon the Houses of our Legislatures the same British privileges as those of the House of Commons, are independent provisions and are not to be construed as subject to Part III of the Constitution, guaranteeing the Fundamental Rights. For instance, if the House of a Legislature expunges a portion of its debates from its proceedings, or otherwise prohibits its publication, anybody who publishes such prohibited debate will be guilty of contempt of Parliament and punishable by the House and the Fundamental Right of freedom of expression [Art. 19(1)(a)] will be no defence. But in a later case,¹¹ the Supreme Court has held that though the existing privileges would not be fettered by Art. 19(1)(a), they must be read subject to Arts. 20-22 and 32.

The privileges of each House may be divided into two groups—
Privileges classified. (a) those which are enjoyed by the members individually, and (b) those which belong to each House of Parliament, as a collective body.

(A) The privileges enjoyed by the members individually are (i) Freedom from arrest; (ii) Exemption from attendance as jurors and witnesses; (iii) Freedom of speech.

(i) *Freedom from Arrest.* Section 135A of the C.P. Code, as amended by Act 104 of 1976, exempts a member from arrest during the continuance of a meeting of the Chamber or Committee thereof of which he is a member or of a joint sitting of the Chambers or Committees, and during a period of 40 days before and after such meeting or sitting. This immunity is, however, confined to arrest in civil cases and does not extend to arrest in criminal case or under the law of Preventive Detention.

(ii) *Freedom of Attendance as Witness.* According to the English practice, a member cannot be summoned, without the leave of the House, to give evidence as a witness while Parliament is in session.

(iii) *Freedom of Speech.* As in England, there will be freedom of speech within the walls of each House in the sense of immunity of action for anything said therein. While an ordinary citizen's right of speech is subject to the restrictions specified in Art. 19(2), such as the law relating to defamation, a Member of Parliament cannot be made liable in any court of law in respect of anything said in Parliament or any Committee thereof. But this does not mean unrestricted licence to speak anything that a member may like, regardless of the dignity of the House. The freedom of speech is therefore 'subject to the rules' framed by the House under its powers to regulate its internal procedure.

The Constitution itself imposes another limitation upon the freedom of speech in Parliament, namely, that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court

or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge [Art. 121].

(B) The privileges of the House *collectively* are—(i) The right to publish debates and proceedings and the right to restrain publication by others; (ii) The right to exclude others; (iii) The right to regulate the internal affairs of the House, and to decide matters arising within its walls; (iv) The right to publish Parliamentary misbehaviour; (v) The right to punish members and outsiders for breach of its privileges.

Thus, each House of Parliament shall have the power—

(i) To exclude strangers from the galleries at any time. Under the Rules of Procedure, the Speaker and the Chairman have the right to order the 'withdrawal of strangers from any part of the House'.

(ii) To regulate its internal affairs. Each House of Parliament has the right to control and regulate its proceedings and also to decide any matter arising within its walls, without interference from the Courts. What is said or done within the walls of Parliament cannot be inquired into in a Court of Law.

(iii) To punish members and outsiders for breach of its privileges. Each House can punish for contempt or breach of its privileges, and the punishment may take the form of admonition, reprimand or imprisonment. Thus, in the famous *Blitz case*, the Editor of the newspaper was called to the Bar of the House of the People and reprimanded for having published an article derogatory to the dignity of a member in his capacity as member of the House. In 1990, Sri K.K. Tewari, a former Minister was reprimanded by the Rajya Sabha. What constitutes breach of privileges or contempt of Parliament has been fairly settled by a number of precedents in England and India. Broadly speaking—

"Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such House in the discharge of his duty or which has a tendency, directly or indirectly, to produce such results as may be treated as a contempt, even though there is no precedent of the offence."¹²

The different stages in the legislative procedure in Parliament relating to Bills *other than Money Bills* are as follows:

1. *Introduction.* A Bill other than Money or financial Bills may be introduced in either House of Parliament [Art. 107(1)] and requires passage in both Houses before it can be presented for the President's assent. A Bill may be introduced either by a Minister or by a private Member. The difference in the two cases is that any Member other than a Minister desiring to introduce a Bill has to give notice of his intention and to ask for leave of the House to introduce which is, however, rarely opposed. If a Bill has been published in the official gazette before its introduction, no motion for leave to introduce the Bill is necessary. Unless published earlier, the Bill is published in the official gazette as soon as may be after it has been introduced.

**Legislative
Procedure:**

I. Ordinary Bills.

2. *Motions after introduction.* After a Bill has been introduced or on some subsequent occasion, the Member in charge of the Bill may make one of the following motions in regards to the Bill, *viz.*—

- (a) That it be taken into consideration.
- (b) That it be referred to a Select Committee.
- (c) That it be referred to a Joint Committee of the House with the concurrence of the other House.
- (d) That it be circulated for the purpose of eliciting public opinion thereon.

On the day on which any of the aforesaid motions is made or on any subsequent date to which the discussion is postponed, the principles of the Bill and its general provisions may be discussed. Amendments to the Bill and clause by clause consideration of the provisions of the Bill take place when the motion that the Bill be taken into consideration is carried.

3. *Report by Select Committee.* It has already been stated that after introduction of the Bill the Member in charge or any other Member by way of an amendment may move that the Bill be referred to a Select Committee. When such a motion is carried, a Select Committee of the House considers the provisions of the Bill (but not the principles underlying the Bill which had, in fact, been accepted by the House when the Bill was referred to the Select Committee). After the Select Committee has considered the Bill, it submits its report to the House and after the report is received, a motion that the Bill as returned by the Select Committee be taken into consideration lies. When such a motion is carried, the clauses of the Bill are open to consideration and amendments are admissible.

4. *Passing of the Bill in the House where it was introduced.* When a motion that the Bill be taken into consideration has been carried and no amendment of the Bill has been made or after the amendments are over, the Member in charge may move that the Bill be passed. This stage may be compared to the third reading of a Bill in the House of Commons. After the motion that the Bill may be passed is carried,¹³ the Bill is taken as passed so far as that House is concerned.

5. *Passage in the other House.* When a Bill is passed in one House, it is transmitted to the other House. When the Bill is received in the other House it undergoes all the stages as in the originating House subsequent to its introduction. The House which receives the Bill from another House can, therefore, take either of the following courses:

- (i) It may reject the Bill altogether. In such a case the provisions of Art. 108(1)(a) as to joint sitting may be applied by the President.
- (ii) It may pass the Bill with amendments. In this case, the Bill will be returned to the originating House. If the House which originated the Bill accepts the Bill as amended by the other House, it will be presented to the President for his assent [Art. 111]. If however the originating House does not agree to the amendments made by the other House and there is final

disagreement as to the amendments between the two Houses, the President may summon a joint sitting to resolve the deadlock [Art. 108(1)(b)].

(iii) It may take no action on the Bill, i.e., keep it lying on its Table. In such a case if more than six months elapse from the date of the reception of the Bill, the President may summon a joint sitting [Art. 108(1)(c)].

6. President's Assent. When a Bill has been passed by both Houses of Parliament either singly or at a joint sitting as provided in Art. 108, the Bill is presented to the President for his assent. If the President withholds his assent, there is an end to the Bill. If the President gives his assent, the Bill becomes an Act from the date of his assent. Instead of either refusing assent or giving assent, the President may return the Bill for reconsideration of the Houses with a message requesting them to reconsider it. If, however, the Houses pass the Bill again with or without amendments and the Bill is presented to the President for his assent after such reconsideration, the President shall have no power to withhold his assent from the Bill.

II. Money Bills.

A Bill is deemed to be a 'Money Bill' if it contains only provisions dealing with all or any of the following matters:

(a) the imposition, abolition, remission, alteration or regulation of any tax; (b) the regulation of the borrowing of money by the Government; (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such fund; (d) the appropriation of moneys out of the Consolidated Fund of India; (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure; (f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f) [Art. 110].

But a Bill shall not be deemed to be a Money Bill by reason only that it provides for imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final. This means that the nature of a Bill which is certified by the Speaker as a Money Bill shall not be open to question either in a Court of law or in the either House or even by the President.

When a Bill is transmitted to the Council of States or is presented for the assent of the President, it shall bear the endorsement of the Speaker that it is a Money Bill. As pointed out earlier, this is one of the special powers of the Speaker.

The following is the procedure for the passing of Money Bills in Parliament:

A Money Bill shall not be introduced in the Council of States.

After a Money Bill has been passed by the House of the People, it shall be transmitted (with the Speaker's certificate that it is a Money Bill) to the Council of States for its recommendations. The Council of States cannot reject a Money Bill nor amend it by virtue of its own powers. It must, within a period of fourteen days from the date of receipt of the Bill, return the Bill to the House of the People which may thereupon either accept or reject all or any of the recommendations of the Council of States.

If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it is passed by the House of the People without any of the amendments recommended by the Council of States.

If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People [Art. 109].

Money Bill and Financial Bill. Generally speaking, a Financial Bill may be said to be any Bill which relates to revenue or expenditure. But it is in a technical sense that the expression is used in the Constitution.

I. The definition of a 'Money Bill' is given in Art. 110 and no Bill is a Money Bill unless it satisfies the requirements of this Article. It lays down that a Bill is a Money Bill if it contains *only* provisions dealing with all or any of the six matters specified in that Article or matters incidental thereto. These six specified matters have already been stated [See under 'Money Bills', *ante*].

On the question whether any Bill comes under any of the sub-clauses of Art. 110, the decision of the Speaker of the House of the People is final and his certificate that a particular Bill is a Money Bill is not liable to be questioned. Shortly speaking, thus, only those Financial Bills are Money Bills which bear the certificate of the Speaker as such.

II. Financial Bills which do not receive the Speaker's certificate are of two classes. These are dealt with in Art. 117 of the Constitution—

(i) To the first class belongs a Bill which contains any of the matters specified in Art. 110 but does not consist *solely* of those matters, for example, a Bill which contains a taxation clause, but does not deal solely with taxation [Art. 117(1)].

(ii) Any ordinary Bill which contains provisions involving expenditure from the Consolidated Fund is a Financial Bill of the second class [Art. 117(3)].

III. The incidents of these three different classes of Bills are as follows—

(i) A Money Bill cannot be introduced in the Council of States nor can it be introduced except on the recommendation of the President. Again, the Council of States has no power to amend or reject such a Bill. It can only recommend amendments to the House of the People.

(ii) A Financial Bill of the first class, that is to say, a Bill which contains any of the matters specified in Art. 110 but does not exclusively deal with such matters, has two features in common with a Money Bill, *viz.*, that it cannot be introduced in the Council of States and also cannot be introduced except on the recommendation of the President. But not being a Money Bill, the Council of States has the same power to reject or amend such a Financial Bill as it has in the case of non-Financial Bills subject to the limitation that an amendment other than for reduction or abolition of a tax cannot be moved in either House without the President's recommendation. Such a Bill has to be passed in the Council of States through three readings like ordinary Bills and in case of a final disagreement between the two Houses over such a Bill, the provision for joint sitting in Art. 108 is attracted. Only Money Bills are excepted out of the provisions relating to a joint sitting [Art. 108(1)].

(iii) A Bill which merely involves expenditure and does not include any of the matters specified in Art. 110, is an ordinary Bill and may be initiated in either House and the Council of States has full power to reject or amend it. But it has only *one special incident* in view of the financial provision (*i.e.*, provision involving expenditure contained in it) *viz.*, that it must not be *passed* in either House unless the President has recommended the consideration of the Bill. In other words, the President's recommendation is not a condition precedent to its introduction as in the case of Money Bills and other Financial Bills of the first class but in this case it will be sufficient if the President's recommendation is received before the Bill is *considered*. Without such recommendation, however, the consideration of such Bill cannot take place [Art. 117(3)].

But for this special incident, a Bill which merely involves expenditure is governed by the same procedure as an ordinary Bill, including the provision of a joint sitting in case of disagreement between the two Houses.

It has already been made clear that any Bill, *other than a Money Bill*,
Provisions for removing deadlock between two Houses of Parliament. can become a law only if it is agreed to by both the Houses, with or without amendments. A machinery should then exist, for resolving a deadlock between the two Houses if they fail to agree either as to the provisions of the Bill as introduced or as to the amendments that may have been proposed by either House.

(A) As regards Money Bills, the question does *not* arise, since the House of the People has the final power of passing it, the other House having the power only to make recommendation for the acceptance of the House of the People. In case of disagreement over a Money Bill, thus, the

lower House has the plenary power to override the wishes of the upper Houses, *i.e.*, the Council of States.

(B) As regards all other Bills (including 'Financial Bills'), the machinery provided by the Constitution for resolving a disagreement between the two Houses of Parliament is a joint sitting of the two Houses [Art. 108].

The President may notify to the Houses his intention to summon them for a joint sitting in case of disagreement arising between the two Houses in any of the following ways:—

If, after a Bill has been passed by one House and transmitted to the other Houses—

- (a) the Bill is rejected by the other House; or
- (b) the Houses have finally disagreed as to the amendments to be made in the Bill; or
- (c) more than six months have elapsed from the date of the reception of the Bill by the other House without the Bill being passed by it.

No such notification can be made by the President if the Bill has already lapsed by the dissolution of the House of the People; but once the President has notified his intention to hold a joint sitting, the subsequent dissolution of the House of the People cannot stand in the way of the joint sitting being held.

As stated earlier, the Speaker will preside at the joint sitting; in the absence of the Speaker, such person as is determined by the Rules of Procedure made by the President (in consultation with the Chairman of Council of States and the Speaker of the House of People) shall preside [Art. 118(4)]. The Rules, so made, provide that

"During the absence of the Speaker from any joint sitting, the Deputy Speaker of the House or, if he is also absent, the Deputy Chairman of the Council or, if he is also absent, such other person as may be determined by the Members present at the sitting, shall preside."

There are restrictions on the amendments to the Bill which may be proposed at the joint sitting:

(a) If, after its passage in one House, the Bill has been rejected or has not been returned by the other House, only such amendments may be proposed at the joint sitting as are made necessary by the delay in the passage of the Bill.

(b) If the deadlock has been caused because the other House has proposed amendments to which the originating House cannot agree, then (i) amendments necessary owing to the delay in the passage of the Bill, as well as (ii) other amendments as are relevant to the matters with respect to which the House have disagreed, may be proposed at the joint sitting.

If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the *total number* of members of both Houses *present and voting*, it shall be deemed for the purposes of this Constitution to have been passed by both the Houses.

Joint sitting cannot be resorted to, for passing Constitution Amending Bill. It is to be carefully noted that the procedure for joint sitting, as prescribed by Art. 108, is confined to Bills for ordinary legislation and does *not* extend to a Bill for amendment of the Constitution, which is governed by Art. 368(2), and must, therefore, be passed by each House, separately, by the special majority laid down.

That is why the 43rd Amendment Bill, introduced in the *Lok Sabha* in April 1977, could not overcome the apprehended resistance in the *Rajya Sabha*, by resorting to a joint sitting, as carelessly suggested in some newspaper articles. The 45th Amendment Bill suffered mutilation in the *Rajya Sabha*, for the same reason.

Financial legislation in Parliament. At the beginning of every financial year, the President shall, in respect of the financial year, cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year. This is known as the "annual financial statement" (*i.e.*, the 'Budget') [Art. 112]. It also states the ways and means of meeting the estimated expenditure.

Policy Statement in the Budget. In conformity with the usual Parliamentary practice in the United Kingdom, the Budget not only gives the estimates for the ensuing year but offers an opportunity to the Government to review and explain its financial and economic policy and programme to the Legislature to discuss and criticise it. The Annual Financial Statement in our Parliament thus contains, apart from the estimates of expenditure, the ways and means to raise the revenue,—

- (a) An analysis of the actual receipts and expenditures of the closing year, and the causes of any surplus or deficit in relation to such year;
- (b) An explanation of the economic policy and spending programme of the Government in the coming year and the prospects of revenue.

Votable and non-votable Expenditure. The estimates of expenditure embodied in the annual financial statement shall show separately—(a) the sums required to meet expenditure described by this Constitution as expenditure *charged upon* the Consolidated Fund of India; and (b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India.

- (a) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall *not* be submitted to the vote of Parliament but each House is competent to discuss any of these estimates.
- (b) So much of the estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and that House shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein. No demand for a grant shall however be made except on the recommendation of the President [Art. 113].

In practice, the presentation of the Annual Financial Statement is followed by a general discussion in both the Houses of Parliament. The estimates of expenditure, *other than those which are charged*, are then placed before the House of the People in the form of 'demands for grants'.

No money can be withdrawn from the Consolidated Fund except under an Appropriation Act, passed as follows:

As soon as may be after the demands for grants have been voted by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of India of all moneys required to meet—

(a) the grants so made by the House of the People; and (b) the expenditure charged on the Consolidated Fund of India.

This Bill will then be passed as a Money Bill, subject to this condition that no amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund [Art. 114].

The following expenditure shall be expenditure charged on the Consolidated Fund of India [Art. 112(3)]—

(a) the emoluments and allowances of the President and other expenditure relating to his office; (b) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People; (c) debt charges for which the Government of India is liable; (d) (i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court; (ii) the pensions payable to or in respect of Judges of the Federal Court; (iii) the pensions payable to or in respect of Judges of any High Court; (e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India; (f) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal; (g) any other expenditure declared by this Constitution or by Parliament by law to be so charged.

As has been already explained, financial business in Parliament starts with the presenting of the Annual Financial Statement. This Statement is

Relative parts played by the two Houses in financial legislation. caused to be laid by the President before *both* Houses of Parliament [Art. 112]. After the Annual Financial Statement is presented, there is a general discussion of the Statement as a whole in *either* House. This discussion is to be a general discussion relating to a policy involving a review and criticism of the administration and a valuation of the grievances of the people. No motion is moved at this stage nor is the Budget submitted to vote.

(b) The Council of States shall have *no further business* with the Annual Financial Statement beyond the above general discussion. The voting of the grants, that is, of the demands for expenditure made by Government, is an

exclusive business of the House of the People. In the House of the People, after the general discussion is over, estimates are submitted in the form of demands for grants on the particular heads and it is followed by a vote of the House on each of the heads [Art. 113(2)].

(c) After the grants are voted by the House of the People, the grants so made by the House of the People as well as the expenditure charged on the Consolidated Fund of India are incorporated in an Appropriation Bill. It provides the legal authority for the withdrawal of these sums from the Consolidated Fund of India.

Similarly, the taxing proposals of the budget are embodied in another Bill known as the Annual Finance Bill.

Both these Bills being Money Bills, the special procedure relating to Money Bills shall have to be followed. It means that they can be introduced *only in the House of the People* and after each Bill is passed by the House of the People, it shall be transmitted to the Council of States which shall have the power only to make *recommendations* to the House of the People within a period of 14 days but no power of amending or rejecting the Bill. It shall lie at the hands of the House of the People to accept or reject the recommendations of the Council of States. In either case, the Bill will be deemed to be passed as soon as the House of the People decides whether it would accept or reject any of the recommendations of the Council of States and thereafter the Bill becomes law on receiving the assent of the President.

The financial system consists of two branches—revenue and expenditure.

Parliament's control over the Financial System.

(i) As regards revenue, it is expressly laid down by our Constitution [Art. 265] that no tax shall be levied or collected except by authority of law. The result is that the Executive cannot impose any tax without legislative sanction. If any tax is imposed without legislative authority, the aggrieved person can obtain his relief from the courts of law.

(ii) As regards expenditure, the pivot of parliamentary control is the Consolidated Fund of India. This is the reservoir into which all the revenues received by the Government of India as well as all loans raised by it are paid and the Constitution provides that no moneys shall be appropriated out of the Consolidated Fund of India except in accordance with law [Art. 266(3)]. This law means an Act of Appropriation passed in conformity with Art. 114. Whether the expenditure is charged on the Consolidated Fund of India or it is an amount voted by the House of the People, no money can be issued out of the Consolidated Fund of India unless the expenditure is authorised by an Appropriation Act [Art. 114(3)]. It follows, accordingly, that the executive cannot spend the public revenue without parliamentary sanction.

While an Act of Appropriation ensures that there cannot be any expenditure of the public revenues without the sanction of Parliament, Parliament's control over the expenditure cannot be complete unless it is able to ensure economy in the volume of expenditure. On this point, however, a reconciliation has to be made between two conflicting principles,

namely, the need for parliamentary control and the responsibility of the Government in power for the administration and its policies.

The Government has the sole initiative in formulating its policies and Committee on Estimates. in presenting its demands for carrying out those policies. Parliament can hardly refuse such demands or make drastic cuts in such demands without reflecting on the policy and responsibility of the Government in power. Nor is it expedient to suggest economies in different items of the expenditure proposed by the Government when the demands are presented to the House for its vote, in view of the shortage of time at its disposal. The scrutiny of the expenditure proposed by the Government is, therefore, made by the House in the informal atmosphere of a Committee, known as the Committee on Estimates. After the Annual Financial Statement is presented before the House of the People, this Committee of the House, annually constituted, examines the estimates, in order to:

- (a) report to the House what economies, improvements, in organisation, efficiency or administrative reform, consistent with the policy underlying the estimates, may be effected;
- (b) suggest alternative policies in order to bring efficiency and economy in administration;
- (c) examine whether the money is well laid out within the limits of the policy implied in the estimates;
- (d) suggest the form in which estimates are to be presented to Parliament.

Though the report of the Estimates Committee is not debated in the House, the fact that it carries on its examination throughout the year and places its views before the members of the House as a whole exerts a salutary influence in checking Governmental extravagance in making demands in the coming year, and in moulding its policies without friction in the House.

The third factor to be considered is the system of parliamentary control to ensure that the expenditure sanctioned by Parliament has actually been spent in terms of the law of Parliament, that is, the Appropriation Act or Acts. The office of the Comptroller and Auditor-General is the fundamental agency which helps Parliament in this work. The Comptroller and Auditor-General is the guardian of the public purse and it is his function to see that not a paisa is spent without the authority of Parliament. It is the business of the Comptroller and Auditor-General to audit the accounts of the Union and to satisfy himself that the expenditure incurred has been sanctioned by Parliament and that it has taken place in conformity with the rules sanctioned by Parliament. The Comptroller and Auditor-General then submits his report of audit relating to the accounts of the Union to the President who has to lay it before each House of Parliament.

After the report of the Comptroller and Auditor-General is laid before the Parliament, it is examined by the Public Accounts Committee on Public Accounts. Committee. Though this is a Committee of the House of the People (having 15 members from that House),

by an agreement between the two Houses, seven members of the Council of States are also associated with this Committee, in order to strengthen it. The Chairman of the Committee is generally a member of the Lok Sabha who is not a member of the ruling party.

In scrutinising the Appropriation Accounts of the Government of India and the report of the Comptroller and Auditor-General thereon it shall be the duty of the Committee on Public Accounts to satisfy itself—

(a) that the moneys shown in the accounts as having been disbursed were legally available for and applicable to the service or purpose to which they have applied or charged;

(b) that the expenditure conforms to the authority which governs it; and

(c) that every re-appropriation has been made in accordance with the provisions made in this behalf under rules framed by competent authority.

This Committee, in short, scrutinises the report of the Comptroller and Auditor-General in details and then submits its report to the House of the People so that the irregularities noticed by it may be discussed by Parliament and effective steps taken.

All moneys received by or on behalf of the Government of India will be credited to either of two funds—the Consolidated Fund of India, or the 'public account' of India. Thus,

(a) Subject to the assignment of certain taxes to the States, all *revenues* received by the Government of India, all *loans* raised by the Government and all moneys received by that Government in *repayment of loans* shall form one consolidated fund to be called "the Consolidated Fund of India" [Art. 266(1)].

(b) All other public moneys received by or on behalf of the Government of India shall be credited to the Public Account of India [Art. 266(2)], e.g., moneys received by an officer or Court in connection with affairs of the Union [Art. 284].

No money out of the Consolidated Fund of India (or of a State) shall be appropriated except in accordance with a law of Appropriation. The procedure for the passing of an Appropriation Act has been already noted.

(c) Art. 267 of the Constitution empowers Parliament and the Legislature of a State to create a 'Contingency Fund' for India or for a State, as the case may be. The 'Contingency Fund' for India has been constituted by the Contingency Fund of India Act, 1950. The Fund will be at the disposal of the executive to enable advances to be made, from time to time, for the purpose of meeting *unforeseen expenditure*, pending authorisation of such expenditure by the Legislature by supplementary, additional or excess grants. The amount of the Fund is subject to be regulated by the appropriate Legislature.

The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, withdrawal of moneys therefrom, custody of public moneys other than those credited to such Funds, their payment into the public accounts of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law by Parliament, and, until provision in that behalf is so made shall be regulated by rules made by the President [Art. 283].

Constitutional position of the Council of States as compared with that of the House of the People.

Though our Council of States does not occupy as important a place in the constitutional system as the American Senate, its position is not so inferior as that of the House of Lords as it stands to-day. *Barring the specific provisions with respect to which the lower House has special functions, e.g., with respect to money Bills (see below),* the Constitution proceeds on a theory of equality of status of the two Houses.

This equality of status was explained by the Prime Minister Pandit Nehru himself,¹⁴ in these words—

"Under our Constitution Parliament consists of two Houses, each functioning in the allotted sphere laid down in the Constitution. We derive authority from that Constitution. Sometimes we refer back to the practice and conventions prevailing in the Houses of Parliament of the United Kingdom and even refer erroneously to an Upper House and a Lower House. I do not think that is correct. Nor is it helpful always to refer back to the procedure of the British Parliament which has grown up in the course of several hundred years and as a result of conflicts originally with the authority of the King and later between the Commons and the Lords. We have no such history behind us, though in making our Constitution we have profited by the experience of others.

Our guide must, therefore, be our own Constitution which has clearly specified the functions of the Council of States and the House of the People. To call either of these Houses an Upper House or a Lower House is not correct. Each House has full authority to regulate its own procedure within the limits of the Constitution. Neither House by itself, constitutes Parliament. It is the two Houses together that are the Parliament of India ...That Constitution treats the two Houses equally, except in certain financial matters which are to be the sole purview of the House of the People. In regard to what these are, the Speaker is the final authority."

The Constitution also makes no distinction between the two Houses in the matter of selection of Ministers. In fact, during all these years, there have been several Cabinet Ministers from amongst the members of the Council of States, such as the Ministers for Home Affairs, Law, Railway and Transport, Production, Works, Housing and Supply, etc. But the responsibility of such member, as Minister, is to the House of the People [Art. 75(3)].

The exceptional provisions which impose limitations upon the powers of the Council of States, as compared with the House of the People are:

(1) A Money Bill shall not be introduced in the Council. Even a Bill having like financial provisions cannot be introduced in the Council.

(2) The Council has no power to reject or amend a Money Bill. The only power it has with respect to Money Bills is to suggest 'recommendations' which may or may not be accepted by the House of the People, and

the Bill shall be deemed to have been passed by both Houses of Parliament, without the concurrence of the Council, if the Council does not return the Bill within 14 days of its receipt or makes recommendations which are not accepted by the House.

(3) The Speaker of the House has got the sole and final power deciding whether a Bill is a Money Bill.

(4) Though the Council has the power to discuss, it has no power to vote money for the public expenditure and demands for grants are not submitted for the vote of the Council.

(5) The Council of Ministers is responsible to the House of the People and not to the Council [Art. 75(3)].

(6) Apart from this, the Council suffers, by reason of its numerical minority, in case a joint session is summoned by the President to resolve a deadlock between the two Houses [Art. 108(4)].

On the other hand, the Council of States has certain special powers which the other House does not possess and this certainly adds to the prestige of the Council:

(a) Art. 249 provides for temporary Union legislation with respect to a matter in the State List, if it is necessary in the national interest, but in this matter a special role has been assigned by the Constitution to the Council. Parliament can assume such legislative power with respect to a State subject only if the Council of States declares, by a resolution supported by not less than two-thirds of its members present and voting, that it is necessary or expedient in the national interest that Parliament should make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(b) Similarly, under Art. 312 of the Constitution, Parliament is empowered to make laws providing for the creation of one or more All-India Services common to the Union and the States, if the Council of States has declared 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 interest so to do.

In both the above matters, the Constitution assigns a special position to the Council because of its federal character and of the fact that a resolution passed by two-thirds of its members would virtually signify the consent of the States.

Notwithstanding these special functions and the theory of equality propounded by Pandit Nehru, it is not possible for the Council of States, by reason of its very composition, to attain a status of equality with the House of the People. Even though there is no provision in the Constitution, corresponding to Art. 169 relating to the upper Chamber in the States, for the abolition of the upper Chamber in Parliament, there has been, since the inauguration of the Constitution, a feeling in the House of the People that the Council serves no useful purpose and is nothing but a 'device to flout the voice of the People',¹⁴ which led even to the motion of a Private Member's Resolution for the abolition of the Council. It was stayed for the

time being only at the intervention of the then Prime Minister Pandit Nehru on the ground that the working of the Council was yet too short to adjudge its usefulness.¹⁴

(c) The most extreme instance of its importance, during its career, has recently been shown by the Council of States in the matter of constitutional amendment. Under Art. 368(2), a Bill for the amendment of the Constitution, in order to be law, must be passed in *each* House of Parliament by the specified special majority, and the device of joint sitting under Art. 108 is *not* available to remove the opposition by the *Rajya Sabha* in respect of a Bill for amendment of the Constitution. While the Janata Party had an overwhelming majority in the *Lok Sabha*, the Congress [(O) and (I) together] had an imposing majority in the *Rajya Sabha* so that there was no chance of the 43rd Amendment Bill, 1977, being passed by a two-thirds majority in the *Rajya Sabha*, as its composition existed in April, 1977. The progress of the 43rd Amendment Bill had, therefore, to be halted after its introduction in the *Lok Sabha*, since the Congress Party declared its intention to oppose the consideration of this Bill. The opposition of the two Congress Parties also truncated the 45th Constitution Amendment Bill, while in the *Rajya Sabha*.

The Constitution (64th Amendment) Bill, 1989 and the Constitution (65th Amendment) Bill, 1989 could not secure the requisite majority in the *Rajya Sabha* and hence could not be passed (13-10-1989), even though they had earlier been duly passed by the *Lok Sabha*.

REFERENCES

1. The first general election under the Constitution took place in the winter of 1951-52. The first Lok Sabha, which held its first sitting on 13-5-1952 was dissolved by the President on 4-4-1957.

The second general election was held in the winter of 1956-57, and the second Lok Sabha held its first sitting on 10-5-1957.

The third general election was held in February, 1962, and the third Lok Sabha had its first sitting on 16-4-1962.

The fourth general election was held in February, 1967, and the fourth Lok Sabha had its first sitting on 16-3-1967 and was prematurely dissolved on 27-12-1970.

The fifth general election, which was thus a mid-term election, was held in March, 1971, and the fifth Lok Sabha had its first sitting on March 19, 1971.

The sixth general election was held in March 1977, after the dissolution of the Lok Sabha on 18th January, 1977, during its second extended term. Excepting in Kerala, there was no simultaneous election to the Legislative Assemblies of the States. The sixth Lok Sabha had its first sitting on 25-3-1977.

The seventh general election was held in January, 1980 and the first sitting was on 21-1-1980.

The eighth general election was held in December, 1984 and the first sitting was on 15-1-1985.

The ninth general election was held in November, 1989 and the ninth Lok Sabha had its first sitting on 18th December 1989.

The tenth general election was held on 20th May, 12th and 15th June, 1991 and the tenth Lok Sabha had its first sitting on 20-6-1991.

The eleventh general election was held in May 1996 and the Eleventh Lok Sabha had its first sitting on 22-5-1996.

The twelfth general election was held in February, 1998 and the twelfth Lok Sabha had its first sitting on 23-3-1998.

The thirteenth general election was held in September and October, 1999 and the thirteenth Lok Sabha had its first sitting on 20-10-1999.

The fourteenth general election was held in April and May, 2004 and the fourteenth Lok Sabha had its first sitting on 02-06-2004.

~~The Rajya Sabha was first constituted on 3-4-1952 and it held its first sitting on 13-5-1952, and the retirement of the first batch of the members of the Rajya Sabha took place on 2-4-1954.~~

2. Sections 27A, 27H of Representation of the People Act, 1950.
3. The actual number of members of the two Houses now is given in Table VIII.
4. As amended by the Constitution (31st Amendment) Act, 1973, and by the Goa, Daman and Diu Reorganisation Act, 1987 w.e.f. 30-5-1987.
5. As amended by the Constitution (61st Amendment) Act, 1988.
6. The Union Territories (Direct Election to the House of the People) Act, 1965.
7. VII C.A.D. 1262.
8. By the 42nd Amendment Act, 1976, the Indira Government, extended this term to 6 years but it has been restored to 5 years, by the 44th Amendment Act, 1978.
9. This power was used during the Emergency on the ground of internal disturbance (1975-77).
10. *Sharma v. Shri Krishna*, AIR 1959 S.C. 395.
11. Ref. under Art. 143, AIR 1965 S.C. 745 (764, 767).
12. May, *Parliamentary Practice*, 15th Ed., p. 109.
13. Except in the case of Bills for the amendment of the Constitution (Art. 368), all Bills and other questions before each House are passed or carried by a simple majority [Art. 100(1)].
14. Statement in the Rajya Sabha, dated 6-5-1953. Similar views were reiterated in the other House (H.P. Deb, 12-5-1953).

CHAPTER 13

THE STATE EXECUTIVE

1. The General Structure.

As stated at the outset, *our* Constitution provides for a federal Government, having separate systems of administration for the Union and its Units, namely, the States. The Constitution contains provisions for the governance of both. It lays down a uniform structure for the State Government, in Part VI of the Constitution, which is applicable to all the States, save the State of Jammu & Kashmir which has a separate Constitution for its State Government, for reasons which will be explained in Chap. 15.

Broadly speaking the pattern of Government in the States is the same as that for the Union, namely, a parliamentary system,—the executive head being a constitutional ruler who is to act according to the advice of Ministers responsible to the State Legislature (or its popular House, where there are two Houses),—except in matters in respect of which the Governor of a State is empowered by the Constitution to act ‘in his discretion’ [Art. 163(1)].

2. The Governor.

At the head of the executive power of a State is the Governor just as the President stands at the head of the executive power 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 shall be a Governor for each State, but an amendment of 1956 makes it possible to appoint the same person as the Governor for the two or more States [Art. 153].

The Governor of a State is not elected but is appointed by the President and holds his office at the pleasure of the President. Any citizen of India who has completed 35 years of age is eligible for the office, but he must not hold any other office of profit, nor be a member of the Legislature of the Union or of any State [Art. 158]. There is no bar to the selection of a Governor from amongst members of a Legislature but if a Member of a Legislature is appointed Governor, he ceases to be a Member immediately upon such appointment.

The normal term of a Governor’s office shall be five years, but it may be terminated earlier, by—

- (i) Dismissal by the President, at whose ‘pleasure’ he holds the office [Art. 156(1)]; (ii) Resignation [Art. 156(2)].

The grounds upon which a Governor may be removed by the President are not laid down in the Constitution, but it is obvious that this power will be sparingly used to meet with cases of gross delinquency, such as bribery, corruption, treason, and the like or violation of the Constitution.¹

There is no bar to a person being appointed Governor more than once.²

Why an appointed Governor. The original plan in the Draft Constitution was to have elected Governors. But in the Constituent Assembly, it was replaced by the method of appointment by the President, upon the following arguments³:

(a) It would save the country from the evil consequences of still another election, run on personal issues. To sink every province into the vortex of an election with millions of primary voters but with no possible issue other than personal, would be highly detrimental to the country's progress.

(b) If the Governor were to be elected by direct vote, then he might consider himself to be superior to the Chief Minister, who was merely returned from a single constituency, and this might lead to frequent *friction* between the Governor and the Chief Minister.

But under the Parliamentary system of Government prescribed by the Constitution, the Governor was to be constitutional head of the State,—the real executive power being vested in the Ministry responsible to the Legislature.

"When the whole of the executive power is vested in the Council of Ministers, if there is another person who believes that he has got the backing of the province behind him, and, therefore, at his discretion he can come forward and intervene in the governance of the province, it would really amount to a surrender of democracy."³

(c) The expenses involved and the elaborate machinery of election would be out of proportion to the powers vested in this Governor who was to act as a mere constitutional head.

(d) A Governor elected by adult franchise to be at the top of the political life in the State would soon prefer to be the Chief Minister or a Minister with effective powers. The party in power during the election would naturally put up for Governorship a person who was not as outstanding as the future Chief Minister with the result that the State would not be able to get the best man of the party. All the process of election would have to be gone through only to get a second rate man of the party elected as Governor. Being subsidiary in importance to the Chief Minister, he would be the nominee of the Chief Minister of the State, which was not a desirable thing.

(e) Through the procedure of appointment by the President, the Union Government would be able to maintain intact its control over the States.

(f) The method of election would encourage separatist tendencies. The Governor would then be the nominee of the Government of that particular province to stand for the Governorship. The stability and unity of the Governmental machinery of the country as a whole could be achieved only by adopting the system of nomination.

"He should be a more detached figure acceptable to the province, otherwise he could not function, and yet may not be a part of the party machine of the province. On the whole it would probably be desirable to have people from outside, eminent in something, education or other fields of life who would naturally co-operate fully with the Government in carrying out the policy of the Government and yet represent before the public something above politics.³

The arguments which were advanced, in the Constituent Assembly, against nomination are also worthy of consideration:

(i) A nominated Governor would not be able to work for the welfare of a State because he would be a foreigner to that State and would not be able to understand its special needs.

(ii) There was a chance of friction between the Governor and the Chief Minister of the State no less under the system of nomination, if the Premier of the State did not belong to the same party as the nominated Governor.⁴

(iii) The argument that the system of election would not be compatible with the Parliamentary or Cabinet system of Government is not strong enough in view of the fact that even at the Centre there is an elected President to be advised by a Council of Ministers. Of course, the election of the President is not direct but indirect.

(iv) An appointed Governor under the instruction of the Centre might like to run the administration in a certain way contrary to the wishes of the Cabinet. In this tussle, the Cabinet would prevail and the President-appointed Governor would have to be recalled. The system of election, therefore, was far more compatible with good, better and efficient Government plus the right of self-Government.

(v) The method of appointment of the head of the State executive by the federal executive is repugnant to the strict federal system as it obtains in the U.S.A. and Australia.

In actual working, it may be said that in States where one party has a clear majority, the part played by the Governor has been that of a constitutional and impartial head, but in those States where there are multiple parties with an uncertain command over the Legislature, the Governor has

Status of appointed Governor so far. acted as a mere agent of the Centre in various matters, such as inviting a person to form a Ministry, because he belonged to the ruling party at the Centre, even though he had no clear following (as in the case of Sri Rajagopalachari in Madras, after the General election in 1952) or bringing about the removal of a Ministry having the confidence of the Legislature, by means of a report under Art. 356 (as happened in Kerala in 1959, in the case of the Communist Ministry headed by Sri Namboodiripad). Nevertheless, there is one aspect in which the system of appointing an outsider by the Centre has proved to be beneficial, and that is the prevention of disruptive and separatist forces from impairing the national unity and strength as might otherwise have been possible without the knowledge of the Centre, under a locally elected Governor.

It is from this standpoint alone that one can tolerate the patently undemocratic instances of appointing a retiring or a retired member of the Indian Civil Service or the Indian Administrative Service (who is obviously a veteran bureaucrat) or of the Armed Forces as a Governor.

A Governor gets a monthly emolument of Rs. 36,000⁵, together with **Conditions of the use of an official residence free of rent and also Governor's office.** such allowances and privileges as are specified in the Governor's (Emoluments, Allowances and Privileges) Act, 1982 as amended in 1998 (w.e.f. 1-1-1996). The emolument and allowances of a Governor shall not be diminished during his term of office [Art. 158(3)-(4)].

Powers of the Governor. The Governor has no diplomatic or military powers like the President, but he possesses executive, legislative and judicial powers analogous to those of the President.

I. *Executive.* Apart from the power to appoint his Council of Ministers, the Governor has the power to appoint the Advocate-General and the Members of the State Public Service Commission. The Ministers as well as Advocate-General hold office during the pleasure of the Governor, but the Members of the State Public Service Commission cannot be removed by him, they can be removed only by the President on the report of the Supreme Court on reference made by the President and, in some cases, on the happening of certain disqualifications [Art. 317].

The Governor has no power to appoint Judges of the State High Court but he is entitled to be consulted by the President in the matter [Art. 217(1)].

Like the President, the Governor has the power to nominate members of the Anglo-Indian community to the Legislative Assembly of his State, if he is satisfied that they are not adequately represented in the Assembly; but while the President's corresponding power with regard to the House of the People is limited to a maximum of two members, in the case of the Governor the limit is one member only, since the Constitution (23rd Amendment) Act, 1969 [Art. 333].

As regards the upper Chamber of the State Legislature (in States where the Legislature is bi-cameral), namely, the Legislative Council, the Governor has a power of nomination of members corresponding to the power of the President in relation to the Council of States, and the power is similarly exercisable in respect of "persons having special knowledge or practical experience in respect of matters such as literature, science, art, co-operative movement and social service" [Art. 171(5)]. It is to be noted that 'co-operative movement' is not included in the corresponding list relating to the Council of States. The Governor can so nominate 1/6 part of the total members of the Legislative Council.

II. *Legislative.* As regards *legislative* powers, the Governor is a part of the State Legislature [Art. 164] just as the President is a part of Parliament. Again, he has a right of addressing and sending messages, and summoning, proroguing and dissolving, in relation to the State Legislature, just as the President has in relation to Parliament.⁶ He also possesses a similar power of causing to be laid before the State Legislature the annual financial statement [Art. 202] and of making demands for grants and recommending 'Money Bills' [Art. 207].

His powers of 'veto' over State legislation and of making Ordinances are dealt with separately. (See Chap. 14 "Governor's power of veto" and "Ordinance-making power of Governor".)

III. Judicial. The Governor has the power to grant pardons, reprieves, respite, or remission of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which executive power of the State extends [Art. 161]. He is also consulted by the President in the appointment of the Chief Justice and the Judges of the High Court of the State.

IV. Emergency Power. The Governor has no emergency powers⁷ to meet the situation arising from external aggression or *armed rebellion* as the President has [Art. 352(1)], but he has the power to make a report to the President whenever he is satisfied that a situation has arisen in which Government of the State cannot be carried on in accordance with the provisions of the Constitution [Art. 356], thereby inviting the President to assume to himself the functions of the Government of the State or any of them. [This is popularly known as 'President's Rule'.]

3. The Council of Ministers.

As has already been stated, the Governor is a constitutional head of the State executive, and has, therefore (subject to his discretionary functions noted below), to act on the advice of a Council of Ministers [Art. 163]. The provisions relating to the Council of Ministers of the Governor are, therefore, subject to exceptions to be stated presently, similar to those relating to the Council of Ministers of the President.

At the head of a State Council of Ministers is the *Chief Minister* (corresponding to the *Prime Minister* of the Union).

Appointment of Council of Ministers. The Chief Minister is appointed by the Governor,⁸ while the other Ministers are appointed by the Governor on the advice of the Chief Minister. The

Council of Ministers shall be collectively responsible to the Legislative Assembly of the State and individually responsible to the Governor. The Ministers are jointly and severally responsible to the Legislature. He/They is/are publicly accountable for the acts or conducts in the performance of duties.⁹ Any person¹⁰ may be appointed a Minister (provided he has the confidence of the Legislative Assembly), but he ceases to be a Minister if he is not or does not remain, for a period of six consecutive months, a member of the State Legislature. The salaries and allowances of Ministers are governed by laws made by the State Legislature [Art. 164].

It may be said that, in general, the relation between the Governor and his ministers is similar to that between the President and his Ministers, with this important difference that while the Constitution does not empower the President to exercise any function 'in his discretion', it authorises the Governor to exercise some functions 'on his discretion'. In this respect, the principle of Cabinet responsibility in the States differs from that in the Union.

Article 163(1) says—

"There shall be a Council of Ministers.... to aid and advise the Governor in the exercise of his functions, *except* in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion."

It is because of this discretionary jurisdiction of the Governor that no amendment was made by the 42nd Amendment Act in Art. 163(1) as in Art. 74(1), which we have noticed in Chap. 11.

In the exercise of the functions which the Governor is empowered to exercise in his discretion, he will *not* be required to act according to the advice of his ministers or even to seek such advice. Again, if any question arises whether any matter is or is not a matter as regards which the Governor is required by the Constitution to act in his discretion, the decision of the Governor shall be final, and the validity of anything done by the Governor shall not be called into question on the ground that he ought or ought not to have acted in his discretion [Art. 163(2)].

A. The functions which are specially required by the Constitution to be exercised by the Governor in his discretion are—

Discretionary functions of Governor (a) Para 9(2) of the 6th Sch. which provides that the Governor of Assam shall, in his discretion, determine the amount payable by the State of Assam to the District Council, as royalty accruing from licences for minerals.¹¹

(b) Art. 239(2) [added by the Constitution (7th Amendment) Act, 1956] which authorises the President to appoint the Governor of a State as the administrator of an adjoining Union Territory and provides that where a Governor is so appointed, he shall exercise his functions as such administrator 'independently of his Council of Ministers'.

B. Besides the above functions to be exercised by the Governor 'in his discretion', there are certain functions under the **Special Responsibility** amended Constitution which are to be exercised by the Governor 'on his special responsibility',—which practically means the same thing as 'in his discretion', because though in cases of special responsibility, he is to *consult* his Council of Ministers, the final decision shall be 'in his individual judgment', which no court can question. Such functions are—

(i) Under Art. 371(2), as amended,¹² the President may direct that the Governor of Maharashtra or Gujarat shall have a special responsibility for taking steps for the development of certain areas in the State, such as Vidarbha, Saurashtra.

(ii) The Governor of Nagaland shall, under Art. 371A(1)(b) (introduced in 1962), have similar responsibility with respect to law and order in that State so long as internal disturbances caused by the hostile Nagas in that State continue.

(iii) Similarly, Art. 371C(1), as inserted in 1971, empowers the President to direct that the Governor of Manipur shall have special responsibility to secure the proper functioning of the Committee of the Legislative Assembly of the State consisting of the members elected from the Hill Areas of that State.

(iv) Art. 371F(g), inserted by the Constitution (36th Amendment) Act, 1975, similarly, imposes a special responsibility upon the Governor of Sikkim "for peace and for an equitable arrangement for ensuring the social and economic advancement of different sections of the population of Sikkim".

In the discharge of such special responsibility, the Governor has to act according to the directions issued by the President from time to time, and subject thereto, he is to act 'in his discretion'.